

(2010) 03 GUJ CK 0013

In the Gujarat High Court

Case No : Special Civil Application No. 3662 of 2010

Nadiad Nagarpalika

APPELLANT

Vs

Hasmukhlal Motilal Soni and Others

RESPONDENT

Date of Decision : 25-03-2010

Acts Referred:

Constitution of India, 1950 — Article 227
Industrial Disputes Act, 1947 — Section 19(2), 19(2)(3), 33(c)(2)
Payment of Gratuity Act, 1972 — Section 2(f), 4, 4(1), 4(5), 5

Citation : (2010) 2 GLH 250

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : Mehul Sharad Shah, for the Appellant;

Judgement

H.K. Rathod, J.—Heard learned Advocate Mr. Mehul Sharad Shah for petitioner - Nagarpalika. By way of present petition, the petitioner has challenged the order passed by Controlling Authority dated 6. 3. 2009 in Gratuity Application No. 98 of 2008 and also the order passed by appellate Authority, Baroda dated 7. 9. 2009.

2. The Controlling Authority has directed to present petitioner to pay difference of gratuity amount of Rs. 60, 494/- and on delayed payment of gratuity amount with 10% simple interest within a period of 30 days from date of receiving the order of Controlling Authority.

2.1 The appellate Authority has also not entertained the appeal because no amount is deposited along with appeal before Controlling Authority by petitioner. Therefore, appeal came to be disposed of because pre-condition for filing appeal is not complied with by petitioner.

3. Learned Advocate Mr. Shah has raised number of contentions before this Court being a public Authority. The respondent No. 1 was retired on 30. 6. 2003 as a Clerk of Tax Department on attaining the age of superannuation. The petitioner had paid amount of gratuity of Rs. 1, 13, 381/- in the year 2005 by two

installments; one was paid Rs. 50, 000/- on 20. 6. 2005 and another of Rs. 67, 381/- dated 9. 11. 2005. Then after a period of 5 years of his retirement, respondent moved an application before Controlling Authority under the Payment of Gratuity Act, 1972 (for short "the Act") on 18. 11. 2008 claiming difference of gratuity amount after accepting retiral benefits. The respondent No. 1 was paid retiral benefits and gratuity considering his revision of pay scale as per 5th Pay Commission report and as per the BCSR Rules and as per the Payment of Gratuity (Gujarat) Rules, 1973. The application was preferred by respondent on the ground that as per settlement award arrived between Union and Nagarpalika in Reference (IT) No. 174 of 1974, the respondent is entitled 25 months' wages towards the gratuity in stead of 16 and 1/2 months' wages as per Rules. While getting other benefits, he has not referred the above settlement. The above settlement in Reference (IT) No. 174 of 1974 was terminated by Nagarpalika following the procedure u/s 19(2)(3) of the I. D. Act, 1947 w. e. f. 4. 12. 2003. Therefore, he submitted that similar question arose in number of petitions namely SCA No. 608/2009, 610/2009, 611/2009, 642/2009 and 2853/2009 which are pending before this Court for final hearing. He further submitted that Appellate Authority has to decide the matter on merits in stead of not entertaining the appeal because of amount is not deposited by petitioner along with appeal. He raised contention that there is a delay in filing gratuity application before Controlling Authority and therefore, Controlling Authority has committed gross error in entertaining such belated application filed by respondent. The claim which was based on award passed by Industrial Tribunal in Reference (IT) No. 174 of 1974 which was terminated and therefore, the respondent is not entitled any benefits from said terminated award. He also submitted that Bombay Civil Services Rules are applicable and all benefits have been received by respondent under the provisions of BCSR Rules. Therefore, Controlling Authority has committed gross error in granting difference of gratuity amount as per award passed by Industrial Tribunal, Nadiad in Reference (IT) No. 174 of 1974. In short, his submission is that once the award is terminated, it is ceased to operate between the parties. Meaning thereby that such award which was terminated having no legal effect which is to be considered and implemented by Controlling Authority. Therefore, according to him. authorities below have committed an error in passing such orders which are under challenge.

