

(2003) 08 JH CK 0091
In the Jharkhand High Court
Case No : Writ Petition (S) No. 444 of 2003

Shib Ram Mahto

APPELLANT

Vs

Jharkhand State Electricity Board and Others

RESPONDENT

Date of Decision : 20-08-2003

Acts Referred:

Constitution of India, 1950 — Article 226
Payment of Gratuity Act, 1972 — Section 5

Citation : (2003) 3 BLJR 2381 : (2003) 4 JCR 518

Hon'ble Judges : M.Y. Eqbal, J

Bench : Single Bench

Advocate : Ajit Kumar and M.K. Sinha, T.K. Das, for the Appellant; A.K. Sinha I. Sen Choudhary and A.K. Jha, for the Respondent

Final Decision : Allowed

Judgement

M.Y. Eqbal, J.—The petitioner has prayed for issuance of a writ for quashing the notice-cum-order dated 30.12.2002 whereby the respondents have stopped payment of pension to the petitioner and have directed the petitioner to refund all the amount of pension received by him.

2. The facts of the case lie in a narrow compass :

The petitioner joined the service of the Bihar State Electricity Board in 1967 and retired on 30.4.1998 as Head Electrician. He submitted all the papers regarding his pension and gratuity and other benefits. The respondents-BSEB, by order dated 24.11.1998 sanctioned Rs. 1313/- as monthly pension from 1.5.1998. The petitioner was also paid gratuity amounting to Rs. 52080.00 and Rs. 33,418.00 vide office order dated 5.9.1998. The petitioner was also paid GPF amount of Rs. 83,747/-. However, from January, 2003 the respondents have stopped payment of pension on the ground that the petitioner was paid gratuity as per Payment of Gratuity Act. Petitioner's case is that since he received less gratuity which he was entitled under the said Act, so he filed a petition before the competent authority. The application was allowed and the authority directed the respondents

to pay to the petitioner Rs. 95,217.14 paise as gratuity. A copy of the order passed by the authority under the Payment of Gratuity Act in case No. 9/99 has been annexed as annexure 6 to the writ application.

3. The respondent-JSEB, against the order of the competent authority, preferred an appeal before the appellate authority, namely, the Additional Labour Commissioner which was registered as appeal No. 6/2001 and the appellate authority dismissed the appeal. The petitioner then moved this Court by filing WP(C) No. 947/2002 which was also dismissed on 5.3.2002. The respondents, thereafter, passed the impugned order and stopped payment of pension on the ground that he has been paid gratuity under the provisions of Payment of Gratuity Act and, therefore, he is not entitled to pension.

4. The respondents' case in the counter-affidavit is that in 1987 a tripartite settlement was arrived at between the respondent-Board and the recognized union in presence of the Labour Commissioner, Bihar wherein it was agreed to introduce a new GPF-cum-Pension Scheme in place of old CPF Scheme which is already in vogue in the Board. Pursuant to that settlement the Board issued a resolution dated 8.12.1987 whereby Pension-cum-GPF Scheme was extended to all the employees of the Board who were so far born in non-pensionable scheme and were under CPF rules of the Board. As per the scheme the existing employees of the Board were given opportunity to exercise their option to continue in CPF Scheme. It was mentioned that if option is not given within the prescribed time it would be presumed that the employee has opted for Pension-cum-GPF Scheme. The petitioner did not exercise his option to be governed by old CPF Scheme and, as such, in terms of the aforesaid resolution he was governed by Pension-cum-GPF Scheme. Accordingly, after retirement the petitioner submitted his claim for Pension/DCR; gratuity as per the provisions of Bihar Pension Rules and his claim for gratuity and pension was settled under the Pension-cum-GPF Scheme. The amount of gratuity was calculated and he was paid the amount. But after receiving the said amount the petitioner moved the authority under Payment of Gratuity Act and in terms of the final order passed by the authority under the Payment of Gratuity Act, the Board deposited the gratuity amount payable to the petitioner under the Payment of Gratuity Act. In that view of the matter the petitioner would not be entitled to pension under the pension scheme. It is contended that the petitioner had not given his option and had chosen to have the benefits of gratuity under the Gratuity Act and, therefore, he is not entitled to double benefits. The petitioner either may avail GPF Scheme for the benefit of pension or CPF Scheme according to which he was entitled to gratuity as per Payment of Gratuity Act.

