

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WP(C) 2180/2003**

% **Date of decision: 8th March, 2010**

R.K. GUPTA

..... Petitioner

Through: Mr. Satya Mitra Garg, Advocate.

Versus

**REGIONAL LABOUR COMMISSIONER
NEW DELHI & ORS.**

..... Respondents

Through: Mr. R.V. Sinha with Ms. Sangita Rai,
Advocates for R-1 & 2.
Mr. Ravindra Kumar, Advocate for R-
3/NBCC Ltd.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

RAJIV SAHAI ENDLAW, J.

1. The petitioner seeks, a) a writ of certiorari quashing the orders dated 18th August, 2002 and 16th September, 2002 of the respondents No.2 & 1 being the Authority and the Appellate Authority respectively under the Payment of Gratuity Act, 1972, denying the claim of the petitioner for interest on gratuity already paid by the respondent No.3 M/s NBCC Ltd. and; b) a writ of mandamus directing the respondent No.3 to pay interest to the petitioner for the delayed payment of gratuity.

2. The petitioner was employed with the respondent No.3 since 28th January, 1963 and was since the year 1969 working as a Financial Advisor and Chief Accounts Officer. On 28th February, 1983 the petitioner sent a letter seeking voluntary retirement and also giving three months notice. The petitioner was informed that there was no scheme of voluntary retirement but the respondent No.3 agreed to relieve the petitioner of his duty

on the petitioner paying for the balance notice period. The petitioner was also informed that proceedings for imposition of major penalty were then being contemplated against the petitioner. The petitioner filed CW No.450/1983 in this Court which was disposed of vide order dated 5th April, 1983 whereby the petitioner withdrew his letter seeking voluntary retirement and/or giving notice and the respondent No.3 accepted the petitioner back in service. However, on 8th April, 1983 the petitioner was suspended in view of contemplated disciplinary proceedings against him and pursuant to an inquiry, was on 11th February, 1985 dismissed from the services of the respondent No.3. The petitioner challenged the said dismissal by filing CW No.419/1985 in this Court which was allowed by a Division Bench of this Court vide judgment dated 20th February, 1998 and the order dated 11th February, 1985 of dismissal of the petitioner from service was set aside and the petitioner was held entitled to all the consequential benefits. However the petitioner having in the meanwhile on 30-04-1990 attained the age of superannuation, the respondent No.3 was directed to pay to the petitioner all the benefits to which he was entitled to as per the rules, as on the date of order of suspension i.e. 8th April, 1983 up to the date of superannuation within a period of three months from 20th February, 1998. The said judgment was not challenged by either party.

3. The petitioner on 22nd January, 2001 filed an application before the Controlling Authority under the Payment of Gratuity Act (Respondent No.2) seeking interest compounded annually @12% w.e.f. 1st May, 1982 to 8th June, 1998 and compounded annually at 24% thereafter up to the date of release of payment on delayed payment of gratuity. It may be noticed that the sum of Rs.1 lac had been released by the respondent No.3 to the petitioner towards gratuity, on 8th June, 1998 pursuant to the order dated 20th February, 1998 (supra) of this Court.

4. The Authority vide order dated 18th August, 2002 held that the respondent No.3 was following the provisions of the Act for payment of gratuity to its employees and those employees not covered under the Act were also being paid gratuity as per the

provisions of the Act except that in their cases ceiling of wages for the purpose of calculating gratuity was in terms of guidelines from time to time of Bureau of Public Enterprises. It was thus held that the plea of the respondent No.3 that the petitioner was not covered by the provisions of the Act did not require any further detailed examination. It was further held that though the petitioner was not eligible to gratuity under the Act owing to his last salary as on 30th April, 1990 being Rs.7,488/- while the maximum wage limit for the employee to be covered under the Act then was Rs.3,500/-, but since as per the scheme of the respondent No.3 all the employees who were not covered under the Act were also being paid gratuity as per the provisions of the Act, the petitioner was entitled to gratuity and had been rightly paid gratuity in the sum of Rs.1 lac. The Authority however held that since the Division Bench of this Court in its order dated 20th February, 1998 while setting aside the order of dismissal of the petitioner had directed payment to be made within a period of three months from that date, the respondent No.3 became liable to payment of gratuity to the petitioner in terms of the said order only rather than in accordance with the Act on the basis of the petitioner having superannuated on 30th April, 1990. Finding that there was a delay of two months seven days beyond the time of three months given by this Court for payment, the Authority held the petitioner entitled to interest as per the provisions of Section 7 (3-A) of the Act found to be at the rate of 10% simple interest for the period of two months and seven days only.

