



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11989 OF 2022

The Maharashtra State Co-Operative Adivashi]
 Vikas Mahamandal Maryadit,]
 Adivashi Bhavan, Gadkari Chowk,]
 Old Agra Road, Nashik]
 Through its Authorized Signatory.] ... Petitioner

Versus

Shri Pandurang S/o Kalu Pawar,]
 Age : 65 years, Occ. : Retired,]
 R/o. : Ketaki Co-Op. Hsg. Society Ltd.]
 Mhasarul, Tq. & Dist. Nashik – 422 004.] ... Respondent

Mr. S. S. Kulkarni for Petitioner.
Ms. Gauri Jadhav for Respondent.

CORAM :- SANDEEP V. MARNE, J.
RESERVED ON :- 06 OCTOBER, 2023
PRONOUNCED ON :- 10 OCTOBER, 2023

JUDGMENT :-

1. **Rule.** With the consent of the learned Counsel for the parties, Rule is made returnable forthwith and called out for hearing.

2. This Petition is filed by The Maharashtra State Co-Operative Adivashi Vikas Mahamandal Maryadit challenging the

Judgment and Order dated 02/01/2020 passed by the Controlling Authority under the Payment of Gratuity Act, 1972 (**'Gratuity Act'**) directing payment of gratuity of Rs. 2,11,390/- along with interest to the Respondent–employee. The Petitioner has unsuccessfully tested the Controlling Authority's decision before the Appellate Authority which has proceeded to reject the Appeal filed by its Judgment and Order dated 30/07/2022, which is also subject-matter of challenge in the present Petition.

3. Facts of the case are that the Respondent was employed in the office of Petitioner with effect from 13/07/1976. He tendered his resignation on 14/12/1988. For having completed 12 years of service, the Respondent was paid gratuity commensurate to the number of years of service put in by him. The Respondent was re-employed by the Petitioner again on 21/09/1994 and on attaining the age of 60 years, he retired from service on 31/08/2012.

4. While paying gratuity to the Respondent in respect of his second spell of service during 21/09/1994 to 31/08/2012, the Petitioner combined both the spells of service from 13/07/1976 to 14/12/1988 (12 years) and 21/09/1994 to 31/08/2012 (18 years). Under Rule 84 of the Maharashtra State Cooperative Tribal Development Corporation Limited Employees Service Rules (**'Service Rules'**), gratuity is payable as 30 days' pay for each completed year of service, subject to the cap of maximum 20 months of pay.

Applying the said cap, since the Respondent was already paid gratuity for 12 years of service in the first spell, the Petitioner restricted the gratuity in respect of the second spell of service to only 8 years and paid him gratuity for another 8 months of Rs.1,79,112/-. On 10/04/2014, the Respondent filed Complaint (ULP) No.31/2014 before the Industrial Court at Nashik under Item Nos. 9 and 10 of Schedule IV of the MRTU & PULP Act. The complaint was dismissed by the Industrial Court holding that Item Nos. 9 and 10 of Schedule IV of MRTU & PULP Act did not cover the grievance of non-payment of gratuity. It held that Petitioner had a remedy provided under the Gratuity Act.

5. The Respondent thereafter approached the Controlling Authority under the Gratuity Act by filing Application (PGA) No.22/2018 on 21/04/2018. The Application was opposed by Petitioner questioning its maintainability after rejection of Complaint by the Industrial Court. The Application was also resisted on merits by Petitioner placing reliance on Rule 84 of the Service Rules. The Controlling Authority was pleased to allow the Application by Judgment and Order dated 02/01/2020 and held that the Respondent is entitled for payment of 18 months gratuity for service of 18 years rendered from 21/09/1994 to 31/08/2012. The Controlling Authority therefore directed the Petitioner to pay remaining amount of gratuity of Rs. 2,11,390/- along with interest @ 10% from 31/08/2012 till realization.

6. Petitioner filed Application (PGA) No.01/2020 before the Appellate Authority challenging the Order of the Controlling Authority. The Appellate Authority however rejected the Appeal by its order dated 30/07/2022. The Petitioner has accordingly filed the present Petition challenging the decision of the Controlling and Appellate Authority.

