

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.10.2020

CORAM

THE HON'BLE MR. JUSTICE P.D. AUDIKESAVALU

W.P. No. 2891 of 2018
and
W.M.P. No. 3557 of 2018

P.Shanmugasundaram

... Petitioner

-vs-

1. The Appellate Authority under the Payment of Gratuity Act, 1972 and Deputy Chief Labour Commissioner (Central),
Sasthri Bhavan, Haddows Road,
Chennai - 600 006.
2. The Controlling Authority under the Payment of Gratuity Act, 1972 and the Assistant Labour Commissioner (Central), O/o. the Deputy Chief Labour Commissioner,
Sasthri Bhavan, Haddows Road,
Chennai - 600 005.
3. The Zonal Manager,
Central Bank of India,
Zonal Office, 48/49, Montieth Road,
Egmore, Chennai - 600 008. ... Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus, calling for the records from the files of the 1st Respondent in G.A. No. 16 of 2017 and quash the impugned order dated 30.11.2017 and consequently restore the order passed by the 2nd Respondent in G.A. No. 32 of 2012 dated 19.05.2017.

For Petitioner : Mr. K.M.Ramesh

For Respondents: Mr. D.Sathyaraj,
Special Government Pleader (for R1 & R2)

Mr. Anand Gopalan
for M/s. T.S.Gopalan & Co. (for R3)

O R D E R
(through video conference)

Heard Mr. K.M.Ramesh, Learned Counsel for the Petitioner, Mr. D.Sathyaraj, Learned Special Government Pleader appearing for the First and Second Respondents and Mr. Anand Gopalan, Learned Counsel for the Third Respondent, and perused the materials placed on record, apart from the pleadings of the parties.

2. The Petitioner had made a claim for the payment of gratuity against the Third Respondent in G.A. No. 32 of 2012 under Section 7(4) of the Payment of Gratuity Act, 1972, (hereinafter referred to as the 'Act' for short) before the Second Respondent, who is the Controlling Authority under that Act. According to the Petitioner, though he had worked for 16 years without any break since 1995 as a personal driver to the executives of the Third Respondent Bank, he was orally informed that his services had been severed on attaining the age of 60 years and he was not paid gratuity due for that period of service. The Second Respondent by order dated 19.05.2017 in G.A. No.32 of 2012 and taking into account the definition of 'employer' under Section 2(f)(iii) of the Act, as the person, who, or the authority which, has the ultimate control over the affairs of the establishment, supported by the evidence produced, arrived at the conclusion that the Petitioner was an employee of the Third Respondent Bank and held that the Petitioner was entitled to the gratuity of Rs. 64,615/- with simple interest at 10% per annum from the date on which the gratuity became payable till the date on which it is paid within a period of 30 days from the date of receipt of that order.

3. In the appeal in G.A. No.16 of 2017 preferred by the Third Respondent under Section 7(7) of the Act before the First Respondent, who is the Appellate Authority, against the aforesaid order passed by the Second Respondent, a copy of the award dated 29.08.2011 in I.D. No. 56 of 2007 passed by the Central Government Industrial Tribunal-cum-Labour Court, Chennai between the Central Bank of India Staff Union and the Third Respondent, was produced where the demand for regularizing 14 personal car drivers including the Petitioner, was rejected mainly on the ground that they had not been recruited following the prescribed procedure in consonance with the dictum laid down by the Constitution Bench of the Hon'ble Supreme Court of India in Secretary, State of Karnataka -vs- Umadevi [(2006) 4 SCC 1] in that regard. The First Respondent relied only on the said award to set aside the order passed by the Second Respondent and allowed the appeal filed by the Third Respondent. Aggrieved thereby, the Petitioner has preferred this Writ Petition, challenging the order passed by the First Respondent.

4. The question that arises for consideration in this Writ Petition is whether the First Respondent is justified in reversing the order of the Second Respondent in which gratuity was awarded to the Petitioner.