5. Mr. T.K. Das, learned counsel appearing on behalf of the petitioner submitted that the Provident Fund Act and the Gratuity Act are two different Acts dealing with different situations. According to the learned counsel under the substituted Rule 50 of CPF Rules the petitioner is entitled to pension. According to the learned counsel gratuity amount was paid to the petitioner as per the award and,

therefore, he is entitled to get pension. Learned counsel relied on the decision of the Supreme Court in the case of Municipal Corporation of Delhi Vs. Dharam Prakash Sharma and Another, .

6. Mr, A.K. Sinha, learned Advocate General appearing on behalf of the respondents-Board firstly submitted that in the year, 1987 a tripartite settlement was arrived at between the Board and the members of the recognized union representing the interests of the employees in presence of the Labour Commissioner, Bihar, wherein it was agreed to introduce a new G.P.F.-cum-Pension Scheme in place of old CPF Scheme and pursuant to that settlement the Board issued resolution dated 8.12.1987 extending the said scheme to all the employees of the Board. Consequently Rule 50 of the Bihar State Electricity Board CPF Rules was substituted. Learned counsel submitted that the petitioner retired in 1998 and submitted his claim for pension/gratuity as per the provisions of Bihar Pension Rules. The amount of gratuity was calculated and was paid to the petitioner. Learned counsel submitted that the petitioner has been paid gratuity amount as per Payment of Gratuity Act inspite of the fact that he preferred to be guided by the G.P.F.-cum-Pension Scheme. According to the learned counsel the petitioner is not entitled to double benefit i.e., pensionary benefits payable as per Bihar Pension Rules and the gratuity payable under the Payment of Gratuity Act. Learned counsel put reliance on the decisions of the Supreme Court in the cases of Sudhir Chandra Sarkar Vs. Tata Iron and Steel Co. Ltd. and Others, Barauni Refinery Pragatisheel Shramik Parishad Vs. Indian Oil Corporation Ltd., D.T.C. Retired Employees Association and Others Vs. Delhi Transport and Others etc. etc., .

7. Before appreciating the rival submissions of the learned counsels I would like to discuss the ratio decided by the Supreme Court in the decisions relied upon by the parties. In Sudhir Chandra Sarkar's case (supra) the dispute arose when the employee wanted to recover the amount of gratuity on the basis of continuous service rendered by him. The employer contested the lis contending that the gratuity amount is payable at the absolute discretion of the Company irrespective of whether the employee has or has not performed all or any of the conditions stated in the Rules. Deciding the said issue their lordships held :

"Can such social security measure be denuded of its efficacy and enforcement by so interpreting the relevant rules that the workman could be denied the same at the absolute discretion of the employer notwithstanding the fact that he or she has learned the same by long continuous service? If Rule 10 is interpreted as has been done by the High Court, such would be the stark albeit unpalatable outcome. It is, therefore, necessary to take a leaf out of history bearing on the question of retiral benefits like pension to which gratuity is equated. In Burhanpur Tapti Mills Ltd. v. Burhanpur Tapti Mills Mazdoor Sangh, this Court observed that : "a scheme of gratuity and a scheme of pension have much in common. Gratuity is a lump sum payment while pension is a period payment of a stated sum". Undoubtedly both have to be earned by long and continuous service.

For centuries the Courts swung in favour of the view that pension is either a bounty or a gratuitous payment for loyal service rendered depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court. This view held the field and a suit to recover pension was held not maintainable. With the modern motions of social justice and social security, concept of pension underwent a radical change and it is now well settled that pension is a right and payment of it does not depend upon the discretion of the employer. In *Deokinandan Prasad v. State of Bihar*, *State of Punjab v. Iqbal Singh* and *D.S. Nakara v. Union of India*. If pension which is the retiral benefit as a measure of social security, can be recovered through civil suit, we see no justification in treating gratuity on a different footing. Pension and gratuity in the matter of retiral benefits and for recovering the same must be put on par."

