ASSOCIATED NEWSPAPERS OF CEYLON LTD.
v
COMMISSIONER OF LABOUR AND OTHERS

COURT OF APPEAL
J.A.N. DE SILVA, J.
CA 519/99
JANUARY 18, 2000
MARCH 1, 2000
MAY, 2000

Payment of Gratuity Act No. 12 of 1983, Section 6(2)b – Section 20 – Wage? Salary ? – Commission earned – Could it be considered for purpose of computing gratuity? – Employees Provident Fund Act – Amended to include commission? – Difference between piece rates and commissions?

Held:

(1) In terms of Section 20 of the Payment of Gratuity Act Wage or Salary means

(1) Basic/consolidated salary.

(2) Cost of Living allowance, special allowance or other similar allowance.

(3) Piece rates.

It is clear that commissions do not fall within the purview of any of the items (1), (2) and (3) above.

(2) There is a clear distinction between piece rates and commissions which had been taken into account by the legislature which use the two terms in contradistinction to each other.

Per J.A.N. de Silva, J.

"The character of a commission is that it is always a variable which does not have a fixed price. It is always co-related to the ultimate value or profit

made and or the sale price. However in a piece rate there is a constant, invariable sum paid in respect of each specific piece produced."

Held further:

(3) As far as the Employees Provident Fund Act is concerned in the original regulations piece rate was included but there was no reference to commission, this position was changed by an amendment to include – the remuneration if any paid to an employee by way of commission for any services rendered to the employer".

(4) Duty to pay Gratuity arises upon the termination of employment.

AN APPLICATION for a *writ of certiorari.*

Faiz Musthapha PC with *Sanjeewa Jayawardane* for petitioner.

Bimba Tillakaratne SSC for 1st and 2nd respondents.

S. Gunasekera for 3rd respondent.

Cur.adv.vult.

May 5, 2000

J.A.N. DE SILVA, J.

The petitioner company viz the Associated Newspapers of Ceylon Ltd. by this application seeks a *writ of certiorari* to quash the decision of the Commissioner of Labour, the 1st respondent to this application, regarding its liability to pay gratuity to the 3rd respondent employee under and in terms of the payment of Gratuity Act No. 12 of 1983 as amended.

The petitioner's fundamental complaint is that the Commissioner of Labour had directed the petitioner to pay the 3rd respondent as a sum of Rs. 5,537,526/- and a further sum of Rs. 1,661,257.80/- as surcharge for the delay in payment making a total sum of Rs. 7,198,783.80/- and that in computing the said figure the Commissioner had erroneously,

(a) decided the terminal date of the 3rd respondent's employment to be 11.11.1996 when in fact he was retired on 30.06.1993 on reaching the compulsory age of retirement viz sixty years;

(b) applied a scheme of gratuity to the 3rd respondent to which he is not entitled to;

(c) taken into account the "Commissions" earned by the 3rd respondent contrary to the provisions of the payment of Gratuity Act as amended;

(d) failed to appreciate the distinction between "piece rate" and Commissions.

When this application was taken up for hearing Learned Counsel for the 3rd respondent raised a preliminary objection on the basis that the petitioner has suppressed and misrepresented material facts and for that reason alone this application should be dismissed. It was submitted that it had been falsely averred in paragraph five of the petition that the 3rd respondent had accepted a gratuity of Rs. 9700/- when he had not in fact done so. The petitioner had explained the correct position in the counter affidavit and it appears to have been a genuine error made in the petition. The petitioner even at the stage of inquiry before the Labour Commissioner had proceeded on the same basis as the cheque had been posted to the 3rd respondent by registered post. During the course of the argument the legal officer of the petitioner's company brought to the notice of Court that even before the Commissioner the 3rd respondent had not contradicted this position but kept silent having returned the cheque to the accounts department without informing the Personal Division.

The second objection was that in paragraph 6 of the petition the petitioner averred,

(a) that at or about the time of the 3rd respondents retirement he requested an extension which the petitioner refused but offered by letter dated 19th July 1983 (P6) to engage him as an advertising canvasser.

(b) that terms and conditions of the said offer differed substantially from those which applied to him as a permanent employee.

(c) on the above basis he was appointed as a Free Lance Advertising Representative for a period of one year from 01.07.1983.

As averred by the 3rd respondent in paragraph 6.1 of his statement of objections the said letter p6 had nothing to do with the extension of service beyond the age of 60.

