

(1993) 06 BOM CK 0014

In the Bombay High Court

Case No : Writ Petition No. 2695 of 1983

Principal, Bhartiya Mahavidyalaya and Another

APPELLANT

Vs

Ramakrishna Wasudeo Lahudkar

RESPONDENT

Date of Decision : 22-06-1993

Acts Referred:

Bombay Shops and Establishments Act, 1948 — Section 2(4), 4
Payment of Gratuity Act, 1972 — Section 1(3), 5

Citation : (1993) 95 BOMLR 594 : (1994) 2 LLJ 556

Hon'ble Judges : V.S. Sirpurkar, J

Bench : Single Bench

Advocate : V.Y. Pradhan, for the Appellant; K.H. Deshpande, R.K. Deshpande and A.G. Majumdar, for the Respondent

Final Decision : Dismissed

Judgement

V.S. Sirpurkar, J.—The Principal of a college as also the President of the educational institution have approached this Court challenging the orders passed by the Labour Court. Akola, as also the concurring order passed by Appellate Authority, at Nagpur. By these two orders the Courts below allowed the application filed by the respondent for the payment of gratuity. The claim of the employee originally as it stood was that he was entitled to be paid the gratuity in the light of the provisions of the Payment of Gratuity Act, 1972 (hereinafter to be referred to as "the Gratuity Act")

2. The application was opposed by the petitioners on number of grounds. Firstly, it was contended that the college or the institution was not an "industry" and, therefore, there was no question of the application of the Gratuity Act. Secondly, it was stated that even if it was an industry, the salary of the concerned applicant was more than the prescribed limits and, therefore, the petitioners were not liable to pay the gratuity as prayed for. It was submitted further by the petitioners in defence that the college was affiliated to Nagpur University, Nagpur and, therefore, the college and its employees were governed by the Rules framed

by the University. It was claimed that the original applicant's service conditions were governed by the Rules framed by the Nagpur University which were called "Alternate Statute No. 71" and since these Rules did not make any provision for the payment of gratuity, there was no question of the applicant being entitled to get any gratuity. Suffice it to say that the defence was limited to only those three points.

3. The Controlling Authority before whom the matter was tried came to the conclusion that the question regarding whether the college or the institution was an "industry" or not was no more res integra and that it was an established position that the said college or the institution was an industry. The concerned Authority relied upon the reported decision in Bangalore Water Supply and Sewerage Board Vs. A. Rajappa and Others, . It is held by the Controlling Authority that the concerned college or the institution which ran the said college was an industry. It seems that probably the challenge was only restricted to the question whether the said college and the institution were an industry. The challenge did not go further than this and it was probably because of that that the Controlling Authority restricted itself only to that question. On merits, the Controlling Authority, however, held that the objection by the petitioners was not justified and that the applicant was entitled to get Rs. 7,000/- as gratuity on the basis of his salary.

4. An appeal was filed against this decision by the present petitioners u/s 7(7) of the Gratuity Act and the Appellate Court also reiterated the findings of the trial Authority. In the grounds of appeal, the first ground which is raised is in extremely general terms to say that the provisions of the Gratuity Act were not applicable to the services of the respondent. Again the same question regarding the petitioners not being an industry reiterated. However, even in appeal the petitioners did not raise any other plea particularly on the lines which is now being raised before this Court. There was, therefore, obviously no finding excepting that the petitioners were the industry. However, probably at the stage of arguments, a question was raised that the petitioners could not be covered under the mischief of the Gratuity Act because of the provisions of Section 1(3) (b) of the Payment of Gratuity Act, 1972. It was contended that the word "establishment" was nowhere defined under the Gratuity Act and, therefore, the definition as given in the Bombay Shops and Establishments Act, 1948 would have to be adhered to. The Appellate Authority basing its judgement on the definition of "establishment" as given in Section 2(8) as also the definition of "commercial establishment" as given in Section 2(4) of the Bombay Shops and Establishments Act, 1948 again found that the petitioners were an industry and that on merits, the workman was entitled to get his gratuity at the rate decided by the Controlling Authority.

