

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

+ **W.P.C.No.9184/2006**

% Judgment reserved on :25th April, 2012
Judgment delivered on:03rd July,2012

A.K.MITRA

..... Petitioner

Through: In person.

versus

UOI & ORS.

..... Respondents

Through: Mr.Ravinder Aggarwal and
Mr.Amit Yadav, Advs for R1.

Mrs.Pinki Anand, Sr. Adv with Mr.Mirza
Kayesh Begg, Adv for R2 & R3.

CORAM:

HON'BLE MR. JUSTICE SURESH KAIT

SURESH KAIT, J.

1. It is pertinent to mention that instant petition was disposed of on the date of its filing itself vide order dated 26.05.2006 by issuing the direction as under:-

“4. I have considered the material on record. The petitioner’s grievances vis-a-vis non-payment of gratuity does not appear to have been addressed by the respondent EEPC. The stand of the EEPC appears to be based on the judgment of the Supreme court that wherever gratuity had already been settled on the then prevailing basis, there was no question of releasing any further amount. I am of the opinion that the respondent have not taken into consideration a very material fact namely that

after the petitioner was relieved from services, the organisation undertook revisions of pay scale and apparently had released differential pay. In the event the last pay drawn also stood enhanced. As a consequence, the respondent – employer was under a duty to consider this material and relevant factor while deciding if the differential gratuity ought to be released. A direction is, therefore, issued to the respondent to consider the issue in the light of the above factors and issue a speaking order within six weeks from today. While doing so, the respondent shall also take into consideration the petitioner's grievances vis-a-vis provident fund. The speaking order shall be communicated directly to the petitioner. All rights and contentions of the parties are kept open. In the event of grievance, it is open to the petitioner to approach the appropriate forum."

2. Being aggrieved, the respondents challenged the order passed by this Court mentioned above, same has been set aside by the Division Bench of this Court in LPA No.1720/2007 vide order dated 12.07.2007 as under:-

"7. The appellant has raised question of laches also. At the same time, the respondent disputes the above statement made by the learned counsel for the appellant. These aspects are required to be examined and considered for adjudicating and deciding pleas raised by both parties after pleadings and documents are filed. It is however; an admitted position that notice had not been issued to Engineering Export Promotion Council and the said Council was not heard, when order dated 26th May, 2006 came to be passed.

8. In that view of the matter, we find no other option but to set aside the impugned order and

remit back the matter to the learned Single Judge for consideration of the writ petition on merits and contentions raised before us.”

3. Present petition is being filed for seeking direction to the respondents for payment of the arrears of gratuity entitled on actual payment of salary, which comes to ₹ 3.00Lacs approximately with interest at the rate of 18 per cent per annum from the date of accrual of right till the date of payment.

4. The petitioner was recruited as a Trainee Marketing Officer for office of Engineering Export Promotion Council (hereinafter referred as ‘EEPC’) at Dusseldorf, Germany under a government run project in the year 1970. The petitioner, thereafter, served in various capacities both overseas and in India till October, 1997. But due to constant harassment by the then Executive Director started from 1996, the petitioner asked for voluntary retirement after serving the respondents for more than 27½ years.

5. Since the request of the petitioner for VRC was treated as resignation by the respondent ham-handed, without giving him an opportunity to rethink, the petitioner accepted the term ‘resignation’ used by his employer in utter disgust and sheer dismay and left the service on 31.10.1997.

6. Petitioner appearing in person submitted that after the resignation, he accepted his earned wages, gratuity and provident fund. Thereafter about one month of relieving of the petitioner, with effect from 01.11.1997, the respondent adopted the report of the Fifty Central

Pay Commission with effect from 02.12.1997, as per the Government Notification, the petitioner legally entitled to the arrears; after his last pay was fixed according to the report Fifth Pay Commission and the respondent has given the arrears of salary with effect from 01.01.1996 to 31.10.1997 as per revised pay in the year 1998.

7. He further submitted that the respondents paid the salary arrears in the year 1998 retrospectively with effect from 01.01.1996, having implemented the revised pay scales as per the Government Order dated 02.12.1997, and terminal leave encashment benefits, but the respondent failed to pay arrears on gratuity.

8. In the year 1998-99, petitioner sent a representation to the Director of EEPC and to the Ministry of Commerce, for payment of gratuity due to the revision of pay scales and provident fund dues. However, the petitioner got his provident fund dues in late 1998, but not the gratuity dues.

9. He further submitted that respondent No.2 rejected the representation of the petitioner on the ground that full and final settlement of gratuity has been made at the time of the petitioner's resignation and arrears are not payable on gratuity as per rule of the Council i.e. EEPC.

