

(2012) 05 BOM CK 0027

In the Bombay High Court

Case No : Writ Petition No. 2408 of 2011

Jagdeo Sukhdev Hirole (Dead) through L.Rs., Babybai
Jagdeorao Hirode and Pramod Jagdeorao Hirode

APPELLANT

Vs

Divisional Controller, Maharashtra State Road Transport
Corporn. Akola and Additional Commissioner of Labour and
Appellate Authority under Payment of Gratuity Act, 1972,
Bhosale Chambers, Civil Lines, Nagpur

RESPONDENT

Date of Decision : 11-05-2012

Acts Referred:

Maharashtra State Road Transport Corporation Gratuity Funds Regulations, 1968 —
Regulation 11
Payment of Gratuity Act, 1972 — Section 4(5), 5
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full
Participation) Act, 1995 — Section 47

Citation : (2012) 5 ALLMR 98 : (2012) 6 BomCR 311 : (2012) 134 FLR 438 :
(2012) 4 MhLj 298

Hon'ble Judges : A.B. Chaudhari, J

Bench : Single Bench

Advocate : B.M. Khan, for the Appellant; R.S. Charpe, for R 1, for the
Respondent

Final Decision : Allowed

Judgement

A.B. Chaudhari, J.—Heard. Rule. Rule returnable forthwith. Heard finally by consent of the Learned Counsel for the rival parties. In the present petition the petitioner employee has put to challenge the judgment and order dated 20.12.2010, passed by the Additional Labour Commissioner and Appellate Authority under the Payment of Gratuity Act, 1972 in Appeal No. PGA/65/2010, rejecting the claim made by the petitioner and confirming the order passed by the Controlling Authority on 9.9.2010.

2. In support of the writ petition, Advocate Shri Khan argued that the petitioner had claimed supplementary gratuity in terms of the Regulation No. 11 of the

Maharashtra State Road Transport Corporation (Gratuity Fund) Regulations as amended, which provides for supplementary amount of gratuity in case of permanent disability, which had occurred in case of the petitioner/employee, but the claim has been denied for no reasons and on improper and illegal interpretation of the regulation. There is a further misconception that the petitioner had admitted that he was not entitled to supplementary gratuity, which is not correct. According to the Learned Counsel for the petitioners, the employer of the petitioner himself found the petitioner to be unfit on medical ground to perform his duties once for all and thus had incurred permanent disability. The petitioner was entitled to supplementary gratuity as provided in Regulation 11 of the M.S.R.T.C. Regulations. That apart, the petitioner had not been given any alternate employment nor the same was even offered to him as required by Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short the Act of 1995), which provides that the employer has obligation to shift such disabled employee some other post with the same pay scale and service benefits and in case the same is not possible to keep him on a supernumerary post but not to dispense with his services. This provision of Section 47 of the Act of 1995 has been held to be mandatory and the respondent has not tendered any compliance of this provision. He, therefore, submits that the petitioner was entitled to supplementary gratuity in terms of Regulation 11 and therefore, relief should be granted to him. He cited the following decisions.

(A) Transport Manager, Kolhapur Municipal Transport Undertaking, Kolhapur...Versus...Appellate Authority Under Payment of Gratuity Act, 1972, Pune (EQUITAS Bombay High Court Decisions) (Citation : 2004-EQ (BOM)-0-840).

(B) Workmen of Metro Theatre, Bombay...Versus...Metro Theatre Limited Bombay (Equitas Supreme Court Decisions) (Citation : 1981-EQ(SC)-0-351).

(C) 1982 (44) 365 (Eastern Coal Fields Ltd...Versus...Regional Labour Commissioner (Central) and others).

(D) State of Punjab Vs. Labour Court Jullunder and Others, .

3. Per contra, Advocate Shri Charpe vehemently opposed the writ petition and argued that Regulation 11 of the M.S.R.T.C. Regulations has no application at all in the instant case.

4. In the first place, Regulation 11 of the M.S.R.T.C. Regulations providing for supplementary gratuity is not a matter of right. Further the petitioner had never applied for alternate employment to the employer, he having been declared permanently disabled and therefore, such a person is not entitled to supplementary gratuity. Had he approached the employer, he would have offered the alternate employment. There was no obligation on the employer to offer him alternate employment.

