(2007) 11 BOM CK 0024

In the Bombay High Court

Case No : Writ Petition No. 1946 of 2007

Pharma Base India Pvt. Ltd. APPELLANT

Vs

State of Maharashtra and Another RESPONDENT

Date of Decision : 02-11-2007

Acts Referred:

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

Citation : (2008) 1 BomCR 374 : (2008) 116 FLR 815 : (2008) 2 LLJ 401 : (2008) 2 MhLj 462

Hon'ble Judges : Bhosale D.B., J

Bench : Single Bench

Advocate : P.K. Rele, V.K. Wasnik and Rahul Oak, for the Appellant; Anjali P. Purav, for the Respondent

Final Decision : Dismissed

Judgement

Bhosale D.B., J.—Rule, returnable forthwith. Ms. Purav, learned Counsel waives service for respondent No. 3. By consent taken up for the final hearing.

2. This writ petition under Article 226 of the Constitution of India takes exception to an order dated 9.8.2007 rendered by the Appellate Authority under the Payment of Gratuity Act, 1972 (for short "the Act") by which the Appellate Authority has allowed the application filed by respondent No. 2 holding that the appeal is not maintainable as the same was not filed within the time stipulated u/s 7(7) of the Act. The petitioners had challenged the order dated 5.10.2006 passed by the controlling authority on the Application bearing (PGA) No. 3 of 2005 filed by respondent No. 2, by which the petitioners were directed to pay an amount of Rs. 13,75,000/- as gratuity payable to respondent No. 2.

3. The questions that arises for my consideration in the present writ petition is whether an appeal under Sub-section (7) of Section 7 of the Act, challenging the order of controlling authority passed under Sub-section (4) of Section 7 of the

Act, instituted without depositing an amount equal to the amount of gratuity with the Appellate Authority or has failed to produce a certificate of the controlling authority showing such deposit made with him under Sub-section (4), could be treated as the appeal preferred within the time prescribed under this provision; and/or whether the appellant could be allowed to deposit an amount equal to the amount of gratuity, any time after preferring the appeal u/s 7(7) of the Act, or even after the extended period of 60 days as provided under the first proviso to Section 7(7) for preferring appeal under that provision.

4. The facts, that are relevant and necessary to address the aforesaid question, are as follows: The controlling authority by the order dated 5.10.2006 directed the petitioner-company to pay an amount of Rs. 13,75,000/ - as gratuity payable to respondent No. 2. The petitioners received a copy of the text of the said order on 27.10.2006. The petitioner applied for certified copy on 10.11.2006 and received it on the very same day. According to the petitioners, they made attempts to file an appeal, challenging the order dated 5.10.2006, on 24.11.2006 and 28.11.2006 but their attempts failed in view of the fact that no responsible officer was present to accept the appeal. The petitioners, therefore, send the appeal to the Appellate Authority by speed post on 8.12.2006 which according to the petitioners, was received by the Appellate Authority on 12.12.2006, though the office stamp on postal acknowledgement is of 13.12.2006. In the meantime, it appears that the controlling authority had send a show cause notice to the petitioners as to why a recovery certificate should not be issued and asked the petitioners to appear on 13.12.2006. The petitioners also seem to have had received the notice under Land Revenue Code to pay the amount of gratuity within ten days. The petitioners on receipt of the said notice made grievance to the revenue authorities as well as to the Controlling Authority that they had not received the certificate issued by the Controlling Authority. Since there was no response, the petitioners preferred Writ Petition No. 813 of 2007 in this Court seeking stay of the recovery and also sought direction to the Appellate Authority to hear the appeal without insisting full deposit of money as contemplated by the second proviso to Section 7(7) of the Act. It appears that on 7th February, 2007 the petitioners received a letter dated 22.1.2007 from the Appellate Authority returning their appeal for want of compliance of Section 7(7) of the Act. The petitioners once again made representation to the Appellate Authority seeking hearing on merits and since there was no response to the request, the petitioners deposited the amount of gratuity on 9.3.2007 in the bank by way of caution. The demand draft with covering letter dated 9.3.2007 was, however, deposited with the Appellate Authority on 12.3.2007 since 10th and 11th March, 2007 were holidays.

5. It appears that respondent No. 2 raised a preliminary objection as to maintainability of the appeal on the ground of limitation to which the petitioners filed their reply dated 29.5.2007. The Appellate Authority after having considered the application filed by respondent No. 2, reply filed by the petitioners so also the other material placed before it disposed of the appeal holding that it was not

filed within the period of limitation as prescribed u/s 7(7) of the Act. It is against that order the petitioners have filed the instant writ petition.

