(2010) 10 MAD CK 0249

Madras High Court (Madurai Bench)

Case No: Writ Petition (MD) No''s. 10377 of 2007, 1343 to 1346 of 2008 and 5426 of 2008, 12175 to 12177 and 11358 to 11360 of 2008 and 46 to 48 of 2009 and M.P. (MD) No''s. 1, 1, 1, 1, 1, 1, 1, 1, 1, 1, 1, 1, 1, 1, 1, 2, 2, 2, 2, 2, 2, 2, 2, 2, 2, 1, 2, 1, 1, 1 ,1

M. Vairamuthu,	APPELLANT
Vs	
Ponnaiah and N. Harikrishnan Vs Regional Labour Commissioner/(Authority under Payment of Gratuity Act) and The Head, Indian Rare Earths Ltd. Indian Rare Earths Ltd. Vs Regional Labour Commissioner (Central) (Appellate Authority), Under Payment of Gratuity Act and Others	RESPONDENT

Date of Decision: Oct. 21, 2010

Acts Referred:

- Constitution of India, 1950 - Article 133(1), 226
- Industrial Disputes Act, 1947 - Section 10(3), 25B, 25B(1), 25B(2), 25F
- Payment of Gratuity (Amendment) Act, 1984 - Section 2A
- Payment of Gratuity Act, 1972 - Section 12, 2, 2A, 3(2), 4
- Tamil Nadu Industrial Disputes Rules, 1958 - Rule 39
- Tamil Nadu Industrial Establishment (Conferment of Permanent Status to Workmen) Act, 1981 - Section 3

Hon'ble Judges: K. Chandru, J

Bench: Single Bench

Advocate: T. Murugan, in W.P. MD No. 10377 of 2007 and Sanjay Mohan, for S. Ramasubramaniam, Associates, for the Appellant; S. Meenakshi Sundaram, for S. Ramasubramaniam, Associates in W.P. (MD) No. 10377 of 2007, C. Muthusaravanan, D. Sureshkumar, R. Thangasamy, K.K. Senthilvelan, S. Bharathy Kannan, P. Krishnasamy and D. Sivaraman, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

K. Chandru, J.

M/s. Indian Rare Earths Ltd. (for short IRE Ltd.) which is a wholly owned Central Government Company is the petitioner in all writ petitions except in W.P.(MD) No. 10377 of 2007. They have come forward to challenge the orders of the Appellate Authority under the Payment of Gratuity Act, 1972 (Regional Labour Commissioner (Central), Chennai) in W.P.(MD) Nos. 1343 to 1346, 12175 to 12177, 11358 to 11360 of 2008, 46 to 48 of 2009. In W.P.(MD) Nos. 2851, 5084 to 5093, 5426, 9151 to 9153 of 2008, they have challenged the orders of the Controlling Authority (Assistant Labour Commissioner (Central)) in granting gratuity for the period when the contesting respondents workmen were employed on casual or temporary basis before their spell of employment as permanent workers in the company. In W.P.(MD) No. 10377 of 2007, three workers have filed a writ petition challenging the order of the appellate authority under the Payment of Gratuity Act in declining to grant any relief to them.

I. History of the litigation:

2. The short facts leading to filing of the writ petitions are as follows: The IRE Ltd. started its mining operations at Manavalakurichi village, a remote non-discrept village in Kanyakumari District in the early 1960s. At that time, they were constructing the plant. Workers were employed for construction works and for early mining operations. The mining operations involved sand gathered by beach washing. After processing the same, they extract various rare minerals. The workers involved in the early construction works were subsequently retrenched for want of work. At that time, because of lack of Unionization and not being aware of various labour legislations, workers did not fight for any relief before the forums under the Industrial Disputes Act, 1947. Subsequently, when mining operations got expanded and there was need for more workers, the workers who were retrenched in the late 1960s and early 1970s, staked their claim for reemployment in terms of Section 25-H of the Industrial Disputes Act. There were disputes between the workers who had by then organised into trade unions and the management of IRE. This resulted in some of the workers who were originally employed either as casual or temporary, being taken back again as casual or temporary and subsequently made permanent. Some of the workers were also absorbed as permanent workers directly.

3. The workers who were either re-employed or recruited as permanent workers after their regular service got superannuation from the employment of IRE Ltd. At the time of superannuation (which were on different dates), the workers were paid their terminal benefits including gratuity. While calculating gratuity, the IRE Ltd. counted their regular service in the company and paid gratuity. The workmen long after their settlement of gratuity by the management, staked their claim for further

gratuity for their first spell of employment in the IRE Limited in the 1960s and 1970s. Since the IRE Limited did not pay gratuity for that portion of their service, the workmen moved the Controlling Authority under the Payment of Gratuity Act, 1972, i.e. Assistant Labour Commissioner (Central). The said authority when held in their favour, the IRE Limited filed appeals before the appellate authority, i.e. Regional Labour Commissioner (Central). When that was also rejected, they have come forward with the first set of writ petitions as noted above.

