IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

Appellate Side

Present:

The Hon'ble Justice Shampa Dutt (Paul)

WPA 22777 of 2024

Hooghly Infrastructure Pvt. Ltd.
Vs
Sri Ram Okil Prasad & Ors

For the Petitioner	**:**	Mr. Soumya Majumder, Mr. Rabi Kumar Dubey, Mr. S.K. Singh.
For the State	**:**	Ms. Sanghamitra Nandy, Mr. Aviroop Bhattacharya.
Hearing concluded on	**:**	10.02.2025
Judgment on	**:**	04.03.2025

SHAMPA DUTT (PAUL), J. :

1. The present writ application has been preferred praying for direction upon the respondents to set aside and cancel the order dated 21.05.2024 passed by the Appellate Authority.

2. The petitioner's case is that the Respondent No. 1 was engaged in Petitioner Company as a Badli worker on 23.03.1976. At that time qualifying period and days for provident fund membership was 120 days within a period of six months from 10.08.1974 to

30.01.1981. However, as the applicant did not work continuously even 120 days within 6 months from 23.03.1976 to 1979, he could not be made member of the Employees Provident Fund Scheme. The Respondent No.1 got his provident fund membership only on 23.04.1980. The Respondent No.1 was made special badli on 01.04.2002 and attained his age of superannuation on 13.02.2010. The respondent no.1 had been working as badli worker from 23.03.1976 till the date of being made special badli i.e., from 31.03.2002 and he superannuated on 13.02.2010.

3. On being retired the Respondent No.1 had been paid all his retiral benefits inclusive of gratuity amounting to Rs. 27,770.96 and after receiving his dues on all accounts, the respondent no.1 sent form "I" on 13.11.2013 and applied for gratuity in Form N before the respondent no.3 on 20.12.2013 alleging less payment to the tune of Rs. 91,254.04p.

4. Ultimately the Controlling Authority passed an order dated 26.12.2016, when after considering all the materials on record, he was pleased to dismiss the application of the respondent no. 1 claiming Gratuity. While passing the order dated 26.12.2016, the Controlling Authority specifically observed that in spite of all opportunities being forwarded to him, the respondent no. 1

failed to establish his claim for being eligible to be entitled for gratuity payment.

5. Being aggrieved by and dissatisfied with the order passed by the Controlling Authority, the respondent no.1 filed an appeal before the Appellate Authority under the Payment of Gratuity Act, 1972, Barrackpore, North 24 Parganas on 17.03.2017, on the grounds as stated therein.

6. The petitioner was served with order dated 21.05.2024 under cover of notice dated 03.07.2024 in Form S. While passing the order dated 21.05.2024 the appellate authority, inter alia, **reversing the order** passed by the Controlling Authority, declared the respondent no. 1 to be entitled to gratuity for **34 years** along with interest @ 10%, totaling to a sum of Rs. 1,33,358.85p i.e., Rs. 79,053.49p+ 54,305.36 p.

7. It is stated that while passing the order dated 21.05.2024 the appellate authority, illegally shifting the onus to prove that respondent no.1 did not work for 240 days in each year of his alleged tenure of service upon the petitioners and miserably failed to appreciate that it is impossible to prove a negative, i.e., the years respondent no. I did not work for 240 days in each year.

8. The said order has been challenged in the present writ application.

9. **The Appellate Authority in disposing of the appeal held as follows :-**

> *"……. In the instant case, the appellant had discharged his initial onus by producing whatever documents available with him and in his custody to establish that he was on employment for 240 days in a year. The respondent company was in possession of the best evidence which he could not produce. So, an adverse inference may be drawn in view of the failure on the part of the respondent to produce the original service record even on being asked by the Ld. Controlling Authority (vide Mahant Shri Srinivas Ramanuj Das Vs Surjanarayan Das & Anr; AIR 1967 SC 256). While the respondent who is statutorily bound to maintain the attendance registers of his employees fails to produce the same, the appellant, being a jute mill worker and placed in a weaker position to his employer is hardly expected to preserve the details of his service records after expiry of a long period of time from his retirement.*
>
> *Furthermore, it is pertinent to cite here the Ruling of the hon'ble High court at Calcutta in the matter of WPA 19017 of 2023 and WPA 23207 of 2023. In the instant judgement the Hon'ble High Court has deliberated on the question of the employer obtaining acknowledgement of the receipt of the amount of gratuity paid to the employee in derogation of the Payment of Gratuity Act, 1972 and whether such an acknowledgement can be treated as waiver of the right of the employee to receive gratuity as per the provision of the said Act. This ruling has pronounced that it is well settled that right to receive gratuity is a recognised legal right, which cannot be curtailed except in circumstances mentioned in Section 4(6) of the said Act.*

Given above, drawing an adverse inference, I am left with no other option but to hold that the respondent employer failed to establish that the appellant workman had not rendered continuous service from 23/03/1976 to 13/02/2010 in his company. Hence, I am of the considered opinion that the decision of the Controlling Authority under challenge is not in order. Thus, it is ordered that the decision of the Ld. Controlling Authority is reversed and the appellant workman is entitled to get gratuity for the period of 31 years of his service life i.e. from the year of becoming member of PF till his superannuation.

