

**IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
ORIGINAL SIDE**

BEFORE

The Hon'ble Justice RAJA BASU CHOWDHURY

Date: 26th June, 2023

WPO/603/2023

**PALAS MANDAL
VERSUS**

BRIDGE AND ROOF COMPANY (INDIA) LIMITED & ORS.

For the Petitioner : Mr. Ajitesh Pandey, Advocate
Mr. Zohaib Ray, Advocate

For the Respondent No.1 & 2 : Mr. Soumya Majumder, Advocate
Mr. Rohan Raj, Advocate

Heard On : 26.06.2023

Judgment on : 26.06.2023

RAJA BASU CHOWDHURY, J.:

1. The present writ application has been filed, inter alia, praying for a direction upon the respondents to make payment of the retiral benefits of the petitioner.
2. It is the petitioner's case that the petitioner had been working under the respondent no.1 since 29th December, 2007 in different capacities until 7th December, 2020 when his service was terminated. The

petitioner claims that since 6th October, 2017, the petitioner was working as a Quality Assurance-cum-Quality Control (QA/QC) Supervisor at the Boiler Site, Chennai. The petitioner, however, claims that his salary and other terminal benefits were not disbursed in his favour for the period from October to December, 2020 and he was deprived of bonus for the year 2019-20.

3. It is the petitioner's further contention that the petitioner is entitled to gratuity as is payable in terms of the provisions of the Payment of Gratuity Act, 1972. Since gratuity was not disbursed in his favour, he had also applied in Form-I before the respondent authorities. Despite reminders, since the respondents did not accede to his prayer and did not make payment of his terminal benefits including the gratuity, the petitioner was compelled to invoke the extra-ordinary writ jurisdiction of this Hon'ble Court.
4. At the interim stage, on 3rd April, 2023, it was represented on behalf of the respondents that subsequent to filing of the present writ application, the petitioner's salary had been cleared. However, since no application in Form-1 had been received by the respondents, no steps had been taken to consider the petitioner's case for payment of gratuity. Since, it appeared that the application in Form-I, addressed to the Chairman-cum-Managing Director of the respondent no.1, had been annexed to the writ application and the Track report showing delivery confirmation had also been annexed at page 26 of the writ

application, this Court, taking note of the aforesaid, had directed the respondents to take immediate steps in the matter. It was further clarified that pendency of the writ application would not stand in the way of the respondents disbursing the admitted entitlement of the petitioner.

5. Since then, it was represented on behalf of the respondents that admitted entitlement of the petitioner had been disbursed and leave was sought for to use an affidavit in the matter.
6. Considering the submissions made by the learned advocate for the parties, the parties were permitted to exchange affidavits. The respondents have since filed their affidavit-in-opposition in the matter and a reply has also been filed by the petitioner. Mr. Pandey, learned Advocate representing the petitioner by drawing attention of this Court to the Service Certificates which are at pages 12 to 17 of the writ application submits that the petitioner has been in an uninterrupted service under the respondent no.1 since the year 2007. The aforesaid Service Certificates are undisputed documents which establish that the petitioner was in the employment of the respondent no.1 since 29th December, 2007.
7. He, however, submits that the respondents, to somehow demonstrate that the petitioner had not been in continuous

service, had issued such certificates by indicating the date of joining and date of leaving of the petitioner.

8. He then places reliance on the Member Passbook maintained by the Employees' Provident Fund Organisation for the period from March, 2010 to February, 2021 in order to demonstrate that there had been no break in payment of provident fund contributions by the respondent no.1 on the petitioner's account, save for the month of December, 2011.
9. By referring to Section 2A of the Payment of Gratuity Act, 1972 (hereinafter referred to as the "said Act"), he says that a perusal of the aforesaid Service Certificates read with members pass book as aforesaid, would in no uncertain terms demonstrate that the break in service shown in the Service Certificates is not due to any fault of the petitioner. As such, the petitioner is entitled to the benefit of continuous service.
10. It is still further submitted that the respondents have in their affidavit-in-opposition, inter alia, contended that the petitioner is not entitled to payment of gratuity since the petitioner has not rendered continuous service for a period of five years. In light of the disclosures made by the petitioner, the aforesaid contention raised by the respondents in their affidavit-in-

opposition should be rejected and appropriate direction should be issued directing the respondent no.1 to make payment of gratuity and the accrued interest thereon.

11. Mr. Majumdar, learned advocate representing the respondents, on the other hand, submits that the respondents had paid the admitted dues as were payable to the petitioner. By referring to paragraph 4 of the affidavit-in-opposition filed by the respondents (hereinafter referred to as the "said affidavit"), it is submitted that the petitioner was engaged on contractual basis for a particular project work and his engagement was renewed from time to time as and when necessary. The petitioner was not a regular employee of the respondents and the petitioner was not working continuously at any site.
12. The petitioner was engaged from time to time at different sites and a consolidated amount was paid for the works, from the day of start of the project till the date of completion of the project. He says that Service Certificates would only corroborate the statements made by the respondents in this regard. It is still further contended that the petitioner herein had not rendered his service for a continuous period of five (5) years as required under the Payment of Gratuity Act for claiming gratuity. In any

event, in-depth scrutiny is required to be made to ascertain the continuity of the petitioner. The same is not possible in a proceedings before the Hon'ble High Court.

