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**(2014) 08 GAU CK 0039**  
**In the Gauhati High Court**  
**Case No : WP (C) NOs. 467 and 1209 of 2009**

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|-----------------------------------------|------------|
| Assam Power Generation Corporation Ltd. | APPELLANT  |
| Vs                                      |            |
| The State of Assam                      | RESPONDENT |

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**Date of Decision :** 14-08-2014

**Acts Referred:**

Constitution of India, 1950 — Article 226  
Industrial Disputes Act, 1947 — Section 2(s)  
Payment of Gratuity Act, 1972 — Section 2(e), 4, 6, 7, 7(4)(a)

**Citation :** (2014) 143 FLR 397 : (2014) 3 GLD 64 : (2014) 4 GLT 262 : (2015) 1 LLJ 187

**Hon'ble Judges :** Biplab Kumar Sharma, J

**Bench :** Single Bench

**Advocate :** B.D. Das, Sr. Advocate and P. Bhowmick, Advocate for the Appellant;  
M.U. Mahmud, Advocate for the Respondent

**Final Decision :** Disposed Off

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## Judgement

Biplab Kumar Sharma, J.—Both the writ petitions by and between the same parties on the issue of entitlement or otherwise the gratuity as per the provisions of the Payment of Gratuity Act, 1972 by the Workmen said to be represented by the respondent No. 4 Union have been heard analogously and are being disposed of by this common judgment and order. While in WP(C) No. 1209/2009 the challenge is to the Annexure-1 communication dated 22/01/2009 addressed to the representative of the petitioner by the Labour Officer, Kokrajhar, the challenge in the other writ petition being WP(C) 467/2009 is to the Annexure-1, Annexure-2, Annexure-3 and Annexure-4 letters dated 16/05/2008, 12/09/2008, 05/11/2008 and 18/11/2008 addressed to the representative of the petitioner company by the Labour Officer, Kokrajhar. By the said communications, directions have been issued to the petitioner to pay gratuity amount of Rs. 5,98,752/- and Rs. 1,88,05,011/- (in total) to the workers counted as 28 and 500 respectively. According to the petitioner company, the persons referred to in the impugned communications being not its workers, they are not entitled to

receive any gratuity. Further case of the petitioner is that no direction could have been issued by the Labour Officer without first complying with the provisions of the Payment of Gratuity Act, 1972 and the Rules framed there under. Referring to the award dated 27/01/2006 passed in Reference Case No. 8/2002 and reference Case No. 6/2003 by the Labour Court of Assam at Guwahati, affirmed by this Court vide Judgment and Order dated 10/01/2007 passed in WP(C) No. 5154/2006, it is the stand of the petitioner that the impugned communications are non est in the eye of law. According to the petitioner, the matter having attained finality through the said award and the judgment of this Court, the issue cannot be re-opened on the grounds assigned in the impugned communications.

2. I have heard Mr. B.D. Das, learned senior counsel assisted by Mr. P. Bhowmick, learned counsel for the petitioner. I have also heard Mr. M.U. Mahmud, learned counsel representing respondent No. 4 and 5. None has appeared for the respondent Nos. 1, 2 and 3. I have also perused the entire materials on record.

3. In the award referred to above, the following were the issues involved.

"1. Whether the contract workers of BTPS Salakati represented by Kokrajhar Zilla Thika Shramik Union and the Shramik Parishad/Trade Union Salakati are workman as defined under Industrial Dispute Act, 1947?

2. If so, whether the termination of their services is malafide and what relief they are entitled to against alleged wrongful termination of their services."

4. Answering the said two issues, the learned Presiding Officer, Labour Court has held thus :-

"7. The evidence of both sides establish it clearly that 602 labours worked under BTPS with specific terms of contract between BTPF and their supplier. As per definition of workman u/s. 2(s) of the Industrial Disputes Act, 1947, they are all workmen. The first point of the schedule of the two references is, therefore, decided in favour of the workers.

8. The documents from Ext. A to A Y shows that BTPS had engaged contract labours for various works. It has been held by the Hon"ble Supreme Court in (2001) 7 SCC 1 that contract labours are employers of the contract and not of the principal employer. The evidence-oral and documentary adduced by both sides establishes beyond doubt that the 602 works were supplied to BTPS by contractors under specific contract. The mere fact that gratuity was paid to the contract labours directly by BTPS does prove that they were workers/employees directly under BTPS. Gratuity and other benefits were given to the contract labours as per terms and conditions of the contract itself. I am therefore unable to agree with the learned advocates Shri B.N. Sarma that the contract between BTPS and contractors was sham or camouflage. The contract between the BTPS and the contractors is legal and binding on both sides. Non renewal of the contract to engage contract labours beyond the specified period of contract does not amount to termination of services of the contract labours nor non renewal of

contract can be termed as malafide in any way. The first part of the second point of the schedule is answered in the negative against the workers. Consequently it is decided that the contract labours are not entitled to any relief."

