

**SIRISENA
VS.
DE MEL AND ANOTHER**

COURT OF APPEAL,

A. DE Z. GUNAWARDANA, J.

C.A. APPEAL NO. 664/82

L.T. NEGOMBO NO. 21/1196,

(PREVIOUSLY, L.T. COLOMBO CASE NO. 8/6383/74),

JUNE 12, 25, 1991, AUGUST 19, 1991,

AND SEPTEMBER 19, 1991.

Industrial Disputes Act - Payment of gratuity should not be confined to retiral situation - Against whom should a claim for gratuity be made when the employer is dead? - No provision in the Industrial Disputes Act to make heirs liable in their personal capacity.

The Applicant who was the Superintendent of an estate worked under the deceased employer for nearly 29 years and was continued in employment by the deceased's wife and daughter who were the heirs, for about another 2 years, till the estate was vested in the Land Reform Commission.

Held :

1. That the payment of gratuity should not be confined to retiral situation but should also be available to a workman for long and meritorious service where services have been terminated as in the instant case.
2. That the obligations incurred by a deceased employer, will be the liability of the representative of the estate of the deceased employer.

Per Gunawardana J., "Unfortunately, however, the two Respondents in this case have not been sued in that capacity, viz. as representatives of the estate of the deceased, Mr. V. M. de Mel, although in fact, they may be the only heirs of the deceased employer, Mr. V. M. de Mel. The distinction drawn here is that, although they may be liable in their representative capacity as representatives of the estate of the deceased, they are not liable personally, for any obligations incurred by the deceased."

3. That the Industrial Disputes Act does not make any provision to make a claim for gratuity against an estate of a deceased employer. There is a lacuna in the Industrial Disputes Act, as at present, in regard to this aspect.

Cases referred to:

1. *Independent Industrial & Commercial Employees Union v. Board of Directors, Co-operative Wholesale Establishment* 74 NLR 344, 352.
2. *Hatton Transport Agency Co., Ltd., v. R. George* 74 NLR 473.
3. *Ambalamana Tea Estates Ltd., v. Ceylon Estates Staff Union* 76 NLR 457.
4. *National Union of Workers v. Scottish Tea Company Ltd.*, 78 NLR 133
5. *Y.G. de Silva v. Associated Newspapers Ltd.*, *Bar Association Law Journal* Vol. 1 PT III, P. 118.
6. *Somerville & Co, Ltd., v. O. F. Bakelman* C.A. 170/83 *Court of Appeal Minutes of 27.11.1987.*

7. *Arnolda v. Gopalan* 64 NLR 153, 156, 157.

APPEAL from the Judgment of the Labour Tribunal of Negombo.

J. W. Subasinghe P.C. with *Harsha Soza* for Applicant - Appellant.

H.L. de Silva P.C. with *Desmond Fernando P.C.* and *Kumudini de Silva* for Employer - Respondents.

Cur.adv.vult.

October 30, 1991.

A. DE Z. GUNAWARDENA, J.

This is an appeal from an Order of the Labour Tribunal dated September 1, 1982, dismissing the application of the Applicant-Appellant. In the said application to the Labour Tribunal the Applicant-Appellant had claimed the following reliefs: (a) Compensation for loss of career calculated at Rs. 91,876/- (b) Gratuity for 31 years of service (c) Provident Fund and (d) Bonus for the year 1973 or in the alternative for reinstatement with back wages. At the inquiry the Applicant-Appellant did not canvass his claim for reinstatement and back wages. The Applicant-Appellant's claims for gratuity, Provident Fund and bonus have been dismissed by the Labour Tribunal on the basis that it had no jurisdiction to entertain such claims. The claim for compensation for loss of career was refused by the Labour Tribunal as it held that it was not just and equitable and that it had no power to make such an Order, against a widow or legal representative of the deceased employer.

At the hearing of this appeal the main matter that was argued before this Court was whether the Applicant-Appellant was entitled to claim gratuity from the two Respondents, not only for the period that they employed him, but also for the period their predecessor-in-title Mr. V. M. de Mel, employed him.

