
(1995) 08 MP CK 0009
In the Madhya Pradesh High Court
Case No : M. P. No. 3108 of 1991 (J)

M/s. Parmali Wallace Ltd. Bhopal

APPELLANT

Vs

State of M. P. and Others

RESPONDENT

Date of Decision : 03-08-1995

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Payment of Gratuity Act, 1972 — Section 2, 4, 7

Citation : (1995) 2 MPJR 352

Hon'ble Judges : S.K. Dubey, J

Bench : Single Bench

Advocate : Vijay Gupta, for the Appellant; R. K. Gupta, Amicus Curaie, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Dubey, J.

By this petition under Article 226/227 of the Constitution of India, the petitioner has challenged the order (Annexure P. 5) of the Controlling Authority under Payment of Gratuity Act, 1972 (for short the Act) directing the petitioner to pay the amount of gratuity of Rs. 8625 /- to respondent No.4 earned by him during the period of his employment. This order was confirmed by the Appellate Authority under the Act. vide order dated 6.8.91 (Annexure P-6) passed in Gratuity Appeal. No. 6/BPL/90).

Facts giving rise to the petition are thus - The petitioner is an Engineering Industry engaged in manufacturing and sale of insulated material Fibre Glass Engineering components etc. Respondent No. 4 was employed as a workman, who vide order dated 2.8.1986 was dismissed, after holding a domestic enquiry from service on a charge of misconduct under clause 12(1) (m) of the Statutory Standing Orders, framed under M.P. Industrial Employment (Standing Orders) Act, 1961. Against, the order of said dismissal the respondent No. 4 raised an industrial dispute which was referred for adjudication of Labour Court No. 2 at

Bhopal. which is still awaiting its final award. During the pendency of the dispute, respondent No. 4 filed an application u/s 7 of the Act. before the Controlling Authority for a direction to petitioner to make the payment of gratuity. The petitioner contested the application on the grounds, that the application is barred by time, the order of termination has not attained finality as the dispute relating to termination is sub-judice. before the Labour Court, the petitioner was guilty of causing loss and damages because of his act of willful slowing down in performance of his work of the undertaking. After enquiry, the Controlling Authority, vide order date 12.6.1990 (Annexure P-4) directed the petitioner to make the payment of gratuity amounting to Rs. 8625 /-. Aggrieved of that the petitioner preferred an appeal which was dismissed by Appellate Authority, vide order (Annexure p-6).

Shri Vijay Gupta, learned counsel for the petitioner, mainly contended that as the service of respondent No. 4 was terminated for causing loss and damage, which was in lacs of rupees, hence, in view of clause (a) or sub-section (6) of section 4 of the Act, his gratuity was forfeited, to which the respondent No. 4 is not entitled, because of his act of misconduct.

Shri R.K. Gupta, who appeared as a micus curiae submitted that no opportunity was given to the employee before forfeiting the gratuity to the extent of loss and damage caused by the employee due to the alleged misconduct committed by him. The petitioner has not proved the extent of loss or damage suffered by the petitioner, nor it is reflected in the order of termination (Annexure P-1). The amount of gratuity of an employee, under clause (a) of sub-section (6) of section 4 of the Act, can only be forfeited to the extent of damage or loss so caused, because of an act of willful omission or negligence causing any damage to the employer, reliance was placed on a decision of Karnataka High Court in case of M/s Bharat Gold Mines Vs. The Regional Labour Commissioner 1986 Lab. L.C. 1976.

As the petitioner has forfeited the gratuity under clause (a) of sub-section (6) section 4 of the Act, it would be appropriate to refer section 4 of the Act which reads thus:

Payment of gratuity - (1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years. -

(a) on his superannuation, or

(b) on his retirement or resignation, or

(e) on his death or disablement due of accident or disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement.

Provided further that in the case of death of the employee, gratuity payable to

him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.

Explanation-Far the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned:

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account:-

Provided further that in the case of (an employee who is employed in a seasonal establishment and who is not so employed throughout the year), the employer shall pay the gratuity at the rate of seven days' wages for each season:

(Explanation - In the case of monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.

