
(2014) 02 CAL CK 0023
In the Calcutta High Court
Case No : W.P. No. 977 (W) of 2014

Murlidhar Ratanlal Exports Ltd.

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 26-02-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 114(iii)(g), 2(a)(1)
Industrial Disputes Act, 1947 — Section 10, 25B, 25F, 25-F
Payment of Gratuity Act, 1972 — Section 7, 7(4), 7(7), 8

Citation : (2015) 1 WBLR 304

Hon'ble Judges : Soumen Sen, J

Bench : Single Bench

Advocate : P.B. Chowdhury, Amrita Pandey, Anamika Pandey and Abhijit Pal, Advocates for the Appellant; Saugata Bhattacharjee, Advocates for the Respondent

Judgement

Soumen Sen, J.—The subject-matter of challenge in this writ petition are three several orders, namely, order dated 24th January, 2012, 10th October, 2012 and 25th July, 2013 passed by the respondent Nos. 2, 3 and 4 respectively. All the aforesaid orders were passed in a proceeding initiated by the respondent No. 6 for recovery of his gratuity under the Payment of Gratuity Act.

2. Shorn of all facts, the facts relevant to the issue are stated hereinafter. The petitioner took over the running and operation of M/s. Hooghly Mills Co. Ltd. from the erstwhile owners in terms of an agreement dated 21st June, 2007. The petitioner alleged that the petitioner was not aware of the service conditions and/or employment related issues of the Indian Jute Mills Unit of M/s. Hooghly Mills Co. Ltd. It was during the course of the proceeding arising out of the claim for recovery of gratuity, the petitioner became aware that the private respondent No. 6 was an employee of M/s. Hooghly Mills Co. Ltd. and had joined service in the said mill on March 16, 1964 as a badli workman and did not render continuous service in any year until 1976. The respondent No. 6 had rendered

continuous service on and from 1st January, 1976 and on attaining the age of superannuation on 15th July, 2005 he retired from service. In the year 1993 and 2005 the respondent No. 6 worked less than 240 days and is, therefore, entitled to gratuity for twenty-eight years amounting to Rs. 80,018/- calculated on the basis of fifteen days average of Rs. 2,857.82/-, i.e. 190.34. The respondent No. 6, it is alleged, however in its Form "N" application had wrongly and incorrectly shown rendition to continuous service for 41 years, i.e. from March 18, 1964 to July 15, 2005 but had failed to disclose any document and/or discharge its obligation to prove that he had been in continuous service without any break for 240 days in each year for which gratuity was claimed by him. The respondent No. 6 it is alleged remained as a badli workman and was engaged in work on a temporary basis.

3. On 25th June, 2008 the respondent No. 6 filed an application before the controlling authority under the Payment of Gratuity Act, 1972 under sub-rule (1) of Rule 10 of the West Bengal Payments of Gratuity Rules, 1973 claiming gratuity from the year 1964 till 2005 on the basis of last drawn wages as Rs. 190.34.

4. The respondent No. 6 during his chief and cross-examination stated before the Controlling Authority that he joined the petitioner company on 18th March, 1964. He was made permanent in the year 1967 and was superannuated on 28th July, 2005. During the period from his joining to superannuation he rendered continuous and uninterrupted service to his employer and he also enjoyed STL all along every year. His last drawn wages was Rs. 190.34 only per day. He claimed his total period of service was 41 years 10 months and a sum of Rs. 1,17,059.00. He also claimed interest admissible on such sum for delayed payment. The claim of the respondent was supported by exhibits.

5. The controlling authority by the judgment and order dated 24th January, 2012 held that the petitioner is liable to pay Rs. 1,17,059.00/- to the respondent No. 6 towards his gratuity dues. The said controlling authority in arriving at the said finding had taken into consideration the evidence recorded in the said proceeding as also four document namely, Employment Book, Last Pay Slip, General Diary and copy of Form "I" and letter of superannuation in order to arrive at a finding that the petitioner had worked for a period of forty-one years. The controlling authority has recorded that the petitioner in spite of giving repeated opportunities at every stage of the proceeding did not produce any document in support of its claim and in fact was adopting dilatory tactics to delay the conclusion of the said proceeding. The said authority arrived at an adverse finding against the petitioner in view of the failure on the part of the said petitioner to produce the attendance register or wage register or the certified standing order as a rebuttable evidence.

