
(1998) 11 BOM CK 0054
In the Bombay High Court
Case No : Writ Petition No. 1627 of 1996

Shri Ramappa Bhimappa

APPELLANT

Vs

M/s. Phoenix Mills Ltd. and others

RESPONDENT

Date of Decision : 12-11-1998

Acts Referred:

Bombay Industrial Relations Act, 1946 — Section 73, 97(1)
Payment of Gratuity Act, 1972 — Section 2

Citation : (1999) 1 ALLMR 445 : (1999) 1 BomCR 412 : (1999) 2 BOMLR 156 :
(1999) 81 FLR 151 : (1999) 2 LLJ 405 : (1999) 1 MhLj 214

Hon'ble Judges : A.V. Savant, J

Bench : Single Bench

Advocate : B.C. Shah, for the Appellant; Kiran S. Bapat, for the Respondent

Judgement

A.V. Savant, J.—Heard both the learned Counsel; Shri Shah for the petitioner and Shri Bapat for the first respondent.

2. This is a petition filed by Shri Ramappa Bhimappa, a former employee of the first respondent M/s Phoenix Mills Limited challenging the concurrent findings recorded by the Controlling Authority and the Appellate Authority under the Payment of Gratuity Act, 1972. (for short "Gratuity Act") Under the impugned orders, the petitioner's claim for the alleged balance of gratuity payable namely an amount of Rs. 16,942.50 has been rejected. Though in the application filed by the petitioner u/s 4 read with section 7 of the Gratuity Act, the petitioner claimed an amount of Rs. 15,171.75. Counsel appearing before me are agreed that as per the petitioner's own claim the total dues worked out to Rs. 33171.75. Admittedly, the petitioner was paid an amount of Rs. 3697.20 on 22nd October, 1990 and he was further paid an amount of Rs. 12,532.05 on 7th April, 1994 towards the gratuity. Thus, the petitioner was, in all, paid an amount of Rs. 16,229.25 towards the gratuity. Deducting this amount from the total amount of Rs. 33,171.75 the balance would work out to Rs. 16,942.50 though what was claimed was Rs. 15,171.75 on an erroneous assumption that Rs. 18,000/- was

paid. (What was actually paid to the petitioner was Rs. 16,229.25 only).

3. The few facts may be stated as under. The petitioner joined the services of the first respondent as a badli worker on 25th April, 1971. He claimed to have been made permanent on 1st March, 1975. There was general strike in the textile industry with effect from 18th January, 1982. Respondent Ho. 1 Mill moved the Labour Court by Application No. 38 of 1982. The Labour Court by its order dated 10th February, 1982 declared that the strike resorted to by all the employees of all the departments (except watch and ward department) in all the shifts on and from 18th January, 1982 and continued every day thereafter was illegal in view of the provisions of section 97(1)(b) of the Bombay Industrial Relations Act, 1946. Since the petitioner did not report to duty within the stipulated period after the declaration of the strike as illegal, the first respondent issued a show cause notice to the petitioner on 7th July, 1982 pointing out that his services were liable to be terminated and that penal action was liable to be taken against him. No reply was given by the petitioner and order of dismissal was passed on 5th August, 1982.

4. It appears that in respect of dismissal of several employees of the first respondent Mill, there was a reference to the Industrial Court, at Mumbai being Reference No. (IC) 21 of 1986. Part I of the Award was pronounced on 10th July, 1990. Several workmen as many as 902 whose names appear in the list annexed to the order dated 10th July, 1990 compromised the matter with the employer having collected their gratuity and prayed for deletion of their names from the pending reference. The name of the petitioner Ramappa Bhimappa appears at Sr. No. 166 in the said list. Shortly thereafter i.e. to say on 22nd October, 1990 the petitioner accepted the amount of Rs. 3697.20 towards his claim for gratuity in respect of the services rendered by him from 25th April, 1971 to 17th January, 1982. There is no protest or objection in respect of acceptance of the said amount of Rs. 3697.20 as the amount of gratuity due in accordance with the provisions of the Gratuity Act.

5. It appears that in the meanwhile the petitioner was re-employed on 19th February, 1985 and has subsequently tendered his resignation on 1st December, 1993. In respect of the services rendered from 19th February, 1985 to 1st December, 1993 as stated earlier the petitioner has been paid the gratuity of Rs. 12,532.05 on 7th April, 1994. He has accepted this amount without any protest.

6. On 24th June, 1994 the petitioner wrote to the first respondent employer claiming gratuity in accordance with the provisions of section 4 of the Gratuity Act on the ground that he was in continuous service for nearly 23 years i.e. to say from 25th April, 1971 till 1st December, 1993. The employer not having responded to the petitioner's claim, petitioner filed the application (P.G.A.) 86 of 1994 on 27th July, 1994 claiming the amount as above.