3.1 Learned Advocate Mr. Shah has relied upon decision of this Court in the case of GSRTC v. Karshan Meghji Dabhi reported in 1997 II CLR 775. Relying upon aforesaid decision, he submitted that for claiming difference of amount of gratuity based on settlement, respondent has to file recovery application u/s 33(c)(2) of the I. D. Act. 1947. Therefore, application which was made before Controlling Authority is not maintainable in law.

4. I have considered submissions made by learned Advocate Mr. Shah and also perused the order passed by Controlling Authority as well as appellate Authority. The facts are not much in dispute between the parties. The respondent was appointed on 9. 3. 1970 and retired from service on 30. 6. 2003. At the time of

retirement, his last drawn salary was Rs. 459(V-basic + dearness allowance Rs. 2525/-totaling to Rs. 7115/-. The petitioner Nagarpalika has made payment of Rs. 50, 000/- on 20. 6. 2005 and Rs. 67, 381/- was paid on 9. 11. 2005 total of which comes to Rs. 1, 17, 381/-. The total length of services is 33 years and 3 months and therefore, the respondent has claimed amount of gratuity as per award passed by Industrial Tribunal, Nadiad in Reference (IT) No. 174 of 1974 where it was decided that maximum amount of gratuity is to be paid 25 months salary which comes to Rs. 1, 77, 875/-, in stead of that total amount was paid at Rs. 1, 17, 381/-. Therefore, remaining amount comes to Rs. 60, 494/- which is required to be paid by petitioner with 12% interest. The demand was made by respondent before Chief Officer of petitioner -Nagarpalika on 17. 10. 2008. Thereafter, application was made to Controlling Authority. The Controlling Authority has considered submissions made by both authorities and also considered award passed by Industrial Tribunal, Nadiad in Reference (IT) No. 174 of 1974 which was terminated on 4. 12. 2003. The contention raised by petitioner before Controlling Authority that respondent is not entitled amount of gratuity as per award passed by Industrial Tribunal in Reference (IT) No. 174 of 1974. The facts remain that on 30. 6. 2003 when workman was retired from service, at that relevant time, the award passed by Industrial Tribunal, Nadiad in Reference (IT) No. 174 of 1974 was in force and not terminated. Therefore, it was a binding award to petitioner - Nagarpalika and it must have to be applied and complied with by petitioner in favour of respondent workman. The petitioner has not raised any other contention about delay in filing such Gratuity Application before Controlling Authority. There is no specific contention was raised by petitioner before Controlling Authority that BCSR Rules are applicable and therefore, the Act is not applicable and respondent is not entitled any amount under the provisions of the Act. But apart from that contention was raised that gratuity amount is paid by petitioner to each employee, who retired from service as per 5th Pay Commission report. Therefore, contention raised by learned Advocate Mr. Shah that BCSR Rules are applicable and therefore, the Act is not applicable and the respondent is not entitled any amount from petitioner - Nagarpalika.

5. This Court had an occasion to decide group of SCA No. 2 138 of 2002 and allied matters wherein this Court has held that Bilimora Municipality is not exempted from the operation of provisions of the Gratuity Act u/s 5 of the Act, then employee is entitled to benefit of gratuity under the said Act. The order passed in group of SCAs has been challenged before the Division Bench of this Court by Bilimora Municipality by way of LPA Nos. 379 of 2008 which is reported in 2008 (2) GLH 448. Relevant observations are in Para. 4. 5 and 6. which is quoted as under: -

"4. Ms. Jhaveri has appeared for the Municipality. She has assailed the judgment of the learned Single Judge. She has submitted that the Municipality has, as far back as in the year 1972, framed rules for payment of gratuity to its employees. The said rules have been approved by the State Government by its Resolution

dated 24th November, 1972. Since then, the said rules are implemented and retired employees of the Municipality are paid gratuity according to the said rules.

5. We are unable to accept the contention raised by Ms. Jhaveri. Section 2(f) of the Act of 1972 defines "employer. " Sub-clause (ii) of the said clause (0 expressly includes the "local Authority" within the meaning of the word employer. Section 4(1) of the Act of 1972 enjoins the employer to pay gratuity to its employee on termination of employment after he renders continuous service for not less than five years, inter alia, on his superannuation or on his retirement. Thus, the Municipality is under obligation to pay gratuity to its retired employees in accordance with the Act of 1972.

