

(1992) 08 KL CK 0026
In the High Court Of Kerala
Case No : W.A. No. 303 of 1992

Velukutty Achary

APPELLANT

Vs

Harrisons Malayalem Ltd.

RESPONDENT

Date of Decision : 20-08-1992

Acts Referred:

Payment of Gratuity Act, 1972 — Section 2, 2A, 2A(1)

Citation : (1993) 66 FLR 423 : (1993) 1 ILR (Ker) 339 : (1993) 1 LLJ 1118

Hon'ble Judges : M. Jagannadha Rao, C.J;T.S. Krishnamoorthy Iyer, J

Bench : Division Bench

Advocate : P. B. Sahasranaman, for the Appellant;

Final Decision : Dismissed

Judgement

Jagannadha Rao, C.J.—This appeal is preferred by the writ petitioner against the judgment of the learned single Judge in OP 7615 of 1987 dated September 6, 1991.

2. The writ petition was filed questioning the orders passed by the second respondent (Deputy Labour Commissioner, Kollam) and of the third respondent (appellate authority) under the Payment of Gratuity Act, 1972 (hereinafter referred to as "the Act"). The said authorities had held that the appellant was not entitled to gratuity as provided in the Act.

3. The facts of the case are as follows: The appellant-writ petitioner was initially employed by the first respondent-Company prior to September 1, 1970 and was admittedly retrenched on December 18, 1970. The appellant is a blacksmith. However, subsequent to the retrenchment, it appears that the Company was engaging the appellant for wages whenever there was work. The evidence was that whenever there was such work, a notice was being put up in the notice board and the appellant used to attend to that work and receive his wages for that work. It was further established that though the appellant claims to be under continuous employment after retrenchment from December 18, 1970 to

March 21, 1981 for eleven years, he had actually been engaged for wages on specific days namely, 176 days during the period October 24, 1973 to March 14, 1981. In fact, he had not been engaged even on a single day during 1975, 1976 and 1977. The appellant had worked for 53 days in 1973, 35 days in 1974, 34 days in 1978, 38 days in 1980 and 16 days in 1981. When such is the factual position, the appellant filed the present application on June 11, 1982 before the second respondent under the Act claiming gratuity from the first respondent. The second respondent passed Ext. P1 order and came to the conclusion that the appellant was working only for wages as stated above and was not in continuous employment. According to the provisions of the Act, a worker should have put in atleast 240 days service during an year for being entitled to gratuity. His application was, therefore, dismissed. The appellate authority confirmed the said finding and dismissed the appeal on coming to the conclusion that the appellant did not satisfy the conditions in Section 2A read with Section 4 of the Act inasmuch as he does not have five years continuous services under the employer. In other words, he did not have the minimum of 240 days.

4. The learned single Judge refused to interfere with the findings of both the authorities. It is against this judgment that the appeal is preferred.

5. In this appeal, learned counsel for the appellant contends that he was an employee of the Company and as such even on the days when he was not allotted any work for no fault of his, he must be treated as if he was under employment and was under continuous employment. For this purpose, reliance is placed on Section 2A of the Act which defines "continuous service". That Section, so far as it is relevant for the present purpose, reads as follows:

"2A. Continuous service:-For the purposes of this Act-

(1) an employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay-off, strike or a lockout or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act;

(2) where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of Clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer-

(a) for the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) two hundred and forty days, in any other case;

(b)..... Explanation:...."

From a reading of the above said provisions of Section 2A which were introduced by Central Act 26 of 1984 with effect from February 11, 1981, it is clear that, under Sub-clause (1) of Section 2A of the Act, a person could be treated to be in continuous service if he has been in uninterrupted service. If he was "an employee" the interruptions created by sickness, accident, leave, absence from duty without leave, lay-off, strike or lock out or cessation of work not due to any fault of the employee are not to be treated as creating any interruptions. This is the gist of Sub-clause (1). Sub-clause (2) deals with a different situation where the employment is not continuous as specified in Section 2A(1), but there are interruptions. In managements such as the one where the appellant was working, a person who was an "employee" working for 240 days with interruptions he still be treated as being in continuous service during that year.

6. So far as the appellant is concerned, if he was an "employee" in uninterrupted service, as is now contended before us, there could be no question of resorting to Sub-clause (2) of Section 2A. But the question is whether the appellant is in continuous service for purposes of Sub-clause (1) of Section 2A.

7. In this behalf, it is contended by learned counsel for the appellant that though the appellant was ready to work for the Company, subsequent to December 18, 1970, the date of retrenchment, he was not given any work and, therefore, his case would come within the meaning of the words "cessation of work not due to any fault of the employee" in Section 2A(1) of the Act. That is the point that falls for consideration in this appeal.

8. In this context, it is also necessary to refer to the definition of "employee" in Section 2(e) of the Act which reads as follows:

(e) "employee" means any person (other than an apprentice) employed on wages, not exceeding two thousand and five hundred rupees per mensem, or such higher amount as the Central Government may, having regard to the general level of wages, by notification specify, in any establishment, factory....to do any skilled, semi-skilled, or unskilled, manual..... whether the terms of such employment are express or implied, and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity.

Explanation:- In the case of an employee, who, having been employed for a period of not less than five years on wages not exceeding...gratuity...shall be determined on the basis of the wages received by him during that period."

From a reading of the definition of "employee" in Section 2(e), it is clear that a person must be employed as an employee as stated in Section 2(e) upon a particular salary per mensem. The nature of the employment could be of the various categories mentioned in Section 2(e). In other words, Section 2(e) requires an employment upon salary not exceeding Rs. 2,500/- per mensem, or such higher amount as may be notified.

9. In the present case, the findings of both the authorities are that after retrenchment on December 18, 1970, the appellant was not employed at all. In fact, during the deposition of the appellant (see paragraph 2 of Ext. P1 order of the Deputy Labour Commissioner), the appellant has stated that he and 17 workers were retrenched on December 18, 1970 and thereafter all of them had been engaged for work on temporary basis according to the availability of work. On his own showing, therefore, he was not an "employee" coming within Section 2(e) of the Act. Therefore, unless he is an "employee" who is supposed to work under the terms of the employment continuously from day to day, he could not come in Section 2A(1). All that the Section says is that if one is an "employee", the interruptions relating to sickness, accident, leave, absence from duty without leave, lay-off, strike or lock out could not be treated as interruptions. Likewise, if a person is engaged as an "employee" of the employer, then the fact that he was not given work on any particular days for no fault of his, would not result in any interruptions of purposes of Section 2A(1). For the purpose of applying Section 2A(1) and for omitting from consideration the various interruptions concerned, one must be an "employee" engaged by way of a contract of employment, express or implied. A person who is not such an employee but is offered work whenever available does not come u/s 2A(1). If however, a person is an employee first and then, the employer does not allot him work on certain days, those days where, for no fault of the employee, no work is allotted to him, cannot be treated as interruptions. The appellant was never employed as an employee and even according to him, the respondent calls him whenever there is work and pays wages. He is not subject to any contract of employment, express or implied. Therefore, he cannot come u/s 2A(1).

10. For the aforesaid reasons, we are of the view that the appellant is not entitled to any gratuity under the Act. The appeal fails and it is accordingly dismissed.