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(1999) 02 AHC CK 0132

In the Allahabad High Court

Case No : C.M.W.P. No. 23548 of 1998

Rajendra Deva — APPELLANT

Vs

Addl. Labour Commissioner (Account), Kanpur and another — RESPONDENT

Date of Decision : 03-02-1999

Acts Referred:

Payment of Gratuity Act, 1972 — Section 2, 7, 7(2), 7(3A)

Citation : (1999) 2 AWC 1083 : (1999) 81 FLR 914 : (1999) 2 LLJ 211 : (1999) 3 UPLBEC 130

Hon'ble Judges : S.R. Singh, J

Bench : Single Bench

Advocate : Rajendra Deva, for the Appellant; S.C. and Piyush Bhargava, Piyush Verma and V.R. Agrawal, for the Respondent

Final Decision : Allowed

Judgement

S.R. Singh, J.—The petitioner, Rajendra Deva, was employed as a Chemist in M/s. Hari Fertilizers which was an unit of M/s. Orlssa Cement Limited, Sahupuri, Varanasi, U. P. The services of the petitioner came to be terminated w.e.f. 16.5.1989 on account of closure of the said unit. The gratuity payable to the petitioner was not paid by the employer and, therefore, he staked his claim for gratuity u/s 7 of the Payment of Gratuity Act. 1972 thereinafter referred to as the Act). In his application, the petitioner submitted that he had completed more than 20 years of service on 16.5.1989 and his last pay was Rs. 1,440 per month. The amount of gratuity claimed by the petitioner was Rs. 16,615,38 paise with interest. The application was contested, inter alia, on the ground that the last wages drawn by the petitioner was Rs. 1,400 only besides Rs. 38 per month as H.R.A. which was not to be included in the wages for the purpose of calculating the amount of gratuity. The petitioner thereafter filed replication stating therein that according to the pay structure prevalent in the establishment, he had earned an increment @ Rs. 40 per month w.e.f. 1.4.1989 and, therefore, his wages as on 16.5.1989 would be Rs. 1.440. The Controlling Authority on consideration of the facts and circumstances of the case allowed the petitioner''s application and held that he was entitled to payment of Rs. 16,615.38 paise as gratuity and interest @ 10% u/s 7(3A) of the Act.

2. Aggrieved against the said order, the respondent, employer filed an appeal which was initially dismissed for want of prosecution vide order dated 22.12.1993 but the matter came to be remitted by this Court to the appellate authority for decision on merit. The appellate authority thereafter allowed the appeal in part and held that calculation of the amount of gratuity on the basis of imaginary increment of Rs. 40 in the monthly salary of Rs. 1,400 was unjustified and the order passed by the Controlling Authority was modified accordingly. The instant petition has been filed praying for issuance of writ order or direction for the payment of modified gratuity amount with interest and compensation of Rs. 40,000 for unnecessary delay and harassment in payment of gratuity.

3. I have heard the petitioner who appeared in person and Sri Piyush Bhargava, learned counsel appearing for the respondent No. 2

4. Although the prayer clause of the writ petition is not happily worded but the petitioner in the course of his submissions urged that the appellate authority was not justified in modifying the order passed by the Controlling Authority inasmuch as the increment earned by the petitioner was rightly added in the monthly salary last drawn by him. "Wages", according to Section 2(s) of the Act of 1972 means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are "payable" to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance. The Controlling Authority in its order dated 10.12.1993 has clearly held that according to the pay scale prevalent in the establishment, the petitioner had earned the increment of Rs. 40 as on 1.4.1989 and for the purpose of calculating the gratuity, the increment so earned was to be added in the salary, actually paid to the petitioner inasmuch as was no order withholding payment of increment was brought on record. In the absence of any order withholding the annual increment, the Controlling Authority was, in my opinion Justified in calculating the amount of gratuity on Rs. 1.440 as the wages\\last drawn by the petitioner. Even the appellate authority in its order dated 30.12.1995 has held that the increment ought to have been given to the petitioner but since it was in fact not given and, therefore, the appellate authority held that the Controlling Authority was not Justified in calculating the amount of gratuity after adding the "imaginary" increment of Rs. 40 in the monthly salary, in my opinion the order passed by the appellate authority is unsustainable.

5. It was also submitted by the petitioner that the failure of the employer to discharge the obligation cast upon it by sub-section (2) rendered itself liable to pay interest on the amount of gratuity till the date on which the amount of gratuity was actually paid. Sri Piyush Bhargava submitted that a sum of Rs.

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16,615 was deposited by the petitioner with the appellate authority on 17.3.1993 and, therefore, the employer was not liable to pay interest after 17.3.1993. The submission made by the learned counsel cannot be countenanced. Sub-section (2) of Section 7 of the Act of 1972 provides that as soon as gratuity becomes payable, the employer shall, whether an application referred to in sub-section (1) has been made or not, "determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount "of gratuity so determined". Sub-section (3) of Section 7 of the Act of 1972 provides that the employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to the person to whom the gratuity is payable. Sub-section (3A) of Section 7 of the Act of 1972 fastens the liability to pay interest in the event of failure to discharge the obligation cast upon the employer under sub-section (3A) of Section 7 of Act of 1972. Subsection (3A) of Section 7 of the Act is reproduced hereunder.

"(3A) If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in subsection (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long term deposits, as that Government may, by notification specify :

Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground."

6. It is evident from sub-section (3A) of Section 7 of the Act, extracted above, that the employer is liable to pay simple interest at the prescribed rate from the date on which the gratuity becomes payable to the date on which it is paid. The deposit of the amount with the appellate authority would not absolve the employer of its liability to pay interest once it is established that the employer has failed to discharge the obligation cast upon it by sub-sections (2) and (3) of Section 7 of the Act. In the instant case, the employer failed to determine the amount of gratuity and give notice in writing to the petitioner and also to the controlling authority specifying the amount of gratuity so determined, as visualised by sub-section (2) of Section 7 of the Act. It further failed to arrange the payment of gratuity within thirty days from the date it became payable to the petitioner. The deposit of the amount with the appellate authority after the order passed by the Controlling Authority would not absolve the employer of its liability to pay interest as visualised by sub-section (3A) of Section 7 of the Act. The petitioner is, therefore, entitled to get interest till the date of actual payment of gratuity to him. He is also entitled to cost quantified at Rs. 2,000.

7. In the result, therefore, the petition succeeds and is allowed with cost quantified at Rs. 2,000. The appellate order dated 30.12.1995 is quashed. The petitioner is held entitled to interest at the prescribed rate till the date of actual payment.

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