

(1997) 07 PAT CK 0044
In the Patna High Court
Case No : C.W.J.C. No. 2396 (R) of 1994

Mineral Area Development Authority

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 17-07-1997

Acts Referred:

Constitution of India, 1950 — Article 226
Payment of Gratuity Act, 1972 — Section 1(3), 2

Citation : (1997) 45 BLJR 1680 : (1998) 2 LLJ 54 : (1997) 2 PLJR 912

Hon'ble Judges : S.N. Mishra, J

Bench : Single Bench

Advocate : S.B. Gododia, A.K. Jha, B.P. Mishra and A.B. Kumar, for the Appellant; Indrani Sen Choudhary, V. Shiv Nath and Rajendra Prasad for Respondent Nos. 1 to 3, for the Respondent

Final Decision : Dismissed

Judgement

S.N. Mishra, J.—In this writ application filed by the petitioners, namely, Mineral Area Development Authority, a very short but interesting question arises as to whether an employee, respondent No. 1 who was originally drawing a salary of less than Rs. 1000/- per month continuously for more than five years on the date of commencement of the Payment of Gratuity Act, 1972, (hereinafter referred to as the Act) but subsequently drawing more than the statutory limit per month on the day of his retirement, will be deemed to be an employee within the meaning of Section 2(e) of the Act.

2. The fact of this case is not in dispute. The respondent- workman was previously appointed in the Jharia Mines Board of Health and Jharia Water Board constituted under the provisions of the Bihar and Orissa Mining Settlement Act, 1920 and Jharia Water Supply Act, 1914. By subsequent legislation, namely, Bihar Coal Mining Area Development Authority Act, 1986, the aforesaid two Boards were replaced. Subsequently by amendment the name of the Bihar Coal Mining Development Authority was changed to the Mineral Area Development

Authority. All the employees of the aforesaid Jharia Mines Board of Health and Jharia Water Board have been retained in service at the time of taking over by the petitioner Authority. The concerned workman was appointed in the year 1953 at the monthly salary of Rs. 500/-only and retired as head clerk with effect from June 30, 1985 and his salary was subsequently increased and at the time of retirement he was getting more than Rs. 1000/- per month. Since the employer failed to pay the gratuity even after complying Rule 7 of the Payment of Gratuity (Bihar) Rules 1972 (hereinafter referred to as the Rules) the concerned workman filed an application in terms of Rule 10 of the Rules before the respondent Controlling Authority, namely Deputy Labour Commissioner, Bokaro Steel City, some time in the year 1993, which was registered as P.G. Case No. 4 of 1993. The Petitioner-Authority has appeared before the respondent Controlling Officer and tiled written statement stating, inter alia, therein that the concerned respondent workman is entitled to a sum of Rs. 28,943.00 only as gratuity according to the Rules followed by the Petitioner Authority and, accordingly, directed the concerned respondent to receive the payment and further to pay a sum of Rs. 4,62,579.00 as penal rent of the quarter which was in his occupation after retirement. It is further alleged that after adjustment of the said amount, there is no due to the concerned respondent on account of gratuity. A supplementary rejoinder was also filed stating therein that the provision of the Act is not applicable to the petitioner as it is not an establishment within the meaning of Section 2(6) of the Bihar Shops and Establishments Act, 1953 (hereinafter referred to as the 1953 Act).

3. In this case a counter affidavit has been filed on behalf of the concerned employee stating, inter alia, therein that he is an employee within the meaning of Section 2(e) of the Act and fulfils all the requirements as envisaged u/s 4 of the Act for payment of gratuity. It is further stated that after retirement he was given reemployment and in that capacity he was occupying the quarter which was allotted to him when he was in regular service of the petitioner Authority. It is further alleged that his son, who was also a clerk under the petitioner, was allotted quarter in the very beginning, who had refused to accept the same since he was living with his father and after the retirement of his father the quarter was allotted to him. In the premises it is submitted that the action of the petitioner and its officials charging the penal rent of the quarter is wholly illegal, arbitrary and uncalled for. The petition filed under Rule 10 of the Rules was subsequently amended by the concerned workman since the amount of salary mentioned in the original petition did not include the Dearness Allowance which was being paid to the employee during the service and, accordingly, the said amendment was accepted by the respondent Controlling Authority. The respondent Controlling Authority after hearing the parties and going through the materials on record has held that the applicant, namely, the respondent No. 3 is an employee within the meaning of Section 2(e) of the Act and having fulfilled the conditions as required u/s 4 of the Act for payment of gratuity has directed the petitioner Authority to pay a sum of Rs. 40,064.00 along with an interest at

the rate of 10% per annum from the date of order, copy of the said order is made Annexure-5 to this writ application. The petitioner being aggrieved by the order passed by the respondent Controlling Authority has filed the instant writ application for the relief as mentioned above.

