

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE ARINDAM MUKHEREJEE.

W.P.A 7693 of 2024

DEBASHISH BASU

VS.

STATE OF WEST BENGAL & OTHERS.

For the Petitioner : Mr. Saibalendu Bhowmik,
Mr. Biplab Guha,
Mr. Rajsekhar Basu,
Mr. Subrata Bhattacharjee.
....Advocates

For the State : Mr. Subhendu Bandyopadhyay,
Mr. Subhendu Sengupta.
....Advocates

For the Respondent no. 5 & 6 : Mr. Aditya Roy.
....Advocate

Heard on 08.04.2024 and 25.04.2024

Judgment on : 9th May, 2024.

Arindam Mukherjee, J.:

- 1) The writ petition is at the instance of an employee for setting aside the order dated 8th June 2023 of the Appellate Authority under the provisions of Payment of Gratuity Act, 1972 (hereinafter referred to as

the 1972 Act). The appeal arose from the rejection of petitioner's claim for gratuity by the Controlling Authority.

- 2) It is the case of the petitioner that he had been appointed as the Senior Manager Supply Chain Management of the respondent no.5 on 28th February, 2014. The petitioner underwent a six months probation period and was thereafter confirmed by a letter dated August 6, 2014. The petitioner reached his superannuation age on 3rd June, 2016 and was thereafter engaged in the respondent no.5 without any break on reaching the age of superannuation.
- 3) The petitioner claims there was no break in service as immediately from the next day of his superannuation, he continued to work in the respondent no.5, may be on different terms and on such agreement being renewed yearly, had worked up till 30th January, 2020. The petitioner claims that the period he worked as a permanent employee should be treated as his continuous service. The petitioner, therefor, has worked for more than 5 years and as such, the petitioner is entitled to gratuity under the provisions of the 1972 Act. The petitioner states that in the year 2017 his remuneration was Rs. 46,000/- (Rupees Forty Six thousand) only per month that remuneration was further enhanced to Rs. 52000 per month in 2019 along with his designation to the post of AGM-Supply Chain Management.

- 4) The petitioner also states that on 30th January, 2020 he was ultimately retired and released from the said company after completion of more or less 5 years 11 months 27 days continues service with the said respondent no. 5 company. The petitioner also says that since the respondent no. 5 company had not taken any steps to release the gratuity amount in favour of the petitioner and even after waiting for more than one year, the petitioner found no other alternative but to file one application before the Labour Commissioner, EL & MW Section, Government of West Bengal on 24th March, 2021 under the provisions of Rule 7 of the West Bengal Payment of Gratuity Rules, 1973 but the respondent no. 5 company refused to pay any gratuity amount to the petitioner.
- 5) The Controlling Authority and the Appellate Authority have turned down the petitioner's prayer by holding that the permanent employment on the petitioner having attained the age of superannuation came to an end. The subsequent engagement even though was from the next date of superannuation but is a different agreement and as such, it cannot be said to be a continuous one from 28th February, 2014 for which 5 years continuous service has been rendered by the petitioner.
- 6) The petitioner states that the controlling authority heard the petitioner as well as respondent no. 5 company and passed an Order on 17th February 2022 by rejecting the prayer for gratuity of the petitioner. The

Controlling Authority while doing so observed that in Serial No. 9 of contract of service it has been clearly mentioned that during the contractual period employee was not eligible for gratuity. The employee agreed to this term on a clear understanding that the employment during the entire period is not permanent in nature.

- 7) Being aggrieved and dissatisfied with the Order dated 17th February 2022, the petitioner filed an appeal under Section 7 (7) of the 1972 Act before the Learned Appellate Authority on 27th April, 2022. The Appellate Authority by an order dated 8th June, 2023 has rejected the prayer and appeal of the petitioner.
- 8) The petitioner states that in the said Order dated 8th June, 2023 the Appellate Authority stated that in the instant case the full and final settlement is arrived at between the worker and management. Since the full and final settlement has been arrived at Shri Debasish Basu, appellant is not entitled to receive gratuity. Therefore, the Appellate Authority is dismissing the appeal regarding the admissibility of the claim of Shri Debasish Basu, appellant.
- 9) The petitioner says that he worked continuously for more or less than 6 years with the said company before termination of his service by way of a unilateral decision from the side of the employer and as a result the said company is bound to pay the gratuity amount of Rs.1,80,000/- with interest as per law. The petitioner categorically submits that there is a

difference between the word “retirement” and the word “superannuation” as defined in 2(q) and 2(r) respectively in the said 1972 Act.

