

(2016) 06 GUJ CK 0010
In the Gujarat High Court

Case No : Special Civil Application No. 1575 of 2016

State of Gujarat

APPELLANT

Vs

Kiritsinh Navalsinh Jadeja

RESPONDENT

Date of Decision : 06-06-2016

Acts Referred:

Payment of Gratuity Act, 1972 — Section 4

Citation : (2016) 150 FLR 634 : (2016) 4 LLN 140

Hon'ble Judges : Paresh Upadhyay, J.

Bench : Single Bench

Advocate : Ms. Manisha Shah, Government Pleader, for the Appellant; Mr. Premal S. Rachh, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Paresh Upadhyay, J.—;Challenge in this petition is made by the Employer ? State to the order passed by the Controlling Authority under the Payment of Gratuity Act, 1972 at Jamnagar in Gratuity Case No. 83 of 2013 dated 13.11.2013. By the impugned order, the Controlling Authority has held that, the employee is entitled to gratuity, also for the period from 25.04.1985 to 24.04.1995 - the period which was excluded by the employer from the total period of service from 25.04.1985 to 30.06.2010. The appeal against the said order is not entertained by the Appellate Authority at Rajkot and the same is dismissed vide order dated 02.12.2014 in Appeal No. 82 of 2014.

2. The relevant facts as emerging from record are as under.

2.1 The respondent employee had initially joined the service on 25.04.1985. He was taken as a daily wager labouror.

2.2 Subsequently, with effect from 25.04.1995, he was taken up in the regular pay-scale of Rs.750-940 (then prevailing).

2.3 He retired on attaining the age of superannuation on 30.06.2010.

2.4 He is paid his pension and gratuity under the Gujarat Civil Services (Pension) Rules, 2002. The said payment is made considering his service from 25.04.1995 to 30.06.2010.

2.5 He is not paid anything towards the service for the period from 25.04.1985 to 24.04.1995.

2.6 It is the case of the employee that, he is entitled to receive gratuity for the entire service i.e. from 25.04.1985 to 30.06.2010. It is also his case that he is already paid gratuity for his service for the period from 25.04.1995 to 30.06.2010 under the provisions of The Gujarat Civil Services (Pension) Rules, 2002 and therefore he does not claim gratuity under the provisions of The Payment of Gratuity Act, 1972 for the said period. However, it is his case that, for the period from 25.04.1985 to 24.04.1995 he should be paid gratuity under the provisions of The Payment of Gratuity Act, 1972, since for the said period, he is not paid gratuity under the Gujarat Civil Services (Pension) Rules, 2002. He had asked for it, which was denied and under these circumstance, he approached the Controlling Authority and the Controlling Authority has accepted the claim vide order dated 13.11.2013.

2.7 By the impugned order dated 13.11.2013, the employer - State is directed to make payment of gratuity under the Payment of Gratuity Act for the period from 25.04.1985 to 24.04.1995 amounting to Rs. 62,856/- plus statutory interest thereon.

2.8 It is noted that, the said order of the Controlling Authority dated 13.11.2013 was challenged by the employer in Gratuity Appeal No. 82 of 2014. The same was filed after the period of limitation. The Appellate Authority has not entertained the Appeal being barred by limitation. Whether the Appellate Authority should have condoned the delay or not is not the subject matter of this petition. Parties have concentrated on merits of the matter and this Court has also decided the issue on merits, as to whether the order of the Controlling Authority directing the payment of gratuity for the period from 25.04.1985 to 24.04.1995 is legal.

3. It is noted that, this petition was heard along with number of other matters involving identical, similar or nearer issue. Reference is made to:- (i) the order dated 22.04.2016 in Special Civil Application No. 213 of 2016, (ii) order dated 10.03.2016 in Special Civil Application No. 20755 of 2015, (iii) order dated 12.01.2016 in Special Civil Application No. 20146 of 2015 and (iv) order dated 27.01.2016 in Special Civil Application No. 1219 of 2016. For the reasons recorded in the said orders, the authorities of the Government of Gujarat in various departments including:- (i) the Finance Department, (ii) the Labour and Employment Department, (iii) the Urban Housing and Urban Development Department, (iv) the Energy and Petrochemicals Department, (v) the Panchayat Rural Housing and Rural Development Department, (vi) the Women and Child Development Department and (vii) the Commissioner of Labour were joined as

party respondents. Learned Government Pleader herself has appeared on behalf of the said authorities and has assisted the Court, along with other learned advocates for the respective employer.