5. Under the provisions of the Payment of Gratuity Act, 1972, the issue of

supplementary gratuity would not fall and consequently, supplementary gratuity cannot be claimed in the proceedings under the Payment of Gratuity Act, 1972 before Controlling Authority. Consequently, this petition is also not maintainable. The Payment of Gratuity Act, 1972 provides for claiming only gratuity and not supplementary gratuity. There is admission made by the petitioner that he was not entitled to supplementary gratuity. He relied on the following decisions.

(a) Dinkar Shankar Pawar-Versus-Elphinstone Spg. and Wvg. Mills Co. (EQUITAS Bombay High Court Decisions) (Citation : 1986-EQ (BOM)-0-235).

(b) D.T.C. Retired Employees Association-Versus-Delhi Transport Corporation (Equitas Supreme Court Decisions) (Citation : 2001 -EQ(SC)-0-845).

(c) Shitla Sharan Srivastava-Versus-Government of India (Equitas Supreme Court Decisions) (Citation 2001-EQ (SC)-0-929).

6. I have gone through the impugned orders made by the authorities. I have heard Learned Counsel for the rival parties. It is not in dispute that the petitioner was found unfit medically to perform his duties, which he was performing. It is not in dispute that the respondent/employer did not offer any alternate employment to the petitioner when he was declared medically unfit. At the same time, it is not established on record that the petitioner had himself offered for alternate employment. In the first place, when the employer himself declares the employee medically unfit to perform his normal duties and is found to be permanently disabled, the employer has obligation to shift such disabled employee some other post with the same pay scale and service benefits and in case the same is not possible to keep him on a supernumerary post but not to dispense with his services. The obligation will be discharged no sooner such offer is made and the employee does not respond. Therefore, since it is admitted that the respondent employer did not offer any alternate employment after he was declared medically unfit, the submission that the employee did not demand alternate employment loses its force. That is all the more so in view of the provisions of Section 47 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. Section 47 reads thus :

47. Non-discrimination in Government employment (1) No establishment shall dispense with, or reduce in rank, an employee who acquires a disability during his service :

Provided that, if an employee, after acquiring disability is not suitable for the post he was holding, could be shifted to some other post with the same pay scale and service benefits :

Provided further that if it is not possible to adjust the employee against any post, he may be kept on a supernumerary post until a suitable post is available or he attains the age of superannuation, whichever is earlier.

(2) No promotion shall be denied to a person merely on the ground of his disability:

Provided that the appropriate Government may, having regard to the type of work carried on in any establishment, by notification and subject to such conditions, if any, as may be specified in such notification, exempt any establishment from the provisions of this section.

7. In the light of above parliamentary legislation, which is beneficial legislation for the disabled, I have no difficulty in holding that it was the obligation on the employer to offer the petitioner alternate employment. That obligation having not been discharged, it is not open to the respondent/employer to contend otherwise. I, therefore, hold that the respondent erred in not offering alternate employment and the reason for not offering supplementary gratuity is, therefore, not in existence. It is not in dispute that the Regulation 11 of the M.S.R.T.C. Regulations provides for supplementary gratuity besides the regular gratuity in case of death or permanent disability. In the instant case, the petitioner was disabled permanently and therefore, he became entitled to supplementary gratuity.

8. Second submission regarding tenability of the application for claiming supplementary gratuity on the ground that the Payment of Gratuity Act, 1972 provides only for claiming gratuity and nothing more, is again misconceived. The legislation is a beneficial legislation and instead of dilating any further, it would be better to quote the paragraph nos.5, 6 and 8 from the decision in the case of Workmen of Metro Theatre, Bombay...Versus...Metro Theatre Limited Bombay, cited supra.

