

(2014) 09 OHC CK 0087
In the Orissa High Court
Case No : Writ Appeal No. 86 of 2013

Indian Red Cross Society

APPELLANT

Vs

Banka Nidhi Mishra

RESPONDENT

Date of Decision : 04-09-2014

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Orissa Shops and Commercial Establishments Act, 1956 — Section 2(19), 2(8)
Payment of Gratuity Act, 1972 — Section 1, 1(3)(a), 1(3)(b), 1(3)(c), 2(e)
Payment of Wages Act, 1936 — Section 2(ii)(g)

Citation : (2014) 143 FLR 696 : (2014) 2 ILR 1105 : (2015) LabIC 1893

Hon'ble Judges : Amitava Roy, C.J.; Dr. B.R. Sarangi, J

Bench : Division Bench

Judgement

Dr. B.R. Sarangi, J.—The writ petitioner, being the appellant, has filed the instant appeal challenging the judgment dated 15.3.2013 passed by the learned Single Judge dismissing the writ petition and confirming the order passed under section 4 of the Payment of Gratuity Act, 1972 (hereinafter referred to as "1972 Act") by the Controlling Authority under Payment of Gratuity Act-cum-Asst. Labour Commissioner, Cuttack (in short "the Controlling Authority") in P.G. Case No. 23 of 2009 allowing the claim of the respondent-opposite party in part directing to deposit of Rs. 3,00,000 (Rupees Three Lakhs) in the said Court along with interest @ 10% per annum within 30 days from the date of receipt of the order for onward disbursement as per section 7(3) of the 1972 Act. The pleaded facts on record are that the appellant-petitioner is a Society constituted by an Act of Parliament, 1920 and the respondent-opposite party was a Doctor employed in Blood Bank, who entered into service on 31.10.1997 and subsequently, appointed as Director, Central Red Cross, Blood Bank, Cuttack on 31.5.2006. On attaining the age of superannuation, he retired from service on 31.5.2006, but he was paid Rs. 50,000/- towards retirement benefit, gratuity and others as per Clause 28(a) of the Indian Red Cross Society, Orissa State Branch (Recruitment and Conditions of Service) Rules, 2001 (in short, "2001 Rules"). The respondent-

opposite party had claimed that his last drawn salary was Rs. 21,545/- per month and considering his length of service of 28 years, he was entitled to get a sum of Rs. 3,48,034/- towards gratuity. Though he submitted representation for higher gratuity, the same was not considered for which he moved the Controlling Authority in P.G. Case No. 23 of 2009 under section 4 of the 1972 Act. After the case was registered, the Controlling Authority issued notice to the appellant-petitioner calling upon it to file show cause and on considering the materials available on record, passed the order on 29.11.2010 allowing the claim of the respondent-opposite party by granting Rs. 3,48,034/- towards gratuity. Challenging the aforesaid order dated 29.11.2010 passed by the Controlling Authority in P.G. Case No. 23 of 2009, the appellant-petitioner preferred the writ petition before this Court. Learned Single Judge after hearing the learned Counsel for the parties, dismissed the same vide its judgment dated 15.3.2013 and confirmed the order passed by the Controlling Authority in P.G. Case No. 23 of 2009. Hence, this writ appeal.

2. Amongst other grounds, the judgment of the learned Single Judge has been assailed on the ground that the respondent-opposite party does not come within the purview of 1972 Act since it is neither a factory, mine, oilfield, plantation, port and railway company as provided under section 1(3)(a) of the 1972 Act nor it is a shop or establishment as defined under section 1(3)(b) of the Act nor an establishments as notified by the Central Government under section 1(3)(c) of the 1972 Act. Referring to section 2(8) and 2(19) of the Orissa Shops and Commercial Establishments Act, 1956 (hereinafter referred as "1956 Act"), it was submitted that "establishment" means "a shop or a commercial establishment" and "shop" means any premises where any trade or business is carried on or where services are rendered to customers respectively. "Employee" has been defined under section 2(e) of the 1972 Act and "employer" has been defined in section 2(f). The respondent-opposite party was the Director (Chief Executive under Class-1 Officer) of Central Red-Cross Society Blood Bank and does not come within the ambit of "employee" under the 1972 Act. The appellant-petitioner has already paid a sum of Rs. 50,000/- towards full and final settlement of gratuity as per Rule 28(a) of the Rules, 2001. Therefore, the Controlling Authority is not justified in directing to pay a sum of Rs. 3,50,000/- towards gratuity under the said Act.

