CEYLON COLD STORES LTD.
v.
SRI NANDALOCHANA AND ANOTHER

SUPREME COURT
RANASINGHE, C.J., G.P.S. DE SILVA, J., AND JAMEEL, J.
S.C. APPEAL 43/87
CA (LA-SC) 8/87
CA 621/81
LT 2/15052/81
SC APPEAL 44/87
CA (LA-SC) 9/87
CA 622/81
LT 2/15053/81
NOVEMBER 09, 1988

Industrial Dispute – Gratuity – Is gratuity payable to an employee who resigns? – Payment of Gratuities Act, No. 12 of 1983, ss. 3, 5 and 6 – Computation during period before the Act.

(1) The Gratuities Act. No. 12 of 1983 certified on 18.03.83 regulates and prescribes the mode and computation of gratuity after its passage. During the period before the Act came into operation the principles governing the computation of gratuity are as follows:

   (a) A month's salary for each year of service when there has been no benefit of a Provident Fund.

   (b) Half a month's salary for each year of service as gratuity when there has been a contribution to a Provident Fund at the minimum statutory rate.

   (c) When the employer has made contributions considerably higher than the statutory rates, gratuity awards which are relatively less have been made.

(2) Gratuity is payable even on resignation and notwithstanding the fact that the workman had been contributing to a Provident Fund Scheme. The gratuity ordered must be just and equitable.

Cases referred to:

(1) *Karunaratne* v. *Appuhamy* 74 NLR 46

(2) *Employees Union* v. *CWE* 74 NLR 344

(3) *N.U.M.* v. *Scottish Tea Co. Ltd.* 78 NLR 133

(4) *Boyd Moss* v. *George Stuart & Co. Ltd.* S.C. 119/74; Supreme Court Minutes 24.03.76

(5) *Silva* v. *Southern Freighters* 74 NLR 239

(6) *Y.G. Silva* v. *A.N.C.L. Bar Association L.J.* Reports Vol. I Part III p. 87

(7) *Wickremasekera* v. *Ganegoda* 76 NLR 452

(8) *Ran Banda* v. *R.V.D.B.* 71 NLR 25

(9) *RVDB* v. *Sheriff* – S.C. Minutes of 24.11.1971

(10) *CWE* v. Superintendent Beragala Estate –S.C. Minutes of 03.02.72

(11) *U.P.W.U.* v. *Kaliappa* - Sri Lanka Labour Gazette No. 52 of 23.03.72

(12) *Mayen (Ceylon) Tea & Rubber Co. Ltd.* v. *C.E.S.U.* - S.C. 13/71: S.C. Minutes of 16.10.72

(13) *U.E.W.U.* v. *Kandiah Chetty* - S.C. 81/72: S.C. Minutes 12.02.72

(14) *C.E.S.U.* v. *Ambalamana Tea Estates Ltd.* - Sri Lanka Labour Gazette No. 13 of 23.06.72, 76 NLR 457

(15) *Peiris* v. *A.C.C. & I.W.U.* S.C. 34/72 - S.C. Minutes of 29.01.74

(16) Swadeshi Industrial Works Ltd. v. *De Silva* 77 NLR 211

(17) *H.W. Amarasuriya* v. C.F.S.: C.A. (S.C.) 254/75 Court of Appeal Minutes of 17.11.80

(18) *R.V.D.B.* v. All Ceylon R.V.D.B. & State Corporation General Employees Union et al: S.C. Application 29/83 – S.C. Minutes of 20.03.84

APPEAL from judgment of the Court of Appeal

Crossette Tambiah for appellant

D.R.P. Goonetilleke with *Sidath Sri Nandalochana* for respondent

Cur. adv. vult.

December 14, 1988

JAMEEL, J.

Mr. Nandalochana, the Applicant in S/C43/87 had been an employee of the Appellant for twenty years and had resigned his post of Marketing Manager on 31.3.81 in order to better his prospects. At the time of resignation he was drawing a salary of Rs. 4725/- a month and was a contributer to the Provident Fund. He had to his credit, at the time of resignation, a sum of Rs. 311,013/80, out of which sum of Rs. 97,409/25 had been, admittedly, the contribution made by the Employer-Appellant. The Applicant had filed action in the Labour Tribunal in December 1981 claiming gratuity, as none had been awarded to him by the Appellant.

