

(2012) 09 MAD CK 0024

In the Madras High Court

Case No : W.A. No's. 3825 of 2003 and 993, 994 and 2040 of 2004 and W.P. No. 15497 of 2002

E. Gopal

APPELLANT

Vs

Arulmigu Dhandayuthapaniswamy Temple, The Appellate Authority Payment of Gratuity Act/Joint Commissioner of Labour and Competent Authority, Under Payment of Gratuity Act, Assistant Commissioner of Labour
D. Renganathan and Others Vs The Commissioner, H.R. and C.E. Administration and 2 Others
Arulmighu Sankaranarayanawamy Devasthanam Vs S. Srinivasan Legal Heir of S. Alamelu Ammal, The Deputy Commissioner of Labour/Appellate Authority (Under the Payment of Gratuity Act) and The Assistant Commissioner of Labour (Controlling Authority under the Payment of Gratuity Act)

RESPONDENT

Date of Decision : 17-09-2012

Acts Referred:

Constitution of India, 1950 — Article 246(2), 254, 254(2)
Payment of Gratuity Act, 1972 — Section 1(3), 1(3)(a), 1(3)(b), 14, 2(3)
Payment of Wages Act, 1936 — Section 2(ii)(g)
Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 — Section 116

Citation : (2013) 2 LLN 709 : (2013) 2 LW 97 : (2013) 3 SCT 789

Hon'ble Judges : M. Venugopal, J;Elipse Dharma Rao, J;Darmar Murugesan, J

Bench : Full Bench

Advocate : Silambanan, for Mr. N. Umapathy in WA. No. 3825/2003, Ms. G. Thilakavathi in WA. Nos. 993 and 994/2003 and Mr. P. Gopalan in WA. No. 2040/2004 and WP. No. 15497/2002, for the Appellant; A. Navaneetha Krishnan, Advocate General Assisted by Mr. S. Kandasamy, Spl. Govt. Pleader (HR and CE) for Respondent-State, Mr. Venkatachalapathy, for Mr. M. Sriram for Respondent-1 in WA. Nos. 993 and 994/03 and Mr. P. Gopalan for Respondent-2 in WA. Nos. 993 and 994/2003, for the Respondent

Judgement

Elipse Dharma Rao, J.—Learned Division Bench has raised some doubt regarding the applicability of the ratio of a Division Bench decision

of the Madras High Court in W.A. No. 2626 of 2002, dated 2.9.2008 (Tiruchendur Arulmigu Subramaniasamy Kovil Oivupetra Paniyalargal

Sangam v. Executive Officer, Arulmigu Subramaniasamy Devasthanam, Tiruchendur) in the light of the law laid down by the Hon''ble Supreme

Court in State of Punjab Vs. Labour Court Jullunder and Others, which was followed by the earlier Division Bench in The Management of S.I.E.T.

Women''s College, Madras Vs. Mohamed Ibrahim and Others and referred the matter to a Larger Bench by observing as follows:-

20. The decision in W.A. No. 2626 of 2002 (supra) may have to be reconsidered afresh with regard to the construction of Section 1(3)(b) of the

Act in the light of the law laid down in State of Punjab Vs. Labour Court Jullunder and Others, which has been followed by the earlier Division

Bench in The Management of S.I.E.T. Women''s College, Madras Vs. Mohamed Ibrahim and Others We are of the opinion that the matter should

be heard and decided by a Larger Bench.

Thereafter, the present Full Bench has been constituted by the Honourable the Chief Justice.

The precise question to be answered is whether a ""religious institution/temple"" will come within the purview of Section 1(3)(b) of the Payment of

Gratuity Act in the light of the law laid down by the Hon''ble Supreme Court in State of Punjab Vs. Labour Court Jullunder and Others, If this

question is decided, the other related questions relating to applicability of Article 254(2) of the Constitution and whether the provisions of the Tamil

Nadu Hindu Religious Institutions (Officers and Servants) Service Rules, 1964 in respect of payment of gratuity is repugnant to the provisions of

the Payment of Gratuity Act, 1972, can be answered.

2. Before considering the aforesaid question, it would be appropriate to notice the relevant statutory provisions contained in the Payment of

Gratuity Act, 1972, and the Tamil Nadu Hindu Religious Institutions (Officers and Servants) Service Rules 1964.

2.1 The Payment of Gratuity Act, 1972 (39 of 1972) came into force on 16th September, 1972. In order to ensure uniform pattern of payment of

gratuity to the employees throughout the country and to avoid different treatment to the employees of establishments, the Legislature thought it fit to

enact a Central law on the subject and that is how the Payment of Gratuity Act,

1972 came into existence.

2.2 The Statement of Objects and Reasons for enacting the Act was to provide for a scheme for the payment of gratuity to employees engaged in

factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental

thereto. The payment of gratuity is a kind of retiral benefit like pension, provident fund, etc., and it is a gift, especially for services rendered or

return for favours received. One should not forget that for the wage-earning population, when the worker becomes old or infirm, as security of

income, the payment of gratuity assumes great importance. It is a gratuitous payment given to an employee on discharge, superannuation or death.