7. Before the Controlling Authority, the first Labour Court, Mumbai the parties led their oral and documentary evidence. The question which arose for consideration

was whether the petitioner was in continuous service of the first respondent from 25th April, 1971 to 1st December, 1993 as claimed by him and if so, what was his claim of gratuity. The Controlling Authority came to the conclusion that the petitioner's services were terminated on 5th August, 1982 and he was reemployed on 19th February, 1985. He was paid gratuity in respect of his services for two distinct periods as mentioned above. His contention that he was in continuous service of the first respondent within the meaning of section 2-A of the Gratuity Act, was rejected by the Controlling Authority. Reliance was placed on the fact that after the petitioner was dismissed from service on 5th August, 1982, during the pendency of Reference No. 21 of 1986 he had entered into compromise with the employer. He had filed an application on 21st February, 1990 before the Industrial Court praying that his name may be deleted from the reference pursuant to which part I of the Award was pronounced on 10th July, 1990. The petitioner's name stood deleted from the reference proceedings which order has become final. In this view of the matter, the Controlling Authority rejected the petitioner's claim for gratuity by its order dated 3rd February, 1996.

8. Being aggrieved by the said order, the petitioner had preferred Appeal (P.G.A.) No. 1 of 1996 before the Appellate Authority. The Appellate Authority, agreed with the conclusions arrived at by the Controlling Authority. Reliance was placed on the order passed by the Industrial Court in Reference No. 21 of 1986 where Part I of the Award was pronounced on 10th July, 1990 deleting the petitioner's name and Part II of the award was pronounced on 21st December, 1994 rejecting the reference. In the result the petitioner's appeal was dismissed on 15th July, 1996. It is these concurrent findings that are challenged before me in this writ petition.

9. u/s 4 of the Gratuity Act, gratuity is payable to an employee on the termination of his employment after he has rendered continuous service for not less than 5 years - (a) on his superannuation or (b) on his retirement or resignation or (c) on his death or disablement due to accident or disease subject to certain conditions. Section 4 reads as under :

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,

(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 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, and

where any such nominees or heirs is minor, the share of such minor, shall be deposited with the Controlling Authority who shall invest the same for the benefit of such minor in such Bank or other financial institution, as may be prescribed, until such minor attains majority.

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

Provided further that in the case of (an employee who is employed in a seasonal establishment and who is not so employed throughout the year), the employer shall pay the gratuity at the rate of seven days' wages for each season.

(Explanation: In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages drawn by him by twenty six and multiplying the quotient by fifteen.)

(3) The amount of gratuity payable to an employee shall not exceed (one lakh rupees).

(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 (i) :-

(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 (may be wholly or partially 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."

10. The words "continuous service" have been defined in section 2A of the Gratuity Act as under :

2-A. Continuous Service.- (1) For the purpose of this Act :

(1) An employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave absence from duty without leave (not being absence in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay-off, strike or a lock-out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act.

(2).....

(3).....

11. It will be evident from the above provisions that an employee is entitled to gratuity if he has been in uninterrupted service for certain period including the service which may be interrupted for the reasons set out in sub-section (1) of section 2-A. Such interruption includes interruption by strike or lock out or cessation of work not due to any fault of the employee whether such uninterrupted or interrupted service was rendered before or after the commencement of the said Act.

12. In the light of the above legal position, let me briefly refer to the evidence on record. Admittedly, there was a general strike in the textile industry from 18th January, 1982. The strike was declared by the Labour Court to be illegal on 10th February, 1982. Show cause notice was issued to the petitioner on 7th July, 1982 and order of dismissal has been passed on 5th August, 1982. While it is true that the petitioner was a party to the reference proceedings u/s 73 of B.I.R. Act, 1946, it is clear from the order dated 10th July, 1990 that pursuant to the petitioner's application dated 21st February, 1990, his name was deleted from the reference. In the list of names of workmen annexed to the said order dated 10th July, 1990, the petitioner's name is at ST. No. 166. Apart from the above, the reference itself was rejected finally on merits on 21st December, 1994 by the Industrial Court, Mumbai. There is no challenge either to the order dated 10th July, 1990 or to the order dated 21st December, 1994. It is true that the final order dated 21st December, 1994 was challenged in this Court in Writ Petition No. 645 of 1995 which was dismissed on 20th February, 1998, The appeal against the said order of the learned Single Judge being Appeal No. 609 of 1998 was also dismissed. It is stated before me that the application for review of the order dismissing the appeal is pending in this Court. The fact, however, remains

that the petitioner had applied on 21st February, 1990 to the Industrial Court in Reference No. 21 of 1986 categorically stating that there was a compromise between him and the employer and the dispute between them had come to an end. The petitioner stated in the said application which is at Ex. C-11 in the present proceedings before the Controlling Authority that he had no dues or any claim against the employer. He had accepted fresh employment with effect from 19th February, 1985 which fact is categorically stated in the application dated 21st February, 1990. It was, in these circumstances, that he prayed for his name being deleted from the reference pursuant to which an order was passed on 10th July, 1990. The petitioner was paid an amount of Rs. 3697.20 towards the claim of gratuity on 22nd October, 1990.