Similarly, Mr.Wijesinghe, the Applicant in S.C. 44/87 had been an employee under the Appellant for 17 years and he too had resigned his post of Assistant Factory Manager on 1.2.81 in order to better his own prospects. He had then been in receipt of a salary of Rs. 3100/- per month. His Provident Fund account stood at Rs. 141,446/31, out

of which the Employer-Appellant's contribution had been Rs. 32,590/-. He too had been refused a gratuity payment and had thereupon gone to the Labour Tribunal in June 1981.

Of consent of parties, both cases had been taken up together on 24/8/81 at the Labour Tribunal. The questions that had arisen in each case were whether gratuity was due, and, if so, in what amount. Each party had been directed to file written submissions on these matters in each case. The employer had done so in each case. The learned President of the Labour Tribunal had made a consolidated order, rejecting their claims. Both Applicants appealed and the Court of Appeal, after due hearing, made a consolidated order granting Applicant Nandalochana Rs. 47,250/- and Applicant Wijesinghe Rs. 27,350/- as gratuity, based on a computation of HALF a months salary at termination for each year of service.

These appeals are by the employer from that decision. Leave to appeal to this Court had been granted to each of these Appellants by the Court of Appeal itself. In this Court, too, of consent, both cases were argued together and one consolidated order is being made in respect of them.

It is not without significance that each of these applicants went before the Tribunal claiming that they had retired from service when in fact they had resigned, presumably that was because there did exist at that time a measure of ambiguity and uncertainty as to whether gratuity will be available to the worker who resigns his job. Indeed the Employer in these cases, in the answer filed by him, has taken up that position, namely, that in practice no gratuity is paid to those who resign their posts vide *Karunaratne v. Appuhamy*(1), *Employees Union v. C.W.E.*(2).

After a careful analysis of the law and the reported precedents the learned President held that in the circumstances gratuity is payable even on resignation – vide *N.U.M. v. Scottish Tea Co. Ltd.*(3); *Boyd Moss v. George Stuart & Co. Ltd.*(4).

The learned President also held that gratuity was available notwithstanding the fact that the workman had been contributing to a Provident Fund Scheme. The Court of Appeal affirmed these findings and we see no reason to differ. *(Scottish Tea Co. Case -- supra)* This does reflect the current thinking on this matter. (Vide *Silva v. Southern Freighters*(5); *Y.G. de Silva v. A.N.C.L.*(6)

However, the Learned President granted no relief to either Applicant as the quantum of the Appellant's contribution to the Provident Fund was held by him to be:-

".... Almost PHENOMENAL in comparison to what an average middle grade employee could ever hope to get after a much longer period of service."

On and after 18/3/83 (the date of the certification of the Act) by Section 5 of the Payment of Gratuities Act, No. 12 of 1983 every employer in Industry who employs more than 15 workmen, shall pay to a workman on termination of his services (if he had worked for more than 5 years) a gratuity. The parenthetical clause in this section makes the question as to whether the termination had been due to an act of the employer or worker or whether it had been on retirement or on death or by operation of law or otherwise, irrelevant to the grant of gratuity.

The terms of the section itself precludes it from being treated as retroactive. Indeed, Mr. Crossette-Thambiah, who appeared for the Employer not only conceded that after the Act the resignation of a workman would be irrelevant to the consideration as to whether he is entitled to claim gratuity but he also did not seriously challenge the findings of the learned President or of the Court of Appeal that these two Applicants were entitled to claim gratuity notwithstanding the fact that they had resigned their posts. The mode of computation of gratuity is spelled out in Section 6 of the Act. For monthly rated workmen it is half a month's salary per year of service, provided that besides other matters he is not entitled to a pension under a non-contributable pension scheme. The Act does not disqualify a workman who is involved in a contributable Provident Fund. By contrast, in the case of workmen and labour on estates and agricultural lands that are specified in the Act, Section 3, grants gratuity at the rates specified therein LESS the employer's contribution to the Provident Fund if any.