5. Before proceeding further, it would be necessary to refer the reasons assigned by the Second Respondent in accepting the claim of the Petitioner for gratuity, which reads as follows:-

"On perusal of the aforesaid, the following questions are framed:

- 1) Whether Shri P. Shanmugasundaram who has worked as Personal Driver for the Executives of the Bank was an employee in the service of the Respondent as per the Payment of Gratuity Act, 1972?
- 2) Whether the Applicant was entitled for gratuity from the Respondent?

Now I answer as under:

6(1) (a) As per Section 2(e) of the Payment of Gratuity Act, 1972, employee is defined as follows:

"employee means any person (other than an apprentice) employed on wages, in any establishment, factory, mine, oilfield, plantation, port, railway company or shop, to do any skilled, semi-skilled, or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity."

So to be an employee, due process of recruitment and appointment expressly stating the terms of employment are not essential conditions. In this case, the Applicant was employed on oral orders and his service terms were implied in accordance with certain standard rules and guidelines, which were revised from time to time commonly for all the employees holding the post of Personal Drivers of the cars of the Bank's Executives. The Respondent's contention is that the Applicant was not in the service of the Bank but was employed by its Executives and hence not governed by the Bipartite Settlement for workmen and therefore not eligible for the benefits as that of the permanent employee as his monthly wages were paid only by the Executives who

employed him. It is to be noted that the cars provided to the Bank Executives are owned by the bank. The salaries of these drivers are paid by the Executives, which are reimbursed by the bank. Such cars are allotted to the Officers by the Respondent Bank. Such personal drivers can only be removed after obtaining permission from the Respondent Bank. These things show, that there is a clear employee-employer relationship between the Respondent and the drivers engaged by the bank executives, though not directly but implied.

(b) It is seen from the above and on perusal of the documents produced that Shri P. Shanmugasundaram has been engaged as Personal Driver for the Executives of the Respondent Bank from 1995 and upto January, 2011 (Exhibit A4 & A5) and he has also been given certificates to this effect by the Executives to whom he has been attached. Upon the Respondent's contention, the issue to be resolved is, who the Applicant's employer was? Whether the Respondent Bank employed the Applicant or the Bank's Executives in their own personal behalf. In this context Section 2(f)(iii) of the Payment of Gratuity Act, 1972 defines the employer as follows:

".. the person, who, or the authority which, has the ultimate control over the affairs of the establishment, factory, mine, oilfield, plantation, port, railway company or shop, and where the said affairs are entrusted to any other person, whether called a manager, managing director or by any other name, such person".

Though the Executives are changing the Personal Drivers are not changed. It is seen that the Executives are not bringing in their own Personal Drivers. The Personal Drivers remain the same and they are attached to the Executives by the Respondent only. This is evident from Exhibits A-4 when he was attached with the Chief Manager, Mount Road Branch and Exhibit A-5 when he was attached with the Asst. General Manager, Zonal Office, Chennai. This clearly shows that the panel of Personal Drivers was maintained by the Respondent and on the directions of the Respondent he is attached to the Executives. In this case, applying the above definition of an employer, the Bank's Executives, who, the Respondent contended, employed the Applicant, were authorized persons of the Respondent Bank, to whom the Respondent Bank had entrusted its affairs. The Executives were not acting in their personal behalf in employment of the Applicant. The Executives were an arm, a functionary and an authority of the Respondent Bank's management. To support and carry on their official functions, the Respondent Bank provided to the

Executives a car owned by the Bank and registered in the name of the Bank. The Executives did not employ the Applicant as a Driver for the Bank's car, on their own choice or pleasure or terms of service, and they had no freedom to use the Bank's car wholly or partly for their own personal or domestic requirements. The Executives had no ownership over the car and had no control over the employment and the terms of service of the Applicant. Thus, under Section 2(f)(iii) of the Act, the employer of the Applicant was the Respondent Bank, and not its Executives to whom the Bank had allotted the car to support their official functions.

