

(1980) 06 KL CK 0003
In the High Court Of Kerala
Case No : W.A. No. 69 of 1979

The Executive Engineer (Construction) Southern Railway and Others APPELLANT

Vs

M.P. Sankara Pillai RESPONDENT

Date of Decision : 09-06-1980

Acts Referred:

Payment of Gratuity (Central) Rules, 1972 — Rule 7
Payment of Gratuity Act, 1972 — Section 1(3), 2, 4
Payment of Wages Act, 1936 — Section 1(4), 2
Railway Services (Pension) Rules, 1993 — Rule 104

Citation : (1980) 06 KL CK 0003

Hon'ble Judges : Balakrishna Eradi, C.J.; Balagangadharan Nair, J

Bench : Division Bench

Advocate : M. Ramachandran, U.K. Ramakrishnan and U. Ramachandran, for the Appellant; M.M. Cherian, for the Respondent

Final Decision : Dismissed

Judgement

Balakrishna Eradi, C.J.—Respondents Nos. 1 to 3 in O.P. No. 4543 of 1976--The Executive Engineer (Construction), Southern Railway, Quilon. The Chief Engineer (Construction), Southern Railway, Madras and the Union of India represented by its General Manager, Southern Railway, Madras--Have preferred this appeal against the judgment of a learned single Judge of this Court allowing O.P. No. 4543 of 1976 filed by the Respondent herein and holding that the Respondent is an employee entitled to the benefits of the Payment of Gratuity Act (hereinafter called the Act) and directing that on an application being filed by him under Rule 7 of the Payment of Gratuity (Central) Rules for payment of such gratuity, necessary action should be taken by the Respondents in the Original Petition (Appellants herein) to disburse the amounts due to the Petitioner in accordance with the provisions of the Act and the Rules. The parties will hereafter be referred to on the basis of their ranking and array in the Original Petition.

2. The writ Petitioner was admittedly working as a casual labourer under the

Southern Railway Administration during the period from 29th April 1954 till 16th June 1975. Consequent on which his having been found suitable for absorption in regular service after screening, the writ Petitioner was appointed as temporary Lascar as per the order Ext. R-1, dated 17th June 1975 passed by the Executive Engineer (Construction), Southern Railway, Quilon-1st Respondent. The writ Petitioner assumed charge as temporary Lascar on the same date. He retired from service on superannuation on 31st May 1976, after having served only for a short period of 1 year, 6 months and 15 days as temporary Lascar. On a representation having been made by the writ Petitioner to the Railway Administration for payment of gratuity, he was informed that he was not eligible to receive such payment in view of the provision contained in Rule 104 of Chapter I of the Manual of Railway Pension Rules, 1950 insisting on a minimum of three years' service as a condition pre-requisite for eligibility of gratuity in respect of temporary railway servants. Aggrieved by the said decision taken by the Railway Administration the writ Petitioner came up to this Court by filing the Original Petition (O.P. No. 4543 of 1976; praying for the issuance of a writ of mandamus directing the Respondents to pay to the Petitioner 11 months' salary or wages by way of gratuity u/s 4 of the Act. The said prayer was resisted by the Respondents by putting forward three grounds of objection before the learned single Judge. Firstly, it was urged that the writ Petitioner was not an "employee" entitled to the benefit of the Act, since he did not have continuous service for 5 years as specified u/s 4 of the said enactment. The second point put forward by the Respondent was that the writ Petitioner was debarred from claiming any gratuity by reason of the stipulation contained in paragraph 6 of the appointment order Ext. R-1, which was in the following terms: "Your appointment carries no claim to gratuity or to any absentee allowances beyond those admissible to temporary employees under the rules in force from time to time". Lastly, it was contended by the Respondent that the Act has no application at all to personnel employed under the Railway Administration. The learned single Judge rejected all the aforesaid contentions put forward by the Respondents and held that the writ Petitioner is an employee entitled to payment of gratuity u/s 4 of the Act. However, under Rule 7 of the Payment of Gratuity (Central) Rules, 1972, an employee who claims gratuity under the Act has to apply to the employer in Form I and since the said requirement had not been complied with by the writ Petitioner, the learned single Judge permitted the writ Petitioner to file an application under the said Rule within 30 days from the date of receipt of a copy of the judgment and directed that on such application being filed, necessary steps should be taken by the Respondents to disburse the gratuity due to the Petitioner. It is against the said judgment of the learned single Judge that the Respondents have preferred this writ appeal. The learned Counsel appearing for the Appellants reiterated before us all the three points which the Respondents had unsuccessfully put forward before the learned single Judge. In addition, he also urged for the first time at the appellate stage a new point, namely that since at the time of the Petitioner's retirement from service he was holding a civil post under the Central Government, he falls outside the scope of the express in

