

(1992) 09 CAL CK 0044
In the Calcutta High Court
Case No : Matter No. 4090 of 1988

Prashanta Kumar Chatterjee

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 08-09-1992

Acts Referred:

Constitution of India, 1950 — Article 226
Payment of Gratuity Act, 1972 — Section 2A, 7(1)

Citation : (1993) 1 CALLT 312 : (1993) 2 LLJ 1133

Hon'ble Judges : Susanta Chatterji, J

Bench : Single Bench

Advocate : Sibaji Sen and Sambhu Nath Dutta, for the Appellant; Monotosh Mukherjee and Amaresh Chakraborty, for the Respondent

Judgement

Susanta Chatterji, J.—The present writ petition has been filed by challenging the judgment and decision of the Appellate Authority under the Payment of Gratuity Act dated August 26, 1988 (In re. Alliance Mills (Lessees) Pvt. Ltd. v. Prashanta Kumar Chatterjee and Ors.) by reversing the decisions of the Controlling Authority, Barrack-pore. There is a prayer for consequential reliefs to command the respondent No. 4 to pay the petitioner a sum of Rs. 17,596.85 with accrued inter-est. It is stated in detail that the petitioner was employed as a Clerk under M/s. Alliance Jute Mill Co. Ltd., in or about 1944. The petitioner is alleged to have drawn his last salary to the tune of Rs. 1,220/- per month and claimed to be an Industrial Worker within the meaning of the Industrial Disputes Act. The original company had two different divisions, known as "South Mills" and "North Mills". It is further stated that on or about November 4, 1968, the management of the aforesaid "South Mill under the Original Company" declared closure of the said mill. The said mill remain closed for a period of 22 months. By a Tripartite agreement, described as "Memorandum of Settlement", dated August 19, 1970, the respective rights of the management and the workmen were incorporated for running of the industry. It was agreed that all liabilities in respect of all workmen who may be employed by the intending lessees except those who were the

permanent or provident fund members of the company will be of the intending lessees and with the expiry or determination of the termination their lease such workmen shall be entitled to notice and compensation as provided in Section 25-FF of the Industrial Disputes Act from the intending Lessees and the Company shall not be liable to accept the continuity of service of such newly appointed workmen or to take them in employment. There are other various terms and conditions protecting the rights of the management and the workmen. The grievance of the petitioner is that on or about September 1, 1985, the petitioner, after having rendered 42 years of continuous service, was so superannuated. Therefore, on or about September 17, 1985, the petitioner upon the compliance of the provisions of the Payment of Gratuity Act, 1972 and the Rules framed thereunder and in exercise of the power conferred under Sub-section (1) of Section 7 of the Payment of Gratuity Act, 1972, filed his claim in Form "I", inter alia, claiming a sum of Rs. 28,153.85 at the rate of 15 days wages against each year of service. It is alleged that the said application in Form No. "I" was admittedly received by the respondent No.4. The respondent No. 4 in violation of Sub-rule (1) of Rule 8 of the West Bengal Payment of Gratuity Rules, 1973, failed and neglected to inform the petitioner in Form "M", that is notice admitting or rejecting of the payment of Gratuity. The petitioner, however, filed an application on December 20, 1985 for direction before the respondent No. 2, the Controlling Authority under case No. B-3624/G-1/86/ALC praying for a necessary order to direct the management to pay the petitioner a sum of Rs. 28,153.85 as Gratuity. The said application was forwarded to the Respondent No. 4 with a direction to file a statement. The Respondent No. 4 filed its written statement. The Controlling Authority after hearing both sides, upheld the continuity of the petitioner's service and rejected the stand of the respondent No. 4 that the Respondent No. 4 has no liability prior to August 5, 1970 and as such the petitioner is not entitled to Gratuity prior to September 13, 1970 and there is no liability to Respondent No. 4. The Controlling Authority duly considered all the aspects and after adjustment of the payment already received by the petitioner, directed the Respondent No. 4 to make payment of a sum of Rs. 17,596.85. Being aggrieved by and/or dissatisfied with the said order dated June 12, 1987, the respondent No. 4 preferred an appeal. The Appellate Authority has reversed the decision of the Controlling Authority holding, inter alia, that the employees concerned are entitled to payment of Gratuity from the respective date of employment under the appellant and not from their date of employment under the lessor. It was clarified that the employees shall be entitled to payment of Gratuity for the full period of continuous service under the lessee company from the date of the operation of Mill by them.

