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Court : Kolkata

Decided On : Jan-05-2006

Reported in : (2006)2CALLT59(HC),[2006(109)FLR1166],(2007)IILLJ40Cal

Judge : Jayanta Kumar Biswas, J.

Acts : [Payment of Gratuity Act, 1972](#); ;[Indian Contract Act, 1872](#) - Sections 10 and 11; ;[Mines Act, 1952](#) - Section 40; ;Industrial Employment (Standing Orders) Act, 1946

Appeal No. : W.P. No. 699(W) of 2003

Appellant : Bisram Arak

Respondent : Eastern Coalfields Ltd. and ors.

Advocate for Def. : R.N. Majumdar and ;S. Pal, Advs.

Advocate for Pet/Ap. : Nirmalendu Ganguly, Adv.

Judgement :

Jayanta Kumar Biswas, J.

1. The writ petitioner has twofold grievances: (i) benefits on account of gratuity were not paid to him for full length of his service; (ii) no interest was paid for delay in paying the benefits on account of gratuity.

2. There is no dispute that the petitioner retired from the service of the company with effect from May 17th, 2000. In December 1999 the company directed him to submit the necessary papers for payment of gratuity. It is not the case of the respondents that for laches on the part of the petitioner the benefits on account of gratuity could not be paid on May 17th, 2000. There is also no dispute that in two installments a sum of Rs. 2,67,247/- was paid to the petitioner on account of benefits of gratuity. Payments were made on February 1st, 2001 and October 9th, 2002;

3. The writ petition was taken out on January 7th, 2003. The petitioner alleged that though he was entitled to get the benefits on account of gratuity for 45 years, for undisclosed reasons the company paid the benefits for 42 years. He also contended that in view of the Apex Court decisions, including the one in *Vijay L. Mehrotra v. State of U.P. and Ors.* reported at AIR 2000 SC 3513, the company was under the obligation to give interest for delay in paying the benefits on account of gratuity.

4. By order dated March 5th, 2003 the writ petition was admitted. Advocate for the respondents submits that at that date he took the point of availability of alternative remedy under provisions of the [Payment of Gratuity Act, 1972](#). From the order I find that nothing was recorded about such preliminary objection. At this distance of time I cannot permit advocate for the respondents to contradict the contents of that order dated March 5th, 2003. It is to be presumed that the point was not taken at the threshold.

5. Advocate for the respondents argues that he has taken the point in the affidavit-in-opposition. In my view, the question of maintainability of the writ petition on the ground that alternative remedy was available cannot be permitted to be raised now at the time of final hearing, since it was not taken at the very threshold, and since it does not take away the jurisdiction of the writ Court altogether. There is no dispute that the company is amenable to writ jurisdiction. Hence I am not inclined to accept the contention that the writ petition should be dismissed as not maintainable.

6. As to merits of the case, advocate for the respondents argues that in view of provisions of the [Indian Contract Act, 1872](#), Sections 10 & 11, at the date of appointment the petitioner was not competent to contract, since he was a minor, having not reached the age of 18. He says that service of the petitioner given by him till he reached the age of 18 was not to be considered for determining the amount payable to him on account of gratuity.

7. He refers me to the [Mines Act, 1952](#), Section 40, and says that having not reached the age of 18, the petitioner was not eligible to be appointed at the date he was appointed by the private company. He hastens to add that Section 40 of the [Mines Act, 1952](#) was, however, given effect from May 31st, 1984. In support of his contention that provisions of the [Indian Contract Act, 1872](#) do apply also to contract of employment, he cites to me the Apex Court decision in *Upton India Ltd. v. Shammi Bhan and Anr.* reported at : [1998]1SCR719 .

8. In reply, advocate for the petitioner relies on a circular of Central Coal Fields Ltd. dated November 18th, 2003 saying that in view of the Apex Court decision that company decided to give benefits on account of gratuity on the basis of total length of service, even if one was minor at the date of initial appointment. He cites to me also an unreported Division Bench decision of the Jharkhand High Court.

9. As to the question of the petitioner's entitlement to benefits on account of gratuity for the full length of service, I am unable to agree with advocate for the respondents that since the petitioner was a minor at the date of his initial appointment, the three year period which he took for attaining majority, though he was actually in employment, is not to be taken into consideration for determining the amount payable to him.

10. There is no dispute that principles governing a contract within the meaning of the [Indian Contract Act, 1872](#) do apply also to contract of employment. But I do not see how the principles governing contract would affect the petitioner's right in the present case. It is known that although one is appointed by the state on the basis of contract, subsequent to appointment one attains a status, i.e., one is to be governed by the service rules duly framed or by the standing orders, in case the standing orders are to be prescribed.

11. In the instant case employment of the petitioner was governed by the Industrial Employment (Standing Orders) Act, 1946. Hence service of the petitioner was to be governed either by the model standing orders or by the duly certified standing orders, although the initial master servant relationship might have originated from a contract. There is nothing to show that under provisions of any law employment of a minor (not a child below the age of fourteen years) was prohibited. So I am unable to hold that at the date of his appointment the petitioner could not have been lawfully appointed by his employer.

12. In so far as the provisions of the [Mines Act, 1952](#) are concerned, I do not see how they can make the petitioner's appointment, made sometime in 1955, illegal. Relevant provisions of the [Mines Act, 1952](#) prohibiting employment of persons below the age of eighteen years came into force only from May 31st, 1984. The provisions were not given retrospective effect. It is therefore clear that on the basis of provisions of the [Mines Act, 1952](#) the respondents were not empowered or entitled to say that the petitioner would not be entitled to benefits on account of gratuity for the full length of service. Hence I find that the respondents acted wrongfully by not granting the benefits for the full length of service.

13. The other question that needs decision in the case is whether the petitioner was entitled to interest for delay in making payment by the respondents. There is absolutely no reason why the admitted amount on account of gratuity was not paid on May 17th, 2000. The amount was paid by the respondents in two installments, and at the dates mentioned before.

14. I agree with advocate for the petitioner that in view of the Apex Court decisions the respondents were under the obligation to pay interest for delay in making the payment. This aspect of the case has been contested by advocate for the respondents once again by referring me to the question of availability of alternative remedy under provisions of the [Payment of Gratuity Act, 1972](#). I hold that the respondents are liable to pay interest for delay in making the payment.

15. For these reasons I allow the writ petition to the following extent.

16. Benefits on account of gratuity payable to the petitioner shall be redetermined by the respondents taking into consideration the full length of service given by the petitioner. The three year period left out by the respondents shall be added to the period already considered for determining the amount payable. After redetermining the amount, the amount found payable shall be paid to the petitioner.

17. On account of interest for delay in paying the amount already paid, the respondents shall pay to the petitioner simple interest at the rate of 10% p.a. Interest shall be paid for the period from May 17th, 2000 till the respective dates of payment of the installments. On the part of the principal amount payable on account gratuity in terms of this order, the respondents shall pay interest to the petitioner also at the rate of 10% from May 17th. 2000 till the date of actual payment.

18. All the exercises to be carried out in terms of this order shall be carried out within six weeks from the date of receipt of a copy of this order by the respondents. Payments to be made in terms of this order shall also be made by the respondents within that period.

19. Since I have granted benefits on account of interest, I am not inclined to make any order for costs in the writ petition. Hence there shall be no order for costs in it.

Copy of this order duly countersigned by the Assistant Registrar (Court) or Assistant Court Officer shall be supplied to advocates for the parties on usual undertakings.

Urgent certified xerox copy of this order shall be supplied to the parties if applied for.

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