

(1981) 01 CAL CK 0002
In the Calcutta High Court

Shalimar Paints H.O. Employees Union	Vs	APPELLANT
Shalimar Paints Ltd. and Others		RESPONDENT

Date of Decision : 16-01-1981

Acts Referred:

Constitution of India, 1950 — Article 226
Industrial Disputes Act, 1947 — Section 10
Payment of Gratuity Act, 1972 — Section 4, 5

Citation : (1981) 1 CALLT 65 : 85 CWN 343

Hon'ble Judges : A.N. Sen, C.J;N.M. Dutt, J

Bench : Division Bench

Judgement

N.M. Dutt, J.—The appellants who are the workmen of the Shalimar Paints Limited represented by the Employees Union have, in this appeal, challenged the propriety of the judgment of a learned single Judge of this Court whereby the learned Judge made the rule nisi obtained by the respondent-company, Shalimar Paints Limited, absolute, on its application under Article 226 of the Constitution of India.

2. It appears that there was a settlement between the respondent-company and its employees and the terms of such settlement were embodied in a memorandum, a copy of which has been annexed to the Writ petition and marked Annexure "D", Clause (12) of the settlement provides that it will take effect on and from January 1, 1970 and will remain in force up to December 31, 1973. The relevant terms of settlement are as follows:

Retiring Benefits:

(a) Provident Fund:

Provident Fund in accordance with the Employees' Provident Funds Act and Scheme, as at present.

(b) Pension:

50% of the last drawn basic pay plus dearness allowance at the rate of 80% of individual's basic pension with a minimum of Rs. 20 and maximum of Rs. 40. Henceforth there will be no deduction of 1/2% of company's contribution towards Provident Fund as was previously done from Pension or Gratuity as per Company's notice dated 19th August, 1969.

(i) Full pension will be granted to employees on retirement after completion of 25 years of service in this company and proportionate pension after 20 years of service.

(ii) The pension is for life and is certain for a period of 5 years that is to say, in case the retired employee dies before he has received pension for 5 years, his widow will be entitled to get the pension for the remaining period of 5 years but the widow will receive only basic pension without the dearness allowance.

(c) Gratuity Scheme:

Gratuity is payable if an employee has to leave the service of the company on medical grounds or in case of death while in service after completion of 5 years of confirmed service to the widow of the deceased at the scheduled rate mentioned below. In the case of a widow three quarters of the sum which would have been granted to the husband will be given to her. The company may also at its discretion pay gratuity to an employee who resigns after completion of 10 years of confirmed service. Gratuity could also be payable in lieu of pension if an employee has to retire due to incapacity after he has completed 20 years of service.

3. There is no dispute that the settlement arrived at between the respondent-company and its employees were given effect to by the respondent-company. During the operation of the settlement, the West Bengal Legislature passed an Act known as the West Bengal Employees' Payment of Compulsory Gratuity Act, 1971, hereinafter referred to as the State Act. Later on Parliament also passed a similar Act known as the Payment of Gratuity Act, 1972, hereinafter referred to as the Central Act. The provisions of the Central Act are almost verbatim the same as those of the State Act. Needless to say, the State Act remained in force and operation till the enactment and enforcement of the Central Act. Section 4 of the Central Act is as follows:

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.

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 the purpose, the wages paid for any overtime work shall not be taken into account:

Provided further that in the case of an employee employed in a seasonal establishment, the employer shall pay the gratuity at the rate of seven days' wages for each season.

(3) The amount of gratuity payable to an employee shall not exceed twenty months' wages.

(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, wilful 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 shall be wholly 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.

4. It may be stated that the respondent-company made an application u/s 5 of

the Central Act requesting the State Government to exempt the respondent-company from the operation of the Central Act. The State Government, however, refused to grant such exemption. On October 1, 1973, the respondent company issued a circular to its employees to the effect that since gratuity was now compulsorily payable, the pension benefit should be withdrawn.

5. A dispute arose between the respondent-company and its employees over the question of payment of pension. According to the respondent-company, after the enactment of the State Act followed by the Central Act, the respondent-company was only liable to pay gratuity to its employees as the only retirement benefit. The respondent-company refused to give effect to the scheme for pension as embodied in the terms of settlement. The said dispute was referred by the State Government u/s 10 of the Industrial Disputes Act, 1947 to the 8th Industrial Tribunal, West Bengal. The issue that was required to be adjudicated by the Tribunal is as follows:

Whether the management is justified in refusing to continue the existing scheme of pension benefit consequent on the enforcement of legislation providing for payment of gratuity? To what relief, if any, are the workmen entitled?