2.3 As per Section 1(3)(a), the Act shall apply to every factory, mine, oilfield, plantation, port and railway company. According to Section 1(3)

(b), the Act shall apply to every shop or establishment within the meaning of any law for the time being in force in relation to shops and

establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months.

2.4 Section 2(e) defines "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such

employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine oilfield,

plantation, port, railway company, shop or other establishment, to which this Act applies, but does not include any such person who holds a post

under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity.

2.5 In order to ascertain the meaning of shop or establishment as stated in 1(3) of the Act, one has to go by the meaning of any law for the time

being in force in relation to shops and establishments in a State. In the State of Tamil Nadu, the Act for time being in force in relation to shops and

establishments is "The Tamil Nadu Shops and Establishments Act, 1947 (Act XXXVI of 1947). This Act has been enacted for regulation of

conditions of work in shops, commercial establishments, restaurants, theatres and other establishments. Section 2(3) of this Act defines

commercial establishment" means an establishment which is not a shop but which carries on the business of advertising, commission, forwarding or

commercial agency, or which is a clerical department of a factory or industrial undertaking or which is an insurance company, joint stock company,

bank, broker's office or exchange and includes such other establishment as the State Government may by notification declare to be a commercial

establishment for the purposes of this Act.

2.6 Section 2(6) defines ""establishment"" means a shop, commercial establishment, restaurant, eating-house, residential hotel, theatre or any place

of public amusement or entertainment and includes such establishment as the State Government may by notification declare to be an establishment

for the purposes of this Act. u/s 4, the Act provides exemption to certain establishments and it shall not apply to the persons employed in any

establishment in a position of management, establishments in bazaars in places where fairs or festivals are held temporarily for a period not

exceeding fifteen days at a time, etc.. The State Government is empowered u/s 7, to exempt either permanently or for any specified period, any

establishment or person from all or any of the provisions of this Act, by notification.

2.7 Section 2(c) of the Tamil Nadu Payment of Subsistence Allowance Act, 1981 defines the ""establishment"" in the following manner:-

(c) ""Establishment"" means any place where any industry, trade, business, undertaking, manufacture, occupation or service is carried on, and with

respect to which the executive power of the State extends but does not include -

....

2.8 Rule 26 of the Tamil Nadu Hindu Religious Institutions (Officers and servants) Service Rules, 1964 deals with Gratuity payable to the

employees of the Religious Institutions. Rule 26 is as follows

26. Gratuity.- Even non-hereditary officer or servant who retires, after completing ten years of service in a religious institution included in the list

published under Sec. 48 of the Act, shall become eligible for a gratuity at the rate of half a month's salary for every completed year of service

subject to a maximum of 15 month's salary.

Provided that this rule shall not apply to any such institution where the Contributory Provident Fund Scheme is in force.

Explanation.-(1) Fraction of a year equal to six months and above shall be treated as completed years.

(2) "Retirement" for this purpose shall mean retirement on superannuation or after completing twenty-five years of service and shall not include

cessation of service on resignation or as a result of disciplinary action.

(3) Salary for the purpose of this rule shall mean the average monthly salary excluding the Dearness and other Allowances drawn during the last

twelve months of service.

3. By placing reliance on the aforesaid statutory provisions of law, Mr. S. Silambanan, the learned Senior Counsel appearing for the appellant in

W.A. No. 3825 of 2004 would mainly contend that ""Religious Institution"" or ""Temple"" will come under the purview of ""establishment"" as

contemplated under the Tamil Nadu Shops and Establishments Act, 1947.

4. In order to appreciate the aforesaid contention, which was strongly refuted by the other side, one has to primarily go by the decisions of the

Court.

5. In support of their contention, on the side of the Appellants, strong reliance was placed on the following decisions amongst various other

decisions:-

1. Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others,

2. State of Punjab Vs. Labour Court Jullunder and Others,

3 Administrator, Shri Jagannath Temple Vs. Jagannath Padhi and Others,

4. 1992 Writ L.R. 155 (The Management of the SIET Women's College represented by the Secretary v. Mohamed Ibrahim & others)

5. The Management of Sri. Venkatramana Temple and Sri. Hale Mariyamma Temple Vs. The Deputy Labour Commissioner and The Appellate

Authority under the Payment of Gratuity Act, 1972, Hassan Region, The Assistant Labour Commissioner and Controlling Authority under the

Payment of Gratuity Act, 1972 and K. Vishwanatha Shenoy,

7. On the other hand, the learned Advocate General appearing for the State and the learned Senior Counsel appearing for the Respondents placed

strong reliance on the following decisions:-

1 State of Andhra Pradesh Vs. Bhramaramba Mallikarjuna Swamy Devasthanam,

2. Narayanan Naboodiri and Others Vs. Cochin Devaswom Board and Another,

3. Tiruchendur Arulmigu Subramaniasamy Kovil Oivupetra Paniyalargal Sangam

(Reg. No.96/98) Tiruchendur Vs. The Executive Officer,

Arulmigu Subramaniaswamy Devasthanam, Tiruchendur, Tuticorin District

7. First we can go through the decisions relied on the side of the appellants. In Bangalore Water Supply & Sewerage Board (cited above), the

Hon"ble Supreme Court while holding that the educational institution can be and is an industry, went further to probe into the question as to

whether the charitable institutions could also be considered as industries. While answering the aforesaid question, the Hon"ble Supreme Court

observed as follows:-

Are charitable institutions industries?