6. Mr. Bhanja Chowdhury, the learned Counsel for the petitioner has relied upon the decisions reported in Phoenix Mills Ltd. Vs. Balasaheb Dagdoo Hinge and Others, , Essen Deinki Vs. Rajiv Kumar, , The Range Forest Officer Vs. S.T. Hadimani, and Gloster Limited and Another Vs. State of West Bengal and Others,

in order to establish that in a proceeding of like nature the Hon"ble Apex Court has held that the employees is required to establish that he had been in continuous service for 240 days.

7. In Range Forest Officer (supra) the issue before the Hon"ble Supreme Court was that whether the affidavit of the workman was sufficient to prove that he had worked for 240 days in a year so as to entitle him to claim retrenchment compensation. The Hon"ble Supreme Court held that in a case where the claimant asserts that he had worked for 240 days and such claim is denied by the employer it was then for the claimant to lead evidence to show that he had in fact worked for 240 days in a year preceding his termination. In Range Forest Officer (supra) no proof of receipt of salary or wages for 240 days or order or order of appointment or engagement for that period was produced by the workman. The relevant observation of the Hon"ble Supreme Court is stated below:-

"In our opinion the Tribunal was not right in placing the onus on the management without first determining on the basis of cogent evidence that the respondent had worked for more than 240 days in the year preceding his termination. It was the case of the claimant that he had so worked but this claim was denied by the appellant. It was then for the claimant to lead evidence to show that he had in fact worked for 240 days in the year preceding his termination. Filing of an affidavit is only his own statement in his favour and that cannot be regarded as sufficient evidence for any Court or tribunal to come to the conclusion that a workman had, in fact, worked for 240 days in a year. No proof of receipt of salary or wages for 240 days or order or record of appointment or engagement for this period was produced by the workman. On this ground alone, the award is liable to be set aside."

8. In Essen Deinki (supra) the Hon"ble Supreme Court in paragraph 14 have considered the beneficial nature of labour legislation and, thereafter at paragraph 15 held that under Section 25B of the Industrial Disputes Act, 1947 the requirement of the statute of 240 days cannot be disputed and it is for the employee concerned to prove that he has in fact completed 240 days in the last preceding twelve months period. It appears from paragraph-6 of the said judgment that the workman joined the service of the appellant as an helper on 1st July, 1990 and continued till 26th February, 1991. The service was terminated however, on the ground that in his short stay with the appellant his work was not found to be of desired standard. The appellant did not feel it expedient, however, to comply with the provisions of Section 25-F by reason of non-completion of 240 days in the preceding 12 calendar months. As a matter of fact it has been the contention of the appellant at all stages that the respondent workman worked for a total period of 219 days in totality within the preceding 12 months" period thereby falling short of statutory requirements noticed above. The Hon"ble Apex Court followings its earlier decision reported in Range Forest Officer (supra) upheld the order of the Labour Court and set aside the order of

the High Court.

9. In *Gloster* (supra) on facts it was held that the workman has failed to discharge its initial onus that he worked for 240 days and accordingly the finding of the Labour Court that the industrial establishment would be required to establish that the workmen did not work continuously for 240 days preceding the date with reference to which calculation is to be made in a proceeding under Section 25F of the Industrial Disputes Act, 1947 was erroneous.

10. It, thus, appears from the ratio of the aforesaid decisions that the claimant-workman would be required to produce some evidence in support of his claim for continuous work for 240 days in a year and the sworn statement in the affidavit in absence of any document corroborating such statement on the face of a challenge being thrown by the employer would not be sufficient.