4. Heard learned advocates.

5.1 Ms. Manisha Shah, learned Government Pleader for the State Authorities (Employer) has submitted that, in view of the liberal policy of the Government, on completion of certain years of service as a daily wager, the concerned employee is taken on the regular pay-scale and in due course of time his service is regularised for all purposes, including for the purpose of payment of pension and gratuity. It is submitted that, the concerned employee having been regularised as such, would be entitled to claim not only gratuity but also pension under the Gujarat Civil Services (Pension) Rules, 2002, subject to stipulations made thereunder. It is submitted that, what the employee gets under the State Rules is more beneficial to him, as compared to what he would have got under the Payment of Gratuity Act, 1972, had his service not been regularised. It is submitted that, after having accepted the benefits under the State Rules for the part of the total service, the employee can not be permitted to claim gratuity under the Payment of Gratuity Act, 1972. It is submitted that, it does not matter whether the said claim is for the same period or for the different period. Learned Government Pleader has taken this Court through the provisions of the Payment of Gratuity Act, 1972 and the Gujarat Civil Services (Pension) Rules, 2002. Reliance is also placed on the decision of the Chhattisgarh High Court in the case of Smt. Pramodani Mishra v. State of Chhattisgarh recorded on Writ Petition No. 3168 of 2010 dated 04.07.2012.

5.2 It is submitted that, the view taken by the Controlling Authority and the Appellate Authority in this case is contrary to the provisions of the Act and would be inconsistent with the Gujarat Civil Services (Pension) Rules, 2002. It is submitted that, for this reason, the impugned orders passed by the authorities below be interfered with.

6.1 On the other hand, learned advocate for the employee has submitted that, even if the break-up of the total service of the employee into two parts, as ? qualifying? and ?non-qualifying? may be valid in view of the provisions of the Gujarat Civil Services (Pension) Rules, 2002, it can not result in complete negation of the Payment of Gratuity Act, 1972 more particularly in view of Section 14 thereof. It is submitted that, had the employee claimed gratuity under both the provisions i.e. ?the Act? and ?the Rules? for the same period, it can not be accepted, however, that is not the claim of the employee. What is claimed by the employee is only that, he be paid gratuity under the provisions of The Payment of Gratuity Act, 1972, for the period for which he is not paid gratuity under the Gujarat Civil Services (Pension) Rules, 2002. Reliance is placed on the decision of the Himachal Pradesh High Court in the case of State of H.P. v. Lashkari Ram reported in 2008 (I) LLJ 137 in Civil Writ Petition No.150 of 2004 dated 09.05.2007.

6.2 It is submitted that, the authorities below have not committed any error in accepting the claim of the employee and therefore this petition be dismissed.

7. Having heard learned advocates for the respective parties and having gone through the material on record, this Court finds that the point for consideration before this Court in this case is, that when an employee is paid his gratuity by the Employer (State) under the provisions of the Gujarat Civil Services (Pension) Rules, 2002, for the part of the total length of his service, whether he can claim gratuity under the provisions of The Payment of Gratuity Act, 1972, for the remaining period of his service i.e. for the period for which he is not paid gratuity under The Gujarat Civil Services (Pension) Rules, 2002.

8.1 For the above purpose, relevant provisions of the Payment of Gratuity Act, 1972 and the Gujarat Civil Services (Pension) Rules, 2002 need to be kept in view. They are as under.

8.2 The relevant portion of the section 4 of the Act 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, 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:

(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 subsection (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 [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."

8.3 "Employee" is defined in the Act as under.

"2(e) "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity"

8.4 Other provisions of the Act, which may have bearing on the point at issue, are as under.

8.4.1 "2(q) " retirement " means termination of the service of an employee otherwise than on superannuation;"

8.4.2 "2(r) "superannuation", in relation to an employee, means the attainment by the employee of such age as is fixed in the contract or conditions of service as the age on the attainment of which the employer shall vacate the employment;"

8.4.3 "2(s) "wages" means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employments and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance."

8.5 The Payment of Gratuity Act, 1972 is the Central Act and the Gujarat Civil Services (Pension) Rules, 2002 is the set of Rules framed by the State in exercise of its power under proviso to Article 309 of the Constitution of India. The Act would prevail over the Rules. Even otherwise there is specific provision in the Act, which reads as under.

"14. Act to override other enactments, etc. - The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."

9. The relevant provisions of the Gujarat Civil Services (Pension) Rules, 2002, relating to payment of gratuity to the employee, are as under.