(c) The Respondent has also called for details of Personal Drivers who have worked for the Executives of the Bank continuously for a period of 10 years as on 31.3.2009 (Exhibit A-6) and the Zonal Office has also produced the list in reply to this Personal Drivers. So it is clear that the Respondent was aware that the Applicant was engaged as Personal Driver to the Executives who have been provided with cars by the Bank. No reason was adduced by the Respondent for not selecting the Applicant for absorption as substaff during the years 2003 and 2004. Only in 2011 they have rejected his candidature on the plea that he had attained the age of 60 years. The executives are changing the Personal Drivers are not changed nor it is seen that the Executives are not bringing in their own Personal Drivers. The Personal Drivers remain the same and they are attached to the Executives by the Respondent only. This is evident from Exhibits A-4 when he was attached with the Chief Manager, Mount Road Branch and Exhibit A-5 When he was attached with the Asst. General Manager, Zonal Office, Chennai. This clearly shows that the panel of Personal Drivers was maintained by the Respondent and on the directions of the Respondent he is attached to the Executives. From the Exhibit A-2 it is seen that Personal Drivers are paid from the GAD Petty Cash of the Bank for the Overtime work and holiday work which is duly signed by the departmental head and paid by GAD for a long time. The Executives do not bear the burden of payment of salary to the Personal Drivers. The Executives do not pay the wages of the Personal Drivers from their salary. It is only that they make the payment to the Personal Drivers and get it reimbursed from the Bank. It is seen that instead of the Respondent making the payment directly to the Personal Drivers it is being paid through another person. This only shows no records are being created to establish an employer-employee relationship between the Respondent and the Applicant.

All things are taken care of by the Respondent, like maintenance, insurance, uniforms, etc. except payment of salary directly to the Applicant.

The dictionary meaning of "reimbursement" is -

"the action of repaying a person who has spent or lost money,

a sum paid to cover money that has been spent or lost."

That means though the Executives pay the wages/salary of the Drivers, the same is reimbursed by the Respondent. Instead of paying directly whereby the employee-employer relationship will be established, the wages of the Drivers are paid by the Executives using the Official Car and the same is reimbursed to them by the Respondent. By this act of the Respondent, the Applicant has been denied his gratuity though he has worked continuously for more than 16 years with the Respondent.

(d) The Respondent's contentions, that the Applicant was not employed in the regular and permanent service of the Bank, that the monthly salary payments were made to the Applicant not by the Bank but only by the Executives out of their salary and allowances, and that the Applicant was not under the control of the Bank but only the Executives, are controverted by facts supported by documentary evidences, as follows:

- (i) The Applicant was employed in accordance with the terms of services formulated, and revised from time to time, by the Respondent Bank, and not by the individual Executives;
- (ii) The Applicant had to maintain proper and regular log book for the car tips, to produce fuel bills to obtain quotations for repairs and to keep other related records for verification and approval by the Respondent Bank at intervals;
- (iii) The Respondent Bank provided uniforms, winter uniforms, shoes and other perquisites to the Applicant and paid batta for outstation trips and extra wages for overtime driving work;
- (iv) and for doing the duties of a sub-staff member at the Respondent Bank's office/branch whenever off the road;
- (v) The Applicant's service was not terminated on the transfer or retirement of the Executive to whom the Bank had allotted its car driven by the Petitioner, but was continued by the Respondent Bank for the successive Executives at the same Branch or Office of the Bank or another Executive at some other Branch or Office of the Bank within Chennai city;

(vi) The Respondent Bank fixed the monthly salary of the Applicant and revised it upwards from time to time, and the Executives concerned merely disbursed the salary to the Applicant through their Bank accounts, into which the Applicant's salary was being credited by the Respondent Bank;

(vii) The Respondent Bank did not pay any specific or special allowance to the Executives concerned for payment of monthly salary to the Petitioner, but used the bank accounts of the Executives concerned as a conduit for disbursement of the Bank's salary payments to the Applicant.

The above facts corroborate the Respondent Bank's control over the nature of duties, service terms, monthly salary fitment, perquisites, payment of salary and perquisites, and other allied matters of the employment of the Applicant, and the fact that the Applicant continued to be in the service of the Respondent Bank under the successive Executives concerned.

Thus, it is clear that the Applicant was an employee in the service of the Respondent Bank, on the Bank's service terms, including pay and perquisites, as a Driver for its car allotted to its Executives who were changing from time to time.

