

United Bank of India Vs Pranab Kumar Bhuiyan

Court: Calcutta High Court

Date of Decision: July 16, 2014

Acts Referred: Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 " Section 19, 19(2), 19(2)(f), 19(4)

General Clauses Act, 1897 " Section 21, 23

Payment of Gratuity Act, 1972 " Section 14, 4, 4(6), 4(6)(a)

Working Journalists and Other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955 " Section 5, 5(1)(a)(i)

Citation: (2014) 142 FLR 1074 : (2014) 3 LLJ 352 : (2014) 3 LLN 659

Hon'ble Judges: Soumen Sen, J

Bench: Single Bench

Advocate: R.N. Majumdar, Sourav Chakraborty and Supratim Bhattacharjee, Advocate for the Appellant; Sandeep Sanyal and Lopamudra Moita, Advocate for the Respondent

Judgement

Soumen Sen, J.

This writ petition raised an interesting point of law. The writ petition is directed against an order passed by the appellate authority under the Payment of Gratuity Act, 1972 (hereinafter referred to as the "said Act") affirming the order passed by the Assistant Labour

Commissioner, Central Kolkata on 1st February, 2013 as a Controlling Authority under the said Act.

2. Although various points have been raised in the writ petition but Mr. R.N. Majumdar, learned Counsel appearing on behalf of the petitioner

restricts his argument on the overriding effect the United Bank of India (Officers) Service Regulations, 1979 (hereinafter referred to as the "Service

Regulations, 1979) over the provisions of the said Act. The principal argument of Mr. Majumdar appears to be that the eligibility for gratuity of the

petitioner shall be governed by Regulation 46 of the Service Regulations, 1979 and not u/s 4 of the Payment of Gratuity Act, 1972.

3. u/s 4(6) of the said Act, the gratuity of an employee whose service has been terminated for any act, willful omission or any negligence causing

any damage or loss to or destruction of property belonging to the employer shall be forfeited to the extent of damage, loss so caused.

4. It is submitted that the Payment of Gratuity Act is a general law and the Service Regulations, 1979 is having an overriding effect over the

Payment of Gratuity Act in case of conflict.

5. The petitioner is a nationalized bank constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970. In

exercise of the power conferred by Section 19 of the said Act, 1970, the Board of Directors of the Company in consultation with the Reserve

Bank of India and with the previous sanction of the Central Government framed the Service Regulations, 1979. Regulation 46 of the Service

Regulations, 1979 deals with the Payment of Gratuity. The said Regulation reads:-

46. (1) Every officer shall be eligible for Gratuity on:-

(a) Retirement

(b) Death

(c) Disablement rendering him unfit for further service as certified by a Medical Officer approved by the Bank.

(d) Resignation after completing Ten Years of continuous service or

(e) Termination of service in any other way except by way of punishment after completion of 10(ten) years of service. (Effective from 15-11-84)

(2) The amount of Gratuity payable to an officer shall be one month's pay for every completed year of service, subject to maximum of 15 month's

pay.

Provided that where an officer has completed more than 30 years of service, he shall be eligible by way of Gratuity for an additional amount at the

rate of one half of month's pay for each completed year of service beyond thirty years.

6. The eligibility criteria for payment of gratuity under the Regulation to a large extent are different from Regulation 46 of the Service Regulations,

1979.

7. u/s 4 of the Payment of Gratuity Act, gratuity is payable on termination of employment after the employee has rendered continuous service for

not less than 5 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 5 years shall not be necessary where the termination of employment of any employee is due

to death or disablement. u/s 4 sub-section 2 of the 1972 Act, 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

whereas under the Regulation 46, the employee shall be entitled to payment of gratuity on:-

(a) Retirement

(b) Death

(c) Disablement rendering him unfit for further service as certified by a Medical Officer approved by the Bank.

(d) Resignation after completing Ten Years of continuous service or

(e) Termination of service in any other way except by way of punishment after completion of 10 (ten) years of service.