8. In the case of *Municipal Corporation of Delhi v. Dharam Prakash Sharma and another*, (supra) the question that arose for consideration before the Supreme Court was whether an employee of the Corporation would be entitled to payment of gratuity under the Payment of Gratuity Act when the Corporation itself has adopted the provisions of CCS (Pension Rules), 1972 wherein there is a provision both for payment of pension as well as gratuity. The contention of the Corporation was that the payment of pension and gratuity under the Pension Rules is a package by itself and once that package is made applicable to the employees of the corporation, the provision of payment of gratuity under the Payment of Gratuity Act cannot be held applicable. Answering the question their Lordships held as under :

"The Payment of Gratuity Act being a special provision for payment of gratuity, unless there is any provision therein which excludes its applicability to an employee who is otherwise governed by the provisions of the Pension Rules, it is not possible for us to hold that the respondent is not entitled to the gratuity under the Payment of Gratuity Act. The only provision which was pointed out is the definition of "employee" in Section 2(e) which excludes the employees of the Central Government and State Governments receiving pension and gratuity under the pension Rules but not an employee of the MCD. The MCD employee, therefore, would be entitled to the payment of gratuity under the Payment of Gratuity Act. The mere fact that the gratuity is provided for under the Pension Rules will not disentitle him to get the payment of gratuity under the Payment of Gratuity Act. In view of the overriding provisions contained in Section 14 of the Payment of Gratuity Act, the provision for gratuity under the Pension Rules will have no effect. Possibly for this reason, Section 5 of the Payment of Gratuity Act has conferred authority on the appropriate Government to exempt any establishment from the operation of the provisions of the Act, if in its opinion the employees of such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act. Admittedly MCD has not taken any steps to invoke the power of the Central Government u/s 5 of the Payment of Gratuity Act. In the aforesaid premises, we are of the considered

opinion that the employees of the MCD would be entitled to the payment of gratuity under the Payment of Gratuity Act notwithstanding the fact that the provisions of the Pension Rules have been made applicable to them for the purpose of determining the pension. Needless to mention that the employees cannot claim gratuity available under the Pension Rules."

9. In the case of DTC Retired Employees" Association v. Delhi Transport Corporation and Ors., (supra) the question that was canvassed by the employees of the Corporation was that the employees who retired on or after 3.8.1981 were entitled to get pension under the scheme Irrespective of the fact whether they had exercised their option or not as by virtue of clause (9) of DTC Pension Scheme, 1992, those employees who had not exercised their option in favour of the Scheme, would be deemed to have opted for pension scheme benefits. The facts of the case was that the Delhi Transport Corporation introduced the Pension Scheme in 1992 for its retired employees. The Central Government sanction the Scheme according to which all employees who retired on or after 3.8.1981, were to be covered for the purpose of concerned benefits. The retired employees opting for Pension Scheme had to refund to the employer the share of provident funds received by them under the Employees Provident Fund Act. It seems that because of certain financial difficulties the concerned scheme could not be implemented in time. Various Employees Association moved the Delhi High Court and that is how the matter came to the Supreme Court. Their lordship, considering the various provisions of the Act, held :--

"It is to be noted that those who had retired by the time the Pension Scheme was introduced must have definitely availed of the benefit under the Provident Fund Scheme and as per the Pension Scheme they were liable to refund the employer's share of provident fund with interest thereon, if they wanted to opt for the Pension Scheme. On the contrary, some such retired employees might not have been interested in refunding the money received by them and having utilized such amount would also find it difficult to raise the funds for repayment. It cannot be assumed that they are bound by the scheme and would automatically come under its purview. The Pension Scheme may, prima facie, be beneficial to them. As regards the existing employees as of 27.11.1992. the employer could always ask them to exercise their option within a stipulated period and if they failed to exercise their option, the deeming provision can be invoked and it could be said that they are covered by the scheme. It is also important to note that as per clause 4 of the scheme, those employees who joined DTC with effect from 23.11.1992 (sic 28.11.1992) are compulsorily covered by the scheme. Therefore, the Division Bench is perfectly justified in holding that the employees who retired on or before 3.8.1981 but before 27.11.1992 and had not exercised their option within the stipulated period or within the extended period, are not entitled to pension under the scheme.