10. Thereafter, during the period from the years 2001 to 2003, the petitioner made oral requests and personal visits to the respondents many a times and also took up the issue of non-payment of the gratuity before the Department of Public Grievance Cell, Government of India.

Finally, the respondent No.1 disposed of the grievance petition stating that as per them and also respondent No.2, petitioner cannot claim gratuity arrears because of the judgment of the Supreme Court in ***State Government Pensioners Association & Ors v. State of Andhra Pradesh : AIR 1986 1907.***

11. Thereafter, petitioner sent a legal notice for payment of the gratuity amount to the respondents; but the respondent sent an out of context reply without even bothering to loan at the legal notice.

12. The main contention of the petitioner in instant petition is that the judgment of the Apex Court in ***State Government Pensioners Association (supra)*** is not applicable in the petitioner's case because therein, Hon'ble Supreme Court held that the Government Pensioners who retired prior to 01.04.1978 shall be denied the benefit of enhancement in gratuity and its consequent arrears because gratuity arrears cannot be paid to all and sundry as that shall entail a huge amount on the A.P. Government exchequer. The A. P. Government vide its Order No. 88 dated 26.03.1980, extended benefits of Gratuity arrears, retrospectively, i.e. to all employees retiring till 01.04.1978, i.e. with back date effect of two years. This was the time limit of two years with retrospect from the Government Order No.88, which the Hon'ble Supreme Court upheld.

13. Whereas, in the instant case, the gratuity Act No.11 of 1998 amended the Gratuity Act retrospectively with effect from 24.09.1997 and also the fact that the internal decision of EEPC did not allow any retrospective time of two years to him, unlike the A. P. Government

from the time of Fifth Pay Commission implementation in December, 1997.

14. Vide instant petition, the petitioner has sought two reliefs, viz (a) Non-payment of arrears on account of gratuity due to revision of pay as per the Pay Commission; and (b) Non-receipt of pension even after 09 years from Provident Fund Authority in Kolkata, due to errors and callous attitude of the EEPC. The respondent though has paid all his dues on the recommendations of Fifth Central Pay Commission latter, but while calculating gratuity, the pay fixed in the revised pay scale with effect from 01.01.1996 was not been taken into account, but calculated as per the pay drawn in pre-revised scale, i.e. at the time of petitioner's leaving the services.

15. The petitioner further submitted that by the similarly placed person a writ petition being W.P.No.8646(W) of 2002 has been filed before Kolkata High Court for the implementation of the Fifth Pay Commission structure as far as gratuity dues were concerned. The same petition is pending consideration.

16. Respondent Nos.2 & 3 have filed response to instant petition and raised the preliminary objection that alternate and efficacious remedy is available to the petitioner under a special statute i.e. the Payment of Gratuity Act, 1972. It is imperative to note here that the Payment of Gratuity Act, 1972 is a special statute enacted solely to address the grievances of the citizens with respect to the due pertaining to the payment of gratuity.

17. Under the Payment of Gratuity Act, 1972 a competent authority is designated to adjudicate the dispute and a complete mechanism has been provided under the Payment of Gratuity Act, 1972 vis-a-vis Rules 11 to 17.

18. It is further submitted that earlier some petitions have been preferred by various other employees of respondent No.2 by way of writ petition before the High Court of Kolkata which has been disposed of with the direction to approach the appropriate forum vis-a-vis the competent authority appointed under the Payment of Gratuity Act, 1972 for the adjudication of the disputes pertaining to the gratuity.

19. Further it has been averred that the High Court of Kolkata while disposing of the similar petition being No.987 of 1998 preferred by one of the employees of respondent No.2 observed as under:-

“.... it appears under the Gratuity Act that there is a complete and efficacious machinery has been provided and that act can take care of this dispute. Therefore, I do not wish to adjudicate this dispute in this writ jurisdiction. I keep it open for both the parties to settle their score on this controversy before the appropriate forum viz. Before the competent authority, appointed under the Gratuity Act, 1972.”

20. A further preliminary objection taken by the respondents on delay and laches and submitted that the claims of the petitioner relates to the difference in gratuity for the year 1970-1997, the recommendations of Fifth Pay Commission came on 02.12.1997, whilst the present petition has been preferred only around May, 2006. The petitioner has not provided any explanation for delay and laches.

It is submitted that the answering respondents implemented some of the recommendations and has paid gratuity as per the last pay scale on the date of date of retirement, to its retiring employees.