An important question for decision in these appeals is the mode of evaluation of the quantum of gratuity to which each of these applicants becomes entitled. The basis will have to be in accordance with the law and practice which obtained in 1981 – viz. prior to the Gratuities Act. Mr. Crossette-Thambiah went even further and argued that, should it be found that the order of the learned President is in accordance with the law as it stood. then. neither should the Court of

Appeal have substituted, nor should this Court, substitute its discretion for that of the President, in fixing the quantum of the gratuity payable. A measure of support for this proposition could be found in the decision of Rajaratnam J. in *Wickremasekera v. Ganegoda*(7)

The facts of that case are as follows:-

In the case of *Ran Banda v. R.V.D.B.*(8) Weeramantry, J. had held that Regulation 16 framed by the Minister under the Industrial Disputes Act was ultra vires the Act and that a workman could file his application in the Labour Tribunal even after the lapse of three months of the date of the termination of his services. However, a Divisional Bench of the Supreme Court in the case of *R.V.D.B. v. Sheriff*(9) overruled that decision on 24/11/71. That Divisional Bench decision itself was later overruled by the Court of Appeal in *C.W.E. v. Superintendent, Beragala Estate* (10). In respect of all applications filed before the Labour Tribunals between 24/11/71 and 3/2/73 the law was that the time bar of three months applied to all applications to the Labour Tribunals, although the regulation was held to be ultra vires on the latter date. During that 15 months period several cases had been disposed of on the basis of the Divisional Bench ruling. The case that came up before Rajaratnam J. was (76 NLR 452(8)) for a writ to quash on order of dismissal made on 14/9/72 based on the Divisional Bench ruling. The learned Judge refused the writ on the ground that, that case had been correctly decided by the Tribunal according to the law that prevailed at the time of its decision.

What then was the law or judicial consensus in 1981? How was the quantum of gratuity, granted at the termination of services on resignation, being computed?

In some instances this gratuity was calculated at one month pay for every year of service (Vide: 1 C.A.L.R - 1 - 92).S.R. de Silva in his book "Some Concepts of Labour Law" at page 43 made reference to the case of *U.P.W.U. v. Kaliappa*(11) (the report is not available to us) published in Sri Lanka Labour Gazette No. 52 of 23/3/73 wherein the same rate was granted for the period of service not covered by Provident Fund contributions. However, in the case of *Mayen (Ceylon) Tea & Rubber Co. Ltd. v. C.E.S.U.* (12) the gratuity calculated at the rate of one month per year of service was made

subject to the deduction from it of the amount contributed by the Employer to the Provident Fund.

At page 44 of this same book there is reference to the decision of the Supreme Court in the case of *U.E.W.U. v. Kandiah Chetty*(13) wherein one month per year of service was granted for the period not covered by Provident Fund benefits, while only HALF a month or year was the basis used for the period during which the employer had made contributions to the Provident Fund. On this same page there is reference to the decision of the learned President in the case of *C.E.S.U. v. Ambalamana Tea Estate Ltd*(14) as follows:-

> ....in deciding on the quantum of gratuity that has to be paid, one factor that the Tribunal has to bear in mind is the Provident Fund contribution made by the employer.... The generally accepted standard has been to pay a month's salary for each year of service where there has been no such benefits and a half month's salary where such contributions have been made at the minimum statutory rates. Where contributions have been considerably higher it has not been unusual for awards to be relatively less, the principle followed, no doubt, being what was considered just and equitable."

A Divisional Bench of the Supreme Court endorsed the award of the Arbitrator. (76 NLR 457). In *Peiris v. ACC & IWU*(15) (Vide: page 44 of De Silva's book - supra) the Supreme Court held that the learned President of the Labour Tribunal should have deducted the E.P.F. contributions made by the Employer.

A collation of these decisions leads to the conclusions that

(a) Receipt of Provident Fund benefits does not necessarily preclude the grant of gratuity as well - See:*Swadeshi Industrial Works Ltd. v. De Silva*(16)

(b) Employer is entitled to credit of his contributions to Provident Funds.

After stating "....the true test being the adequacy of existing superannuation benefits rather than its mere existence." Mr. S.R. de Silva sums up at page 45 as follows:

"INDUSTRIAL SECTOR

(a) minimum qualifying period for gratuity....

(b) The scale of gratuity to be 1 month's gross terminal salary

for every year of service less the employer's contribution to the Provident Fund."

It must be remembered that the award would have to be just and equitable, in all the circumstances of the case.

