(2008) 10 BOM CK 0092

In the Bombay High Court

Case No : O.O.C.J.A. No. 793 of 2007

Pharma Base India Pvt. Ltd. APPELLANT

Vs

State of Maharashtra and Another RESPONDENT

Date of Decision : 18-10-2008

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Limitation Act, 1963 — Section 5
Payment of Gratuity Act, 1972 — Section 7(4), 7(7)

Citation : (2009) 120 FLR 634 : (2009) 2 LLJ 458

Hon'ble Judges : S.B. Mhare, J;R.V. More, J

Bench : Division Bench

Advocate : V.K. Wasnik, for the Appellant; Anjali Purav and Anjali Purav and Co., for the Respondent

Final Decision : Dismissed

Judgement

R.V. More, J.—Heard the learned Counsel appearing for the respective parties.

2. The Appeal takes exception to the order dated November 2, 2007 passed by the learned single Judge in Writ Petition No. 1946/2007 dismissing the petitioner''s Petition thereby confirming the order dated August 9, 2007 passed by the Appellate Authority under the Payment of Gratuity Act, 1972 in Appeal PGA No. CA/YDN/03/2007.

3. By the order dated October 5, 2006 the controlling Authority under the Payment of Gratuity Act, 1972 passed an order thereby directing the petitioner Company to pay respondent No. 2 an amount of Rs. 13,75,000/-by way and as a gratuity. The petitioner challenged the aforesaid order before the Appellate Authority by filing an Appeal on December 13, 2006. However, the petitioner deposited the amount of gratuity with the Appellate Authority on March 12, 2007. Respondent No. 2 raised preliminary objection as to the maintainability of the Appeal on the ground of limitation. The petitioner filed reply on May 29, 2007 to this Application. The Appellate authority by its order dated August 9, 2007

upheld the preliminary objection raised by the respondent No. 2 and held that the petitioner has filed the Appeal after the expiration of limitation period of 120 days. Consequently, the petitioner''s Appeal came to be dismissed.

4. The petitioner being aggrieved, preferred above said Writ Petition No. 1946/2007 before the learned single Judge of this Court. However, by an order dated November 2, 2007 the learned single Judge confirmed the order passed by the Appellate Authority and consequently dismissed the petitioner''s Writ Petition. This order as stated above is under challenge in the present Appeal.

5. The following facts are not disputed. The Controlling Authority passed an order on October 5, 2006 directing the petitioner to pay an amount of Rs. 13,75,000/- to the respondent No. 2 by way and as of gratuity. The copy of this order was received by the petitioner on October 27, 2006. The petitioner applied and received the certified copies on the same day i.e. on November 10, 2006. The petitioner''s Appeal sent by speed post was received in the office of the Appellate Authority on December 13, 2006 and the petitioner made deposit of gratuity amount before the Appellate Authority by way of D.D. on March 12, 2007.

6. The submissions of Mr. Wasnik, the learned Counsel appearing for the appellant, are threefold. Firstly, that the Appeal being filed on December 13, 2006, the same is well within the period of limitation as contemplated u/s 7(7) of the Payment of Gratuity Act, 1972. Secondly, the requirement of compulsory deposit as contemplated under Proviso of Section 7(7) is at the time of admission by the Appeal and not at the time of preferring an Appeal and thirdly, even it is assumed that the Appeal is filed on March 12, 2007 on which date, deposit was made, in that case also Appeal is within limitation inasmuch as the limitation would start to run from the date of receipt of the certified copy of the order. Apart from these submissions, Mr. Wasnik also submitted that it was not open for the Appellate authority to go into the questions of limitation and the Appeal ought to nave been heard on merits in view of the order dated April 23, 2007 passed in Writ Petition No. 1946/2007.

7. Mr. Wasnik also relied upon the following judgments.

1. Madurai District Central Co-operative Bank, Ltd., Madurai v. Appellate Authority under Payment of Gratuity Act, Madurai and Ors. (1984) I LLN 763 (Mad);

2. L. Palaniswamy Vs. The Appellate Authority under the Payment of Gratuity Act (The Deputy Commissioner of Labour), Coimbatore and another, ;

3. Sahkari Ganna Vikas Samiti Ltd. Vs. Controlling Authority under Payment of Wages Act, ;

4. Janpad Panchayat Masturi, Bilaspur v. Appellate Authority and Dy. Labour Comm. and Ors. 1998 III LLJ (Suppl) 163 (MP);

5. Malabar Spinning & Weaving Mill v. Narayanan Nair 1994 III LLJ (Suppl) 323

(Kerala)

