

(1972) 10 CAL CK 0006
In the Calcutta High Court

Case No : Appeal from Original Order No. 20 of 1971 and 335 of 1970

Workmen of Jessop and Co. and Another	APPELLANT
Vs	
Jessop and Co. and Another	RESPONDENT

Date of Decision : 05-10-1972

Acts Referred:

Constitution of India, 1950 — Article 186, 226
Industrial Disputes Act, 1947 — Section 10, 19(4)

Citation : 77 CWN 134

Hon'ble Judges : B.C. Mitra, J;Amiya Kumar Mookerji, J

Bench : Division Bench

Advocate : I.P. Mookerji, P.K. Sanyal and D. Mookherji, for the Appellant;Sankardas Banerjee and D.N. Das, for the Respondent

Final Decision : Dismissed

Judgement

Amiya Kumar Mookerji, J.—These two appeals are directed against the judgment and order of Prodyot Banerjee, J. dated 21-9-1970 setting aside the award of the Industrial Tribunal so far as the issue of gratuity is concerned and remitting the matter back to the said Tribunal for reconsideration of the said issue in accordance with law. The appeal from Original Order No. 20 of 1971 is preferred by the employees' union against the said order of remand and Appeal No. 335 of 1970 is preferred by the employer against that part of the order which affirms the Tribunal's award with respect to leave. Jessop & Co. Ltd. is one of the leading engineering concerns in India. It employs about 10,000 employees in the Head Office and in its factory at Dum Dum. The company was a party before the Omnibus Tribunal known as Mercantile Tribunal and the award of the said Tribunal was made on 1st June, 1949. In 1955, the Union, representing the workmen of Dum Dum Works submitted a charter of demands. As the conciliation proceeding with respect to the said demands failed, the State Government made a reference in October 1957, to the 4th Industrial Tribunal, West Bengal, for adjudication of certain issues including the issue regarding age for retirement. The said Tribunal's award was published in the Calcutta Gazette

on February 25, 1960. The employees union moved the Supreme Court against the said award. The Supreme Court by its judgment dated 2nd August, 1963, modified the award of the Tribunal by raising the retiring age from 55 to 58 years. In view of the changed circumstances after that award in 1965, the employees' union made fresh demands and three conciliation proceedings started. The said conciliation proceedings failed. So, the respondent No. 4, the State of West Bengal by an order dated October 11, 1966, made a reference u/s 10 of the Industrial Disputes Act, 1947, to the 5th Industrial Tribunal, West Bengal. The issues referred to the said Tribunal for adjudication were:

- (1) retiring age of the clerical and subordinate staffs
- (2) leave
- (3) gratuity.

On 20th October, 1967, the Tribunal made and published its award. By the said award, the Tribunal refused to enhance the age of retirement, raised the ceiling of gratuity from Rs. 5000/- to Rs. 6000/- and, regarding the leave, the Tribunal found no material to increase the casual leave but, held that the members of the clerical staffs and the subordinate staffs could enjoy the same; there was no change in the medical leave but with regard to privilege leave, the Tribunal found that the said leave should be 14 days cumulative upto 28 days for those who have not completed 10 years' service; and, for those who have completed 10 years' service, privilege leave will be 21 days in a year cumulative upto 42 days.

2. On 25th April, 1968, the employer company, respondent No. 1, moved this Court in an application under Art. 226 of the Constitution against the said award of the Tribunal and obtained a Rule nisi. The said Rule was ultimately heard by Banerjee, J. and, the learned Judge by his judgment and order dated 21st September, 1970, remanded the matter back to the Tribunal for consideration of the award so far as the gratuity was concerned and affirmed the Tribunal's award regarding the issue of leave.

3. The Union of the employees and the employer-company being aggrieved by the said judgment of Banerjee J. preferred these two appeals.