4. In the meanwhile, being aware of such claims being made by other workmen, certain other workmen also moved the Controlling Authority and got computed the unpaid gratuity in favour of them. Instead of filing appeals u/s 7(7) of the Payment of Gratuity Act, the management has straightaway filed second set of writ petitions as noted above. It is only in the case of three workers, i.e. M. Vairamuthu, V. Ponnaiah and N. Harikrishnan, whose beneficial orders were reversed by the Appellate Authority, they have filed W.P.(MD) No. 10377 of 2007, challenging the appellate authority''s order.

II. Floodgate theory not acceptable:

5. The claims made by the workmen are very insignificance. It was unnecessary for the public sector to have filed so many writ petitions challenging the orders passed by the authority constituted under the special enactment, especially in the light of the National Litigation Policy evolved by the Central Government. However, Mr. Sanjay Mohan, learned Counsel submitted that once these petitions are decided in favour of the workmen, it will result in large number of cases filed, thereby opening the floodgates by the workmen who are waiting on the wings.

6. This Court is not persuaded with the submission made by the learned Counsel for the IRE. If workmen are entitled to get paid according to law, it is inconsequence as to the number of cases that may come to this Court. While rejecting the floodgate theory, the Supreme Court in N. Kannadasan v. Ajoy Khose reported in (2009) 7 SCC 1 in paragraph 127 of its judgment observed as follows:

127. Mr Venugopal would submit that such an interpretation would open a floodgate. We do not think so. We even wish no occasion like the present one arises in future before the superior courts for their consideration. Even otherwise, the floodgate argument does not appeal to us. In Coal India Ltd. v. Saroj Kumar Mishra37 this Court held: (SCC p.632, para 19)

19. The floodgate argument also does not appeal to us. The same appears to be an argument of desperation. Only because there is a possibility of floodgate litigation, a valuable right of a citizen cannot be permitted to be taken away. This Court is bound to determine the respective rights of the parties. (See Zee Tele films Ltd. v. Union of India38 and Guruvayoor Devaswom Managing Committee v. C.K. Rajan39.)

III. Priliminary objections overruled:

7. Though initially the IRE Limited wanted to contend delay and laches on the part of the workmen in moving the authority under the Payment of Gratuity Act, however, no serious submissions were made on that score. Hence it is unnecessary to deal with the issue elaborately except when dealing with W.P.(MD) No. 10377 of 2007. Even otherwise, this Court has already held that if there is unpaid gratuity, the workmen can move the authority and the prescription of limitation by rules is beyond the power conferred on the rule making authority.

8. The contesting respondents in W.P.(MD) Nos. 5084 to 5093 of 2008 objected to the entertainment of writ petitions against the order of the Controlling Authority especially when there is valuable right of appeal u/s 7(7) of the Payment of Gratuity Act. Therefore, it was urged that the writ petitions are liable to be rejected on that score. However, this Court is not persuaded to entertain the objection, since in the other set of writ petitions, the challenge is to the appellate authority''s order. If any decision rendered in those writ petitions it will have an automatic bearing on the writ petitions filed against the order of the Controlling authority. Even assuming that the IRE Limited is directed to file appeals before the appellate authority, the appellate authority will be bound by the order passed by this Court in the other batch of writ petition since common questions of law are involved in both set of writ petitions. Further, such directions to file appeals will become an empty formality. Therefore, the objection raised in this regard seeking for a direction to IRE Limited to file an appeal before the appellate authority is hereby overruled.

IV. Core question raised:

9. In the light of the rival submissions, the only crucial question that arises for consideration is whether the employment rendered during the first spell which resulted in retrenchment and their subsequent re-employment either as permanent or temporary can be calculated as the length of service to enable the workmen to receive gratuity?

10. Incidentally, the management also raised a point of lack of proof of service of workmen for the period for which they have claimed differential gratuity. In case of N. Harikrishnan, one of the petitioner in W.P.(MD) No. 10377 of 2007 and one T. Damodharan, the contesting respondent in W.P.(MD) No. 11358 of 2008, it is also claimed that they have got maximum of Rs. 1 lakh towards gratuity. Therefore, in view of the ceiling of gratuity at the relevant time, they are ineligible to get any further gratuity even though they might have made out a case for differential gratuity.

V. Contentions by IRE Ltd.:

11. Mr. Sanjay Mohan for M/s. S. Ramasubramaniam Associates in assailing the order of gratuity authority contended that with reference to rendering service during the first spell of employment, it had come to an end due to retrenchment of workmen. Therefore, their subsequent re-employment being employed on direct

recruitment cannot be tagged on because during the interregnum period, there was no master-servant relationship existed. When that employment was brought to an end, which terminated the earlier service, that cannot be counted as a service eligible for gratuity.

