(2015) 10 BOM CK 0049

In the Bombay High Court

Case No : Writ Petition No. 1237 of 2015

Changunabai Sambhaji Gaware APPELLANT

Vs

Kapus Visheshadnya, Kapus Sanshodhan Kendra and Others RESPONDENT

Date of Decision : 05-10-2015

Acts Referred:

Limitation Act, 1963 — Section 5
Payment of Gratuity Act, 1972 — Section 7, 7(4), 7(7)

Citation : (2015) 6 ABR 739 : (2016) 1 ALLMR 542

Hon'ble Judges : R.V. Ghuge, J.

Bench : Single Bench

Advocate : Shelke Avishkar S., Advocate, for the Appellant; Navandar Manish N., Advocate, for the Respondent

Final Decision : Allowed

Judgement

R.V. Ghuge, J.—Heard.

2. Rule.

3. By consent, Rule is made returnable forthwith and the petition is taken up for final disposal.

4. The petitioner is aggrieved by the judgment and order dated 18.11.2014 delivered by the Industrial Court under Section 7(7) of the Payment of Gratuity Act, 1972 ("Act of 1972"), thereby allowing Misc. PGA Delay No. 3 of 2013.

5. The petitioner submits that the Controlling Authority delivered its judgment, dated 25.2.2013 in Application Nos. 199 to 291 of 2010. All the applications were allowed and the respondent / management was directed to pay gratuity in accordance with the provisions of the Act of 1972. By communication dated 13.3.2013, the petitioner supplied the photostat copies of the judgment of the Controlling Authority to the respondents. As such, the respondents had received the copy of the judgment on 15.3.2013 as is indicated by the Inward Stamp of acknowledgment of the respondents.

6. The petitioner further submits that the respondents preferred an Appeal dated 15.10.2013 along with an application for condonation of delay, which was registered as Misc. PGA Delay No. 3 of 2013. The respondents, by the said application, dated 15.10.2013, sought extension of time under the first proviso to Section 7(7) of the Act of 1972. By the impugned order dated 18.11.2014, the said application was allowed.

7. Shri Shelke, learned Advocate submits that there is a clear prohibition under Section 7(7) read with the first proviso for entertaining any appeal beyond 120 days from the date of the receipt of the judgment of the Controlling Authority.

8. The application dated 13.3.2013, by which the copy of the judgment was served upon the respondent on 15.3.2013, was exhibited as U-9 before the Industrial Court. Specific SAY was filed by the petitioner raising the ground that 120 days will have to be computed under Section 7(7) of the Act 1972 from 15.3.2013. There is no whisper, much less reference to the SAY of the petitioner and Exhibit U-9, in the reasoning part of the impugned judgment, which has condoned the delay beyond the permitted 120 days.

9. Shri Nawandar, learned Advocate on behalf of the respondents has strenuously supported the impugned judgment. He submits that the respondents applied for a certified copy of the judgment dated 25.2.2013 on the same date. Certified copy was ready on 21.6.2013. Permission was sought from the State Government to file an appeal. After receiving the permission, the Misc. Application along with the PGA Appeal was filed on 15.10.2013 within 120 days, which expired on 18.10.2013.

10. He, therefore, submits that the Industrial Court has properly computed 120 days from 21.6.2013 and has noted that the appeal was preferred before the expiry of 120 days. He, therefore, submits that this petition deserves to be dismissed with costs.

11. I have considered the submissions of the learned Advocates. The whole issue turns upon Section 7(7) and the first proviso thereunder and the Payment of Gratuity (Central) Rules 1972 and the Payment of Gratuity (Maharashtra) Rules, 1972.

12. Section 7(7) and the two proviso read as under:-

"Section 7 -Determination of the amount of gratuity.

(1) to (6)............................

(7) Any person aggrieved by an order under sub-section (4) may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf:

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days:

Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with hi m an amount equal to the amount of gratuity required to be deposited under sub-section (4), or deposits with the appellate authority such amount."