102. Can charity be "industry"? This paradox can be unlocked only by examining the nature of the activity of the charity, for there are charities and

charities. The grammar of labour law in a pluralist society tells us that the worker is concerned with wages and conditions of service, the employer

with output and economies and the community with peace, production and stream of supply. This complex of work, wealth and happiness, firmly

grasped, will dissolve the dilemma of the law bearing on charitable enterprises. Charity is free: industry is business. Then how? A lay look may

scare; a legal look will see; a social look will see through a hiatus inevitable in a sophisticated society with organizational diversity and motivational

dexterity.

103. If we mull over the major decisions, we get a hang of the basic structure of "industry" in its legal anatomy. Bed rocked on the ground norms,

we must analyze the elements of charitable economic enterprises, established and maintained for satisfying human wants. Easily, three broad

categories emerge; more may exist. The charitable element enlivens the operations at different levels in these patterns and the legal consequences

are different, viewed from the angle of "industry". For income tax purposes, Trusts Act or company law or registration law or penal code

requirements the examination will be different. We are concerned with a benignant disposition towards workmen and a trichotomy of charitable

enterprises run for producing and/or supplying goods and services, organized systematically and employing workmen, is scientific.

104. The first is one where the enterprise, like any other, yields profits but they are siphoned off for altruistic objects. The second is one where the

institution makes no profit but hires the services of employees as in other like businesses but the goods and services, which are the output, are made available, at low or no cost, to the indigent needy who are priced out of the market. The third is where the establishment is oriented on a humane mission fulfilled by men who work, not because they are paid wages, but because they share the passion for the cause and derive job satisfaction from their contribution. The first two are industries, the third not. What is the test of identity whereby these institutions with eleemosynary inspiration fall or do not fall under the definition of industry?

7.1 Pausing for a moment, one has to see now whether the religious institution in the present case can be termed as industry as defined by the

Hon"ble Supreme Court in the aforesaid decision. From the activities carried on by the temple in the present case, admittedly, it will not fall under

the first category as it was not an enterprise, like any other, yields profits, but siphoned off for altruistic objects. Certainly the Institution will also

not fall under the third category, because when the employees share the passion for the cause and derive job satisfaction from their contribution,

the question of approaching the Court would certainly not arise and this position is amply made clear by the Hon"ble Supreme Court in the coming

paragraphs. Therefore, we have to see whether the present institution will fall under the second category or not, for which one has to go through

the materials on record.

7.2 The Hon"ble Supreme Court has further proceeded to delve in detail of the aforesaid three categories of industries in the following words:-

105. All industries are organized, systematic activity. Charitable adventures which do not possess this feature, of course, are not industries.

Sporadic or fugitive strokes of charity do not become industries. All three philanthropic entities, we have itemised, fall for consideration only if they

involve cooperation between employers and employees to produce and/or supply goods and/or services. We assume, all three do. The crucial

difference is over the presence of charity in the quasi-business nature of the activity. Shri Tarkunde, based on Safdarjung submits that, ex

hypothesi, charity frustrates commerciality and thereby deprives it of the character of industry.

106. It is common ground that the first category of charities is disqualified for

exemption. If a business is run for production and or supply of goods and services with an eye on profit, it is plainly an industry. The fact that the whole or substantial part of the profits so earned is diverted for purely charitable purposes does not affect the nature of the economic activity which involves the cooperation of employer and employee and results in the production of goods and services. The workers are not concerned about the destination of the profits. They work and receive wages. They are treated like any other workmen in any like industry. All the features of an industry, as spelt out from the definition by the decisions of this Court, are fully present in these charitable businesses. In short, they are industries. The application of the income for philanthropic purposes, instead of filling private coffers, makes no difference either to the employees or to the character of the activities. Good Samaritans can be clever industrialists.

If a philanthropic devotion is the basis for the charitable foundation or establishment, the institution is headed by one who whole-heartedly dedicates himself for the mission and pursues it with passion, attracts others into the institution, not for wages but for sharing in the cause and its fulfillment, then the undertaking is not "industrial". Not that the presence of charitable impulse extricates the institution from the definition in Section 2(j) but that there is no economic relationship such as is found in trade or business between the head who employs and the others who emotively flock to render service. In one sense, there are no employers and employees but crusaders all. In another sense, there is no wage basis for the employment but voluntary participation in the production, inspired by lofty ideals and unmindful of remuneration, service conditions and the like.