5. In this petition, however, Shri V.Y. Pradhan, the learned counsel for the petitioners, has raised a very interesting question which has not been hitherto raised before any of the Authorities below or which has not even been gone into

by those Authorities. Considering the importance of the subject and considering that the submissions of Shri Pradhan go directly to the jurisdictional aspect and to the root of the matter, I have permitted Shri Pradhan to raise that question here before this Court. The contention of Shri Pradhan is based on the provisions of Section 1(3)(b) of the Gratuity Act as also on the definitions of "establishment", "commercial establishment" and more particularly on Entry No. 6F of Schedule II of the Bombay Shops and Establishments Act. His contention is that Section 1(3)(b) of the Gratuity Act provides that 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 comes within the scope and mischief of the Gratuity Act. He contends that the word "establishment", therefore, will have to be understood as the establishment "within the meaning of" any law for the time being in force in the State in relation to the shops and establishments. He carries on his point further by suggesting that such law in respect of State of Maharashtra is none other than the Bombay Shops and Establishments Act, 1948, however, the State of Maharashtra under the provisions of Section 4 which provides for the powers of the State Government to exempt a particular establishment has in fact exempted all the educational institutions from the complete operation of the Act. In short, what Shri Pradhan contends is that if the establishment of the petitioner is totally and completely exempted from the provisions of the Bombay Shops and Establishments Act, 1948, then it could not be said to be an establishment "within the meaning of any law" in force in relation to shops and establishments in State of Maharashtra. In short, Shri Pradhan contends that the words "within the meaning of any law" in Section 1(3)(b) of the Gratuity Act would not cover an establishment which though an establishment but is exempted completely from the operation of the Bombay Shops and Establishments Act. The question therefore, which falls for consideration in this petition, is as to what is the meaning and true interpretation of the words "within the meaning of any law" as used in Section 1(3)(b) of the Gratuity Act and if the establishment like that of the petitioners is exempted completely, as has been done, from the operation of the Bombay Shops and Establishments Act, then would the employees of such establishment be excluded from the operation of the Payment of Gratuity Act, 1972 and would they be deprived of such gratuity because of the non-application of the Act, i.e. the Payment of Gratuity Act, 1972?

6. In support of his contention, Shri Pradhan further relied upon the reported decision in Biswambhar Singh and Others Vs. The State of Orissa and Another, , wherein the words "within the meaning of the Act" have been defined by the Apex Court.

7. In order to appreciate the controversy, it will be better to go to the various provisions of law. Section 1 of Payment of Gratuity Act, 1972 runs as under:

"1.(1) This Act may be called the Payment of Gratuity Act, 1972.

(2) It extends to the whole of India:

Provided that in so far as it relates to plantations or ports, it shall not extend to the State of Jammu and Kashmir.

(3) It 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)....

(3A)....

(4)...."

The word establishment is not defined in the Payment of Gratuity Act. In short, the Payment of Gratuity Act would apply to all the establishments which are "establishments" as per any law in the State concerning the shops and establishments. There is no dispute and indeed there cannot be any that the Bombay Shops and Establishments Act, 1948 would be one of such laws which is in force in the State of Maharashtra and which pertains to the subjects to shops and establishments. In order that an establishment is covered u/s 1(3)(b) of the Gratuity Act, that establishment will have to be "within the meaning of" the Bombay Shops and Establishments Act or any other law which covers the subject of shops and establishments.

8. Section 5 of the Gratuity Act provides that the appropriate Government may by notification and subject to such conditions as may be specified in the notification exempt any establishment from the operation of the Gratuity Act. It will be better to quote Section 5(1) of the Payment of Gratuity Act, 1972 which is as under:-

"Section 5(1). The Appropriate Government may, by notification and subject to such conditions as may be specified in the notification, exempt any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from the operation of the provisions of this Act if, in the opinion of the appropriate Government, the employees in such establishment, factory, mine, oilfield, plantation, port, railway company or shop are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act."

