D.B.R. Mills Ltd. Vs Appellate Authority, Under Payment of Gratuity Act

Court: Andhra Pradesh High Court

Date of Decision: Feb. 7, 1984

Acts Referred: Payment of Gratuity Act, 1972 â€" Section 2, 4, 4(1), 4(2)

Citation: (1985) 1 LLJ 181

Hon'ble Judges: K. Madhava Reddy, C.J; Mohammed Sardar Ali Khan, J

Bench: Division Bench

Judgement

K. Madhava Reddy, C.J.
These four appeals raise a common question of law as to the mode of computing the amount of gratuity payable

to a workman under the Payment of Gratuity Act, 1972 (Act 39/72) (hereinafter referred to as the Act). The D.B.R. Mills Ltd. is a Public Ltd.

Company (hereinafter referred to as the Company). The appellant herein is the employer within the meaning of S. 2(f) of the Act and is liable to

pay gratuity u/s 4 of the Act to its employees who have been in continuous service as defined u/s 2(c) of the Act. There is no dispute that the

appellant Company is the employer and the third respondent in each of these writ Appeals is its employee. Under sub-s.(2) of S. 4 of the Act, for

every completed year of service or part thereof in excess of six months the employer is under an obligation to pay gratuity to an employee ""at the

rate of fifteen days (wages)"" based on the rate of wages last drawn by the employee concerned. The employees claim that in computing the

continuous service Sundays and public holidays on which days the Establishment is closed or the employees are given a holiday should also be

taken into account and if they have been in employment for a period of 240 days in a year, they should be deemed to be in continuous service for a

period of one year. Further the rate of wages payable should be calculated for the actual number of days in a month after excluding Sundays, and

at that rate, fifteen days'' wages for every completed year of service should be paid to them. The Controlling Authority under the Payment of

Gratuity Act cum the Asst. Commissioner of Labour, Hyd., second respondent herein, accepted their claim in his order dated 25th August, 1983.

The employer preferred an appeal against the order and the appellate authority under the Payment of Gratuity Act Deputy Commissioner of

Labour, Hyd. (twin Cities) first respondent herein, confirmed the said order and dismissal the appeal.

2. The learned Single Judge before whom these orders were challenged did not accept the contention of the appellant-company that the public

holidays and Sundays should be excluded in computing 240 days for purpose of determining whether the employers was in uninterrupted service

for one year and dismissed the Writ Petition.

3. We may dispose off at the outset the contention which was only feebly pressed that wages paid for the entire month should be taken as paid for

all the 30 days in the month in determining the rate of wages and not as paid for the actual number of working days. This contention runs counter to

the well accepted principle that wages payable to an employee for a month are wages paid for the actual number of days he has worked which are

taken as 26 days in a month after excluding Sundays which are given as compulsory holidays for all establishments; the holiday on Sunday is

earned by the employee by working on the remaining days of the month. The rate of wages has, therefore, to be arrived at by dividing the total

amount of wages paid in a month by 26 days and not by 30 days. The argument to the contrary has been set at rest by the Supreme Court in D.W.

Mills Ltd. v. M. P. Buch (1980 LIc 1052). The Supreme Court held that ""the wages for 26 days are to be treated as monthly wages and not of

days.

4. The Supreme Court observed :

Ordinarily of course, a month is understood to mean 30 days, but the manner of gratuity payable under the Act to the employees who worked for

26 days a month ... cannot be called perverse .... to indicate the calculating monthly wages as wages for 26 working days is not anything unique or

unknown, we may refer to a passage from the judgment of this Court Delhi Cloth and General Mills Co., Ltd. Vs. Workmen and Others etc., ,

which disposed of several appeals arising out of an award made by the Industrial Tribunal. The expression ""Average of the basic wages"" occurring

in the scheme was explained by this Court as follows :

The expression ""Average of the basic wage"" can only mean the wage earned by a workman during a month divided by the number of days for

which he has worked and multiplied by 26 days in order to arrive at the monthly wage for the computation of the gratuity payable.

5. We, therefore, hold that fifteen days wages for every completed year of service have to be calculated on the basis of wages paid to an

employee for the month divided by 26 days and the quotient multiplied by fifteen days.

6. The next and the principle question that was canvassed by Sri B. K. Seshu, learned counsel for the employer, was that in computing 240 days,

the number of holidays whether Sundays or public holidays on which the establishment itself was closed and the employee did not actually work

should be included. If after exclusion of these days the employee is found to have worked for not less than 240 days in a year he should be treated

to be in uninterrupted service for one year. In order to appreciate this contention it is necessary to read the definition ""continuous service"" and the

definition means uninterrupted service. The definition reads as follows :

Section 2(c) : Continuous Service"" means uninterrupted service and includes service which is interrupted by sickness, accident, leave, lay-off,

strike or a lock-out or cessation of work not due to any fault of the employee concerned, whether such uninterrupted or interrupted service was

rendered before or after the commencement of this Act.

Explanation I : In the case of an employee who is not in uninterrupted service for one year, he shall be deemed to be in continuous service if he has

been actually employed by an employer during the twelve months immediately preceding the year for not less than -

(i) 190 days, if employed below the ground in a mine, or

(ii) 240 days in any other case, except when he is employed in a seasonal establishment.

Explanation II : An employee of a seasonal establishment shall be deemed to be in continuous service if he has actually worked for not less than

seventy-five per cent. of the number of days on which the ""establishment was in operation during the year.