Supposing there is an Ashram or Order with a guru or other head. Let us further assume that there is a band of disciples, devotees or priestly subordinates in the Order, gathered together for prayers, ascetic practices, bhajans, meditation and worship. Supposing, further, that outsiders are also invited daily or occasionally, to share in the spiritual proceedings. And, let us assume that all the inmates of the Ashram and members of the Order, invitees, guests and other outside participants are fed, accommodated and looked after by the institution. In such a case, as often happens, the cooking and the cleaning, the bed-making and service, may often be done, at least substantially by the Ashramites themselves. They may chant

in spiritual ecstasy even as material goods and services are made and served. They may affectionately look after the guests, and, all this they may do, not for wages but for the chance to propitiate the Master, work selflessly and acquire spiritual grace. It may well be that they may have surrendered their lucrative employment to come into the holy institution. It may also be that they take some small pocket money from the donations or takings of the institution. Nay more; there may be a few scavengers and servants, a part-time auditor or accountant employed on wages. If the substantial number of participants in making available goods and services, if the substantive nature of the work, as distinguished from trivial items, is rendered by voluntary wage-less sishyas, it is impossible to designate the institution as an industry, notwithstanding a marginal few who are employed on a regular basis for hire. The reason is that in the crucial, substantial and substantive aspects of institutional life the nature of the relations between the participants is non-industrial.

(Emphasis added)

8. In the second cited decision viz., State of Punjab Vs. Labour Court Jullunder and Others, , the Hon"ble Supreme Court had an occasion to deal with the aspect of Section 1(3)(b) of the Payment of Gratuity Act and, while determining the applicability of the ""law"" defined in the said section, it proceeded to observe as follows:-

3...Section 1(3)(b) speaks of "any law for the time being in force in relation to shops and establishments in a State". There can be no dispute that the Payment of Wages Act is in force in the State of Punjab. Then, it is submitted, the Payment of Wages Act is not a law in relation to "shops and establishments". As to that, the Payment of Wages Act is a statute which, while it may not relate to shops, relates to a class of establishments, that is to say, industrial establishments. But, it is contended, the law referred to u/s 1(3)(b) must be a law which relates to both shops and establishments, such as the Punjab Shops and Commercial Establishments Act, 1958. It is difficult to accept that contention because there is no warrant for so limiting the meaning of the expression "law" in Section 1(3)(b). The expression is comprehensive in its scope, and can mean a law in relation to shops as well as, separately, a law in relation to establishments, or a law in relation to shops and commercial establishments and a law in

relation to non-commercial establishments. Had Section 1(3)(b) intended to refer to a single enactment, surely the appellant would have been able

to point to such a statute, that is to say, a statute relating to shops and establishments, both commercial and non-commercial. The Punjab Shops

and Commercial Establishments Act does not relate to all kinds of establishments. Besides shops, it relates to commercial establishments alone.

Had the intention of Parliament been, when enacting Section 1(3)(b), to refer to a law relating to commercial establishments, it would not have left

the expression "establishments" unqualified. We have carefully examined the various provisions of the Payment of Gratuity Act, and we are unable

to discern any reason for giving the limited meaning to Section 1(3)(b) urged before us on behalf of the appellant. Section 1(3)(b) applies to every

establishment within the meaning of any law for the time being in force in relation to establishments in a State. Such an establishment would include

an industrial establishment within the meaning of Section 2(ii)(g) of the Payment of Wages Act.

9. In Shri Jagannath Temple's case, a Division Bench of Orissa High Court by going one step further what was stated in State of Punjab Vs.

Labour Court Jullunder and Others, gave a well constructed definition for the term ""establishment"". The short but interesting question which fall for

consideration in the said case was relating to applicability of the provisions of the Payment of Gratuity Act, 1972 to the employees of Shri

Jagannath Temple. In that context, while answering the question whether the term ""establishment"" as defined in any law operating in the State

includes within its ambit ""Temple"", the Division Bench proceeded to observe as follows:-

3...The authorities under the Act have observed that the Industrial Disputes Act and the statute relating to shops and commercial establishments

include ""Temple Trust"" and therefore, the Temple is included therein. It would be relevant at this stage to refer to a decision of this Court reported

in Gopi Chand Agarwalla Vs. State of Orissa and Others, , wherein the question whether deity is an establishment or an undertaking under the

Orissa Prevention of Land Encroachment Act came up for consideration and it was held that deity is neither an establishment nor an undertaking

within the meaning of that Act. It was observed that the word ""establishment"" was not defined in the concerned statute and therefore to be assigned

the commonsense meaning; it is difficult to conceive that a religious institution like a Hindu temple can constitute an establishment in the sense the

words have been used in Section 2(e) of the Orissa Prevention of Land Encroachment Act, 1972.

Ultimately, the Division Bench held that it would be unconscionable to keep temple out of the purview of the Act, more particularly when the low paid employees have served the temple for a very long span of time.

10. In The Management of SIET Women's College case (supra), the question posed before the Division Bench of this Court was whether the

provisions of the Payment of Gratuity Act, 1972 are applicable to the minority educational institution in question. The Division Bench by

considering all the earlier decisions of the Hon'ble Supreme Court holding the field and the decisions of various High Courts came to a conclusion

that the minority educational institution is also an establishment. While refuting the contention raised by the Management to the effect that the law

referred to in Section 1(3)(b) of the Act should be a law already in force in the concerned State and not any law which comes into force

subsequently, the Division Bench observed as follows:-

5... We do not agree with this contention. The question has to be decided only when it arises before the Court. If at the time when the question

arises before the Court for consideration, there is a law in force in relation to shops or establishments in a state, then the Act will apply to all shops

and establishments within the meaning of such law. There is no necessity for the relevant law to have been in force already when the Act was

passed in 1972.

