
(2000) 03 MAD CK 0084

In the Madras High Court

Case No : Writ Petition No. 14789 and W.M.P. No. 21049 of 1992

Parthasarathy M.

APPELLANT

Vs

Deputy Commissioner of Labour (Appeals) and Others

RESPONDENT

Date of Decision : 16-03-2000

Acts Referred:

Payment of Gratuity Act, 1972 — Section 4(2)

Citation : (2001) 1 LLJ 326

Hon'ble Judges : V. Kanagaraj, J

Bench : Single Bench

Advocate : K. Chandru, for D. Hariparanthaman, for the Appellant; V. Karthick, for T.S. Gopalan and Co., for the Respondent

Final Decision : Allowed

Judgement

V. Kanagaraj, J.—The petitioner has filed this writ petition for the issue of a writ of certiorarified mandamus to call for the records from the file of the first respondent pertaining to the proceedings in PGA No. 35/1991 and to quash the order dated April 24, 1992 in so far as it deprives the petitioner, his full gratuity and consequently direct the third respondent to pay full gratuity as ordered by the second respondent vide order dated January 8, 1987 made in PG Case No. 621/85 together with Interest at 18 per cent per annum and with costs.

2. Heard the learned senior counsel appearing for the petitioner and the learned counsel for the respondents.

3. In the affidavit filed in support of the writ petition, the petitioner would submit that he joined the services of the third respondent company on April 20, 1944 and retired on reaching the age of superannuation on March 30, 1985; that his last drawn monthly wages was Rs. 1,158.65; that he was paid a gratuity of Rs. 23,316.30 at the time of his superannuation.

4. The petitioner would further submit that prior to January 2, 1985, the third respondent company was working 40 hours per week that is 8 hours a day for

five days in a week; that under the provisions of the Factories Act, the maximum hours of work fixed for a worker is six days a week at the rate of 8 hours a day totalling to 48 hours per week; that whenever a worker proceeded on leave, the third respondent resorted to the practice of deducting wages not at the rate of one day's wage, but 1.2 day's wage; that this position continued even after January 2, 1985 when the third respondent started working nine hours per day, that is five days a week; that according to the Payment of Gratuity Act, 1972, only a day's wage will have to be calculated but the action of the third respondent company in calculating 1.2 day's wages and granting less gratuity is arbitrary. The petitioner, therefore, would say that he was paid less gratuity than what he is entitled to as per the provisions of the Payment of Gratuity Act, 1972 (hereinafter referred to as the "Act").

5. The petitioner would further submit that a dispute arose due to the short payment of gratuity and he filed an application before the Controlling Authority, the second respondent herein and it was taken on file as PG Case No. 621/85; that by oversight, he miscalculated the gratuity as Rs. 3,421.77 instead of the actual shortfall which was Rs. 8,963.70; that the second respondent calculated the gratuity at the daily rate of Rs. 53.80 and for 40 years of service, held that the petitioner was entitled to Rs. 32,380/- and deducting the already paid sum of Rs. 23,316.30, he held that the petitioner was entitled to Rs. 8,963.70 as difference of gratuity by the second respondent's order dated January 8, 1987; thus aggrieved, the third respondent filed an appeal u/s 7(7) of the Act and since it was not entertained on ground that the third respondent failed to produce the certificate of deposit of the gratuity amount in dispute, the third respondent filed W.P. No. 4638 of 1987 challenging the provision of deposit and this Court by its Judgment dated August 5, 1991 found it prerequisite as a mandatory provision and directed the third respondent to deposit the amount within eight weeks and on deposit of the same, the first respondent took up the appeal as PGA 35 of 1991.

6. The petitioner would end up his pleading saying that unfortunately, the first respondent reversed the order of the second respondent arriving at Rs. 26,907.30 as gratuity payable to him and directed a sum of Rs. 3,587.10 alone to be paid and not Rs. 8,963.75 without having regard to the provision of the Act as per its order dated April 24, 1992 which is wholly illegal and is liable to be interfered with by this Court.

7. In the counter-affidavit filed on behalf of the third respondent, it would be submitted that immediately prior to the retirement of the petitioner, his last drawn wage was Rs. 1,158.65 per month and that he was paid a gratuity of Rs. 23,316.30; that on a full and final settlement receipt, the petitioner preferred a claim for a difference of gratuity of Rs. 3,421.77; that the second respondent curiously passed orders determining the gratuity as Rs. 8,963.70 as per his order dated January 21, 1987; that on appeal, the first respondent held that the petitioner's last drawn wage was Rs. 1,165.81 and the maximum gratuity of 20

months salary would come to Rs. $1,165.81 \times 15 \times 20/26 = \text{Rs. } 26,903.30$ which itself was more than the gratuity originally claimed by the petitioner; that the difference was only Rs. 3,587.10 and the said order cannot be said to be illegal or unfair or unreasonable, nor does the order suffer from any error of law or jurisdiction and the same does not call for interference by this Court.