8. Thus, it would appear that under the Regulation, an employee would be eligible for gratuity on resignation only after completion of 10 years of

service or termination of service in any other way except by way of punishment after completion of 10 years of service. The computation of

gratuity is also different under the Regulation. According to the petitioner, the respondent employee while functioning as Deputy General Manager

and Chief Regional Manager of the North India Region of the Bank from 8th August, 2003 to 24th December, 2005 sanctioned loans to its entities

against the norms and/or without an adequate security. In view of the commission of such acts of misconduct, a disciplinary proceeding was

initiated against the respondent No. 1 by issuing a charge sheet dated 9th June, 2006. The Enquiry Officer after giving reasonable opportunity of

hearing to the respondent No. 1 submitted his report dated 14th February, 2007 holding that out of the charges levelled against the respondent

No. 1 Charge Nos. 1, 2, 3 and 4 have been proved and Charge No. 5 has been partially proved. Upon consideration of the materials and perusal

of the findings of the enquiring authority, the disciplinary authority concurred with the finding of the enquiring authority. The disciplinary authority

considered the gravity of the misconduct imposed a major penalty of dismissal which shall ordinarily be a disqualification for future employment by

an order dated August 18, 2007. On an appeal preferred by the respondent No. 1 before the Chairman and the Managing Director being the

appellate authority, the said appellate authority by a reasoned order dated November 27, 2007 confirmed the punishment that was imposed by the

disciplinary authority by an order dated August 18, 2007. The writ petitioner alleged that by reason of such acts of misconduct various loan

accounts became Non-Performing Assets (NPA) causing huge loss to the employer bank being a public institution. It is submitted that the

petitioner bank has suffered loss assessed at Rs. 26,67,39,081.96/- in respect of eight loan accounts which have been written off by the petitioner

Bank later, as on date in respect whereof the disciplinary proceedings were initiated by the writ petitioner and on the basis of the charges duly

proved, the punishment of dismissal was imposed by the disciplinary authority. It is argued that in terms of Regulation 46(1)(e) of the Service

Regulations, 1979, an officer eligible for gratuity for his service is terminated by way of punishment after completion of 10 years of service.

Moreover, u/s 4(6)(a) of the Gratuity Act, 1972, if any act, willful omission or negligence of an employee causing any damage or loss to or

destruction of property belonging to the employer, the employer would be entitled to forfeit the amount of such loss or damage suffered out of the

amounts payable towards gratuity. Mr. Majundar has also referred to a Circular No. PD/DISC/08/99 dated 20th May, 1999 dealing with

entitlement of terminal benefits of the employees of the petitioner Bank in case of termination by way of punishment where it has been specifically

mentioned that in case of termination by way of dismissal the employee would not be entitled to any gratuity. The respondent No. 1 challenged the

entire disciplinary proceeding including the order of punishment dated 18th June, 2007 and in the said proceeding being W.P. No. 3096(W) of

2008, the employee has also claimed the payment of gratuity. It is submitted that the said writ petition is still pending.

9. During the pendency of the said writ petition on 21st May, 2013, the petitioner Bank received a notice dated 15th May, 2012, along with a

copy of the application dated 27th April, 2012 in Form N as prescribed under sub-rule (1) of Rule 10 of the Payment of Gratuity (Central) Rules,

1972 from the Assistant Labour Commissioner (Central) Kolkata and the Controlling Authority under the Payment of Gratuity Act, 1972 calling

upon the petitioner to appear before the learned Controlling Authority in connection with the said application filed for determination of gratuity. In

the said proceeding, the Controlling Authority amongst others in deciding issue No. 4 held that in view of Section 14 of the Payment of Gratuity

Act, 1972 which clearly lays down that the provision of the Act or in any rule made thereunder will have overriding effect over any other enactment

other than the Act or any instrument or contract having effect by virtue of any enactment other than the provisions of Gratuity Act shall prevail. The

authority while arriving at the said finding has relied upon two decisions reported in Co-operative Cane Development Union Ltd. Vs. Nahar Singh

and Others, and Regional Provident Fund Commissioner Vs. Regional Labour Commissioner and Others,

10. Mr. R.N. Majumdar, the learned Counsel appearing on behalf of the petitioner in support of his contention has relied upon a decision of the

Hon"ble Supreme Court reported in Ramesh Chandra Sharma Vs. Punjab National Bank and Another, It is submitted that the Hon"ble Supreme

Court in considering the same and/or similar regulation that was framed u/s 19 of the Banking Companies (Acquisition and Transfer of

Undertakings) Act, 1970 held that such regulations framed u/s 19 of the said Act are statutory in nature and, accordingly, any provision made in

the said regulations shall have an overriding effect in case of conflict with any other provisions or Act occupying the same field.

11. Mr. Majumdar submitted that irrespective of the fact that whether the regulation is prior or subsequent to the Payment of Gratuity Act, 1972,

the Court is required to find out if the said regulation is a special law and in the event it is held to be a special law that would prevail over the

Payment of Gratuity Act which shall be treated as a general law. In this regard he has relied upon a decision reported in P. Rajan Sandhi Vs. Union

of India (UOI) and Another, where the appellant was a journalist and was associated with a publishing house and was charge-sheeted for making

false allegations against the Managing Director of the Company and was ultimately dismissed from service. His claim for gratuity was rejected.