6(2) (a) Regarding the second issue, whether the Applicant was eligible for payment of gratuity by the Respondent Bank, the Respondent's contention that the Applicant was not in permanent and regular employment of the Bank is to be answered first. Section 2A of the Act provides for only minimum continuous service for an employee to be eligible for payment of gratuity and it does not exclude employees on temporary, casual, part-time or irregular tenures of service. The Applicant's continuous service of 16 years is undisputed. The question whether the service was regular or permanent is irrelevant and immaterial for his eligibility for gratuity payment. The Hon'ble Supreme Court held, in the decision reported in (AIR 1984 SC 1842; [(1984) 4 SCC 356] (Jeewanlal Ltd. -v- Appellate Authority under the Payment of Gratuity Act), that even the employees, who are paid daily wage, are entitled to get gratuity. In an Order dated 25.07.2011 in W.P.No.3377/2007 between K. Natarajan Vs Tamil Nadu Civil Supplies Corporation, the Hon'ble High Court of

Madras has also upheld the Decision dated 29.11.2005 of the Controlling Authority awarding payment of gratuity for temporary period of service.

(b) Therefore, the answer to the second issue is that, under the provisions of the Act, the Applicant is eligible for payment of gratuity for the continuous period of his service with the Respondent Bank in whatever cadre or designation he was employed in, regardless of whether he was in permanent service or in casual or temporary service, and whether he was recruited and appointed in a due process or not."

It is evident from the aforesaid order passed by the Second Respondent that there has been pointed consideration of the specific issue as to whether the Petitioner was entitled to receive gratuity from the Third Respondent in terms of the provisions of the Act and the affirmative conclusions have been arrived on the basis the materials placed on record.

6. As noticed earlier, the only reason attributed by the First Respondent to upset the order of the Second Respondent was that the claim for regularization made by the Central Bank of India Staff Union for regularizing 14 Personal Car Drivers including the Petitioner had been rejected in the award dated 29.08.2011 in I.D. No. 56 of 2007 by the Central Government Industrial Tribunal-cum-Labour Court, Chennai. Though the said document had not been marked as an exhibit in the proceedings before the Second Respondent, it is apparent from para 4 of that order that it had been brought to its notice and the inapplicability of the same has been duly considered and answered, as follows:-

"4. The Respondent's two citations are to be taken up for consideration, namely, one, the Notification No. F. No. 9/5/92-IR dated 23rd June 1997 by the Central Government Ministry of Finance, Banking Division, which restrained the Respondent Bank from recruitment of Drivers for its Cars allotted to the Executives, and the other, the Award dated 29th Aug 2011 passed by the Hon'ble CGIT cum Labour Court, Chennai, in ID No. 56/2007 between Central Bank of India Staff Union and the Respondent Bank in support of its contention of no employer-employee relationship between the Bank and the Petitioner. Evidently and obviously, these citations are stale and anachronistic and the Respondent has not come up clean in citing the same in this case, inasmuch as the Respondent Bank had introduced three successive processes in the years 2007, 2009 and 2011 for regularization / absorption of the services of Personal Drivers in the permanent Sub-Staff Cadre of the Bank, in the first two of which the Respondent had excluded the

Applicant without assigning any reason and in the last of which, the Respondent had excluded the Applicant because of his superannuating age. The documentary evidences prove that the Respondent Bank had laid no inviolable sanctity on the said two citations relate to regularization / absorption of the Personal Drivers in permanent Sub Staff Cadre of the Bank and are irrelevant to this case where the claim is for payment of gratuity under the PG Act for the period of the Applicant's continuous service of 16 years with the Respondent Bank. On his retirement he was not paid any retirement benefits including gratuity. He had personally approached the Respondent several times but there was no response/reply from the Respondent. Hence he prayed that the Respondent be directed to pay his due gratuity for the 16 years of service rendered by him to the Bank."

There is conspicuously no reference in the impugned order passed by the First Respondent to the aforesaid germane aspects highlighted by the Second Respondent for the inapplicability of the award dated 29.08.2011 in I.D. No. 56 of 2007 passed by the Central Government Industrial Tribunal-cum-Labour Court, cited by the Third Respondent, with regard to the claim for gratuity made by the Petitioner.

