(1985) 08 DEL CK 0011

In the Delhi High Court

Case No : Civil Writ No. 3494 of 1982

Municipal Corporation of Delhi APPELLANT

Vs

Padma Devi and Another RESPONDENT

Date of Decision : 14-08-1985

Acts Referred:

Payment of Gratuity Act, 1972 — Section 1(3), 4(1)

Citation : (1986) 52 FLR 372 : (1995) 3 LLJ 501

Hon'ble Judges : Yogeshwar Dayal, J

Bench : Single Bench

Advocate : J.K. Mehra and Dinesh Agani, for the Appellant; Ashok Agarwal, for the Respondent

Final Decision : Dismissed

Judgement

Yogeshwar Dayal, J

1. This is a petition under Article 226 of the Constitution of India for challenging the order of the Controlling Authority appointed under the Payment of Gratuity Act, 1972 dated 10th December, 1980 and the order dated 6th July, 1982 passed by the Appellate Authority under the aforesaid Act.

2. Smt Sushma Devi, an employee of the Municipal Corporation of Delhi, (hereinafter called the ''Corporation'') died on 2nd July, 1980 and her daughter Km. Padma Devi, respondent No. 1 herein, filed an application for directions before the Controlling Authority appointed under the Payment of Gratuity Act, 1972(hereinafter referred to as the ''Act'') for payment of gratuity due to her deceased mother u/s 4 of the Act on account of her death on 2nd July, 1980. Before the Controlling Authority, as it appears from the order of the Controlling Authority, two points were taken in the reply filed on behalf of the Corporation. First point was that the Payment of Gratuity Act, 1972 is not applicable to the Corporation and the second point was that the Corporation has its own Gratuity Regulation/pension rules to allow gratuity to retiring employees and since this

scheme was applicable to deceased employee, recourse to Payment of Gratuity Act was not permissible in law. The Controlling Authority held that the Act was applicable to the Corporation on the second point the Controlling Authority took the view that Section 4(5) of the Act only, safeguards the rights of those employees who are entitled to receive better terms of gratuity under any award, agreement or contract, but does not exclude those establishments from the purview of the Act who have less favorable own gratuity Regulations having no provisions of gratuity to daily rated employees. It was admitted on behalf of the Corporation that the deceased employee was getting daily wages of Rs.8/- per day; that she worked with the Corporation up to 6th October, 1979 and the deceased was also paid for the weekly holiday. After computing the service of the deceased for four years, the Controlling Authority held the respondent''s entitlement of gratuity to the extent of Rs. 553.85 with 9% per annum compound interest with effect from 3rd September, 1980 to the date of payment.

3. The Corporation being dissatisfied with the order of the Controlling Authority filed an appeal before the Appellate Authority. Even before the Appellate Authority, the aforesaid two points were urged and the Appellate Authority relying upon the decision of the Supreme Court in the case of State of Punjab Vs. Labour Court Jullunder and Others, took the view that the petitioner Corporation was an ''establishment'' within the meaning of Section 1 Sub-section (3) Clause (b) of the Act. On the other plea that the petitioner-Corporation has got its own gratuity scheme which is more favorable, the Appellate Authority took the view that there is no doubt that the Corporation has its own gratuity scheme for its employees but Section 14 of the Act supersedes or over-rides any contract inconsistent with the provisions of the Payment of Gratuity Act, unless the Corporation ask for exemption under the Act. It appears that no other point was urged before the Appellate Authority and with the above observations, the Appellate Authority dismissed the appeal of the Corporation.

4. In the petition filed under Article 226 of the Constitution, same two points have been urged. But apart from urging the aforesaid two points, a new point has been taken to the effect that since the deceased worked with the Corporation only during the period from 13th December, 1975 to 6th October, 1979, the working was for a period of less than 5 years and since she died on 2nd July, 1980, it could not be said that the deceased was in service of the Corporation for not less than 5 years nor can it be said that this period of 5 years continuous service is not necessary as the termination of her employment was not on account of her death.

5. Elaborating the submission, Mr. J.K. Mehra, learned counsel for the Corporation submitted that there is no finding of the Authorities under the Payment of Gratuity Act to the effect that termination of service of the deceased was on account of her death. It was submitted that the respondent No. 1''s own case before the Controlling Authority was that her deceased mother''s total service with the Corporation was 4 years 6 months and 18 days. It was also

stated that about the death of employee, the Corporation had no information but admitted that she had worked up to 6th Oct., 1979. From this the argument was developed by Mr. J.K. Mehra that the termination of deceased''s services was not on account of death; she was only a daily wager and she had worked only till 6th October, 1979 but died later on 2nd July, 1980 and thus, she had not served for continuous period of 5 years and is not entitled to payment of gratuity u/s 4 of the Act.