12. In this context, the learned Counsel for the IRE Limited placed reliance upon the judgment of the Allahabad High Court in Hindalco Industries Ltd. v. Shiv Narayan Singh and Ors. reported in 2007 (III) LLJ 897 (All) and placed reliance upon the following passage found in paragraphs 6 and 7 which are as follows:

6. The petitioner has filed Annexure 3-A which is a discharge notice dated August 6, 1977. Consequently, the petitioner having not worked between the period August 6, 1977 till the date of his re-employment w.e.f. July 9, 1979, the said period as well as the previous period of employment cannot be included while calculating the gratuity u/s 4 of the Gratuity Act, inasmuch as, the said period would not be treated to be in continuous service as contemplated u/s 2-A of the Gratuity Act.

7. In Dungerbha Meghabhai v. Shri Arbuda Mills Ltd. and Anr. 1997 III LLJ 1286 (Guj) the Gujarat High Court held that suspension from employment removes the master and servant relationship and that subsequent re-employment after two or three years would not entitle the workman from claiming service rendered prior to reemployment as continuous service rendered by the workman prior to July 9, 1979 cannot be taken into consideration while calculating the gratuity.

13. He further relied upon a judgment of the Bombay High Court in Maharashtra State Textile Corporation Limited Vs. Gopal Balu Saikar (since deceased by his heirs Smt. Rukmini Gopal Saikar, Ravindra Gopal Saikar, Gajanan Gopal Saikar, Smt. Shalini Tukaram Kelaskar and Smt. Kalpana Manohar Khedekar) and K.M. Desai, Appellate Authority, under the Payment of Gratuity Act, 1972, and placed reliance upon the following passage found in paragraph 18 which is as follows:

18. ...The phrase "liability accruing or arising as a result of continuance of any employee in the service of the Corporation" certainly includes the liability as to pension, gratuity and other matters. It cannot be said that merely because the words pension, gratuity and other matters are absent in Sub-section (2), these are not liabilities as a result of continuance of an employee in the service of the Corporation, and therefore these liabilities became the liabilities of the Corporation from the appointed day. Such a construction would defeat the intention of the Legislature in enacting Sub-section (2) with a non-obstante clause, the intention being to fasten liability on the Corporation only for the period on and after the taking over of management. In the present case, it is not indispute that the taking over of the management took place u/s 18FA on 10th March, 1977. It is further not in dispute that the Petitioners have computed the Respondent''s entitlement to gratuity from that date onwards and have paid gratuity to him accordingly.

14. He also relied upon a judgment of the Supreme Court in State of Tamil Nadu and Others Vs. Nellai Cotton Mills Ltd. and Others, and relied upon the following passage found in paragraph 9, which is as follows:

9. That apart, the view taken by the High Court, in striking down a portion of Sub-section (2), in our opinion, cannot be found fault with. Sub-section (2) of Section 3 consists of three parts. The first part refers to interruption of service including service which may be interruption on account of sickness or authorised leave or an accident or a strike which is not illegal or a lockout. The second part consists of the portion which has been struck down by the High Court as unreasonable restriction on the right of the employer. The third part refers to cessation of work which is not due to any fault on the part of the workmen. The provisions under the first and the third parts seem to be similar to the terms of Section 25-B of the Industrial Disputes Act which also provides for continuous service of the workman. The second part dealing with non-employment and discharge of a workman is distinct from the first and the third parts. It refers to the period during which there is no subsisting relationship of master and servant. We agree with the High Court that the word ''non-employment'' would include retrenchment as well and a person whose services have been terminated or discharged albeit illegal cannot at all be said to be a person in service, much less in continuous service. Therefore, the period of non-employment or the period after discharge cannot be counted for the purpose of giving continuity of service. If the discharge is set aside and workman is reinstated by process known to law the workman automatically gets continuity of service. No special provision is necessary for such purposes.

VI. Contentions by the workmen:

15. The counsel for the contesting respondents, per contra, relied upon a judgment of the Himachal Pradesh High Court in H.P.S.E.B. and Another Vs. Balak Ram and Another, and referred to the relevant passage found in paragraphs 22 and 23, which are as follows:

22. The workman had continuously worked with the petitioner-Board initially on daily wages and thereafter on regular basis and thus he always remained in continuous service of the petitioner-Board.

23. The upshot of the above discussion is that the order passed by the appellate authority dated November 16, 2002 cannot be faulted with. The entire period rendered by the workman with effect from 1983 to 1998 is to be counted for the purpose of determining the gratuity under the Payment of Gratuity Act, 1972. The workman is entitled to get the gratuity on the basis of last pay drawn by him I.e. Rs. 4239/- at the time of superannuation. The order passed by the appellate authority allowing interest with effect from February 1, 1999 cannot be interfered in view of the law laid down by the Hon''ble Supreme Court as cited above.

