

(2000) 05 GUJ CK 0057

In the Gujarat High Court

Case No : Spl. Civil Application No. 377 of 2000

Nitin A. Mehta

APPELLANT

Vs

Mehta Prafullaben Dalpatrai and Another

RESPONDENT

Date of Decision : 02-05-2000

Acts Referred:

Payment of Gratuity Act, 1972 — Section 1(3), 2(4), 4

Citation : (2001) 91 FLR 396 : (2001) 1 LLJ 1348

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

Bench : Single Bench

Advocate : Nagin N. Gandhi, for the Appellant; H.J. Nanavati Patel, for the Respondent

Judgement

1. In the present writ petition, the order dated 23-12-1999 passed by the Controlling Authority under the Payment of Gratuity Act, 1972, Bhavnagar in Gratuity Application No. 17 of 1999 is under challenge.

2. The respondent-workman has filed application claiming the benefit of gratuity under the provisions of Payment of Gratuity Act, 1972 (hereinafter referred to as "the Act") against the petitioner-Abhinav Siksan Sikshak Samaj (hereinafter referred to as "the Society"). Before the Controlling Authority, the petitioner-Society has raised a preliminary contention that the provisions of Gratuity Act are not applicable, and therefore, the Controlling Authority has no jurisdiction to entertain and try such application filed by the respondent-workman. The said preliminary contention has been examined by the Controlling Authority and came to the conclusion that considering the notification issued by the Central Government dated 3rd April, 1997, the educational institutions are covered within the purview of the Payment of Gratuity Act, 1972, and therefore, he held that the Controlling Authority has jurisdiction to entertain such application filed by the respondent workman. Mr. Gandhi, learned advocate appearing for the petitioner-Society has raised a contention that though there is a notification issued by the Central Government covering the Educational Institutions within

the purview of the Payment of Gratuity Act but it is necessary to consider the provisions of Section 1(3) of the said Act. Said Section 1(3) of the Act reads as under :-

"1 (3) xx xx xx (a) every factory, mine oil-field, 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 shop, and establishments in State, in which ten or more persons are employed, or were employed on any day of the preceding twelve months."

3. Learned advocate for the petitioner-Society submitted that for Section 1(3)(a) the petitioner is not naturally falling within the provisions but in respect to Section 1(3)(b) the question is required to be examined as to whether the petitioner is an "Establishment" within the meaning of "State Act" or not. He, therefore, placed reliance upon Section 2(8) of the Bombay Shops and Establishments Act, 1948. Said Section 2(8) defines "Establishments" as under :-

"Establishment means a shop, commercial establishment, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment to which this Act applies and includes such other establishment as the State Government may, by notification in the official Gazette declare, to be an establishment for the purpose of this Act."

4. Thus, according to the submission of the learned advocate, the petitioner-Society is not an "Establishment" or "Commercial Establishment", and therefore, the provisions of Bombay Shops and Establishments Act, 1948 are not applicable. He further submitted that "Commercial Establishment" is defined u/s 2(4) to mean, "an establishment which carries on any business, trade or profession or any work in connection or incidental or ancillary to any business, trade or profession and includes the Society registered under the Societies Registration Act and a Charitable or other Trust; whether registered or not, which carries on, whether for the purpose of gain or not, any business, trade or profession or work in connection with or incidental or ancillary thereto but does not include (a) factory, shop, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment. He also placed reliance upon item No. 6-F of third Column of Schedule-II of the said Act. Section 4 of the Bombay Shops and Establishments Act, 1948 grants exemption in favour of certain shops or institutions to whom the said Act is not made applicable. Section 4 exemption depicts that, "notwithstanding any thing contained in this regard, the provisions of this Act mentioned in the third column of Schedule II shall not apply to the establishments and other persons mentioned in the second column of the said schedule. Mr. Gandhi referred Item No. 6-F of the Second Schedule of the said Act. Section 6-F relates to "Establishments pertaining to any kind of educational activities". He therefore submitted that the provisions of the Act will not apply to such establishment which is having educational activities. Therefore,

according to his submissions, the view taken by the Controlling Authority that he is having jurisdiction is erroneous and contrary to the provisions of the Act and the Bombay Shops and Establishments Act, 1948.