9.1 "Rule-9(68)." Qualifying Service" means service rendered while on duty or otherwise which may be taken in account for the purpose of pension and gratuity admissible under Gujarat Civil Services (Pension) Rules."

9.2 "Rule-25. Qualifying Service : Subject to the provisions of these rules, qualifying service of a Government employee, means and includes,-

(i) all service including service on probation rendered on a regular establishment in any capacity whether, temporary or permanent, interrupted or continuous but it shall not include

(a) service in non-pensionable establishment,

- (b) service paid from contingencies,
- (c) service rendered in daily rated establishment,
- (d) actual periods of break in service if any, between spell of service,
- (e) service prior to resignation, removal or dismissal,
- (f) service as an apprentice,
- (g) service on fixed pay basis, and
- (h) service on contract basis.
- (ii) all service rendered in work charged establishment provided that the total service put in, as such is five years or more,
- (iii) foreign service,
- (iv) Vacation taken by Government employee in vacation department,
- (v) all periods of leave including extraordinary leave upto a maximum of thirty six months during entire service,
- (vi) addition to qualifying service admissible under rule ? 37,
- (vii) services rendered as Kotwal by a Government employee after regular appointment in the regular time scale.
- (viii) Services rendered as full time attendant by a Government employee before his regular appointment in class IV service, and
- (ix) services rendered under the Central Government/Central Government Autonomous bodies having pension scheme, by a Government employee who is absorbed in Government.
- (x) Pensionable service rendered by an employee in a grant-in-aid institution the pension liability in respect of which is borne by the Government to the extent as may be ordered by the Government from time to time."

9.3 "Rule-80. Amount of Service Gratuity/Pension :

(1) In the case of a Government employee retiring on Superannuation, Retiring, Invalid, Wound and Injury or Compensation Pension before completing qualifying service of ten years, the amount of service gratuity shall be one month's pay for each completed year of service.

(2)

(a) In the case of a Government employee retiring on Superannuation, Retiring, Invalid or Compensation Pension in accordance with the provisions of these rules after completing qualifying service of not less than thirty-three years, the amount of pension shall be fifty per cent of the pensionable pay subject to minimum amount of Rs. 1275 and maximum amount of Rs. 13000.

(b) In the case of a Government employee retiring on Superannuation, Retiring, Invalid or Compensation Pension in accordance with the provisions of these rules before completing qualifying service of thirty-three years but after completing qualifying service of the ten years, the amount of pension shall be proportionate to the amount of pension under clause (a) and in no case the amount shall be less than minimum.

(3) In calculating the length of qualifying service, fraction of a year equal to six months and above shall be treated as a complete year and reckoned as qualifying service.

(4) The amount of pension finally determined under clause (a) or clause (b) of sub-rule (2), shall be expressed in whole rupees and where the pension contains a fraction of a rupee it shall be rounded off to the next higher rupee."

Note: The pay for the purpose of service gratuity admissible under sub-rule (1) shall be the last drawn pay plus dearness allowance admissible on the date of actual retirement.

9.4 "Rule-81. Death ? cum ? Retirement Gratuity :

(1) (a) A Government employee, who has become eligible for service gratuity or pension under Rule 80 shall, on his retirement, be granted death-cum-retirement gratuity equal to one half of his pay last drawn for each completed year of qualifying service, subject to a maximum of 16.1/2 times the pay."

9.5 "Rule-26. Conditions subject to which service qualifies : (1) The service of a Government employee shall not qualify unless his duties, pay and allowance are regulated by the Government or under conditions determined by the Government.

(2) For the purposes of sub-rule (1) the expression ?service? means service under Government and paid by Government from the Consolidated Fund of State."

9.6 "Rule-27. Age after which service counts for pension : Service rendered by a Government employee after attaining the age of eighteen years shall only be counted for pension."

9.7 "Rule-34. Interruption in service : (1) Unless there are specific entries regarding break in service in the service record of the Government employee, all service from the date of entry to the date of retirement shall be treated as continuous ? subject to the condition that in case if there is interruption in service of a period of more than three months, the entire interruption shall be disregarded while working out the qualifying service, interruption upto three months being treated as qualifying service.

(2) All unauthorised absences not regularised by grant of leave and all leave of any kind granted for a continuous period exceeding five years shall constitute a brake in service and shall be dealt with as per sub-rule (1)."

9.8 "39. Non-pensionable service : Notwithstanding anything contained in rule 25, the following shall not be pensionable service:

(a) Government employees who are paid for services rendered for Government but who are not retained for whole time in the public service,

(b) Government employees who are not in receipt of pay but are remunerated by honoraria,

(c) Government employees holding posts which have been declared to be non-pensionable,

(d) Holders of all tenure posts in the Medical Department, whether private practise is allowed to them or not, when they do not have an active or suspended lien on any other permanent posts under Government."