16. Further reliance was placed upon a division bench judgment of the Calcutta High Court in Bharat Aluminium Company Limited and Others Vs. Sukumar Mukherjee and Others, . Reliance was placed upon the following passage found in paragraphs 10 and 13, which are as follows:

10. In view of the aforementioned decision, there cannot, therefore, be any doubt that the word ''continuous service'' has to be interpreted liberally. The submission of Mr. Banerjee to the effect that as a lock-out had been declared, there was a cessation in the relationship of employer and employee, cannot be accepted. Not only by reason of a lock-out the relationship of employer and employee does not come to an end, but the same continues. Furthermore, as noticed hereinbefore, the very purpose of the Act was to take over the management at the first instance and to take over the assets of the said undertaking, read with Section 12 thereof clearly goes to show the intention of the Parliament that all those employees who had been working in the Aluminium Corporation, should continue to work in the Central Government and the appellant Company, as the case may be. ...

....

13. We, therefore, in agreement with the judgment and order passed by the learned Trial Judge hold that the writ petitioners would be deemed to be in continuous service, and would be entitled to payment of gratuity despite the fact that a part of service had been rendered by them in Aluminium Corporation of India, subject however, to the observations made hereinbefore. The appeal is, therefore, dismissed, but in the facts and circumstances of this case, there will be no order as to costs.

17. Reliance was also placed upon a judgment of the Bombay High Court in Ramachandra Ganpat Dalvi Vs. Phoenix Mills Ltd. and Others, . The learned Counsel also placed reliance upon a judgment of the Punjab and Haryana High Court in District Food and Supplies Controller and Another Vs. Prem Chand and Another, . Reliance was placed upon the following passage found in paragraph 4 of the said judgment, which is as follows:

4...It would make all the differences in this case, for the workman who had been terminated on February 26, 1983, was complaining that he had been wrongly terminated. The Labour Court had accepted such a premise and directed reinstatement as well as continuity of service. The provision for continuity of service in the award of the Labour Court could only be seen in the context of every other benefit which the workman would have been entitled to, other than the backwages, which, by express order, the Labour Court was disallowing in this particular case. If it had not been a case of reinstatement with continuity of service and merely an incident where a workman, who was badli worker, who on being regularized, could have been disentitled for reckoning the period when he was not actually employed for the purpose of computation of gratuity. This shall not be in a case where there is

an intervention through an award of the Labour Court that provides for continuity in the service. The continuity in the sense employed by the Labour Court ought, in my view, to be applied also to the entitlement of gratuity.

18. In the light of these submissions, it has to be seen whether the contentions raised by the IRE Limited is legally valid?

VII. Bird''s eye of the legislature provisions:

19. It must be noted that the Parliament has amended the Payment of Gratuity Act and introduced Section 2A by amending Act 26/1984. The said section reads as follows:

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 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;

Therefore, it is easily seen that the definition includes both continuous and discontinuous service.

20. The liability of the employer to pay gratuity is provided u/s 4, which reads as follows:

4.Payment of Gratuity.-(1)Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,-

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease: Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement:

4.(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days'' wages based on the rate of wages last drawn by the employee concerned: Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account: Provided further that in the case of

[an employee who is employed in a seasonal establishment, and who is not so employed throughout the year] the employer shall pay the gratuity at the rate of seven days'' wages for each season.

VIII. Findings:

21. Therefore, when contingency u/s 4(1) takes place, the employer is liable to pay gratuity in terms of length of service of workman. It is not a case of the management that the workmen are not entitled for gratuity as contingency u/s 4 is not fulfilled. In the present case, the workmen are eligible to get gratuity even as per the admission of the management. They have also paid gratuity for the second spell of their employment. But the only question is whether the management has paid gratuity for full length of service of workmen though done on two spells of employment. If the contention of the IRE Limited is accepted, then it is easy for the employer to provide employment in different spells and deny gratuity to the workmen inspite of the fact the workmen might have put in sufficient length of service. Therefore, once the workmen become eligible to get gratuity, then the entire length of service must be counted including different spells under which they were employed by the same employer. Otherwise, it will defeat the very purpose of the enactment.

22. Before dealing with the specific contentions of the parties, it is necessary to deal with the object of the Act and the interpretation to be made while construing the provisions of the Act. The Supreme Court in Jeewanlal (1929) Ltd. Vs. Appellate Authority under the Payment of Gratuity Act and Others, as follows:

11. In construing a social welfare legislation, the court should adopt a beneficent rule of construction; and if a section is capable of two constructions, that construction should be preferred which fulfils the policy of the Act, and is more beneficial to the persons in whose interest the Act has been passed. When, however, the language is plain and unambiguous, the Court must give effect to it whatever may be the consequence, for, in that case, the words of the statute speak the intention of the Legislature. When the language is explicit, its consequences are for the Legislature and not for the courts to consider. The argument of inconvenience and hardship is a dangerous one and is only admissible in construction where the meaning of the statute is obscure and there are two methods of construction. In their anxiety to advance beneficent purpose of legislation, the courts must not yield to the temptation of seeking ambiguity when there is none. ...

