(2018) 04 J&K CK 0031

In the Jammu And Kashmir High Court

Case No : OWP No.1900 OF 2017

JKSFC AND ORS — APPELLANT

Vs

SHOKET ALI AND ANR — RESPONDENT

Date of Decision : 18-04-2018

Acts Referred:

Payment of Gratuity Rule, 1972 — Rule 18
Payment of Gratuity Act, 1972 — Section 1, 1(2), 1(3)(b), 1(3)(c)
Contract Law (R&A) Act, 1970 — Section 2(1)(e)
Industrial Disputes Act, 1947 — Section 2(j)

Citation : (2018) 04 J&K CK 0031

Hon'ble Judges : ALOK ARADHE

Bench : Single Bench

Final Decision : Disposed Of

Judgement

1. The petition is admitted for hearing and with consent of the learned counsel for the parties, the same is heard finally. In this petition, the petitioners,

inter alia seek writ of certiorari for quashing the order dated 31.07.2017 passed by the Controlling Authority under the Payment of Gratuity Act, 1972.

In order to appreciate the petitionersâ?? challenge to the impugned order, few facts need mention which are stated infra.

2. The respondent No.1, superannuated from the service of Jammu and Kashmir State Forest Corporation on 30.04.2013. It is the case of the

petitioners that respondent No.1 as per the Jammu and Kashmir State Forest Service Regulations, 1981 framed under J&K State Forest Corporation

Act, 1978 was paid the gratuity which was due to him. It has also been averred that respondent No.1 accepted the amount of gratuity without any

protest. After accepting the gratuity, the respondent No.1 filed the petition before the Controlling Authority under the Payment of Gratuity Act, 1972 claiming gratuity. The petitioners, thereupon, filed objections. The Controlling Authority by an order dated 31.07.2017, inter alia, held that J & K State

Forest Corporation is an establishment and, therefore, the provisions of the Payment of Gratuity Act, 1972 are applicable. Accordingly, the claim

petition filed by the respondent No.1 was allowed. Several other employees numbering about more than 50 approached the Controlling Authority under

the Payment of Gratuity Act and their claims were also allowed. Being aggrieved by the order passed by the Controlling Authority in some of the

cases, the petitioners filed an appeal under Rule 18 of the Payment of Gratuity Rules. However, the appellate authority upheld the order passed by the

Controlling Authority.

3. Learned counsel for the petitioners while inviting the attention of this court to Section 1(2) of the Act, submitted that the provisions of the Act do not

apply to the plantations or ports insofar as it pertains to State of Jammu and Kashmir. However, the aforesaid aspect of the matter has not been

appreciated by the Controlling Authority while passing the impugned order. It is further submitted that respondent No.1 had accepted the amount of

gratuity, which was paid to him, without any demur. It is also submitted that orders were complied in 21 cases, as the petitioners had not taken

objection in the aforesaid cases that the provisions of the Act do not apply to the Jammu and Kashmir State Forest Corporation Act, insofar as it

pertains to the plantations.Â

3. On the other hand, learned counsel for respondent No.1 while referring to the order dated 31.07.2017 passed by the Controlling Authority referred

to Section 1(3)(c) of the Act and pointed out that the Controlling Authority on the basis of material on record and taking into account the activities in

which the petitioners are involved, has recorded a categorical finding that the petitioner-Corporation is a shop and, therefore, the Act in question

applies to the employees of the Corporation. It is further submitted that revised LPCs were issued for calculation of gratuity, as per the amended

provisions of the Payment of Gratuity Act and, therefore, the respondent No.1 filed a claim application before the Controlling Authority for payment of

gratuity in terms of revised LPCs. It is further submitted that in the case of Hafiz Zahoor Jahan, the petitioners had filed an appeal and on dismissal of

the appeal, the order passed by the Controlling Authority has been set aside by the petitioners, after obtaining approval of the Board of Directors.

Lastly, it is urged that the Chief General Manager of the petitionerCorporation has issued a Circular dated 25.10.2013 to the concerned DDOs to

revise LPCs in favour of the retired employees and, therefore, no interference with the award passed by the Controlling Authority is called for.

4. I have considered the submissions made by learned counsel for the parties. The pivotal issue which arises for consideration in this writ petition is

whether the provisions of the Payment of Gratuity Act apply to the Jammu and Kashmir State Forest Corporation. Before proceeding further, it is

apposite to take not of Section 1 of the Payment of Gratuity Act, which reads as under:

1. Short title, extent, application and commencement.- (1) This Act may be called the Payment of Gratuity Act, 1972.

(2) It extends to the whole of India:

Â Provided that in so far as it relates to plantations or ports, it shall not extend to the State of Jammu and Kashmir.

(3) It shall apply to-

(a) every factory, mine, oilfield, plantation, port and railway company;

(b) 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;

(c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the

preceding twelve months, as the Central Government may, by notification, specify in this behalf.

