

(1997) 06 BOM CK 0034

In the Bombay High Court

Case No : O.O.C.J. W.P. No. 407 of 1995

Ramachandra Ganpat Dalvi

APPELLANT

Vs

Phoenix Mills Ltd. and Others

RESPONDENT

Date of Decision : 25-06-1997

Acts Referred:

Payment of Gratuity Act, 1972 — Section 2, 4

Citation : (1999) 3 LLJ 848

Hon'ble Judges : R.M. Lodha, J

Bench : Single Bench

Advocate : B.C. Shah, for the Appellant; Meena Doshi, for the Respondent

Judgement

R.M. Lodha, J.—The order dated June 22, 1994 passed by the appellate authority under the Payment of Gratuity Act, 1972 is subject matter of challenge in this writ petition filed at the instance of the petitioner. By the said order dated June 2, 1994 the appellate authority set aside the order passed by the Fifth Labour Court on the application u/s 4 of the Payment of Gratuity Act, 1972 made by the petitioner. The appellate authority held that the petitioner is not entitled to difference of gratuity amount and is only entitled for interest at the rate of 12% per annum on the amount of Rs. 10,044/-from January 17, 1982 to October 27, 1990.

2. The petitioner Shri Ramchandra Ganpat Dalvi (for short "employee") made an application u/s 4 of the Payment of Gratuity Act, 1972 (for short "Act of 1972") against the respondent M/s. Phoenix Mills Ltd. (for short "employer"). The case of the employee was that he was working with the employer in Winding Department since February 24, 1958. On January 17, 1982 there was strike in textile industry and as a result whereof he continued with the employer upto the date. On March 3, 1985 he was employed again with continuity of service and worked with the employer till May 31, 1992 when he resigned from his service. According to the employee he was paid gratuity amounting to Rs. 10,044/- by the employer though he was entitled to a further amount of gratuity of

Rs.28,992.50 as difference. The claim of the employee was contested by the employer by filing reply to the application and it was averred that the employee was first engaged in Roto Winding Department as substitute and made permanent on August 1, 1961 and since then he worked continuously with the employer till January 17, 1982. The employee participated in illegal strike from January 18, 1982. The case of the employer is that the employee did not report for work despite various appeals published in the newspapers and he was dismissed from service on August 7, 1982. It is the further case of the employer that the employee was re-employed at his request on August 30, 1985 as fresh employee and he accepted the said position and continued to work till May 31, 1992 when he resigned. According to the employer, the difference of Rs. 28,992.50 claimed by the employee was misconceived and untenable. In support of his case the employee examined himself and produced documents. It appears that no oral evidence was led by the employer. The controlling authority after recording the evidence and hearing the parties allowed the application made by the employee and held that he is entitled to Rs. 28,992.50 towards the difference in gratuity and is also entitled to simple interest at the rate of 12% per annum on the amount of gratuity from July 18, 1992 till payment was actually made. The order passed by the controlling authority on January 24, 1994 was challenged in appeal by the employer before the appellate authority. The appellate authority allowed the appeal, set aside the order passed by the Labour Court and it was held that the employee Was not entitled to difference of gratuity amount as claimed. As observed above, the appellate authority, however, held that the employee was entitled for interest at the rate of 12% per annum on the amount of Rs. 10,044/-from January 17, 1982 to October 27, 1990.

3. The principal ground on which the appellate authority interfered with the order of the controlling authority was that the employee was out of service from 1982 to 1985 and thus there was break in service. On that basis the claim of the employee accepted by the controlling authority was set aside by the appellate authority.