13. The intention of the Legislature enacting Sub-Section (2) of Section 4 of the Act was not only to achieve uniformity and reasonable degree of certainty, but also to create and bring into force a self-contained, all-embracing, complete and comprehensive code relating to gratuity as a compulsory, retiral benefit. The quantum of gratuity payable under Sub-section (2) of Section 4 of the Act has to be fifteen days'' wages based on the rate of wages last drawn by the employee

concerned for every completed year of service or more in excess of six months'' subject to the maximum of 20 months'' wages as provided by Sub-section (3) thereof. The whole object is to ensure that the employee concerned must be paid gratuity at the rate of fifteen days'' wages for 365 days in a year of service. The total amount of gratuity payable to such employee at that rate has to be multiplied by the number of years of his service subject to the ceiling imposed by Sub-section (3) of Section 4 of the Act viz. that such amount shall not exceed 20 months'' wages. The construction of Sub-section (2) of Section 4 of the Act adopted by the learned Single Judge of the Andhra Pradesh High Court in Associated Cement Company case3 and later approved by a Division Bench of that Court in Swamy case4 would make it utterly unworkable. If the determination of the amount of gratuity payable under Sub-section (2) of Section 4 depends on the number of calendar days in a month in which the services of the employee concerned terminates, the quantum of gratuity payable would necessarily vary between an employee and an employee, belonging to the same class, drawing the same scale of wages, with like service for the same number of years. Obviously, this could not have been the legislative intention.

....

16. It has been our unfortunate experience that a beneficent measure like Payment of Gratuity Act, 1972 providing for a scheme of retrial benefit, has been beset with many difficulties in its application. It need not be over emphasised that a legislation of this kind must not suffer from any ambiguity. In the recent past, the Court in Lalappa Lingappa v. Laxmi Vishnu Textile Mills Ltd. 7 faced with the problem as to whether the expression "actually employed" in Explanation I to Section 2(c) of the Act must, in the context in which it appeared, meant "actually worked". The inclusive part of the definition of "continuous service" in Section 2(c) is to amplify the meaning of the expression by including interrupted service under certain contingencies which, but for such inclusion, would not fall within the ambit of the expression "continuous service". But the use of the words "actually employed" in Explanation I to Section 2(c) of the Act created a difficulty. The Court observed that it was not permissible to attribute redundancy to the words "actually employed" and, accordingly, held that the expression "actually employed" in Explanation I to Section 2(c) of the Act meant "actually worked". The law declared by this Court in Lalappa Lingappa case7 resulted in denial of gratuity to a large number of permanent employees, whose short term absence had remained unregularised, due to lack of appreciation of the significance for the purpose of working out their entitlement to gratuity. It is to be regretted that the Government waited for a period of three years before introducing the Payment of Gratuity (Amendment) Bill, 1984 to remove the lacuna in the definition of continuous service in Section 2(c) of the Act by specifically providing that a period of absence in respect of which no punishment or penalty has been imposed would not operate to interrupt the continuity of service for the purpose of payment of gratuity. It also amplified the definition of continuous service u/s 2(c) of the Act. Such a belated legislation must have worked great injustice to a

large number of permanent employees.

23. The Supreme Court while considering the payment of closure compensation u/s 25-FFF of the Industrial Disputes Act had an occasion to deal with a similar contention of the employer in Management of Standard Motor Products of India Limited Vs. A. Parthasarathy and Another, . Section 25-FFF reads as follows: 25FFF. Compensation to workmen in case of closing down of undertaking.-(1)Where an undertaking is closed down for any reason whatsoever, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the provisions of Sub-section (2), be entitled to notice and compensation in accordance with the provisions of Section 25F, as if the workman had been retrenched:

When payment of closure compensation was sought to be denied on the ground that a year preceding the closure, there was no continuous service for one year and thereby the employer denied their statutory liability to pay gratuity, repelling the said contention, the Supreme Court in Standard Motor Products of India Ltd.''s case in paragraphs 1 and 2 held as follows:

The Standard Motor Products of India Limited closed down their factory on May 22,1970. During the 12 months preceding the date of closure, the workmen were on strike from September 12, 1969 to November 6, 1969 and February 12, 1970 to February 26, 1970. The strike was illegal from September 19, 1969 to November 6, 1969 and from February 12, 1970 to February 26, 1970 as the Government of Tamil Nadu had made an order u/s 10(3) of the Industrial Disputes Act on September 19, 1969 prohibiting the strike. After the closure on May 22, 1970, there was a settlement between the management and the workmen on February 15, 1971. Under the terms of the settlement, it was agreed that the closure should be accepted as a fact, with the necessary legal consequences to follow. The factory resumed work as a new unit on January 22, 1971. The erstwhile employees were taken back as new employees, but it was agreed that their previous services were to be taken into account for the purpose of gratuity. Two hundred and seventeen workers filed petitions u/s 33-C(2) of the Industrial Disputes Act claiming closure compensation u/s 25-FFF. The petition were dismissed by the Labour Court. Two writ petitions were filed before the High Court of Madras as test cases and both of them were allowed by the High Court. The Management of Standard Motor Products of India Limited has come up in appeal having obtained a certificate under Article 133(1)(a) of the Constitution.