4. Mr. Mukherjee, appearing on behalf of the appellants in the employees' union's appeal, contends that the learned trial Judge erred in remitting the case back to the Industrial Tribunal for further decision of the issue of gratuity upon the view that the Tribunal failed to take into consideration the relevant principle as laid down by the Supreme Court in (1) *Burhanpur Tapti Mills Ltd. Vs. Burhanpur Tapti Mills Mazdoor Sangh, Determination of gratuity*, Mr. Mukherjee submits, is not based on any definite rules. In each case it must depend upon the prosperity of the concern, needs of the workmen and the prevailing economic conditions. In support of his contentions, Mr. Mukherjee draws our attention to a passage of the decision of the Supreme Court in (2) *Delhi Cloth and General Mills Co., Ltd. Vs. Workmen and Others etc.*,

5. In modifying and reversing the existing gratuity scheme, the Tribunal is required to take into consideration the same factor as of framing of a gratuity scheme. (Vide, (3) *Jardine Henderson Ltd. Vs. Their Employees*, Even in a case where the demand is for revising the terms of a gratuity scheme which is likely to introduce additional burden, the capacity of the employer to bear the financial burden must always be taken into account. Pre-condition to framing of a gratuity scheme is to take into consideration the financial position of the employer. In (1) *Burhanpur Tapti Mills Ltd. Vs. Burhanpur Tapti Mills Mazdoor Sangh*, the Supreme Court observed that emphasis must always be laid upon the financial position of the employer and his profit making capacity. To judge whether the financial position of the employer would bear the strain the average number of retirements must be found out. That is one part of the inquiry. The next part of the inquiry is to see whether the employer can be expected to bear the burden from year to year, the present condition of his finance, the past history and the future prospects all enter into the appraisal of his ability. In the present case the Tribunal in revising the existing gratuity scheme of the company took into consideration the comparative statement (Exhibit 6) showing the amount of gratuity that would have been payable to the employees in different pay scales, had there been no ceiling for Rs. 5,000/-, and also exhibit 4--5, years statement of accounts. The Directors' Report (exhibit 7), where the financial position of the company and its future prospect and expansion have been set out, had not been taken into account by the Tribunal in raising the ceiling.

6. It is stated at page 8 of the Report regarding "future prospect", that the Chairman was not in a position to hold out an encouraging picture of the future. The high duty Iron Foundry at Durgapore has been commissioned but due to teething trouble it has yet to reach the target output. It is said in the said Report, "Our plan to build up the Durgapore Unit as a full-fledged ancillary of our main Works is now being considerably slowed down. We are proceeding with caution and circumspection so that the Durgapore Unit can be developed as an asset rather than a liability of the company".

7. In (4) *Hindusthan Antibiotics Ltd. v. Their Workmen*, reported in 1967 S.C. 948, the Supreme Court refused to disturb the conclusion arrived at by the Tribunal because in that case the Tribunal considered all the relevant circumstances; the stability of the concern, the profits made by it in the past, its future prospect and its capacity and, came to the conclusion that in the concern in question the labour should be provided with gratuity scheme.

8. The observations of the Supreme Court in *Delhi Cloth Mills*" case, which has been relied upon by Mr. Mukherjee, have to be construed in their own context. In (2) *Delhi Cloth and General Mills Co., Ltd. Vs. Workmen and Others etc.*, the Supreme Court had to consider whether gratuity payable to workmen in the textile industry in the Delhi region should be related to the consolidated wages. After referring to the scheme framed in respect of the industry in Bombay and Ahmedabad and other industries, the Supreme Court concluded "that

determination of gratuity is not based on any definite rules. In each case it must depend upon the prosperity of the concern, needs of the workmen and the prevailing economic conditions, examined in the light of the auxilliary benefits which the workmen may get on determination of employment." Those observations were made in the context of determination in the quantum of gratuity and the Supreme Court has not led down in that case a general principle that determination of gratuity is not based on any definite rules.

9. It appears that the principle as laid down by the Supreme Court in (1) Burhanpur Tapti Mills Ltd. Vs. Burhanpur Tapti Mills Mazdoor Sangh, has been uniformly followed by the Supreme Court in its subsequent decisions, namely, in (5) National Iron and Steel Co. Ltd. v. State of West Bengal, AIR 1967 S.C. 1207; in (6) Management, Chitavalsah Jute Mills Ltd. Vs. Workmen of Chitavalsah Jute Mills, (7) D.C.M. Ltd. v. Their Workmen, AIR 1970 S.C. 91. So, we are unable to accept the contentions of Mr. Mukherjee that determination of gratuity is not based on any definite rules.