11. In the instant case, however, the claimant had produced four documents which were found to be sufficient to discharge the burden cast upon the petitioner to claim gratuity. The employment book, wage slips along with receipt are sufficient to discharge such burden. The petitioner accepted Form "I" without any demur. There is no contemporaneous denial of the contents of Form "I". When such evidence are produced, it is for the employer to produce relevant documents to rebut such evidence. It is surprising that the employer has failed to produce the attendance register and the wage resister which would clearly show if the petitioner had made any false claim. The petitioner under the facts and circumstances could not be asked to prove the negative or to produce any other evidence in support of his claim. On the contrary an adverse presumption is to be drawn in view of the failure on the part of the petitioner to produce any document. The petitioner as an employer is expected to be in possession of attendance register and all other documents in relation to the employment of the private respondent. The petitioner is in possession of best evidence. The petitioner has inexplicably failed to produce any records, muster rolls, wage sheet, provident fund record and other documents in its possession. The petitioner is statutorily required to maintain some document. The burden of proof is not an abstract concept. It has to be assessed on the basis of the relative position of the parties to the lis and the advantageous and disadvantageous position to which a party is put during trial by withholding vital information which are exclusively in its possession and/or within its special knowledge.

12. In paragraph 10 of the petitioner, the petitioner has stated that the petitioner made reference to such factual details, namely, that the respondent No. 6 was a badli workman and he was not in continuous since until May, 1978 and the said paragraph has been affirmed as information derived from records which the deponent believes to be true. The petitioner, however, did not produce any evidence in support of what has been stated in paragraph 10 of the writ petition before the controlling authority. The statement of the petitioner is prevaricating as one hand it contends that they have not received any document from the management of M/s. Hooghly Mills Ltd. and at the same time it is contended that

record maintained by the company would show that he did not render any continuous service in any year until 1976, although, he joined as a badli worker in the said Mill on March 16, 1964. The fact remains that no evidence whatsoever has been produced before the controlling authority in spite of opportunities being given to the petitioner to produce documents in support of its claim.

13. Another striking feature of the matter is that the petitioner has not preferred any appeal against the said order. It was only when the order of the Controlling Authority was put to execution, the petitioner filed an application before the Certificate Officer praying for stay or review of the order passed by the learned controlling authority and/or remit back the case to the learned controlling authority to pass an appropriate order. The Certificate Officer before whom the proceeding was initiated for realization of the amount adjudicated upon, in my view, has rightly dismissed the said petition. In fact there cannot be any dispute that the company had failed to produce any evidence on the basis of which the petitioner could have asked for modification of the certificate. The said application was made in order to delay the realization of the amount adjudicated by the controlling authority. The Certificate Officer is not competent to review or recall the said order. The petitioner undeterred by such dismissal again filed an appeal before the Appellate Authority under the Bengal Public Demand Recovery Act. The petitioner contended in the said appeal that the Certificate Officer without giving an opportunity to the petitioner had passed the order dated 10th October, 2012. The Appellate Authority on consideration of the materials on record refused to interfere with the order passed by the Certificate Officer.

14. Mr. Bhanja Chowdhury submits that even in such execution proceeding the executing authority had the power to set aside the order by which the liability was determined. Mr. Chowdhury even had gone to the extent in contending that in such proceeding the executing authority could go to the merit of the claim which had attained finality. If such interpretation is accepted, then the provision of appeal would be rendered otiose and executing authority would be bestowed with a power which the statute does not confer or contemplate. The statutory time to prefer an appeal had expired. It was only thereafter such applications were filed before the respondent Nos. 3 and 4 with such untenable pleas in an attempt to reopen the issue and to deny a just claim. The Bengal Public Demands Recovery Act, 1913 was enacted to consolidate and amend the law relating to recovery of public demands in Bengal. The Payment of Gratuity Act, 1972 was enacted to provide for a scheme for the payment of gratuity but employees engaged in factories, mines, oil fields, plantations, space, railway companies, shops or other establishments and for matters connected therewith or incidental thereto. The said Act is a self-contained Code. The said Act is a special Act and a subsequent Act. The said Act provides for determination of the amount of gratuity and also there is a provision for appeal. The mode of execution is also prescribed in Section 8 of the said Act which prescribes that if the amount of gratuity payable under the Act is not paid by the employer within the prescribed time to the person entitled thereto, the Controlling Authority shall,