13. A similar situation arose in the case of Ramkrishna Bhagoo, another an employee of the first respondent who had filed Writ Petition No. 2115 of 1996. The Division Bench of M.B. Shah, C.J. and J.N. Patel, J., dismissed the petition with the following order.

"P.C.

Heard learned Counsel for the parties.

2. As stated in detail in paragraph 10 of the impugned order and after appreciating evidence, particularly the undertaking given by the petitioner before the Industrial Court in Reference (IC) No. 21 of 1986, in our view, there is no substance in the Writ Petition. The said order cannot be said to be in any way illegal or erroneous.

Hence, this petition is rejected.

Review Petition No. 10 of 1997 filed for review of the said order dated 29th November, 1996 was rejected by M.B. Shah, C.J., and Smt. R.P. Desai, J., on 20th August, 1997 in the following terms.

"Heard the learned Counsel for the parties.

2. No ground for review of the order dated 29th November, 1996 is made out. The said Order is based upon the reasons as recorded in paragraph 10 of the Judgment, of the Appellate Authority under the Payment of Gratuity Act, dated 7th October, 1996.

3. Hence, this review petition is rejected.

M.B. SHAH, C.J., Smt. R.P. DESAI, J."

14. The facts in Writ Petition No. 2115 of 1996 of Ramkrishna Bhagoo as disclosed from the reasoning in para 10 of the order dated 7th October, 1996 passed by the Appellate Authority which order was challenged in Writ Petition No. 2115 of 1996 are similar to the facts in the present case. The Division Bench referred to the reasoning in para 10 of the order passed by the Appellate Authority while dismissing the Writ Petition as also the review petition.

Ramkrishna Bhagoo was also an employee of the first respondent. He was also initially employed as a badli workman in 1962. He was made permanent in 1972. There was a general strike in textile industry on 18th January, 1982. Ramkrishna Bhagoo was issued a show cause notice on 5th July, 1982 and he was dismissed from service on 13th July, 1982. He was also one of the parties in Reference No. 21 of 1986 u/s 73 of B.I.R. Act. He also submitted an application stating that he had compromised the matter with the mill and had accepted re-employment. Ramkrishna Bhagoo's name appears at Sr. No. 224 in the list of workmen who had applied for deletion of their names from the reference on the ground that they had compromised the matter with the employer. Under order dated 10th July, 1990, Ramkrishna Bhagoo's name was also deleted alongwith the petitioner's name. Ramkrishna Bhagoo also had filed an application for full gratuity on the ground that he was in continuous service from 1962 to 1995. Evidence in Ramkrishna Bhagoo's case was similar to the evidence in the present case. Though his application was allowed by the Controlling Authority, the Appellate Authority allowed the appeal filed by respondent No. 1 and rejected the application filed by Ramkrishna Bhagoo. Writ Petition No. 2115 of 1996 filed by Ramkrishna Bhagoo was summarily rejected on 29th November, 1996 by the Division Bench which order I have reproduced above. Review Petition No. 10 of 1997 was also rejected by the Division Bench on 20th August, 1997 as per the order reproduced above.

15. Incidentally, 1 may also refer to the judgment of Rebello, J., in O.O.C.J. Writ Petition No. 1036 of 1997 Baburam Rameshwar v. Phoenix Mills Ltd. and others, decided on 25th November, 1997. The facts in Baburam Rameshwar's case are also identical with the facts in the present case. Baburam Rameshwar was also one of the employees who had applied for deletion of his name from Reference u/s 73 of B.I.R. Act, In the list of workmen who had applied to the Industrial Court, his name appears at Sr. No. 225 immediately below Ramkrishna Bhagoo's name at Sr. No. 224. In Baburam Rameshwar's case also this Court refused to grant him full gratuity though his claim was of continuous service from the date of initial employment in 1956 till his superannuation in 1995. The order of his dismissal was passed after the strike was declared illegal after which he was re-employed on 6th (June, 1983 as is evident from the findings in para 8 of the judgment of Rebello, J., in Baburam Rameshwar's case.