6. The earlier Writ Petition No. 813 of 2007 was filed by the petitioners challenging recovery/show cause notice dated 12.1.2007 issued by Naib Tahasildar, Mumbai Suburban District in pursuance of the recovery certificate issued by the controlling authority and also sought direction to the Appellate Authority to hear their appeal without insisting upon full deposit of the gratuity amount as contemplated by Section 7(7) of the Act. The writ petition was disposed of on 23rd April, 2007, in view of the fact that on 12.3.2007 the amount of gratuity was deposited as contemplated u/s 7(7) of the Act, with direction to the Appellate Authority to decide the appeal as expeditiously as possible and in any case within a period of six months from the date of the order.

7. Mr. Rele, learned Senior Counsel for the petitioners at the outset submitted that the appeal was preferred by the petitioners within the time stipulated under Sub-section (7) of Section 7 of the Act. He submitted that merely because an amount equal to the amount of gratuity required to be deposited alongwith an appeal is not deposited at the time of filing of the appeal, it cannot be stated to have been filed on the date of deposit of the amount but appeal has to be treated as preferred on the date when one institutes it, with or without an amount of gratuity. He submitted that under the second proviso to Section 7(7) of the Act what is necessary is an admission of the appeal and not its preferring and, therefore, if the appeal is preferred within the time prescribed under this provision, even without deposit of the amount of gratuity, it cannot be treated as barred by limitation. The deposit of an amount of gratuity before admission of the appeal is the pre-requisite condition and not at the time of preferring an appeal u/s 7(7) of the Act. He next submitted that the petitioners received certified copy of the order on 10.11.2006 and, therefore, the limitation would start to run from that date and not from 27.10.2006 when a copy of the order was received by the petitioners. Taking 10.11.2006 as the date to reckon the limitation, the last date for filing the appeal, according to Mr. Rele was 10.3.2007, when the period of 120. days got over, as contemplated by Section 7(7) of the Act. He submitted that since 10th and 11th were the holidays, the amount was deposited on 12.3.2007 and, therefore, the appeal cannot be held to be barred by limitation. Mr. Rele further submitted that in any case the Appellate Authority ought not to have gone into the issue of limitation in view of the direction issued by this Court, while disposing of Writ Petition No. 813 of 2007, to dispose of the appeal on merits within six months from the date of the order.

8. On the other hand Mrs. Purav, learned Counsel for respondent No. 3 placed heavy reliance upon the judgment of the Division Bench of this Court in Writ Petition No. 3019 of 2006 in J.L. Morrison India Ltd v. Dy. Commissioner of Labour and Ors. decided on 10.8.2007, reported in 2007(5) Bom.C.R. 654, and submitted that the Appellate Authority has no powers to condone the delay in view of the proviso to Section 7(7) which clearly indicates that the applicability of

Section 5 of the Limitation Act, 1963 is excluded. The limitation as contemplated by second proviso to Section 7(7) would start to run from the date of receipt of the order and not certified copy of the order and if it is not filed within the time stipulated under this provision the Appellate Authority has no other option but to reject it on the ground of limitation. She submitted that if an amount equal to the amount of gratuity is not deposited alongwith the appeal, the appeal cannot be treated as preferred. In short, she submitted that while filing the appeal the appellant must deposit the amount of gratuity, ordered by the Controlling Authority, failing which the appeal is either not liable to be admitted or the date of deposit of the gratuity amount only can be treated as the date of preferring the appeal.

9. From the facts unfolded and the submissions advanced by the learned Counsel for the parties it reveals that though the appeal was send by speed post, which according to the petitioners, was received by the Appellate Authority on 12.12.2006, it was not accompanied with the amount of gratuity ordered by the Controlling Authority and the amount of gratuity was deposited by the petitioners for the first time on 12th March, 2007. Even if the date of receipt of the certified copy, namely, 10.11.2006 is taken as the date for reckoning the limitation, in the present case the appeal ought to have been filed within 60 days, that is, on or before 9th January, 2007 or at the most on or before 10th March, 2007 i.e. within the extended period of 60 days as contemplated by the first proviso to Section 7(7) of the Act. Preferring an appeal without deposit of the amount of gratuity ordered by the controlling authority, whether could be treated as the date for preferring an appeal, as contemplated by Section 7(7) of the Act, requires consideration.

10. Sub-section (7) of Section 7 of the Act provides that any person aggrieved by an order under Sub-section (4) may, within 60 days from the date of the receipt of the order, "prefer" an appeal to the Appellate Authority provided that the Appellate Authority may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of 60 days, extend the said period by a further period of 60 days. The second proviso to Section 7(7) provides 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 the Appellate Authority such amount.

