

(1996) 07 CAL CK 0044
In the Calcutta High Court
Case No : C.R. No. 143 (W) of 1987

Sukumar Mukherjee and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 24-07-1996

Acts Referred:

Aluminium Corporation of India Limited (Acquisition and Transfer of Aluminium Undertaking) Act, 1984 — Section 12, 12(2), 14, 3, 6
Constitution of India, 1950 — Article 14
Industries (Development and Regulation) Act, 1951 — Section 18AA
Payment of Gratuity Act, 1972 — Section 2(c)

Citation : 100 CWN 1170

Hon'ble Judges : Nikhil Nath Bhattacharjee, J

Bench : Single Bench

Advocate : Kashi Kanta Maitra and Amulya Kr. Mukherjee, for the Appellant; Alok Kr. Ghosh and Srikanta Maitra, for the Respondent

Final Decision : Allowed

Judgement

Nikhil Nath Bhattacharjee, J.—The writ petitioners. 21 (sic).number, joined the Aluminium Corporation of India Limited in its factory at Jaykaynagar, Asansol on different dates as stated in paragraphs (sic) to 22 of the writ application and they were on the roll of employment of the said Corporation on 15th September. 1973 when a lockout in the said factory was declared by the Corporation management. Although the factory was locked but the Officers including the writ petitioners were allowed to continue to do their duty. However from 1st June; 1974 the management of the Corporation started issuing letters to the writ petitioners and others asking them to go on, leave without pay until further notice. By an order dated 1st May. 1978 issued by the Govt, of India under sub-section 2 of Section 18AA of the Industries (Development and Regulation Act), 1951 respondent no. 4. Bharat Aluminium Company Ltd. (in short BALCO) was appointed as the authorised person for taking over the management of the said Corporation. in relation to its (sic) undertaking at Jaykaynagar.

2. By virtue of Section 3 of the Aluminium Corporation of India Ltd. (Acquisition and Transfer of Aluminium Undertaking) Act, 1984 w.e.f. the appointed day i.e. 2nd June, 1984, the Aluminium undertaking of the said corporation and the right, title and interest of the Corporation in relation to that undertaking stood transferred and vested in the Central Govt.

3. By a notification dated 21st June, 1984 issued under sub-section (1) of Section 6 of the said Aluminium Corporation Acquisition and Transfer of Aluminium Undertaking Act, 1984 the Central Govt, directed that the aluminium undertaking at Jaykaynagar. Asansol of the Aluminium Corporation of India Ltd. at Calcutta and the right, title and interest of the company in relation to that undertaking, which have vested in the Central Govt. u/s 3 of the said Act, shall, instead of continuing to vest in the Central Govt., vest in the Bharat Aluminium Company Ltd. w.e.f. 2nd June, 1984.

4. After the take over the authorised Agent M/S.-BALCO inducted the erstwhile employees of the Aluminium Corporation of India Ltd. by phases on a consolidated salary as drawn on September 1973. the workman of the erstwhile company after series of discussions and negotiations entered into a bipartite agreement to restart the plant by phases. One of the terms of the settlement was that the workmen who joined will be given notional continuity of service in respect of their past services under the erstwhile company and those who could not be given any employment on, commencement of operation in the factory shall be given terminal benefits including gratuity as per payment of Gratuity Act. The President and Secretary of the aluminium undertaking at Jaykaynagar Officers' Association submitted memoranda to the concerned Ministry of the Govt, of India drawing attention to the fact that where as gratuity on notional continuity of service had been granted to the workmen employees already working after the take over and also to those who had been declared superannuated by the authorised Agent or those who had left tendering resignation. Such representations were also submitted before the Managing Director of BALCO. It was pointed out that most of the officers inducted in had experience of 15/20 years with the erstwhile management but they (sic) considered as fresh recruits without giving them any continuity of (sic) which caused loss and serious injustice to them.

5. Meanwhile the writ petitioners individually filed claims before the respondent no. 5 Commissioner of Payments appointed under sub-section 14(1) of the Acquisition and Transfer of Aluminium Undertaking Act, 1984 in prescribed form duly filed in claiming gratuity for the period from the date of entry into the erstwhile company upto 1st June, 1984. the petitioners being the employees of the erstwhile company are entitled to the payment of gratuity notwithstanding the lockout or cessation of work which was not due to any fault of them and irrespective of uninterrupted or interrupted service. Payment of gratuity is mandatory in case of termination of employment after one has rendered continuous service for not less than 5 years. The gratuity admissible shall not

exceed 20 months" wages for every completed year of service or part thereof in excess of 6 months and such gratuity is to be paid 15 days salary at the rate last drawn by the employee. The Commissioner of Payments paid very meagre amounts to the writ petitioners in respect of their claims for their gratuity arising prior to the factory was put under lockout.