13. It is apparent that the 60 days appeal period is to be computed from the date of receipt of the order. Further extension of 60 days is permissible under the first proviso.

14. The petitioner has served a copy of the judgment dated 25.2.2013 upon the respondents by application Exhibit U-9, dated 13.3.2013 and the respondents received the copy on 15.3.2013. As such, it cannot be over looked and the respondents do not dispute that they have received the photostat copy of the judgment dated 25.2.2013 on 15.3.2013.

15. Rule 18(3) of the Payment of Gratuity (Central) Rules, 1972 reads as under:-

" 18. Appeal.-(1)......................

(2)...............................

(3) There shall be appended to the Memorandum of appeal a certified copy of the finding of the controlling authority and direction for payment of gratuity."

The Maharashtra Rules 1972 contain Rule 18(3) which is exactly the same as above.

16. It is, therefore, necessary that the memorandum of Appeal must be accompanied with a certified copy of the findings of the Controlling Authority i.e. the judgment dated 25.2.2013. No Rule is cited by the parties to indicate that the certified copy can be dispensed with and the memorandum of appeal could be accompanied by a photostat copy of the judgment of the Controlling Authority. As such, the Appeal could be preferred along with the certified copy of the impugned judgment.

17. However, I find from the impugned judgment of the Industrial Court that the Appeal was registered on 7.11.2013 and not on 15.10.2013. The roznama from the proceedings before the Industrial Court placed on record, indicate that the documents presented on 7.11.2013 include the application for extension of time and the appeal memo and those documents are granted Exhibit Nos. C-1 to C-7. Notice at O-1 was issued on the same date.

... Dated: October 5, 2015 ...

18. It appears from the record and proceedings that though Gratuity Appeal was registered on 7.11.2013, the presentation form to the memo of the appeal indicates that the appeal was tendered on 17.10.2013 in the Registry of the

Industrial Court. Below Clause 11 on the presentation form, certain objections have been raised by the concerned Superintendent and who has mentioned the date 17.10 (should be read as 17.10.2013), below his signature.

19. I have calculated the days post receiving the certified copy of the judgment of the Controlling Authority by the respondents on 21.6.2013. The day on which the certified copy was received, will have to be excluded. The 120 days will therefore, have to be calculated from 22.6.2013, which will be as follows:-

June -9 days, July -31 days, August -31 days, September -30 days, October -19 days.

The total, therefore, will be 120 days from 22.6.2013 till 19.10.2013. On this count, the Appeal can be said to have been filed on the 118th day.

20. However, there is another angle to this case. The amount of gratuity, as was assessed by the Controlling Authority, is mandatorily required to be deposited before the Controlling Authority. The second proviso to Section 7(7) mandates that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4) or deposits with the appellate authority such amount.

21. This issue has been dealt with by the learned Division Bench of this Court in the case of Pharma Base India Pvt. Ltd. Vs. State of Maharashtra and Another, . The learned Division Bench of this Court has relied upon an earlier judgment, delivered by this Court, in the matter of J.L. Morrison India Ltd. Vs. Dy. Commissioner of Labour, Appellate Authority under the Payment of Gratuity Act, 1972, Asst. Commissioner of Labour, Controlling Authority under the Payment of Gratuity Act, 1972 and Government of Maharashtra, .

22. It would be apposite to reproduce the relevant facts and conclusions of the learned Division Bench in the Pharma Base judgment (supra), which are as under:-

"3. By the order dated October 5, 2006 the controlling Authority under the Payment of Gratuity Act, 1972 passed an order thereby directing the petitioner Company to pay respondent No. 2 an amount of Rs. 13,75,000/-by way and as a gratuity. The petitioner challenged the aforesaid order before the Appellate Authority by filing an Appeal on December 13, 2006. However, the petitioner deposited the amount of gratuity with the Appellate Authority on March 12, 2007. Respondent No. 2 raised preliminary objection as to the maintainability of the Appeal on the ground of limitation. The petitioner filed reply on May 29, 2007 to this Application. The Appellate authority by its order dated August 9, 2007 upheld the preliminary objection raised by the respondent No. 2 and held that the petitioner has filed the Appeal after the expiration of limitation period of 120 days. Consequently, the petitioner''s Appeal came to be dismissed.