10. It is next contended by Mr. Mukherjee that where the Industrial Tribunal on appreciation of oral and documentary evidence gave its award in gratuity after considering the financial position of the company, the learned Judge of the trial court in exercise of supervisory jurisdiction under Art. 226 of the Constitution erred in reviewing the findings of facts of the Tribunal below that the present maximum ceiling of the gratuity of the company was low in view of the financial position of the company. In exercise of its supervisory jurisdiction, the High Court cannot convert itself into a court of appeal and correct errors of fact, errors in the appreciation of oral and documentary evidence and errors in drawing inferences or omission to draw inferences. The Court will not review the findings of fact reached by the inferior Tribunal, even if they be erroneous. In support of his contentions, Mr. Mukherjee relied upon the decision of the Supreme Court in (8) Management and Ghaziabad Engineering Co., (P) Ltd. Vs. Its Workmen, and, a decision of this Court, (9) Workmen of Kettlewell Bullen and Co. Ltd. and Another Vs. Kettlewell Bullen and Co. Ltd. and Others,

11. In Gaziabad Engineering's case (1970) S.C. 390, the Industrial Tribunal on appreciation of evidence came to the conclusion that the financial position of the company was sound, the Supreme Court refused to interfere with the findings of the Tribunal in an appeal under Art. 186 of the Constitution. In the present case; the material evidence namely, the Directors' Report, exhibit 7, has not been considered by the Tribunal. Therefore, the decisions of the Gaziabad Engineering's case would be of no assistance to the appellants.

12. The Industrial Tribunals are created by the statute and their powers are derived from the statute that creates them. Jurisdiction to revise or modify an existing gratuity scheme depends upon the existence of the financial capacity of the employer. Where the Tribunal raises the quantum of maximum limit of the gratuity without considering the financial capacity of the employer to bear the additional burden, in our opinion, such revision or modification is without

jurisdiction and the writ court has ample jurisdiction to interfere in the matter. It is not a question of reviewing the findings of fact arrived at by the inferior Tribunal.

13. Mr. Mukherjee contends that exhibit 4, the statement of five years' profit and loss, were before the Tribunal. So the Tribunal considered the financial aspect of the company. Therefore, it cannot be said that the conclusion arrived at by the Tribunal is perverse. In (10) Calcutta Insurance Co. Ltd. v. Their Workmen reported in AIR 1167 SC 1286, the Supreme Court observed that the problem of burden imposed by the gratuity scheme could be looked at in two ways. One was to capitalize the burden on actuarial basis which would show theoretically that the burden would be very heavy; and the other was to look at the scheme in its practical aspect and find out how many employees retire every year on the average and that this practical approach ought to be taken into account. In the instant case from the chart exhibit 6, it appears that 8 or 9 persons retire every year. So, the financial burden, according to Mr. Mukherjee, would not be more than Rs. 8000/- to Rs. 10,000/- per annum and, in view of the Balance Sheet of five years, the Tribunal was justified in raising ceiling of the gratuity only to Rs. 1,000/- from the existing ceiling.

14. In (11) Airlines Hotel (Private) Ltd. Vs. Its Workmen, the Supreme Court observed that, to impose such a burden without recording a definite finding as to the financial capacity of the employer to bear the additional burden, would be improper for the Industrial Tribunal.

15. Mr. Banerjee, appearing on behalf of the respondent, contends that where 11 thousand workers are employed in a factory it is preposterous to conceive that only 8 or 9 workers retire every year and the additional burden of the company would be only Rs. 8,000/- or, Rs. 10,000/- as contended by Mr. Mukherjee. The company has exhausted its maximum limits of its available borrowings in obtaining advance from the Banks. All assets of the company have been mortgaged to the Banks. There are no other assets on which further money can be borrowed from the Banks. In the report of the shareholders on the accounts for the year 1965-66, the Chairman and the Board of Directors of the Company pointed out that the future of the company was very gloomy.