"employee" contained in Section 2(e) of the Act and is not therefore eligible for payment of gratuity.

3. We may at the outset state that we find no substance at all in the three contentions which the Appellants herein had unsuccessfully urged before the learned single Judge. The requirement of continuous service of 5 years specified in Section 4 does not get attracted when we are concerned with determining whether a person is an "employee" as defined in Section 2(e) of the Act. Leaving apart the contention newly urged before us that the writ Petitioner falls outside the scope of the said definition by reason of his having held a civil post at the time of his retirement, which contention we shall be presently dealing with, we find no merit at all in the plea put forward by the Appellants that the Respondent was otherwise not an "employee" as defined in Section 2(e). He was admittedly a person employed on wages not exceeding Rs. 1000 per (sic) in the establishment of the Southern Railway. Hence, unless he is able to be excluded from the scope of the definition by reason of his being found to have held a civil post in the Central Government, it is impossible to escape the conclusion that the writ Petitioner was not an "employee" as defined in Section 2(e) of the Act.

4. The second contention put forward by the Railway Administration is equally devoid of merit. If the writ Petitioner is otherwise an employee eligible to claim payment of gratuity under the Act, the stipulation in paragraph 6 of the appointment order, Ext. R-1 will not legally operate to deprive him of the said right. Section 4 of the Act, which provides for payment of gratuity to the employees governed by the said provision, will override the stipulation contained in paragraph 6 of Ext. R-1.

5. The next argument advanced on behalf of the Appellants is that the Payment of Gratuity Act does not have any application to personnel employed under the Railway administration. Section 1(3) of the Act reads:

(3) It shall apply to-

(a) every factory, mine, oilfield, plantation, port and railway company;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;

(c) such other establishment or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf

It is contended before us by the Appellants that the expression "railway company" occurring in Clause (a) of Sub-section (3) will not take in the establishment of the Indian Railway Administration and is limited in its applicability to a few railway companies which are still in existence in some parts of the country. The learned Single Judge overruled this contention. We do not

consider it necessary to express any opinion regarding the said question, since we have come to the conclusion that even if it is to be assumed that the establishment of the Indian Railway Administration will not fall within Clause (a) of Sub-section (3) of Section 1, it will clearly fall within the scope of Clause (b) of the said Sub-section which states that the provisions of the Act shall apply to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed.

6. In *State of Punjab Vs. Labour Court Jullunder and Others*, the Supreme Court had occasion to examine the scope of Clause (b) of Sub-section (3) of Section 1 of the Act. It was held that the said clause applies to every establishment within the meaning of any law for the time being in force in relation to establishments in a state and not merely to establishments covered by state laws relating to shops and commercial establishments only. It was further held that the expression "law" in Section 1(3)(b) is "comprehensive in its scope, and can mean a law in relation to shops as well as, separately, a law in relation to establishments, or a law in relation to shops and commercial establishments and a law in relation to non-commercial establishments." In this view the Supreme Court held that the expression "establishment" referred to in Section 1(3)(b) would include an industrial establishment within the meaning of Section 2(ii)(g) of the Payment of Wages Act.