5. The aforesaid award dated 27/01/2006 was put to challenge by filing a writ petition being WP(C) No. 5154/2006. Dismissing the writ petition vide judgment and order dated 10/01/2007, it has been held thus :-

"6. A reading of the impugned Award dated 27.1.2006 would go to show that the findings reached by the learned Labour Court that the disengagement of the concerned workmen was on account of the termination of the contracts for supply of labour, following the stoppage of power generation by the BTPS, was arrived at on due consideration of the oral and documentary evidence on record. The findings recorded in this regard in paragraph 6 and 8 of the impugned Award are pure findings of fact based on an appreciation of the evidence on record which appreciation, in the considered view of the Court, does not disclose any fundamental error so as to warrant interference of this Court under Article 226 of the Constitution. If the workmen were the employees of the contractors engaged by the BTPS and the contracts for supply of labour had to be terminated on account of stoppage of power generation, it is difficult to see how the consequential disengagement of the workmen can be termed as malafide or as to how the workmen can be held to be entitled to any relief."

6. As recorded in the said judgment and order it was urged on behalf of the workmen that contract was a sham or a pretence and therefore the workmen should be treated as employees of the Principal employer i.e. the petitioner. It was urged that the termination of the services of the workmen was wrong. However, repelling the said contention and dismissing the writ petition, this Court recorded the above quoted finding.

7. Section 2(e) of the Payment of Gratuity Act, 1972 defines the term "Employee". Section 4 makes provision for payment of gratuity. Section 6 and 7 provide for nomination and determination of amount of gratuity. As per section 7(4)(a) if there is any dispute as to the amount of gratuity payable to an employee under the Act, the employer shall deposit the same with the controlling authority. Section 7(4)(b) provides that where there is a dispute with regard to another matter or matters specified in clause 4(a), the employer or employee or any other person raising the dispute may make an application to the controlling authority for deciding the dispute. The controlling authority, shall after due enquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter in dispute.

8. Rule 7 of the Payment of Gratuity (Central) Rules, 1972 makes provision for application for gratuity. An employee who is eligible for payment of gratuity under the Act, or any person authorized, in writing shall apply, ordinarily within 30 days from the date the gratuity became payable in form "I" to the employer. Rule 11 lays down the procedure for dealing with the application for direction.

9. Referring to the aforesaid provisions of the Act and the Rules, Mr. Das, learned counsel for the petitioner submits that the Labour Officer of his own could not have determined the issue without affording an opportunity of being heard to the petitioner and for that matter its representative. On the other hand, Mr. M.U. Mahmud, learned counsel for the workmen submits that the controlling authority having decided the issue on the basis of the materials furnished to it by the workmen, there is no question of providing any further opportunity to the petitioner.

10. It is the definite case of the petitioner that the workmen in question were not the employees of the petitioner company but they were workmen under the contractor. As is evident from the award and the judgment of this Court referred to above, the termination of services of the workmen has been upheld for the reasons assigned in the said award and judgment. As to whether the workmen are entitled to gratuity or not is a matter to be decided in reference to the provisions of the aforesaid rules. Irrespective of the limitation prescribed under Rule 7 of the aforesaid Rules of 1972, I am of the considered opinion that the Workmen will be entitled to make application in the prescribed form to the controlling authority justifying their claim for gratuity. In the event of such applications being made, the said authority shall proceed with the matter in accordance with law and decide the issue taking note of all the attending facts and circumstances and in accordance with law.

11. Mr. Mahmud, learned counsel for the respondent No. 4 and 5 placed reliance on the decision of the Apex Court reported in Air India Statutory Corporation, etc. Vs. United Labour Union and others [overruled], so as to submit that the work being perennial in nature, the workmen should be deemed to be the employees under the petitioner. This issue having been answered in the award and the judgment referred to above, there is no scope to reopen the same in the instant proceeding.

12. In view of the above, the impugned communications referred to above in both the writ petitions stand interfered with granting liberty to the workmen to take recourse to the procedure laid down in the Rule 7 of the aforesaid Rules of 1972.

13. Writ petition stands disposed of, without however, any order as to costs.