

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE SMT. JUSTICE P.V.ASHA

TUESDAY, THE 2ND DAY OF JUNE 2015/12TH JYAISHTA, 1937

WP(C).No. 5581 of 2012 (W)

PETITIONER:

**D.SIVAMANI AGED 63 YEARS
'AISWARYA LAKSHMI', THATTARASSERIL, MUHAMMA.P.O.
ALAPPUZHA-688 525.**

BY ADV. SRI.C.ANIL KUMAR

RESPONDENT(S):

**1. KERALA STATE ELECTRICITY BOARD
VYDYUTHI BHAVAN, PATTOM PALACE POST
THIRUVANANTHAPURAM-695 004
REPRESENTED BY ITS SECRETARY.**

**2. CHIEF ENGINEER (HRM)
KERALA STATE ELECTRICITY BOARD, VYDYUTHI BHAVAN
PATTAM PALACE.P.O., THIRUVANANTHAPURAM-695 004.**

**R1& R2 BY SRI.K.S.ANIL, SC, KSEB
BY SRI.K.S.ANIL, SC, KSEB**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 02-06-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

PETITIONER(S) EXHIBITS

EXHIBIT P1-TRUE COPY OF MEMO DATED 22.3.1978 ISSUED BY THE KOTTAYAM ELECTRIC SUPPLY AGENCY TO THE PETITIONER.

EXHIBIT P2-THE KOTTAYAM ELECTRIC SUPPLY AGENCY (UNDERTAKING) ACQUISITION ACT, 1980.

EXHIBIT P3-TRUE COPY OF THE OPTION FORM DATED 29.7.1993 SUBMITTED BY THE PETITIONER TO THE 1ST RESPONDENT.

EXHIBIT P4-TRUE COPY OF THE ORDER DATED 12.1.1996 PASSED BY THE 1ST RESPONDENT.

EXHIBIT P5-TRUE COPY OF THE ORDER DATED 17.10.1996 PASSED BY THE 1ST RESPONDENT.

EXHIBIT P6-TRUE COPY OF THE COMMON ORDER DATED 6.7.06 PASSED BY THE CONTROLLING AUTHORITY UNDER THE PAYMENT OF GRATUITY ACT.

EXHIBIT P7-TRUE COPY OF THE LIST PUBLISHED BY THE 1ST RESPONDENT FOR THE PURPOSE OF DISBURSEMENT OF PENSION ARREARS.

EXHIBIT P8-TRUE COPY OF THE REPRESENTATION DATED 11.5.2009 SUBMITTED BY THE PETITIONER TO THE 2ND RESPONDENT.

EXHIBIT P9: COPY OF THE ORDER PASSED BY THE APPELLATE AUTHORITY IN G.A. NOS.959/02 TO 1058/06 ON THE FILES OF THE APPELLATE AUTHORITY UNDER THE PAYMENT OF GRATUITY ACT, KOLLAM DATED 5.7.2011

RESPONDENTS EXHIBITS: NIL

/TRUE COPY/

P.A. TO JUDGE

SKV

P.V.ASHA, J.

=====

W.P.(C). No.5581 OF 2012

=====

Dated this the 2nd day of June, 2015

JUDGMENT

Question to be decided in this case is whether the service rendered by the petitioner in Kottayam Electric Supply Agency (hereinafter referred to as 'Agency' for short) before joining the Kerala State Electricity Board (hereinafter referred to as 'KSEB' for short) can be reckoned towards service for the purpose of payment of gratuity. The petitioner is aggrieved by the deduction of a sum of Rs.23,035/- from his arrears of pension towards the alleged excess amount of gratuity paid to him.

2. The petitioner initially entered service in the Agency as Junior Assistant, on 1.4.1978 based on Ext. P1 memo of appointment. While working there, the Agency was taken over by the Government by Act 3 of 1980 viz, Kottayam Electric Supply Agency (undertaking) Acquisition Act 1980. Under Section 11 of the Act every whole time officer who was working in the Agency as on that date were

transferred to the KSEB. Section 11 reads as follows:-

“S.11. Transfer of services of existing employees-(1)

“(1) Every whole time officer or other employee who was immediately before the appointed day, employed in connection with the undertaking shall, on the appointed day, become an officer or employee, as the case may be, of the Government or the Board and shall hold his office by the same tenure, at the same remuneration and upon the same terms and conditions and with the same rights and privileges as to pension, gratuity and other matters as would have been admissible to him if the undertaking had not been transferred to and vested in the Government or the Board, as the case may be, and shall continue as the case may be, is duly terminated or until his remuneration or terms and conditions of service are duly altered by the Government or the Board, as the case may be.

(2) If any question arises as to whether any person was a whole time officer or other employee in or in connection with the undertaking immediately before the appointed day, the question shall be referred, within a period of one year from the appointed day, to the Government and the Government shall, after giving a reasonable opportunity of being heard to the person concerned in the matter, decide it in such manner as they think fit and such decision

shall be final.

(3) Notwithstanding anything contained in the Industrial Disputes Act, 1947 (Central Act 14 of 1947), or in any other law for the time being in force, the transfer of the services of any officer or other employee employed in or in connection with the undertaking to the Government or the Board, shall not entitle such employee to any compensation under the Act or any other law for the time being in force and no such claim shall be entertained by any court, tribunal or other authority.”

