
(1982) 01 KL CK 0009
In the High Court Of Kerala

Thiruvangadi Service Co-op. Bank Ltd.

APPELLANT

Vs

Dist. Labour Officer

RESPONDENT

Date of Decision : 13-01-1982

Acts Referred:

Industrial Disputes Act, 1947 — Section 33C

Citation : (1982) 1 ILR (Ker) 542 : (1982) 1 LLJ 430

Hon'ble Judges : Kochu Thommen, J

Bench : Single Bench

Judgement

Kochu Thommen, J.—This case is governed by the Kerala Industrial Employees' Payment of Gratuity Act, 1970 (the "Act") and the Kerala Industrial Employees' Payment of Gratuity Rules, 1970 (the "rules"), The only question that is urged before me by the petitioner ("the "employer") is as to whether or not the 3rd respondent (the "employee") is entitled to gratuity as provided under the Act and the Rules. According to the employer no gratuity is payable to the employee by reason of the fact that he did not make an application for gratuity within the period prescribed u/s 7 read with Rule 4.

2. Before considering the question in the light of the relevant provisions of the law, I would refer to certain significant aspects of the background of this case. The employee was dismissed by the employer on 25-9-1965 on the basis of certain charges of misconduct. The dispute which arose as a result of the dismissal was referred to the Labour Court, Quilon. An award was passed by the court on 14-1-1969 directing reinstatement of the employee and payment of his backwages. The award was challenged by the employer in O.P. No. 2708,1969 which was dismissed by this Court on 14-9-1971. The employer's Writ Appeal W. A. No. 351/1971 was also dismissed by judgment dated 10-2-1972. Since the amount payable to the employee had not been paid he approached the Labour Court u/s 33C(2) of the Industrial Disputes Act for computation of the amounts payable to him. The was computed by the court by its order dated 1-7-1976. In the meantime, i.e. on 14-10-1970 the petitioner had retired from the service of

the employer. Accordingly the petitioner filed an application before the employer for payment of gratuity in accordance with the Act and the Rules. This application was filed only on 27-8-1976. By the impugned order Ext. P. 3, the 1st respondent, the District Labour Officer, Malapuram, rejected the employer's objection urged on the ground of delay and ordered payment of gratuity. The employer filed an appeal before the Appellate Authority. It was dismissed by Ext. P 5. Exbits P 3 and P 5 are now challenged. As I stated earlier the only question which is urged before me by the employer's counsel is as to whether or not it was rightly held that the employee's application for payment of gratuity was not vitiated by reason of delay. The finding of the authorities below that the complaint of the employee filed before the Controlling Authority under Rule 6 was presented within time is not any longer challenged by the employer.

3 The Act provides for payment of gratuity to the employees in factories plantations and other establishments in the State. The establishment of the employer admittedly comes within the scope of the Act. Section 4 provides:

Payment of gratuity.- (1) Gratuity shall be payable to an employee -

(a) on his superannuation;

(b) on his retirement, resignation, retrenchment, discharge or dismissal from service after completion of a minimum period of five years of continuous service.

... ..

The retirement of the employee is an occasion which demands payment of gratuity. Section 7 prescribes the procedure for payment. It says:

Application for gratuity and procedure for payment.- (1) Any employee who is eligible for payment of gratuity under this Act shall send a written application to the employer within such time and in such form as may be prescribed.

(2) As soon as the amount of gratuity becomes payable the employer shall give notice in writing to the employee and the controlling authority specifying the amount and the employer shall arrange to pay the amount to the employee within such time as may be prescribed.

Sub-section (1) requires an employee who is eligible for payment of gratuity as provided u/s 4 to send a written application to the employer within the time prescribed. Sub-section (2) enjoins the employer to send a notice in writing to the employee and the controlling authority specifying the amount.

4. Rule 4 prescribes the time and the manner in which the employee's application has to be sent as required u/s 7(1). The employee has to apply within a period of 30 days before his retirement and such application has to be in Form III, This is what Rule 4 says:

Application for Gratuity : - (1) An employee who is eligible for payment of gratuity under the Act on his superannuation or retirement consequent on any

event other than resignation, retrenchment, discharge or dismissal from service, shall within a period of thirty days before his superannuation or retirement as the case may be, send an application to the employer in Form III.

Rule 5 concerns procedure for payment of gratuity. It says:

Procedure for Gratuity.- (1) On receipt of an application under Rule 4, the employer shall determine the amount of gratuity payable to his employee or his nominee or nominees, as the case may be, and give notice in Form IV to the employee or his nominee or nominees and the controlling authority specifying the amount of gratuity and the employer shall arrange to pay the amount to the employee or his nominee or nominees, as the case may be under intimation to the controlling authority within thirty days from the date of receipt of the application under Rule 4.