11. In Sri Venkataramana Temple and Sri Hale Mariyamma Temple's case, the contention of the temple was that the Payment of Gratuity Act was

not applicable to the employees/petitioners since they were not engaged in any business, trade or profession and hence cannot be termed as an

establishment"" under the Payment of Gratuity Act. It was their further contention that the temple being governed under the provisions of the

Karnataka Hindu Religious Institutions and Charitable Endowments Act, any claim for gratuity or service benefits could have been raised only

under the provisions of that Act and the authorities under the Payment of Gratuity Act would have no jurisdiction. Learned single Judge of the

Karnataka High Court by relying on the decisions of the Hon'ble Supreme Court in Delhi Cloth and General Mills Co., Ltd. Vs. Workmen and

Others etc., and The Indian Hume Pipe Co. Ltd. Vs. The Workmen and Another, observed as follows:-

12. On these rival contentions and on a further examination of the case-law, it is clear that the word "establishment" in Section 1(3)(b) of the

Payment of Gratuity Act, 1972 is not to be restricted as referring to "commercial establishments" alone. The Act has been held to apply even to

institutions which were exempted under the Shops and Establishments Act (See: Principal, Bhartiya Mahavidyalaya and Another Vs. Ramakrishna

Wasudeo Lahudkar, . There is no doubt that a liberal construction has to be given to the expression and any institution or organisation where

systematic activity is carried on, by employing ten or more persons, would fall within the ambit of the provision.

13. In a temple, the main activity of facilitating devotees to offer prayers, requires the employment of personnel who render service just as they

would in any other establishment. The circumstance that the profit motive is absent, in the activity in which the institution is engaged, is not material.

The petitioner-temples would hence fall within the purview of Section 1(3)(b) of the Act. The impugned orders cannot be said to be without

jurisdiction.

(Emphasis added)

12. Before coming to a conclusion as to whether the temple would come under the term "establishment" as stated in the aforesaid decisions, it is

appropriate to examine the decisions relied on by the other side.

13. Learned Senior Counsel has placed strong reliance on the decision of a Division Bench of the Andhra Pradesh in Sri Bhramaramba

Mallikarjuna Swamy Devasthanam's case (cited supra) to establish that a religious or charitable institution would not come under the purview of

business/commercial activity. The said case arose under the Andhra Pradesh General Sales Tax Act, 1957. The Sales Tax Department sought to

levy tax on sales of food and drink in the canteens run by Devasthanam, on the sales of motor parts as scrap and on sales of human hair by

contending that though the Devasthanam may not be carrying on in the main any business activity, running of canteen being a business activity

where food is sold for consideration to those who visit the canteen, sales tax is attracted. The counter contention of the Devasthanam was that the

Devasthanam being a religious and charitable institution and the predominant activities are nothing but religious and charitable in nature and,

therefore, merely because it is catering to the needs of pilgrims who come over to Devasthanam for the purpose of having darshan and for whose

facility the canteen is run, wherein eatables are supplied for reasonable prices, the Devasthanam cannot be termed as a dealer and such activity

cannot be termed as business activity within the meaning of the Andhra Pradesh General Sales Tax Act. The Division Bench by placing reliance on

various decisions held as follows:-

Now, bearing in mind the above principles, when we come to the incidental activity of the assessee-Devasthanam, viz., running of the canteen

wherein eatables are sold to the pilgrims, it is clear that the main object of the assessee-Devasthanam is neither commercial nor trading in nature

and secondly the running of a canteen for the supply of foodstuffs to the visiting pilgrims or devotees is to extend the facilities at reasonable prices,

which has, in our judgment, the bearing of functional integrality and, therefore, though such activity by itself constitutes business activity but it must

escape sales tax because of the second principle as enumerated above.

14. The other foremost decision relied on by the Management is the decision of a Division Bench of this Court in W.A. No. 2626 of 2002, dated

2.9.2008 Tiruchendur Arulmigu Subramaniasamy Kovil Oivupetra Paniyalargal Sangam v. Executive Officer, Arulmigu Subramaniasamy

Devasthanam, Tiruchendur, which decision made the Division Bench to refer the matter to the Full Bench.

15. Before going through the aforesaid order of the Division Bench, it would be profitable to note the order of the learned single Judge, which gave

rise to the aforesaid Division Bench decision.

The matter related to payment of gratuity to the retired employees of the Arulmigu Subramaniaswamy Devasthanam, Tiruchendur, under the

Payment of the Gratuity Act. The main contention of the employees before the learned single Judge was that at the time of retirement, the

employees are paid only the provident fund but not pension and the Devasthanam comes under the purview of the Payment of Gratuity Act and as

per Section 2-J of the Industrial Disputes Act, the Devasthanam has to be treated as an industry. The stand of the Management was that the

employees are entitled to provident fund and not either pension or gratuity and that the management does not come under the category of

industry"" nor fall under the ambit of Section 1(3) of the Payment of Gratuity Act.

In the absence of furnishing of already decided cases towards their stand point by either of the counsel, the Court proceeded to pass orders on the

facts pleaded by parties and the circumstances encircling the case.