2. The petitioner has challenged the said decision by filing the present writ petition on the ground that the Appellate Authority failed to appreciate the impact of Section 25FF of the Industrial Disputes Act and it should have held that the petitioner is entitled to the benefit of the continuous service as stipulated u/s 2-A of the Payment of Gratuity Act, 1972. The specific grievance of the petitioner

is that the Transferee Company cannot avoid the liability of the Transferor Company and upon proper construction of the Memorandum of Settlement dated August 19, 1970 should have appreciated that the continuity of service of the employees under the claim as made by the petitioner cannot be defeated. It is placed on record that in view of the fact that no new standing order is enforced in the mill, and it was basically stipulated in the tripartite settlement that the employment of the workmen would be governed by the self same standing orders and the standing orders itself provides that notwithstanding the change in the event of the transfer of the ownership and/or the management of the mill, the workmen shall remain unaffected as regards continuity of service and as such the Appellate Authority should have held that the Controlling Authority was justified in issuing the directions.

3. The writ petition is opposed by the Respondent No. 4. It is placed on record that the tripartite settlement is a settlement under the Industrial Disputes Act arrived at in course of conciliation proceedings and it deals with the liabilities and obligations of the lessee who took on lease the machinery and certain other accessories in the factory from the erstwhile owner, the lessor company vis-a-vis the workmen employed in the said factory. The lessor company took upon itself with regard to certain specific obligations until the date of execution of the lease and shifted the liability for the subsequent period to the lease on the lessee company. It is made clear that in the said tripartite settlement neither the lessor nor the lessee has any liability in respect of the periods which are specifically excluded by the said settlement. The said tripartite settlement was arrived at in course of conciliation proceedings under the provisions of the Industrial Disputes Act and the same is binding not only on the actual parties to the Industrial Dispute but also on the heirs, successors or assigns of the employer on the one hand and all the workmen in the establishment. It is, however, claimed that the tripartite settlement has not taken away any right of the workmen. It is made clear that such rights and claims would be paid in any event either by the lessor or by the lessee whose liability to make such payment as in specific clauses of the case. It is highlighted that the lessee company had given employment to some of the employees who appeared to have had employment prior to the lease. The lessee company has never denied the payment of the gratuity to the employees employed by it on execution of the lease. On the contrary, the lessee company had offered payment and/or is still agreeable to pay Gratuity to its employees whatever amount is payable since they had taken the assets of the company on lease for running a fresh business. They claim that "there is no break in service" cannot be contended on the face of the tripartite settlement. The terms of the tripartite settlement clearly provide that the lessee would give employment to such persons, as may be required, who might have been in employment with the lessor. It is nowhere provided that there will be a continuation of service of the workmen to be employed by the lessee company. It is claimed that the lessee company is the employer within the meaning of Sub-section (f) of Section 2 of the Payment of Gratuity Act, 1972, only with effect

from the date they started operation of the South Mill Factory, that is from September 13, 1970, and they have ultimate control only with effect from September 13, 1970 in relation to the factory of the South Mill and not earlier than that. According to the said respondent, the South Mill was closed down from November 4, 1968 to September 12, 1970, that is for a period of nearly two years, and in the said memorandum of settlement dated August 19, 1970 to which the workmen were parties, the fact of closure of the South Mill Factory and the owner's inability to re-open it was accepted by the workmen represented by their Trade Unions. All other allegations of the writ petitions have been denied. The impugned order has been supported as being lawful and justified.

4. The petitioner filed an affidavit-in-reply in reiterating the points already taken in the writ petition by challenging the contention of the respondents with the legality and validity of the impugned order.