16. Shri Shah for the petitioner placed reliance on the decision of another Division Bench of this Court in Writ Petition No. 491 of 1996 of Phoenix Mitts Ltd. v. Balasaheb D. Hinge, decided on 17th June, 1996 by Tipnis and Rebello, JJ., A perusal of the judgment shows that in Balasaheb Hinge's case the first respondent employer failed to produce any evidence on record that there was any break in service. The findings in para 6 of the decision in Balasaheb Hinge's case show that the burden of proof was on the employer to show that the employee was not in continuous service within the meaning of section 2A of the Act and that the employer had failed to discharge the said burden. It also appears that Balasaheb Hinge was not one of the persons who had submitted the

application in Reference No. 21 of 1986 for deletion of his name from the Reference on the ground that he had compromised the dispute with the employer. From the material that is placed before me, it does not appear that Balasaheb Hinge was one of the 902 employees who had compromised their dispute with the first respondent employer and had prayed in writing that their names should be deleted from the reference No. 21 of 1986 since they had compromised the matter and accepted re-employment. It is on such distinguishing features that the Division Bench of Tipnis and Rebello, JJ., granted the claim of Balasaheb Hinge in Writ Petition No. 491 of 1996 decided on 17th June, 1996. Indeed, Rebello, J., who is party to the Division Bench judgment has distinguished the said Division Bench judgment while rejecting the claim of Baburam Rameshwar when, sitting singly, he was deciding Writ Petition No. 1036 of 1997. Having regard to the distinguishing features in Balasaheb Hinge's case, with respect, I do not think that ratio of the decision in his case can be of any assistance to the petitioner.

17. Shri Shah also placed reliance on another decision of a learned Single Judge Lodha J., rendered on 25th June, 1997 in the case of Ramchandra Ganpat Dalvi v. M/s Phoenix Mills Ltd., being Writ Petition No. 407 of 1995. Apart from the fact that appeal against the judgment dated 25th June, 1997 delivered by Lodha, J., is pending, the name of Ramchandra G. Dalvi does not appear in the list of employees who had applied to the Industrial Court in Reference No. 21 of 1986 for deletion of their names on the ground that they had settled the dispute with the first respondent employer. It is not necessary for me to express any further opinion about the decision of Lodha, J., in Ramchandra Dalvi's case since both the learned Counsel pointed out that the matter is pending in appeal. The fact remains that Ramchandra Dalvi's case, like Balasaheb Hinge's case decided by Division Bench of Tipnis and Rebello, JJ., proceeds on a different set of facts. In the case before me as in the case of Ramkrishna Bhagoo before the Division Bench in Writ Petition No. 2115 of 1996 and Baburam Rameshwar in Writ Petition No. 1036 of 1997, the employees had submitted written applications to the Industrial Court in the reference proceedings categorically stating that they had compromised the matter with the employer, settled the dispute and had no claim against the employer and had accepted re-employment. They had earlier been paid their full claim of gratuity for the earlier period of service.

18. In the circumstances mentioned above, Shri Bapat is justified in placing reliance on the decision of the Division Bench in Ramkrishna Bhagoo's case in Writ Petition No. 2115 of 1996 and of Rebello, J., in Baburam Rameshwar's case (Writ Petition No. 1036 of 1997). There is no error of law or of jurisdiction in the concurrent findings recorded by the two Authorities that the petitioner was not in continuous service from 25th April, 1971 to 1st December, 1993: There is a categorical admission of the petitioner in the application dated 21st February, 1990 that he had accepted fresh employment and that he had settled the earlier dispute with the employer. The petitioner had been paid the amount of Rs. 3697.20 on 22nd October, 1990. What remains to be paid to the petitioner is

interest at the rate of 12% p.a. for the delayed payment in respect of the payment of Rs. 3697.20. The period for which interest is to be paid would be from 18th February, 1982 till 22nd October, 1990. Similarly, for the subsequent payment of Rs. 12,532.05 on 7th April, 1994 the first respondent would be liable to pay interest for the period from 1st January, 1994 to 7th April, 1994.

19. Hence, I pass the following order.

i) The findings recorded by the two authorities below on the question as to whether the petitioner was in continuous service from 25th April, 1971 to 1st December, 1993 are hereby confirmed. Writ Petition is liable to be rejected subject, however, to the petitioner's claim for interest at the rate of 12% p.a for the delayed payment in respect of the following sums of money.

a) Interest at the rate of 12% p.a. for the period from 18th February, 1982 to 22nd October, 1990 on the sum of Rs. 3697.20; and

b) interest at the rate of 12% p.a. for the period from 1st January, 1994 to 7th April, 1994 on the sum of Rs. 12,532.05.

Payment of interest as above is to be made within the period of six weeks from today.

20. Subject to the above direction regarding payment of interest, rule in the petition is discharged. There will, however, be no order as to costs.

21. Petition rejected with directions.