Rule 5 would show that the employer's liability to send a notice u/s 7(2) specifying the amount of gratuity arises only upon receipt of an application from the employee under Rule 4. In the instant case counsel points out that the obligation of the employer to send the notice required u/s 7(2) did not arise for no application was received from the employee within the time prescribed under Rule 4(1). It is therefore contended that the employee is not entitled to receive gratuity in the instant case, and that the employer is entitled to appropriate the amount to himself.

5. The employee's application was not sent to the employer in time. To satisfy the rule the application ought to have been sent within 30 days prior to the date of retirement, which was on 14-10-1970. The question is whether the gratuity claimed by the employee can be denied to him for the reason that the application was received long past the date of retirement.

6. The object of the enactment is to confer a benefit upon the employee. Every employee who has put in the required number of years 5 years of continuous service-is entitled to payment of gratuity on his retirement. This right arises by virtue of Section 4. The procedure for the enforcement of that right is mentioned u/s 7. The manner and the time in which the application motioned u/s 7 has to be made is stated under Rule 4. The procedural provisions are meant to implement the substantive provision contained in Section 4. Ordinarily an employee who has failed to make an application in the manner prescribed cannot be heard to complain that gratuity has not been paid to him. The procedure laid down under the Act and the Rules must however be understood with reference to the legislative intent to confer a benefit upon the employee. The procedure has to be understood consistently with the legislative object stated in Section 4 as well as in the Preamble and other provisions of the Act. A recalcitrant employer by recourse to litigation cannot be allowed to evade gratuity on the technical ground that the employee, caught in the web of legal proceedings forced upon him by the employer, failed to file the application within time. The dates mentioned by me show that on the date of retirement the industrial dispute

arising from the dismissal of the employee was pending. The award of the Labour Court was challenged by the employer in proceedings before this Court. Even after the proceedings ended, the employer was not minded to implement the award until the Labour Court was approached by the employee u/s 33C of the Industrial Disputes Act. It was only on 1-7-76 the court finally computed the amount. The amount computed by the court did not include the gratuity, for that question did not arise in that proceeding. It was thereafter that (he employee made the application for gratuity. Notwithstanding that application, the notice required u/s 7(2) was not issued by the employer. It is true that the notice is to be issued in terms of Rule 5 only on receipt of an application under Rule 4. But Rule 5 has to be read harmoniously with Section 7 which says that the notice must be issued as soon as the amount of gratuity becomes payable. The amount became payable on the retirement of the employee. That is what is laid down u/s 4. If Section 7 is understood with reference to Section 4, the liability to compute the amount payable by an employer is squarely placed upon the employer as soon as the amount of gratuity becomes payable u/s 4, Although the employer cannot be found fault with for not giving the notice computing the amount payable as gratuity in the absence of an application, the employer cannot divest himself of his responsibility under the Act to pay the amount claimed as gratuity when such claim is made. To read Section 7(1) and Rule 4(1) as mandatory would be to defeat the legislative object. The expression used in these provisions is "shall", But these procedural provisions have to be understood, as stated by the Supreme Court in *Motor Owners' Insurance Company Limited Vs. Jadavji Keshavji Modi and Others*, , sympathetically and imaginatively, so that they operate consistently and harmoniously with the object of the enactment. If such purposive interpretation is adopted to understand the true meaning of the provision, "shall" has to be read as "may". Section 7(1) and Rule 4(1) have to be then understood as directory and not mandatory. The result would be that while an employer cannot be penalised for failure to pay gratuity to an employee who has not made an application, the employer cannot refuse to comply with the demand for gratuity upon receipt of a proper application. An application presented by an employee can not be treated as improper, or rejected as invalid solely by reason of delay if the delay has not been deliberately or negligently caused by the employee and if there are justifiable grounds for condonation of the same. But an employee who negligently sleeps over his rights and chooses to file an application at any time of his choice cannot legitimately complain that he has been denied gratuity. The burden is upon the employee in such event to show that the delay has been caused by justifiable reasons. This would be the effect of reading Section 7(1) and Rule 4(1) as directory and not mandatory. In the circumstances, if the authorities under the Act were satisfied that the employee was justified in not filing the application u/s 7(1) within the time prescribed, it is open to them to condone the delay and allow the application to stand on its strength. This is what has been done by respondents 1 and 2. In the circumstances I see no ground to interfere with the impugned orders. The O.P. is dismissed. No costs.