The said letter had been written in a different context in 1983. Therefore annexing of P6 cannot be by any parity of reasoning be considered to be a device to deceive court. P6 has no relevance to the petitioner's case. It has been written 10 years prior to 3rd respondent's retirement. Learned Counsel for the petitioner stated that it was a mistake committed by a junior who drafted the papers. However it must be noted that seniors should not put the blame on the juniors and wash their hands off for such lapses. If there was proper supervision this could have been avoided. I must remark that this sort of mistakes should not be repeated at any level in the future. As there are two important questions of law involved I do not wish to dismiss this application on the preliminary objections.

The facts relevant to this application are briefly as follows:- The 3rd respondent who was first employed by the petitioner in 1954 as a process server was subsequently appointed as an advertising representative on the 1st of April 1956. Initially he was paid a travelling allowance of Rs. 100/- per month and a commission varying from 4% to 10% on the value of the advertisements canvassed by him for the respective newspapers published by the petitioner. The travelling allowance was increased from time to time and in 1993 the travelling allowance so paid was Rs. 250/-. The petitioner made contributions to the Employee's Provident Fund and Employee's Trust Fund on the basis of commissions earned by him for the respective months. The 3rd respondent reached

the age of 60 years on the 30th June 1993 which is the age of compulsory retirement. All the superannuation benefits due to the 3rd respondent had been paid to him on the basis of retirement. His gratuity had been calculated at Rs. 9750/- and a cheque in his favour for the said sum had been dispatched by the petitioner to him by registered post.

The 3rd respondent had subsequently returned this to the Accounts Department of the petitioner company and it had been lying in the suspense account. The said sum had been computed on the basis of one months travelling allowance for each completed year of service (250.00 x 39 = 9750) giving him the benefit of a scheme which was in operation of the petitioner's company where terms were more favourable to him than the gratuity payable under the Act.

When the petitioner intimated to the 3rd respondent that on 30.06.1993 he would be completing 60 years the 3rd respondent requested an extension of his contract of employment with the petitioner. This request the petitioner turned down, but offered him the position of a free lance advertising representative, as suggested by the 3rd respondent by his letter dated 14th 1993. This contract was for one year to be affective from 01.07.1993. The said appointment was subjective to the special terms and conditions contained in letter dated 7th July 1993 (P.7). He was paid a retainer of Rs. 1000/- per month subject to minimum targets specified therein. If those targets were achieved the retainer to be increased to Rs.1500/- Commissions were payable on the rates specified therein.

Before the end of the above period the 3rd respondent went abroad and on his return he was re-engaged in the same position for a period of 1 year from 01.11.1994 to 31.10.1995. His term was again extended and finally terminated on 10.12.1996. The retainer paid to him as at that date was Rs.2000/- per month.

On the termination of his services the 3rd respondent made a complaint to the Commissioner of Labour claiming that he

was entitled to be paid a gratuity for his entire period of service from 1954 to the 10th of December 1996 and to have such gratuity computed on the basis of both the retainer and the commissions earned by him under and in terms of section 6(2) of the Payment of Gratuity Act No. 12 of 1983 as amended.

He also claimed that he was entitled to the one and a half months wage as gratuity for every year of service in terms of a scheme of gratuity payments announced by the petitioner by notice dated 10th August 1994 (P.10).

The Commissioner of Labour commenced an inquiry and the questions that he had to decide were as follows:

1. When did the liability to pay arise,
2. What was the period of service in respect of which gratuity was payable.
3. What was the last salary or wage.
4. What was the rate of payment applicable.

At the conclusion of the inquiry the Commissioner of Labour awarded the 3rd respondent a gratuity in a sum of Rs. 5,537,526,00/- for 42 years of service taking the commissions earned by him as being part of wages. He also directed the petitioner to pay a surcharge of Rs. 1,661,257.80/- for delay in paying the said gratuity.

Under Section 5 of the Payment of Gratuity Act employer's liability to pay a gratuity arises on termination of the services of a workman, whether by the employer or workman or on retirement or by the death of the workman or by operation of law or otherwise, of the services of a workman who has a period of service not less than five years.

It is common ground that the 3rd respondent reached the age of sixty years on 30th of June 1993. The only issue is whether the 3rd respondent retired on the 30th of June 1993 or on being given an extension he was in continuous employment till his services were terminated on the 10th of

December 1996. In this respect the document marked P2 under the heading "Service Particulars" is very relevant. Item 4 thereof refers to the cause of leaving as being "retirement". In terms of item 6th period of service is 38 years and item 7, the "Final Salary/Wage Drawn" is the travelling allowance Rs. 250/-. Item 8 states as follows: "On reaching the age 60 years, he was retired and re-employed as a free lance advertising representative with effect from 01.07.1993."