11. From mere perusal of Section 7(7) of the Act it is clear that the right of appeal, though is a vested right, has been restricted/limited by the first proviso. Even application of Section 5 of the Limitation Act, as held by the Division Bench of this Court in M/s. J.L. Morrison India Ltd., is clearly ruled out. A person aggrieved by any order regarding determination of the amount of gratuity or claim in that regard in exercise of powers u/s 7(4) of the Controlling Authority, can prefer an appeal to the Appellate Authority either within 60 days from the

date of receipt of such order or within further period of 60 days if he was prevented by sufficient cause from preferring the appeal within the first sixty days. The first proviso confers a discretion on the Appellate Authority to extend the period of limitation by additional 60 days.

12. The Legislature by the second proviso to Section 7(7) of the Act has imposed fetter on the right of the appellant to file appeal. It clearly provides a pre-condition of deposit of the amount ordered by the controlling authority to entertain the appeal. In other words, right to appeal u/s 7(7) becomes vested right only when pre-condition of deposit is complied with. The Appellate Authority is not to admit the appeal 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 the authority an amount equal to the amount of gratuity required to be deposited u/s 7(4) or deposit with the Appellate Authority such amount. The second proviso to Section 7(7) leaves no manner of doubt that the Appellate Authority has no discretion to admit/ accept the appeal unless it was preferred with deposit of an amount equal to the amount of gratuity ordered by the controlling authority. The appellant, therefore, must deposit the said amount while preferring an appeal and in any case before expiry of the limitation prescribed u/s 7(7) of the Act Outer limit for such deposit would be the extended period of 60 days, if the appellant satisfies that he was prevented by sufficient cause from preferring the appeal within first 60 days. The pre-condition of the deposit, in my opinion, is mandatory and the Appellate Authority has no power to admit the appeal unless such deposit is made either at the time of preferring the appeal or at the most before expiry of the extended period of 60 days as contemplated by the first proviso to Section 7(7) of the Act.

13. Under Sub-section (7) of Section 7 of the Act two stages of the appeal are contemplated; the first being preferring of an appeal and the second being admittance or acceptability of the appeal. The second proviso to Sub-section (7) of Section 7 clearly prohibits admission or acceptance of the appeal unless the appellant produces a certificate of the controlling authority showing requisite deposit under Sub-section (4) of Section 7 of the Act or deposit of such amount with the Appellate Authority. In the present case the petitioner did not comply with either of the requirements contemplated by the second proviso while preferring an appeal. The amount of gratuity was deposited by the petitioner on 12.3.2007 and in view thereof the Appellate Authority dismissed the appeal on the ground that it was not filed within the time stipulated u/s 7(7) of the Act. The purpose of the second proviso to this section is not only to secure and ensure payment of gratuity payable to the employee, but it is also to see that such employee is actually paid or his payment is secured and ensured immediately after the order of Controlling Authority is passed and is not delayed by the employer by adopting legal proceedings, namely, an appeal. If the employer is allowed to prefer an appeal without deposit, he would do so within 60 days and would keep it pending for along time and then seek permission to deposit the amount as contemplated by the second proviso. If such permission is granted

after the extended period of 60 days, as contemplated in the first proviso to Section 7(7) of the Act the very object of this provision would be defeated. The appellant is obliged to either produce a certificate of controlling authority to the effect that the appellant has deposited with him such amount required to be deposited under Sub-section (4) of Section 7 or deposit with the Appellate Authority such amount within 60 days from the date of receipt of the order as contemplated by Sub-section (7) or within the extended period of 60 days as contemplated by the first proviso and if he fails to do so the appeal filed by him cannot be treated as preferred within the meaning of this section. The Appellate Authority, in my opinion, has no jurisdiction to accept the deposit of an amount equal to the amount of gratuity after 120 days as contemplated by Section 7(7) of the Act. The appeal preferred without deposit is not a valid appeal and the period of limitation in such eventuality would not stop to run.