3. Based on such absorption, petitioner joined duty under the KSEB as Junior Assistant on 15.2.1980. He retired from service on 31.5.2003, while working as Senior Superintendent(NC). He was having service of 1 year and 10 months and 14 days under the Agency, along with 25 years 3 months and 16 days of service in KSEB. His pension was fixed reckoning his entire service of 25 years i.e in Agency as well as KSEB, as per the provisions contained in Part III KSR.

4. As the KSEB denied gratuity saying that Payment of Gratuity Act was not applicable to it, petitioner and similarly situated others had approached the Controlling

Authority under payment of Gratuity Act and based on Ext. P6 order passed by the authority he received gratuity for the entire qualifying service of 25 years i.e. reckoning service rendered in the 1st institution. Even though the KSEB took up the matter in appeal, the same was dismissed, as per order dated 5.7.2011. While so, on account of a revision, a sum of Rs. 64,983/- was found admissible to petitioner towards his arrears of pension, as per Ext. P7 chart. But the KSEB deducted with a sum of Rs.23,035/- from this arrears of pension, on the ground that the service under the Agency was not liable to be reckoned towards continuous service for the purpose of gratuity.

5. I heard the learned counsel appearing on either side. Learned counsel for the petitioner submitted that by virtue of Section 11 of Ext.P2 Act, the service rendered by the petitioner is continuous and liable to be reckoned towards gratuity. It is also pointed out that KSEB itself issued orders Ext.P4 and Ext.P5 providing grade promotion reckoning the service rendered in the Agency along with the service in KSEB. Therefore there cannot be any objection in

reckoning the service rendered therein towards gratuity. It is pointed out that the recovery was affected based on the objection raised in the audit. Apart from that the gratuity was paid to petitioner based on Ext. P1 judgment, which was affirmed by the appellate authority.

6. Learned Counsel on either side submitted that the issue is covered by the judgment dated 14.8.2014 of this court in W. P.(C) No.1678/2011. There the learned Single Judge of this court considered similar question of recovery effected under similar circumstances.

7. This court took note of the order passed by the Controlling Authority, which was confirmed by the Appellate Authority, on account of which, the Gratuity was paid to the petitioner years back.

8. On the other hand, the learned Standing Counsel argued that the payment of gratuity to the petitioner is governed by the provisions contained in Payment of Gratuity Act 1974, according to which gratuity is paid on the basis of the total continuous service. Therefore according to the learned Standing Counsel the service rendered in the KSEB

alone can be reckoned for calculating the gratuity due to petitioner.

9. In this context it is relevant to note Section 2A of Payment of Gratuity Act which defines continuous service, which 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 lock-out 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 any 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) for the said period of six months, if the employee during the period of six calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than—

(i) ninety-five 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) one hundred and twenty days, in any other case.

[Explanation— For the purposes of clause (2) the number of days on which an employee has actually worked under an employer shall include the days on which—

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (standing Orders) Act, 1946 (20 of 1946), or under the Industrial Disputes Act, 1947 (14 of 1947), or under any other law applicable to the establishment;

(ii) he has been on leave with full wages, earned in the previous year;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not

exceed twelve weeks]

(3) where 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 for such period if he has actually worked for not less than seventy-five per cent. of the number of days on which the establishment was in operation during such period].”

10. Thus it can be seen that the employee who has been in uninterrupted service, including the service which may be interrupted on account of the specified circumstances, can be said to be in continuous service.

11. In this case the petitioner worked under the Agency until it was taken over under the provisions contained in Section 11 of Ext.P2 Act and he was absorbed in KSEB without causing any break in service. It is pertinent to note that as per Section 11 of the Act, every whole time officer or other employee who was employed in connection with the Agency shall become an employee of the Board and shall hold his office by the same tenure, at the same remuneration and upon the same terms and conditions and

with the same rights and privileges as to pension, gratuity, etc. Admittedly he worked in the same post on absorption in KSEB. In other words there is no dispute over the fact that petitioner who was working as Junior Assistant under the Agency, was absorbed as Junior Assistant in KSEB and he joined in KSEB without incurring any break in service and he was in uninterrupted and continuous service ever since 1978. Therefore it cannot be said that he was not in continuous service. Section 2A does not prohibit reckoning of service under the agency. It does not say the service should be in the same institution or that service rendered other than in the institution from which the employee retired, cannot be reckoned as continuous service for the purpose of gratuity. Therefore going by Section 2A of the Payment of Gratuity Act read with section 11 of the Act, there cannot be any iota of doubt in reckoning the entire service put in by petitioner towards continuous service and hence towards Gratuity. Hence the objection raised by the KSEB is not sustainable.

12. In the above circumstances, it is declared that

the petitioner is entitled to payment of gratuity calculated on the basis of the total service rendered by him in the Agency as well as KSEB, which is continuous as well as uninterrupted in terms of Section 2A of Payment of Gratuity Act.

13. Moreover this court has already found that as long as the orders passed by the statutory authorities under the payment of Gratuity Act, were not reviewed or modified, the KSEB cannot touch the Gratuity paid in terms of those orders.

In view of the above findings, the deduction effected from the arrears of pension due to petitioner towards the alleged excess drawn Gratuity is illegal and unsustainable. Therefore there will be a direction to the KSEB to refund the amount recovered from petitioner towards the alleged excess payment towards gratuity within a period of 2 months from the date of receipt of a copy of this judgment.

P.V.ASHA, JUDGE