16. While dealing with the applicability of Section 1(3) of the Payment of Gratuity Act, the learned single Judge observed as follows:-

12. Coming to the applicability of Section 1(3) of the Payment of Gratuity Act, 1972 to the employees of the respondent Devasthanam, excepting

to denote u/s 1(3)(b) to the effect of having ten or more persons employed in relation to the Shops and Establishment Act, nothing else is found for

being applicable to religious institutions like the respondent Devasthanam. The other establishments indicated therein are either commercial or

industrial establishments and not a religious institution such as the respondent Devasthanam. Therefore, it is safe to conclude that for the respondent

Devasthanam, Section 1(3) of the Payment of Gratuity does not apply at all, needless to mention that the members of the petitioner Sangam are not

entitled to claim gratuity as they have claimed in the above writ petition.

17. When the matter was taken in appeal, the Division Bench by a short judgment dismissed the writ appeal by observing as follows:-

2. This writ appeal is directed against the order of the learned Single Judge rejecting the contention of applicability of Payment of Gratuity Act,

1972 (in short "the Act") to the religious institution/respondent herein. The fact that the respondent is a religious institution is not disputed. If that be

so, Section 1(3) of the Act read with Shops and Establishments Act, makes it clear that Section 1(3) of the Act does not apply to the respondent.

That apart even on 17.10.98, the appellant/sangam had made an application to the Joint Commissioner/Executive Officer of the respondent

endowment for payment of gratuity and even though, the plea was rejected on the ground of inapplicability of the provisions of the payment of

gratuity, that order had become final, as it remains unchallenged. For the above reasons, the writ appeal is dismissed.

18. A reading of the aforesaid decisions rendered by the learned single Judge and confirmed by the Division Bench would show that neither the decision of the Apex Court or the other High Courts or this Court had been relied on/referred to in order to arrive at a conclusion that a religious institution does not come under the purview of the Payment of Gratuity Act, 1972. The learned single Judge merely on the basis of facts encircling the case proceeded to observe that Section 1(3) of the Act is not applicable to religious institutions. Neither the learned single Judge nor the Division Bench had the benefit of going through the decisions of the Hon''ble Supreme Court rendered in the context of applicability of the term establishment''.

19. The Hon''ble Supreme Court in State of Punjab Vs. Labour Court Jullunder and Others, had given a wider meaning to the expression ''law'' in Section 1(3)(b) of the Payment of Gratuity Act by stating that it can apply to every establishment within the meaning of any law for the time being in force in relation to an establishment in a State and it was not necessary that the law should be one relating to shops and establishment alone. In other words, it was laid down that Section 1(3)(b) can even apply to non-commercial establishments.

20. In Bangalore Water Supply & Sewerage Board case (cited supra), while analysing the question whether Charitable Institutions are Industries, laid down three categories (already extracted above) and we are concerned with the second category, where the institution makes no profit but hires the services of employees as in other like business. To fall under the second category as laid down by the Hon''ble Supreme Court one has to see whether the charitable employer is exactly like a commercial minded employer and there is relationship of employer and employee as like that of the industries. In the present case, though the Management may state that they fall under the third category to the effect that the establishment is oriented on a humane mission fulfilled by man who work, not because they are paid wages, but because they share the passion for the cause and derive job satisfaction from their contribution, from the materials on record and the documents produced by either side, we are not inclined to accept that the respondent Devasthanam fall under the third category. From the orders passed by the authorities below, there is no dispute that

there is employer and employee relationship between the Management and the appellants/employees and the employees are paid wages according to the work done and they are entitled to leave as per the Rules. From the part of the employees the Devasthanam is not a charity and it is only an establishment working for profit. It is also brought to our notice that the temples in question were paying salary in Crores of rupees to the employees, which fact is not in dispute. The other decisions relied on and extracted by us viz., Administrator, Shri Jagannath's case, The Management of SIET College, Sri Venkataramana Temple Sri Hale Mariyamma Temple, etc., (cited above) would only pave a way to the conclusion that the Religious Institutions would also be attracted by the term ""establishment"" under the Payment of Gratuity Act and it would not stop within the meaning prescribed to the ""establishment"" defined under the Tamil Nadu Shops and Establishments Act.

21. The contention raised by the learned Advocate General to the effect that the word ""establishment"" has to be construed to mean what has been referred to in the Tamil Nadu Shops and Establishments Act and not in any other Act which deal with the establishment, cannot be accepted in view of the wider meaning give by the Hon''ble Supreme Court in State of Punjab Vs. Labour Court Jullunder and Others, . Moreover, keeping in view the observations made by the Hon''ble Supreme Court with regard to charitable institutions in Bangalore Water Supply & Sewerage Board's case, which are extracted above, we have no hesitation in arriving at a conclusion that the ""religious institutions"" will certainly fall within the meaning of ""establishment"" as defined u/s 1(3)(b) of the Payment Gratuity Act. The decisions relied on by the respondents/Management will be of no help to them.