3. Mr. S.K. Sarangi, learned Counsel for the appellant strenuously urged that the learned Single Judge has committed a gross error by confirming the order passed by the Controlling Authority by directing to pay a maximum of Rs. 3,50,000/- by applying the provisions of 1972 Act. The provisions contained under sections 1(3) (b) & (c) of 1972 Act are not applicable. Therefore, direction given for payment of maximum gratuity cannot sustain.

4. Mr. T. Mishra, learned Counsel for respondent-opposite party while refuting the contentions urged by learned Counsel for the appellant-petitioner has raised a preliminary objection with regard to maintainability of writ appeal and also stated

that the appellant-petitioner would not have preferred a writ application when alternative remedy was available under section 7(7) of the 1972 Act against the order of the Controlling Authority by preferring an appeal and in order to avoid limitation prescribed under the 1972 Act of 60 days, the appellant-petitioner straightaway invoked the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India. It is stated that the appellant-petitioner cannot challenge service proceeding having accepted the order passed by the Controlling Authority by not preferring an appeal and participating in the said proceeding, thereby, on principle of waiver, acquiescence and estoppel, he seeks for dismissal of the appeal. It is further urged that the ground for challenging the order of the Controlling Authority is that the 1972 Act has no application to the appellant-petitioner and more so, 2001 Rules provide for maximum gratuity amount of Rs. 50,000/-. So far as applicability of 2001 Rules is concerned, exempting from the purview of the 1972 Act is essentially dependant upon the conditions as envisaged under section 5 of the 1972 Act. The first requirement of section 5 of 1972 Act is that the establishment must obtain exemption from the appropriate Government and there must be a notification to that effect and second requirement is that gratuity payable should not be less favourable than the benefit conferred under the statute. Therefore, 2001 Rules, which has been framed by the appellant-petitioner, are deficient on both the counts. It is further urged that under section 4 of the 1972 Act, an employee is entitled to get his gratuity subject to maximum of Rs. 3,50,000/- and such benefit cannot be taken away by limiting the entitlement to Rs. 50,000/- as no Rule can be framed and made applicable to the employee, which is less favourable in comparison to what is entitled to under the statute and statutory entitlements cannot be curtailed by any Rules framed by the employer. In support of his contention he has relied upon the judgment in Municipal Boards and another v. Salim Khan and another, 1998 (7) SCC 221 All India Allahabad Bank Retired Employees Association, AIR 2009 SCW 7667 and Paradeep Port Trust Vs. A. Controlling Authority and Others, .

5. Mr. T. Mishra further urged that the definition under section 1(3)(b) and (c) of 1972 Act are wide enough to include all establishments in which more than 10 employees are employed. So much so, section 1(3)(b) of 1972 Act includes all shops and establishments. Section 2(8) of the 1956 Act defines "establishment" as a shop or a commercial establishment. Section 2(19) of 1956 Act defines "shop" to mean any premise where any trade or business is carried on or where services are rendered to customers, thereby on close reading of section 2(8) and 2(19) of 1956 Act, it includes all premises where any transaction is carried on. The respondent-opposite party is an "employee" within the meaning of section 2(e) of 1972 Act. But Rule 3(b) of 2001 Rules defines "employee" as all persons employed by the Society. The appellant carries on commercial activities by selling bloods conducting different types of medical/pathological tests/examination where testing fees and service charges are collected from the customers. By the time the respondent-opposite party retired from service w.e.f. 2007 there were

more than 40 employees working under the establishment and over Rs. 3 crores of fixed deposits was available with such establishment. To substantiate its contention he has relied upon the case in Indian Red-Cross Society Vs. Vidyaben H. Vyas, .

6. Being an "employee" of the appellant-petitioner, the respondent-opposite party is not entitled to get any pension and he earned his livelihood after retirement from service from the gratuity amount admissible to him. Therefore, at this old age, if the gratuity amount would be paid in conformity with the provisions of law, it will suffice the purpose for which he has approached this Court.

7. While considering the case of the appellant-petitioner, the learned Single Judge framed as many as four issues to resolve the dispute. While answering issue Nos. (i) and (ii), learned Single Judge has come to a definite conclusion that the appellant-petitioner comes within the meaning of "establishment" thereby provision of 1972 Act is applicable to it and while answering the issue No. (iii), learned Single Judge has categorically held that no Rule can be framed by the employer and made applicable to the employees, which is less favourable in comparison to what the employee gets under the 1972 Act. After coming to such conclusion, the learned Single Judge held that there is no infirmity and illegality in the impugned order passed by the Controlling Authority warranting interference of the Court and there is also no illegality in the consequential order passed by the competent authority. Accordingly he dismissed the writ petition.