on an application be made to it in this behalf by the aggrieved person would issue a certificate for that amount to the collector who shall recover the same together with compound interest as arrears of land revenue and pay the same to the person entitled thereto. It is because of this provision that the collector as an executing authority recovers and realizes the amount under the Public Demands Recovery Act. The provisions of the Public Demands Recovery Act cannot be extended to an aggrieved person to re-agitate the issue which is the subject matter of determination under Section 7 of the Gratuity Act, 1972 either before the Certificate Officer or the appellate authority under the Public Demand Recovery Act. The appellate authority under the Public Demand Recovery Act does not exercise any appellate power over and in respect of the order passed by the Controlling Authority. If such an interpretation is given and power is extended to the collector and the appellate authority under the Public Demands Recovery Act then the entire procedure prescribed under the Payment of Gratuity Act would become otiose and nugatory. It would not only lead to absurdity and militate against the provisions of the Gratuity Act but also it would be open for an aggrieved employer to question the determination of liability before the collector by passing the provision of appeal under Section 7(7) of the said Act and disregarding the special period of limitation.

15. Although the Evidence Act may not strictly apply to such industrial adjudication but the fact remains that the workman, in order to succeed before the Controlling Authority, would be required to establish that if he is not an employee employed in a seasonal establishment and is not in continuous service within the meaning of Clause 1 of Section 2(a)(1) for any period of one year or six months, he shall be deemed to be in continuous under the employer for the said period of one year if the employee during the period of 12 calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than 240 days. It is no doubt that the workman is required to establish that he worked for a period of 240 days. In the instant case, the workman had discharged his initial onus by producing whatever documents that were available with him and in his custody to show that he was in employment for 240 days. In such a situation, the employer would be required to produce Attendance Registers and Muster Rolls to rebut the evidence of the employee concerned. The question of shifting of onus assumes relevance only when evidence is adduced. The employer although alleged did not lead any evidence.

16. In *Sriram Industrial Enterprises Ltd. Vs. Mahak Singh and Others*, , the Hon'ble Supreme Court on review of all the earlier decisions held that the best evidence having been withheld by the employer and the High Court was entitled to draw such an adverse inference against the employer. The Hon'ble Supreme Court had also noticed that the views expressed by the Apex Court on the question of burden of proof in *Range Forest Officer (supra)* were watered down by a subsequent decision *R.M. Yellatti Vs. The Assistant Executive Engineer*, . It was held that the workman had discharged their initial onus by production of the

documents in their possession. The relevant observations of R.M. Yellatty (supra) which has been relied upon at Paragraph 23 of the M/s. Sriram Industrial (supra) are stated below:-

"Analysing the above decisions of this Court, it is clear that the provisions of the Evidence Act in terms do not apply to the proceedings under Section 10 of the Industrial Disputes Act. However, applying general principles and on reading the aforesaid judgments, we find that this Court, has repeatedly taken the view that the burden of proof is on the claimant to show that he worked for 240 days in a given year. This burden is discharged only upon the workman stepping up in the witness box. This burden is discharged upon the workman adducing cogent evidence, both oral and documentary. In cases of termination of services of daily-waged earners, there will be no letter of appointment of termination. There will also be no receipt of proof of payment. Thus in most cases, the workman (the claimant) can only call upon the employer to produce before the Court the nominal muster roll for the given period, the letter of appointment of termination, if any, the wage register, the attendance register, etc. Drawing of adverse inference ultimately would depend thereafter on the facts of each case. The above decisions however make it clear that mere affidavits or self-serving statements made by the claimant workman will not suffice in the matter of discharge of the burden placed by law on the workman to prove that he had worked for 240 days in a given year. The above judgments farther laid down that mere non-production of muster rolls per se without any plea of suppression by the claimant workman will not be the ground for the Tribunal to draw an adverse inference against the management. Lastly, the above judgments lay down the basic principle, namely, that the High Court under Article 226 of the Constitution will not interfere with concurrent findings of fact recorded by the Labour Court unless they are perverse. This exercise will depend upon the facts of each case."