7. At this juncture, it would be relevant to refer the decision of the Hon'ble Supreme Court of India in Punjab National Bank -v- Ghulam Dastagir [(1978) 2 SCC 358], where in an industrial dispute arising out of termination of service of a Personal Driver engaged by a Manager of the Bank to drive a car of his own, taking into consideration evidence placed on record, it was held that though it was not unusual for public sector industry or a nationalized banking institution to give allowances to its high level officers leaving it to them to engage the services of drivers or others for fulfilling the needs for which the allowances are meant, in the absence of material to make out that the driver was employed by the Bank was under its direction and control, the jural relationship of employer and employee between the Bank and the driver engaged by its executives could not be recognized and relief was refused but it has been cautioned in that ruling as follows:-

"5. We are impressed with Shri Khera's appeal to us that the system of allowances in a country where there is unemployment may lead to individual injustice with an exploitative edge. It is likely that if the Bank had to employ drivers for their vehicles, the terms and conditions would have been much higher but in the private sector individual drivers may be hired on lower pay. This is not a desirable tendency for a

public sector undertaking like a nationalised Bank. We hope that the possibility of abuse of the system of drivers' allowances and the obligation of the public sector undertakings to be model employers will lead to a change in the approach of our nationalised banks and other public sector undertakings towards this issue of employing persons on a private basis by senior officers and the management itself giving some small sum by way of allowances in lieu of procuring such services. A fair and straight forward method would be for the Bank or like institution to engage its own driving staff. It is also important to remember that the vehicles belong to the industry and if drivers hired on a private basis by officers are allowed to use such vehicles, there may be potential damage and reckless use. In the long run, both from the point of view of employment morality and preservation of institutional property, it may be wise to revise the approach to the issue like the one we are confronted with. Of course, on the facts in this case we have decided what we consider is the only conclusion possible. Even so, this does not preclude the banking institutions and like undertakings adopting a different policy which we consider will be commendable."

8. The issue again came up for examination before the Hon'ble Supreme Court of India in Bank of Baroda -v- Ghemarbhai Harjibhai Rabari [(2005) 10 SCC 792] where the validity of an award of the Central Government Industrial Tribunal-cum-Labour Court granting such regularization in respect of a driver who had been engaged to drive a car allotting to one of the officers of a Nationalized Bank, has been upheld in the following words:-

"5. As noted above, challenge to the said award by the Bank before the learned Single Judge as well as before the Division Bench of the High Court has failed. The Division Bench of the High Court in the impugned order agreed with the finding of the Tribunal that the respondent workman was driving the car of the Bank between July 1994 and October 1995. It also accepted the genuineness of the vouchers Exts. 14 to 16 which showed the payment made by the Bank to the workman, hence, came to the conclusion that such vouchers would not have been issued by the Bank if really the respondent workman was not employed by the Bank itself. It also noticed the fact that the signatures of the workman were obtained in the register maintained by the Bank. It further noticed the fact that as against the said evidence produced by the respondent workman, there

was absolutely no evidence led by the Bank. Thus, it concurred with the findings of fact arrived at by the Tribunal as affirmed by the learned Single Judge.

....

8. While there is no doubt in law that the burden of proof that a claimant was in the employment of a management, primarily lies on the workman who claims to be a workman, the degree of such proof so required, would vary from case to case. In the instant case, the workman has established the fact which, of course, has not been denied by the Bank, that he did work as a driver of the car belonging to the Bank during the relevant period which comes to more than 240 days of work. He has produced 3 vouchers which showed that he had been paid certain sums of money towards his wages and the said amount has been debited to the account of the Bank. As against this, as found by the fora below, no evidence whatsoever has been adduced by the Bank to rebut even this piece of evidence produced by the workman. It remained contented by filing a written statement wherein it denied the claim of the workman and took up a plea that the employment of such drivers was under a scheme by which they are, in reality, the employee of the executive concerned and not that of the Bank; none was examined to prove the scheme. No evidence was led to establish that the vouchers produced by the workman were either not genuine or did not pertain to the wages paid to the workman. No explanation by way of evidence was produced to show for what purpose the workman's signatures were taken in the register maintained by the Bank. In this factual background, the question of workman further proving his case does not arise because there was no challenge at all to his evidence by way of rebuttal by the Bank."

