
(2019) 09 UK CK 0079

In the Uttarakhand High Court

Case No : Writ Petition (M/S) No. 891, 893, 894, 896, 897, 899, 901, 1778, 1779, 1781, 1788 Of 2016

Nawab Khan & Others

APPELLANT

Vs

Union Of India & Others

RESPONDENT

Date of Decision : 13-09-2019

Acts Referred:

Payment Of Gratuity Act, 1972 — Section 3, 4, 4(1), 4(3), 4(5), 7(3A), 7(4)(a), 7(7)
Constitution Of India, 1950 — Article 14

Citation : (2019) 09 UK CK 0079

Hon'ble Judges : Sudhanshu Dhulia, J

Bench : Single Bench

Advocate : B.D. Upadhayaya, Sunil Upadhayaya, Rajesh Sharma, Vikas Anand

Final Decision : Disposed Of

Judgement

Sudhanshu Dhulia, J

1. All the petitioners before this Court are the former employees of a Public Sector Enterprise (in short "PSE") known as "Central Electronics Limited" (from hereinafter referred to as "CEL"). Having reached their age of superannuation, they retired from service in the PSE between 01.01.2007 to 24.05.2010.

2. They have filed these writ petitions before this Court, as they are being denied the "enhanced gratuity", which according to them, was liable to be given to them, in view of the Office Memorandum of Government of India dated 26.11.2008, which is applicable to all PSEs and which has been implemented in its letter and spirit by all PSEs, except their PSE which is CEL.

3. It would be relevant for our purposes to note that the payment of gratuity or the revision of pay scale, with which, we are presently concerned, is only related to Board level and below Board level executives and Non-Unionised Supervisors in PSEs.

4. The short background here is that while the petitioners were still in service, a

pay revision exercise for the employees of PSEs was underway by the Government of India. It was being done under the chairmanship of a retired Supreme Court Judge Justice M. Jagannadha Rao. The Committee i.e. Pay Revision Commission (in short "PRC") had in all 39 sittings. The first meeting it had was on 13.12.2006 at New Delhi, where among other deliberations, a strategy was adopted, for studying the existing market scenario and issues relating to compensation packages for PSEs executives, etc were discussed.

5. The PRC invited suggestions from all the stakeholders, and taking their suggestions into account gave its recommendations ultimately in favour of enhancement of the pay scale of the employees, and also for grant of other benefits to them, such as the enhanced gratuity. These recommendations were ultimately accepted by Government of India through its Ministry of Heavy Industries & Public Enterprises Department of Public Enterprises, which is the apex body of these PSEs. Their Office Memorandum was finally published on 26.11.2008. It not only states that the pay ought to be revised with 30% increase on basic pay plus 68.8% DA, but other benefits were also to be given. As regarding the gratuity, paragraph no. 13 of the Office Memorandum dated 26.11.2008 said as under:-

"13. Gratuity: The ceiling of gratuity of the executives and non-unionised supervisors of the CPSEs would be raised to Rs. 10 lakhs with effect from 1.1.2007."

6. The basic question which will fall for the consideration of this Court would be as to the force which this particular Office Memorandum dated 26.11.2008 carries and whether it was mandatory for all PSEs to follow.

7. There are two kinds of directions which are issued by the Government of India through Department of Public Enterprises, or through its relevant Ministry. First are the ones in shape of a "Presidential Directive". A Presidential Directive has the force of law and it is mandatory upon PSEs to follow these Presidential Directives. The second are the "instructions", which are given by either Department of Public Enterprises or by the concerned Ministry of Public Unit is in the shape of an Office Memorandum.

8. An Office Memorandum may not have the force of law and it may not be mandatory upon a PSE to follow it as it generally only advisory in nature. However, the Board of Directors of such PSEs who are not following the office memorandum must assign reasons as to why they are not following a particular office memorandum.