8. Mr. T. Mishra, learned Counsel for respondent has raised a preliminary objection with regard to the maintainability of the writ petition before this Court. It is urged that the impugned order having been passed under Article of Constitution of India, the writ appeal is not maintainable. It is stated that challenging the order passed by the Controlling Authority under the 1972 Act, the writ petition was filed before this Court in exercise of the power of superintendence under Article 227 of the Constitution of India and after due adjudication, the learned Single Judge has passed the impugned judgment and order. Therefore, once the order has been passed under Article 227 of the Constitution of India, the present writ appeal is not maintainable. To substantiate his contention, he has relied upon the judgment of this Court in Mahammed Saud and Others Vs. Dr. (Maj) Shaikh Mahfooz and Another, .

9. On query being made by this Court, Mr. T. Mishra, learned Counsel for respondent-opposite party fairly admitted that while challenging the order of the Controlling Authority, the appellant-petitioner has mentioned the nomenclature in the writ petition as an application under Articles 226 and Article 227. Therefore, whether the Court has exercised the power under Article 226 or Article 227 of the Constitution of India, no conclusion can be inferred at this stage. However, similar question has been considered by the Apex Court in Surya Dev Rai Vs. Ram Chander Rai and Others, Though the Apex Court passed the judgment, but the matter has been referred to larger Bench, which is now pending for

consideration. In that view of the matter, this Court should refrain from making any observation when the matter is sub judice before the Apex Court regarding maintainability of the writ appeal against the order passed by the learned Single Judge under Articles 226 and 227 of the Constitution of India. When this fact was confronted to the Mr. T. Mishra, learned Counsel for respondent, he pleaded of maintainability of the writ appeal and proceeded with the matter for hearing on merit.

10. In order to dislodge the finding of the learned Single Judge Mr. S.K. Sarangi, learned Counsel appearing for the appellant-petitioner brought to our notice the provisions of sub-section (3)(a)(b)(c) of section 1 and sub-sections (1) and (2) of section 4 and sub-sections (7) and (8) of section 7 of the 1972 Act. He has also referred to sections 2(8) and 2(19) of the 1956 Act, and submitted that "establishment" means "a shop or a commercial establishment" and "shop" means "any premises where any trade or business is carried on or where services are rendered to customers respectively. In addition to the same, it is urged that the appellant-petitioner has already paid a sum of Rs. 50,000/- to the respondent-opposite party towards full and final settlement of gratuity under Rule 28(a) of the 2001 Rules framed by the appellant-petitioner, which has come into force w.e.f. 5.11.2001. The term "employee" has been defined under section 2(e) and (f) of the 1972 Act and it is stated that the Director (Chief Executive under Class-I Officer) of the appellant-petitioner does not come within the ambit of meaning of "employee" under the 1972 Act. As the service condition of the respondent-opposite party is regulated by 2001 Rules and in consequence thereof, he has been retired from service w.e.f. 31.5.2007. The 1972 Act is not applicable and any order passed by the Controlling Authority extending the benefits of gratuity is absolutely misconceived one. In that view of the matter, 1972 Act so far as the appellant-petitioner is concerned is not applicable and as such, no exemption is required under section 5 of the 1972 Act from the Central Government. The self-contained 2001 Rules is applicable to the appellant-petitioner which prescribes the limit of gratuity.

11. On the basis of the pleaded facts mentioned above, it is admitted that the respondent-opposite party entered into the service of the appellant-petitioner as Medical Officer on 31.10.1977 and was appointed as Director on 31.5.2006 and retired from service on 31.5.2007 and he had rendered 28 years continuous service and his last drawn salary was Rs. 21,545/- per month. On superannuation, he has been paid a gratuity of Rs. 50,000/- as against the claim of Rs. 3,48,034/-. The Controlling Authority considering the fact that the appellant-petitioner is indulged in commercial activities held that the appellant is coming within the purview of section 1(3)(b) of 1972 Act.

