

(2004) 07 BOM CK 0082

In the Bombay High Court

Case No : Writ Petition No. 3747 of 2004

The Transport Manager, Kolhapur Municipal Transport
Undertaking

APPELLANT

Vs

Pravin Bhabhutlal Shah, Controlling Authority under Payment
of Gratuity Act, 1972 and Appellate Authority under Payment
of Gratuity Act, 1972

RESPONDENT

Date of Decision : 02-07-2004

Acts Referred:

Industrial Disputes Act, 1947 — Section 2

Payment of Gratuity Act, 1972 — Section 10, 4(2), 4(5), 7(2)

Citation : (2004) 4 ALLMR 297 : (2004) 5 BomCR 10 : (2005) 104 FLR 1009 :
(2005) 2 LLJ 104 : (2005) 1 MhLj 497 : (2005) 1 SLJ 485

Hon'ble Judges : Nishita Mhatre, J

Bench : Single Bench

Advocate : D.S. Sawant and N.A. Kulkarni, for the Appellant; M.S. Topkar, for
the Respondent

Judgement

Nishita Mhatre, J.—Rule, returnable forthwith. Mr. Topkar waives service for Respondent No. 1 Respondent Nos. 2 and 3 need not be served being formal parties. By consent, Rule called out and heard.

2. This Petition has been filed against the order dated 30th March 2002 passed by the Controlling Authority, Kolhapur in Application (PGA) No. 19 of 2000 allowing the application filed by Respondent No. 1 and the order dated 9th October 2003 of the Appellate Authority, Pune in Appeal (PGA) No. 2 of 2003 dismissing the Appeal preferred by the Petitioner.

3. The facts, in brief, are as follows:

On 19th October 1966 Respondent No. 1 (hereinafter referred to as "the workman") was employed with the Petitioner Undertaking and he was superannuated on 1st December 1999. As his gratuity was not paid, respondent No. 1 filed and application before the controlling Authority on 14th August 2000

claiming gratuity of Rs. 2,71,656/- for 33 years of service. The claim was made on the basis of the monthly wages which were payable to basic wages of Rs. 2,900/- plus Rs. 6612/- as dearness allowance calculated at the rate of 228% of the basic wage plus an amount of Rs. 690/- towards interim rise in wages. The total wage payable was Rs. 10,192/-. The recognised Union proposed that the dearness allowance paid to the workers should be frozen at 182% of basic wage in order that the Petitioner Undertaking be able to tide over the financial difficulties faced it. It appears that no agreement was entered into under the provisions of the Industrial Disputes Act, 1947 for a ceiling on the dearness allowance. However, the Union and the workmen stood by the proposal and accepted payment of dearness allowance at 182% of the basic wage.

4. A settlement was entered into between the Union representing the workmen and the Petitioner Undertaking in 1977 agreeing that the gratuity would be payable under the Payment of Gratuity Act, 1972. It was further agreed that gratuity would be calculated at 21 days wages per year of service for those employees whose services cease on account of superannuation, death and physical disability. The Controlling Authority after assessing the evidence led before it held that the Respondent workman was entitled to gratuity as claimed by him.

5. The Controlling Authority was of the view that the dearness allowance should be calculated at the rate of 228% of basic wages and not 182% as that was the amount payable by way of dearness allowance. According to the Controlling Authority, the Respondent workman is entitled to an amount of Rs. 2,84,58.10 by way of gratuity together with simple interest calculated at 10% from the due date. The increase in the amount of gratuity was on account of the fact that the Respondent workman had wrongly calculated the dearness allowance. The Respondent by an application had submitted the correct calculations to the Controlling Authority showing the additional dearness allowance payable at the rate of 37% from 1st July 1999.

6. The Appellate Authority has confirmed the findings of the Controlling Authority and held that the calculations of the gratuity payable to the Respondent workman should be made after taking into account 288% as dearness allowance.

7. Mr. Sawant, learned Advocate for the petitioner, submits that the gratuity payable has been claimed under the Act. Therefore, the claim ought to have been made within the period of limitation prescribed. It is further submitted that once gratuity is claimed under the Act, the claim must be calculated under the provisions of the Act and not under the provisions of any settlement. According to him, the workman is entitled to gratuity calculated at the rate of 15 days per year of service and not 21 days per year of service. It is next urged that the calculation of gratuity must be on the basis of last drawn wages. The last drawn wages. The last drawn wages of the workmen was Rs. 8858/- and, therefore, he was entitled to gratuity computed on the basis of those wages. It is urged that both the Controlling Authority and the Appellate Authority have erred in

computing the gratuity on the basis of the last drawn wages to include dearness allowance at the rate of 228% of the basic wage rather than 182%. According to the learned Advocate, both the Authorities below have misread the provisions of law and have wrongly interpreted the.

8. Mr. Topkar, learned Advocate for Respondent No. 1 workman, submits that there is no period of limitation prescribed under the Act or the Rules framed thereunder. As rightly submitted by Mr. Topkar, the second proviso to Rule 10 provides that there is no limitation for filing an application under Rule 10 if the employer has failed to give notice under Sub-section (2) of Section 7. Sub-section (2) of Section 7 of the Act stipulates that the employer shall as soon as the gratuity becomes payable, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable specifying the amount of gratuity, irrespective of whether an application has been made by the workman to claim gratuity. The learned Advocate rightly submits, in my view, that the question of limitation does not arise in the present case as the Petitioner has failed to give the notice as stipulated in Sub-section (2) of Section 7 of the Act.