9. The distinction which has been stated above between a "presidential directive" and an "office memorandum" was given in the case of Sureshchandra Singh and others v. Fertilizer Corpn. of India Ltd. and other, by the Hon'ble Apex Court, reported in (2004) 1 SCC 592. In paragraph no. 4 of the said judgment it has been said that "all instructions/guidelines issued by the Government of India would be of two kinds: (a) directives issued in the name of the President of

India, and (b) guidelines. Directives would be issued by the Administrative Ministry in the name of the President while all other instructions issued by the Department of Public Enterprises or by the Administrative Ministry are only advisory which the Board of Directors of the public sector undertakings concerned may in their discretion adopt or not for reasons to be recorded in writing."

10. The present petitioners reached their age of superannuation between 01.01.2007 to 24.05.2010, as already been referred above, and thereafter have received their post-retiral benefits as per the office memorandum dated 26.11.2008, except the enhanced gratuity.

11. As far as gratuity is concerned, it must be stated that the field is governed by the Payment of Gratuity Act, 1972 (from hereinafter referred to as the "Act"). Sub-section (1) of Section 4 of the Act which is the primary section regarding payment of gratuity clearly stipulates that the "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:"

12. It is an admitted case that all the petitioners before this Court have put in five years of service and were entitled to receive their gratuity after they have reached the age of superannuation on their retirement. As per law all the petitioners are entitled to receive the highest prescribed amount of gratuity.

13. The amount of gratuity which a person receives depends upon the number of years or the period of service he has put in his employment. However, there is a ceiling attached to the upper limit under sub-section (3) of Section 4 of the Act. Sub-section (3) of Section 4 of the Act reads as under:-

"4. Payment of gratuity.-

(1)...

(2)....

(3) The amount of gratuity payable to an employee shall not exceed such amount as may be notified by the Central Government from time to time."

14. It is again an admitted case that prior to the office memorandum dated 26.11.2008 the ceiling limit to the gratuity was Rs.3,50,000/- (Rupees Three Lakh Fifty Thousand only). It is also admitted that all the petitioners before this Court are entitled to the maximum limit of the gratuity, as fixed by law.

15. It is also the admitted position that now the Central Government vide its notification dated 24.05.2010, which is only in pursuance of the office

memorandum dated 26.11.2008, has increased the gratuity to Rs.10,00,000/- (Rupees Ten Lakh only). CEL with which the petitioners were in the employment has been paying this enhanced gratuity (upto the ceiling limit of Rs.10,00,000/-) to those who have reached the age of superannuation or to those who have made a claim after 24.05.2010, subject to their entitlement. The dispute is only of the period between 01.01.2007 to 24.05.2010.

16. The petitioners, however, relies upon sub-section (5) of Section 4 of the Act. Section 4 of the Act reads as under:-

"Section 4. 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

(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:

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.- For 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 a 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 such amount as may be notified by the Central Government from time to time.

(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 or 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."

(Emphasis provided)

17. The petitioners' case is that although at the relevant time when they were superannuated, the notification, under the provisions of the Act, only spoke about the maximum limit of Rs.3,50,000/- (Rupees Three Lakh Fifty Thousand only) as gratuity, but this benefit had given to them by way of an office memorandum dated 26.11.2008, in view of sub-section (5) of Section 4 of the Act, as an employee can receive better terms of gratuity under an award, agreement or contract with the employer, and since the office memorandum dated 26.11.2008 gives them a better term as far as gratuity, they were liable to be given the enhanced gratuity in terms of the office memorandum dated 26.11.2008.

18. Under sub-section (4)(a) of Section 7 of the Act, all disputes regarding the payment of gratuity are to be determined by the Controlling Authority. Sub-section (4) (a) of Section 7 of the Act reads as under:-

"Section 7. Determination of the amount of gratuity.-

(1).....

(2).....

(3).....

(4)(a) if there is any dispute as 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."

19. Since after the superannuation at the time of payment of their post retiral benefits, the gratuity which was given to each of the petitioner was Rs.3,50,000/- (Rupees Three Lakh Fifty Thousand only) as against Rs.10,00,000/-(Rupees Ten Lakh only) claimed by them, they raised their claim before the Controlling Authority which is appointed under the Act.

