

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE DAMA SESHADRI NAIDU

MONDAY, THE 2ND DAY OF NOVEMBER 2015/11TH KARTHIKA, 1937

WP(C).No. 2891 of 2015 (J)

PETITIONER:

NIRMALA THOMAS, RETIRED MANAGER
(FINANCE & ACCOUNTS), KERALA STATE
CO-OPERATIVE CONSUMER FEDERATION LTD.,
RESIDING AT 47/21, MULAKKAL, TOLL GATE ROAD,
VADUTHALA, CHITTOOR, ERNAKULAM PIN - 682 023.

BY ADV. SRI.P.P.JACOB

RESPONDENTS:

1. KERALA STATE CO-OPERATIVE CONSUMER FEDERATION
LTD., GANDHI NAGAR, ERNAKULAM, PIN - 682 020
REPRESENTED BY ITS MANAGING DIRECTOR,
GANDHI NAGAR, ERNAKULAM, PIN - 682 020
REPRESENTED BY ITS MANAGING DIRECTOR.
2. THE BOARD OF MANAGEMENT OF THE KERALA STATE
CO-OPERATIVE CONSUMER FEDERATION LTD.,
GANDHI NAGAR, ERNAKULAM, PIN - 682 020
REPRESENTED BY ITS CHAIRMAN.
3. THE REGISTRAR OF CO-OPERATIVE SOCIETIES,
THIRUVANANTHAPURAM - 695 001.
4. STATE OF KERALA REP. BY ITS SECRETARY TO GOVT.,
CO-OPERATIVE (C) DEPARTMENT, SECRETARIAT,
THIRUVANANTHAPURAM - 695 001.

R1 & R2 BY ADV. SRI.RAJU JOSEPH (SR.)

BY ADV. SRI.K.T.PAULOSE

R3 & R4 BY GOVERNMENT PLEADER SRI.G.GOPAKUMAR

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
02-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX IN WP(C).No. 2891 of 2015 (J)

PETITIONER'S EXHIBITS:

EXHIBIT P1. TRUE PHOTOCOPY OF THE PETITION FILED BY THE PETITIONER BEFORE THE THIRD RESPONDENT DATED 09.01.2012.

EXHIBIT P2. TRUE PHOTOCOPY OF THE ORDER ISSUED BY THE THIRD RESPONDENT TO THE PETITIONER DATED 28.04.2012.

EXHIBIT P3. TRUE PHOTOCOPY OF THE APPEAL FILED BY THE PETITIONER BEFORE THE FOURTH RESPONDENT DATED 21.05.2012.

EXHIBIT P4. TRUE PHOTOCOPY OF THE ORDER VIDE G.O.(P)NO.333/13/CO-OP. DATED 21.05.2013

RESPONDENT'S EXHIBITS: NIL.

/TRUE COPY/

P.S. TO JUDGE

Dama Seshadri Naidu, J.

W.P.(C)No.2891 of 2015 J

Dated this the 2nd day of November, 2015

JUDGMENT

The petitioner, having put in 34 years of service, retired on 30.06.2010 from the service of the first respondent Federation. He is said to have been eligible to receive ₹ 5,24,260/- as gratuity, but he was paid only ₹ 3,50,000/-.

2. Aggrieved at the reduced amount of gratuity paid to him, the petitioner submitted Exhibit P1 representation to the Joint Registrar, who disposed it of through Exhibit P2 order of rejection. Further aggrieved, the petitioner filed Exhibit P3 appeal before the Government, which also dismissed, through Exhibit P4 order, the petitioner's claim. Eventually, assailing Exhibits P2 and P4 orders, the petitioner has filed the present writ petition.

3. The learned counsel for the petitioner has strenuously contended that though the Kerala State Co-operative Societies Act ('the Act' for brevity) contains certain provisions as regards the payment of gratuity to the employees of the Societies, in the event of any conflict or repugnance, the provisions of the Payment of Gratuity Act, 1972, the central enactment, alone shall prevail.