4. The petitioner being aggrieved, preferred above said Writ Petition No. 1946/2007 before the learned single Judge of this Court. However, by an order dated November 2, 2007 the learned single Judge confirmed the order passed by the Appellate Authority and consequently dismissed the petitioner''s Writ Petition. This order as stated above is under challenge in the present Appeal.

5. The following facts are not disputed. The Controlling Authority passed an order on October 5, 2006 directing the petitioner to pay an amount of Rs. 13,75,000/- to the respondent No. 2 by way and as of gratuity. The copy of this order was received by the petitioner on October 27, 2006. The petitioner applied and received the certified copies on the same day i.e. on November 10, 2006. The petitioner''s Appeal sent by speed post was received in the office of the Appellate Authority on December 13, 2006 and the petitioner made deposit of gratuity amount before the Appellate Authority by way of D.D. on March 12, 2007.

6. The submissions of Mr. Wasnik, the learned Counsel appearing for the appellant, are threefold. Firstly, that the Appeal being filed on December 13, 2006, the same is well within the period of limitation as contemplated under Section 7(7) of the Payment of Gratuity Act, 1972. Secondly, the requirement of compulsory deposit as contemplated under Proviso of Section 7(7) is at the time of admission by the Appeal and not at the time of preferring an Appeal and thirdly, even it is assumed that the Appeal is filed on March 12, 2007 on which date, deposit was made, in that case also Appeal is within limitation inasmuch as the limitation would start to run from the date of receipt of the certified copy of the order. Apart from these submissions, Mr. Wasnik also submitted that it was not open for the Appellate authority to go into the questions of limitation and the Appeal ought to have been heard on merits in view of the order dated April 23, 2007 passed in Writ Petition No. 1946/2007.

7. Mr. Wasnik also relied upon the following judgments.

1. Madurai District Central Co-operative Bank, Ltd., Madurai v. Appellate Authority under Payment of Gratuity Act, Madurai and Ors.;

2. L. Palaniswamy Vs. The Appellate Authority under the Payment of Gratuity Act (The Deputy Commissioner of Labour), Coimbatore and another, ;

3. Sahkari Ganna Vikas Samiti Ltd. Vs. Controlling Authority under Payment of Wages Act, ;

4. Janpad Panchayat Masturi, Bilaspur v. Appellate Authority and Dy. Labour Comm. and Ors.; 1998 III LLJ (Suppl) 163 (MP),

5. Malabar Spinning & Weaving Mill v. Narayanan Nair 1994 III LLJ (Suppl) 323 (Kerala),

6. Commissioner, Edapadi Municipality Vs. Joint Commissioner of Labour, Appellate Authority under the Payment of Gratuity Act and Others, ;

7. Shaik Kaisar and Others Vs. Forbes Gokak Ltd. and Others, ;

8. Sunderlal Laxman Mahyavanshi Vs. N.T.C. (MN) Ltd. and Another, ;

9. Standard Stonewares and Tiles Vs. Appellate Authority, ;

8. Per contra Ms. Purav, the learned Counsel appearing for respondent No. 2. supported the order of Appellate Authority as well as that of learned single Judge in the aforesaid Writ Petition. She submitted that the limitation would start to run from the date of receipt of the order and not from the date of receipt of the Certified copy as certified copy was received within one day. She further submitted that the petitioner could not have been preferred an appeal without compliance with the provisions of proviso 2 of Section 7(7) which was admittedly complied on March 12, 2007 and therefore, it could not be said that the Appeal was preferred within a period of limitation. She lastly submitted that the Appellate Authority has no powers to condone the delay and therefore, the Appeal was rightly rejected. In this regard, she relied upon the Division Bench judgment in J.L. Morrison India Ltd. Vs. Dy. Commissioner of Labour, Appellate Authority under the Payment of Gratuity Act, 1972, Asst. Commissioner of Labour, Controlling Authority under the Payment of Gratuity Act, 1972 and Government of Maharashtra, .