Taking into account all the material before him the learned President decided in these two cases that neither of these Applicants should receive any further payments as the employers 'Phenomenal' contribution exceeded the gratuity that may be payable when calculated at the rate of one month's gross terminal salary as at the time of the resignation from service.

The learned President however, failed to consider the possibility of granting a gratuity payment in addition to any superannuation benefits derived from the Provident Funds. The provision of such double benefits was considered with favour in *Meyen (Ceylon) Tea & Rubber Co. Ltd. v. C.E.S.U.*(supra) wherein it was held: (Vide: S.R. De Silva's book – supra – at page 43) that, an employee who had rendered long and faithful service earns a moral right to a gratuity in addition to the Provident Fund, and that it should be paid in the absence of financial incapacity on the part of the employer to bear the double burden. The burden of establishing his inability to bear this double burden is on the employer. That would be a matter within his personal knowledge. There is no evidence in these cases that the Appellant suffers any such incapacity. As contemplated in the decision in the *Ambalamana Case,* (supra) it is not the total Provident Fund contribution that would be relevant, in quantifying the gratuity that would be payable, whenever a payment is found to be due, but whether and in that event in what sum the employer had contributed *in excess* of his statutory obligation. As rightly pointed out by the Court of Appeal there was no evidence or proof before the Tribunal as to the minimum contribution that had been due from the employer to the Provident Fund, and as a result it was not possible to compute the excess so paid. There was no denial by these workmen of the accuracy of the figures submitted by the employer as to the total contribution made to each of their Provident Fund accounts. The burden of proving such excess payments is on the employer. In the absence of such proof, the learned Judges of the Court of Appeal have ordered as gratuity payments sums calculated on the basis of half a month's salary for each year of service. A perusal of their judgment reveals that the reasoning of the President in the

Ambalamana Case (supra) had not been available to the judges in the Court of Appeal. While the decision of Ranasinghe, J. (as he then was) in the case of *H.W. Amarasuriya v. C.F.S.*(17) had been cited before the Court of Appeal in the course of the argument in these two cases, the judgment of Colin-Thomé, J. in S.C. (Application) 29/83 – C.A. 405-406, 457-507, 695-739/1979, S.C.M. 30/3/84 in *R.V.D.B. v. All Ceylon R.V.D.B. & State Corporation General Employees Union* et al(18) does not appear to have been made available to that Court. After an exhaustive analysis of the law and the case law His Lordship Justice Colin-Thomé summarised the position with regard to payment of gratuity as follows:-

(a) A month's salary for each year of service when there has been no benefit of a Provident Fund.

(b) Half a month's salary for each year of service as gratuity when there has been a contribution to a Provident Fund at the minimum statutory rate.

(c) When employer has made contributions considerably higher than the statutory rates, gratuity awards which are relatively less have been made.

We are in entire agreement with this statement of the law and practice regarding gratuity payments as it then stood. Those were also cases filed prior to 1981.

In the circumstances the grant of half a month's salary, per year of service, simplicitor, may not be 'just and equitable' in a situtation where it is admitted that the employer has contributed to the Provident Fund in excess of the statutory minimum. The Provident Fund Act 15 of 1958 and its amendments by Acts Nos. 8 of 1971 and 26 of 1981 indicate the percentages of the salary which the employer is statutorily bound to contribute to the Fund. Yet, without evidence of the salary particulars of these applicants over the years we are unable to compute exactly what has been the statutory minimum contributable from time to time. Consequently we cannot ascertain what part of the admitted contribution in each of these cases is in excess of its statutory minimum.

These two cases were filed in 1981 and it would be invidious to send them back to the Labour Tribunal for further inquiry and for computation, 8 years after they had been filed. In the circumstances we set aside the order for payment of gratuity at the rate of half month's salary, made by the Court of Appeal in each of these cases,

and substitute therefor orders for payment at the rate of a quarter month's salary for each year of service, namely, in a sum of Rs. 23,625/- to Mr. Nandalochana and a sum of Rs. 13,675/- to Mr. Wijesinghe. These monies should be deposited with the Commissioner of Labour within four weeks of today. In all the circumstances of this case each party will bear its own costs.

RANASINGHE. C.J. – I agree.

G.P.S. DE SILVA – I agree.

Order for gratuity set aside.
Amended gratuity ordered.