4. In elaboration of his submissions, the learned counsel has submitted that Rule 59 of the Kerala Co-operative Societies Rules (the 'Rules' for brevity) mandates that the amount of gratuity shall be fifteen months' salary. He has further contended that in the light of the amendment to Section 4 of the Payment of Gratuity Act, 1972, it is the amount specified in the said central enactment that has to be applied to the petitioner. The specific contention of the learned counsel is that the amendment to the central enactment was effected on

24.05.2010, whereas the petitioner retired from service soon thereafter—on 30.06.2010. Simply stated, as per the amendment dated 24.05.2010 to Section 4(3) of the Central Act, the petitioner ought to have been paid the full gratuity to a tune of ₹ 5,24,260/-.

5. In support of his submissions, the learned counsel has placed reliance on **M.S.R.Murthy v. Arva Somayajula Yagneswara Chenulu**¹, **Southern Clock Industries v. Regional Joint Labour Commissioner**², **Ahmedabad Panjrapole Sanstha v. Miscellaneous Mazdoor Sabha and others**³, **State of Punjab v. The Labour Court, Jullundur and Others**⁴.

6. The learned Senior Counsel for respondents 1 and 2, in tune with the averments made in the counter affidavit filed by the respondents, has contended that the first respondent is a Co-operative Society, which is governed by

¹ 1985 LAB I.C. 189

² 2003 (3) KLT 931

³ 1987 LAB I.C. 577

⁴ 1980 LAB L.C. 1084

the Kerala Co-operative Societies Act, 1969 and the Rules made thereunder as well as its own bye-laws.

7. The learned Senior Counsel has submitted that the respondent Federation has enrolled itself in the Group Gratuity Life Assurance Scheme of LIC in order to meet the gratuity liability of its employees. In that scheme the contribution made by the employer Federation was for a maximum ceiling limit of ₹ 3,50,000/-, under the Payment of Gratuity Act, 1972.

8. The learned Senior Counsel further contends that the petitioner having retired on 30.06.2010 is eligible only under the Payment of Gratuity Act 1972, under which the then ceiling on the maximum gratuity was ₹ 3,50,000/-. It is the specific contention of the learned Senior Counsel that the enhanced ceiling limit as per the amended Section 4 of the Central Act was incorporated in Rule 59 of the Rules on 02.11.2010.

9. In that context, the learned Senior Counsel contends that the benefit envisaged under Section 4 of the amended Central Act could be applicable to the employees under the Federation only with effect from 02.11.2010. Thus, summing up his submissions, the learned Senior Counsel has contended that the employees who retired from the Federation on or after 02.11.2010 were paid gratuity taking ₹ 10,00,000/- as the maximum gratuity; on the other hand, the employees who had retired before 02.11.2010, the date on which the enhanced ceiling limit took effect in the Federation, were paid gratuity only under the pre-amended Payment of Gratuity Act, 1972.

10. Heard the learned counsel for the petitioner and the learned Senior Counsel for the respondent Federation, as well as the learned Government Pleader, apart from perusing the record.

11. The issue to be determined in this writ petition is whether the benefit under Section 4(3) of the Payment of Gratuity Act, 1972, applies from the date of its original amendment, i.e. 24.05.2010 or from the date when the said amendment was adopted by the State in Rule 59 of the Rules, i.e. from 02.11.2010.

12. Indeed, the facts are not in dispute and the issue falls in a narrow compass. The pure question of law that has to be decided is whether the provisions of the Payment of Gratuity Act straight away apply to the employees of the Co-operative Societies in the State of Kerala or whether they require any adoption by way of incorporation or otherwise in a State enactment, say, the Co-operative Societies Act, for their enforceability.

13. Section 62 of the Act mandates to the effect that the employees of a society shall be entitled to gratuity at such rates and on such conditions as prescribed. It is

further pertinent to observe that Rule 59 of the Rules specifies that every society shall make in its bye-laws provision for payment of gratuity to its employees and frame regulations for its administration. It also, inter alia, specifies that all monthly paid employees on the permanent establishment shall be eligible for gratuity, if the service rendered by those employees is continuous and satisfactory. The proviso to the said provision imposes a cap of fifteen months' pay as being the total gratuity an employee is entitled to.

14. The pivot of the controversy is the second proviso which was added to the Rule through S.R.O.No.1005/2010 dated 02.11.2010. The said proviso is to the effect that the amount of gratuity payable shall not exceed the amount which an employee is eligible as per the Payment of Gratuity Act, 1972 (Central Act 39 of 1972) or under the Act and the Rules, whichever is applicable irrespective of the

amount received out of any scheme chosen or implemented by a society for the purpose.