10. The provisions of the Payment of Gratuity Act, 1972 need to be read and applied keeping in view the observations of Honourable the Supreme Court of India in the case of Ahmedabad Pvt. Primary Teachers' Association v. Administrative Officer reported in AIR 2004 SC 1426. Para: 6 and 7 of the said decision read as under.

"6. The Act is a piece of social welfare legislation and deals with the payment of gratuity which is a kind of retiral benefit like pension, provident fund etc. As has been explained in the concurring opinion of one of the learned Judges of the High Court 'gratuity in its etymological sense is a gift, especially for services rendered, or return for favours received.' It has now been universally recognised that all persons in society need protection against loss of income due to unemployment arising out of incapacity to work due to invalidity, old age etc. For the wage earning population, security of income, when the worker becomes old or infirm, is of consequential importance. The provisions contained in the Act are in the nature of social security measures like employment insurance, provident fund and pension. The Act accepts, in principle, compulsory payment of gratuity as a social security measure to wage earning population in industries, factories and establishments.

7. Thus, the main purpose and concept of gratuity is to help the workman after retirement, whether, retirement is a result of rules of superannuation, or physical disablement or impairment of vital part of the body. The expression 'gratuity' itself suggest that it is a gratuitous payment given to an employee on discharge, superannuation or death. Gratuity is an amount paid unconnected with any consideration and not resting upon it, and has to be considered as something given freely, voluntarily or without recompense. It is sort of financial assistance to tide over postretiral hardships and inconveniences."

11. If the above quoted provisions of the Payment of Gratuity Act, 1972 and the Gujarat Civil Services (Pension) Rules, 2002 are conjointly and harmoniously read and applied in the facts of the present case, while keeping in view the observations of Honourable the Supreme Court of India in the case of

Ahmedabad Pvt. Primary Teachers' Association (supra), the picture which has emerged before this Court is as under.

11.1 It is the case of the employee that, he is entitled to receive gratuity for the entire service i.e. from 25.04.1985 to 30.06.2010. It is also his case that he is already paid gratuity for his service for the period from 25.04.1995 to 30.06.2010 under the provisions of The Gujarat Civil Services (Pension) Rules, 2002 and therefore he does not claim gratuity under the provisions of The Payment of Gratuity Act, 1972 for the said period. However, it is his case that, for the period from 25.04.1985 to 24.04.1995 he should be paid gratuity under the provisions of The Payment of Gratuity Act, 1972, since for the said period, he is not paid gratuity under the Gujarat Civil Services (Pension) Rules, 2002.

11.2 It is not in dispute that, had the service of the employee been not regularised, he would have been paid gratuity under the Payment of Gratuity Act, 1972 for the entire service.

11.3 The break-up of the total service of the employee into two parts, as 'qualifying' and 'non-qualifying' as is done by the Employer in this case, may, at the first blush, appear to be valid in view of the provisions of the Gujarat Civil Services (Pension) Rules, 2002. Specific reference can be made to Rule 25(i)(c), (g), (b) and (ii) read with Rule 9(68). Applying the said pair of Rules, the stand of the State that only part of the service is accepted to be qualifying service for the purpose of payment of gratuity under 'the Rules', may not be discarded, that too when the legality of 'the Rules' is not the subject matter of the petition, further when the challenge in this petition is to the order passed by the Controlling Authority under the Payment of Gratuity Act, 1972. However, the said stand of the State can not be accepted to the extent that it will negate even the Payment of Gratuity Act, 1972 along with Section 14 thereof. Had the employee claimed gratuity under both the provisions i.e. 'the Act' and 'the Rules' for the same period, it can not be accepted. However, that is not the case. The claim of the employee is that, he be paid gratuity under the provisions of The Payment of Gratuity Act, 1972, for the period for which he is not paid gratuity under the Gujarat Civil Services (Pension) Rules, 2002. No provision of the Gujarat Civil Services (Pension) Rules, 2002 can authorise the State to dis-entitle the employee from this claim. Only because, for some part of the service, the employer pays gratuity at better rate is no ground to wipe out the earlier service of the employee for the purpose of payment of gratuity under the Act.

12.1 It is noted that, identical issue had cropped up before the Himachal Pradesh High Court in the case of State of H.P. v. Lashkari Ram reported in 2008 (1) LLJ 137 (Civil Writ Petition No. 150 of 2004, dated 09.05.2007).