Before the Supreme Court, on behalf of the appellant, it was contended that since no damage or loss or destruction of property of the employer

was alleged or proved against the appellant, nor he was alleged to have committed any riotous act, his claim for gratuity could not have been

denied. The appellant before the Supreme Court, as the petitioner in this case, relied on Section 4(6) of the Payment of Gratuity Act. For the

respondents the sheet anchor was Working Journalists" and Other Newspaper Employees Condition of Service and Miscellaneous Provisions

Act, 1955. The two Acts contain different provisions relating to the release of gratuity. The Supreme Court held that Section 5 of the Working

Journalists" Act being a special law, will prevail over Section 4(6) of the Payment of Gratuity Act which is a law of general nature. Section 5 of the

Working Journalists" Act was specially meant for working journalists alone; whereas Payment of Gratuity Act was meant for all charges covered

by the Payment of Gratuity Act and was not limited to working journalists.

12. The learned Counsel has also relied on an unreported judgment of this Hon"ble Court in Pranab Kumar Roy v. United Bank of India and

Others, WP No. 416 of 2013 decided on 1st April, 2014 in support of his contention that the said Regulation, 1979 is having an overriding effect

over the provisions of the Gratuity Act.

13. Per contra, Mr. Sandeep Sanyal, the learned Counsel appearing on behalf of the respondent No. 1 supports and defends the view taken by

the Controlling Authority. It is argued that in view of a clear mandate u/s 14 of the Payment of Gratuity Act, the entitlement to gratuity on the basis

of Regulation 46 could not be denied. It is submitted that the analysis of the Section would show that the said Section gives priority to the

provisions of the Act and Rules made thereunder over any other (i) enactment or (ii) instrument or contract having effect by virtue of any enactment

other than the Gratuity Act. It is further submitted that the Regulation 46 has undergone an amendment in 15th November, 1994 and in absence of

any material placed before the Court to show that a prior sanction of the Central Government has been obtained, the bank cannot rely upon the

said amended portion of the regulation. It is submitted that in terms of Section 19 sub-section 4 of the Banking Companies (Acquisition and

Transfer of Undertakings) Act, 1970 such regulations have to be forwarded to the Central Government and that Government shall cause a copy of

the same to be laid before each House of Parliament. In absence of any material to show that Section 19(4) has been complied with in connection

with the said regulation, the bank cannot rely upon at least that portion of the regulation which became effective on and from 15th February, 1994.

He has referred to Sections 21 and 23 of the General Clauses Act, 1897 in support of the said contention. It is further submitted that unless the

establishment is an exempted establishment, the bank cannot deny the payment of gratuity and in this connection he has relied upon a decision of

the Hon"ble Supreme Court reported in Allahabad Bank and Another Vs. All India Allahabad Bank Retired Emps. Assn.,

14. Mr. Sanyal has also relied upon a decision of the Hon"ble Supreme Court in Life Insurance Corporation of India Vs. D.J. Bahadur and

Others, in support of his contention that the Regulation of 1979 cannot override the provisions of the Act. It is submitted that in Life Insurance

Corporation of India v. D.J. Bahadur and Others (supra), the Hon"ble Supreme Court has given precedence to settlements under the Industrial

Disputes Act over the Regulation framed under the Life Insurance Corporation Act.

15. It is submitted that the legislature appears to be quite clear and emphatic about the beneficial nature of the said statute. It is submitted that

entitlement of the preamble of the Act read with Section 14 of the said Act, the Act was intended by the legislature to be comprehensive and

exhaustive law dealing with the entire subject of the payment of gratuity to the persons and such right cannot be denied by making a regulation

which is patently inconsistent with Section 14 of the Payment of Gratuity Act.

16. The Hon"ble Supreme Court in Bakshish Singh Vs. M/s. Darshan Engineering Works and others, after referring to its earlier decisions dealing

with the concept of gratuity pointed out that although the dictionary meaning suggested that gratuity is a gratuitous payment, a gift or a boon and a

matter of discretion of the employer, in industrial adjudication, it was initially considered as a reward for a long and meritorious service, but later, it

was recognized as a retiral benefit in consideration of the past service. It is stated:

The Payment of Gratuity Act is a welfare measure introduced in the interest of the general public to secure social and economic justice to

workmen to assist them in their old age and to ensure them a decent standard of life on their retirement. The provisions of the Act are meant for

laying down gratuity as one of the minimal service conditions available to all employees covered by the Act.