5. Mr. Sibaji Sen, learned advocate, appearing for the writ petitioner, has strongly argued by referring in tripartite settlement dated August 19, 1970, the standing order of the company and by interpreting the provisions of the Payment of Gratuity Act, 1970 that the continuity of service of the petitioner cannot be ignored. According to him Section 25-FF of the Industrial Disputes Act, 1947, and Rule 13 of the Rules thereof, the service conditions as referred in the standing order should be read along with the tripartite settlement dated August 19, 1970, apart from the fact that the Standing Order governs the employer and employee relationship, and the said standing order has been reiterated and referred as an integral part of the tripartite settlement. It is submitted that the appellate authority overlooked the implication and effect of Section 4 read with Section 2-A of the Payment of Gratuity Act and the error is apparent on the face of the impugned order inasmuch as the concept of relationship of the employer and employee and the eligibility to receive Gratuity has not been properly appreciated. He has laid stress upon Section 2(e) of the Payment of Gratuity Act as to the definition of the "Employee" and the introduction of meaning u/s 2-A of the said Act. He has referred to a case reported in *Lalappa Lingappa and Others Vs. Laxmi Vishnu Textile Mills Ltd.*, regarding the continuity of service. He has also relied upon the case reported in *Dorab Pirojsha Siganporia Vs. The President and Appellate Authority of Industrial Tribunal, Bombay*, Mr.Sen has strongly referred to various clauses of the Tripartite settlement to refer the continuity of service and he has also referred to cases, reported in *N.J. Chavan and Ors. v. P.D. Sarvakar and Ors.* AIR 1950 Bom 133, *Sayaji Mills Ltd. Vs. Regional Provident Fund Commissioner*, and 1952 II LLJ 109 as to the case of *Chhaya Talkies*. Mr.Sen has developed his argument by urging that the Payment of Gratuity Act is a welfare legislation and when the two constructions are possible, the benefit should be adopted for the workmen.

6. Mr. Monotosh Mukherjee, appearing for the respondents, has argued, inter alia, that the tripartite settlement is a settlement under the Industrial Disputes Act arrived at in course of a conciliation proceedings and it deals with the

liabilities and obligations of the lessee who took on the lease the machinery and certain other accessories in the factory from the erstwhile owner, the Lessor-Company vis-a-vis the workmen employed in the said factory. The Lessor-Company took upon itself with regard to certain specific obligations until the date of the execution of the lease and shifted the liability for the subsequent period to the lease on the Lessee-Company. It is made clear in the said tripartite settlement that neither the Lessor nor the Lessee has any liability in respect of the periods which are specifically excluded by the said Settlement. The tripartite settlement under the Industrial Disputes Act shall not only be binding on the actual parties to the Industrial Dispute but also on the successors or assigns of the employer on the one hand and all the workmen in the establishment. He has referred to a case reported in *The Jhagrakhan Collieries (P) Ltd. Vs. Shri G.C. Agrawal*, Presiding Officer, Central Government Industrial Tribunal-Cum-Labour Court, Jabalpur and Others, It is submitted that, in fact, the workmen through their Unions had accepted the lease deed and operation of the factory anew by the lessee through the said tripartite settlement in view of Section 13(3) of the Industrial Disputes Act, 1947. He has urged further that under Sub-clause (f) of Clause 6 of the Tripartite Settlement, it was, inter alia, agreed by the workmen of the factory that an application would be filed before the concerned Industrial Tribunal for a no-dispute Award in relation in the issues as to whether the closure was real or a lockout in the garb of closure, and whether the termination of service of the workmen without payment of compensation was justified, which was then pending for adjudication before the Industrial Tribunal under the Industrial Disputes Act, 1947. The fact of closure was accepted by all concerned and subject to the terms of settlement, South Mill Factory, according to him, under the ownership of Messers. Alliance Jute Mills Company Ltd., did not automatically resume their work of starting separation of the Mills as if one and the same factory was reopened. Sub-clause (a) of Clause 6 of the tripartite settlement clearly stipulated that they would be "taken into employment" of the lessee under the specific condition. The continuity of service under the said Tripartite settlement had been allowed only for the purpose of Section 25-FF of the Industrial Disputes Act, and not for any other purpose and the same was done with the consent and knowledge of the workmen duly represented by different Unions who were parties to the said Settlement. It is submitted that the Payment of Gratuity Act did not come into force when the operation of the South Mill Factory was started anew by the Lessee-Company. In an adjudication under the Industrial Disputes Act, the adjudicator, that is the tribunal, has a wide power. A Tribunal could decide in a particular case as to whether the benefit of past service should be allowed to the employees concerned by the lessee even in the event of lease of a factory on the basis of a demand by the employees, provided it is an industrial dispute. But they are clearly beyond the jurisdiction of an Authority, whether Controlling or Appellate Authority, under the Payment of Gratuity Act. They have to decide the issue strictly within the provisions of that Act, that is, on the basis of the facts and circumstances and legal instrument subsisted. Mr. Monotosh Mukherjee emphasised that the lessee company has no