9...............................

10. The plain reading of above said proviso will reveal that any person aggrieved by an order, under sub-clause 4 of Section 7 , may within 60 days from the receipt of the order, prefer an Appeal to the Appellate Authority. However, the Appellate Authority is at liberty, if a sufficient cause is shown, to extend the period of 60 days for further period of 60 days. The Second proviso of Section 7(7) provides that no Appeal by an employer shall be admitted unless, at the time of preferring an appeal, the appellant either produce a certificate of controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity, required to be deposited under Section 7(4) with the Appellate Authority or deposit with the Appellate Authority such amount. Thus, this proviso has imposed fetter on the employers right to file an Appeal. It is amply clear, that employer is obliged to deposit the amount or produce the certificate of the controlling authority as the case may be at the time of preferring an Appeal.

11. In the background of above legal provisions, now let us consider the facts of the present case. There is no dispute of the fact that the petitioner received copy of the order of controlling authority on October 27, 2006. There is also no dispute that petitioner applied for the certified copy and received the same on November 10, 2006. In view of the provisions of sub-section 7 of Section 7 , limitation would start to run from the date of receipt of the order and in this case limitation would start from October 27, 2007. We do not find any substances in the contention of the learned Counsel appearing for the petitioner that limitation would start to run from the date of receipt of the certified copy. The petitioner from October 27, 2006 to November 10, 2006 did not apply for certified copy.

For the first time the Certified Copy was applied on November 10, 2006 and the same was delivered to him on the same day. Therefore, at the most one day can be excluded which required to obtain Certified Copy while computing of period of limitation of either 60 days or further extended period of 60 days. The petitioner sent Appeal by speed post which was received by the office of the Appellate Authority on December 13, 2006. However, along with this Appeal, petitioner neither produced the certificate of the controlling authority to the effect that they have deposited with them an amount equal to the gratuity required to be deposited under sub-section 4 of Section 7 nor deposited such amount with the Appellate Authority. In our view, if the petitioner wanted to challenge the order of controlling authority, in that case, he was duty bound to produce the certificate or deposit the amount as the case may be, at the time of preferring an Appeal. Though the above dates show that the petitioners preferred an appeal within a period of 120 days, mandatory deposit as contemplated under second proviso of Section 7(7) was not made within a period of 120 days. There is no dispute that this deposit was made by the petitioner on March 12, 2007. Precondition of deposit at the time of preferring an Appeal being mandatory, we are of the view that it is to be presumed that the petitioner filed Appeal only on March 12, 2007.

12. Since the petitioner received order of the controlling authority on October 27, 2006, his appeal is beyond the period of 120 days, even if it granted the benefit of exclusion of time required for obtaining certified copies. The issue before the Division Bench in J.L. Morrison India Ltd. v. Deputy Commissioner of Labour and Ors. (supra) was whether the Appellate Authority under the payment of Gratuity Act, 1972 can entertain the Appeal beyond 120 days from the date of receipt of the order? After examining several judgments including that of Apex Court, Division Bench concluded that the Appellate authority under the said Act cannot entertain the Appeal beyond 120 days from the date of receipt of the order. The Division Bench also held that Section 5 of the Limitation Act would have no Application, in this regard. In the facts and circumstances mentioned above, we are of the clear view that the Appellate Authority as well as the learned single Judge of this Court rightly upheld the respondent No. 2''s preliminary objection regarding maintainability of the Appeal and there is no reason to interfere in the said findings.