6. Section 5 of the Act of 1972 empowers the appropriate Government to exempt any establishment, etc. to which the Act applies, from the operation of the provision of the Act of 1972. In other words, unless an establishment is expressly exempted by the appropriate Government by notification issued u/s 5 of the Act of 1972, such establishment would be liable to pay gratuity to its retired employees in accordance with the Act of 1972. It was not the case of the Municipality before the Controlling Authority or before the learned Single Judge or before us that the Municipality is exempted from the operation of the provisions of the Act of 1972 as envisaged by Section 5 of that Act. In absence of the exemption specifically granted u/s 5, the Municipality is duty bound to pay its employees gratuity in accordance with the Act of 1972.

7. In above view of the matter, the order of the learned Single Judge does not warrant interference. The Appeals are dismissed in limine. Civil Applications stand disposed of."

5.1 Therefore, unless and until the petitioner Nagarpalika exempted by State Government while exercising powers u/s 5 of the Act, the provisions of the Act are applicable to petitioner - Nagarpalika. Therefore, employees those who are working, no doubt receiving benefits under BCSR Rules for other service benefits, but for gratuity amount employees are entitled the benefits of the Act because there is a specific provisions made in Section 4(5) of the Act which provides that nothing in this Section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer. Therefore, if any amount to be received as per award which is a better terms of gratuity, then concerned employee is entitled to receive it better terms of gratuity from employer as per award passed by the Industrial Tribunal. Therefore, claiming amount of gratuity in terms of award passed by Industrial Tribunal in Reference (IT) No. 174 of 1974 cannot be considered to be illegal or unauthorized claimed beyond the scope of the Act. The petitioner - Nagarpalika is not exempted u/s 5 of the Gratuity Act, 1972. The right to gratuity is a statutory right. Similarly, if any amount granted by Controlling Authority is not deposited before Controlling Authority as per Section 7(4) while filing appeal, it is a legal obligation upon employer while filing appeal under proviso to Section 7(7) that no appeal by an employer shall be admitted unless at the time of preferring

the appeal, the appellant produced a certificate of the controlling Authority to the effect that appellant has deposited with him an amount equal to the amount of gratuity required to be deposited in Sub-Section-4 or deposit with the Appellate Authority such amount. Therefore, Appellate Authority has rightly not entertained appeal because the amount granted by Controlling Authority u/s 7(4) has not been deposited by petitioner Nagarpalika before the Controlling Authority or Appellate Authority. Therefore, subsequent payment or deposit has no legal consequence. The pre-condition of deposit is mandatory. The appeal preferred without deposit is not a valid appeal. (See: Pharma Base India (P) Ltd. (Mumbai) v. State of Maharashtra & Anr. reported in 2008 I CLR 1 (Bombay High Court) and the High Court has no discretion to waive such pre-deposit condition, as decided in case of Arulmiga Sankar Narayanaswamy Devasthanan v. Joint Commissioner of Labour reported in 2008 (1) LLN 273 (Madras High Court).

5.2 Learned Advocate Mr. Shah has raised contention that looking to financial condition of petitioner Nagarpalika, interest amount is to be reduced. This contention cannot be accepted because this being statutory interest cannot be reduced in late or delay application is filed, in case of S.N. Vasudevaiah Vs. Appellate Authority under Payment of Gratuity Act, 1972 and Deputy Labour Commissioner and Controlling Authority Under PG Act and KSC Apex Bank Limited, and in case of Praye Mohan Prasad v. Regional Labour Court (C) Dhanbad reported in 2007 LLR 173 (Jharkhand High Court).

5.3 But such contention cannot be entertained because it is an employees' right to claim interest on delayed payment being a statutory as decided by the Patna High Court in the case of Champaranya Sugar Co. Ltd. v. Joint Labour Commissioner and appellate Authority reported in 1987 (54) FLR 60. The provision of Section 7(3) provides that employer shall arrange to pay the amount of gratuity within 30 days from the date it becomes payable to the person to whom the gratuity is payable. Section 7(3)(A) of the Act provides that if the amount of gratuity payable under Sub-Section (3) if it is paid by employer within the period specified in Sub-Section-3. the employer shall pay from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate specified by Controlling Authority. It is further provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the Controlling Authority for the delayed payment on this ground.