12. Considering similar fact, this Court in Administrator, Shri Jagannath Temple Vs. Jagannath Padhi and Others, is held as follows:

"Gratuity, as observed by the Supreme Court in its etymological sense, means a gift, especially for service rendered or return for favours received, (See Delhi

Cloth and General Mills Co. Ltd. v. Its Workmen) 1970 (20) FLR 716 (SC). The general principal underlying the gratuity schemes is that by their length of service, workmen are entitled to claim a certain amount as a retiral benefit. (See The Indian Hume Pipe Co. Ltd. Vs. The Workmen and Another, . Gratuity has to be considered to be an amount paid unconnected with any consideration and not resting upon it, and has to be considered something given freely or without recompense. It does not have foundation on any legal liability, but upon a bounty steaming from appreciation and graciousness. Long service carries with it expectation of an appreciation from the employer and a gracious financial assistance to tide over post retiral difficulties. Judged in that background, we feel that it would be unconscionable to keep temple out of the purview of the Act, more particularly when opposite party No. 1, a low paid employee has served the temple for a very long span of time."

13. In view of such position, there is no dispute that the respondent-opposite party is entitled to get the gratuity but the dispute is whether the entitlement is to be determined on the basis of the 1972 Act or 2001 Rules applicable to the employees of the appellant-petitioner. On perusal of the provisions contained in section (1)(3)(b) of 1972 Act, it is clear that it applies to every "shop" or "establishment" within the meaning of any law for the time being in force in relation to "shop" and "establishment" in a State in which ten or more persons are employed or were employed, or on any day preceding twelve months. It is clear that "establishment" has not been defined in 1972 Act. In absence of any definition to the word "establishment", considering the dictionary meaning of "establishment" as given in Webster's International Dictionary, the Apex Court in Central Inland Water Transport Corporation Limited Vs. The Workmen and Another, observed that "establishment" means "an institution or place of business, with its fixtures and organized staff; as, large establishment, a manufacturing establishment". "Establishment" therefore means the whole trading, business or manufacturing apparatus with a separate identifiable existence.

14. In Ram Kumar Mishra v. State of Bihar, 1984 (49) FLR 63 (SC) the Apex Court considering section 2(6) of Bihar Shops and Establishments Act, 1953 stated thus:

"The word "establishment" has been defined which carries on any business, trade or profession or any work in connection with, or incidental or ancillary to, any business, trade or profession."

15. Section 1(3)(b) of the 1972 Act applies to every shop or establishment within the meaning of any law for the time being in force in relation to shops or establishments in a State. The Apex Court in State of Punjab Vs. Labour Court Jullunder and Others, held as follows:

"It is urged for the appellant that the Payment of Wages Act is not an enactment contemplated by section 1(3)(b) of the Payment of Gratuity Act. The Payment of

Wages Act, it is pointed out, is a Central enactment and section 1(3)(b), it is said, refers to a law enacted by the State Legislature. We are unable to accept the contention. 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 under section 1(3)(b) must be a law which relates to both shops and establishments, such as the Punjab Shops & Commercial Establishment 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 noncommercial. 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) applied 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. Accordingly, we are of opinion that the Payment of Gratuity Act applies to an establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on. The Hydel Upper Bari Doab Construction Project is such an establishment, and the Payment of Gratuity Act applied to it."

16. Considering the provisions contained in section 1(2)(b)(c) of the 1972 Act, the Gujarat High Court in *Vidyaben H. Vyas* (supra) held as follows:

"Therefore, in light of above observation, Apex Court held that establishments having a wide meaning, it includes commercial establishments as well as non-commercial establishments and no limited meaning can be given to the word "establishments" which has been referred in section 1(3)(b) of the Act, and therefore, contention raised by learned advocate Mr. Thakkar cannot be accepted

and same is rejected."

17. It has been brought to the notice of the Court that the judgment passed in Vidyaben H. Vyas (supra) has not been challenged before the Apex Court and therefore, it has reached finality.

18. In view of such proposition of law laid down by the Apex Court, the appellant-petitioner is coming within the meaning of "establishment" and as such, provisions contained in 1972 Act is applicable in letter and spirit. Therefore, 2001 Rules framed by the appellant-petitioner cannot limit gratuity benefit of the respondent-opposite party to Rs. 50,000/-, which is less favourable in comparison to what an employee gets under 1972 Act. In view of the facts and circumstances and law applicable to the present case, we are of the considered opinion that the learned Single Judge has not committed any illegality or irregularity by confirming the order of the Controlling Authority with regard to payment of gratuity to respondent-opposite party, warranting interference by this Court. Accordingly, the writ appeal fails and the same is dismissed.

Amitava Roy, J.

I agree