20. Controlling Authority is defined and is appointed under Section 3 of the Act. Section 3 of the Act reads as under:-

"Section 3. Controlling authority.-The appropriate Government, may, by notification appoint any officer to be a controlling authority, who shall be responsible for the administration of this Act and different controlling authorities may be appointed for different areas."

21. The Controlling Authority after having heard the side of the petitioners as well as PSE i.e. CEL came to the conclusion that the claim of the petitioners is based on the office memorandum dated 26.11.2008 read with sub-section (5) of Section 4 of the Act. The Controlling Authority has thereafter proceeded with the matter taking the office memorandum as a presidential directive having full force of law, and therefore, a combined reading of the office memorandum and the interpretation given is that it is in the nature of a presidential directive, which has to be read with sub-section (5) of Section 4 of the Act. The Controlling Authority thus came to the conclusion that the petitioners were liable to be given the enhanced gratuity of Rs.10,00,000/- (Rupees Ten Lakh only).

22. The second determination of the Controlling Authority is based on the fact that in any case the CEL has accepted all other terms and all the benefits as per the same office memorandum, which has been given to the employees regarding their pay scale, post-retiral dues, etc, and therefore holding the benefits of "gratuity" is not proper.

23. The third determination of the Controlling Authority was that all other similarly situated employees of all other PSEs have been given this benefit and therefore the petitioners cannot be singled out and denied this benefit.

24. The matter was then taken in appeal before the Deputy Chief Labour Commissioner (Central), Dehradun by the employer i.e. CEL, under sub-section (7) of Section 7 of the Act. The appellate authority allowed the appeal and has set aside the order of the Controlling Authority on ground that the reliance on the

office memorandum dated 26.11.2008 as a presidential directive was wrong. The office memorandum dated 26.11.2008 was only advisory in nature, and therefore, it was not mandatory upon the employer to follow it. Moreover, the appellate authority also came to the conclusion that in the office memorandum dated 26.11.2008 itself in paragraph no.17 it is stated that the revised pay scale would be implemented by issue of presidential directive, and therefore, unless there is a presidential directive, the gratuity could not have been given. Paragraph no. 17 of the office memorandum dated 26.11.2008 is reproduced as under:-

"17. Issue of Presidential Directive, effective date of implementation and payment of allowances etc.: The revised pay scales would be implemented by issue of Presidential Directive in respect of each CPSE separately by the concerned Administrative Ministry/Department. The revised pay scales will be effective from 1.1.2007. The payment of HRA, perks and allowances based on the revised scales will, however, be from the date of issue of Presidential Directive. The Board of Directors of each CPSE would be required to consider the proposal of pay revision based on their affordability to pay and submit the same to the Administrative Ministry/Department for approval. The concerned Administrative Ministry with the concurrence of its Financial Advisor will issue the Presidential Directive. A Copy of the Presidential Directive issued to the CPSEs concerned may be endorsed to the Department of Public Enterprises."

25. Now the employees have reached this Court by means of the above writ petitions. In my considered view sub-section (5) of Section 4 of the Act would come into play as the said provision prescribes that in case an award, agreement or contract gives better terms to an employee, than the Act, he is liable to get his payment of gratuity in terms of that award, agreement or contract, as the case might be.

26. What has to be seen is whether the office memorandum dated 26.11.2008 has any force of law, and whether it comes within the definition of award, agreement or contract as given under sub-section (5) of Section 4 of the Act.

27. Gratuity is a right of an employee which he gets after his superannuation or his heirs get after his death or retirement or any such contingency as given in Section 4 of the Act, and it is for gratuitous service which an employee has put in. It is the right of an employee, not a bounty, as held by the Hon'ble Apex Court (R. Kapoor Vs. Director of Inspection (Painting and Publication), Income Tax and Anr. reported in 1995(1) UPLBEC page 89).