6. Therefore, in view of provisions made u/s 7(3)(A) read with Section 7(3), such interest on delayed payment being a statutory compulsion and Controlling Authority have no discretionary power to deny statutory interest in case of delayed payment of amount of gratuity to concerned employee. The view taken by Apex Court in the case of H. Gangahanume Gowda Vs. Karnataka Agro Industries Corpn. Ltd., wherein it is held that proviso to Section 7(3)(A) and Section-8, interest on delayed payment of gratuity is a mandatory and not discretionary if delay is not due to fault of the employee and employer has not

obtained permission from controlling Authority for delayed payment on that ground.

7. If the appeal preferred against the order of Controlling Authority without pre-deposit as required u/s 7(7) which is considered to be a mandatory as per decision of Bombay High Court in the case of Pharma Base India Pvt. Ltd. Vs. State of Maharashtra and Another, .

8. Similarly, considering provisions of Section 7(3) and 7(3)(A) of the Act, interest on delayed payment is being a mandatory as decided recently by Apex Court in the case of Kerala State Cashew Dev. Corporation & Anr. v. N. Ashokan reported in 2009 (13) Scale 109.

9. The contention raised by learned Advocate Mr. Shah that there is a delay in filing application for gratuity amount. Therefore. Controlling Authority has committed gross error in entertaining such application. But there is no bar in claiming gratuity even after the specified period of 30 days as decided by the Division Bench of Andhra Pradesh High Court that rules prescribing limitation for filing an application for gratuity are merely procedural and would not debar the right of employee to claim gratuity in a decision in the case of Ramjilal Chimanlal Sharma v. Elphinstone Spinning and Weaving Mills. Co. Ltd. reported in 1984 Lab. 1. C. 1703 and also in a decision in the case of P. Gallema v. Appellate Authority under the Act, reported in 1994 111 IJ. J (Suppl.) 791.

10. The decision given by this Court in the case of Karshan Meghji Dabhi is relied referred to above by learned Advocate Mr. Shah and submitted that recovery application is maintainable. But it was a case of amount of gratuity claimed by employee based on settlement only and it was not a claim made by employee under the provisions of the Act. If any amount of gratuity claimed by employee under the provisions of the Act. then recovery application u/s 33(c)(2) of the I. D. Act. 1947 is not maintainable as per decision of Apex Court in the case of State of Punjab Vs. Labour Court Jullunder and Others, . Therefore, decision which has been relied by learned Advocate Mr. Shah is not helpful and not covered the issue which has been raised before this Court. Apart from that no such contention raised by petitioner before controlling Authority. The employee is entitled to claim better terms of gratuity as per Section 4(5) of the Gratuity Act, 1972 by filing application under the provision of Gratuity Act, 1972.

11. Therefore, contentions raised by learned Advocate Mr. Shah cannot be accepted because controlling Authority has rightly considered award passed by Industrial Tribunal, Nadiad in Reference (IT) No. 174 of 1974 which was terminated on 4. 12. 2003, and prior to that, workman had retired from service on 30. 6. 2003 and on that day, the award was in force and employee is entitled benefits from such award and such award is binding to petitioner Nagarpalika. Therefore, controlling Authority has rightly granted difference of amount of gratuity with interest, which cannot be considered to be erroneous finding or conclusion given by controlling Authority. Therefore, according to my opinion,

controlling Authority has not committed any error which requires interference by this Court under Article 227 of the Constitution of India. Hence, there is no substance in present petition. Accordingly, present petition is dismissed. The order passed by this Court in SCA No. 21865 of 2007 dated 26. 2. 2008 wherein facts which are involved is altogether different and hence, not applicable to facts of present case. Similarly, other petitions which are admitted and pending for final hearing where question is that what is the legal effect of termination of award by Nagarpalika u/s 19(2) of I. D. Act, 1947 but here that question is not at all involved because before terminating award dated 4. 2. 2003 the respondent was retired on 30. 6. 2003. Therefore, pending petitions are not identical and hence, the contention is rejected.