12.2 Para:10 of the said judgment reads as under.

"10. Two questions which require deep consideration by this Court are:

(1) Whether the workman is entitled to get gratuity for the period he remains on

daily wages basis under the Payment of Gratuity Act, 1972 and thereafter is he entitled to get the gratuity under the CCS (Pension) Rules, 1972 for the period commencing from regularisation to the date of superannuation.

(2) Whether the workman's entire period w.e.f. his initial date of engagement on daily wages basis, including the period of regularisation up to superannuation, will entitle him to get the gratuity either under the Payment of Gratuity Act, 1972 or under the CCS (Pension) Rules, 1972."

12.3 After considering the various decisions of Honourable the Supreme Court of India, the Court held as under.

"23. In view of the above discussion, the Controlling Authority was required to calculate the gratuity for the period w.e.f. March, 1982 to December 31, 1993 under the Payment of Gratuity Act, 1972 and for the remaining period i.e. January 1, 1994 to January 31, 2001 (regular period only), the State was bound to pay the gratuity under the CCS (Pension) Rules, 1972. Accordingly, the writ petition is disposed of with the following directions:

(i) The workman is entitled to get the gratuity for the period w.e.f. March, 1982 to December 31, 1993 under the Payment of Gratuity Act, 1972 with interest as per law laid down by the Hon'ble Supreme Court in *H. Gangahanume Gowda v. Karnataka Agro Industries Corpn. Ltd.*, [AIR 2003 SC 1526] (supra); (ii) The workman is held entitled and is to be paid the gratuity w.e.f. January 1, 1994 to January 31, 2001 (sic) (regular period) under the CCS (Pension) Rules, 1972 with interest @ 9% per annum. The copy of the judgment be sent to the Secretary Labour & Employment for its distribution to the Controlling as well as Appellate Authority constituted under the Payment of Gratuity Act, 1972."

12.4 The view taken by this Court in the present case is further fortified by the above decision.

13.1 Reference can also be made to the decision of the Division Bench of this Court in the case of *Chief Officer v. Mohmad Irshad Husenbhai Baloch* recorded on Letters Patent Appeal No. 214 of 2011 dated 03.02.2001.

13.2 Reference also needs to be made to the decisions of this Court in the case of (i) *Vadodara Mahanagar Seva Sadan v. Vimlaben Natubhai Sharma* recorded on Special Civil Application No.6683 of 2013 dated 26.04.2013 and (ii) *Vadodara Mahanagar Seva Sadan v. Subhashbhai Khodabhai Solanki* recorded on Special Civil Application No. 8744 of 2013 dated 03.07.2013 and 25.07.2013.

14. The decision of the Chattishgarh High Court in the case of *Pramodani Mishra* (supra) as relied by the learned advocates for the employer would not take the case of the employer any further for the reason that, the claim of the employee in the said case was for pension and gratuity under the State Rules like the Gujarat Civil Services (Pension) Rules, 2002, under which the service as a daily wagger was not accepted as pensionable service. Whether the said employee was entitled to gratuity under the provisions of the Payment of Gratuity Act, 1972 or

not was not the issue before the High Court. It needs to be noted that in the present case, the claim of the employee, as noted above is to the effect that, he be paid gratuity under the provisions of The Payment of Gratuity Act, 1972, for the period for which he is not paid gratuity under the Gujarat Civil Services (Pension) Rules, 2002.

15. In view of above, in the facts of the present case, it is held that when the employee is paid his gratuity by the Employer (State) under the provisions of the Gujarat Civil Services (Pension) Rules, 2002 for the part of the total length of his service, he is not dis-entitled to claim gratuity under the provisions of The Payment of Gratuity Act, 1972 for the remaining period of his service i.e. for the period for which he is not paid gratuity under The Gujarat Civil Services (Pension) Rules, 2002, if otherwise there is no disqualification under the provisions of the Act. In the present case therefore it is held and it needs to be directed that, the employee is entitled to claim gratuity under the Payment of the Gratuity Act, 1972 for the period for which he is not paid gratuity under the Gujarat Civil Services (Pension) Rules, 2002.

16. For the reasons recorded above, the following order is passed.

16.1 This petition is dismissed.

16.2 The impugned order passed by the Controlling Authority under the Payment of Gratuity Act, 1972 at Jamnagar in Gratuity Case No. 83 of 2013 dated 13.11.2013 is confirmed.

16.3 Rule is discharged. No order as to costs.