5. Learned advocate H. J. Nanavati, on the other hand, submitted that the order impugned herein is based on the preliminary issue and the Controlling Authority has not determined the main application, and therefore, it is not a conclusive order. Mr. Nanavati submitted that the contentions raised by the petitioner can very much be raised by it at the time of final hearing of the said application. Mr. Nanavati has pointed out that only the question of jurisdiction has been examined by the Controlling Authority in light of the notification dated 3rd April, 1997, and therefore, the present writ petition is premature. Mr. Nanavati further argued that once, under the Payment of Gratuity Act, the Central Government has issued Notification on 3rd April, 1997, covering all the Educational Institutions within the purview of the Payment of Gratuity Act then the question of considering exemption under the provisions of the Bombay Shops and Establishments Act, 1948 of "Establishment" which is having educational activities does not make any difference because the exemption which has been granted under the provisions of Bombay Shops and Establishments Act is applicable to the provisions of the said Act but that does not mean that petitioner is not covered within the definition of "Establishment". Mr. Nanavati further argued that the said exemption cannot have any effect when the Notification dated 3rd April, 1997 has been issued by the Central Government covering the Educational Institutions within the purview of the Payment of Gratuity Act, and therefore, the Act is applicable to the petitioner and the decision which has been taken by the Controlling Authority; relying upon the said Notification, cannot be said or considered to be erroneous. In support of his arguments, learned advocate Mr. Nanavati has placed reliance upon the decision of the Division Bench of Bombay High Court in the matter of Premlata Digambar Raodeo v. Principal, St. Phelomine's Convent High School, Nasik, reported in (1997) 1 CLR 569 (596 and of Division Bench of Andhra Pradesh High Court in the matter between V. Venkateshwara Rao v. Chairman/Governing Body, S.M.V.M. reported in 1997 Lab IC 2543.

6. I have heard at length both the learned advocates.

7. The question which has been raised by Mr. Gandhi that the Gratuity Act is not applicable to the petitioner cannot bear importance in light of the Notification dated 3rd April, 1997 issued by the Central Government in exercise of powers vested in it u/s 1(3)(c) of the Act. The point with regard to exemption relates to the implementation of provisions of Bombay Shops and Establishments Act but it has nothing to do with the applicability of the Gratuity Act. Therefore, the view taken by the Controlling Authority; relying upon the Notification dated 3rd April, 1997 is not erroneous and it is quite just, proper and reasonable. This aspect has been examined in detail by the Division Bench of the High Court of Judicature at Bombay in Para-12 of its decision in the matter of Premlata Digambar Raodeo

(1997 (1) CLR 569) (Supra). The said Para-12 reads as under :-

"12. As far as we are concerned, the Supreme Court in its decision reported in Shri B.P. Hira, Works Manager, Central Railway, Parel, Bombay etc. Vs. Shri C.M. Pradhan etc., has clearly laid down that an establishment which is exempted under Schedule II of the Shops and Establishments Act would show that but for that exemption, the same would be covered by the Shops and Establishments Act. The position would be clear if the relevant portions of the Supreme Court decision are reproduced below :-

"(21) Incidentally the learned Attorney General suggested, though faintly, that the establishments mentioned at Sr. Nos. 1 to 6 in Col. 2 of Schedule II are wider than and different from the establishment as defined by S. 2(8). We do not think that this suggestion is well founded. There can be no doubt that Section 4 grants exemptions to the said establishments from the application of the provisions mentioned in Col. 3 of Schedule II : and that itself postulates that but for the exemption thus granted the provisions of the Act would have applied to them. Indeed the Scheme of Schedule II shows that whereas all the provisions of the Act are made inapplicable to the establishment and offices enumerated at Serial Nos. 1 to 6 including 6 (a) to 6 (k), in regard to the others which are enumerated at Serial Nos. 7 to 55 it is only some provisions of the Act specified in Col. 3 that are excluded. In other words, the remaining sections not so specified would apply to them. If that is so, they must be and are establishments u/s 2(8) of the Act.

(22) In this connection it must be borne in mind that S. 2(8) empowers the State Government to include by notification any office or institution within the definition of establishment and so the inclusion of any such office or institution in Col. 2 of Schedule II would make it an establishment under the Act, and as such it would be governed by it subject of course to the corresponding entry in Col. 3. That is why we think that the suggestion of the learned Attorney General as the denotation and character of establishments enumerated in Serial Nos. 1 to 5 in Col. 2 of Schedule II cannot be accepted. All the offices, establishments and other institutions mentioned in Col. 2 of Schedule II are and must be held to be establishments u/s 2(8)".

From the above, it is clear that the Supreme Court held that Section 4 of the Shops and Establishments Act granted exemption to the establishments from the application of the provisions mentioned in Col. 3 of Schedule II and that postulated that but for the exemption thus granted the provisions of Shops and Establishments Act would have applied to them. The Supreme Court further at the end of para 22 has specifically held that all the offices, establishments and other institutions mentioned in Col. 2 of Schedule II are and must be held to be establishments u/s 2(8) of the Bombay Shops and Establishments Act. Entry 6-F added by G.N. Lab. D. No. 8/48-I dated 28th April, 1949 deals with establishments pertaining to any kind of educational activities (excepting certain coaching or tuition classes) and exempts them from application of all the

provisions of the said Establishments Act. In the light of the clear pronouncement by the Supreme Court in the matter it has done as shown above, we are not at all impressed by the submission made by Mr. Bukhari."