9. Mr. Topkar then submits that the provisions of the Act are wide enough to take into consideration any settlement which may be entered into between the employer and the employees to pay gratuity in excess of 15 days wages per year of service. He submits that under Sub-section (5) or Section 4 of the Act, the right of an employee to receive better terms of gratuity which are payable under any award or agreement or contract entered with the employer are recognised and, therefore, the agreement by which the employer had agreed to be paid in accordance with the agreement. He further submits that the calculations made by the Respondent workman are correct as the wages which were last drawn were less than the wages "payable" to the workman and, therefore, the gratuity was required to be calculated on the amount which was payable to the workman. He relies on the judgment of the Allahabad High Court in the case of Rajendra Deva v. Addl. Labour Commissioner (Account) Kanpur-cum-Appellate Authority and another, 1999 1 CLR 1216 and the judgment of the Karnataka High Court in the case of Karnataka Agro Industries corporation Ltd. Bellary v. Presiding Office, Industrial Tribunal, Bangalore and another, 1984 Lab. I.C. 1358 to submit that the Controlling Authority is required to compute gratuity on the basis of the wages payable to the workman.

10. The submissions on behalf of the Petitioner that gratuity, if it is paid under the Payment of Gratuity Act, 1972, can be calculated only at the rate of 15 days wages is unsustainable. Section 4(5) of the Act clearly states that the right of employee to receive better terms of gratuity under any award or agreement or contract with the employer is not taken away by the provisions of the Act. Undisputedly, there is a settlement under which it was agreed that the workman would be paid gratuity at the rate of 21 days wages per year of service. The Petitioner, Therefore, cannot calculate the gratuity only on the basis of 15 days wages per year of service. Furthermore, the submission of Mr. Sawant that if

gratuity is to be calculated as per the Payment of Gratuity Act, there is a ceiling on the gratuity payable and, therefore, the workman was not entitled to gratuity amount of Rs. 2,84,583/- cannot be accepted. the amendment to the Payment of Gratuity Act was made by Act 11 of 1998 whereby the limit of payment of gratuity was increased to Rs. 3,50,000/- from the earlier limit of Rs. 1,00,000/-. Admittedly, the Respondent workman retired in 1999 and hence he would be entitled to gratuity as claimed by him. In any event, if the settlement does not impose any limit to the gratuity receivable by an employee, the Act cannot impose such a limit in view of Section 4(5) of the Act.

11. Now, turning to the main contention of Mr. Sawant that the gratuity ought to have been calculated by considering dearness allowance at the rate of 182% of the basic wage and not at 228% as is claimed by the workman, it would be advantageous to set out certain provisions of the Act. Payment of gratuity is to be computed as stipulated in Section 4(2) of the Act, which reads thus:

"4.(2) for every complete year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at rate of wages last drawn by the employee concerned :

? Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account :

? Provided further that in the case of an employee who is employed in a seasonal establishment and who is not so employed throughout the year, the employer shall pay the gratuity at the rate of seven days wages for each season.

Explanation : In the case of monthly rated employee, the fifteen days" wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen."

"Wages" have been defined u/s 2(s) of the Act as under :

"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 by does not include any bonus, commission, house rent allowance, overtime wages and any other allowance."

12. Therefore, a conjoint reading of both these provisions of law shows that the workman is entitled to gratuity calculated at wages last drawn by him. However, since the term "wages" has been defined as "all emoluments paid or payable", the gratuity must be computed on the basis of the wages payable to him at the time of retirement. There is no dispute that the Fifth Pay Commission recommendations were accepted by the petitioner Undertaking and that payments were to be made on the basis of these recommendations. However, with a view to assist the Petitioner Undertaking to tide over its financial

difficulties, the workmen had suggested that there should be a ceiling on the dearness allowance at 182% of the basic wages. The evidence on record indicates that the Undertaking had lifted the ceiling on the dearness allowance. The witness for the Petitioner has stated that the workmen had been paid a higher dearness allowance than 182%, being 193% and 203% of the basic wage. The dearness allowance at the rate 228% was to be released in August 2001. This was because the financial position of the Petitioner Undertaking had improved. The witness has also stated that the arrears in respect of dearness allowance would also be release. This being the position, there is no doubt that the gratuity payable to the workman was the basic wages plus the dearness allowance calculated at the rate of 228% of the basic wages. Therefore, the gratuity was required to be computed on the wages payable to the Respondent workman and not on the wages last received by him. Wages last drawn would mean the wages last payable to the workman and, therefore, the computation made by the Controlling Authority is correct. I am supported in my view that wages payable would include dearness allowance at the rate of 228% by the judgment in Rajendra Deva (supra). In the case of Karnataka Agro Indl. Corp. (supra), the High Court considered the provisions of Section 2(rr) which is the definition of "wages" under the Industrial Disputes Act and has come to the conclusion that the wages payable would be the wages to which the employee is entitled and not merely the reduced wages or the wages which an employer unilaterally pays to the worker.

13. Therefore, in my view, the submission made by Mr. Sawant for the Petitioner Undertaking cannot be accepted and the impugned orders must be upheld. Writ Petition, therefore, fails. Rule discharged. No order as to costs.

14. Certified copy expedited.