(3) The amount of gratuity payable to an employee shall not exceed fifty thousand rupees.

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced.

(5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement of contract with the employer.

(6) Notwithstanding anything contained in sub-section (1) - (a) the gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused:

(b) the gratuity payable to an employee may be wholly or partially forfeited, (i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is

committed by him in the course of his employment.

(7) For the removal of doubts, it is hereby declared that the gratuity determined in accordance with the provisions of Explanation to clause (e) of Section 2 shall be payable to an employee referred to in that clause notwithstanding that immediately, or at any time, before the termination of his employment in the manner specified in clause (a) or clause (b) or clause (c) of sub-section (1), he was in receipt of-

(i) where such termination of his employment is before the commencement of the payment of Gratuity (Amendment) Act, 1984(25 of 1984). wages exceeding one thousand rupees per month, and

(ii) where such termination of his employment is after such commencement, wages exceeding one thousand and six hundred rupees per month.

From a bare look to section 4 of the Act, it is clear, that it creates liability of the employer for the payment of gratuity to an employee who had rendered, not less than 5 years" continuous service and that is payable on his superannuation or retirement or resignation or termination of service or his death or disablement due to accident or disease. Sub-section (2) prescribes the manner in which the gratuity is to be calculated, for every completed year of service or part thereof in excess of six months gratuity to an employee shall be at the rate of fifteen days wages based on the wages last drawn by the employee. Sub-section (3) puts a ceiling on the gratuity amount which shall not exceed fully thousand rupees. Sub-section (4) lays down the manner of computing gratuity of an employee who is employed and after his employment and whose wages are reduced due to disablement. Sub-section (5) lays down that nothing in this section affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer. Sub-section (6) lays down certain circumstances in which an employer is entitled to forfeit the gratuity earned by an employee wholly or in part as the case may be Sub-section (7) removes doubt about the determined gratuity in accordance with the provisions of Explanation to clause (e) of Section 2.

In the case in hand as the gratuity has been forfeited under clause (a) of sub-section (o) of section 4 a bare look to this Sub-section shows that the right of the employer to forfeit the amount of earned gratuity is sine quo turn to the extent of the damage or loss so caused. The petitioner has not placed any material to demonstrate the extent of loss suffered because of the act of respondent No. 4 in slowing down the performance of his work of the undertaking. Nor the loss or damage is apparent from the order of termination. Not only this, before this Court when pointedly asked that how much loss or damage was suffered by the petitioner company, because of the act of willful slowing down in performance of the work which is a major misconduct under Clause 12 (I) (m) of the Standing Orders, learned counsel simply stated that the loss was in lacs of rupees. However, he submitted that no issue to that effect was framed nor any

opportunity was afforded to the petitioner employer to prove the extent of loss or damage so caused by the act of the employee.

Without expressing any opinion on the act of the respondent No. 4 of enumerated misconduct in clause 12(1) (in) of the Standing Orders, on the material adduced by the panics, the petitioner/employer has failed to prove before the Controlling Authority, the extent of damages or loss so caused by the employee because of his act of alleged major misconduct. Therefore, right to forfeit the gratuity under clause (a) of sub-section (6) of Section 4 of the Act was not available to the petitioner. Besides, before forfeiting the gratuity amount the petitioner did not afford any opportunity to the employee to explain why his amount of gratuity be not forfeited. Therefore, the action of the petitioner in forfeiting the amount of gratuity cannot be sustained. See the decision of Karnataka High Court in case of M/s Bharat Gold Mines (supra). The prayer of the petitioner to remit the case now after a period of 9 years cannot be accepted, as it was the duty of the petitioner who came with a specific plea of forfeiture of gratuity under clause (a) of sub-section (6) of Section 4 to prove and establish the said plea and extent of loss or damage so caused by the act of the respondent No. 4. Not only this, this grievance was not raised by the petitioner before the Appellate Authority which now cannot be allowed to be raised.

Before parting with case. 1 place my appreciations on record to Mr. R.K. Gupta. Dy. Advocate General for rendering this assistance to Court in the hearing of the case.

In the result, the petition is dismissed with no order as to costs. Security amount, if any, be refunded to the petitioner.