8. Similarly, the Division Bench of Andhra Pradesh High Court has considered the very same question in respect to S.M.V.M. Polytechnic Institute, by holding the said Institute as an "Establishment" within the meaning of Section 1(3)(b) of the Act, while examining the provisions of Payment of Gratuity Act, 1972. Relevant paragraph Nos. 5 & 6 of the said decision in the matter of V. Venkateshwara Rao v. Chairman/Governing Body, S.M.V.M. (1997 Lab IC 2543) (Supra) reads as under :-

"5. In the nature of the controversy, the matter may also be examined in the context of Section 1(3) of the Payment of Gratuity Act regarding a State law relating to Shops and Establishments Clause (b) concerns any law within whose meaning a shop or establishment is brought. The clause opens with the expressions "every shop or establishment" as distinctive entities and not conductive ones. Their meaning is sought to be imported as any law in a State relating to Shops and Establishments which is understood as a conductive attire. There is no reason to think that any law in any State concerns both shops and establishments, shops only and establishments only. Among such laws, A.P. Shops and Establishments Act is one. All shops may not be establishments or all establishments may not be shops. There may be shops in an establishment or establishments in a shop. There appears to be no law so far to say that both the shops and establishments should not exist together or should exist together. So, the word "and" in Clause (b) in the second limb of Section 1(3) should be read as "and"/"or" and not to take it as strictly as conjunction. In the context of the open words using "or" as disjunctive, the use of the word "and" later as conjunctive for the same purpose or subject matter should be a definite articulate as "or" to make it disjunctive. So, to understand Clause (b) correctly where any law in a State relating to Shops and Establishments means that it may be any law relating to Shops or Establishments and need not be confined to a particular Act. A.P., Shops and Establishments Act.

6. The laws relating to Shops and Establishments or Shops and Establishments in Andhra Pradesh are (1) A.P. Shops and Establishments Act, (2) The Factories Act, (3) Labour Laws (Exemption from furnishing returns and Maintaining Registers by certain Establishments) Act, 1988 (4) Payment of Wages Act, (5) Minimum Wages Act., If any one of them bring the petitioner within the meaning of "establishment" that is sufficient to attract Section 1(3)(b) of the Payment of Gratuity Act. This view is fully supported by the Supreme Court in State of Punjab Vs. Labour Court Jullunder and Others, , of which is relied upon by a Division Bench Madras High Court in the Management of SIET Women's College v. Md. Ibrahim (1992) I LLJ 91 to conclude that an educational institution like the petitioner-Polytechnic is an establishment governed by the Payment of Gratuity Act"

9. Recently, this Court in the matter between Andhjan Vividhlaxi Talim Kendra v. Pushpaben N. Chandalia (2000) 1 LLJ 124 has examined the very question as regards the applicability of the Gratuity Act to the Andhjan Mandal or not. While considering the provisions of the Shops and Establishments Act, this Court has come to the conclusion that considering the decision of the Apex Court in the case of State of Punjab Vs. Labour Court Jullunder and Others, it is held that in order to come within the purview of the Payment of Gratuity Act, it is not at all necessary that the Institution should be a Commercial Establishment. The Public Trust registered under the Bombay Public Trust Act, 1950 is an "Establishment" covered by the provisions of Payment of Gratuity Act, 1972.

10. Now considering the above observations made by the Apex Court as well as Division Bench of the Bombay High Court and Andhra Pradesh High Court, I am of the opinion that the Controlling Authority has not committed any error in coming to the conclusion that he has jurisdiction to entertain application filed by the respondent workman under the Payment of Gratuity Act, 1972. However, the order under challenge is in respect to the preliminary issue raised by the petitioner-Society, and therefore, this is an interlocutory order and not the final one. In such circumstances, the view taken by this Court in case of Cadila Healthcare Ltd., Ahmedabad Vs. Union of India and Others, that a petition under Arts. 226 and 227 of the constitution challenging the interlocutory orders order not deciding the case finally. In that event, even if the interlocutory order, is illegal, in absence of failure of justice and in view of the right to challenge the said order when it becomes final, petition against the interim order is not maintainable. Considering this decision of the learned single Judge as well as another decision of the Division Bench of this Court in the matter between Chhagan Ranchod Kukvaya v. General Manager, Western Railways, Bombay reported in (1998) 1 GLH 461 : (1998 Lab IC 2420) wherein it is observed that, an order passed by the Tribunal can be challenged under Arts. 226 and 227 of the Constitution of India only if there is a jurisdictional error or procedural error apparent on the face of the record.

11. In the light of aforesaid citations, observations and discussion said decision, according to my opinion, the Controlling Authority has not committed any jurisdictional error in entertaining the application preferred by the respondent workman. Further, no jurisdiction error is committed by the Controlling Authority which requires interference at the hands of this Court in exercise of powers under Arts. 226 and 227 of the Constitution of India. Therefore, the present petition is dismissed at the notice stage. Ad-interim relief granted earlier stands vacated. There shall be no order as to costs.

12. Petition dismissed.