There is no dispute about the fact that the appropriate Government in the present case would be the State Government, i.e. the Government of Maharashtra. The State of Maharashtra, therefore, is empowered to specifically exempt any establishment provided it does so according to the modality provided

by Section 5(1) of the Gratuity Act. It is also an admitted position that the State of Maharashtra has not exempted any educational institutions, much less any institution or establishment like that of the petitioners from the operation of the Gratuity Act.

9. The argument of Shri Pradhan is that under its powers u/s 4 of the Bombay Shops and Establishments Act, the State Government has exempted such establishments from the operation of the Bombay Shops and Establishments Act. It will be worthwhile to quote Section 4 of that Act. Section 4 reads as under:-

"Section 4. Notwithstanding anything contained in this Act, the provisions of this Act mentioned in the third column of Schedule II shall not apply to the establishments, employees and other persons mentioned against them in the second column of the said Schedule:

Provided that the State Government may, by notification published in the Official Gazette, add to, omit or alter any of the entries of the said Schedule subject to such conditions, if any, as may be specified in such notification and on the publication of such notification, the entries in either column of the said Schedule shall be deemed to be amended accordingly."

It will be worthwhile to see whether the petitioners come within the definition of the term "establishment" because it is only then and then alone that the further controversy would arise. Unless it is established that the petitioner is an establishment within the meaning of Bombay Shops and Establishments Act, it could not invite the wrath of the Payment of Gratuity Act, 1972. The word "establishment" is defined in Section 2(8) as under:-

Section 2(8). "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 purposes of this Act."

Now, had the matter stood only till this extent probably the petitioners could not be held as an establishment but the petitioners are covered in the definition of "commercial establishment". The term "commercial establishment" is defined thus:

"Section 2(4). "Commercial establishment"" means an establishment which carries on any business, trade or profession or any work in connection with, or incidental or ancillary to, any business, trade or profession and includes establishment of any legal practitioner, medical practitioner, architect, engineer, accountant, tax consultant or any other technical or professional consultant and also includes a society registered under the Societies Registration Act, 1866, and a charitable or other trust, whether registered or not, which carries on, whether for purposes 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."

The petitioner is a college where the activity of education is undertaken. It is also a society registered under the Societies Registration Act, 1866. Therefore, the petitioner would come within the clutches of the Bombay Shops and Establishments Act unless it is specifically exempted like in the present case. It is an admitted position that the establishment of the petitioners is exempted specifically u/s 4 as per Entry No. 6F in Schedule II of the Act. Now it is because of this exemption that the petitioners contend that since the establishment of the petitioners is completely exempted from the operation of the Bombay Shops and Establishments Act, 1948, it cannot be an establishment within the meaning of the Bombay Shops and Establishments Act so as to be covered under the provisions of Section 1(3)(b) of the Payment of Gratuity Act, 1972.

10. The argument fails to impress. In fact, what is contemplated by Section 1(3)(b) of the Gratuity Act is an establishment "within the meaning of any law for the time being in force in relation to shops and establishments in a State". Giving the ordinary meaning to these words would mean and include any establishment so defined to be an establishment in such law in relation to shops and establishments in a State. Now it is an admitted position that the Bombay Shops and Establishments would be such a law. Therefore, if an establishment is so defined to be an establishment in the Bombay Shops and Establishment Act, it would complete the test provided by Section 1(3)(b) of the Gratuity Act. What is suggested by the words "within the meaning of any law" is only for the identification of such establishments. If those institutions can be called to be the establishments within the meaning of the State law, then Section 1(3)(b) of Gratuity Act must apply to them, even if such establishments ultimately are exempted from the operation of the Act. Now one thing is certain that in order that certain establishment can be exempted from the operation of the Bombay Shops and Establishments Act, it has to be an establishment within the meaning of the Bombay Shops and Establishments Act first, because otherwise there would be no power to exempt any such institution. It is only when that particular institution partakes a colour of establishment as defined in the Bombay Shops and Establishments Act that the State Government would get the power to exempt the same. Otherwise, there would be no question of the application of the Bombay Shops and Establishments Act. The further question whether the provisions of the Bombay Shops and Establishments Act are applicable to it or not, is entirely a different question and not germane to the controversy at all. Once the identity of the establishment, as is the need of the language of Section 1(3)(b) of the Gratuity Act, is established, the further fact whether the said Act is applicable to that establishment or not loses all its significance atleast for the purposes of the Gratuity Act. This position is obtained more forcefully because of the specific provision in Section 5 of the Payment of Gratuity Act itself which gives the power to the appropriate Governments to exempt any establishment from its operation and admittedly, the establishments such as the establishmet of