22. The decision in State of Andhra Pradesh Vs. Bhramaramba Mallikarjuna Swamy Devasthanam, relied on by the respondents relate to payment of tax by Sri Bhramaramba Mallikarjuna Swamy Devasthanam arise under the Andhra Pradesh General Sales Tax Act. The question was whether the religious or charitable institution having any distinct incidental activity like running of canteen for the pilgrims is exempted from payment of tax or not. The Division Bench of Andhra Pradesh held that since the main activity of the Devasthanam was neither commercial nor trading in nature and

the incidental activity of running a canteen for the pilgrims, although of a business nature, was for the supply of foodstuffs to visiting pilgrims at

reasonable prices, which was functionally integral to the main activity, the sale of food in the canteen was not liable to tax. In the said decision, the

scope of Section 1(3)(b) of the Act was not examined and, moreover, for income tax purposes or for any tax liability, the Trusts Act or Company

Law or Registration Law or penal code requirements, the examination will be different, but we are concerned with a benignant disposition towards

workmen. Therefore, the said decision cannot come to aid to the respondents.

23. The next decision on which much reliance was placed by the respondents was the decision of a learned single Judge of Kerala High Court in

Narayanan Namboodiri's case (cited above). Though the second question which arose for consideration in the aforesaid case was, whether

Devaswom employees are covered by the Payment of Gratuity Act, the decision of the Hon'ble Supreme Court in Bangalore Water Supply &

Sewerage Board's case or the decision of the Orissa High Court in Administrator, Shri Jagannath Temple Vs. Jagannath Padhi and Others, were

not brought to the notice of the learned single Judge. Further the principle laid down by the Hon'ble Supreme Court in State of Punjab Vs. Labour

Court Jullunder and Others, to the effect that Section 1(3)(b) of the Payment of Gratuity Act will apply to non-commercial establishments has not

been brought to the notice of the learned single Judge. Therefore, the decision of the Kerala High Court cannot be followed.

24. Coming to the decision referred to this Full Bench, the Division Bench upheld the decision of the learned single Judge rejecting the contention

of applicability of Payment of Gratuity Act, 1972 to the religious institution. The learned counsel appearing for both sides have not brought any of

the decision of the Hon'ble Supreme Court to the attention of either the learned single Judge or the Division Bench. The Division Bench without

noticing the decisions holding the field, came to a conclusion that section 1(3) of the Act read with Shops and Establishments Act will not apply to

the Devasthanam. Moreover, the decision rendered was on a factual finding that the application made by the appellant therein, viz., Tiruchendur

Arulmigu Subramaniasamy Kovil Oivupetra Paniyalargal Sangam for payment of gratuity was rejected by the Joint Commissioner/Executive

Officer on the ground of inapplicability of the provisions of the payment of gratuity and the said order has become final as it remained unchallenged.

Here the facts of the case are different. The authorities under the Act have concurrently held that Section 1(3)(b) of the Act is applicable to the

respondents/Management and the appellants are entitled for gratuity. In view of the decisions of the Hon'ble Supreme Court referred to above and

the conclusion arrived by us, we are of the considered opinion that the ratio laid down in W.A. No. 2626 of 2002, dated 02.09.2002 has to be

overruled.

25. The other question to be answered is whether Rule 26 of the Tamil Nadu Hindu Religious Institutions (Officers and Servants) Service Rules,

1964 will apply or the provisions of the Payment of Gratuity Act, 1972 will apply in respect of those employees employed in the temples governed

by the Hindu Religious and Charitable Endowments Act, 1959. According to the employees, the Payment of Gratuity Act, 1972 will apply as it

was beneficial, whereas, according to the Management, Rule 26 will apply, which restricts payment of gratuity where the Contributory Provident

Fund Scheme is in force. Admittedly, the Contributory Provident Fund Scheme is in force in the respondent Devasthanams.

26. In view of the power conferred u/s 116 of the Tamil Nadu Hindu Religious and Charitable Endowment Act, 1959, the State Government has

framed the Tamil Nadu Hindu Religious Institutions (Officers and Servants) Service Rules, 1964. Rule 26 to 30 relates to payment of Gratuity. The

aforesaid State Rules came into existence prior to the Central Act, the Payment of Gratuity Act. The prior Act falls under Entry 28, Schedule VII,

whereas the latter comes under Entry 24 of List III of the Concurrent List, Schedule VII. It is the contention of the learned Senior Counsel for the

Management that the Rules framed in exercise of power granted u/s 116 of the HR & CE Act falls under the Concurrent List and, therefore, the

State Legislature has full power to legislate on the subject and in so far as the latter Act is concerned, as it also falls under the concurrent list, the

State is also competent to frame rules by virtue of Article 246(2) of the Constitution. However, the learned Senior Counsel accepted that the State

Act do not have conflict with those of any Central Act or the subject in terms of Article 254 and, if there is any conflict over any such provision,

then the Central Act will prevail over the State Act to the extent of repugnancy. Therefore, one has to see whether the Payment of Gratuity Act will

prevail over the Rules framed in exercise of the power conferred u/s 116 of the HR & CE Act keeping in view the aforesaid provisions of law.