13. On the query made by this Court, Mr. Majumdar has produced a communication dated 23rd March, 2023 addressed to the Chief Manager, State Bank of India, instructing the Chief Manager, State Bank of India to credit the bank account of the petitioner with a sum of Rs.46,846/- towards the payment of his terminal dues. The particulars of the amount paid to the petitioner have also been disclosed in a chart, which is appended to such letter. Both the letter dated 23rd March, 2023 and the chart captioned "Full and Final Payment Sheet" are taken on record.
14. Heard the learned advocates representing the respective parties and considered the materials on record. I find that in this case, the petitioner has been working with the respondents at different sites. It would, however, appear that since January, 2012, the petitioner was designated as a QA/QC Supervisor and continued to serve the respondents till 7th December, 2020.
15. A perusal of the Service Certificate dated 30th June, 2010 would demonstrate that the petitioner's date of joining appears

to be as 29th December, 2007 while the date of leaving appears to be recorded as 30th June, 2010. The next relevant Service Certificate dated 8th November, 2011 would demonstrate the date of joining of the petitioner as 19th July, 2010 and the date of leaving as 8th November, 2011. Again, the Service Certificate dated 31st July, 2015 would demonstrate the date of joining as 13th January, 2012 and the date of leaving as 31st July, 2015. The next Service Certificate dated 4th October, 2017 would demonstrate the date of joining as 1st August, 2015 while the date of leaving as 4th October, 2017. The last Service Certificate issued on 7th December, 2020, however, gives a completely different picture. In the said Service Certificate, the date of joining is shown as 6th October, 2017 and the date of retrenchment is shown as 7th December, 2020. In none of the other certificates, the date of retrenchment has been mentioned. In fact, on 7th December, 2020, the petitioner was terminated from service. The said documents (Service Certificates) read with the Salary Sheet including the Employees' Provident Fund Members Passbook would lead to an inevitable conclusion that the petitioner had been engaged by the respondents from the year 2007.

16. Mr. Majumdar, learned advocate representing the respondents, however, has strenuously argued that the petitioner was not in continuous service. According to him, unless the petitioner has completed two hundred and forty (240) days in a particular year, the petitioner cannot be entitled to gratuity. It is, however, relevant to note that the payment of gratuity under the said Act defines continuous service. To appropriately appreciate the issues involved in the present writ application, the definition of ‘continuous service’ is extracted hereinbelow:

“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 ²[***] 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 ²[such

period as may be notified³ by the Central Government from time to time].]"

17. A perusal of the aforesaid provisions would in no uncertain terms demonstrate that an employee is 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 by reason of sickness, accident, leave, lay-off, strike or a lock-out or cessation of work or the like, not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after commencement of the Act.
18. In this case, it is apparent from the Service Certificates that the petitioner was in continuous service since 29th December, 2007. It is not the case of the parties that the interruptions, as reflected in the Service Certificates, are on account of interruption effected at the instance of the petitioner, on the contrary it is evident that the aforesaid interruptions were effected by the respondents over which the petitioner had no control and was not at fault.
19. I find that Mr. Majumdar has also laid a stress on Section 2A(ii) to highlight that unless it is established that the petitioner had been working for more than two hundred and forty (240) days in a year, no relief can be granted to the petitioner. I am afraid that such contention of the respondents is unacceptable inasmuch as the respondents themselves have credited provident fund contributions of

the petitioner month by month and every month without interruption, save and except, for the month of December, 2011. Although the respondents claimed that the petitioner was appointed on contractual basis, the Service Certificates, issued by the respondents for the years 2007 to 2017, do not demonstrate that the petitioner's employment was on contractual basis. It, however, appears that in the Service Certificate dated 7th December, 2020, for the first time the respondents had incorporated the words "on contractual basis". Admittedly, the petitioner was employed on wages as defined under Section 2(s) of the said Act, which means he is also entitled to all emoluments which an employee has earned while on duty or on leave, in accordance with the terms and conditions of his employment which are payable to him.

20. I find that although separate Service Certificates were issued from time to time, the respondents have continued with the petitioner since 29th December, 2007. As such it cannot be said that the petitioner was not an employee of the respondent no.1. Having regard to the aforesaid, I am of the view that the respondents should not be permitted to deny the legal right of the petitioner to claim gratuity. In this case, the petitioner had to approach this Hon'ble Court even for disbursement of wages which had admittedly remained unpaid and was cleared during the pendency of the proceeding. Considering the

materials on record, a roving enquiry is not necessary to ascertain the status of the petitioner.

21. Having regard to the aforesaid, I direct the respondents to make payment of the gratuity due and payable to the petitioner by treating him to be in continuous employment from 29th December, 2007, along with interest at statutory rate within eight weeks from the date of communication of this order. The interest must be computed from the date of retrenchment of the petitioner i.e. 7th December, 2020.
22. The petitioner shall also be entitled to interest on the terminal benefits disbursed in his favour at the rate of 10% per annum since no explanation has been forthcoming for the delay.
23. With the aforesaid observation, the present writ petition being WPO/603/2023 is disposed of.
24. Urgent Photostat certified copy of this order, if applied for, be made available to the parties on priority basis upon compliance of all requisite formalities.

(RAJA BASU CHOWDHURY, J.)