6. Commissioner, Edapadi Municipality Vs. Joint Commissioner of Labour, Appellate Authority under the Payment of Gratuity Act and Others, ;

7. Shaik Kaisar and Others Vs. Forbes Gokak Ltd. and Others, ;

8. Sunderlal Laxman Mahyavanshi Vs. N.T.C. (MN) Ltd. and Another, ;

9. Standard Stonewares and Tiles Vs. Appellate Authority, ;

8. Per contra Ms. Purav, the learned Counsel appearing for respondent No. 2. supported the order of Appellate Authority as well as that of learned single Judge in the aforesaid Writ Petition. She submitted that the limitation would start to run from the date of receipt of the order and not from the date of receipt of the Certified copy as certified copy was received within one day. She further submitted that the petitioner could not have been preferred an appeal without compliance with the provisions of proviso 2 of Section 7(7) which was admittedly complied on March 12, 2007 and therefore, it could not be said that the Appeal was preferred within a period of limitation. She lastly submitted that the Appellate Authority has no powers to condone the delay and therefore, the Appeal was rightly rejected. In this regard, she relied upon the Division Bench judgment in J.L. Morrison India Ltd. Vs. Dy. Commissioner of Labour, Appellate Authority under the Payment of Gratuity Act, 1972, Asst. Commissioner of Labour, Controlling Authority under the Payment of Gratuity Act, 1972 and Government of Maharashtra, .

9. Having heard the learned Counsel appearing for the respective parties and having gone through the impugned order and Petition alongwith the annexures thereto and the case laws cited by the learned Counsel in this regard, we are of the considered opinion that there is no merit in the Appeal. Sub-Clause 7 of the Section 7 reads as follows:

(7) Any person aggrieved by an order under sub-section (4) may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government in this behalf;

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days;

Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4), or deposits with appellate authority such amount.

10. The plain reading of above said proviso will reveal that any person aggrieved by an order, under sub-clause 4 of Section 7, may within 60 days from the

receipt of the order, prefer an Appeal to the Appellate Authority. However, the Appellate Authority is at liberty, if a sufficient cause is shown, to extend the period of 60 days for further period of 60 days. The Second proviso of Section 7(7) provides that no Appeal by an employer shall be admitted unless, at the time of preferring an appeal, the appellant either produce a certificate of controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity, required to be deposited u/s 7(4) with the Appellate Authority or deposit with the Appellate Authority such amount. Thus, this proviso has imposed fetter on the employers right to file an Appeal. It is amply clear, that employer is obliged to deposit the amount or produce the certificate of the controlling authority as the case may be at the time of preferring an Appeal.

11. In the background of above legal provisions, now let us consider the facts of the present case. There is no dispute of the fact that the petitioner received copy of the order of controlling authority on October 27, 2006. There is also no dispute that petitioner applied for the certified copy and received the same on November 10, 2006. In view of the provisions of sub-section 7 of Section 7, limitation would start to run from the date of receipt of the order and in this case limitation would start from October 27, 2007. We do not find any substances in the contention of the learned Counsel appearing for the petitioner that limitation would start to run from the date of receipt of the certified copy. The petitioner from October 27, 2006 to November 10, 2006 did not apply for certified copy. For the first time the Certified Copy was applied on November 10, 2006 and the same was delivered to him on the same day. Therefore, at the most one day can be excluded which required to obtain Certified Copy while computing of period of limitation of either 60 days or further extended period of 60 days. The petitioner sent Appeal by speed post which was received by the office of the Appellate Authority on December 13, 2006. However, alongwith this Appeal, petitioner neither produced the certificate of the controlling authority to the effect that they have deposited with them an amount equal to the gratuity required to be deposited under sub-section 4 of Section 7 nor deposited such amount with the Appellate Authority. In our view, if the petitioner wanted to challenge the order of controlling authority, in that case, he was duty bound to produce the certificate or deposit the amount as the case may be, at the time of preferring an Appeal. Though the above dates show that the petitioners preferred an appeal within a period of 120 days, mandatory deposit as contemplated under second proviso of Section 7(7) was not made within a period of 120 days. There is no dispute that this deposit was made by the petitioner on March 12, 2007. Precondition of deposit at the time of preferring an Appeal being mandatory, we are of the view that it is to be presumed that the petitioner filed Appeal only on March 12, 2007.