6. The Tribunal, after considering the facts and circumstances of the case and the evidence adduced on behalf of the parties, made an award holding inter alia that the respondent-company could not discontinue the existing pensionary benefit in favour of its employees and the workmen on the ground that payment of gratuity had been made compulsory by the Central Act. The Tribunal directed that the respondent-company must restore the system of pensionary benefit and give advantage of the same to the employees and workmen who might retire thence forth. It was, further, directed by the Tribunal that the respondent-company should also extend this benefit according to the rules of practice to employees and workmen, if any, who had retired since the date of discontinuation by the respondent-company of the said pensionary benefit till the date of the award.

7. Being aggrieved by the award of the Tribunal the respondent-company moved this Court under Article 226 of the Constitution and obtained the rule nisi out of which this appeal arises.

8. At the hearing of the Rule it was contended on behalf of the respondent-company that under the settlement, payment of gratuity was alternative of pension. In other words, if an employee opted for pension, he was not entitled to gratuity. As gratuity was compulsorily payable under the Central Act, it was submitted, the respondent-company was justified in discontinuing the scheme for pension. It was also contended that the Tribunal committed an error of law in directing payment of pension to those employees who had retired since the date of discontinuation of the pension scheme till the date of the reference. It was submitted on behalf of the respondent-company that the Tribunal could, if at all, only direct payment of pension to those employees who had retired since the date of the reference and not earlier.

9. The learned Judge held that gratuity was compulsorily payable either under the Central Act or under the State Act. He, however, took the view that on the basis of the settlement, gratuity, although payable in a limited number of cases, was clearly an alternative to pension. In that view of the matter, the learned Judge set aside the impugned award of the Tribunal and made the rule nisi absolute. Hence this appeal.

10. The principal question that is involved in this appeal is whether the employees who, on retirement, are entitled to the benefit of pension under the settlement is also entitled to the payment of gratuity by virtue of the provisions of the State Act or the Central Act. There can be no doubt that if under the settlement payment of gratuity is alternative to pension as held by the learned Judge, the employees will only be entitled to either gratuity or pension and, because of the mandatory provision of Section 4 of the Central Act, gratuity being compulsorily payable, the employees will only be entitled to gratuity and not pension.

11. Let us consider if under the terms of settlement payment of gratuity is alternative to pension. An employee, on retirement, will be entitled to full pension on completion of 25 years of service and proportionate pension on completion of 20 years of service. The terms of settlement do not provide for payment of gratuity to an employee retiring in usual course either on completion of 25 years of service or on completion of 20 years of service. Such an employee has not been conferred with any light to claim payment of gratuity in lieu of pension. But where an employee retires not in the normal course of superannuation on completion of 20 years of service, but is compelled to retire before the full tenure of service due to his incapacity on the completion of 20 years of service, he may be paid gratuity in lieu of pension, depending upon the option he exercises in that regard. Thus it is apparent that under normal circumstances, an employee is only entitled to the benefit of pension on retirement after completion of a minimum period of 20 years service. As the employee has no right to claim payment of gratuity in lieu of pension, it will be, in our opinion, a wrong interpretation of the terms of settlement to hold that gratuity is alternative to pension. The scheme for gratuity under the settlement shows that in certain special cases payment of gratuity has been provided for presumably on compassionate grounds, to wit, when an employee has to leave service on medical grounds or in case of death while in service after completion of 5 years of confirmed service. Employees falling under the special cases do not come within the purview of the pension scheme under the settlement. So neither in the usual cases of retirement on the completion of 20 or 25 years of service, nor under the special cases mentioned above, payment of gratuity can be said to be alternative to pension or vice versa,

12. In this connection, it may be noticed that in coming to the finding that under the settlement gratuity is alternative to pension, the learned Judge has placed reliance on the following term of the settlement as the most relevant term:

For purposes of avoiding any misunderstanding it is recorded that an employee who is eligible for pension as per existing rules, if he opts for pension he will not be entitled to any gratuity.

It has been already seen when an employee is entitled to pension on his retirement from service. The above term, in our opinion, does not entitle an employee retiring in usual course on the completion of 20 or 25 years of service to the payment of gratuity in lieu of pension for the simple reason that the scheme for pension does not provide for payment of gratuity in lieu of pension. In our view, the above term relates to the provision for payment of gratuity to an employee who has to retire, that is, who is compelled to retire before his normal superannuation, due to incapacity after he has completed 20 years of service. The said term only seeks to clarify that in such a case if the employee who is eligible for pension (because he has completed the minimum period of 20 years of service) opts for pension, he will not be entitled to gratuity. In our opinion, therefore, the term does not provide for payment of gratuity as an alternative to pension.