28. The law on payment of gratuity is primarily a labour beneficial, or an employee beneficial legislation. It has therefore to be read and interpreted with a purposive interpretation. What has to be seen by the Court is the purpose behind the legislation. When both a narrow as well as wide definition can be adopted to a term or phrase, in my humble opinion what has to be adopted is the wide interpretation so that the legislation achieves its purpose.

29. With this view in my mind, the benefits which have to be given to the employees in the shape of the office memorandum dated 26.11.2008, have to be examined. Strictly speaking it will not come within the definition of either "award" or "contract" as both have a precise meaning in law. Therefore, technically speaking the office memorandum dated 26.11.2008 is neither an award nor a contract. An award would normally be a judicial or a quasi judicial adjudication of a dispute and what the Government of India has done vide office memorandum dated 26.11.2008 is not an adjudication of a dispute. Similarly contract too has a precise meaning and the office memorandum is not covered under the definition of a contract.

30. We must recollect here that it was only after a wide discussion, with all the stakeholders, including the Managers of the PSEs, workers, employees, etc., that the scheme was finally prepared by the Committee, which recommended, inter alia, increase in the gratuity of the employees. Therefore the office memorandum dated 26.11.2008 is ultimately based on the recommendations of PRC, which had arrived at its findings and recommendations after having a broad agreement, with all the stakeholders on the subject. Consequently if we apply an inclusive definition of agreement, the office memorandum dated 26.11.2008 should come under the definition of an agreement. But in any case the denial of their enhanced gratuity in favour of the petitioners is patently unjust and inequitable. For this reason alone the employees must get it.

31. In *Som Prakash Rekhi vs. Union of India* and another reported in (1981) 1 SCC 449, where primarily dealing with the post-retiral benefits to be given to the workers, the Hon'ble Apex Court observed as follows:-

"We live in a welfare State, in a 'socialist' republic, under a Constitution with profound concern for the weaker classes including workers (Part IV). Welfare benefits such as pensions, payment of provident fund and gratuity are in fulfilment of the directive principles. The payment of gratuity or provident fund should not occasion any deduction from the pension as a "set-off". Otherwise, the solemn statutory provisions ensuring provident fund and gratuity become illusory."

32. The said judgment has been relied upon by the Hon'ble Apex Court in the case of *Allahabad Bank and another vs. All India Allahabad Bank Retired Employees Association* reported in (2010) 2 SCC 44, where a liberal interpretation of a scheme has to be done i.e. the interpretation which benefits the workman or an employee.

33. The office memorandum dated 26.11.2008 is definitely to be seen in the light of sub-section (5) of Section 4 of the Act. The tenor and tone of the office memorandum also shows that it is not merely advisory in nature as paragraph no. 17 of the office memorandum dated 26.11.2008 says that as far as pay scales are to be considered, the same have to be implemented by way of a presidential directive. In other words, only the implementation of office

memorandum dated 26.11.2008 so far as it deals with the pay scales of employees is concerned depends upon a Presidential Order. There is no such rider as far as payment of gratuity is concerned. In paragraph no. 13 of the office memorandum dated 26.11.2008 when it speaks about the gratuity, it only says that the ceiling of gratuity of the executives and non-unionised supervisors of the PSEs is to be increased from Rs.3,50,000/- to Rs.10,00,000/- and it would be effective from 01.01.2007. Nothing more or nothing less.

34. It is again true that paragraph no. 3 of the office memorandum dated 26.11.2008 speaks about the financial health of an organization before it can implement the entire scheme, but again the aspect of the financial health of an organization is only to be seen while enhancing the pay scale of its employees. It is an admitted fact that PSE, with which, we are presently concerned, has enhanced the pay scale of its employees, as per office memorandum dated 26.11.2008, which would mean that it is financially stable and it is in a position to bear this burden of the additional expenditure, as only then has it implemented the enhanced pay scale. It now cannot deny its other employees the gratuity on the sole ground of the company being in bad financial health.