7. Mr. Kulkarni would appear on behalf of Petitioner and submit that payment of gratuity to the employees of Petitioner is governed by the provisions of the Service Rules. That, under Rule 84, there is a maximum cap of payment of gratuity of 20 months. That, the impugned orders passed by the Controlling and Appellate Authority are in the teeth of provisions under Rule 84. He would submit that the number of spells of service rendered by an employee is an irrelevant factor and employee's entitlement for payment of gratuity depends on total length of service rendered with the employer. That, Petitioner has correctly clubbed both the spells of services for determining Respondent's entitlement for payment of gratuity. He would submit that Respondent cannot claim something more than what he would have received, if he was to continue in service of the Petitioner than what he is asking on account of a break in 2 spells of service. That, if the Petitioner was to continue in service without any break, cap of 20 months' gratuity would have been attracted and that mere break in 2 spells of his service would not entitle him to extra amount of gratuity. In support of his contention, Mr. Kulkarni would rely upon the Judgment of this Court

in the case of *M/s. Phoenix Mills Limited Vs. Shri Manohar Arjun Rasal*¹, *Shri Ramappa Bhimappa Vs. M/s. Phoenix Mills Ltd. & Others*² and *Baburam Rameshwar Vs. Phoenix Mills Ltd. & Others*³.

8. Mr. Kulkarni would question the maintainability of the Application filed before the Controlling Authority after rejection of Complaint by the Industrial Court filed for the same purpose. He would submit that the Industrial Court did not grant any liberty to the Respondent to reagitate the issue of payment of gratuity.

9. *Per Contra*, Ms. Gauri Jadhav, learned Counsel appearing on behalf of Respondent – employee would oppose the Petition and support the Judgment and Order passed by the Controlling and Appellate Authority. She would submit that the Respondent must get the entire gratuity for 18 years of service rendered by him in second spell. That, the appointment granted to him in the second spell is a fresh appointment subject to probation. That, the second spell of service had absolutely no connection with the earlier spell of service. That, therefore, for payment of gratuity under Rule 84 of Service Rules, earlier spell of service rendered by the Respondent is immaterial. She would pray for dismissal of the Petition.

¹ *Writ Petition No.2883 of 2005, decided on 11/10/2010*

² *1999 (1) BomCR 412*

³ *(1999) ILLJ 258 Bom*

10. Rival contentions of the parties now fall for my consideration.

11. So far as the first objection of Mr. Kulkarni about maintainability of the Application filed before the Controlling Authority is concerned, I do not find any merit in that objection. The Respondent had adopted an erroneous remedy with regard to his grievance of non-payment of full gratuity by knocking the doors of Industrial Court under the provisions of MRTU and PULP Act. The correct remedy for him was to file an application before the Controlling Authority under the Gratuity Act. The Industrial Court held that the grievance of the Respondent was not covered by Item Nos.9 and 10 of Schedule IV of MRTU and PULP Act. It also held that the Respondent had a remedy under the Gratuity Act to air his grievance. Though the Industrial Court has made some unnecessary observations with regard to merits of the issue, the said observations are without jurisdiction and would not come in the way of the Respondent espousing his cause before the Court of correct jurisdiction. The objection of maintainability of application filed under the Gratuity Act raised by Mr. Kulkarni is therefore repelled.

12. Coming to the merits of the issue, Mr. Kulkarni has strenuously relied on the provisions of Rule 84 of the Service Rules which reads thus:-

“(84) The gratuity shall be payable calculated at the rate of 30 days for each completed year of service subject to the maximum of 20 months pay.

An employee who rendered 5 years of service should be eligible for 50% of gratuity admissible and 7 to 10 years for 75% and above 10 years cent percent. The service rendered for 6 months and more shall be rounded to the next year.

Pay means basic pay plus Dearness Allowance drawn in the last month of his/her services. An employee should be retired for this purpose on the last date of the month.”

13. Thus, the employees of the Petitioner – Corporation are entitled to gratuity calculated at the rate of 30 days for each completed year of service. There is however a cap for payment of maximum amount of gratuity fixed at 20 months’ pay. It is relying on Rule 84 that Mr. Kulkarni has contended that though the total length of service tendered by the Respondent in 2 spells adds to 30 years, he could be paid total gratuity only of 20 months since the Respondent was already paid gratuity in respect of 12 years of service upon accepting his resignation on 14/12/1988. He has been paid additional gratuity for only 8 years in respect of second spell of service, though the same is for 18 years.

14. The Controlling Authority has undertaken the exercise of determining the nature of second spell of appointment. There is a gap of 6 long years during the two spells of service. The Controlling Authority has considered the appointment order in respect of second

spell of service, under which the Respondent was put on probation for a period of 2 years. The Controlling Authority has also placed reliance on Rule 27 of the Service Rules which reads thus :-

“Re-employment (27) The re-employment of the employee after resignation or removal or dismissal or after discharge on reduction of the post or after invalidation out of the service amounts to fresh appointment at the discretion of the Managing Director.”

Thus, as per the Service Rules, re-employment after resignation amounts to fresh appointment. The Controlling Authority has also considered the fact that the two separate service books of Respondent were maintained in respect of his two spells of service. It has also considered the fact that his designation during the first spell of service was ‘Truck Cleaner’ whereas his designation in the second spell is shown as ‘Driver’. After considering these factors, the Controlling Authority has arrived at a finding that the two spells of service are different and distinct, without any connection with each other. I do not find any perversity in this finding of the Controlling Authority.