5. The petitioner being dissatisfied preferred an appeal under Section 7(7) of the Act and which has been dismissed by the Appellate Authority (Respondent No.1) vide order dated 16th September, 2002 on the same grounds as in the order dated 18th August, 2002. Aggrieved therefrom the present petition has been filed.

6. In the present petition the petitioner has claimed interest at the rate of 9% compounded annually from 11th February, 1985 to 30th November, 1987, 15% compounded annually from 1st May, 1990 to 8th June, 1998 and 15% compounded

annually from 9th June, 1998 to the date of full & final settlement, after deducting Rs.1 lac from the same.

7. The counsel for the respondent No.3 contended –

(i) that the petitioner had in the application filed before the Authority claimed interest 12% compounded annually w.e.f. 1st May, 1990 to 8th June, 1998 (being the date on which gratuity of Rs.1 lac was paid to the petitioner) and 24% compounded annually thereafter up to the date of release of payment; that he has expanded his case in the writ petition by claiming interest for an earlier period and at a higher rate and which cannot be permitted.

(ii) that interest is payable under Section 7 (3A) of the Act at such rate not exceeding the rate notified by the Central Government from time to time for repayment of long term deposits and at simple rate only and not compounded rate; that only under Section 8 if a Recovery Certificate is issued by the Collector is compound interest payable and which also cannot exceed the amount of gratuity payable under the Act.

(iii) that the petitioner having been dismissed from employment in 1985 was not entitled to any gratuity and gratuity became payable to him only when the said order of dismissal was set aside on 20th February, 1998 and thus the claim of the petitioner of interest from 1985 till 1998 is not justified. On enquiry as to where it is provided that in the case of dismissal from service no gratuity is payable, reliance is placed on the letter dated 7th October, 1998 of the respondent No.3 providing that employees of respondent No.3 who are not covered under the Act are also being paid gratuity as per the provisions of the Act and that the Board of Directors of the respondent No.3 in their 238th Meeting held on 14th September, 1988 had decided that payment of gratuity to employees who are not covered under the Act shall be made subject to the terms and conditions contained in the enclosed statement. The enclosed statement provides that gratuity will not be admissible to an employee whose services are terminated for misconduct, insolvency or inefficiency.

8. The petitioner countered the above contention of the counsel for the respondent No.3 by drawing attention to Section 2 (q) of the Act defining retirement as termination of service of an employee otherwise than on superannuation. He thus contended that he was entitled to gratuity under the Act even upon termination of his services in 1985 and the respondent No.3 ought to have paid gratuity to him and/or deposited the same with the Authority and he is thus entitled to interest from that date. The counsel for the respondent No.3 sought time to consider the said plea of the petitioner. The proceedings were adjourned for a day.

9. The counsel for the respondent No.3 on the next date urged that it is only by the amendment to Section 2(e) of the Act defining employee w.e.f. 24th May, 1994 that the gratuity has become payable to all employees irrespective of their wages; earlier there was a ceiling of Rs.1,000/- or Rs.1,600/- and lastly Rs.3,500/-. It is urged that in 1985 when the services of the petitioner were terminated his wages which would be inclusive basic wage plus all allowances were in excess of the then prescribed ceiling and the petitioner was thus not covered by the Act and his claim for gratuity can only be under the statement approved by the Board of Directors of the respondent No.3 in their 238th Meeting (supra) held on 14th September, 1988 and as per which the petitioner was not entitled to gratuity, his services having been terminated and gratuity became payable only on the said order of dismissal being set aside on 20th February, 1998. He further contended that the order dated 20th February, 1998 of this Court setting aside the dismissal of the petitioner, though conscious of the petitioner having superannuated on 30th April, 1990 did not provide for payment of interest on arrears and only provided for the payment of the dues within three months. It is urged that the Authorities under the Gratuity Act had rightly held that the petitioner was entitled to interest only for the period of delay beyond three months.