2. Shri G.B. Pai, learned Counsel for the appellant Management submitted that the workmen were not entitled to any closure compensation u/s 25-FFF as they had not been in continuous service for not less than one year in the undertaking immediately before such closure. His submission was that the continuity of service was broken by the two periods of illegal strike and therefore, the workmen could not be said to have been in service for not less than one year. There is no force in

this submission. Section 25-B(1) of the Industrial Disputes Act says that a workman shall be said to be in continuous service for a period if he is, for that period, in uninterrupted service, including service which may be interrupted by a strike which is not illegal. According to Shri Pal, since the strike in the case was illegal, there was a break in the continuity of service. There would be force in the submission of Shri Pai if Section 25-B(2) did not exist. u/s 25-B(1), where a workman is not in continuous service within the meaning of clause (1) for a period of one year he shall be deemed to be in continuous service for a period of one year, if the workman, 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 two hundred and forty days. In the present case, even if the period of illegal strike is excluded, the number of days during which the workman actually worked under the employer would be found to be more than 240 days. That being so it has to be held that the workmen were in continuous service for a period of one year immediately before the date of closure. The further submission of Shri Pai that the number of days on which the workmen actually worked under the employer would be less than 240 days if Sundays and other holidays for which the workmen were paid wages were excluded has already been answered by us in the case of Workmen of American Express International Banking Corporation v. Management1 in which judgment has just been pronounced by us. In the circumstances, both the appeals are dismissed with costs.

24. The term "continuous service" defined u/s 25-B of the Industrial Disputes Act is more or less similar to the definition u/s 2-A of the Payment of Gratuity Act. Reliance placed upon Nellai Cotton Mills Ltd''s case (cited supra) may not be appropriate, because that case arose on an interpretation of Section 3 of the Tamil Nadu Industrial Establishments (Conferment of Permanent Status to Workmen) Act 1981. There, the Supreme Court was concerned about the grant of permanent status to workmen. Therefore, it was held that the term "continuous service" will not include discontinuous service brought about by either termination or non employment. The idea there being to grant permanent status. The workmen who, by a deemed fiction provided u/s 3 of the Tamil Nadu Act 46 of 1981, is entitled to be made permanent. The circumstances under which that law was enacted was totally different from the aim and object of the Payment of Gratuity Act. The Payment of Gratuity Act is a welfare legislation which provides statutory terminal benefits for an employee on account of his long service rendered to his employer.

25. In this context it is necessary to refer to the judgment of the Supreme Court in Hatisingh Mfg. Co. Ltd. and Another Vs. Union of India (UOI) and Others, , the Supreme Court held as follows:

14.Compensation related to the length of service of the employee is also not unreasonable. An employee remaining employed in an industry for an appreciable length of time acquires experience and some degree of aptitude in the branch in

which he is employed and his experience in that branch qualifies him to promotion and to receive wages at a higher level. By his continued employment, he reaches seniority in the cadre of employment, with chances of promotion, the benefit of which he loses by sudden termination of employment. The workman, on termination of employment, may have to compete for employment at a lower level in branches to which he may be by experience or aptitude, not fitted, or to seek employment in a job similar to the one terminated at a lower level. If, in the light of these considerations, the legislature has related the compensation payable on termination of employment to the period of service of the employee, the provision cannot be regarded as unreasonable.

26. In fact, the Supreme Court vide its judgment in Jeewanlal (1929) Ltd., Calcutta Vs. Its Workmen, found that there is distinction between closure compensation and gratuity and they are different concept. Thus saying, they had upheld the Award of an Industrial Tribunal granting gratuity. If the object was to provide gratuity on the basis of length of service, then certainly the employer cannot shirk their liability to pay gratuity on the basis of length of service when once the workmen become eligible to get gratuity in terms of Section 4(1) of the Payment of Gratuity act.

27. The judgment of the Allahabad High Court in Hindalco Industries Ltd.''s case (cited supra) drew inspiration from the Nellai Cotton Mills case (cited supra) which arose under a different enactment and that cannot be applied to the Payment of Gratuity Act. Hence this Court respectfully disagree with the judgment of the Allahabad High Court.

28. The judgment of the Bombay High Court in Maharashtra State Textile Corporation Limited (cited supra) arose under the interpretation of the Industries (Development and Regulation) Act, 1951 by which sick textile mills were taken over and the Act itself fixed limited liability on the new employer. All that judgment said was the new employer need not pay gratuity for the service rendered in the erstwhile textile company. Hence their liability was limited. It does not mean that the workmen cannot claim gratuity from the erstwhile employer for that portion of his previous employment.