13. Now, we shall consider the petitioner''s submission in this regard. So far as the first submission that the Appeal was filed on December 13, 2006 and therefore, it was well within 120 days, is concerned, we find no merit. On December 13, 2006, the appellant has neither produced certificate of controlling authority to the effect that they have deposited with him an amount equal to an amount of gratuity required to be deposited under Section 7(4) nor deposited the said amount with the Appellate Authority. In view of the 2nd proviso or Section 7(7) , the petitioner''s Appeal cannot be said to have been filed on December 13, 2006, in the absence of production of certificate of controlling authority or deposit of an amount of gratuity. The petitioner deposited the amount for the first time with Appellate Authority on March 12, 2007 and therefore, it is to be

presumed that the petitioner filed an Appeal on March 12, 2007 which is beyond the period of 120 days.

14. The petitioners second submission namely the production of certificate from the controlling authority or deposit of the amount of gratuity as contemplated under 2nd proviso of Section 7(7) required to be complied with at the time of admission of the Appeal and not at the time of institution of Appeal also devoid of merit, in view of the specific provisions of 2nd proviso of Section 7(7) that the above said Certificate is to be produced or deposit is to be made at the time of "preferring the Appeal."

23. It is, therefore, apparent that the learned Division Bench has concluded that if the appellant desired to challenge the order of the controlling authority, he was duty bound to either produce the certificate from the controlling authority or deposit the said amount before the appellate authority at the time of preferring an appeal. It was, therefore, held that though the petitioners preferred an appeal within a period of 120 days, the mandatory deposit as contemplated under the second proviso to Section 7(7) was not made along with the tendering of the appeal or within the period of 120 days.

24. In the J.L. Morrison''s case (supra), the learned Division Bench of this Court has held that the appellate authority cannot entertain the appeal beyond 120 days from the date of receipt of the order. It was further held that Section 5 of the Limitation Act would have no application in this respect. The appeal beyond 120 days along with the receipt or depositing of the amount was not maintainable.

25. In the instant case, though the appeal was tendered on 17.10.2013 and the 120 days expired after 19.10.2013, the respondent deposited the amount under the second proviso to Section 7(7) before the appellate authority on 31.10.2013 after the Industrial Court permitted it to deposit the said amount.

26. It is, therefore, apparent that the appeal preferred by the respondent was beyond limitation of 120 days in the light of the ratio laid down by the learned Division Bench of this Court in the Pharma Base judgment (supra).

27. Shri Shelke, learned Advocate has also canvassed that this Court must deal with the issue of the petitioners getting their certified copy within three weeks from the date of the judgment of the controlling authority dated 25.2.2013 and having served a photostat copy of the certified copy on the respondent on 15.3.2013. Therefore, considering the ratio laid down in the J.L. Morrison''s judgment (supra), the limitation period of 120 days shall be computed from 16.3.2013.

28. I find from the judgment of the learned Division Bench of this Court in the J.L. Morrison''s case (supra), that Rule 18(3) mandating filing of a certified copy of the judgment of the controlling authority, along with the memorandum of appeal under the Payment of Gratuity (Maharashtra) Rules, 1972 and the

corresponding Rule 18(3) of the Payment of Gratuity (Central) Rules, 1972 were not cited before the learned Division Bench. However, I do not intend to deal with this issue in this judgment for the reason that the appeal preferred by the respondent is barred in the light of the ratio laid down by the learned Division Bench of this Court in the Pharma Base judgment (supra).

29. I find from the impugned judgment of the Industrial Court, dated 18.11.2014 that the above factors were neither canvassed nor has the Industrial Court considered the Maharashtra Rules and the Central Rules of 1972. Similarly, the judgment of the learned Division Bench of this Court in the Pharma Base case (supra) was also not brought to the notice of the Industrial Court.

30. In the light of the above, this petition is allowed.

31. The impugned judgment of the Industrial Court dated 18.11.2014 is quashed and set aside. Misc. Application (PGA) Delay No. 3 of 2013 stands dismissed. In the event, the appeal has been registered by the Industrial Court, the same does not survive and shall stand disposed off.

32. Rule is, therefore, made absolute in the above terms.

