

(1997) 03 BOM CK 0017

In the Bombay High Court

Case No : Writ Petition No. 1033 of 1993

The Divisional Controller, Maharashtra State Road Transport Corporation

APPELLANT

Vs

Kashinath Jairam Rahate and Others

RESPONDENT

Date of Decision : 27-03-1997

Acts Referred:

Constitution of India, 1950 — Article 227
Payment of Gratuity Act, 1972 — Section 2, 4

Citation : (1997) 99 BOMLR 471

Hon'ble Judges : B.N. Srikrishna, J

Bench : Single Bench

Final Decision : Allowed

Judgement

B.N. Srikrishna, J.—This writ petition under Article 227 of the Constitution of India is directed against an order 18th September, 1992 made by the Appellate Authority in Appeal (PGA) No. 5 of 1990 under the provisions of the Payment of Gratuity Act, 1972 (hereinafter referred to as "the Act").

2. The Petitioner is the Divisional Controller of Maharashtra State Road Transport Corporation, Sangli Division. The Maharashtra State Road Transport Corporation is a statutory Corporation carrying on the business of transporting passengers by Bus in the State of Maharashtra. The First Respondent is an ex-employee of the Petitioner. The First Respondent was employed as Art "A" Mechanic in 1966 in the Sangli Division of the Petitioner Corporation and was working in the Depot at Tasgaon. Under the Service Regulations the First Respondent was required to produce proof of his date of birth. Though the First Respondent had made a declaration at the time of joining of service that his date of birth was 22nd May, 1929, he did not produce the proof of his date of birth either by way of the certified extract from the Register of Birth and Deaths or the School Leaving Certificate. From time to time, the Petitioner called upon the First Respondent to produce his School Leaving Certificate, but for reasons known to himself, the

First Respondent failed to do so. Under the Service Regulations of the Petitioner Corporation the age of superannuation prescribed is 58 years. On account of the failure of the First Respondent to produce evidence as to date of birth, the Petitioner Corporation itself found out the name and address of the School last attended by the First Respondent and wrote to the said School asking for the date of birth of the First Respondent as on records. The School Authority disclosed that in the School Leaving Certificate issued to the First Respondent the date of birth recorded was 15th July, 1923. In view of the First Respondent's failure to produce documentary evidence as to the date of his birth, the Petitioner Corporation had continued him in service in the meanwhile. As soon as the Petitioner became aware of the correct date of birth of the First Respondent, as recorded in the First Respondent's School Leaving Certificate, the Petitioner Corporation superannuated him from service with effect from 31st December, 1986 as the First Respondent attained the age of superannuation. The First Respondent, thereafter, applied for gratuity from 1.8.1981 to 31.12.1986, but the Petitioner computed the gratuity payable to him for the service rendered from the date of joining till 31st July, 1981, the date on which the First Respondent was superannuated.

3. The First Respondent moved Application (PGA) No. 31 of 1987 claiming that he was entitled to be paid gratuity even for the service rendered between 1.8.1981 to 31.12.1986, though this period would be beyond his age of 58 years according to his true date of birth as reflected in the School Leaving Certificate. The Labour Court, by its order dated 16th October, 1990 dismissed the application. The First Respondent carried Appeal (PGA) No. 5 of 1990 before the Appellate Authority at Kolhapur. The Appellate Authority by its order dated 18th September, 1992 allowed the appeal and directed the Petitioner Corporation to pay the difference in the gratuity amount by treating the First Respondent as if he was in service upto 31st December, 1986, together with interest at the rate of 9 per cent per annum. Being aggrieved, the Petitioner Corporation is before this Court.

4. Mr. Sawant, learned Advocate for the Petitioner, contends that the Appellate Authority erred in taking the view that there was doubt about the true date of birth of the First Respondent and that the First Respondent was not entitled to be paid gratuity in respect of the period from 1.8.1981 to 31.12.1986, as in law he would not have been entitled to continue in service beyond 31st July, 1981. In my view, this contention is justified. Despite the fact that under the Service Regulations the First Respondent was required to produce proof of age, in the form of some acceptable document like the Birth Certificate or the School Leaving Certificate, the First Respondent failed to produce such documentary proof and by his act of omission managed to continue in service beyond 31st July, 1981. In fact, this led the Petitioner Corporation to trace and discover the name of the school last attended by the First Respondent, correspond with the school and obtain the School Leaving Certificate of the First Respondent. It was then realised that the correct date of birth of the First Respondent, as recorded

in his School Leaving Certificate, was 15th July, 1923. Having ascertained the correct date of birth, the Petitioner Corporation was obviously justified in terminating the service of the First Respondent by way of superannuation as soon as the First Respondent attained the age of 58 years reckoned from 15th July, 1923. Though the First Respondent actually attained the age of 58 years on 15th July, 1981, by his own failure to produce requisite proof of date of birth, the First Respondent managed to continue in service for the period from 1.8.1981 to 31.12.1986. The question for consideration is, whether service rendered by the First Respondent during the aforesaid period can be said to be "service" for the purpose of earning gratuity under the provisions of the Act?

5. The contingency upon which the First Respondent claimed gratuity u/s 4(1) of the Act was the ground of superannuation. "Superannuation" has been defined in Section 2(r) of the Act to mean 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 employee shall vacate the employment. Under the Service Regulations of the Petitioner Corporation 58 years was the age fixed upon attainment on which the First Respondent was required to vacate the employment. In my view, merely because the First Respondent gave a false declaration of age when he joined service and continued to suppress his true date of birth by his failure to produce proof in support of his date of birth, the service rendered by the First Respondent beyond the date on which he would have attained the age of 58 years does not become qualifying service for the purpose of payment of gratuity. Taking any other view would put premium on the dishonest conduct of the First Respondent. The decision relied upon by the Appellate Authority in support of the proposition that an employee is entitled to all benefits under the contract of employment, even for the period he was wrongfully in service, does not appear to be good law in view of the recent decision of the Supreme Court in *Radha Kishun Vs. Union of India (UOI) and Others*, . In fact, in this judgment the Supreme Court has gone so far as to say that public authority would be entitled to seek refund even of the salaries and allowances unauthorisedly paid to an employee who was wrongfully continued in service, In my view, this principle would equally apply to the First Respondent's case. Fortunately for the First Respondent, I am not concerned with the issue of refund of the salary and allowance paid to the First Respondent for the period 1.8.1981 to 31.12.1986. In any event, I am of the view that the First Respondent was not entitled to claim gratuity for the said period though he might have physically rendered service to the Petitioner Corporation on account of his own dishonest act of suppression veri and suggestion falsi.

6. In my considered view, the First Respondent does not deserve the usual sympathy which this Court would be inclined to while dealing with a claim for gratuity. The impugned order dated 18th September, 1992 is liable to be quashed and set aside in my view.

7. In the result, the writ petition is allowed. The impugned order of the Appellate

Authority dated 18th September, 1992 made in Appeal (PGA) No. 5 of 1990 is hereby quashed and set aside.

8. Rule accordingly made absolute with no order as to costs.