17. Generally it is the duty of the party to lead the best evidence in his possession, which could throw light on the issue in controversy and in case such material evidence is withheld, the Court may draw adverse inference under Section 114(iii)(g) of the Evidence Act notwithstanding that the onus of proof did not lie on such party and it was not called upon to produce the said evidence. Union of India (UOI) Vs. Ibrahim Uddin and Another, .

18. The learned Counsel for the petitioner realizing that the subsequent applications before the collector and the appellate authority under the Public Demand Recovery Act were thoroughly misconceived sought to explain the same by arguing that such applications were filed under wrong advice so as to take refuge to the plea that alternative remedy of appeal would not be bar in filing this writ application. It was for this reason that the learned Counsel has argued that notwithstanding provision for appeal the writ Court has jurisdiction to interfere with the order passed by the controlling authority and has cited the decisions reported in Ritesh Tewari and Another Vs. State of U.P. and Others, , Union of India (UOI) and Another Vs. Guwahati Carbon Ltd., , U.P. State Spinning

Co. Ltd. Vs. R.S. Pandey and Another, , Bombay Gas Co. Ltd. Vs. Gopal Bhiva and Others, , (1980) 4 SCC 401 (Badlu & Anr. v. Shiv Charan & Ors.).

19. In all the aforesaid decisions, the Hon''ble Supreme Court while defining the scope and power of Article 226 of the Constitution of India held that such power is discretionary and supervisory in nature and not to be used merely because it is lawful to do so. The extra ordinary power in the writ jurisdiction does not exist to set right mere errors of law which do not occasion any substantial injustice. Where a party's claim is not founded on valid grounds, the party cannot claim equity. As a party that claimed equity must come before the Court with clean hands. However, such powers under Article 226 can only be exercised in those cases where the statutory authority has not acted in accordance with the provisions of enactment in question or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violations of principles of natural justice. The Hon''ble Supreme Court dismissed the appeal of Union of India on the ground that the assessable value of the commodity as determined by the Tribunal should have been carried by an appeal and the assessee ought not to have filed a writ petition before the High Court questioning correctness or otherwise orders passed by the Tribunal. The excise law was held to be a complete code in order to seek address in excise matters and hence may not be appropriate for the writ Court to entertain a writ Court under Article 226 of the Constitution of India. It was further held that existence of adequate alternative remedy is a factor to be considered by the writ Court before exercising its writ jurisdiction. The Gratuity Act similarly is a complete code in order to seek redress in gratuity matters and it would not be appropriate for the writ Court to disregard the provisions of the Gratuity Act.

20. The attempt on the part of the petitioner to re-open the issue without preferring the appeal on the ground of alternative remedy thus falls to ground. The three decisions cited by the petitioner, namely, Ritesh Tewari (supra), Union of India (supra) and U.P. State Spinning Co. Ltd. (supra) do not come to the aid of the petitioner.

21. The ratio of the said decisions squarely apply to the instant case. The petitioner as an employer instead of preferring an appeal before the appellate authority filed a misconceived application before the collector after the expiry of the limitation and after the order of the Controlling Authority had attained finality. Such application was filed with an oblique motive to delay the recovery proceeding and to harass the employee. Inasmuch as the order passed by the Controlling Authority is not without jurisdiction, the ratio of the decision reported in Bombay Gas Co. Ltd. (supra) also does not apply.