10. A perusal of the writ petition shows that it is the plea of the petitioner that his basic pay at the time of joining the employment of the respondent No.3 on 28th January,

1963 was Rs.320/- p.m. increased w.e.f. 25th April, 1964 to Rs.350/- p.m., w.e.f. 1965 to Rs.590/- p.m. and w.e.f. 1967 to Rs.700/- p.m. and w.e.f. 1969 to Rs.900 p.m. It is the case of the petitioner that his wages for the first five years from 1963 to 1968 being below the ceiling limit of Rs.1,000/- under Section 2(e) of the Act as it originally stood, he was covered by the Gratuity Act. The counsel for the petitioner has also urged that the Authority as well as the Appellate Authority have held the petitioner to be covered by the provisions of the Act and the respondent No.3 has not challenged the said order and has rather complied with the same by paying the interest found due.

11. I find that the Supreme Court in *Management of Goodyear India Ltd. Vs. K.G. Devessar* (1985) 4 SCC 45 has held that the date of coming into force of the Act (being 16th September, 1972) has relevance to the date on which the gratuity becomes payable and in order to be eligible to payment of gratuity, the termination of employment has to be after the date of coming into force of the Act and further that the gratuity will have to be paid to all those persons whose employment came to an end after coming into force of the Act for that period during which he came within the definition of an employee within the meaning of Section 2(e) of the Act and that to hold otherwise may render a whole class of persons who all their lives got wages less than Rs.1,000/- p.m. but on the eve of their retirement started getting wages of Rs.1,000/- p.m. without the benefit of the Act and which is impermissible. It was thus held that a person whose services are terminated after coming into force of the Act is entitled to the payment of gratuity if he has rendered continuous service for not less than five years, for that period during which he satisfies the definition of employee under Section 2 (e) of the Act. It may also be noticed that in the facts of that case also, the employee at the time of coming into force of the Act was drawing wages more than Rs.1,000/- p.m. but was held entitled to gratuity for the reason of having over five years prior to coming into force of the Act drawn wages less than Rs.1,000/-.

12. I further find that the office orders of the respondent No.3 make the provisions of the Act applicable to even those employees whose salary is above the ceiling then existing in Section 2(e) of the Act; the only difference is that the computation of gratuity in such cases is as per guidelines from time to time of Bureau of Public Enterprises, instead of under the Act. Thus the respondent No.2, in the matter of payment of interest has to be held covered by the provisions of the Act. The respondent No.3 has also not challenged the findings, of the Authorities below of respondent No.3 being liable to pay interest under the Act, if found due.

13. I am however unable to accept the claim of the petitioner of gratuity having become payable to him at the time of order of his dismissal in 1985. The petitioner successfully challenged the order of dismissal and the same has been set aside. The petitioner cannot on the one hand claim benefit the order of this Court setting aside his dismissal and on the other hand make a claim for interest on the basis of the said dismissal.

14. The next question which arise is as to when the gratuity became payable, whether on the date of superannuation or on the date of setting aside of order of dismissal. In my view, upon the order of dismissal being set aside and the petitioner having been deemed to have superannuated and the respondent No.3 having been found to be in default, the order of dismissal is now nonest. The delays of the court in adjudicating the challenge by the petitioner to the order of dismissal cannot harm the petitioner or benefit the respondent No.3. The counsel for the respondent No.3 has been unable to show any basis for denying interest to the petitioner for the period during which his challenge to the order of dismissal which ultimately succeeded was pending.