15. In the context of the second proviso to Rule 59, it is essential for us to examine the Payment of Gratuity Act, 1972 (the Central Act). As the preamble makes it clear, the Central Act provides for a Scheme for the payment of gratuity to the employees engaged in the factories, mines, ports, shops or other establishments. As far as the Co-operative Societies are concerned, we need to examine whether it falls within the category of shop or establishment under any extent state legislation.

16. As can be seen, sub-section (b) of Section 1 of the Central Act specifies that every shop or establishment in which ten or more persons are employed, or were employed, on any day of the preceding twelve months shall have the Central Act applied. Clause (c) of sub-section (3) of Section 1 further specifies that such other establishments or

class of establishments, in which ten or more employees are employed, will also have the Central Act applied.

17. Respondents 1 and 2 have not contested the petitioner's statement that the Central Act applies to the Co-operative Societies in the State. The counter affidavit filed by the said authorities, in fact, contains an admission that the Central Act does apply. The expression employed by the respondents in the counter affidavit is that the petitioner is 'eligible only under the Payment of Gratuity Act, 1972'. The fact, nevertheless, remains that the respondents have taken a plea that under the Central Act, by the time the petitioner retired, the ceiling limit of gratuity was ₹ 3,50,000/-, which is eminently incorrect, though.

18. A learned single Judge of the High Court of Andhra Pradesh in M.S.R.Murthy (supra) has held as follows:

“4. Item No.24 of Concurrent List (iii) of Sch. VII to the Constitution empowers both the Parliament and the

Legislature of a State to make Law relating to Welfare of labour including the conditions of work, Provident Fund, Employer's Liability etc. The entries are to be construed broadly. In exercise of the same power, the Parliament as well as the Legislature of the State of Andhra Pradesh made the Central Act and the State law respectively. The Central Act is later in point of time. The latter was reserved for the consideration of the President and had received his assent. Admittedly, as far as gratuity is concerned, both Sec. 40 of the State Act and Sec. 4 of the Central Act operate in the same field."

19. In the light of the fact that both the Co-operative Societies Act and the Payment of Gratuity Act are in the concurrent list, unless there is an irreconcilable repugnancy, both the enactments concurrently hold their fields. In the present instance, the principal enactment, i.e. the Kerala Co-operative Societies Act, 1969, has not contained any specific provision regarding the ceiling of gratuity. Section 62 of the Act mandates that the benefit of gratuity shall be extended to the employees of the societies. It is Rule 59 of the Rules, the subordinate legislation, that spells out in what manner the gratuity has to be reckoned, including the ceiling thereof.

20. It is not in dispute that the Central Act underwent an amendment on 24.05.2010 and the petitioner retired soon thereafter, i.e. on 30.06.2010. The State of Kerala, however, amended Rule 59 of the Rules incorporating the amendment of the Central Act on 02.11.2010, only prospectively.

21. In this context, the learned Senior Counsel for respondents 1 and 2 has submitted that the benefit of the Central enactment can be extended to those employees who have retired subsequent to 02.11.2010, i.e. from the date of amendment of Rule 59.

22. Having examined the statutory Scheme, I am of the considered opinion that the Central enactment has all along been applied to the Co-operative Societies. And the provisions of the State enactments, be it the principal enactment or the subordinate legislation, have occupied the field so long as they have not come in conflict with those of

the Central enactment.

23. In **Anandan v. Assistant Labour Officer**⁵, this Court has emphatically held that a Co-operative Bank would come within the definition of 'commercial establishment' under the Kerala Shops and Commercial Establishments Act.