6. By a subsequent supplementary affidavit the writ petitioners have sought to make out that the employees who have in the meantime superannuated have been given gratuity of very meagre amounts by BALCO for the period since their induction into the undertaking after nationalisation as fresh entrants. This means that the writ petitioners have been deprived of their claims for gratuity for the lockout period, which benefit was given to the workmen by virtue of the bipartite settlement and thereby a discrimination has been effected by the present management

7. Therefore, by filing this writ application the petitioners have prayed for issuance of mandamus directing the respondents to pay full gratuity after treating notional continuity of service including to those who have already superannuated or left on tendering resignation.

8. Respondent Nos. 4, 9, 10 and H being the authorities of BALCO contest the writ application by filing an affidavit in opposition. It has been stated that, the writ petitioners have already taken, payment of gratuity as a full and final settlement from respondent no. 4 for the period to lockout. By a supplementary affidavit affirmed on 7th April. 1996 annexing a. comparative statement showing the payments of gratuity from the Commissioner of Payments and BALCO marked Annexure "O" to the said supplementary affidavit it has been stated that the writ petitioner nos. 1, 8, 9, 13, 16 and 18 and also those who have superannuated are entitled to further sums of money being the balance of their entitlement after adjusting the amounts they received from the Commissioner of Payment or as admissible from BALCO. In the affidavit-in-opposition to the said supplementary, affidavit what has been stressed is that the employment of the writ petitioners under BALCO is new service with new conditions of service and accordingly there cannot be any question of giving notional extension of service for the lockout period and further that during the lockout period some employees worked elsewhere drawing regular salary.

9. Section 12 of The Aluminium Corporation of India Ltd. (Acquisition and Transfer of Aluminium Undertaking) Act, 1984 runs as follows:

12. (1) Every-person who has been, immediately before the appointed day, employed in the Aluminium undertaking shall become,-

(a) on and from the appointed day, an employee of the Central Government; and

(b) where the Aluminium undertaking is directed u/s 6. to vest in the Bharat Aluminium Company, an employee of that company on and from the date of such vesting, and shall hold office or service under the Central Government or the

Bharat aluminium Company, as the case may be, with the same rights and privileges as to pension, gratuity and other matters as would have been admissible to him if there had been no such vesting and shall continue to do so unless and until his employment under the Central Govt, or the Bharat Aluminium Company, as the case may be, is duly terminated or until his remuneration and other conditions of service are duly altered by the Central Government or the Bharat Aluminium Company, as the case may be.

(2). Notwithstanding anything contained in the Industrial disputes act, 1947. or in any other law for the time being in force, the transfer of the services of any Officer; or other person employed in the Aluminium undertaking to the Central Government or the Bharat Aluminium Company shall not entitle such officer or other employee to any compensation under this Act or under any other law for the time being in force and no such claim shall be entertained by any court, tribunal or other authority.

10. This Section, in short, lays down that every employee of the erstwhile company shall be automatically an employee of the Central Govt/BALCO with the same rights and privileges as to pension, gratuity and other matters as would have been admissible to him if there had been no such vesting. This must mean that the rights and privileges including the right to receive gratuity in respect of the employees of the erstwhile company shall after vesting continue to remain with them. The workings of the Section do not indicate that the erstwhile employees shall after the take over be treated as new entrants. They are to continue with their rights and privileges including the right to receive gratuity as they enjoyed under the erstwhile company and the Central Govt, or BALCO as the case may be shall bear the burden of these employees. The provision is sufficiently indicative of notional continuity of service in respect of these employees and any contrary view to deprive them, of this benefit would be dehors the statute. True, the writ petitioners approached the Commissioner of Payments for grant of gratuity for the period of their service prior to 1984 if but this was clearly a fallacious approach, for the Commissioner of Payments has been provided u/s 14 of the Act for the purpose of disbursing amount payable to the company u/s 7 and 8 by way of compensation to the owners of the company or its shareholders and not for making any payment to the employees of the company. The right to receive compensation by any erstwhile employee has been specifically barred u/s 12(2) of the Act and that being so, there could be no occasion to the employees to run after the Commissioner Of Payments for paying gratuity to them for the period prior to the appointed day As Section 12 shows that this is the liability of the Central Govt, or BALCO and as in the case of the workmen of the company by virtue of bipartite settlement gratuity has been made admissible to the workmen on notional continuity of service, there can be no reason why the same privilege ought not to have been extended to the case of non-workmen employees including the writ, petitioners. However, the writ petitioners approached the Commissioner of Payments and admittedly some Amounts have been received by them. It has been urged that after they made

claims before the Commissioner of Payments and the Commissioner of Payments actually made certain payments, they should be estopped from claimed further gratuity from the Central Govt./BALCO. But it is a settled principle of law that there cannot be any estoppri against a statute. If the employees wrongly approached the Commissioner of Payments for payment of their gratuity for the period prior to nationalisation, it was for the commissioner of Payments, to make known to the employees that their right to continue in service had been amply safeguarded u/s 12 of the Act and that it is the Central Govt, or the BALCO who will have to settle such claims of the employees in due course. The Commissioner of Payments under the provisions of the statute could not settle such claims of the employees and such payments as made by the commissioner of Payments would not stand in the way of these employees getting balance sums after adjustments of the sums they received from the commissioner of Payments.