15. The next argument of the counsel for the respondent No.3 and accepted by the Authorities below is that the claim of the petitioner for interest from 1st May, 1990 to 8th June, 1998 when the payment was made is not entertainable for the reason of the order

dated 20th February, 1998 of this Court having granted three months time to the respondent No.3 to pay the dues of the petitioner.

16. This Court, while deciding the writ of the petitioner against the order of dismissal, did not have the lis of interest before it. There is neither any discussion nor finding on the entitlement if any of the petitioner to interest. A judgment is a decision of the court on the basis of what is agitated before it and what is decided and cannot be presumed to be a decision on what was not in controversy and/or for decision before the court. The reasoning of the Authorities below that the petitioner is not entitled to interest from the date of superannuation when gratuity became payable, for the reason of this Court having granted three months time to make the payment is thus found to be erroneous. Moreover, this Court had directed payment to the petitioner of all the benefits to which he was entitled, "as per the Rules"; in fact there is no express mention of gratuity in the said order. If in accordance with the Rules or under the Gratuity Act, held above to be applicable, the respondent No.3 is liable for any interest, the order dated 20th February, 1998 does not come in the way of such entitlement of the petitioner. I may also notice that the petitioner had first sought to agitate his claim for interest by way of filing CCP No.100/1999 in this Court which was disposed of by holding that non-payment of interest furnishes a separate cause of action to the petitioner for which he could approach the appropriate Authority. It was only thereafter that the petitioner had approached the Authorities as aforesaid under the Act.

17. The next question is as to the rate at which the petitioner is entitled to interest and whether it is to be simple or compound interest. The scheme of Section 7 (3A) & 8 read harmoniously, is that first the claim for interest is to be agitated before the Authorities under the Act and if the employer in spite of direction of the Authorities fails to pay interest found due, the Authority is to issue a certificate to the Collector for recovery of that amount from the employer. The jurisdiction to grant interest under Section 7 (3A) is at simple rate. However if the interest so found due remains unpaid and a certificate of

recovery is required to be issued to the Collector, interest becomes payable at compounded rate. In the present case the interest found due by the Authorities has already been paid to the petitioner. It is thus not a case of respondent No.3 not paying the interest so found due, for interest to become payable at compound rate. The grievance of the petitioner and which has been found correct is to the decision of the Authorities. However that would still not entitle the petitioner to interest at compound rate inasmuch as the stage of Section 8 has not reached as yet. If inspite of order of this Court interest is not paid and the petitioner has to approach the Authority for issuance of a Recovery Certificate, it is only then that interest will be payable at compound rate.

18. The petitioner, in the writ petition is seeking interest till the date of payment in terms of order of this Court. However the same cannot be permitted. The sum of Rs.1,00,000/- towards gratuity was paid to petitioner on 8th June, 1998. The petitioner cannot be permitted to treat the said payment on account of or on account of interest. The petitioner in terms of Section 7(3A) is entitled to interest till 8th June, 1998 only.

19. The petition therefore succeeds. A writ of certiorari is issued quashing the orders of the Authority and the Appellate Authority under the Act and holding the petitioner entitled to interest in terms of Section 7 (3A) of the Act w.e.f. 30 days after the superannuation of the petitioner on 30th April, 1990 i.e. w.e.f. 1st June, 1990 and till the date of payment i.e. on 8th June, 1998 less the amount paid towards interest in terms of orders of Authorities below. There is some controversy as to the rate at which such simple interest is payable. However, in the absence of the rates notified by the Central Government at the relevant time, for repayment of long term deposits being available to this Court, the payment is directed at such rates. The interest amount so found due was payable to the petitioner along with gratuity on 8th June, 1998 and has not been so paid. Neither can the petitioner be made to suffer nor can the respondent No.3 be made to benefit from non-payment of the said interest for the last nearly 12 years. The petitioner is thus held entitled to further interest @ 7% p.a. on the amount of interest now found

due, from 9th June, 1998 till the date of payment. Since the petitioner was unsuccessful before the Authorities below and further since the non-payment of interest is not found to be malafide and was for plausible reasons and further since interest as aforesaid has been awarded to the petitioner, no order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

8th March, 2010

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