35. The only reason assigned by the PSE for denying the enhanced gratuity to its employees who have retired between 01.01.2007 to 24.05.2010 is lack of fund and the financial health of the PSE. All the same, though financial health could have been a reason for denying the enhanced pay scales to its employees, it has not been done and the new pay scales have been implemented. Therefore, PSE has no valid reasons for denying the enhanced gratuity to its retired employees on the ground of its so called financial condition, which has in any case not been explained.

36. Even assuming therefore for the sake of argument, that the office memorandum dated 26.11.2008 is only advisory in nature and has no binding force, which can be an argument against the petitioners as submitted by the learned counsel for the employer Sri Vikas Anand, yet under the facts and circumstances of the case and in the light of overwhelming evidence which this Court has before it, such as, that this PSE has accepted all other recommendations contained in the office memorandum dated 26.11.2008, that all other PSEs have given all benefits as per the aforesaid office memorandum, (including the enhanced payment of gratuity), the benefit denied to a narrow class of employees of this PSE and that too only those who have retired between 01.01.2007 to 24.05.2010, is neither just nor equitable. This is also in violation of Article 14 of the Constitution of India. What the employer has done is not fair. Respondent is a public sector unit. It is supposed to be a model employer and it should not have denied the just and legitimate claim of the petitioners.

37. Having heard the learned counsel for the parties at length, this Court is of the opinion that the order of the appellate authority cannot be sustained in law and is liable to be set aside. The petitioners are liable to be given the enhanced gratuity in terms of the office memorandum dated 26.11.2008.

38. Payment of gratuity is to be given as per the Payment of Gratuity Act, 1972. The maximum limit which has been fixed under sub-section (3) of Section 4 of the Act is the one which is to be notified by the Central Government and it is true that at the relevant time even at the time when the petitioners had reached the age of superannuation, the notification which was existing under the Payment of Gratuity Act, 1972 prescribed a maximum gratuity of Rs.3,50,000/- (Rupees Three Lakh Fifty Thousand only). This amount has already been given to the petitioners. The petitioners claim Rs.10,00,000/- (Rupees Ten Lakh only) in terms of sub-section (5) of Section 4 of the Act. After deducting Rs.3,50,000/- (Rupees Three Lakh Fifty Thousand only) from the sum of Rs.10,00,000/- (Rupees Ten Lakh only), the remaining gratuity amount shall be given to each of the petitioner.

39. Considering the facts and circumstances of the case and in view of the fact that when a delayed payment of gratuity is made, under sub-section (3-A) of Section 7 of the Act, it has to be given along with an interest as fixed by the Government of India.

40. This Court has been informed by the learned Senior Counsel for the petitioners that as per the Notification dated 1st October, 1987 where the gratuity is not paid within the specified period, the amount has to be paid along with ten per cent simple interest per annum.

41. Notification dated 1st October, 1987 reads as under:-

"Notification under section 7(3-A)

Rate of Interest specified

Notification No.S.O. 874 (E), dated 1st October, 1987

In exercise of the powers conferred by sub-section (3-A) of section 7 of the Payment of Gratuity Act, 1972 (39 of 1972), the Central Government hereby specifies ten per cent per annum as the rate of simple interest payable for the time being by the employer to his employee in cases where the gratuity is not paid within the specified period.

This notification shall come into force on the date of its publication in the Official Gazette."

42. Therefore since out of Rs.10,00,000/- (Rupees Ten Lakh only), Rs.3,50,000/- (Rupees Three Lakh Fifty Thousand only) has already been paid, the remaining amount of Rs.6,50,000/- (Rupees Six Lakh Fifty Thousand only) shall be given to each of the petitioners at the rate of 10 per cent simple interest per annum from the due date i.e. after one month when each of the petitioners had reached the age of superannuation and retired from service. The amount shall be paid by the respondents within a period of four weeks from the date of production of a certified copy of this order.

43. In view of the above, writ petitions stand disposed.