11. In the supplementary affidavit affirmed on 7th april 1996 annexing a comparative statement showing payments of gratuity received from the Commissioner of Payments and in respect of the employees who have superannuated from BALCO. marked Annexure *C to the said supplementary affidavit, it has been stated that the writ petitioner nos. 1, -8, 9, 13. 16 and 18 and also those who have since superannuated are entitled to further sum of money being the balance of their entitlement on account of gratuity after adjusting the amount they received from the Commissioner of Payments or from BALCO. This statement is opposed by the contesting respondents by stressing that the employment of the writ petitioners under BALCO is with new conditions of service and accordingly there cannot be any question of giving notional extension of service for the lockout period. It is further been stated that during lockout period some of the employees worked elsewhere drawing regular salary and accordingly they are not entitled to get notional extension of service. If the evidence is unequivocal that some employees engaged themselves in gainful employment elsewhere during toe lockout period, certainty they are not entitled to claim continuity of service for the said.period and draw gratuity for the said period. But those who lay idle and did Hot join any other establishment against regular salary, I do not understand why their claim for continuity of service for the purpose of granting full gratuity shall be ignored by the respondents. Under the Gratuity Act it is only for continuous service that an employee is entitled to its full advantage. Continuity of service has to be presumed u/s 12 of the Act which can be rebutted on cogent material. Then -ore, those who did not suffer break in service, there cannot be any reason to deny them the statutory benefit of continuity of service.

12. Mr. Kashi Kanta Maitra. learned Senior Advocate assisted by Amulya Kr. Mukherjee, learned Advocate, in his erudition and fairness submitted that the only point he would urge on behalf of the writ petitioners is about discrimination and placed his reliance on Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, , V.S. Murty and Others Vs. Deputy Chief Accounts Officer and Others, , Speed Post Judgement Volume XVI 1993 3 page 572, AIR 1967 SC

1427, 1979 Volume II LkJ 342, AIR 1986 SC 180. 1991 1 SCC 212. He submitted that continuous service u/s 2(c) of the Payment of. Gratuity Act, 1972 means uninterrupted service and includes service which is interrupted by sickness, accident, leave, Say off, strike or lockout or cessation of work not due to any fault of the employee concerned. Mr. Maitra submitted that Superme Court has laid down that the benefits of past service cannot be taken away and Article 14 of the Constitution of India must stand in the way of making discrimination between two classes of employees, namely workmen and non-workmen in respect of giving statutory benefit of payment of gratuity. He urged that if such discrimination is allowed, there would be an occasion for exercise of arbitrary power thereby violating the rule of law upon which the whole constitutional system is based. He emphasised that when the statute, namely. Acquisition and Transfer of Aluminium Undertaking Act provides that every person who has been immediately before the appointed day employee in the Aluminium undertaking shall become the employee of the Central Govt, and the BALCO enjoying the same rights and privileges as to pension, gratuity and other matters as. would have been admissible to him if there had been no vesting or takeover, denial of full gratuity to the writ petitioners would be beyond all predictable norms and would be antithesis to the Rule of law and concept of the equality principle ans enshrined under Article 14 of the Constitution of India.

13. On the other hand, Mr. Alok Kr. Ghosh, learned Advocate assisted by Mr. Srikanta Maitra appearing for the respondent relied on a decision rendered by me.in CO. No. 49998(W) of 1987 (Basudev (sic)Union of india & Ors wherein rejected the claim of the petitioner of (sic). case.(sic) (sic) (sic) to the cost while company to get the benefit of commuity of service. It would appear that the claim of the petitioner in the said case was disallowed by me on the ground that after the lockout of the erstwhile Aluminium Corporation of India Ltd. in its factory at Jaykaynagar and before the appointed day, the petitioner admitted accepted employment under different employers and drew salary on continuous jobs and that being the position there could not be any question of granting any fictional continuity of service to him. The ratio of the said decision cannot have any applicability to the present ease, as there has not been any admission or cogent evidence on record, in particular, against the writ petitioners that they worked elsewhere during the interregnum period and drew salary and other benefits.

14. Be It recorded, however that in case of any of the writ petitioners, if it is found that he worked in any other company during the period after lockout and before induction drawing salary, his case may be ignored by Respondent. But in respect of those who remained idle and starved during the said period there cannot be any reson for refusing to grant full permissible gratuity giving notional continuity of service. For the reasons aforesaid the write petition is allowed to the extent indicated below:

Let the notional continuity of service be given to the writ petitioners for the

purpose of computing full admissible gratuity with the rider that in case of such of the writ petitioners as have worked elsewhere during the period from the date of the lockout till the appointed day, with salary and emoluments drawn by them, they are not entitled to get the benefit of notional continuity of service. While computing such full admissible gratuity, adjustments shall be made in, respect of payments already received from the Commissioner of Payments or BALCO. as the case may be. the respondent no. 4 may in this respect consult the chart being Annexure "O" to the Supplementary affidavit dated 17th April, 1996 filed by the writ pensioner. Such computation shall be made by the Respondents no. 4, 9, 10 & 11 and appropriate orders passed within a period of. three months from this date.