4. There is no dispute that from January 18, 1982 there was a strike in the textile industry including the employer mill. The said strike was declared illegal by the Labour Court subsequently and the case of the employer is that despite the notices when the employer did not report to the duty, his services were terminated. There is no dispute that the employee was employed on March 3, 1985 by the employer. Though in reply to the application the employer set up the defence that the said employment given to the employee in March 3, 1985 was fresh employment, yet no evidence was led by the employer to prove this fact that the employment given to the employee on March 3, 1985 was fresh employment without continuity of service. The employee on the other hand in his cross-examination denied the suggestion made by the employer that he was taken as fresh entrant on March 3, 1985. In the absence of any evidence led by the employer that the employee was accorded fresh employment on March 3, 1985 without continuity of service, on the basis of the available material the

controlling authority reached the conclusion that the oral evidence led by the employee and the documents, Exhibit U-5 and Exhibit U-6 establish that the employee was accorded continuity of service by the employer and there was no break in his service. There is no evidence on record led by the employer that there was active participation of the employee in the strike which commenced on January 18, 1982. If due to strike in the entire textile industry, the employee could not attend his duties, though the strike was held illegal subsequently, I am afraid, in view of the definition of "continuous service" given in Section 2(a) of the Act of 1972, the employee could not be denied the benefit of continuity of service. The circumstances were beyond the control of the employee and the absence from duty and the break in service in any case was not due to fault of the employee. Much capital was sought to be drawn by the learned counsel for the employer from the fact that in the year 1987 the employee made an application under Bombay Industrial Relations Act challenging his dismissal order and he prayed for his reinstatement though the said application was ultimately withdrawn by the employee. The learned counsel for the employer posed the question had the employee been given continuity of service there was no occasion for the employee to file such an application. Again the said facts are not clearly established from the record. The appellate authority itself has observed in its order that there is some confusion between the parties about this aspect in as much as according to the employee the complaint was withdrawn since he got re-employment with continuity of service while according to the employer the complaint was dismissed by the Labour Court. The application u/s 4 of the Act of 1972 could have only been decided by the Labour Court on the basis of the available evidence. The evidence was only led by the employee by examining himself and by producing documents Exhibit U-5 and Exhibit U-6. From the said evidence coupled with the definition of "continuous service" occurring in Section 2(a) of the Act of 1972, the controlling authority cannot be said to have erred in reaching the finding that there was no break in the service of the employee and the employee was able to establish that he was in continuous service.

5. The appellate authority also relied upon the circumstance against the employee that upto January 17, 1982 the first spell till he worked was paid gratuity in the year 1990 which was accepted by him. If in law the employee is entitled to gratuity on the basis that he was in continuous service till May 31, 1992, payment of gratuity in part and its acceptance by employee will not make any difference in the eye of law. I have already observed that the employer did not lead any evidence in support of its case that on March 3, 1985 the employee was re-employed without continuity of service. In the absence of any evidence of the employer if the controlling authority relied upon the evidence led by the employee in holding that the employee was in continuous service in view of the provisions contained in Section 2(a) of the Act of 1972, the finding recorded by the controlling authority was fully justified and the appellate authority erred in setting aside the said finding.

6. By the artificial definition of "continuous service" in Section 2(a) of the Act of

1972, even an interrupted service on account of strike or lockout without any fault of the employee is not treated as break in service and the employee is deemed to be in continuous service even if there was interruption in the service due to the circumstances mentioned in Section 2(a). Though the employee's evidence that there was no fault on his part which led to interruption in service for the period from 1982 to 1985 yet no evidence was led by the employer in rebuttal to prove otherwise.

7. For the reasons aforesaid, the order passed by the appellate authority cannot be sustained and is liable to be set aside which I hereby order. The order passed by the Fifth Labour Court on January 24, 1994 is restored. Rule is made absolute in aforesaid terms. No costs.

8. Mrs. Doshi, the learned counsel for the employer submits that the disputed amount has already been deposited with the controlling authority and the same may be directed to be paid to the employee. The submission of the learned counsel for the employer is very fair. The controlling authority is accordingly directed to pay the amount deposited by the employer towards gratuity to the employee within one month from receipt of the order of this Court.

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