8. During arguments, the learned senior counsel appearing for the petitioner would submit that Section 4(2) of the Payment of Gratuity Act, 1972 fixes the gratuity payable to the employee as 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. Section 4(3) would fix the maximum gratuity as the amount of gratuity payable to an employee shall not exceed twenty months' wages.

9. Quoting the above provisions of law, the learned senior counsel would argue that prior to the coming into being of the Payment of Wages Act, the payment of gratuity depended on the whims and fancies of the employer; that a worker is entitled for one day off; that in the salary of an industrial worker, half month's salary means, 15 days; that a controversy arose if the Gratuity Act is meant for 15 days that an interpretation was given to the effect that half month means 13 days. Therefore, the Supreme Court said that in these circumstances, we have to calculate months wage divided by 26 multiplied by 15 that is how the Supreme Court interpreted Section 4(2) for; the purpose of arriving at the gratuity that is 15 days cannot equate half month. Therefore, this Judgment was taken note of by the Parliament and the Section was amended in the year 1989 (Act 22 of 1987).

10. The learned senior counsel would point out that a pre-amendment case was considered in the quoted Supreme Court Judgment and would say that the Supreme Court never laid down a law; that in the case in hand, the particular worker approached the Controlling Authority who accepted his contentions, but the appellate authority reversed it. The learned senior counsel would point out that the Act does not give any indication; that it is only the rate and it is the social Justice that is important; that when two views are available, that view which is feasible to the workmen has to be preferred while interpreting the view of the Parliament assessed and taken, the date of which, the month of which, 20 months, 15 days dividing by 26.

11. At this juncture, the learned senior counsel would cite a judgment delivered in Digvijay Woollen Mills Ltd. Vs. Shri. Mahendra Prataprai Buch, wherein it is held at P. 252 of LLJ:

"The view of the High Court in following the pattern of fixation of wages "by the method of 26 working days" appears to be legitimate and reasonable. Ordinarily, of course, a month is understood to mean 30 days, but the manner of calculating gratuity payable under the Act to the employees the work for 26 days a month

followed by the Gujarat High Court cannot be called perverse.

Treating monthly wages as wages for 26 working days is not anything unique or unknown as is evident from the Supreme Court decision in Delhi Cloth and General Mills Co., Ltd. Vs. Workmen and Others etc., .

The next Judgment cited by the learned senior counsel is one delivered in Divisional Manager Central Bank of India, Hyderabad v. T. K. Ramamoorthy reported in 1978 LIC 100, wherein it is held:

"Gratuity is in the nature of a gracious gift and a donor cannot be compelled to make a gift but in the Industrial Law, gratuity came to be recognized as a retiral benefit available as of right to an employee for long, continuous and meritorious service whether such retirement is the result of superannuation, physical disability or otherwise. The Payment of Gratuity Act is a piece of beneficial legislation made in the interests of the employees and it is the intention of the Legislature that the employees should not be allowed to be exploited so as to contract out of the rights conferred on them by the Act when the terms of the contract are detrimental to their interests. The Act is intended to safeguard the employees who served the employer for a long time from penury in their declining years of old age the helpless dependants of the employee's in the event of the employee's death. Section 14 of the Act reads as follows:

"The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."

12. The next judgment cited by the learned senior counsel is one delivered in Jeewanlal (1929) Ltd. Vs. Appellate Authority under the Payment of Gratuity Act and Others, wherein the judgment of the Division Bench of this Court delivered in Jeevanlal (1929) Limited v. Controlling Authority, Payment of Gratuity Act (supra) came to be confirmed by the Supreme Court. The Supreme Court has held as follows in Jeewanlal (1929) Ltd. Vs. Appellate Authority under the Payment of Gratuity Act and Others, :

