

(2010) 10 MAD CK 0338

Madras High Court

Case No: Writ Petition No. 19781 of 2007

Management of Tractors and
Farm Equipment Ltd.

APPELLANT

Vs

Joint Commissioner of Labour
and Another

RESPONDENT

Date of Decision: Oct. 8, 2010

Acts Referred:

- Payment of Gratuity Act, 1972 - Section 2, 4, 4(2), 4(6), 7(4)

Citation: (2011) 1 LLJ 279

Hon'ble Judges: P. Jyothimani, J

Bench: Single Bench

Advocate: Ramasubramaniam and Associates, for the Appellant; V. Manoharan,
Government Advocate and K. Chairman Selvaraj, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

P. Jyothimani, J.

This writ petition is directed against the order of first Respondent/the Appellate Authority under Payment of Gratuity Act dated April 23, 2007, by which the first Respondent has directed the Petitioner Management to pay a sum of Rs. 84,808/- towards Gratuity to the second Respondent and also to pay 10% interest to the above said Gratuity for a period from October 1, 1999 to December 22, 2006.

2. The short facts leading to the passing of the impugned order are that the second Respondent has joined in the factory of the Petitioner management at Sembiam on September 10, 1964. On the basis of certain charges framed against him, which includes that on March 13, 1981 when he was on duty at 4.45 he was idling in the shop and when he was asked to report to work, he refused to carry out engineer's instructions and he abused the engineer in filthy and vulgar language and the said

act amounted to wilful disobedience of the lawful order of the superior, he was dismissed from service on March 16, 1981. He raised an Industrial Dispute in I.D. No. 73/1982 and the Labour Court dismissed the same on November 7, 1984. As against the said Award, the second Respondent has filed a writ petition in W.P. No. 9342/1987 before this Court, in which, by order dated June 8, 1993, a direction was issued to the Petitioner Management to reinstate the second Respondent without backwages. It was against: the said order of the learned single Judge, the Petitioner Management has filed a writ appeal in W.A. No. 711/1993 and the Division Bench by judgment dated July 24, 1997 while setting aside the order of the learned single Judge, modified the Award of Labour Court by directing the Petitioner Management to pay a sum of Rs. 75,000/- as compensation in lieu of reinstatement and also directed that the compensation shall be spread over a period of 26 months for the purpose of income tax and the said judgment of the Division Bench has become final. It is stated that based on the said judgment of the Division Bench of this Court, the Petitioner Management has paid the amount to the second Respondent. It is stated that the Management by letter dated August 29, 1997 has directed the second Respondent to submit the necessary forms under Payment of Gratuity Act and the second Respondent has submitted Form I. Based on the same, the Petitioner Management has calculated the services of 17 years of the second Respondent and sent a sum of Rs. 7,084/- towards the Gratuity Settlement by way of a Cheque dated September 30, 1997. It is stated that the second Respondent had returned the cheque alleging that the amount does not denote as per the direction in the writ appeal.

3. Thereafter, the second Respondent has approached the Controlling Authority/Assistant Commissioner of Labour by filing P.G. No. 29/2005 claiming payment of gratuity for a sum of Rs. 1,92,500/- for the period from September 10, 1964 to June 10, 1981. The Management has filed a counter statement and the second Respondent was examined by his representative and marked the documents as Exhibits A-1 and A-2. He was cross-examined by the Management and marked nine documents as Exhibit M-1 to M-9 by consent. It is stated that thereafter, the representative of the Management viz., R. Murugesan (Personnel Manager) appeared by filing a proof affidavit and marked 13 documents. It is stated that the witness of the Management was cross-examined by the representative of the second Respondent. After the argument, by order dated July 10, 2006, the Controlling Authority directed the Petitioner Management to pay a sum of Rs. 7,085/- together with 10% interest from July 24, 1997 till the date of payment and dismissed the rest of claim amount made by the second Respondent. It is stated that the Petitioner Management has sent two cheques one for a sum of Rs. 7,085/- and another for a sum of Rs. 6,612.89 being the interest awarded by the Authority drawn on November 23, 2006 and November 17, 2006 respectively, which were returned by the second Respondent on November 29, 2006 and therefore, it is stated that the Petitioner Management had deposited the entire amount on

December 21, 2006. It is stated that the second Respondent has filed an appeal in P.G.A. No. 29/2006 before the first Respondent.