12. Since the petitioner received order of the controlling authority on October 27, 2006, his appeal is beyond the period of 120 days, even if it granted the benefit of exclusion of time required for obtaining certified copies. The issue before the Division Bench in J.L. Morrison India Ltd. v. Deputy Commissioner of Labour and

Ors. (supra) was whether the Appellate Authority under the payment of Gratuity Act, 1972 can entertain the Appeal beyond 120 days from the date of receipt of the order? After examining several judgments including that of Apex Court, Division Bench concluded that the Appellate authority under the said Act cannot entertain the Appeal beyond 120 days from the date of receipt of the order. The Division Bench also held that Section 5 of the Limitation Act would have no Application, in this regard. In the facts and circumstances mentioned above, we are of the clear view that the Appellate Authority as well as the learned single Judge of this Court rightly upheld the respondent No. 2''s preliminary objection regarding maintainability of the Appeal and there is no reason to interfere in the said findings.

13. Now, we shall consider the petitioner''s submission in this regard. So far as the first submission that the Appeal was filed on December 13, 2006 and therefore, it was well within 120 days, is concerned, we find no merit. On December 13, 2006, the appellant has neither produced certificate of controlling authority to the effect that they have deposited with him an amount equal to an amount of gratuity required to be deposited u/s 7(4) nor deposited the said amount with the Appellate Authority. In view of the 2nd proviso or Section 7(7), the petitioner''s Appeal cannot be said to have been filed on December 13, 2006, in the absence of production of certificate of controlling authority or deposit of an amount of gratuity. The petitioner deposited the amount for the first time with Appellate Authority on March 12, 2007 and therefore, it is to be presumed that the petitioner filed an Appeal on March 12, 2007 which is beyond the period of 120 days.

14. The petitioners second submission namely the production of certificate from the controlling authority or deposit of the amount of gratuity as contemplated under 2nd proviso of Section 7(7) required to be complied with at the time of admission of the Appeal and not at the time of institution of Appeal also devoid of merit, in view of the specific provisions of 2nd proviso of Section 7(7) that the above said Certificate is to be produced or deposit is to be made at the time of "preferring the Appeal."

15. The third submission, viz. that the limitation required to be computed from the date of receipt of the certified copy is also devoid of any substance. In the present case, the copy of the order was received by the petitioner from controlling authority on October 27, 2006 and therefore, the limitation would start from that date. At the most, the period required for obtaining certified copy can be excluded. However, since the certified copy was applied and made available to the petitioner in one day. If we consider starting point of limitation as the date of receipt of the order, in that case obviously the deposit was made beyond the period of limitation.

16. This takes us to consider the petitioner''s last submission that the Appellate Authority was obliged to dispose of the appeal on its own merits without going into the aspect of limitation. The petitioner in this regard relied upon order dated

April 23, 2007 passed in Writ Petition No. 1946/2007. The submission is misconceived. We have perused the order dated April 23, 2007. By this order the above Writ Petition was disposed of by giving directions to the Appellate Authority to decide the Appeal as expeditiously as possible and in any case within a period of 6 months from the date of the order. The order does not say that the Appellate Authority to dispose of the Appeal ignoring limitation aspect. The Appellate authority after hearing both the sides concluded, and in our view, rightly that Appeal is not within a limitation and therefore, we do not see any merit in this submission.

17. This takes us to consider the case laws relied upon by the petitioner. The single Judge of Madras High Court in Madurai District Central Co-operative Bank, Ltd., Madurai v. Appellate Authority under Payment of Gratuity Act, Madurai and Ors., (supra) held that the time taken by the party in applying for and receiving the copy of order against which the Appeal is preferred will have to be excluded. In the present case, even time required to obtain certified copy is excluded, the Appeal cannot said to have been filed within a period of 120 days and, therefore, ratio of this decision is not applicable.

18. In Palaniswamy L. v. Appellate Authority under Payment of Gratuity Act, Coimbatore and Anr. (supra), the Appeal u/s 7(7) of the Gratuity Act was filed within the extended period of 60 days along with the application for condonation of delay. The Appellate authority rejected the Appeal. The High Court held the Appeal could not have been rejected without considering the petitioners claim regarding the question of condonation of delay. This ratio has no application in the present facts and circumstances of the case inasmuch as the Appeal was filed beyond 120 days.