29. Likewise, the decisions cited by the contesting respondents cannot have much bearing on the present case. In the H.P.S.E.B.''s case (cited supra), the Court was concerned about the casual/temporary employment being continued with the permanent employment and total length must be counted. Similarly, the division bench judgment of the Calcutta High Court in Bharat Aluminium Company Ltd.''s case (cited supra) was a case relating to lockout where relationship of employer and employee subsists even during the period of lockout.

30. The judgment of the Punjab and Haryana case in District Food & Supplies Controller, Ropar and another''s case (cited supra) rendered by K. Kannan, J is a case where the worker''s non employment was set aside by the labour court and he was

reinstated. Therefore, the interrupted service was considered to be deemed continuous service. But, as per the ratio laid by the Supreme Court in Standard Motor''s case (cited supra), once a workman is entitled to get gratuity, then there is no reason to deny his earlier spells of employment. It is only by such interpretation the provisions of the Act can held to be meaningful. Thus the workers also will be rewarded for the length of service actually put in by them.

31. In view of the above, the objection raised by the management on the findings rendered by the appellate authority and the controlling authority for granting gratuity for the workmen towards their first spell of employment either temporary or casual basis has to be rejected.

32. The second contention that the workmen have failed to discharge their obligation in some of the cases and the authorities simply went by the sworn statement made by the workers and there is no evidence in this regard also cannot be accepted as rightly commented by the authority, the service records produced by the IRE Ltd. is delightfully vague. They have also failed to discharge their obligation under law. In the matter of discharging the obligation, it is not as if the employer do not have any obligation.

33. The Supreme Court in Director Vocational Education and Training and Anr. v. Nashim Shaikh Chand reported in 2006 (10) SCC 301 in dealing with the question of burden of proof regarding the length of service, in paragraph 8 and 10 held as follows:

8. Learned Counsel appearing on behalf of the respondent, however, has submitted that despite specific orders issued by the Labour Court the muster rolls for the period in question had not been produced by the appellant. This would have clearly shown whether the respondent was employed during the period in question with the appellant or not. The appellant having failed to produce the muster roll an adverse inference could be drawn u/s 114 of the Evidence Act.

....

10. The muster roll is not the only basis for establishing the employment of an employee with the employer. The appellant in this case had produced other documents on the basis of which the Industrial Court came to the conclusion that the appellant''s case must be accepted. These documents have neither been considered by the Labour Court nor by the High Court held to be uncreditworthy. They should have therefore been relied upon as genuinely reflecting the factual situation. Besides, the respondent has admitted that she had taken employment with the Boys'' Town Public School. Her defence to the charge of taking up employment elsewhere was met by her statement that her daughter was employed in her place instead. The Labour Court accepted this as a "probable" situation without asking for any further corroborative evidence. As far as the oral evidence by the respondent is concerned, the High Court has not relied upon the evidence of

such employee in reversing the finding of the Industrial Court. The Industrial Court as a Revisional Court had considered the evidence and came to its conclusion on the basis thereof. The Court under Article 226 in exercise of its jurisdiction should not have interfered with the order unless it was found that the Revisional Court had exercised its jurisdiction improperly. ...

34. Further a division bench of this Court headed by M. Srinivasan, J. (as he then was) in S. Ramaiah Mudaliar Brothers (represented by its Proprietor, S. Ramaiah Mudaliar), Sankarankoil and Ors. v. Industrial Tribunal, Madras and Anr. reported in 1991 (2) LLN 158 (Madras) in dealing with the appreciation of evidence under the provisions of the Industrial Disputes Act in terms of Rule 39 of the Tamil Nadu Industrial Disputes Rules, held that in good conscience, equity evidence can be accepted by a tribunal. If proof affidavits are filed and the workers are ready to get cross examined and still if there is no cross examination, then the contents of the affidavits can also be accepted as substantial evidence. The relevant passage found in paragraph 11 of the said judgment reads as follows:

11. ... we would also hold that the writ petitioners have to blame themselves for not cross-examining the deponents of the affidavits and there was no error in the procedure adopted by the Tribunal. The Tribunal cannot be found fault with for not inviting the petitioners to cross-examine the deponents. There was no question of the petitioners being denied an opportunity or cross-examining the deponents. If the petitioners or the opposite party had stated that they would like to cross-examine the deponents, the latter would have presented themselves for cross-examination. The decisions relied on by learned Counsel for the petitioners with regard to this aspect of the matter are not relevant as we have found that there is no question of any denial of opportunity to the writ-petitioners and there was no violation of the principles of natural justice. We do not find any error in the acceptance by the Tribunal of the affidavits filed by the workers.