13. The only ground that weighed with the learned Judge in making the rule nisi absolute, namely, under the terms of settlement gratuity is alternative to pension, does not commend to us. Mr. Ginwalla, learned Counsel appearing on behalf of the respondent-company has, however, made some submissions relating to the interpretation of the provisions of the State Act and the Central Act in support of the contention that only gratuity and not gratuity and pension both are payable to the employees. He has placed much reliance on the preamble to the State Act which is as follows:

Whereas it is expedient to provide for a uniform scheme of retirement benefit for employees engaged in factories, plantations, shops and establishments.

It is contended by the learned Counsel that it is manifestly clear from the preamble to the State Act that its object is to provide for a uniform scheme of retirement, and that the object can be achieved only if the retirement benefit is gratuity and not both gratuity and pension. It is submitted by him that if the employees of the respondent-company are allowed both gratuity and pension as retirement benefits because of the settlement there will be no uniformity in the retirement benefit in all the establishments within the State, for, in the case of employees of other establishments there may not be such settlements and the employees will be allowed only gratuity on retirement by virtue of the provisions of the State Act or the Central Act. It is contended by the learned Counsel that the provision of Section 4 of both the Acts under which payment of gratuity has been made compulsory should be interpreted in the light of the said object. Attractive though the argument is, we regret we are unable to accept the same. The Legislature in passing the enactments in question undoubtedly intended to confer benefits on the employees of industrial establishments on their retirement from service, so that they are not put to financial stringency in maintaining them after retirement. It can be reasonably presumed that in providing for the

compulsory payment of gratuity, the Legislature was quite aware of the retirement benefits by way of pension and/or gratuity in force in the different establishments, but considered such benefits to be insufficient. It is true that under the preamble to the State Act, the object is to achieve uniformity in the scheme of retirement benefit, but surely such object is not to curtail or reduce the benefits already enjoyed by the employees. If the preamble is construed in the manner as suggested by the learned Counsel for the respondent-company, we are afraid, the object for which payment of gratuity has been made compulsory will be frustrated. The uniformity in the scheme of retirement benefit referred to in the preamble should, in our opinion, on a proper construction, be understood to be the uniformity in the minimum level, that is, by payment of the minimum amount of gratuity as prescribed by Section 4. It is significant to be noticed that while the Central Act has enacted the same provisions as in the State Act, it has not adopted the object of the State Act as contained in the preamble. Be that as it may, we are of the view that there is nothing in the State Act which abridges or takes away the benefit of pension already conferred on the employees of the respondent-company by the terms of settlement ; on the contrary, the effect of both the Acts is that the employees entitled to pension on retirement are also entitled to an additional benefit of the payment of the minimum amount of gratuity as prescribed by said Acts.

14. It is next contended by Mr. Ginwalla that Section 5 of the Central Act which confers power on the appropriate Government to exempt the application of the Central Act to an establishment indicates that the existing retirement benefits are substituted by the only benefit of payment of gratuity. Section 5 inter alia authorises the appropriate Government to exempt any establishment, factory, etc., from the operation of the provisions of the Central Act if, in the opinion of the appropriate Government, the employees in such establishment, factory, etc., are in receipt of "gratuity or pensionary benefits" not less favourable than the benefits conferred under the Central Act. In support of his contention, much emphasis has been put by Mr. Ginwalla on the words "gratuity or pensionary benefits", and it is contended by him that the Legislature has by this provision clearly intended to equate "gratuity" with "pension". It is submitted by him that Section 5 evinces an intention of the legislator that the employees will only be entitled to one kind of retirement benefit -pension or gratuity - and not both. The learned Counsel submits that as pension can be computed in terms of one lump sum amount, there is no difficulty in equating gratuity with pension, and if the appropriate Government is satisfied that the payment of gratuity under the Central Act is less favourable than the commuted, value of the pension, it will exempt the establishment concerned from the operation of the Central Act. But, in case it is not less favourable, the appropriate Government will refuse to exercise the power of exemption u/s 5 and, in that case, it is submitted by the learned Counsel, the scheme for pension will stand substituted by the payment of gratuity.

15. We are afraid Section 5 does not admit of any such interpretation as to

include within it the theory of substitution of the pension scheme by payment of gratuity in accordance with Section 4 of the Central Act. Section 5 confers a power on the appropriate Government to exempt an establishment, factory, etc., from the operation of the Central Act only if the retirement benefits of the employees of such establishment, factory, etc., are not less favourable than the payment of gratuity under the Central Act. It is true that Section 5 refers to "gratuity or pensionary benefits", but merely from that it will not be proper, in our opinion, to come to a conclusion that gratuity has been sought to be equated with pension. The Legislature has not used the words "gratuity or pension", but the words used are "gratuity or pensionary benefits". The term "pensionary benefits" which is plural in form, seems to be of wider import than the word "pension" simpliciter, and it may also include gratuity. In our opinion, there is nothing to show that the Legislature intended to take into consideration the commuted value of pension so that it can be said that payment of gratuity has been equated with pension.