21. Respondents have further raised preliminary objection that the petitioner has not challenged the letter dated 22.02.2000 whereby it was categorically informed to him that the gratuity paid to him at the time of his resignation was as per the prevailing rules and same cannot be revised/enhanced upon the recommendations of the Fifth Pay Commission. Instead, petitioner chose not to take any action against such a decision and also concealed this fact and prefers this present petition after a period of six years, seeking for issuance of fresh directions. Keeping in mind that the respondents have already decided the said issue vide its letter dated 22.02.2000, the present petition so preferred deserves outright dismissal as the same is infructuous.

22. The stand taken by the respondents in the counter affidavit that the recommendations of Fifth Pay Commission are merely recommendatory in nature and not mandatory to follow in toto. The respondent company accepted the said recommendations as far as it related to the revised pay scales and duly paid the arrears to the respective employees; however, Council / respondent Nos.2 & 3 did not adopt the recommendations with regard to the benefits flowing out of the pay scale like gratuity. Though the gratuity was already paid to the petitioner on the then prevailing rates of retirement. The amount got crystalised on the date of retirement and was also paid on that date itself. The transaction was completed and closed. Thus, there was no

obligation on the part of the respondent No.2 to reassess the gratuity computation in view of the recommendations of the Fifth Pay Commission and re-open the accounts already closed in respect to gratuity.

23. Another objection taken by the respondents is that in the instant petition, the petitioner has sought relief from this Court and sought direction to be issued for payment of pension from the Provident Fund Authority, Kolkata under Employees' Pension Fund Scheme 1995. In the light of above relief sought, it is submitted that the instant petition is bad for non-joinder of necessary parties and deserves dismissal on this ground due to the fact that for the reasons best known to the petitioner, he has failed to make the Commissioner, Provident Fund Authority, Kolkata as one of the necessary opposite party in instant petition.

24. It is pertinent to mention here that respondent raised the issue that the petitioner has placed distorted facts before this Hon'ble Court to get a favourable order/judgment in the matter and has malafidely committed forgery with respect to the communication from the Delhi Legal Services Authority dated 13.06.2005, Annexure P4 and has overwritten and misrepresented as 15.06.2004. Furthermore, the communication from the Ministry of Commerce and Industry, Department of Commerce letter No.2/04/2004-Griev dated 19.11.2004 Annexure P5 has also been forged as dated 14.10.2004. The petitioner has tried to mislead the Court by changing the dates of the above mentioned correspondences and further certifying the said annexures

to be the true copies of the originals.

25. Ms.Pinki Anand, learned Senior Advocate appearing on behalf of respondent Nos.2 & 3 submitted that the petitioner is an ex-employee of respondent No.2 resigned from the service on 29.09.1997. The resignation of petitioner was duly accepted by the respondent No.2 with effect from 01.11.1997. On the said date, the terminal dues of the petitioner including gratuity, leave encashment and provident fund were computed, crystalised and duly settled.

26. The gratuity paid to the petitioner to the tune of ₹ 1,41,435/-; leave encashment to the tune of ₹ 42,663/- and the balance outstanding amount was ₹ 2,39,374/-. Thus, there was a less and negative balance of ₹ 55,276/- still due to the petitioner.

27. Learned Senior Advocate for respondent Nos.2 & 2 relied upon ***M/s.Martin Burn Limited v. Shri T.C.Moorjani & Ors : ILR (1973) II Delhi 785*** wherein Division Bench of this Court has held that Section 7(4)(b) of the Payment of Gratuity Act, 1972 provides a statutory remedy and hence the said remedy ought to be availed first before filing a writ petition.

28. She submitted that the High Court of Calcutta while deciding the same issue in the matter of ***Chanchal Kumar Ghosh v. EEPC in W.P. No.979/1999*** filed by one of the ex-employees of respondent No.2 had held that the Gratuity Act, 1972 provides a complete and efficacious machinery and this dismissed the said writ petition. Law has been settled in ***State Government Pensioners Association (supra)*** that

claim of gratuity can be made only on the date of the retirement on the basis of the salary drawn on the date of retirement and already paid. Based thereon, the transaction is treated as complete and closed. It is also settled position of law that once the process is complete and closed the same cannot be reopened on a later date for persons retiring subsequently.