It is further observed from the record that the gratuity payment (Rs. 27,770.96) was made by the respondent company itself on 26/10/2013 i.e. after 3 years 8 months (approx) of the appellant's retirement. So, it is not well supported by any evidence that the respondent company was ready to pay his due gratuity within the time frame of the provision of the Act. Hence, it is opined that the interest on the due gratuity as claimed by the appellant is justified and he is entitled to get his due gratuity along with the interest at the prescribed rate under the Act upto the date of issuance of direction of the Controlling Authority dated 26/12/2016. Hence, I am of the opinion that as per Sub-section 3A of Section 7 of the Payment of Gratuity Act, 72 the appellant is entitled to simple interest @ 10% per annum on his due gratuity. Calculation of interest is detailed below:-

Due gratuity (Rs.)	**Rate of interest**	**Date of passing order by the Controlling Authority**	**Period under reference as per Sec. 7(3A)**	**Interest accrued (Rs.)**
79,053.49	10%	26.12.2016	13.02.2010 – 26.12.2016	54,305.36

Therefore, it is held that the appellant is entitled to gratuity amounting Rs. 79,053.49+ Rs. 54,305.36 =

Rs. 1,33,358.85 (Rupees One lakh thirty-three thousand three hundred fifty-eight and eighty-five paisa) only inclusive of admissible interest.

The instant appeal is thus disposed of with a direction upon the Ld. Controlling Authority (respondent No. 1) to issue Form S under sub-rule (6) of Rule 18 of the West Bengal Payment of Gratuity Rules, 1973 to the respondent company (respondent no. 2) specifying the amount of gratuity payable and directing payment thereof to the appellant workman.

Sd/-
Appellate Authority
Under the Payment of Gratuity Act, 1972
Barrackpore, North 24 Parganas"

10. From the materials on record the following is evident:-

(i) The respondent no. 1 was employed with the petitioner company as a 'badli worker' from 23.03.1976 till 13.02.2010 **(34 years).**

(ii) The respondent no. 1 became a member under the Provident Fund Scheme in the year 1980.

(iii) The job for **34 long years** involved working in place of permanent workman/employee in their absence on leave or otherwise.

(iv) In support of his case of the period of employment, the employee has produced and exhibited a copy of his ESI Card, his superannuation notice and his wage slip before the tribunal, which was duly considered.

(v) The petitioner company did not produce any documents inspite of the fact that it is the duty of the employer to

maintain all documents relating to its employee and other matters, to be maintained and preserved as per law.

11. The petitioner has relied upon the following the judgments:-

i. ***Calcutta Jute Manufacturing Company vs The State of West Bengal and Anr., in WP 12342(W) of 2015, decided on 15.05.2018, Calcutta High Court.***

ii. ***Sk. Ekbal @ Ekbal Sk. vs The State of West Bengal & Ors., in WPA 23514 of 2023, decided on 03.04.2024, Calcutta High Court.***

iii. ***The Ganges Manufacturing Company Limited vs State of West Bengal & Ors., in FMA 882 of 2024, decided on 21.11.2024, Calcutta High Court.***

Wherein the courts held that duty to produce documents to show continuous service lies on the writ petitioner.

12. Section 25D of the Industrial Disputes Act, lays down:-

> *"**25D. Duty of an employer to maintain muster-rolls of workmen.**- Notwithstanding that workmen in any industrial establishment have been laid-off, it shall be the duty of every employer to maintain for the purposes of this Chapter a muster-roll, and to provide for the making of entries therein by workmen who may present themselves for work at the establishment at the appointed time during normal working hours."*

13. In ***Ranbir Singh vs S.K. Roy, Chairman, Life Insurance, in Misc. Application No. 1150 of 2019, decided on 27 April, 2022,*** the Supreme Court held:-

> *".....25. It is settled principle of law that while considering the order/judgment of Constitutional Court, this Tribunal is required to keep in mind entire spectrum of the orders as well as background of the case. It is not proper to cull out a single para or a sentence from the order/judgment so as to defeat the very purpose of the order so passed by Hon'ble Supreme Court. If the orders dated 11/5/2018, 7/9/2018 and 10/9/2018 are taken into consideration, it is crystal clear that claims of all such workmen and Union/s who worked as Badli workers during the period from 20/5/1985 to 4/3/1991 are required to be considered by this Tribunal. Although I am in full agreement with the submission made on behalf of the PART B Management/LIC that* ***initial onus is always upon the workmen concerned to prove that they were in the employment of the Management at the relevant time, however this Tribunal cannot ignore the fact that UC has not filed on record any document/record relating to employment of various workmen rather has simply taken a plea that same being old record is not traceable."*** *22 The Dogra Report noted that LIC had admitted that 321 workers were found to be eligible for absorption in terms of the Srivastav Award. The report found fault with LIC for making contradictory claims that 321 workers were eligible for absorption when the records of workers were allegedly old and not traceable.* ***The Dogra Report drew an adverse inference against LIC for having failed to maintain the records in pursuance of the burden cast upon it by Section 25-D of the ID Act,*** *particularly when the reference was pending*

since 1991. Paragraph 29 of the report is extracted below:

"29) During the course of arguments as well as in the reply filed on behalf of the Management/LIC, it is clear that Management has admitted that till date 321 Nos. of employees were found to be eligible in terms of the Award and they were considered eligible for absorption. It is not understandable to this Tribunal as to what were the basis for the Management/LIC for coming to the conclusion that only 321 Nos. of workmen/employees were found to be eligible and covered by the Award of CGIT in ID case No.27/1991, when the Management has come up with a plea that record relating to the workmen being old record is not traceable. ***It is worthwhile to mention here that Section 25-D of the ID Act specifically provides that it is the duty of every Employer to maintain a muster roll and to provide for the making of entries therein by the workmen who may present themselves for work at the establishment.*** *This Tribunal has to keep in mind a vital fact that since the reference bearing ID No.27/1991 is pending before various Courts since 1991,* ***the Management/LIC was/is required to keep the record in safe custody when the case of such a huge magnitude was PART B pending before the Courts. In such circumstances, this Tribunal is constrained to draw adverse inference against the management."*** *23 Based on the above hypothesis, the report proceeded to decide "prima facie" the claims of the Unions and individual workers. While taking up the claims made by the All India Life Insurance Employees Association and its affiliate, Life Insurance Employees Association, Delhi, the report notes that 6998 claims had been filed (as contained in Annexure A). Upon scrutiny, LIC drew the attention of the CGIT to the fact that*

3592 duplicate entries were found in the claims which were submitted (as contained in Annexure A-1). Noting that the "Unions have not seriously disputed the same", the Dogra Report concludes that "such claimants are to be given benefit of absorption only once". The Dogra Report also notes that workers who had started working beyond the cut-off date of 4 March 1991 would not be covered in the enquiry. This observation in the Dogra Report was in view of the order of this Court in the contempt proceedings arising out of the review of TN Terminated Employees Association (supra) on 7 September 2018, which had specifically observed that whether the benefit of the Srivastav Award should be given to those who had been engaged as badli workers after 4 March 1991 was a matter for interpretation by this Court. Hence, for the time being, CGIT had been directed to limit its enquiry only to the claims for the period between 20 May 1985 and 4 March 1991 (as contained in Annexure A-2). In this context, the Dogra Report held that those workers who had commenced work after 4 March 1991 would not be covered by its enquiry.

In State of Haryana & Ors. etc. etc. v. Piara Singh & Ors. etc. etc., (JT 1992(5) S.C. 179), the Supreme Court indicated how regularization of adhoc/temporary employees in Government and Public Sector Undertakings should be effected. While PART D laying down the guidelines in this behalf, this court observe in paragraph 43 as under:-

"The normal rule, of course, is regular recruitment through the prescribed agency but exigencies of administration may sometimes call for an adhoc or temporary appointment to be made. In such a situation, effort should always be to replace such an adhoc/temporary employee by a regularly selected employee as early as possible.

> ***Such a temporary employee may also compete along with others for such regular selection/appointment. If he gets selected, well and good, but if he does not, he must give way to the regularly selected candidate.***
>
> ***The appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an adhoc/temporary employee."……."***

14. In the present case, the respondent no. 1 has served continuously as a badli/casual worker for **34 years** in permanent posts and **has produced documents in support. The petitioner/company was bound to produce the documents as required to be maintained under Section 25D of the Act.** ***(Ranbir Singh vs S.K. Roy, Chairman, Life Insurance, (Supra))***

15. The employee has now superannuated **after 34 years** and if such conduct of the employer is ignored, there shall be clear abuse of the process of law.

16. The benefit is under a beneficial legislation and an employee who has **admittedly worked for 34 years** and has rendered his service towards the work to be carried out by a regular employee thus **will have definitely put in work for the number of days required to make him entitled to such benefits.** He even is a member of the PF scheme.

17. The facts as seen proves that **the employee has provided selfless service towards permanent posts and as such has carried out work of a regular employee for the period required each year to entitle him to the said benefits, which led to his employment for 34 years.**

18. Having done so, the least that he is entitled to, are the retiral dues (social security) which includes gratuity and such benefits should be made to the employee without any hindrance as the employee has **given his whole life to serve the company.**

19. Thus the order under challenge being in accordance with law requires no interference by this Court.

20. WPA 22777 of 2024 stands dismissed.

21. All connected applications, if any, stand disposed of.

22. Interim order, if any, stands vacated.

23. Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties, expeditiously after complying with all necessary legal formalities.

[Shampa Dutt (Paul), J.]