(2011) 04 AHC CK 0147

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 35464 of 2007

Kirpal APPELLANT

Vs

The Appellate Authority (Labour Commissioer) and Another RESPONDENT

Date of Decision : 29-04-2011

Acts Referred:

Income Tax Act, 1961 — Section 80G
Payment of Gratuity Act, 1972 — Section 1(3)
Uttar Pradesh Dookan Aur Vanijya Adhishthan Adhiniyam, 1962 — Section 2(4)

Citation : (2011) 04 AHC CK 0147

Hon'ble Judges : Prakash Krishna, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Prakash Krishna, J.—The Petitioner who was employed as attendant with effect from 5th November, 1981 and worked for 18 years, his services have come to an end with effect from 6th May, 1999, has claimed that he is entitled for payment of gratuity under the Payment of Gratuity Act, 1972. In this regard, a claim petition was filed before the Controlling Authority (Deputy Labour Commissioner) which was registered as P.G. Case No. 136-A of 1999. In response, the employer M/s Jawahar Lal Rohtagi Smarak Netra Chikitsalaya (the Hospital) in its objection submitted that the provisions of the Payment of Gratuity Act are not applicable as the Hospital is a charitable institution. The other relevant facts were not disputed. The Petitioner, in rejoinder affidavit denied the allegation that the employer is a charitable institution.

2. The said authority by the order dated 17th May, accepted the claim of the Petitioner by holding that by its earlier order dated 2nd August, 2001, it was found that the provisions of Payment of Gratuity Act are applicable to the establishment in question. He therefore calculated the gratuity amount and found that a sum of Rs. 17,799.00 is payable to the Petitioner along with 10% simple interest per annum.

3. The matter was carried in appeal before the appellate authority being P.G. Appeal No. 65 of 2002. The said appeal vide impugned order dated 13th June, 2003 has been allowed on the short point that the Respondent-employer is not a commercial establishment.

4. Heard Shri Ms. Sumati Rani Gupta, learned Counsel for the Petitioner and Shri C.B. Gupta, learned Counsel for the Respondent.

5. The only point which falls for consideration is whether the provisions of Payment of Gratuity Act are applicable to the Respondent-establishment or not?

6. Section 1(3) of the Payment of Gratuity Act, 1972 provides that the Act shall apply to

(a) ....

(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) ....

7. The question arises whether the Respondent-hospital is an establishment within the meaning of Sub-section (3)(b) of the Payment of Gratuity Act or not?

8. An Act to consolidate and amend the law relating to the regulation of conditions of work and employment in Shops and Commercial Establishments has been enacted in the State of U.P. known as The U.P. Dookan Aur Vanijya Adhisthan Adhiniyam, 1962. Its Section 2(4) defines the commercial establishment as follows:

(4) ''Commercial establishment'' means any premises, not being the premises of a factory, or a shop, wherein any trade, business, manufacture, or any work in connection with, or incidental or ancillary thereto, is carried on for profit and includes a premises wherein, journalistic or printing work, business of banking, insurance, stocks and shares, brokerage or produce exchange is carried on, or which is used as theatre, cinema, for any other public amusement or entertainment or where the clerical and other establishment of a factory, to whom the provisions of the Factories Act, 1948, do not apply, work;

9. The appellate authority on examination of memorandum of association and by-laws (vidhan) reached to the conclusion that the object of the establishment is not to earn profit. It may be placed on record that the above writ petition was listed along with Writ Petition No. 27918 of 2003 wherein the present Respondent-establishment is a party. A copy of the memorandum of association has been filed therein. The said memorandum of association does not say that the Hospital was established as a charitable hospital or that it is not charging any fee and doing charity to the patient indoor and outdoor. It may also be placed on record that in the present writ petition, Respondent has not filed any counter

affidavit, in spite of time granted to it. In para-5 of the affidavit, it has been stated that no evidence was placed on behalf of the Respondent hospital that they were not charging anything from any one of the patients who come for treatment either as indoor patient or outdoor patient. It has been further stated that it was not asserted on behalf the Respondent that they were running hospital on donation. They have not come out with any fact that from whom they were getting donation in order to make the arrangement for running the Hospital. The contents of said para-5, in the absence of any counter affidavit, has to be accepted as correct.

10. Further, case of the Petitioner is that the Respondent-Hospital is paying gratuity to the other staff including to the Chief Medical Officer of the Hospital. In this regard, a copy of the income and expenditure account submitted by it as on 31st March, 1982 with the Registrar of the Society Registration Act, has been filed as annexure-8 to the writ petition. It shows payment of gratuity to the Chief Medical Officer. The said averment also remains unrebutted.

11. The reliance placed by the appellate authority on the order passed under the Income Tax Act by the Income Tax Officer, u/s 80G of the Act is of no assistance to the Respondent so far as the proceedings under the Payment of Gratuity Act are concerned.

12. Learned Counsel for the Petitioner has submitted certain rulings and the extract of other provisions wherein establishment has been defined. Learned Counsel for the Respondent-Hospital, on the other hand, has placed reliance upon a judgment of Gujrat High Court in 1995 (70) 457, Wadhwan Mahajan Panjarapole v. B.D. Bhavasar and Ors. (It is difficult to find out the name of Journal as the photostat copy of the judgment supplied by the learned Counsel for the Respondent-Hospital is blurred).

13. It is not necessary for this Court to dwell upon the issue any further in view of the fact that the order of the appellate authority is unsatisfactory. The issue whether the Respondent-Hospital is an establishment within the meaning of Section 1(3)(b) of the Act was required to be dealt with some detail. It was failed to consider the order dated 2nd August, 2001 passed by the Controlling Authority. It appears that the authority below has not considered the matter properly. It is therefore, desirable that the matter be restored back to the authority concerned to rehear and redecide the appeal No. 65 of 2002, keeping in view the following:

(1) The order dated 2nd August, 2001 passed by the Controlling Authority.

(2) The income and expenditure account of the Respondent establishment. The Respondent establishment shall file annual statements of its income and expenditure.

(3) The fact that under the U.P. Dookan Aur Vanijya Adhisthan Adhiniyam, 1962, what is defined is "commercial establishment" but under the Payment of Gratuity

Act, 1972 the words used are "every shop or establishment".

(4) The evidence, if any, which may be produced by the Respondent establishment that the Hospital is a charitable hospital.

(5) The memorandum of association of the Hospital.

(6) Whether the Hospital is paying gratuity to other employees or not?

14. The matter may be heard and decided expeditiously, preferably within a period of four months from the date of production of certified copy of this order.

15. In the result, the writ petition succeeds and is allowed. The impugned order dated 13.6.2003 is set aside. No order as to costs.