4. It is stated that before the first Respondent, the Petitioner Management has filed three documents as Exhibit M-1 to M-3 by I consent. After hearing the detailed arguments, the first Respondent passed the impugned order on April 23, 2007, directing the Petitioner Management to pay a sum of Rs. 84,808/- towards gratuity to the second Respondent on the basis that the second Respondent has put in 35 years of service in the Management and also directed to pay 10% of interest for the said gratuity amount for the period from October 1, 1999 to December 22, 2006. It was as against the said (order of the first Respondent/Appellate Authority, the present writ petition is filed on various grounds that in the judgment in W.A. No. 711/1993 (1997) 4 LLN 312 , the dismissal of the second Respondent was confirmed and amount of compensation was directed to be paid only in lieu of reinstatement and therefore, the second Respondent cannot be presumed to have been in service from March 16, 1981 that there has been no order of reinstatement that the direction to pay the compensation of Rs. 75,000/-in 26 installments was only for the purpose of income tax and it does not amount to reinstatement or directing payment of the last drawn salary to the employee in 1981 that the installment amount of Rs. 4200/- received by the second Respondent per month cannot be construed as the last drawn salary and it was only compensation amount awarded by the Division Bench in lieu of reinstatement while upholding the order of dismissal that even otherwise on the date of termination on March: 16, 1981, the second Respondent was receiving the last drawn salary of Rs. 722.37 p.m., and therefore, it is not proper for the first Respondent to take into consideration that the second Respondent has served up to the date of superannuation that the High Court in [The Management, CMC and Hospital Vs. The Joint Commissioner of Labour Appellate Authority under Payment of Gratuity Act, The Asst. Commissioner of Labour and S. Ganesan](#), has held that the payment of monetary compensation would not amount to reinstatement and that the Appellate Authority has totally misconstrued the judgment of the Division Bench.

5. This Court, while admitting the writ petition on June 9, 2007 has granted an order of Interim Stay of the impugned order passed by the first Respondent. The second Respondent herein has filed an application to vacate the order of Interim Stay by filing a counter, wherein he has stated that as per the impugned order of the first Respondent, the amount due to him comes to Rs. 3,77,578/-. According to him, the gratuity amount due is Rs. 2,01,923/- while interest from October 1, 1999 to December 22, 2006 for 87 months at the rate of 10% comes to Rs. 1,75,655. It is his case that the gratuity is to be computed on the wages payable to the workman and wages last received by relying upon the decision 2005 (104) F.I.R. 1009. It is the case of the second Respondent that as per the judgment in W.A. No. 711/1983, he was entitled to serve up to superannuation and it was in those circumstances in lieu of such services the compensation was ordered and therefore, according to him, the

term "Wages" for calculating the gratuity should not have been Rs. 4,200/- and it must be Rs. 10,000/- as on the date of superannuation. Therefore, it is the case of the second Respondent that the calculation made by the Appellate Authority on the basis that the monthly wages was Rs. 4,200/- and thereby arriving Rs. 84,808/- by taking note of 35 years of service is not correct and it should have been Rs. 2,01,923/- by taking Rs. 10,000/- as the last drawn salary which should have been on the date of his actual superannuation. It is also stated that the period of service calculated by the first Respondent as 35 years is correct. However, the wages payable as on the actual date of superannuation on August 31, 1999 should be taken into consideration. This Court, by an order dated August 12, 2009 made absolute the Interim Stay and dismissed the vacate stay petition.