22. The plea that the proceedings initiated under the provisions of the Public Demand Recovery Act was due to mistaken advice is not even the case made out in the petition. In any event, such submission is a clear afterthought in order to wriggle out of the special period of limitation mentioned in Section 7(7) of the

Payment of Gratuity Act. In this regard it would be useful to refer to Section 7(4), 7(7) of the Act and Rule 11(5) of the West Bengal Gratuity Rules:-

"S. 7. Determination of the amount of gratuity.....

(4). (a) If there is any dispute to the amount of gratuity payable to an employee under this Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the employer shall deposit with the controlling authority such amount as he admits to be payable by him as gratuity.

(b) Where there is a dispute with regard to any matter or matters specified in clause (a), the employer or employee or any other person raising the dispute may make an application to the controlling authority for deciding the dispute.

(c) The controlling authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as a result of such inquiry any amount is found to be payable to the employee, the controlling authority shall direct the employer to pay such amount or, as the case may be, such amount as reduced by the amount already deposited by the employer.

(d) The controlling authority shall pay the amount deposited, including the excess amount, if any, deposited by the employer, to the person entitled thereto.

(e) As soon as may be after a deposit is made under clause (a), the controlling authority shall pay the amount of the deposit-

(i) to the applicant where he is the employee; or

(ii) where the applicant is not the employee, to the [nominee or, as the case may be, the guardian of such nominee or] heir of the employee if the controlling authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity.

(7). Any person aggrieved by an order under sub-section (4) may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf:

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days:

[Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4), or deposits with the appellate authority such amount]

R. 11. Procedure for dealing with application for direction.....

(5). If the employer concerned fails to appeal on the specified date of hearing without sufficient ground, the controlling authority may proceed to hear and determine the application ex parte, and if the applicant fails to appear on the specified date of hearing without sufficient cause, the controlling authority may dismiss the application:

Provided that an order under this sub-rule may, on good cause being shown within thirty days of the said order, be reviewed and the application re-heard after giving not less than fourteen days" notice to the opposite party of the date fixed for re-hearing of the application."

23. If the amount of gratuity payable under the Act is not paid by the employer within the prescribed time, the Controlling Authority, on an application made to it by the aggrieved person, issued a certificate for that amount to the Collector who shall recover the same together with compound interest thereon at the rate to be specified by the Central Government from the date of expiry of the prescribed time as arrears of land revenue and pay the same to the person entitled thereto. In the instant case, the Controller passed the order of determination of the gratuity on January 24, 2012 under Section 7. Under Section 7(7) of the Act an aggrieved person is required to file an appeal within 60 days from the date of receipt of the order provided the appellate authority may extend the period by a further period of 60 days if such authority is satisfied that the person aggrieved was prevented by sufficient cause from preferring the appeal within the said period of 60 days. The petitioner did not prefer any appeal within the prescribed period or even within the extended period. The petitioner also did not approach the controller in terms of Rule 11(5) of the West Bengal Payment of Gratuity Rules, 1973. Since the petitioner did not pay the amount, a proceeding was initiated under Section 8 by the private respondent for realization of the gratuity amount along with interest. It was at that stage the petitioner filed an application for recalling of the said order before the learned Certificate Officer, Serampore who has initiated a certificate case for recovery of the said amount. The Certificate Officer cannot go into the merits of the said matter which has been determined by the Controlling Authority. The Certificate Officer nor for that matter, the appellate authority under the Bengal Money Lenders Act, would be the appropriate authority to sit in appeal over the order passed by the Controlling Authority. In this writ petition, the petitioner is seeking to re-open the issue instead of preferring a statutory appeal.

24. In any event, it cannot be contended that the order passed by the controlling authority is a nullity or without jurisdiction. Moreover, it cannot be said that the finding of the controlling authority was based on no evidence. In the aforesaid facts and circumstances, the writ application is dismissed with cost assessed at Rs. 5,000/-, which shall be paid by the petitioner to the respondent No. 3.