17. The Hon^{ble} Supreme Court in U.P. State Sugar Corporation Ltd. and Others Vs. Kamal Swaroop Tondon, also recognized that the

employer can recover from the retireable benefits of the employee which includes gratuity if loss is caused to the employer due to negligence of the

employee. It is stated in the said decision:-

14. Now it is well settled that retiral benefits are earned by an employee for long and meritorious services rendered by him/her. They are not paid

to the employee gratuitously or merely as a matter of boon. It is paid to him/her for his/her dedicated and devoted work.

15. In The Garment Cleaning Works Vs. Its Workmen, the relevant clause of the Gratuity Scheme provided that if a workman was dismissed or

discharged for misconduct causing financial loss to the employer, gratuity to the extent of loss should not be paid to the workman concerned. It

was contended on behalf of the employer that the retrenchment benefit and gratuity were payable to the employee for his long and meritorious

services and if he was dismissed by misconduct, he would not be entitled to claim retrenchment benefits or gratuity and the benefits could be

denied to him.

16. Dealing with the argument and the basis of payment of gratuity, this Court, speaking through P.B. Gajendragadkar, J. (as His Lordship then

was), said:

5. On principle if gratuity is earned by an employee for long and meritorious service it is difficult to understand why the benefit thus earned by long

and meritorious service should not be available to the employee even though at the end of such service he may have been found guilty of

misconduct which entails his dismissal. Gratuity is not paid to the employee gratuitously or merely as a matter of boon. It is paid to him for the

service rendered by him to the employer, and when it is once earned it is difficult to understand why it should necessarily be denied to him

whatever may be the nature of misconduct for his dismissal. Then, as to the definition of retrenchment in the Industrial Disputes Act, we are not

satisfied that gratuity and retrenchment compensation stand exactly on the same footing in regard to the effect of misconduct on the rights of

workmen. The rule of the provident fund scheme shows not that the whole provident fund is denied to the employee even if he is dismissed but it

merely authorises certain deductions to be made and then too the deductions thus made do not revert to the employer either. Therefore we do not

think that it would be possible to accede to the general argument that in all cases where the service of an employee is terminated for misconduct

gratuity should not be paid to him. It appears that in award which framed gratuity schemes sometimes simple misconduct is distinguished from

gross misconduct and a penalty of forfeiture of gratuity benefit is denied in the latter case but not in the former, but latterly industrial tribunals

appear generally to have adopted the rule which is contained in clause (h)(b) of the present scheme. If the misconduct for which the service of an

employee is terminated has caused financial loss to the works, then before gratuity could be paid to the employee he is called upon to compensate

the employer for the whole of the financial loss caused by his misconduct, and after this compensation is paid to the employer if any balance from

the gratuity claimable by the employee remains that is paid to him.

(emphasis supplied)

17. In *Calcutta Insurance Co. Ltd. Vs. Their Workmen*, this Court considered the concept of gratuity. It referred to *Garment Cleaning Works* and

other cases. It noted that the opinion expressed in those cases was that gratuity was earned by an employee for "long and meritorious service" and

consequently it must be given to him even though at the end of such service, he may have been found guilty of misconduct entailing his dismissal.

18. In determining whether a statute is a special or a general one, the Hon^{ble} Supreme Court in various decisions have consistently held that the

focus must be on the principal subject matter plus the particular perspective. For certain purposes, an Act may be general and certain other

purposes it may be special. In *The Life Insurance Corporation of India v. D.J. Bahadur and Others* (supra), the Hon^{ble} Supreme Court held that

the Industrial Disputes Act is a special statute devoted wholly to investigation and settlement of industrial disputes which provides definitionally for

the nature of industrial disputes coming within its ambit. It appears that the employer and the employee in the aforesaid case had entered into a

settlement which culminated in an award. The Life Insurance Corporation by making a regulation tried to interfere with the said award. In that

context it was held unless the Settlements of 1974 which between the employer and the employee in relation to the industrial dispute are

subsequently altered by fresh settlement, award or valid legislation, the same would continue to be in force and any notification purporting to

amend the Standardization Order by substituting Clause 9 is invalid and the newly enacted Regulation 58 does not affect the contract in respect of

bonus embodied in the Settlements of 1974.

