

(2015) 03 KL CK 0168

In the High Court Of Kerala

Case No : Writ Petition (C) Nos. 13911, 13915 and 13916 of 2012

Sreeja B.

APPELLANT

Vs

Regional Joint Labour Commissioner and Others

RESPONDENT

Date of Decision : 05-03-2015

Acts Referred:

Industrial Disputes Act, 1947 — Section 25B(2), 25F
Payment of Gratuity Act, 1972 — Section 2A, 2A(2), 4

Citation : (2015) 146 FLR 1075 : (2015) 2 KHC 427 : (2015) 2 KLT 707 : (2015) LLR 826

Hon'ble Judges : K. Vinod Chandran, J

Bench : Single Bench

Advocate : B. Ashok Shenoy, Lakshmi B. Shenoy, K.V. George and K.P. Mehaboob Sheriff, for the Appellant; Manoj Kunjachan, Government Pleader, K.N. Rajani, SC, Advocates for the Respondent

Final Decision : Allowed

Judgement

K. Vinod Chandran, J.—The petitioners in all the above writ petitions raise similar contentions in their claim for entitlement of gratuity under the 2nd respondent Bank.

The facts are that all the petitioners had service exceeding 4 years and 9 months in the 2nd respondent Bank. Their claim for gratuity made before the Controlling Authority the 3rd respondent under the Payment of Gratuity Act, 1972, was upheld under Section 2A of the Act. However, on appeal, the Appellate Authority reversed the same accepting the contention of the employer that the gratuity entitlement would arise only on completion of five continuous years of service.

By Section 4 of the Act, the gratuity entitlement arises after an employee has "rendered continuous service for not less than five years." The continuous service has been defined in Section 2A as inserted by Act 26 of 1984.

"2A Continuous service.--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) Where an employee not being an employee employed in a seasonable establishment is not in continuous service within the meaning of Clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer--

(a) for the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than--

(i) one hundred and ninety days, in the case of any employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) two hundred and forty days, in any other case,"

2. By sub-section (1) continuous service means uninterrupted service including interruption, on account of sickness, accident, leave, absence from duty without leave etc., as long as the absence is not treated as a break in service, by a specific order. Sub-section (2) specifically deems continuous service within any period of one year, not coming within the meaning of Clause (1), to be continuous service, if in the preceding period of twelve calendar months, the workman has worked for 240 days. Hence by a deeming provision, the Statute provides for the service in any twelve months of a five year period to be treated as continuous service, if the employee has more than 240 days of service.

3. Section 25B(2) of the I.D. Act provides in pari materia deeming provision, wherein a workman who is not in continuous service for a period of one year or six months is deemed to be in continuous service, if he has, during the period of twelve calendar months preceding the date of calculation, 240 days service. The Hon"ble Supreme Court, considering the same in Surendra Kumar Verma and Others Vs. Central Government Industrial Tribunal-Cum-Labour Court, New Delhi and Another, AIR 1981 SC 422 : (1980) LabIC 1292 : (1981) 1 LLJ 386 : (1980) 4 SCC 443 : (1981) 1 SCR 789 : (1981) 1 SLJ 107 held so:

"The provision appears to be plain enough. Section 25F requires that a workman should be in continuous service for not less than one year under an employer before that provision applies. While so, present Section 25B(2) steps in and says that even if a workman has not been in continuous service under an employer for

a period of one year, he shall be deemed to have been in such continuous service for a period of one year, if he has actually worked under the employer for 240 days in the preceding period of twelve months. There is no stipulation that he should have been in employment or service under the employer for a whole period of twelve months. In fact, the thrust of the provision is that he need not be. That; appears to be the plain meaning without gloss from any source."

4(3). Following the aforesaid decision, the Madras High Court in a decision reported in 1998 LLR 1072 *Mettur Beardsell Ltd. v. Regional Labour Commissioner* held that the principle squarely applies in the case of the provisions of the Gratuity Act. This Court is inclined to follow the said decision, which is in consonance with the deeming provision.

5(4). The above principle has to be tested on the facts of the present cases. This Court is referring to the facts only in WP (C) No. 13911/2012. Ms. Sreeja B., the petitioner therein, was appointed on 18/09/2002 and left service on 30/06/2007. Hence the computation has to be done on 01/07/2007 taking the preceding twelve calendar months from then on. She has a continuous twelve month period of four years till 01/07/2003. After her appointment on 18/09/2002 till 30/06/2003 she would have around 295 days service. Hence in the preceding 12 months, from 30/06/2003, the petitioner if having more than 240 days service qualifies her first year to be treated as continuous service, for the purpose of Section 4 as per Section 2A of the Payment of Gratuity Act.

6(5). The Hon''ble Supreme Court in *Aneeta Hada Vs. Godfather Travels and Tours Pvt. Ltd.*, AIR 2012 SC 2795 : (2012) 2 BC 638 : (2012) 108 CLA 480 : (2012) 172 CompCas 76 : (2012) 2 CompLJ 433 : (2012) CriLJ 2525 : (2012) 5 CTC 101 : (2012) 2 JCC 113 : (2012) 2 RCR(Criminal) 854 : (2012) 4 SCALE 644 : (2012) 5 SCC 661 : (2012) 113 SCL 564 : (2012) AIRSCW 2693 : (2012) 3 Supreme 416 , extracted the oft quoted opinion in *East End Dwelling Co. Ltd. v. Finsbury Borough Council* 1952 AC 109, which is extracted hereunder:

"If you are bidden to treat an imaginary state of affairs as real, you must surely unless prohibited from doing so, also imagine as real the consequences and incidents, which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it... The Statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

The said principle was said to have been consistently followed by the Hon''ble Supreme Court in a Constitution Bench decision reported in *State of Tamil Nadu Vs. M/s. Arooran Sugars Ltd.*, (1996) 8 AD 473 : AIR 1997 SC 1815 : (1996) 10 JT 116 : (1996) 8 SCALE 71 : (1997) 1 SCC 326 : (1996) 8 SCR 193 Supp : (1997) AIRSCW 1188 . (*State of Tamil Nadu v. M/s. Arooran Sugars Ltd.*). Hence when there is a deeming provision as in Section 2A(2) wherein the continuous service in twelve calendar months is deemed to be 240 days service, in 12

preceding months and Section 4 also refers to continuous service; the five year period has to be treated as 240 days service in every preceding twelve months, as on the date of computation which later date is the date of termination. The petitioners all of whom would be entitled to gratuity if the said condition is satisfied.

7(6). In fact before the Controlling Authority, two contentions were raised by the respondent Bank as to the employer-employee relationship and the entitlement of the gratuity on the basis of continuous service of five years. Both the issues were found in favour of the employees and against the management, in the order of the Controlling Authority. In appeal, specifically the Appellate Authority found that the issue of employer-employee relationship is not gone into, since the entitlement is found against the employee. Hence the matter is remanded back to the Appellate Authority for fresh consideration on the issue of employer-employee relationship. The parties shall appear before the Appellate Authority and the Appellate Authority shall consider the issue in accordance with the observation made herein above within a period of six months from the date of receipt of a copy of this judgment.

The order of the Appellate Authority in all the above writ petitions would stand set aside, to the extent noticed hereinabove. Writ petitions would stand allowed and the matter is remanded as directed herein.