14. I find support of this view in Sub-section (4) of Section 7 of the Act. Clause (a) of Sub-section (4) of Section 7 provides that if there is any dispute to the amount of gratuity payable the employer is required to deposit with the controlling authority such amount as he admits to be payable by him as gratuity. Clause (b) of Sub-section (4) empowers the employer or employee or any other person raising the dispute to the amount of gratuity to the controlling authority for deciding the dispute. Clause (c) of Sub-section (4) empowers the controlling authority to conduct due enquiry after affording an opportunity of being heard to the parties to determine the matter in dispute and if, as a result of such enquiry any amount is found to be payable to the employee, the controlling authority is empowered to direct the employer to pay such amount or, as case may be, such amount as reduced by the amount already deposited by the employer. Clause (d) of Sub-section (4) provides that the controlling authority shall pay the amount deposited, including the excess amount, if any, deposited by the employer, to the person entitled thereto. Clause (e) of Sub-section (4) provides that as soon as may be after a deposit is 14 made under Clause (a) the controlling authority shall pay amount of the deposit to the applicant where he is an employee or where the applicant is not employee, to the nominee or as case may be, the guardian of such nominee or heir of the employee if the Controlling Authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity. From bare perusal of Sub-section (4) it is crystal clear that under any circumstances the payment/deposit of the gratuity amount, whether disputed or not, cannot be postponed for any reason whatsoever. Looking to the statement of object and reasons of the Act and the preamble so also the language employed in Sub-section (4) of Sub-section (7) of Section 7 it is clear that the appellant must deposit an amount of gratuity as ordered by the Controlling Authority while filing an appeal and in any case before expiry of the period of 60 days as contemplated by Sub-section (7) or within the extended period of 60 days as contemplated by the first proviso and if an amount equal to the amount of gratuity is not deposited with the Appellate Authority the appeal is liable to be dismissed on the ground of limitation.

15. If the appellants are allowed to file an appeal without deposit of the amount, as required u/s 7(7) of the Act, and if the appellant is allowed to deposit it even after the extended period of 60 days, the very purpose and the object of the second proviso to Section 7(7) would be defeated. In my opinion, the appeal cannot be treated as preferred within the period of limitation unless the appellant deposits an amount ordered by the Controlling Authority, as contemplated by Section 7(7) of the Act, and in such case the date of deposit only would be treated as the date of preferring an appeal.

16. Mr. Rele, learned Senior Counsel for the petitioner placed heavy reliance upon the judgment of the High Court of Madhya Pradesh in Janpad Panchayat Masturi, Bilaspur v. Appellate Authority and Dy. Labour Comm. and Ors. 1994(1) C.L.R. 487 (H.C.M.P.) in support of his contention. In that case the Madhya Pradesh High Court was dealing with the contention urged that the Appellate Authority should have afforded the appellant an opportunity to make requisite deposit of the gratuity amount before dismissing the appeal on that ground. The Division Bench took a view that if the appellant make such offer the Appellate Authority should consider it and decide the appeal on the basis of 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 or thereafter. Therefore, in my opinion, this judgment is of no avail to the petitioner. For the selfsame reason the judgment of the High Court of Allahabad in Sahkari Ganna Vikas Samiti Ltd. Vs. Controlling Authority under Payment of Wages Act, , also would not apply to the facts of the present case. Even if it is assumed that the law laid down in the aforesaid judgments apply to the fact of the present case still in my opinion, the law pronounced is not correct position of law and I respectfully disagree with the same. As observed earlier under any circumstances the payment or deposit of an amount equal to the amount of gratuity cannot be postponed beyond the period of 120 days. The Appellate Authority has no jurisdiction to entertain such appeal if an amount equal to the amount of gratuity is not deposited within the time stipulated under Sub-section (7) of Section 7 of the Act.

The contention urged by Mr. Rele, learned Senior Counsel for the appellants that in the present case limitation would start to run from the date of receipt of the certified copy also deserves to be rejected outright. In the present case the text of the order of the controlling authority was served on the petitioners on 27.10.2006 and there was no reason whatsoever for the petitioners to wait till they got the certified copy for filing an appeal under Sub-section (7) of Section 7 of the Act. Even if it is assumed that the period for obtaining certified copy needs to be excluded for reckoning the limitation as tried to be contended by Mr. Rele, still, in my opinion, in the present case only one day will have to be excluded. The certified copy was applied and received by the petitioners on 10.11.2006. The petitioner, however, had a knowledge about the order when he had received the order on 27.10.2006. I do not see any valid reason to exclude the period between 27.10.2006 and 9.11.2006 for the purpose of limitation. Moreover, the petitioners did not explain as to why they did not apply for certified copy immediately or why they did not challenge the order of the controlling authority in appeal immediately on receipt of the order on 27.10.2006. In the circumstances even if the period from the date of application for certified copy and date on which it was received is excluded still, in the present case, the appeal was not preferred within 120 days from the date on which the petitioner received the order i.e. 27.10.2006. In my opinion, the appeal in the present case cannot be treated as preferred within the time stipulated u/s 7(7) of the Act since the amount of gratuity was deposited by the petitioners on 12th March, 2007.

17. The submission, that in the face of the directions of this Court in the earlier writ petition, it was not open to the Appellate Authority to go into the question of limitation, also deserves to be rejected outright. The order of this Court is very clear, by which the Appellate Court was simply directed to decide the appeal within six months from the date of order. The question of limitation was neither raised nor was it considered at that stage. In the circumstances the petition deserves to be dismissed and is dismissed as such.