The next contention urged by the learned appellant's counsel is that DTC was not entitled to charge interest on the employer's share of provident fund

received by the employees on retirement. Prior to the Pension Scheme, the employees were entitled to get benefit of the contributory provident fund. These employees on retirement accepted the employer's share of provident fund. The Scheme specifically provided that those who wanted to opt for pension should return the employer's share of provident fund with interest. However, the retired employees had utilized the money to their advantage. Therefore, they are bound to return the same along with interest otherwise, a section of employees would be unduly benefited vis-a-vis other employees. Therefore, we do not think that such a clause in the scheme is irrational or illegal. We do not find any infirmity in the findings recorded by the High Court."

10. In the instant case the petitioner retired as Head Electrician on 30.4.1998. The respondent-Board sanctioned Rs. 1313/- as pension per month from 1.5.1998. The petitioner was also paid gratuity amount of Rs. 52,080/- by office order dated 5.9.1998 and Rs. 83,747/- as GPF by office order dated 20.12.1998. However, from January, 2003 the respondents stopped payment of pension to the petitioner on " the ground that the respondents had to pay the gratuity also as per the provisions of Payment Gratuity Act. Since the petitioner received gratuity amount less than the gratuity which he was entitled to under the Act, he filed a petition before the competent authority under the said Act. The application was allowed by the Controlling Authority on 9.6.2001 and direction was issued to the respondent concerned to pay the full gratuity amount to the petitioner. A copy of the said order has been annexed as annexure 6 to the writ application.

11. From perusal of the said order it appears that the respondent-Board took a stand that in 1987 the Board came with a Scheme called GPF-cum-Pension Scheme in place of old CPF Scheme. The petitioner opted for the said scheme and he continued to be the member of that scheme. According to the respondents, therefore, the petitioner is entitled to pension besides the gratuity as payable according to the said scheme which is less than the amount payable under the Payment of Gratuity act. The Controlling Authority, in the said order held that notwithstanding the scheme formulated by the Board, the employee cannot be denied gratuity which he/she is entitled under the Payment of Gratuity Act.

12. The respondent-Board challenged the said order by preferring appeal before the appellate authority under the Payment of Gratuity Act which was dismissed and, thereafter, the respondent-Board challenged those orders by filing WP(C) No. 947/2002. The Writ Petition was dismissed on 5.3.2002 and Letters Patent Appeal No. 280/2002 filed by the respondent Board has also been dismissed on 9.7.2002 by a Division Bench of this Court. It appears that after dismissal of the said Letters Patent Appeal the respondent-Board, although deposited the gratuity amount, but issued the impugned order dated 30-12.2002 stopping payment of pension and further directing for refund of the amount of pension received by the petitioner. On the face of the order it appears that the respondent-Board, in

order to give a go-bye to the order passed by the Controlling authority and affirmed up to the Division Bench of this Court and further in order to force the petitioner to be satisfied with whatever amount was paid by way of gratuity issued the impugned office order stopping payment of pension which was being paid to the petitioner.

13. Learned Advocate General has submitted that under Bihar Pension Rules sixteen months" salary is payable by way of gratuity which the petitioner is entitled to but under the Payment of Gratuity Act some excess amount is payable. On the other hand, according to the learned counsel, if gratuity is paid by calculating the amount according to the Act, then the Board has to pay some more amount by way of gratuity.

14. There is nothing on record to show that the respondent- Board was exempted by the appropriate Government u/s 5 of the Payment of Gratuity Act in view of the new Scheme introduced by it in the year, 1987. as held by their Lordships of the Supreme Court in Municipal Corporation of Delhi's case (supra) that the Payment of Gratuity Act, 1972 being a special provision shall have an overriding effect over any scheme that might have been adopted by the concerned employer and even if the benefit is availed of under the concerned scheme, the employee would be entitled for payment of gratuity under the Act.

15. Having regard to the facts and circumstances of the case and also regard being had to the fact that the order of the Controlling Authority was affirmed by the appellate authority and upto the Division Bench of this Court in L.P.A. No. 280/2002, in my opinion the impugned office order issued by the respondent - Board stopping payment of pension to the petitioner and directing refund of the pension amount is wholly illegal and without jurisdiction.

16. For the aforesaid reasons this writ application is allowed and the impugned order is quashed. The respondent - Board is directed to release the entire arrears of pension and also continue payment of pension to the petitioner in accordance with law.