16. On the prospect of the company, the Tribunal only considered that the factories started at Durgapore and Farakka and the company was exporting its products to different countries. But the Chairman and the Board of Directors have stated in the 35th Annual Report, which is exhibit 7, "we have trimmed our sail to meet the difficult challenge of coming years". The learned trial Judge is of opinion that what should be considered is, whether the financial position of the company, its profits or loss of the present, and future prospects would enable the company to bear the financial burden that may be imposed by raising of the maximum ceiling of the gratuity. We find no reason to differ from the view of the learned trial Judge.

Before the trial court in the course of hearing, the company filed a supplementary affidavit showing changes in the circumstances and its state of financial position. Mr. Mukherjee contends that if there is a change in the circumstances, the company might apply u/s 19(4) of the Industrial Disputes Act for reference to the appropriate Government. The matter after the award, Mr. Mukherjee submits, would not be taken into consideration.

17. It is well settled that the court can take into consideration the subsequent events and decide the matter in view of those events. A reference u/s 19(4) of the Act is different from the reference u/s 10. u/s 19(4), the Tribunal has to decide only the limited question whether the period of operation of the award should not, by reason of material change in the circumstances, be shortened. Therefore; we are unable to hold that in case of change of financial position of the company a reference u/s 19(4) of the Act is the appropriate remedy.

18. Lastly Mr. Mukherjee contended that the learned trial Judge was wrong in setting aside the award of gratuity in its entirety, the portion of the award and gratuity payable in cases of misconduct or misdemeanour was not challenged at all and the said portion of the award should have in any event been upheld by the learned Judge.

19. In (12) The Garment Cleaning Works Vs. Its Workmen, it has been held by the Supreme Court that once gratuity has been earned by service it does not become forfeited even after dismissal for misconduct, and that the amount due shall be paid off deducting the whole of the financial loss caused by the employees' misconduct. The Tribunal in view of the said decision of the Supreme Court directed that the words "for reasons other than misconduct or misdemeanour" should be deleted in sub-clause (V) of Clause (a) of paragraph 4 of the gratuity scheme and a proviso should be added as follows:

"Provided that no workman who is dismissed for misconduct or misdemeanour should be entitled to receive gratuity only after completion of 15 years" service, but where the misconduct or misdemeanour entails financial loss, the company would be entitled to set off the loss from the amount of gratuity payable". It seems to us that the attention of the learned trial Judge was not drawn by any of the parties otherwise that part of the modification in the gratuity scheme must have been retained. However, we make it clear that in re-considering the revision or modification of gratuity scheme, the Tribunal shall consider only, the principle as laid down by the Supreme Court in (1). Burhanpur Tapti Mills Ltd. Vs. Burhanpur Tapti Mills Mazdoor Sangh, and, also the impact of the West Bengal Employees Payment of Compulsory Gratuity Rules 1971 (Act 7 of 1971), the other part of the award must remain unaltered.

20. Now, in the other appeal preferred by the company with respect to issue of leave, it is contended that the Tribunal did not take into account of the comparable units; financial burden was also not considered. Before the trial Court the argument was proceeded on the ground that the Tribunal did not

consider Factories Act or West Bengal Shop & Establishment Act or Employees State Insurance Act in increasing the leave. A ground was, however, taken as ground No. 10 in the company's application under Art. 226 of the Constitution that the Tribunal had acted illegally and without jurisdiction in holding that "the existing privilege leave as given by Jessop & Co. does not compare favourably with that of the other companies" inasmuch as the Tribunal had completely ignored the basis of industry-cum-region, that is to say, comparison of comparable concern in the same region. The learned trial Judge found that in view of the Supreme Court's decisions in (10) Calcutta Insurance Co. Ltd. Vs. Their Workmen, the Tribunal could award the leave in excess of the statutory limit and affirmed the award of the Tribunal so far as the revision of the privilege leave is concerned. These points were never raised before the trial court, although a ground was taken, but it appears that, the said ground was not pressed before the learned trial Judge. So, under these circumstances, the appellants could not be allowed to raise a new point before the appeal court. We find no reason to interfere with the order passed by the learned trial Judge.

In the result, both the appeals are dismissed, the judgment and order of the trial court are affirmed subject to the observations made in Appeal No. 20 of 1971.

There will be no order as to costs in either of the appeals.

B.C. Mitra, J.

I agree.