6. I have heard the submissions of the learned Counsel for the Petitioner and the learned Counsel appearing for the Respondents.

7. The facts that the second Respondent was dismissed from service on March 16, 1981 and I.D. No. 73/1992 filed by the second Respondent against the dismissal came to be dismissed by the Labour Court on November 7, 1984 are not in dispute. However, the High Court in W.P. No. 9342/1987 has set aside the dismissal of the I.D. by the Labour Court and directed the Management to reinstate the second Respondent without back wages and that was by order dated June 8, 1993 and ultimately when the Management has filed writ appeal in W.A. No. 711/1993, the Division Bench has passed the final judgment on July 24, 1997, which is (1997) 4 LLN 312. A reading of the said decision of the Division Bench shows that the Division Bench has disagreed with the order of the learned single Judge, directing reinstatement of the second Respondent herein and on the date of said judgment, it was informed that the second Respondent was having only 26 months more service before retirement. The Division Bench having taken note of the fact that the second Respondent was having 26 months of service has decided not to reinstate the second Respondent due to the seriousness of the allegations made against him, but roughly arrived at the compensation of Rs. 75,000/- by taking note of the monthly salary of the second Respondent at Rs. 4,200/- at that time. That was arrived at due to the reason that in spite of the order of the learned single Judge in the writ petition directing the Management to reinstate the second Respondent, he was not reinstated, but was being paid salary and it was that salary amounting to Rs. 4,200/- and that was taken note by the Division Bench and Division Bench also indicated that the second Respondent would be entitled to other benefits like gratuity. The operative portion of the said judgment reads as follows:

6. The first Respondent is said to be drawing Rs. 4,200 per month and he has twenty six months more of service before attaining the age of superannuation. Therefore, adopting a rough ready method, we fix a, compensation of Rs. 75,000/- (Rupees Seventy five thousand only) in lieu of reinstatement. The first Respondent will of course be entitled to the other benefits like gratuity, which are payable under law.

The payments made under the interim order, dated July 5, 1995 in 1360/1994 shall not be adjusted in the compensation now directed to be paid. The compensation shall be spread over for a period of twenty six months for the purposes of income tax. The order of the learned single Judge is set aside and the writ appeal is allowed by making an award in I.D. No. 73/1982 on the file of the First Additional Labour Court, Madras, as follows:

In lieu of reinstatement the Appellant shall pay a sum of Rs. 75,000/- (Rupees Seventy Five thousand only) as and by way of compensation to the first Respondent" workman in the manner stated above.

8. Therefore, it is clear that the amount of compensation has been arrived at by taking note of the drawing of salary by the second Respondent at the rate of Rs. 4200/- per month at that time and also considering the fact that the second Respondent will have 26 months period of service for attaining the age of superannuation. Hence, the Division Bench directed the payment of Rs. 75,000/- and the compensation shall be spread over for a period of twenty six months for the purposes of income tax.

9. The payment of gratuity to an employee and the obligation of the employer arises when the workman rendered continuous service of not less than five years either on his superannuation or on his retirement or resignation or on the date or disablement as it is seen u/s 4(1) of the Payment of Gratuity Act, 1972 (hereinafter referred to as "the Act"), which is 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. Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.

10. Section 4(2) of the Act enables an employee to get the amount of gratuity at the rate of 15 days wages for every completed year of service or part thereof in excess of six months and such wages shall be as last drawn. The term "Wages" has been

defined in Section 2(s) of the Act, which is as follows:

"Wages" means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance.

11. Section 4(6) of the Act enables the forfeiture of gratuity due to the workman on the ground of his riotous or disorderly conduct or any other act of violence or termination due to the offence involving moral turpitude.