4. Mr. S.B. Gododia, learned Sr. counsel for the petitioner, has assailed the order under challenge in the writ application firstly on the ground that the petitioner being not an establishment within the meaning of Section 2(6) of the 1953 Act, the provisions of the Payment of Gratuity Act will not apply in the case of the Petitioner. It is further submitted that the employee, who has already retired, cannot be deemed to be an employee within the meaning of Section 2(e) of the Act. It is then submitted that the respondent workman was drawing the salary more than the prescribed limit under the Statute at the time of his retirement, he is not entitled for the gratuity under the Act. It is further submitted that the limitation prescribed for filing application under Rule 10 of the Rules is 90 days whereas the concerned respondent has filed the application before the Controlling Authority after lapse of nine years and on this ground alone the claim of the respondent workman could not have been entertained by the respondent Controlling Authority. Lastly it is submitted that the petitioner Authority having accepted the Bihar Rules and in terms thereof the gratuity amounts" are being paid to its employees the provisions of the Act will not apply for the purpose of paying gratuity to its employees. While developing his argument on the first point regarding the applicability of the provisions of the Act he submits that the concerned respondent at the time of retirement was getting more than 1000/- rupees, and as such, he cannot claim the gratuity under the provisions of the Act, being not an employee within the meaning of Section 2(e) thereof. Before appreciating the argument of Mr. Gododia some relevant provisions of the Act have to be referred to. In this connection Section 1(3) and its various sub-clauses read as follows :-

"(3) It shall apply to

(a) every factory, mine, oil-field, plantation, port and railway company;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in the State, in which ten or more persons are employed, or were employed on any day of the preceding twelve months;

(c) such other establishments or class of establishments, in which ten or more employees are employed or were employed, on any day of the preceding twelve months, as the Central Government may by notification, specify in this behalf."

Sub-section 3-A of Section 10" the Act is also relevant which is as follows:-

"A shop or establishment to which this Act has become applicable shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time after it has become so applicable falls below ten."

From mere reading of the aforesaid provisions of the Act it can safely be held that the petitioner Authority is an establishment within the meaning of the Act. It is true that the establishment has not been defined separately in the Act but the petitioner will definitely come within the purview of Section 1(3)(b) of the Act, as quoted above. Accordingly, it is unnecessary to consider the provisions of Bihar Shops and Establishments Act for the purpose of determining as to whether the petitioner Authority is an establishment within the meaning of Section 2(6) of the 1953 Act. The Act is a complete code in itself and, as such it is not necessary to examine the provisions of the 1953 Act in order to ascertain the status of the petitioner Authority. Accordingly, the submission of Mr. Gododia is wholly misconceived and rejected as such. Section 4 of the Act envisaged that gratuity shall be payable to the employees on termination of their employment after having rendered continuous service for not less than five years. Section 2(a) of the Act defines the employee and the explanation appended thereto as under:

"employee" means any person (other than an apprentice) employed on wages not exceeding two thousand and five hundred rupees per mensem, or such higher amount as to the general level of wages, by notification, specify in any establishment, factory, mine, oil-field, plantation, port, railway company or shop, to do any skilled, semi skilled, or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity.

Explanation-In the case of an employee, who having been employed for a period of not less than five years on wages not exceeding the amount for the time being specified by or u/s 2 Clause (e) is employed at any time thereafter on wages exceeding that amount, gratuity in respect of the period during which such employee was employed on wages not exceeding that amount shall be determined on the basis of the wages received by him during that period."