"12. The intention of the legislature, enacting Sub-section (2) of Section 4 was not" only to achieve uniformity and reasonable degree of certainty, but also to create and bring into force a self, contained, all-embracing complete and comprehensive code relating to gratuity as a compulsory, retiral benefit. The quantum of gratuity payable under Sub-section (2) of Section 4 has to be fifteen days" wages based on the rate of wages last drawn by the employee concerned for every completed year of service or more in excess of six months subject to the maximum of 20 months wages as provided in Sub-section (3) thereof. The whole object is to ensure that the employee concerned must be paid gratuity at the rate of 15 days" wages for 365 days in a year of service. The total amount of gratuity payable to such employee at that rate has to be multiplied by the number of years of his service subject to the ceiling imposed by Sub-section (3)

of Section 4, viz., that the amount shall not exceed 20 months wages. If the determination of the amount of gratuity payable u/s 4(2) depends on the number of calendar days in a month in which the services of the employee concerned terminate, the quantum of gratuity payable would necessarily vary between an employee and an employee belonging to the same class, drawing the same scale of wages, with like service for the same scale of wages, with like service for the same number of years. Obviously this could not have been the legislative intention. Sub-sections (2) and (3) of Section 4 are designed to achieve two separate and distinct objects and they operate at two different stages. While Sub-section (2) provides for a mode of calculation of the amount of gratuity, Sub-section (3) seeks to impose a ceiling on the amount of gratuity payable at 20 months wages. It is meant to provide an incentive to employees to serve for the period of 30 years or more. By no rule of construction, Sub-section (2) be called in aid for construction of the words "20 months" wages" appearing in Sub-section (3) of Section 4 of the Act.

In retrospect, we wish to impress upon the Government that whenever such doubt or difficulty is expressed by the High Courts in the application of provisions of social security measures, viz., retiral benefits, gratuity, provident fund and pension and the like, they must always introduce legislation to cure the defect rather than wait for judicial interpretation by the highest Court. We may also add that the Government may consider the desirability of setting up a National Labour Commission which may be entrusted not only with the task of making periodical review of such social welfare legislations from time to time but also to suggest radical reform of the laws relating to industrial relations which must be brought in tune with the changing needs of the society."

The learned senior counsel would cite yet another judgment delivered in *May and Baker (I) Ltd. v. J.S. Coutinho* reported in 1994 III LLJ (Suppl) 630 wherein it is held as follows at P. 630, 631 :

"3. The company resisted the application by claiming that the amount of gratuity was properly calculated. The company claimed that till year 1972, Saturday was not a holiday but the employees used to work for half a day. By settlement between the employer and the union, Saturday was declared as holiday by increasing the hours of work between Monday and Friday. The company claimed that practice of arriving at day rate of wage by dividing the monthly wages by 30 days is accurate. The controlling authority by order dated October 7, 1981, held that the monthly wages should have been divided by 26 days and not by 30 days as was done by the company. On the strength of this finding, the controlling authority directed payment of additional amount of Rs. 2,285.25. Respondent challenged the order of the controlling authority by filing appeal before the appellate authority under the Act and this appeal was allowed by decision, dated March 19, 1982. The appellate authority held that to arrive at a day's wage, normal working days in a month should be taken into account and normal working days in the month in the establishment run by the petitioner are only 22

days. The appellate authority also observed that for the purpose of overtime wages and deduction on account of absence without leave, the company had divided the monthly wages of employees by 22 days only. On the strength of this finding, the appellate authority directed payment of Rs. 5,399.25 in addition to what the company had paid to respondent towards gratuity. The order of the appellate authority is under challenge".

13. Citing the above judgments the learned senior counsel would point out that the Supreme Court judgment did not lay down the law. He would further contend that Section 4 of the Maternity Benefit Act provides six weeks before and six weeks after delivery and hence $12 \times 7 = 84$ days. But the delay rated only six days and not seven days that in a judgment delivered in B. Shah Vs. Presiding Officer, Labour Court, Coimbatore and Others, wherein 72 days were made to 84 days is a beneficial legislation. The relevant portion of the judgment is extracted hereunder in B. Shah Vs. Presiding Officer, Labour Court, Coimbatore and Others, :

"13. The real though difficult question that calls for determination by us is as to what is the connotation of the term "week" occurring in Sub-sections (1) and (3) of Section 5 of the Act and whether the computation of the maternity benefit prescribed by the Act for the aforesaid two periods has to be made taking a "week" as signifying a cycle of seven days including a Sunday or a cycle of seven days minus a Sunday which is said to be a wage less day. In the Act "week" has to be understood in its ordinary dictionary sense."