6. I will deal with new submission first. It will be noticed that in the Annexure attached to the application for payment of gratuity, the respondent No. 1 had claimed that the salary of her mother last drawn was Rs. 240/- per month. It was nowhere pleaded that she was a daily rated earner. In column No. 9 which relates to, "Date and cause of termination of service of the employee", it was mentioned, "died on 2.7.1980". In the reply filed on behalf of the Corporation the reply to this column No. 9 was, "Admitted to the extent that she worked in Patel Nagar Hosp. up to Oct., 1979 but the office has not been reported of the employee''s death". In reply to averments in column No. 11 which related to wages last drawn by the employee, as stated earner the Claimant had stated Rs.240/- per month. In reply thereto, in the reply in para-11, it was stated on behalf of the Corporation, "Admitted to the extent that she was in receipt of Rs.8/- per day in substitute arrangements". A replication was filed to this reply and the plea taken on behalf of respondent No. 1 was that the deceased was wrongly treated as a daily wage employee. She was a leave substitute and was working against the permanent post and had uninterrupted record of service to her credit. She was a regular and permanent employee under the law as defined in the Model Standing Orders framed under Industrial Employment Standing Order Act, 1946.

7. The question, whether the deceased employee was in continuous service as contemplated by the proviso to Section 4 of the Act is a question of fact. Relevant part of Section 4(1) of the Act is reproduced hereunder:-

"4. Payment of Gratuity-(l) 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

(c) on his death or disablement due to 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:"

8. An analysis of Section 4(1) of the Act shows that if an employee has rendered not less than five years service then, he is entitled to gratuity under the Act. The proviso reduces this period of five years if the termination of the employment is

on account of death or disablement. The case of respondent No. 1 in her application for determination of gratuity was that the termination of her mother''s service was on account of death. There was no counter plea on behalf of the Corporation, that it was not so. There was no plea in reply that the termination of employment was not on account of her death because if the termination of the employment was not on account of death or on account of disablement, when the employee claims gratuity, she has to show that she was in five years continuous service. The applicant was very conscious and she has stated that the deceased had served for four years, six months and 18 days in column No. 10 of the annexure .Her claim for the gratuity before the Controlling-Authority was based on the fact that the termination of her mother''s service was on account of death. This was the crucial point which should have been disputed before the Controlling Authority. Since this point was not taken before the Controlling Authority, it is disputed question of fact which cannot be allowed to be urged for the first time in a petition under Article 226 of the Constitution.

9. So far as the two points urged before the Authorities are concerned, it appears to me that for one of the points, it was not proper for a public body like the Corporation to waste public time of public authority in urging it. The point which was urged before the Authority under the Act was that the Corporation is having its own regulations which provide for benefits including gratuity much better than the benefits being conferred by the Payment of Gratuity Act and, Therefore, the Controlling Authority should not award any gratuity. It was a false plea to say the least. The Corporation''s own case in the writ petition and before the Authority was that the deceased was a daily wage earner. The Corporation has filed its regulations which seek to confer better benefits on the employee like the deceased. It is expressly mentioned in these regulations in para 3 that they are not applicable to employees who are in receipt of daily wages. If the regulations speak like this then obviously the plea taken before the Authority was a false plea and same plea has been repeated in the writ petition. However, I will say in fairness to Mr. J.K. Mehra, learned counsel for the petitioner, that he has not urged this point before me, Therefore, I am not deciding this petition on that ground.

10. Coming to second point that the Corporation was not an establishment within the meaning of Section 1, sub-section (3) clause (b) or the Act, the matter is concluded by a judgment delivered by me earlier today entitled, "Municipal Corporation of Delhi v. Smt. V.T. Naresh and Anr" Civil Writ No. 108/83, For the reasons given in that judgment, it is held that the Corporation is an ''establishment'' within the meaning of the aforesaid provisions and the Payment of Gratuity Act is applicable to the employees or the Municipal Corporation of Delhi. This petition accordingly fails and is dismissed with costs which are assessed at Rs.500/-.