5. We shall next deal with the last question pertaining to the construction of Section 4 (5) of the Payment of Gratuity Act, 1972. The question of construction arises this way. It appears that the existing scheme of gratuity in the Metro Theatre Bombay was as per the award in Reference (IT No. 1 of 1968) and the same had been modified by an agreement between the parties in this Court, which, the Union contended, had become extremely inadequate and desired to have a more beneficial scheme in some respects for its workers. Counsel for the Union urged that it was Open to the Tribunal to give more benefits than were available under the scheme contemplated by the Act and in that behalf reliance was placed on Section 4 (5) of the Act. Counsel for the Company contended the expression award in Section 4 (5) meant in existing award and as such if under the existing award better terms were given to the employees these will not be affected. It was also urged that the Act was exhaustive and was intended to ensure uniform payment of gratuity to the employees throughout the country. The Tribunal accepted the contention of the Management and held that it could not go beyond the scheme contemplated by the Act, and, therefore directed that the gratuity scheme as per the Act shall prevail subject to the modifications arrived at under the terms of settlement, if any, if they were more beneficial.

6. Counsel for the appellant Union urged before us that no standardisation of any gratuity scheme was contemplated by the Act as was clear from the express provisions contained in Section 4 (5) and Section 5 of the Act and that

enactment being a beneficial piece of legislation Section 4 (5) should be construed in favour of the employees and that, therefore, the Tribunals view that it could not grant anything beyond the scheme contemplated by the Act was erroneous. In support of such construction reliance was placed upon this Courts decision in *Alembic Chemical Works Co. Ltd. Vs. The Workmen*, where a similar provision under the Factories Act was construed as conferring power on the Tribunal to fix the quantum of leave on a scale more liberal than the one provided by the Act. We find considerable force in this submission.

8. The question for consideration is whether the expression award occurring in the above provision means an existing award or would include any award whatsoever to be made by an adjudicator under the I.D. Act. In the first, place there is nothing in the provision which limits the expression award. Secondly, it cannot be and was not that under the above provision a gratuity scheme obtaining under an existing agreement or contract could (not) be improved upon by a fresh agreement or fresh contract between the employer and the employee and if that be so there is no reason why the expression award should be construed as referring to an existing award and not to include a fresh award that may be made by an adjudicator or an Industrial Court improving in favour of the employees the scheme obtaining under the Act or the existing award. Thirdly, the very fact that under the above provision better terms of gratuity could be obtained by an employee by an agreement or contract with the employer notwithstanding the scheme of gratuity obtaining under the Act clearly suggests that no standardisation of the gratuity scheme contemplated by the Act was intended by the Legislature. This also becomes amply clear from the provisions of Section 5 which confer power upon the appropriate Government to exempt any establishment to which the Act applies from the operation of the provisions of the Act if in its opinion the employees in such establishment are in receipt of gratuity benefits not less favourable than the benefits conferred under the Act. Therefore, on true construction we are clearly of the view that the expression award occurring in the above provision does not mean and cannot be confined to existing award but includes any award that would be made by an adjudicator wherein better terms of gratuity could be granted to the employees if the facts and circumstances warrant such grant. It is true, as has been observed, by this Court in *State of Punjab Vs. Labour Court Jullunder and Others*, , that the Act enacts a complete Code containing detailed provisions covering all essential features of the scheme for payment of gratuity. But it is also clear that the scheme envisaged by the enactment secures the minimum for the employees in that behalf and express provisions are found in the Act under which better terms of gratuity if already existing are not merely preserved but better terms could be conferred on the employee in future. In other words the view taken by the Tribunal that it could not go beyond the scheme of gratuity contemplated by the Act is clearly erroneous.

9. It is noteworthy that the objection raised by Advocate Shri Charpe about non-maintainability of the application for claiming supplementary gratuity was never

raised in the lower Court and is raised for the first time in the petition, still this Court has dealt with it. Following the decision of the Supreme Court, I hold that supplementary gratuity can be claimed in application under the Payment of Gratuity Act, 1972. In the result, I make the following order.

ORDER

(i) Writ Petition No. 2408/2011 is allowed with costs of Rs. 2,000/- (Rupees Two Thousand Only) payable to the petitioner. Rule is made absolute in terms of prayer clause (c).

(ii) The respondent/employer is directed to make payment of supplementary gratuity within a period of eight weeks from today, failing which the same shall carry interest @ 12% per annum.