""18. Bearing in mind the above mentioned dictionary or popular meaning of the term "week", we think in the context of Subsections (1) and (3) of Section 5 of the Act, the term week has to be taken to signify a cycle of seven days including Sundays. The language in which the aforesaid sub-section are couched also shows that the Legislature intended that computation of maternity benefit is to be made for the entire period of the woman worker's actual absence, i.e., for all the days including Sundays which may be wageless holidays falling within that period and not only for intermittent periods of six days thereby excluding Sundays, falling within that period for if it were not so the Legislature instead of using the words "for the period of her actual absence immediately preceding and including the day of her delivery and for the six weeks immediately following that day" would have used the words "for the working days falling within the period of her actual absence immediately preceding and including the day of her delivery and the six weeks immediately following that day but excluding the wageless days." Again the word "period" occurring in Section 5(1) of the Act is a strong word. It seems to emphasize, in our judgment, the continuous running of time and recurrence of the cycle of seven days. It has also to be borne in mind in this connection that in interpreting provisions of beneficial pieces of legislation like the one in hand which is intended to achieve the object of doing social justice to women workers employed in the plantations and which squarely falls within the purview of Article 42 of the Constitution, the beneficent rule of construction

which would enable the woman worker not only to subsist but also to make up her dissipated energy, nurse her child, preserve her efficiency as a worker and maintain the level of her previous efficiency and output has to be adopted by the Court."

14. The learned senior counsel would then cite a judgment delivered in *Workmen of American Express International Banking Corporation Vs. Management of American Express International Banking Corporation*, wherein it is, held as follows:

"Industrial Disputes Act, 1947, Sections 25-B, 25-F -Delhi Shops and Establishment Act, 1954 - Sections 16, 17, and 18 "Continuous Service" - Actually worked; under the employer "calculation of 240 days - Whether Sundays and other holidays should be treated days of actual work -Sundays and other paid holidays should be taken into account for reckoning number of days on which a workman is said to have actually worked."

The learned senior counsel would then point out that only in 1976, it became five days a week and for the purpose of absence, it is 1.2 days and as to how to determine this, the above case is the best example. The learned counsel would further contend that in *Jeewanlal (1929) Limited v. Appellate Authority, Payment of Gratuity Act and Ors.* reported in (supra) every issue was not resolved; that the issues resolved therein are (i) the validity of the Act and (ii) unreasonable restriction on the employer; that these are the two issues resolved in *Jeewanlal's* case; that at different points of time, different tenures have been adopted; that *Jeewanlal's* case is construed the old scheme they had contemplated; that as to how the 35 days' wages should be construed the Supreme Court never wanted to go into the question but said in *Jeewanlal's* case make a law, only then these variations could be minimised. With this, the learned senior counsel would end up his arguments praying for the relief sought for.

15. In reply, the learned counsel appearing for the respondents would submit that originally 45 hours per week has been adopted, but they are monthly wages of workmen; that the Supreme Court said that per day, the month is divided into 26; that working days are five days a week corresponding increase of the number of working hours and, therefore, when a person applied for leave, the deduction was calculated as 1.2 instead of 1; that at the time of superannuation, he makes the calculation; that the controlling authority paid higher and hence the respondents have to prefer an appeal. At this juncture, the learned counsel would draw the attention of the Court to *Jeevanlal (1929) Limited v. Appellate Authority, Payment of Gratuity Act* (supra) particularly to paragraphs 2, 6, 8, 12, 13 and 16 also. The learned counsel would also cite the judgment delivered in *May and Baker (I) Ltd., v. J, S. Coutinho* (supra) and would point out paragraphs 3 and 4.

(Since paragraph 3 has already been extracted during the arguments of the learned senior counsel for the petitioner (supra) paragraph No. 4 which is

emphasised on the part of the learned counsel for the respondent is extracted hereunder 1994 III LLJ (Suppl) 630 :

"4. Sri Cama, learned counsel appearing on behalf of the company, submitted that the view taken by the appellate authority is entirely unsustainable. The learned counsel urged that it is now well settled by the decision of the Supreme Court in the case of Digvijay Woollen Mills, Ltd. v. Mahendra Prataprai such (supra) that for arriving at a day's wages, 26 working days of a month should be taken into consideration. The learned counsel urged that the appellate authority had bypassed the decision of the Supreme Court by observing that though the Supreme Court had observed that 26 days in a month should be taken into consideration for arriving at day's wage, the observations are not applicable to all the cases. The appellate authority is clearly in error in bypassing the Supreme Court judgment in this fashion. The appellate authority also overlooked that respondent 1: was covered by the provisions of the Act only till June 1972 and the company started working for 22 days in a month only after June 1972 and that too because of the settlement reached between the employees and the employer. Even in respect of the settlement, the working hours were reduced only by half-an-hour and while declaring Saturday as a holiday, the working hours between Monday and Friday were increased. In our judgment, the appellate authority was clearly in error in disturbing the well considered decision of the controlling authority. The decision of the appellate authority is, therefore, required to be reversed."