29. To buttress her submission, she relied upon ***Indian Ex-services League v. Union of India: AIR 1991 SC 1182*** wherein it has been held as under:-

“21. One of the prayers made in these writ petitions is for grant of same Death-cum-Retirement Gratuity to the pre- 1.4.1979 retirees as to the post-1.4.1979 retirees. A similar claim was rejected by this Court in State Government Pensioners' Association and Others v. State of Andhra Pradesh, [1986]3 S.C.C. 501 (AIR 1986 SC 1907) on the ground that the claim for gratuity can be made only on the date of retirement on the basis of the salary drawn on the date of retirement and being already paid on that footing the transaction was completed and closed. It could then not be reopened as a result of the enhancement made at a later date for persons retiring subsequently. This concept of gratuity being different from pension has also been reiterated by the Constitution Bench in Krishena Kumar's case (AIR 1990 SC 1782) . With respect, we are in full agreement with this view. This claim of the petitioners also, therefore, fails.”

30. Moreover, at the time of his resignation, (31.10.1997) the
W.P.C.No.9184/2006 Page 11 of 15

contribution in his name towards pension fund counted for less than ten years as such contributions were only for the period of June, 1993 to October 1997. The said contributions had been remitted to the O/c RCFC, Kolkata accordingly, who had duly intimated the petitioner about the payment in terms of the extant rules which, in this case was withdrawal benefit which, however, he declined to accept.

31. It has also been clarified that that respondent No.1 in its additional affidavit vide office memorandum dated 14.09.2010 issued by the Ministry of Personnel, PG & Pensions, Department of Pension and Pensioner's Welfare, Government of India that payment of gratuity to retiring Central Government is regulated under the CCS (Pension) Rules, 1972 and the employees who retired from the services of EEPC are not covered by the CCS(Pension) Rules, 1972. In view of the same also the petitioner cannot be allowed to ask for revised gratuity.

32. The alleged claim of the petitioner pertains to the year 1970-1997; whereas the present proceedings were initiated only in May 2006 without any explanation for the said delay.

33. I have heard ld. Counsel for the parties.

34. Admittedly, the case of the respondent is that report of 5th Pay Commission was adopted w.e.f 02.12.1997 as per the Government Notification. However, the respondents have paid the arrears of salary in the year 1998 retrospectively w.e.f 01.01.2006 having implemented the revised Pay-Scale as per the Govt. Order dated 02.12.1997.

35. It is further admitted case of the respondent that petitioner resigned from the service on 29.09.1997, same was duly accepted by respondent no. 2 w.e.f 31.10.1997. On the said date, the terminal dues of the arrear including, gratuity, leave encashment and provident fund were computed, crystalised and duly settled.

36. I note, respondents have paid salary to the petitioner as per the revised pay scale w.e.f 01.01.1996 along with other benefits as per the 5th Central Pay Commission, however has not paid the arrear of gratuity, applicable to the petitioner.

37. I am not agreed with the contention of the respondent that respondents are not bound to implement the recommendation of 5th Pay Commission in toto and they have not implemented the enhanced revised gratuity.

38. The payment of gratuity is based on last drawn wages and when the last drawn wage is for the purpose of ex-gratia determined based on the revised pay structure, the same last drawn wage is to be adopted for the payment of gratuity amount also.

39. The condition for the gratuity is prescribed under Section 2(A)(1) Payment of the Gratuity Act, 1972, wherein continues service for the purpose of this Act has been prescribed that 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 treating the absence as break in service has been passed

in accordance with the standing order, rules or regulations governing the employees of the establishment.

40. In Section 4(1) (b) it is prescribed that Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years, on his retirement or resignation.

41. If case of the petitioner is that he was in service till 1997, and the revised Pay Scale as per 5th Central Pay Commission is applicable w.e.f 01.01.1996, then there is no point not to give him the arrear on the gratuity for the service the petitioner rendered with the respondents.

42. The ***High Court of Bombay (Aurangabad Bench)*** in ***Writ Petition No. 2035 of 2011*** decided with the Batch of Petitions on 10.02.2012 held that:

“Petitioner is entitled from the date of applicability of the 5th Pay Commission till his retirement in service. Accordingly, gratuity amount also to be determined accordingly. His arrear on salary already given w.e.f 01.01.1996 having implemented the revised pay scale as per the Govt. Order dated 02.12.1997.”

43. In the case cited above the petitioner was held to be entitled for the revised gratuity.

44. Accordingly, in view of the above discussion, respondents are directed to calculate the gratuity of the arrear as applicable as per the Central 5th Pay Commission and disbursed the same to the petitioner

within four weeks from today.

45. Since the petitioner has been agitated this issue continuously with the respondents and there is no fault of him, therefore, interest thereon @ 8% would also be paid accordingly.

46. If the respondents failed to pay the above directed amount within the period mentioned above, then the petitioner shall be entitled to further interest @ 4% till the realization of the same.

47. In view of the above, instant petition is allowed and disposed.

SURESH KAIT, J

JULY 03, 2012

Mk/jg