7. Section 1(4) of the Payment of Wages Act, 1936 expressly make the provisions of the said Act applicable to persons employed upon any railway by a railway administration. Further, u/s 2(ii)(g) of the said Act, the expression "industrial establishment" means an establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, etc. is being carried on. There can be no doubt that the establishment of the Indian Railway Administration, which regularly carries on the work of construction, development or maintenance of buildings, roads, bridges, etc. will directly fall within the scope of the said definition contained in Section 2(ii)(g) of the payment of Wages Act. Such being the position, in the light of the dictum laid down by the Supreme Court in the decision aforesaid, it is manifest that the establishment of the Indian Railway Administration will fall within the scope of Section 1(3)(b) of the Act. The contention that the Payment of Gratuity Act does not apply to the Railway Administration cannot therefore be upheld.

8. That brings us to the contention raised by the Appellant for the first time in this appeal that the writ Petitioner is disentitled to claim gratuity under the Act, because he is a person excluded from the scope of the expression "employee" as defined in Section 2(e) of the Act by reason of his having been the holder of a civil post under the Central Government at the time of his retirement from service. It is true that the writ Petitioner became the holder of a civil Post under the Central Government when he was appointed as temporary Lascar under the order Ext. R-1, dated 17th June 1975. If he had served the Railway

Administration only in the said capacity, the Appellants would have been well-founded in the contention that the Petitioner is not an employee entitled to the benefits of the Act. But the writ Petitioner had admittedly worked as a casual labourer during the period from 29th April 1954 till 16th June 1975. There was a notional termination of the employment of the writ Petitioner as casual labourer when he was absorbed as temporary Lascar in the regular service of the Railway on 17th June 1975. Such termination having taken place only subsequent to the coming into force of the Act, the provisions of Section 4 get attracted and a right accrued to the Petitioner to have gratuity paid to him in respect of the service rendered by him as casual labourer for the period from 29th April 1951 till 16th June 1975. It is contended on behalf of the Appellants that because the writ Petitioner was absorbed as a temporary Lascar while functioning as a casual labourer, there was no break at all in his service and no termination of service could be said to be implied in his absorption as regular employee. We are unable to accept this contention. A casual labourer is not in the service of the Railway at all in any strict or real sense. The Petitioner became a railway servant only when he was appointed as temporary Lascar under the order Ext. R-1. In accepting that appointment he had necessarily to forsake or abandon his status as a casual labourer and that involved a severance of the nexus that existed between himself and the Railway Administration arising out of his continuous casual employment. It is true that there was no order passed or even any overt action taken by the Railway Department terminating the status of the Petitioner as casual employee. But as pointed out by the Supreme Court in *The State Bank of India Vs. Shri N. Sundara Money*, "termination embraces not merely the act of termination by the employer, but the fact of termination howsoever produced". A termination of the relationship arising out of casual employment took place when the Petitioner was offered appointment as temporary Lascar under the order Ext. R-1 and the said offer was accepted by him on 17th June 1975. The expression "retirement" as defined in Section 2(q) in the Act means termination of the service of an employee otherwise than on superannuation. Going by the said definition the writ Petitioner must be taken to have "retired" from employment as casual labourer on the date of Ext. R-1 and he became entitled to claim gratuity u/s 4 of the Act. The said right, which became vested in him, is not in any way affected by the reason that he has served the railway administration in the capacity of temporary Lascar for the short period of 1 year 6 months and 15 days subsequent to the date of Ext. R-1 which service cannot be counted for the purpose of payment of gratuity under the Act.

9. In the original petition the prayer of the Petitioner is for payment of gratuity based on the entirety of his service in the Railway Administration both as casual labourer and as temporary Lascar. Since no contention had been put forward before the learned single Judge that by reason of the appointment of the Petitioner as temporary Lascar, he became the holder of a civil post under the Central Government and was therefore disentitled to claim the status of "employee" under the Act, the learned single Judge had no occasion to consider

whether the period of service rendered by the Petitioner as temporary Lascar could be counted for the payment of gratuity. In the light of the legal position explained above, the Petitioner is entitled to claim from the Respondents (Appellants) gratuity only in respect of the period of service put in by him as casual labourer and the time during which the writ Petitioner functioned as temporary Lascar cannot be taken into account for purposes of payment of gratuity. Subject to the above clarification regarding the period in respect of which alone the Petitioner is entitled to claim payment of gratuity from the Appellants, we confirm the judgment of the learned single Judge and dismiss this appeal. The parties will bear their respective costs.