The learned counsel for the respondents would end up his argument saying that the method of calculation followed by the appellate authority is the right method that has to be done and would pray for dismissing the writ petition.

16. Assessing the pleadings of parties and having regard to the materials placed on record and upon hearing the learned counsel for both, the point that arises for consideration is fixing the payment of gratuity of the petitioner. It is the argument put forth on the part of the petitioner that while the respondent management deducted 1.2 days wage for one day's absence of the employee and that the same principle should be applied for calculating the gratuity amount by treating the 1.2 days as one day's wage and on that basis, 15 days wages should be arrived at.

17. On the contrary, the contention of the management is that while calculating the 15 days' wages for every year of continuous service rendered by the employee, the authority has to see as to what is a day's wage and the authority need not go into the question as to why 1.2 days' wage was deducted for 1 day's absence.

18. As per the Controlling Authority, the second respondent herein, though a day's wage is ordinarily known as a principle and practice, the respondent has made it known that a day's wage means 1.2 days wages by deducting 1.2 days wages for the absence of 1 day on the part of the employee and when such is the

calculation revealed by the employer himself, why not they use the same yardstick while calculating a day's wage for the purpose of gratuity and hence, remarking that the Controlling Authority cannot be said to be violating the code or the concept if he adopts 1 day's wage is equivalent to 1.2 day's wages and accordingly, calculating the one day's wage as $(44.80 \times 1.2) = 53.80$. Accordingly, since the period of service of the applicant is 41 years according to the Controlling Authority, the amount of gratuity payable to the applicant is Rs. 32,280 $(53.80 \times 15 \times 40)$ and since an amount of Rs. 23,316.30 had already been paid to the petitioner towards gratuity, deducting the same, an amount of Rs. 8,963.70 has been arrived at as the amount that is yet to be paid in favour of the petitioner and has further ordered to pay the said sum within a period of 30 days from the date of receipt of the order, as per the order passed by the controlling authority dated January 8, 1987.

19. On the contrary, when the order thus passed was challenged on appeal by the management before the appellate authority, the contentions of the management is that in order to arrive at a day's wage, the monthly wage should be divided by 26 and on the basis of the said daily wage so arrived at, the gratuity payable for every year of service will have to be multiplied by 15 subject to the maximum of 20 months wages. Likewise, the approach of the first respondent calculating the maximum gratuity of 20 months holding that the petitioner's last drawn wages was Rs. 1165.81 thus calculating Rs. $1165.81 \times 15 \times 20/26$ that is equivalent to Rs. 26,903.30 is quite proper and justifiable.

20. However, the law on this subject since being fluid and yet to be settled fully, this Court is not able to reject the argument advanced on the part of the controlling authority in the relevant paragraphs of his order which are extracted hereunder:

"Though a day's wage is ordinarily known, the respondents by their principle and by their practice made known that a day's wage means 1.2 days wages. While the respondent deducts 1.2 days wage for one day's absence of the employee, why not they use the same yardstick while calculating a day's wages for the purpose of gratuity. Though the controlling authority is not concerned about the deduction of 1.2 days wages for one day's absence of the employee, the Controlling Authority cannot be said to be transgressing his jurisdiction while taking the concept of "one day's wage = 5 days wage" evolved by the respondent.

In order to arrive at 15 days' wages as required under Sub-section (2) of Section 4 of the Act "a day's wage should be calculated." Consequently, a day's wage has to be construed as 1.2 day's wages according to the concept evolved by the respondent. Therefore in this case, the one day wage would mean Rs. $44.80 \times 1.2 = 53.80$.

The total period of service of the applicant of 41 years is not disputed.

Accordingly I determine the amount of gratuity payable to the applicant as Rs.

32,280/= (53.80 x 15 x 40)."

21. Since the order of the Controlling Authority being quite rationale and reasonable and once this argument and calculation is accepted, automatically, the order of the first respondent appellate authority has to be rejected. From out of the said two methods of calculation, the first one adopted by the controlling authority and the other adopted by the appellate authority since the method of calculation adopted on the part of the Controlling Authority being beneficial to the labour, it is always desirable to adopt that calculation besides the same being quite reasonable and acceptable.

22. In result, for all the above discussions held, the writ petition succeeds and the same is allowed.

23. The order passed by the first respondent appellate authority dated April 24, 1992 made in PGA No. 35/1991 is quashed and the order passed by the second respondent Controlling Authority as per his order made in PG Case No. 621/1985 dated January 8, 1987 is restored