Â From perusal of proviso to Section 1(2) of the Act, it is evident that the Act does not apply insofar as it pertains to plantations or ports situated in

the State of Jammu and Kashmir. From perusal of Section 1(3)(b) of the Act, it is evident that the Act applies 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. From perusal of Section 1(3)(c) of the Act, it is axiomatic that the Act applies to such

other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve

months, as the Central Government may, by notification, specify in this behalf. Admittedly, there is no notification on record in terms of Section 1(3)(c)

of the Act by the Central Government insofar as J&K State Forest Corporation is concerned.

5. From perusal of the order passed by the Controlling Authority, it is evident that two issues were framed which is relevant for the purpose of

controversy involved in the writ petition.

1. Whether the present claim applications are maintainable in view of preliminary objections raised? O.P.P.

2. Whether Payment of Gratuity Act is applicable to the employees of the J&K SPC in view of the Sub-Section (3) of Section 1 of gratuity Act, 1972

& the definition of â??employeeâ?? given their?Â O.P.R.

The Controlling Authority has dealt with the matter in the following manner, which reads as under:

The respondents Counsel strenuously argued that the Payment of Gratuity Act, 1972, is not applicable on the J&K Forest Corporation. It is contended

that the Gratuity Act is not extended to the State of Jammu and Kashmir so far as it relates to plantations or ports are concerned. It is contended that

since the J&K State Forest Corporation functioning is related to the plantations also, therefore, the Payment of Gratuity Act, shall not apply to the

Corporation. It has been further argued by the learned counsel for respondents that the corporation does not fall within the definition of

â??establishmentâ?? as prescribed under the Payment of Gratuity Act, 1972 and the same as such is not applicable to the corporation.

Â One needs to read the Section 1(3)(b) of the Act quite carefully to properly understand and appreciate the meaning underneath it. The only test of

applicability prescribed in the said section is that the establishment must be an â??establishmentâ? within the meaning of a specified type of law in the

State. The section does not prescribe further qualification that such law must apply to the establishment in question. Section 2(1)(e) of the Contract

Law (R&A) Act, 1970 defines â??establishmentâ?? as:-

(i) Any office or department of the Government or a local authority; orÂ

(ii) Any place where any industry trade, business, manufacture or occupation is carried on;

The Contract Labour (R&A) Act, 1970 is applicable to an establishment engaging 20 or more than 20 contract workers. Assuming corporation to

have not employed or employing any contract labour, it may be argued that the said Act is not applicable to it. While it is true that the applicability of

the said Act may be determined by a voluntary act of the corporation in engaging the requisite number of contract labour, Section 1(3)(b) of the

Payment of Gratuity Act does not contemplate applicability depending upon the violation of the employer. All that is necessary under Section 1(3)(b) is

that the establishment in question must answer the description of definition of an â??establishmentâ? within the meaning of any law relating to shops

and establishments which is in force in the State, nothing more and nothing less. What may now apply today may apply tomorrow, if the corporation

very much falls within the definition of an â??establishmentâ?? as provided under the provisions of J&K Shops & Establishment Act, 1996.

Moreso, the persons engaged by the corporation are engaged in a manufacturing process (Section 2(k) of the Factories Act, 1948) being carried out in

a systematic activity by corporation between them and in the vinculum of employer and workmen. The respondent corporation is also an industry in

terms of Section 2(j) of the Industrial Disputes Act, 1947.

Further, in case titled Daulat Ram Sharma v/s Management of J&K State Forest Corporation (decided on 31.07.2014), the Industrial Tribunal/ Labour

Court, J&K, Jammu, referring the various Judgments of Apex Court as well as different Honâ?ble High Courts, held that the J&K State Forest

Corporation is an industry, as the corporation is doing the commercial activities and it comes within the definition of industry.

The Allahabad High Court, also in case titled U.P. Forest Corporation & Anr. v/s Presiding Officer, Labour Court (decided on 10th of December,

2004), while referring the judgments of Apex court & different High Courts, held that the forest corporation is an industry.

Even the Forest Department (Chief Conservator of Forests v/s J. Maruti Kondhar (i) LLJ 1223 (SC) have been declared Industry by the Honâ?ble

Supreme Court.

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. Every corporation is an establishment which carries its

business to make gain or profit and perform the activities for promotion of sales or business both.

The J&K State Forest Corporation is not limited upto the plantations only but also used to buy trees from the Forest Department and then sell it in the

open market. The activities of the Corporation can broadly be categorized into the following areas i.e., Extraction, transportation and mechanization,

sales, timber utilization, supply of timber to Forest Department, supply to timber to bonafide consumers through fair price depots. The SFC conducts

regular auctions of timber from its sales depots located in Kashmir valley and Jammu. The Corporation also supplies timber to consumers on demand

at certain rates for house construction and repairs in the Municipal Corporation Areas of Jammu & Srinagar cities. Corporation used to prepare the

balance sheet which is usually prepared by the corporate sector, carrying the commercial activities. So, the SFC dealing with the sale of timber and is

doing its work for gain and performing its commercial activities.