- 10) The respondent submits that the petitioner’s claim for gratuity is without any basis and not maintainable under the said provisions of Section 7(7) of 1972 Act and Rule 18 of the said Rules. The respondent states that there was a break in service and the petitioner is not qualified to be entitled to gratuity since there has been no continuous service.
- 11) The respondent states that the petitioner retired from service on attaining the age of superannuation on 3rd June 2016 and was engaged afresh on contractual basis with fresh terms and conditions which was again renewed annually. The subsequent contractual appointment was unconnected to his initial appointment as a permanent employee.
- 12) The Controlling Authority held that the petitioner retired from service on 3rd June 2016 after working 2 years and 4 months of service and thereafter upto 24th January 2020 worked on a yearly contractual term. The contractual period after retirement is completely separate and unconnected with the earlier employment hence no continuity of service.
- 13) The respondent submits upon attaining the age of superannuation and receipt of full and final payment for such service rendered the main appointment of the petitioner had come to an end with his retirement on attaining the age of superannuation of 58 years. The petitioner is not

entitled to continue as a permanent employee after attaining the age of superannuation. The petitioner did not complete 5 years of service before he was retired from service his total period of service at the time of retirement was 2 years 4 month. Consequent upon retirement there is complete severance of employer employee relationship between the opposite party and the petitioner. After retirement if the employee is inducted on contractual basis even from the date immediately after retirement an employee cannot contend to be in continuous service as the said appointment is totally separate and unconnected with the previous employment. Superannuation and/or retirement from service leads to automatic break in service of the writ petitioner. There is no legal basis to consider the earlier period for the purpose of counting the continuity of service when the earlier employment has come to an end on attaining the age of superannuation. The retirement relinquishes all.

- 14) After retirement the petitioner was engaged afresh on contractual basis for a period of one year commencing from 4th June, 2016 and the said contract was renewable. The petitioner accepted the new engagement offered vide letter dated 3rd June, 2016. On receipt of the said letter the petitioner has noted his acceptance of the offer of contractual appointment by endorsing therein "Received the Original with thanks and accepted". Since the service of the petitioner was no longer required his contract was discontinued vide company's letter dated 25th

November, 2019 with effect from 24th January, 2020 by giving 60 days notice as per contract. The contractual appointment for each year came to end on completion of contractual period. The respondent also says that assuming without admitting that is the yearly contractual period of appointment are treated to be continuous for the sake of argument, then also the total period comes to 3 years 7 months 20 days and not 5 years. Automatically this period is not the qualifying period to get gratuity.

15) The respondent says that almost on the similar facts and circumstances in the cases of ***State Bank of India vs. Sri Ravi Sankar Malani and others reported in (2022) 173 FLR 398*** a Single Bench of this Court has held that the respondent was appointed for an initial period of 3 years and fresh contract were issued in his favour subsequently after expiry of every 2 years. In absence of continuation/renewal of the initial contract during the entire period, it cannot be said that the respondent rendered continuous service for 5 years or more.

16) Upon perusal of documents submitted in the light of the arguments advanced it is clear that employment of the petitioner was renewed annually by the employer from 3rd June, 2016 till 24th January, 2020 though the employer (respondent) required the services of the employee (petitioner) continuously for this period only to show a break in service on papers to defeat the claim of continuous service of the employee (petitioner). The engagement post superannuation age, however it

appears to be under a separate agreement on temporary basis wherein it was stipulated that the petitioner, on such engagement, shall not be entitled to any gratuity, provident fund or leave travel assistance.