15. Once it is held that that second spell of service of the Respondent is a fresh appointment, the next issue is whether it was permissible for the Petitioner to club both the spells of service for the purpose of applying the maximum cap provided for in Rule 84. One may well argue that separating the two spells of service would result in a windfall gain to an employee who resigns and seek re-

employment as compared to the employee who continues in service. This argument is premised on the fact that one employee who diligently continues in service and renders 30 years of service gets gratuity of 20 months. As against this, an employee like the Respondent, who resigns from service and is offered re-employment tends to get gratuity for 30 months. It can therefore be argued that an employee tendering resignation and seeking re-employment stands to gain as compared to his cohorts who loyally continue in the service. These arguments may appear to be attractive in the first blush, but becomes illogical when compared to a situation when the employee secures another employment after resignation. To illustrate, if the Respondent was to render second spell of service with another employer, he would have received gratuity commensurate to the number of years of service rendered in the second spell. Therefore, just because he was offered re-employment by the same employer, he cannot be put to loss in the form of receiving lesser amount of gratuity.

16. It may be true that Petitioner may have to pay higher amount of gratuity to an employee securing reemployment than the ones who loyally continue to render service with Petitioner without any break. But that is informed call that Petitioner has to take while offering reemployment to a resigned employee. By offering fresh appointment to an employee who has already collected his gratuity in respect of past service, Petitioner will have to take responsibility of paying another set of gratuities for services rendered in second

spell. The matter can also be viewed from another angle. Mr. Kulkarni's contention is based on the principle of denial of a windfall to an employee resigning and rejoining. But at the time of his reemployment, Petitioner would treat him as a fresh entrant by fixing his pay at lower level than what he would have otherwise drawn if he was to continue in service. He would lose his seniority and other benefits flowing out of past service as resignation entails forfeiture of past service. Thus by seeking reemployment as a fresh entrant, the employee loses several benefits, though he may be receiving an advantage in the matter of payment of gratuity. Therefore gratuity paid in excess of total cap of 20 months cannot really be treated as windfall.

17. Since the second spell of service had no connection with the earlier spell of service, the exercise undertaken by the Petitioner to club both the services for the purpose of applying the maximum cap of payment of gratuity of 20 months under Rule 84 is unwarranted.

18. What remains now is to deal with the Judgments cited by Mr.Kulkarni.

(i) In *M/s. Phoenix Mills Limited* (*supra*), the Respondent had joined the service as badali employee on 04/11/1968 and was terminated in the year 1982 for having participated in

illegal strike. He was re-employed on 13/02/1990 as fresh badali employee and resigned on 22/08/1997 accepting the benefits of Voluntary Retirement Scheme. He filed application for payment of gratuity during 1967 to 1997. He had already collected his gratuity for the first spell of service from 1967 to 1982. This Court therefore held that he cannot be in continuity of service between the two spells and set aside the order passed by the Controlling Authority and Appellate Authority directing payment of gratuity from 1967 to 1997. In the present case, the issue is entirely different. The issue of maximum cap of amount of gratuity was not involved in *Phoenix Mills Limited* (*supra*) and therefore, the Judgment would have no application.

(ii) In *Shri Ramappa Bhimappa* (*supra*), the issue before this Court was whether the 2 spells of service can be considered as continuous in respect of employees who are terminated on account of participation in strike and who were granted fresh appointments. The issue was thus entirely different and the Judgment would not apply to the present case where the issue is whether delinking of two services would result in payment of separate gratuities for two spells, without applying the maximum cap.

(iii) In *Baburam Rameshwar* (*supra*), the issue was same as was involved in *Shri Ramappa Bhimappa* and therefore, the Judgment would not apply to the facts of the present case.

19. There is only one area where some correction in the Orders passed by the Controlling and Appellate Authorities would be warranted. The Controlling Authority has awarded interest @ 10% p.a. on differential amount of gratuity. In another case (WP No. 2569/2023) involving same Petitioner, the Appellate Authority has reduced the rate of interest from 10% to 8%. However, in the present case, such reduction has not been ordered. In my view interest @ 10% would be excessive and needs to be reduced to 8% so as to maintain uniformity in two cases.

20. Except reduction of rate of interest, I do not find any merit in the Petition filed by the Petitioner. Writ Petition is accordingly disposed of by modifying the Orders of the Controlling and Appellate Authorities by directing that the rate of interest payable on amount of Rs. 2,11,390/- would be 8%. There shall be no order as to costs.

21. Rule is discharged.

(SANDEEP V. MARNE, J.)