The earlier ruling in Punjab National Bank -v- Ghulam Dastagir [(1978) 2 SCC 358] has also been found to be distinguishable by pointing out that it would not apply in view of the established facts of that case.

9. Having due regard to the well reasoned conclusion arrived by the Second Respondent in the order dated 19.05.2017 in G.A. No.32 of 2012 coupled with the principles laid down by the Hon'ble Supreme Court of India in Bank of Baroda -vs- Ghemarbhai Harjibhai Rabari [(2005) 10 SCC 792] to ascertain the jural relationship of employer and employee between a bank and a driver engaged for driving its car for use of executives on payment of special allowance to them with reference to the

relevant provisions of the Act, it would emerge that the First Respondent has committed an error apparent on the face of record in reversing the same without due consideration of relevant evidence of the matter as earlier noted. It must be emphasized here that what is really significant is that the person who claims gratuity must have rendered continuous service under the control of the person from whom he claims gratuity for the prescribed period in terms of the Section 2A of the Act, and the circumstance that the claim of such person for regularization has been denied on the ground that his appointment had not taken place as per the rules, would be inconsequential. In any event, the Petitioner could not be blamed for having worked in the system created by the Third Respondent by engaging drivers for driving its vehicles by paying allowances to its officers to meet such expense incurred, instead of directly appointing persons following the prescribed procedure for recruitment under the Service Rules. In this context, reference must be made to the observations made by the Hon'ble Supreme Court of India in State of Punjab -vs- Jagjit Singh [(2017) 1 SCC 148], which reads as follows:-

"58. In our considered view, it is fallacious to determine artificial parameters to deny fruits of labour. An employee engaged for the same work cannot be paid less than another who performs the same duties and responsibilities. Certainly not, in a welfare State. Such an action besides being demeaning, strikes at the very foundation of human dignity. Anyone, who is compelled to work at a lesser wage does not do so voluntarily. He does so to provide food and shelter to his family, at the cost of his self-respect and dignity, at the cost of his self-worth, and at the cost of his integrity. For he knows that his dependants would suffer immensely, if he does not accept the lesser wage. Any act of paying less wages as compared to others similarly situate constitutes an act of exploitative enslavement, emerging out of a domineering position. Undoubtedly, the action is oppressive, suppressive and coercive, as it compels involuntary subjugation."

Viewed from this perspective, it is not possible to uphold the impugned order dated 30.11.2017 in G.A. No. 16 of 2017 passed by the First Respondent and the same is set aside and the order dated 19.05.2017 in G.A. No.32 of 2012 passed by the Second Respondent is restored. The amount of gratuity due by the Third Respondent to the Petitioner with accrued interest shall forthwith be paid under written acknowledgment and report of such compliance shall be filed by 30.11.2020 before the Registrar (Judicial) of this Court.

10. In the result, the Writ Petition is ordered on the aforesaid terms. Consequently, the connected Miscellaneous Petition is closed. No costs.

Sd/-

Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

dm/kv

To

1.The Appellate Authority under the Payment of Gratuity Act, 1972 and Deputy Chief Labour Commissioner (Central),
Sasthri Bhavan, Haddows Road,
Chennai - 600 006.

2.The Controlling Authority under the Payment of Gratuity Act, 1972 and the Assistant Labour Commissioner (Central), O/o. the Deputy Chief Labour Commissioner,
Sasthri Bhavan, Haddows Road,
Chennai - 600 005.

3.The Zonal Manager,
Central Bank of India,
Zonal Office, 48/49, Montieth Road,
Egmore, Chennai - 600 008.

Copy to

1. The Registrar (Judicial),
Madras High Court,
Chennai - 600 104.

2. P.Shanmugasundaram,
S/o. Parthasarathy,
No. 17, Bajanai Koil Street,
Pallipattu, Tharamani,
Chennai - 600 113.

+1cc to Mr.K.M.Ramesh, Advocate, S.R.No. 32493

+1cc to Mr.T.S.Gopalan & Co, Advocate, S.R.No. 32401

W.P. No. 2891 of 2018

BP(CO)
GN(29/10/2020)