liability to pay Gratuity under the Payment of Gratuity Act, 1972, in respect of any of its employees beyond the period of lease or prior to the period of lease. It is highlighted that Gratuity is payable under the Payment of Gratuity Act, 1972. The said tripartite settlement has demarcated the liability of the lessor company as well as the liability of the lessee company. It was specifically mentioned in the said tripartite settlement that the lessee would be liable to pay in the case of retrenchment or dismissal or discharge of old workman during the period of lease. In the instant case the writ petitioner on attaining the age of superannuation, cannot ask for the gratuity for the period prior to the deed of lease and the lessee-company has no liability to meet the said demand. Mr. Mukherjee has distinguished the case laws referred on behalf of the writ petitioner and according to him the facts and circumstances of the present case should be considered in the proper perspective and the cases cited on behalf of the writ petitioner have no application, in the instant case in view of the lease-deed, tripartite settlement and in view of the provisions of the Industrial Disputes Act.

7. With patience and with great anxiety, this Court has considered the lengthy submissions made on behalf of the petitioner, Respondent employer, and the State. This Court has gone through the impugned decision of the Appellate Authority reversing the decisions of the Controlling Authority. It is true that the claim of the petitioner is for payment of Gratuity and other certain duties treating as continuous service. The Appellate Authority by reversing the judgment and order of the Controlling Authority has held that the Appellate Authority under the Payment of Gratuity Act, 1972, has not the power as exercised by the Industrial Tribunal. The Tribunal through awards may confer new rights. But an Appellate Authority under the Payment of Gratuity Act cannot confer any right. It has been found that the decisions of the Supreme Court given in the context of the Industrial Disputes Act are not applicable in the instant case. It is found that the lessee-company did not avail of exemption from payment of Provident Fund contribution for three years as available to a new company as if to run as a successor company. By referring to the Employees' Provident Fund Act, it is found that the reasons assigned by the Appellate Authority are not clear. However, in a haphazard manner, the Appellate Authority held that the employees concerned are entitled to payment of Gratuity from the respective date of employment under the lessee-company and not from the date of their appointment under the lessor-company. Consequently, the three decisions of the Controlling Authority, Barrackpore, have been reversed after finding that the employers are only entitled to payment of Gratuity for the full period of continuous service under the lessee company from the date of operation of the Mill by them. The only point of the dispute is whether the petitioner-employee, are entitled to the dues from the date of the employment or there will be a break of employment in view of the Standing Orders, tripartite settlement and the lease deed. From the impugned judgment, nothing is found that the terms of employment as envisaged under the Standing Orders and as stipulated in the

tripartite settlement and the impact of lease regarding the continuous service of the workmen, has been considered at all. The Appellate Authority has not applied its mind to appreciate the claim and counter-claim of the respective parties in view of the Standing Orders, lease-deed, tripartite settlement and lawful consequences of provisions of the Industrial Disputes Act and the Payment of Gratuity Act as there is claim of continuity of service of the petitioner. For effective adjudication the Appellate Authority has to apply its mind to decide the point of dispute in the right perspective. The impugned decision and/or the conclusion is not supported by any lawful reason and the said decision cannot be sustained in law. The Writ Court is not sitting in appeal. It has to consider the decision-making process. For the fitness of things, this Court disposes the present writ petition by quashing the impugned decision of the Appellate Authority under the Payment of Gratuity Act. Since there is no independent finding as to the continuity of service as claimed, the matter is sent back on remand to the Appellate Authority directing to give opportunity of hearing to both sides again and to pass a fresh decision within a period of six months from the date of communication of the order by looking to the terms of employment as envisaged under Standing Orders and the subsequent event of lease-deed, tripartite settlement and the provisions of the Industrial Disputes Act and the Payment of Gratuity Act. The respondent, lessee-company, is however directed to deposit to sum of Rs. 17,596.85 p. with the Controlling Authority within a period of one month from the date and the Controlling Authority would hold the same till the disposal of appeal by the Appellate Authority.

8. There will be no order as to costs.