27. The Payment of Gratuity Act, 1972 is a self contained and complete code by itself and its provisions impliedly exclude recourse to any other

statute. Section 14 of the Payment of Gratuity Act has overriding effect over the provisions of any other enactment. It is not in dispute that the

Central Act is more advantageous than that of the State Rules. In other words, the benefit availed by the employees of the Devasthanam under the

State Rules is meager compared to the Gratuity payable under the Payment of Gratuity Act. Section 4(5) of the Act protects the right of the

employee to receive better terms of gratuity under any award or agreement or contract with the employer. The proviso to Rule 26 of the Rules

provides that the said Rule will not apply to any institution where the Contributory Provident Fund scheme is in force. By imposing a restriction, the

Rules prohibit the employees to enjoy the fruits of the beneficial Central Act and to that extent the Rules are inconsistent with the Central Act.

Therefore, we have no hesitation in holding that the Rules are repugnant to the Central Act to the extent indicated above.

28. A doubt has been raised regarding entitlement of gratuity, when the employees are paid pension as one could not be entitled for two. This

doubt has to go in view of the following pronouncements of the Apex Court.

In Som Prakash Rekhi Vs. Union of India (UOI) and Another, Justice Krishna Iyer, while examining the overriding effect of Section 14 of the Act

along with similar provisions contained in other Acts, observed as follows:-

66. We live in a welfare State, in a "socialis"-republic, under a Constitution with profound concern for the weaker classes including workers (Part

IV). Welfare benefits such as pensions, payment of provident fund and gratuity are in fulfillment of the directive principles. The payment of gratuity

or provident fund should not occasion any deduction from the pension as a "set-off". Otherwise, the solemn statutory provisions ensuring provident

fund and gratuity become illusory. Pensions are paid out of regard for past meritorious services. The root of gratuity and the foundation of

provident fund are different. Each one is a salutary benefaction statutorily

guaranteed independently of the other. Even assuming that by private treaty parties had otherwise agreed to deductions before the coming into force of these beneficial enactments they cannot now be depravatory. It is precisely to guard against such mischief that the non obstante and overriding provisions are engrafted on these statutes.

(Emphasis added)

29. In *Sudhir Chandra Sarkar Vs. Tata Iron and Steel Co. Ltd. and Others*, while holding that payment of gratuity is a statutory liability cast on the employer, the Hon"ble Supreme Court observed as follows:-

15. The fundamental principle underlying gratuity is that it is a retirement benefit for long service as a provision for old age. Demands of social security and social justice made it necessary to provide for payment of gratuity. On the enactment of Payment of Gratuity Act, 1972 a statutory liability was cast on the employer to pay gratuity.

16. Pension and gratuity coupled with contributory provident fund are well-recognised retiral benefits. These retiral benefits are now governed by various statutes such as the Employees' Provident Fund and Miscellaneous Provisions Act, 1952, the Payment of Gratuity Act, 1972. These statutes were legislative responses to the developing notions of fair and humane conditions of work, being the promise of Part IV of the Constitution.

(Emphasis added)

30. In *Municipal Corporation of Delhi Vs. Dharam Prakash Sharma and Another*, , the Hon"ble Supreme Court has categorically held that though there is provision for payment of gratuity under the Pension Rules, that will not disentitle the employees from the payment of gratuity under the Payment of Gratuity Act. While holding so, the Hon"ble Supreme Court observed as follows:-

2... The mere fact that the gratuity is provided for under the Pension Rules will not disentitle him to get the payment of gratuity under the Payment of Gratuity Act. In view of the overriding provisions contained in Section 14 of the Payment of Gratuity Act, the provision for gratuity under the Pension Rules will have no effect. Possibly for this reason, Section 5 of the Payment of Gratuity Act has conferred authority on the appropriate

Government to exempt any establishment from the operation of the provisions of the Act, if in its opinion the employees of such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act. Admittedly MCD has not taken any steps to invoke the power of the Central Government u/s 5 of the Payment of Gratuity Act.

In the aforesaid premises, we are of the considered opinion that the employees of the MCD would be entitled to the payment of gratuity under the Payment of Gratuity Act notwithstanding the fact that the provisions of the Pension Rules have been made applicable to them for the purpose of determining the pension. Needless to mention that the employees cannot claim gratuity available under the Pension Rules.

31. In view of the principle laid down by the Hon''ble Supreme Court in the aforesaid decisions, the Management could not have any more doubt with regard to payment of gratuity and the pension.

32. It is brought to our notice that the State Government has introduced the Employees Provident Fund in the temples by issuing G.O.Ms. No. 54, dated 13.2.2006 and the Central Provident Fund scheme has been withdrawn and in future there would no bar as provided under Rule 26 for payment of gratuity and the employee would be entitled to gratuity either under the HR & CE Rules or under the Act, which ever is more beneficial

to them. The issuance of the aforesaid G.O., will not be any way concerned with the present case as the persons affected are retired employees who have been agitating for years together. The doubts raised by the Division Bench regarding the applicability of the ratio of a Division Bench

decision of the Madras High Court in W.A. No. 2626 of 2002, dated 2.9.2008 (Tiruchendur Arulmigu Subramaniasamy Kovil Oivupetra

Paniyalargal Sangam v. Executive Officer, Arulmigu Subramaniasamy Devasthanam, Tiruchendur) in the light of the law laid down by the Hon''ble Supreme Court in State of Punjab Vs. Labour Court Jullunder and Others, have been answered in the preceding paragraphs.

Now the matter can be listed before the Division Bench for disposal, in the light of the conclusions arrived at above.