As has been stated above, at the time of appointment the concerned workman was getting Rs. 500/- only. It is also admitted that the petitioner was getting more than 1000/- rupees by way of salary at the time of retirement. This Act came into force with effect from September 16, 1972. Reading Section 4 along with Clause (e) of Section 2 read with the explanation appended thereto it is amply clear that the concerned employee fulfils all the requirements as envisaged u/s 4 and is an employee within the meaning of Section 2(e) and, as such, he is entitled to gratuity in accordance with the provisions of the Act. It may be mentioned here that the limit of Rs. 1000/- as mentioned in Section 2(e) was increased to Rs. 1600/- which was subsequently increased to Rs. 2500/- by the Amending Act of 1984. Merely because the concerned employee was drawing more than the prescribed limit at the time of retirement he cannot be deprived of the gratuity amount. He will be deemed to be an employee under the Act when

admittedly he was drawing less than the prescribed limit when the Act came into force. In that view of the matter, the submission of Mr. Gododia to the effect that the concerned employee is not entitled for the gratuity amount under the Act since he was drawing more than the statutory limit has to be rejected outright. Somewhat a similar question came for adjudication before the Supreme Court in the case of the Royal Boot House and Others Vs. State of Jammu & Kashmir and Others, when the Court has rejected the similar submission of the Management and held that the employee, who was getting the salary within the statutory limit but subsequently drawing more than the statutory limit at the time of his retirement he shall be entitled for payment of gratuity under the provisions of the Act. The similar question has been answered by a Division Bench of the Bombay High Court in the case of Vasant Industrial and Engineering Works, Bombay v. Narayan Damodar Desai and Anr. 1981 Lab IC 11, in the following terms:

"Now the question is whether merely because the main part of the definition of employee refers only to a person employed on wages not exceeding Rs. 1000/- per mensem, the employee in the instant case should be held to be excluded from the benefits under the Act. The definition of employee in the main part of Clause (b) of Section 2 must be read along with the Explanation. The Explanation in this case is really in the nature of a substantive provision providing for computation of gratuity in case of persons who were initially employed on wages not exceeding Rs. 1000/-. The Explanation makes it very clear in unambiguous language that notwithstanding the fact that a person, who had been in employment for more than five years on wages not exceeding Rs. 1000/- per month draws wages which exceed Rs. 1000/- per month at any time thereafter, his claim for gratuity is to be determined on the basis of the wages received by him during the period when he was drawing less than Rs. 1000/- per month. The intention of the Legislature in enacting the Explanation obviously was to make it clear that the fact that at the time when any one of the events referred to in Section 4(1) occurs, the employee is drawing wages exceeding Rs. 1000/- will not deprive him of the benefits under the Act if it is shown that earlier for a period of five years, the employee concerned was employed on wages not exceeding Rs. 1000/-. Having regard to the definition of employee, it becomes, therefore, clear that the wages drawn by an employee, at the time of either retirement, resignation, superannuation, death or disablement being in excess of Rs. 1000/- per month will not alone be the determining factor for deciding whether the claim for gratuity should be rejected. Even in such a case the Legislature has created an entitlement in favour of an employee if he is able to show that he was employed for a period of not less than five years on wages not exceeding Rs. 1000/-."

Reference may also be made to the case of Jogendra Lal Malakar Vs. Regional Labour Commissioner (Central) and Others, wherein a Bench of the Calcutta High Court has held that it would be wholly unjust to hold that the employee who has rendered such long years of service at the commencement of the Act would be

deprived of the benefits of gratuity simply on the ground that when the Act came into force the employee was drawing a salary of more than the statutory limit per month. The explanation appended to Section 2(e) of the Act clearly goes to show that the case of such employee, who was even drawing more than the prescribed limit at the time of retirement, will come under the purview of the definition of the employee, as quoted above. The last submission of Mr. Gododia to the effect that the application filed by the concerned employee after the statutory period prescribed under the Rules could not have been entertained by the respondent Controlling Authority is also without any substance. This has to be kept in mind that the Act being a Welfare Legislation, the rightful claim of the employee cannot be defeated on the ground of technicality such as limitation. That apart, the respondent Controlling authority has considered this aspect of the matter in detail and after having satisfied on the material on record, has condoned the delay. This Court in exercise of its power under Article 226 cannot interfere with the findings of the respondent authority.

5. After having heard the learned counsel for the parties and going through the material in record including the order under challenge, I am of the view that there is no illegality in the order passed by the respondent Controlling Authority and, accordingly, this writ application is dismissed with cost of Rs. 5000/- payable by the petitioner Authority to the concerned workman.