19. The learned single Judge of Allahabad High Court in Sahakari Ganna Vikas Samiti Ltd. v. Controlling Authority under Payment of Wages Act, (supra) held that non compliance of condition with regard to production of certificate and deposit does not result in dismissal of Appeal and Appeal is only consigned. With respect to the learned single Judge we are of the opinion that the law pronounced is not correct position of law and we respectfully disagree with the same, for the reasons stated earlier. Under any circumstances the payment or deposit of an amount equally to the amount of gratuity cannot be postponed beyond the period of 120 days and the Appellate Authority has no jurisdiction to entertain the Appeal if such deposit is not made within the period of 120 days, from the date of receipt of the copy of the order.

20. The Division Bench of the Madhya Pradesh High Court in Janpad Panchayat Masturi, Bilaspur v. Appellate Authority and Dy. Labour Comm. and Ors. (supra) was dealing with the contention to the effect that the Appellate Authority should have afforded the appellant an opportunity to make a requisite deposit of the Gratuity amount before disposing of the Appeal. The Division Bench took a view that if the appellant makes such offer, the Appellate Court should consider it and decide the Appeal on the basis of the deposit subsequently made. The relevant

dates are not mentioned in the judgment. It is not clear whether subsequent offer to deposit was made within 120 days and thereafter, therefore in our opinion this judgment is of no avail to this Petition.

21. The Judgment of learned single Judge of Kerala High Court in Malabar Spinning & Weaving Mill v. Narayanan Nair, (supra) has also no application in the present facts and circumstances of the case, since the issue in this case was whether the Appeal u/s 7(7) of the Gratuity Act can lie against the order of Controlling Authority on preliminary issue, holding that there was specific cause for condonation of delay in filing the Application u/s 7(4) of the Gratuity Act.

22. The learned single Judge of the Madras High Court in Commissioner, Edapadi Municipality, Edapadi, Salem District v. Joint Commissioner of Labour, Appellate Authority under the Payment of Gratuity Act, Coimbatore and Ors., (supra) held that the time taken for complying with return ordered by Appellate Authority under payment of Gratuity Act-1972, cannot be included for calculating limitation (of 120 days) for filing Appeal. Since we have taken a view that the payment or deposit of gratuity amount cannot be postponed beyond the period of 120 days from the date of order of Controlling Authority, we are of the opinion that the above ratio is not correct position of the law and we respectfully disagree with the same.

23. In Shaik Kaisar and Ors. v. Forbes Gokak Ltd. and Ors. (supra), the employees took up the dispute to the Controlling Authority u/s 7(4) of the Payment of Gratuity Act, 1972. The dispute was rejected and therefore, employees filed the Appeal before the Appellate Authority which, uphold the contention of the employees and the employer feeling aggrieved, preferred Writ Petition under Article 226 and 227 of the Constitution of India before the High Court. It was not the case of the employer filing an Appeal u/s 7(7) of the Payment of Gratuity Act-1972. Therefore, the ratio of this case is not relevant for the purpose of decision of the present Writ Petition.

24. In Sunderlal Laxman Mahyavanshi v. National Textile Corporation (MN) Ltd. and Anr. (supra), the Controlling Authority passed an order on April 20, 2005, copy whereof was received by the petitioner on May 5, 2005. Thereafter, the petitioner proceeded to file an Appeal against the said decision on August 16, 2005. However, the Appeal was not accompanied by an Application for condonation of delay and the said application came to be filed on February 9, 2007. The Appellate Authority dismissed the Appeal summarily on the ground that Application for condonation of delay was not preferred along with Memo of Appeal. The learned single Judge held that Application of condonation of delay can be filed subsequent to the date of filing of an Appeal. The Appeal was filed within a period of 120 days. It is not clear from the fact that whether the mandatory deposit was made within a period of 120 days. In that view of the matter the ratio is not relevant to decide the present case.

25. In Standard Store wares & Tiles v. Appellate Authority, (supra), the employer

deposited the arrears of gratuity amount ordered to be paid by the Controlling Authority but did not remit the amount ordered to be paid towards interest on the delayed payment of gratuity. The learned single Judge of Kerala High Court held that the statute prescribed only the deposit of the gratuity amount and not the interest thereon. In the present case, admittedly, respondent No. 2 did not deposit the amount of gratuity within a period of 120 days and therefore, ratio is not applicable to the present facts and circumstances of the case.

26. The learned single Judge has approached the case from correct point of view and rightly confirmed the order of Appellate Authority. We do not see any reason to interfere in the impugned order, the Petition is devoid of any merits and the same is, accordingly, dismissed.

Later

The learned Counsel appearing for the appellant-Original petitioner makes a request that the respondent No. 2 should not be allowed to withdraw the said amount. In the interest of justice, respondent No. 2 is directed not to withdraw the said amount for the period of four weeks from today.