In Ram Kumar Mishra v/s State of Bihar (1984) 2 SCC 451; AIR 1984 SC 537, the Apex Court considering Section 2(6) of the Bihar Shops &

Establishment Act, 1953 stated that;

â??The word â??establishmentâ? 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.â??

The respondent corporation carried on commercial activities by selling the timber and collecting money from the customers, preparing the balance

sheet which is usually prepared by the corporate sector and accordingly doing trading and business, therefore, the respondent corporation is not limited

to the plantation only, and as such SFC is an establishment and the payment of Gratuity Act applied to it. Hence, the point projected by the

respondents that the SFC only relates to the plantations and payment of Gratuity Act is not applicable so far as state of J&K is concerned, upon the

corporation, is rejected by holding that the State Forest Corporation is an establishment as per Section 1(3)(b) of the Payment of Gratuity, 1972 and

accordingly the Act under reference is applicable on the respondents corporation.Â

Further, the definition does not exclude the petitioners from the ambit of the

Gratuity Act, 1972. The petitioners are not governed by either by Central

Government or State Government rules. Therefore, the petitionersâ? fits in the definition of â??employeesâ? as provided under Section 2(e) of the

Payment of Gratuity Act, 1972.

6. Thus, from perusal of the relevant extract referred to above, it is evident that the Controlling Authority has inter alia held that the J&K State Forest

Corporation is an industry and Section 1(3)(b) and (c) of 1972 Act is wide enough to include establishments in which more than 10 employees are

employed. Therefore, Section 1(3)(b) of the 1972 Act includes all shops and establishments. It is further held that since the activities of J&K State

Forest Corporation are not limited up to plantations only but is involved in buying trees from various departments and to sell it in open market and the

activities of the Corporation include extraction, transportation, machination, sales, timber utilization, supply of timber to Forest Department, supply of

timber to bona fide consumers to their price depots. The State Forest Corporation takes regular auction of timber from its sale depots located in

Kashmir valley and Jammu and the Corporation also supplies timber to consumers on demand and, therefore, the State Forest Corporation is engaged

in commercial activities and, therefore, falls within the definition of establishment and, therefore, provisions of the Payment of Gratuity Act apply to it.

7. In the instant case, the question of applicability of the Act to the J&K State Forest Corporation Act is not pure question of law but is a mixed

question of law and fact which can be adjudicated by the Controlling Authority alone. In the instant case, the Controlling Authority while returning the

finding that Corporation is an establishment has not taken into account the pleadings of the parties, namely, whether the employees were employed in

the work of plantations, extraction, transportation, machinations of timber, sales and supply of timber utilization, etc.Â The aforesaid facts are

jurisdictional facts and after recording finding on the aforesaid issues only, the issue with regard to applicability of the Act can be decided, which has

not been done by the Controlling Authority. Admittedly, it was essential for the Controlling Authority to record the finding in view of pleadings and the

evidence adduce before it whether the employees are engaged in the plantation or not and whether the Corporation has separate departments

including the plantation. Admittedly, there is no notification on record by which

J&K State Forest Corporation has been notified by the Central

Government to be an establishment within the meaning of definition 1(3)(c) of the Act. So far as the finding recorded by the Controlling Authority that

Corporation is an establishment within the meaning of Section 1(3)(b) of the Act as the same is wide enough, is concerned, the same is also without

any foundation as there is no finding that JKSFC is an establishment within the meaning of any law for the time being in force in relation to shops and

establishments in a State. The aforesaid aspect of the matter has not been examined by the Controlling Authority. Besides that, the Controlling

Authority under the Act has not examined the Service Regulations governing the employees of the J&K State Forest Corporation under which they

have received the gratuity. Thus, in the absence of examination of the jurisdictional facts, the finding recorded by the Controlling Authority that the

provisions of the Act in question apply to the J&K State Forest Corporation cannot be sustained in the eye of law.

8. Ordinarily, this Court would have relegated the petitioners to the remedy of appeal under Rule 18 of the Payment of Gratuity Rules. However,

taking into account the fact that appeal preferred by the petitioners in one of the cases has already been dismissed by the Appellate Authority, I have

entertained this writ petition and have dealt with the same on merits.

9. In view of preceding analysis, the impugned order dated 31.07.2017 passed by the Controlling Authority is hereby quashed and set-aside and the

matter is remitted to the Controlling Authority to decide the issue with regard to applicability of provisions of the Payment of Gratuity Act to the

employees of the J&K State Forest Corporation as well as impact of Service Regulations framed under J&K State Forest Corporation Act and in

particular Regulations Nos. 80 to 85, which deal with Payment of Gratuity, and the provisions pertaining the Gratuity therein under which the

respondent No.1 has received the payment.Â The Controlling Authority is directed to decide the issue with regard to the applicability of the Act to the

employees afresh by a speaking order within a period of two months from the date of receipt of a certified copy of the order passed today.

Accordingly, the petition stands disposed of along with connected MP.