It would be noticed that the definition is not exhaustive. It is an inclusive definition. Service undoubtedly means an employee actually discharging his

duties and when continuous service means uninterrupted service, it should not be interrupted by any reason whatsoever. But having regard to the

inclusive definition of continuous service in S. 2(c) such uninterrupted service includes not only service interrupted by sickness, accident, leave, lay-

off, strike or a lock-out but also cessation of work not due to any fault of the employee concerned. Cessation of work by the employee on a

holiday, whether it is Sunday or a public holiday, no doubt, is not on account of sickness, accident, leave, lay-off, strike or a lock-out. But at the

same time, it is not cessation of work due to any fault of the employee concerned. As part of the management of an establishment, the employer

himself either in compliance with the Standing Orders or a statutory duty imposed upon him, in relation to the establishment in which the employee

concerned is rendering service has to observe certain number of days as public holidays and Sundays. The Establishment itself cannot work or

even if it works, the same employees cannot be employed on those days. In such cases the holidays are staggered and other employees are

employed to do the work. For whatever reason it may be, the cessation of work by the individual cannot be termed as one due to any fault of the

employee. Hence cessation of work of the respondent employees on Sunday and other Public Holidays during a year satisfied the inclusive

definition of ""continuous service"". Though the service is interrupted, it is not an interruption caused due to any fault of the employee. If that be the

position then as per Explanation I, he would be deemed to be in continuous service if he has been actually employed by an employer during the

twelve months, immediately preceding the year for not less than 240 days in an establishment such as the appellant Company. Mr. Seshu, learned

counsel, however, contends that ""actually employed"" occurring in Explanation I means actually doing work or discharging duty. We are unable to

accept this contention. In the definition itself where it is intended to actual discharge of duties of work, it is expressly referred to. But where it is

intended to merely connote the relationship of the employer and employee what all has to be seen, is whether he is employed or not, and not

whether he is actually discharging duty or doing any work. Even on a holiday, whether it is Sunday of Public Holiday, he is in actual employment of

the employer. Only he is not discharging duty or doing any work on that particular day, because it is a holiday. On account of holiday there is

cessation of work, but not termination of contract of employment. While the employment continues, he has only ceased to work on public holiday.

Such a cessation of work is not due to any fault of the employee. Hence in computing 240 days during which he has been actually employed.

Holidays including Sundays cannot be excluded in ascertaining whether or not an employee has been in uninterrupted service for one year.

7. Mr. Seshu, learned counsel, however, relied upon a judgment of the Supreme Court in Lalappa Lingappa and Others Vs. Laxmi Vishnu Textile

Mills Ltd., to contend that only actual number of days on which the employee worked should be taken into account in computing these 240 days.

In that judgment the Supreme Court following the Observation of the High Court held at para 16 at p. 313 :

It is important to bear in mind that in Explanation-I the legislature has used the words ""Actually employed"". If it was contemplated by Explanation-

I that it was sufficient that there should be a subsisting contract of employer, then it was not necessary for the legislature to use the words ""Actually

employed"". It is not permissible to attribute redundancy to the legislature to defeat the purpose of enacting Explanation. The expression ""Actually

employed"" in Explanation I to S. 2(c) of the Act must, in the context in which it appears, mean ""Actually worked"". It must accordingly be held that

the High Court was right in holding that the permanent employees were not entitled to payment of gratuity under sub-s. (1) of S. 4 of the Act for

the years in which they remained Absent without leave and had actually worked for less than 240 days in a year"".

That was a case in which the employees did not fall within the inclusive definition of continuous service in S. 2(c) for they had absented themselves

without leave and the contention was that by virtue of Explanation-I to the definition, they should be treated as actually employed because there

was no cessation of the contract of the employment. In that context the Supreme Court said ""actually employed"" in Explanation-I to S. 2(c) of the

Act must, in the context in which it appears, mean actually worked. That interpretation cannot be imported to exclude an employee who had

ceased to work for no fault of his from the inclusive definition in S. 2(c). Though this observation may lead to the conclusion that ""actually

employed"" means actually worked ""the Supreme Court was not called upon to consider the effect of the inclusive definition which takes within its

ambit ""Service"" which is interrupted by cessation of work not due to any fault of the employee concerned. Their Lordships were only considering

the Explanation I to S. 2(c). With respect to an employee whose service could not be deemed to be in continuous service even in the inclusive

definition of continuous service for, in that case it was interrupted due to his own absence without leave. Once the service is interrupted due to the

fault of the employee himself, it is not continuous service at all and hence number of days which are to be calculated are those on which he had

actually worked. The interruption having been due to the fault of the employee, those days on which the employee did not actually work cannot be

included and treated as uninterrupted service so as to entitle the employee to count those days to ascertain if they have worked for 240 days in a

year. In our view the Supreme Court never intended lay down that service interrupted by public holidays should not be treated as continuous

service and those days should not be calculated for ascertaining whether an employee was in service for 240 days in a year. In our view the

judgment is only an authority for the proposition that where the employee absents himself without leave, the days on which he has actually worked

alone can be taken into account in ascertaining whether he has worked for 240 days so as to entitle him to claim gratuity under S. 4 of the Act. We

therefore find ourselves in agreement with the view taken by the learned single Judge that Sundays and holidays on which the establishment is

closed and the employee is not required to work, cessation of work is not due to any fault of employee and consequently it constitutes

uninterrupted service and if such uninterrupted or continuous service is for 240 days or more in a year, he would be deemed to be in continuous

service for a period of one year and would be entitled to fifteen days gratuity calculated at the rate mentioned above. In view of the above

discussion these Writ Appeals fail and are accordingly dismissed. No costs.