24. In **Municipal Board, Gangapur v. Controlling Authority under Payment of Gratuity Act, Bhilwara**⁶, the High Court of Rajasthan has examined the inter-relationship between the Central Act and the Rajasthan Municipalities (Contributory Provident Fund and Gratuity) Rules, 1969. A learned Single Judge has held as follows:

“8. Section 14 overrides the other rules or Act made on the subject by virtue of these provision. Rules of 1969 will have no role to play, so far as they are inconsistent with the Act. Thus the Payment of Gratuity Act will cover the municipalities for the payment of gratuity and not the Rules of 1969. Moreover, this is social legislation and it should be given more extensive application. Thus, this submission of Mr.Lodha has no force and rejected. I hold that the Payment of Gratuity Act is applicable to the Municipalities

⁵ 2012 (3) KLT 347

⁶ 1987 LAB I.C. 575

and in this view of matter, the appellate authority has rightly upheld the order of the controlling authority of granting a sum of Rs.3007/- to the respondent as an arrear of the gratuity under this Act.”

25. A learned Division Bench of this Court on Southern Clock Industries (supra) has held that Payment of Gratuity Act, being the Central Act, will prevail over the Kerala Act, i.e. Kerala Industrial Employees' Payment of Gratuity Act, 1970. Though, in the present instance, the application of the Central Act vis-a-vis the Kerala Co-operative Societies Act is the issue, I am of the considered opinion that the Central Act will prevail. But it is essential to hold that the provisions of the state legislation, if already have occupied the same field, they, too, hold the field so long as they do not come in conflict with any provision of the Central Enactment.

26. In State of Punjab (supra), the Hon'ble Supreme Court has held as follows:

“7. It is apparent that the Payment of Gratuity Act enacts a complete code containing detailed provisions covering all the essential features of a scheme for payment of gratuity. It creates the right to payment of gratuity, indicates when the right will accrue, and lays down the principles for quantification of the gratuity. . .

8. Upon all these considerations, the conclusion is inescapable that Parliament intended that proceedings for payment of gratuity due under the Payment of Gratuity Act must be taken under that Act and not under any other. That being so, it must be held that the applications filed by the employee respondents under S.33-C(2) of the Industrial Disputes Act did not lie, and the Labour Court had no jurisdiction to entertain and dispose of them. On that ground, this appeal must succeed.”

27. It is further pertinent to observe that the respondents themselves have gone on record by submitting that the central enactment applies, but the ceiling then applied was said to have been ₹ 3,50,000/-. I am afraid, the contention of the respondents that by the time of the petitioner's retirement, the ceiling under the central enactment was ₹ 3,50,000/- is demonstrably wrong.

28. By the time the petitioner retired, sub-section (3) of Section 4 of the Central Act had suffered an amendment

and the ceiling had been enhanced to ₹ 10,00,000/-. If the Central Act applies without any further adoption by the State Government, the amendment of Rule 59 on 02.11.2010, I must say, is of no consequence. The Central Act does.

29. The learned counsel for the petitioner has contended that though the petitioner retired from service in 2010, the balance amount of ₹ 1,74,260/- has so far not been paid. According to him, the law is well established that if the delay is inordinate for no fault of the employee, he shall be paid reasonable interest on the amount paid belatedly. In fact, the Hon'ble Supreme Court in **Dua v. State of Haryana**⁷ has appreciated a similar issue concerning the delayed payment of retirement benefits and has held that the employee is entitled to interest.

30. Further, Section 7(3A) of the Central Act mandates that, if the amount of gratuity payable by the

⁷ 2008 (3) KLT 58 (SC)

employer is not paid within the period specified in sub-section (3), i.e. thirty days, the employer shall pay from the date on which the gratuity becomes payable to the date on which it is paid simple interest at such rate not exceeding the rate notified by the Central Government for repayment of long term deposits. The proviso is to the effect that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground.

31. In the present instance, neither can the delay be attributed to the petitioner, nor has the employer obtained any permission in writing from the controlling authority for the delayed payment. In fact, the very permission that could be obtained from the controlling authority is only in relation to the delay on the part of the employee rather than that of the employer. Be that as it may, it is indisputable that for

about five years the petitioner has not been paid the balance amount of ₹ 1,74,260/-. Under these facts and circumstances, in terms of Section 7(3A) of the Act, it is imperative for respondents 1 and 2 to pay to the petitioner interest at the rate of 10% per annum, on the delayed payment of balance gratuity. The interest shall be calculated from the date of the petitioner's retirement till the date of actual payment of the balance amount.

With the above observation, the writ petition stands allowed. No order as to costs.

Dama Seshadri Naidu, Judge

DMR/tkv

'C.R.'