- 17) Secondly, it is a trite law that any statutory benefit provided under a beneficial legislation like the 1972 Act cannot be taken away by any employer by way of making any provision in a contract of employment though contracting out of statute is not alien in law. The provision as to contracting out of statute is not provided under the 1972 Act and for this reason even badly, piece rated, daily wage earners and seasoned workmen are entitled to receive gratuity on fulfilling the eligibility criteria provided under the 1972 Act. If this provision is allowed then taking advantage of the super bargaining power any employer can buy pass the statutory obligation in any country. It would be profitable to rely upon the decision (i) **Allahabad Bank & Anr. Vs. Controlling authority & Anr., reported in 2010 (2) SCC 44** which clearly postulate that any establishment is under statutory obligation to pay gratuity as provided under Section 4 of the 1972 Act. Section 14 of 1972 Act further clarifies that the provision of the act shall have effect notwithstanding anything inconsistent therein contained in any enactment or in any instrument or in any contract having effect by virtue of the said enactment other than this Act.

18) ***Natraj Studios (P) Ltd. v. Navrang Studios reported in 1981 (1) SCC***

523 (Paragraph 17) – The Hon’ble Supreme Court had long back laid down this principle of law by stating that the Public Policy requires that contract to the contrary which nullifies the rights conferred on specified class by the statute itself cannot be permitted. Therefore, public policy of giving some statutory relief to the retired person in the form of money by way of gratuity on being provided, the employer cannot be permitted to contract out of statute to bypass the legislative mandate which requires the employer to comply with certain obligation towards the working people.

19) In ***Food Corporation of India vs. Anurag Properties Pvt. Ltd. &***

Anr., reported in 2007 (I) CHN 1 a Hon’ble Division Bench of our High Court echoed the same principle that any agreement which is inconsistent with the provisions of law cannot be enforced.

The ratio laid down in State Bank of India (supra) relied upon by the respondent employer has no application in the facts of the instant case.

20) The instant case has got two parts-first, the superannuation, secondly, the contractual appointment for a period of year which was extended by a fresh contract for a further period. When the superannuation is affected, the said period of service rendered by the applicant till the date of his retirement ceases. It is unconnected with any other employment taken by the writ petitioner on contractual basis. The superannuation

leads to complete cessation of the employer – employee relationship between the employer (respondent) and the employee (petitioner). The Hon'ble Supreme Court in the case of ***Ramswaroop Masswan vs. Municipal Council and Anr reported in 1999 LAB.IC 226 (SC)*** has held that continuance in service after due retirement amounts to re-employment. The material portion of the said case laws are reproduced below:-

“3. In our view, the High Court was right. At the relevant time the age of superannuation was 55 years. The appellant stood superannuation on reaching the age and, in law, his continuance in service thereafter can only be treated as re-employment. In the municipal council in question no retiral benefits were available to overseers, who retired on 26th January, 1970. Therefore, the appellant could not legitimately make a claim thereto.”

From the above judgment it is clear that continuance in service after superannuation amounts to re-employment which is unconnected with the previous employment rendered till superannuation. This situation in itself leads to break in service. The petitioner in the instant case worked for 2 years 4 months and that period cannot be linked with his subsequent re-employment on contractual basis. Moreover the contractual period even if it is considered to be continuous ignoring the annual renewal does not add up to 5 years of service to provide the writ petitioner the gratuity, treating him to be in continuous service for the said period.

21) This leads to the inevitable conclusion that the writ petitioner having worked as a permanent employee for 2 years 4 months upto 3rd June, 2016 cannot be treated to be in continuous service upto 24th January, 2020 when he worked as a contractual employee thereby taking his total tenure upto 5 years 7 months to be entitled to granting for having rendered services in excess of 5 years as required under Section 4 of the 1972 Act.

The writ petition being No.WPA 7693 of 2024, therefor, fails and is accordingly dismissed.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis after compliance with all necessary formalities.

(Arindam Mukherjee, J.)