After consideration of the evidence led in the case, the learned President of the Labour Tribunal has in my view rightly held that the Applicant-Appellant had been employed by Mr. V. M. de Mel from 1943 upto his death on 28th May 1972 and that the two Respondents continued to employ him upto the time the estate was vested in the Land Reform Commission on 20.5.1974. Thus the deceased Mr. V. M. de Mel had employed the Applicant-Appellant for nearly 29 years and the two Respondents for approximately 2 years.

According to a long line of decided cases it is now well settled law that payment of gratuity should not be confined to a retiral situation only, but should also be available to the workman for long and meritorious service. See *Independent Industrial & Commercial Employees' Union vs. Board of Directors, Co-operative Wholesale Establishment* (1), *Hatton Transport Agency Co., Ltd. vs. R. George* (2) *Ambalamana Tea Estates Ltd. vs. Ceylon Estates Staff Union* (3) *National Union of Workers vs. Scottish Tea Company Ltd. (minority view)* (4) *Y.G. de Silva vs. Associated Newspapers Ltd.* (5) *Somerville & Co., Ltd. vs. O. F. Bakelman C. A.* (6).

In my view, the decision in *Ambalamana Tea Estates Ltd. vs. Ceylon Estates Staff Union* (3) is of particular interest to the facts of this case. Where Chief Justice, H.N.G. Fernando stated that,

“If then his employment under a particular employer is terminated by that employer solely for the latter's purpose, and not because of any voluntary act or any fault on the part of the employee, it is not reasonable for the employee to be deprived of a claim to a gratuity in respect of the period of that employment.”

Although the services of the Applicant-Appellant were terminated by the Respondents in consequence of the operation of the Land Reform Law, in my view the same considerations as stated in the passage quoted above would apply. Hence, the Applicant-Appellant would be entitled to claim gratuity from the employer.

In the enforcement of the said right to claim gratuity a fundamental issue arises for consideration, in the instant case. The question that has to be decided is, against whom should such a claim be made when the employer is dead? In this case there are two periods of service. The first period of nearly 29 years that Applicant-Appellant served under the deceased employer, Mr. V. M. de Mel and the second period of approximately 2 years, that Applicant-Appellant was employed by the Respondents. In regard to the second period there is no difficulty as to the liability as it is clearly the responsibility of the Respondents. However, as to the question whether the period of two years is too short to award gratuity, will be considered later.

The learned Counsel for Applicant-Appellant submitted that a contract does not terminate with the death of the employer, unless it is of a personal nature. He cited the Law of Contracts by C. G. Weeramanthry, Vol. II (1967) page 871 - section 916, where it is stated that, "Examples of contracts of a purely personal nature are those dependent upon personal knowledge, skill or capacity or involving personal services." He pointed out that in the instant case Applicant-Appellant did not perform any personal service to the deceased Mr. V. M. de Mel, like being a Confidential Secretary. He argued that the rights and obligations under the contract of employment subsisting between the deceased and Applicant-Appellant, passed to the Respondents, who are the intestate heirs, who adiated the inheritance, and are therefore liable to pay gratuity to the Applicant-Appellant .

It is to be noted that in the very section cited by the learned Counsel for the Applicant-Appellant, Prof. Weeramanthry has added that,

"In all other cases, (meaning contracts not of a purely personal nature - explanation mine) all contractual rights and duties pass upon death to the representatives

of a deceased person, and the obligation is therefore not extinguished, but survives in favour of or against the representative of the estate of the deceased.”

Thus it is seen that the obligations incurred by the deceased are clearly cast upon the representative of the estate of the deceased. Unfortunately, however the two Respondents in this case have not been sued in that capacity, viz. as representatives of the estate of the deceased Mr. V. M. de Mel, although in fact they may be the only heirs of the deceased employer Mr. V. M. de Mel. The distinction drawn here is that although they may be liable in their representative capacity as representatives of the estate of the deceased, they are not liable personally, for any obligation incurred by the deceased.