It is also relevant to note the contents of the letter written by the 3rd respondent dated 14th May 1993 marked (3R3). That letter was written when the petitioner informed the 3rd respondent that on 30.06.93 he would be reaching the compulsory age of retirement namely sixty years.

The letter referred to above contains the following paragraph.

"Although several openings and avenues have drawn before me, both remunerative and attractive (thanks to my contacts) I have decided to service "mother" A.N.C.L. as one of her beloved sons till I fade away eventually and say "thus and no further please".

Therefore I would be thankful if you and the Board of Directors of A.N.C.L. consider the appeal requesting for granting a further period to serve A.N.C.L. as a Free Lance Advertising Representative on terms now in operation or on better terms. I eagerly await your very early response to this Appeal so that I will be able to prepare myself for the period ahead."

From the contents of the above letter it is clear that the letter 3R3 had been written in clear anticipation of the imminent retirement and consequent loss of employment.

As mentioned earlier in consequence of letter of 3rd respondent dated 14th May 1993, the petitioner offered the 3rd respondent a fresh appointment as a free lance advertising representative for one year to be effective from 1st July 1993. However before the expiry of this period the 3rd respondent

left the country and on his return wrote to the petitioner on the 20th October 1994 in the following terms.

"I retired from permanent service of the company with effect from 30th June 1993. On an application for an extension for a further period I was given one year's extension as free lance advertising representative. I am thankful for it. When this period ended I was out of the country on leave for six months and this period too ended on the 6th instant. However during this period in August I returned to the island prematurely and was quite busy meeting people and attending to various obligations. Amidst those due to an oversight, I could not apply for a re-extension although it should have been a priority. I am sorry about it. I would be grateful if you could kindly consider giving me a further extension."

The duty to pay gratuity arises upon the termination of employment. According to section 5 of the Payment of Gratuity Act No. 12 of 1983 termination of employment can be by a number of ways including retirement."

From the facts stated above it is manifestly clear and the 3rd respondent too had accepted that his period of service ended on the 30th of June 1993 due to his retirement on reaching the age of 60 years. Therefore the 3rd respondent does not qualify for any gratuity after his retirement on 30.06.93 unless he qualifies again under section 5 of the Payment of Gratuity Act No. 12 of 1983 with five completed years. In the circumstances the 3rd respondent's gratuity entitlement is limited to his main period of service that is upto the date of retirement from the petitioner company. Thus the Commissioner has clearly erred by granting the 3rd respondent gratuity in respect of a period for which he does not qualify. It is also to be observed that the special scheme of gratuity applicable to A.N.C.L. employees where one and a half months salary to be paid as gratuity had been brought into operation only on 01.08.1994. That is after the 3rd respondent had retired from service on 30th June 1993. Therefore in this respect too the Commissioner has committed a grave error.

The next important question for determination is whether the commissions earned by the 3rd respondent can be taken into account in computing gratuity.

The Learned Counsel for the 3rd respondent submitted that the 3rd respondent was paid a monthly travelling allowance of Rs. 250/- in addition to "piece rate" earnings by way of commissions on advertisements brought in by him at the time of his said retirement on the 30th of June 1993. Thereafter on contract from 1st of July 1993 he was paid a monthly "retainer" of Rs. 1000/- which was subsequently raised to Rs. 2000/- up to the termination of his services on the 10th of December 1996. Learned Counsel contended that the real wage of the 3rd respondent was his commissions and not the aforesaid travelling allowance of Rs. 250/- per month or retainer of Rs.1000/- – Rs. 2000/-. He further submitted that such pitiful sums which are much less than even the wages of an unskilled labourer could ever have been considered by either the petitioner or the 3rd respondent to be the wage of an advertising canvasser after 40 or more years of service. Mr. Gunasekara drew the attention of Court to a letter written by the petitioner to the Deputy Commissioner of Inland Revenue dated 16.04.1999 marked 3R6 where the earnings of the 3rd respondent are mentioned. The gross commissions earned for 1993 for the period July-December was Rs. 285,580.44/-. In 1994 the gross commissions was Rs. 321,006.47/-. In 1995 the commissions has risen to Rs. 5,72,179.75/- and in 1996 the commissions rose further to Rs. 7,38,543.02/-.

Mr. Gunasekara also submitted that the said amounts constituted the wages of the 3rd respondent and the fact that the petitioner recognized the said commissions as constituting wages is also borne out by the fact that contributions to the Employees Provident Fund and Trust Fund as well as paye tax were paid on such commissions by the petitioner.