12. On the facts of the present case, it is the case of management that an enquiry was conducted in respect of misconduct of the second Respondent and termination was effected and ultimately the Division Bench has not directed reinstatement of service but only calculated the amount of compensation by taking note of the salary being paid admittedly by the Petitioner Management at the rate of Rs. 4200/- per month, which was admittedly paid up to August 31, 1999, which was the actual date of retirement of the second Respondent and in fact, the Petitioner Management has quantified the amount of gratuity payable to him at Rs. 7,085/- and added 10% interest and therefore, the liability of the second Respondent to receive gratuity is not questioned. The Petitioner Management has also not by applying Section 4(6) of the Act forfeited of the gratuity. Therefore, the liability of the second Respondent to get the gratuity is never in dispute. But, the case of the Petitioner Management is that the termination of the second Respondent was in the year 1981 and what was the salary drawn at that time was to be taken into consideration and from the date of the original appointment of the second Respondent from March 10, 1964 till March 16, 1981, the gratuity amount was calculated as Rs. 7,085/-. It was due to the reason there was dispute regarding determination of the amount and the matter went to the Authorities, who have decided u/s 7(4) of the Act as correctly stated in the impugned order of the Appellate Authority dated April 23, 2007.

13. On the above said factual matrix, I do not think that the judgment relied upon by the learned Counsel for the Petitioner Management of CM.C and Hospital, Chennai and *Ors. v. Joint Commissioner of Labour (supra)* can be made applicable. That was a case where in respect of many of the employees, of course on a similar circumstance, based on their conduct ex gratia payment was offered and on the payment of ex gratia, it was construed that the workmen were deemed to have been reinstated. It was in that context and taking note of the fact that the workmen have not even completed the five years of required service as required under the Act, it was held that the direction to pay ex gratia should not be taken into consideration as that of reinstatement in services. It is appropriate to extract the relevant passage from the said decision, which is as follows:

11. In such view of the matter, it must be held that the workmen concerned were never reinstated and therefore, those of the workmen who had not completed five years service were obviously not entitled to any payment of gratuity. In view of the aforesaid discussion, the order passed by the first and second Respondents are liable to be set aside. However, as already submitted fairly at the threshold by the learned Counsel for the Petitioner that irrespective of the result of the case, the amount calculated as per the order passed by the appellate authority would be paid to the workmen concerned as ex gratia payment by the management. It is apparent that as per the order passed by the original authority, some amount has been deposited. However, the learned Counsel for the Petitioner has fairly conceded that the calculation would be made as per the observation of the appellate authority, that is to say, by taking into account the minimum wages payable on the date of the award passed by the arbitrator. On the aforesaid basis, necessary calculation shall be made by the Petitioner management.

On a reference to the facts as stated above, I do not see any reason to apply the rationale laid down in the said case to the facts of the present case.

14. As stated above, when the judgment of the Division Bench, the operative portion of which has been extracted above, has become final, where the Division Bench has taken note of the salary drawn at the time of judgment dated July 24, 1997 and the same was paid by the Petitioner Management to the second Respondent even though the second Respondent was not reinstated and that amount has been continuously paid till the date of his retirement, the first Respondent appellate authority has calculated the 35 years of service and directed payment of Rs. 84,808/-, which in my considered view cannot be said to be either erroneous or against the provisions of the Act. However, the point raised by the second Respondent as if the salary to which the second Respondent should have been eligible on the date of his super annotation on August 31, 1999, which is stated to be at Rs. 10,000/- per month cannot at all be accepted for more than one reasons. First of all, the second Respondent has not raised any such issue against the impugned order of the first Respondent. That apart, for that matter, both the parties viz., the Management and the second Respondent have admitted the judgment of the Division Bench and the same has become final and certainly, it is not open to the second Respondent now to raise that point that his salary as last drawn on the date of superannuation should have been taken into consideration. In such view of the matter, I do not see any illegality in the impugned order of the first Respondent/Appellate Authority under the Payment of Gratuity Act to enable this Court to interfere with the said order.

15. Therefore, this writ petition fails and the same is dismissed. However, there will be no order as to costs.