16. It has been argued by Mr. Somenath Chatterjee, learned Counsel, his argument having been supplemented by Mr. Partha Sarathi Sen Gupta, learned Counsel, both appearing on behalf of the appellants workmen that the agreement arrived at between the respondent-company and its employees are binding on the respondent-company. The contention of the appellants is that as the employees are entitled to the benefit of pension under the terms of settlement, the respondent-company cannot deprive them of the said benefit simply because the payment of gratuity has been made compulsory by Section 4 of the Central Act. In other words, it is contended that in view of the provisions of the State Act and the Central Act, the employees of the respondent-company who are admitted to the pension scheme are entitled to both gratuity and pension as retirement benefits and not gratuity only. In our opinion, there is considerable force in the contention of the appellants. Neither the Central Act nor the State Act has made any provision divesting the employees of their vested right to get pension in terms of the agreement arrived at between the respondent-company and its employees. Both the State Act and the Central Act are beneficial legislations and so it cannot be taken without any provision in that regard that the Legislatures wanted to deprive the employees of the industrial establishments of the benefits which the employees of such establishments were enjoying under the terms of any settlement or agreement. Had it been the intention of the Legislature to deprive the employees of the existing benefits of retirement, it would have made an express provision in that regard, at least, by necessary implication such intention could be gathered. In a beneficial legislation, deprivation of an existing benefit cannot be inferred without a provision to that effect, either express or implied. In our opinion, the statutes with which we are concerned had to be enacted as the existing benefits conferred by the employers on their employees were not considered by the Legislature to be proper and sufficient so as to enable the employees to maintain themselves after they retire from service. In the circumstances, we are of the

view that the employees of the respondent-company are entitled to the benefit of pension in accordance with the scheme for pension, besides the payment of gratuity which is compulsorily payable by virtue of Section 4 of the Central Act.

17. Next it is contended by Mr. Ginwalla that as there was ample justification for the respondent-company to discontinue the pension scheme in view of the circumstances existing at the material time, it was incumbent upon the Tribunal to make an award in favour of the respondent-company. The reason behind this contention as submitted by the learned Counsel is that under the issue which has been referred to the Tribunal for adjudication, the Tribunal was not to consider whether the respondent-company was legally entitled to discontinue the scheme for pension, but it was only to consider whether in so discontinuing the respondent-company was justified. It is difficult for us to accept the contention. An act which is otherwise illegal cannot be upheld on the ground that it is justified. However such an act may be justified, if it has no legal sanction, it must be turned down. Assuming that the respondent-company was justified in discontinuing the pension scheme, such discontinuance being illegal cannot be allowed to exist. Indeed the refusal by the State Government, which is the appropriate Government u/s 5 of the Central Act to grant exemption to the respondent-company from the operation of the Central Act, raises a presumption against the justifiability of the discontinuance of the scheme for pension. Be that as it may, in our opinion, the Tribunal was right in considering whether the respondent-company was legally justified in discontinuing the existing scheme for pension, for, in our opinion, the question of legality of such discontinuance was, as a matter of course, implied in the issue.

18. The last contention of the learned Counsel is that the Tribunal has travelled beyond the scope of the reference as envisaged by the issue referred to it for adjudication by extending the benefit of the award in favour of the employees of the respondent-company who had retired before the reference was made but after the enactment of the State Act or the Central Act. This contention, in our opinion, has no substance. Even assuming that the Tribunal had not so extended the benefit of the award, such benefit was available to the said retired employees consequent on the award of the Tribunal on the finding that discontinuance of the scheme for pension by the respondent-company was illegal. Accordingly, the contentions are rejected. No other point has been urged on behalf of either party.

19. In the circumstances and for the reasons aforesaid, the judgment of the learned Judge is set aside and the award of the Tribunal is restored.

20. The appeal is allowed, but in view of the facts and circumstances of the case, there will be no order for costs.

21. It has been stated that pursuant to an earlier order passed by this Court the company has deposited certain amounts with a Nationalised Bank with the undertaking that the same would be made over to the employees with interest. We direct that in terms of the said undertaking given to the Court as embodied in

the said earlier order, the amounts should be paid to the employees within a fortnight from date.