This position accords with the line of argument taken up by the learned Counsel for the Respondents who submitted that the liability to pay gratuity, was a liability which at the time of the death of the deceased was yet undetermined and is a sum claimable against the estate of the deceased. He added that although the Respondents were the intestate heirs of the deceased, they are not liable as the “former employers” of the Applicant-Appellant, during the relevant period for the purpose of an application made to the Labour Tribunal. He conceded that the Respondents may be liable in a civil action in the District Court as the legal representatives of the deceased for any claim made in respect of the estate of the deceased.

In this context it is pertinent to note that the Industrial Disputes Act does not make any provision to make a claim for gratuity against an estate of a deceased employer. This position was enunciated in the case of *Arnolda vs. Gopalan* (7) where Thambiah, J. stated that,

“The scope and ambit of the amended Industrial Disputes Act is to give relief or redress to a workman who is in a position to make an application before the Labour Tribunal against the employer or ex-employer who is alive at the time of the application. The Labour

Tribunal derives its jurisdiction from the amended Industrial Disputes Act. Its powers as well as its jurisdiction has to be looked for within the four corners of this statute and liability under this statute, therefore cannot be extended to a widow of a deceased employer who is brought before the Labour Tribunal and against whom relief is sought for a liability incurred by her late husband."

He added further at page 157 that,

"There are other statutes which have imposed liability on the executor or the personal representative of a deceased person for debts or liabilities of the deceased (vide the Income Tax Ordinance (Cap. 188) and the Workman's Compensation Ordinance (Cap. 139), but it is significant that the Industrial Disputes Act does not impose any liability on the executor, personal representative or the executor de son tort of a deceased person for his debts or liabilities".

The learned Counsel for the Respondents submitted that, although the Report of the Commission on Industrial Disputes (Sessional Paper No. 10 of 1970) recommended that provision should be made that in the event of the death of an employer, after commencement of proceedings, his legal heirs, executors or administrators should be substituted, and furthermore that claims of a workman against the estate of deceased employer should be made the first charge thereon, and rank in precedence over the claims of the creditors (para 579); such recommendation has not been given effect to by the Parliament. This clearly confirms the lacuna that exists in the Industrial Disputes Act, as at present, in regard to this aspect.

Thus it is clear from the above analysis that the Labour Tribunal does not have the power to make an Order against the Respondents requiring them to pay gratuity for the period of nearly 29 years, the Applicant-Appellant was employed by

deceased employer Mr. V. M. de Mel. In the circumstances the Order made by the Labour Tribunal in this case that it lacked jurisdiction to make an Order for the payment of gratuity against the Respondents, for the said period of nearly 29 years, is correct in law, and I accordingly uphold that part of the Order.

The question that remains to be considered now is, whether Applicant-Appellant is entitled to claim gratuity for the 2 year period he was employed by the Respondents. In ordinary circumstances, gratuity is payable only for long and meritorious service. However in this case although the period under consideration is only two years, one cannot help but note that these two years are the last two years of the service of Applicant-Appellant after having served for nearly 29 years, the deceased Mr. V. M. de Mel, who was the husband and father of 1st and 2nd Respondents respectively. It is also to be seen that the Applicant-Appellant had not been able to recover gratuity due to him for 29 years of service to the deceased, due to the legal impediment that has stood in his way. According to the evidence the last salary received by the Applicant-Appellant is Rs. 1000/- per month. Thus in the special circumstances of this case, I am of the view that, it is just and equitable to award gratuity for the two years he had served the Respondents. Accordingly, I set aside that part of the said Order of the Labour Tribunal in which the Labour Tribunal refused to award gratuity for the said two years and order that the Respondents pay the Applicant-Appellant 1 month's salary for each year of service, which would amount to Rs. 2000/-. The Respondents should deposit the said Rs. 2000/- with the Commissioner of Labour, Colombo on or before 31st December 1991, to be paid to the Applicant-Appellant. The Applicant-Appellant is free to withdraw the same thereafter.

I make no order as to costs.

Gratuity awarded.