19. The relevant regulations impugned in the writ petition have been framed in exercise of powers conferred by Section 19(2)(f) of the Acquisition

and Transfer of Undertakings Act, 1970. Section 19 of the said Act confers powers before the Board of Directors to make the regulations in

consultation with the Reserve Bank of India and with the previous sanction of the Central Government. Section 19 of the said Act further provides

that they shall not be inconsistent with the provisions of Act or scheme made thereunder. Section 19(2) deals with the matters on which regulations

may be framed. The regulation specifically framed by the Board of Directors in exercise of such power for both the employer and the employee is

a special piece of subordinate legislation which because of their very special nature must give pre-eminence and precedence over the general

principal or any general provision of law covering the same field. All that the Court is required to find that in such a situation, the subordinate

legislation is not overreaching or overstepping the principal Act. In order to find out whether a particular enactment is a special or general

enactment, the Court should be required to consider the entire Act along with the circumstances, the reasons for passage and the purposes to be

accomplished. An Act general in form but special in fact would be treated judicially as a special Act. For the most part, the generality or specialty

of an Act is an issue subordinate to the enquiry. Even the special laws in essence are general laws. They are general because their provisions

embrace the whole of the subject. The character of an Act, whether general or special, therefore, depends on its sub-stance and not its form.

When once it is found on a judicial examination that a particular legislation was passed on a special subject, it would be presumed that in the

legislative judgment a general Act could not thereafter be made applicable to the subject covered by the special enactment. *Burmah Shell Oil*

Storage and Distribution Co. of India Ltd. v. Industrial Tribunal, 1975 LAB IC 165. The same view is echoed and reiterated in *P. Ranjan Sandhi*

v. Union of India and Another (supra), in Paragraphs 11 and 12 of this judgment which is reproduced below:-

11. It may be seen that there is a difference between the provisions for denial of gratuity in the Payment of Gratuity Act and in the Working

Journalists Act. Under the Working Journalists Act gratuity can be denied if the service is terminated as a punishment inflicted by way of

disciplinary act, as has been done in the instant case. We are of the opinion that Section 5 of the Working Journalists Act being a special law will

prevail over Section 4(6) of the Payment of Gratuity Act which is a general law. Section 5 of the Working Journalists Act is only for working

journalists, whereas the Payment of Gratuity Act is available to all employees who are covered by that Act and is not limited to working journalists.

Hence, the Working Journalists Act is a special law, whereas the Payment of Gratuity Act is a general law. It is well settled that special law will

prevail over the general law, vide G.P. Singh's "Principles of Statutory Interpretation", Ninth Edition, 2004 pp. 133, 134.

12. The special law, i.e., Section 5(1)(a)(i) of the Working Journalists Act, does not require any allegation of proof of any damage or loss to, or

destruction of, property, etc. as is required under the general law, i.e., the Payment of Gratuity Act. All that is required under the Working

Journalists Act is that the termination should be as a punishment inflicted by way of disciplinary action, which is the position in the case at hand.

Thus, if the service of an employee has been terminated by way of disciplinary action under the Working Journalists Act, he is not entitled to

gratuity.

20. In Ramesh Chandra Sharma v. Punjab National Bank and Another (supra), the Hon'ble Supreme Court in no uncertain term held the said

Regulation to be statutory in nature and permitted continuation of the disciplinary proceedings even after retirement on the strength of Regulation

20(3)(iii) would appear from Paragraphs 16 and 17 of the said report which states:-

16. The question, thus, as to whether continuation of a disciplinary proceeding would be permissible or the employer will have to take recourse

only to the pension rules, in our opinion, would depend upon the terms and conditions of the services of the employee and the power of the

disciplinary authority conferred by reason of a statute or statutory rules.

17. We have noticed hereinbefore that the Bank has made Regulations which are statutory in nature. Regulation 20(3)(iii) of the said Regulations

reads thus:

20. (3)(iii) The officer against whom disciplinary proceedings have been initiated will cease to be in service on the date of superannuation but the

disciplinary proceedings will continue as if he was in service until the proceedings are concluded and final order is passed in respect thereof. The

officer concerned will not receive any pay and/or allowance after the date of superannuation. He will also not be entitled for the payment of

retirement benefits till the proceedings are completed and final order is passed thereon except his own contribution to CPF.

The said Regulation clearly envisages continuation of a disciplinary proceeding despite the officer ceasing to be in service on the date of

superannuation. For the said purpose a legal fiction has been created providing that the delinquent officer would be deemed to be in service until

the proceedings are concluded and final order is passed thereon. The said Regulation being statutory in nature should be given full effect.

21. In view of the aforesaid, the decisions of the Controlling Authority and appellate authority that the provisions of the Gratuity Act would prevail

over the Regulation, does not appear to be correct. The said authority has failed to take into consideration the special nature of the Regulation,

1979.

22. In view of the aforesaid, the impugned orders dated February 1, 2013 and February 27, 2014 are set aside. However, there shall be no order

as to costs. Urgent Xerox certified copy of this judgment, if applied for, be given to the parties on usual undertaking.