The petitioner's position is that the Commissioner had made a grave error of law in taking into account the commissions received by the 3rd respondent in computing the

gratuity payable to him. As a result of this error, the Commissioner had ordered the petitioner to pay the 3rd respondent a monumental sum of Rs. 5,537,526/- plus another Rs.1,661,257/- amounting to a grand total of Rs.7,198,783.80/- as gratuity.

Counsel for the 3rd respondent submitted that the 3rd respondent is entitled to have the commissions earned by him taken into account in determining his wages for the purpose of computing the gratuity payable to him in terms of section 6(2)(b) of the Payment of Gratuity Act inasmuch as such commissions fall within the ambit of piece rate in the definition of the term wage or salary in section 20 of the Payment of Gratuity Act.

Section 6(2) provides that gratuity is payable in respect of workman's wage or salary in respect on each completed year of service. According to section 20 "wage or salary means,

(a) the basic or consolidated wage or salary;

(b) cost of living allowance, special living allowance or other similar allowance and

(c) piece rates."

From the above definition it is clear that commissions do not fall within the purview of any of the items in (a)(b) or (c).

Learned Counsel for the petitioner brought to the notice of Court that the original regulations framed under the Employees Provident Fund Act which are known as the Employees Provident Fund Regulations of 1958, published in Gazette No. 11,573 of 31.1978 provided the items which could be taken into account for purposes of computing Employees Provident Fund. In the said original regulations, although piece rate was included there was no reference to commissions. Vide regulation 60(3). However this position was changed by

an amendment to the original regulations which were published in the Government Gazette of 11.05.1962. After the amendment the regulation reads as follow: "piece rates and the remuneration if any, paid to him by way of commissions for any services rendered to the employer."

Therefore it is clear that originally for the purpose of EPF although piece rates were considered, albeit commissions could not be considered. But commissions were expressly included by the legislature after the Regulations were amended in 1962.

Learned Counsel submitted that the position with regard to gratuity is identical i.e. Whilst piece rates have to be considered in computation of gratuity commissions are eliminated. Counsel pointed out that Gratuity Act was enacted in 1983 long after the amendments to EPF regulations. However the legislation in its wisdom has specifically excluded commissions from the Gratuity Act. Although the Gratuity Act was amended subsequently in 1990 no such corresponding amendment was made to include commissions earned by a workman to be considered for the purpose of computing gratuity. The resulting position is that the commissions earned by the workman continue to be excluded.

As piece rates are included in the computing of gratuity at this junction it is pertinent to consider what is meant by the phrase "a piece rate payment."

A piece rate payment is made in respect of a strictly defined/specified piece and the payment on that piece is not related to the revenue or the profits earned by the sale of that piece.

In order to clarify the above definition Counsel for the petitioner highlighted the following illustration. An establishment which sells shoes may hire a cobbler to make shoes for it. The parties will agree that for a particular style of shoe

that the cobbler makes and supplies to the shoe seller that the latter will pay him Rs. 10/-. This payment is a fixed one and has no relation to the profit which the seller will derive upon its sale. The seller can sell the shoe for Rs. 50/- or Rs. 100/- or even Rs. 200/-. The cobbler will be paid a fixed sum of Rs. 10/-.

The character of a commission is that it is always a variable which does not have a fixed price. It is always co-related to the ultimate value or profit made and/or the sale price. However in a piece rate there is a constant, invariable sum paid in respect of each specific piece produced. I am in agreement with this submission of the Counsel for the petitioner.

However the instant case is distinguishable from the above illustration. The 3rd respondent is paid a percentage of the value of advertisements. All newspapers have a standard, fixed price for every type of advertisement. The 3rd respondent is paid a pre-arranged percentage of the value of every advertisement he procures for the petitioner company. Thus the 3rd respondent directly partakes a percentage in the revenue earned by the petitioner from his advertisements.

There is a clear distinction which exists between piece rates and commissions, which had been taken into account by the legislature which uses the two terms in contra-distinction to each other. As the Counsel for the petitioner pointed out it is not merely the affixing of labels.

The Commissioner of Labour had completely failed to identify this important distinction and therefore fallen into a grave error. In the circumstances the decisions of the Commissioner is totally unsupportable by objective reasoning. It is also to be noted that the Commissioner has not given reasons for his order and thereby exposed himself to the inference that he has no reasons to give.

Having taken the totality of circumstances enumerated above I quash the determination and or decision of the Commissioner of Labour dated 08,04.1999 contained in document P.12. This application is allowed. I make no order with regard to costs.

Application allowed.