35. In similar circumstances, the Bombay High Court in Ramachandra Ganpat Dalvi Vs. Phoenix Mills Ltd. and Others, held as follows:

5.The appellate authority also relied upon the circumstance against the employee that upto January 17, 1982 the first spell till he worked was paid gratuity in the year 1990 which was accepted by him. If in law the employee is entitled to gratuity on the basis that he was in continuous service till May 31, 1992, payment of gratuity in part and its acceptance by employee will not make any difference in the eye of law. I have already observed that the employer did not lead any evidence in support of its case that on March 3, 1985 the employee was re-employed without continuity of service. In the absence of any evidence of the employer if the controlling authority relied upon the evidence led by the employee in holding that the employee was in continuous service in view of the provisions contained in Section 2(a) of the Act of 1972, the finding recorded by the controlling authority was fully justified and the appellate authority erred in setting aside the said finding.

36. Therefore, this Court do not find any fault with the steps taken by the workmen. The questions raised regarding lack of proof about employment is also rejected. Therefore, all writ petitions except W.P.(MD) No. 10377 of 2007 are rejected.

In W.P.(MD) No. 11358 of 2008, a contention was raised that by grant of gratuity of Rs. 23,189/-, the worker will be paid in excess of Rs. 1 lakh which was the ceiling fixed at the relevant time as the worker was already paid Rs. 82,817/-. Therefore, in that case, the management can pay the amount after adjusting the amount which will be in excess of Rs. 1 lakh and it works out to Rs. 6,006/-.

IX. Case filed by the workmen:

37. In W.P.(MD) No. 10377 of 2007, the three writ petitioners aggrieved by the order of the appellate authority, dated 23.09.2005 in reversing the order of the controlling authority, dated 31.12.2004. The Controlling Authority framed two issued which are as follows:

1. Whether the delay in filing the Claim Application before the Controlling Authority has to be condoned or not?

2. Whether the Applicant is eligible for Gratuity for the casual period of service or not?

38. Answering these two issues, the Controlling Authority in its order stated as follows:

For the first question, the Payment of Gratuity, being a beneficial piece of legislation and as the delay in filing the Claim Application is not wilful and the limitation only applies to the civil or criminal court and not to Payment of Gratuity Act and the Act has vested an executive authority with judicial and quasi judicial powers [City College Vs. State of West Bengal and Others,] and to give a liberal interpretation to the provisions of the Payment of Gratuity Act, the delay in filing of the Claim Application is condoned and the Claim Application is a fit claim for condoning the delay. To the second question, whether the Applicant is eligible for the Gratuity for the casual period of service, the Act does not pose any differentiation in the casual or regular period of service. It includes all types of services rendered to the Respondent and being a beneficial piece of legislation, the service of the Applicant employee was regularised from the service of the casual to a permanent service and the same is categorically proved during the evidences adduced and the endorsement made in the Service Record which proves the claim of the Applicant that a casual period of service existed and the Respondent Co., has not relied upon any documentary evidences which existed during the casual service of the Applicant to disprove the claim. Therefore the Applicant is eligible for the Gratuity for the casual service rendered to the Respondent.

39. But, however, the appellate authority by a common order, dated 23.09.2005 set aside the order of the controlling authority on the ground of delay. In paragraphs 4

and 5 of the order, which is impugned, it was observed as follows:

4.On the other hand, the Respondent has submitted that the order of the Controlling Authority be upheld other than the said submission, they have no other issues.

5. On a careful scrutiny of the above, the issues in question are:

a)Whether the Appellant is liable to pay the gratuity amount as ordered by the Controlling Authority or not?

From the material documents, it is evident that the Controlling Authority has failed to assess the material records available on record and to ascertain additional facts from the respondent regarding their casual employment. The Controlling Authority has also failed to ascertain reasons for each day''s delay and a delay of 7 years has been condoned without assigning any reason.

ORDER

The Order of the Controlling Authority is reversed.

40. As already held by this Court, the question of delay will not arise in moving the authority. The form prescribed by the Government under delegated power cannot be prescribed substantial power of litigation as noted already. Since similarly placed persons were getting benefits, these three petitioners cannot be denied the relief claimed. Hence the order of the controlling authority, dated 31.12.2004 will stand restored. But, in the case of Mr. V. Ponniah, one of the petitioner in this writ petition, it was stated that he had received Rs. 1,05,098/- which is the maximum eligible payment at the relevant time. If that is so, he will not be eligible for any further payment. In respect of M. Vairamuthu and N. Harikrishnan, it is suffice that the management pays altogether Rs. 1 lakh towards gratuity claim. After setting off the amount of Rs. 96,540/- already paid in respect of M. Vairamuthu and in respect of N. Harikrishnan Rs. 87,014/-, the management will have to pay the balance amounts to both of them. Hence W.P.(MD) No. 10377 of 2007 will stand allowed to the extent indicated above.

41. In the light of the above, all writ petitions except W.P.(MD) No. 10377 of 2007 will stand dismissed. W.P.(MD) No. 10377 of 2007 will stand allowed to the extent indicated above. No costs. Consequently, connected miscellaneous petitions stand closed.