the petitioner has not been exempted by the appropriate Government. The words used are only for the purpose of establishing the identity of such establishments and if this meaning is given, then the petitioners must be considered to be the establishment within the meaning of the Bombay Shops and Establishments Act.

11. If the interpretation as put by Shri Pradhan is to be accepted, then the language of the Legislature in Section 1(3)(b) of the Gratuity Act would have been different. In that case, the language would have been to the effect that provisions of the Act shall apply to every establishment to which the law in relation to shops and establishments in a State is applicable. If the interpretation of Shri Pradhan is to be accepted, then it will have to be held that by making the law inapplicable to such establishment, the establishment is taken away from the mischief of Section 1(3)(b) of the Gratuity Act. Now if the language of a provision is clear and admits of no ambiguity, then in order to see the true meaning thereof it is not permissible to add the words or to substitute them. The provision will have to be interpreted specifically on the basis of its plain meaning, if such plain meaning is unambiguous or admits of no doubt and indeed, in the present case the meaning of the words "within the meaning of any law" admits of no doubt, the language cannot be allowed to be altered. The import of the words clearly brings out the only meaning that such establishment should be an establishment either defined by or recognised in that particular Act as an establishment.

12. Shri Pradhan thereafter heavily relied upon the judgement of the Supreme Court in *Biswambhar Singh and Ors. v. State of Orissa and Anr.*, (supra) and more particularly paragraphs 29 and 30 thereof. The question in that case was as to what should be the meaning given to this very phrase "within the meaning of". The provision ran somewhat like this: "Intermediary ... with reference to the merged territories means a maufigdar including the Ruler of an Indian State merged with the State of Orissa, a Zamindar, Illaquedar, Khorposhdar or Jagirdar within the meaning of the Wajib-ul-arz, or any sanad, deed or other instrument." The question which fell for consideration was that if such Zamindar was incidentally referred to in any Sanad or deed or any other instrument, could he be said to be a Zamindar? The Supreme Court answered the question in this manner:

"28. What then do the words "within the meaning of "signify? They cannot mean mere mention of A as a Zamindar. They cannot mean that if A is mentioned in one of those documents and is called or referred to as a zamindar that makes him an intermediary, for, if that had been the intention, the definition would have said so. In our opinion, the words have been inserted to include only those documents which deal, or purport to deal, with true intermediaries, that is to say, with persons who hold an interest in the land between the raiyat or actual cultivator and the overlord of the demesne. Two illustrations will show what we mean."

In short, the Apex Court held that a mere mention of a Zamindar in an

instrument without that instrument being relevant for that purpose would not clothe that person with the Zamindari rights. The Apex Court was of the opinion that such mere mention could not be said to be covered within the phrase "within the meaning of". Relying very heavily on this argument, Shri Pradhan contends that merely because the terms "establishment" or "commercial establishments" are defined in the Bombay Shops and Establishments Act, they could not be really the establishments or the commercial establishments within the meaning of that Act because the State Government has specifically exempted those establishments and commercial establishments from the operation of the Act. The argument though forceful lacks the necessary logic. In fact, the terms "establishments" or "commercial establishments" have not been "incidentally" defined in the Act. They are defined with a specific purpose and the true meaning of those definitions is to engulf all and every kind of establishments and the commercial establishments into the operation of the Act, i.e. the Bombay Shops and Establishments Act. It is thereafter that a discretion, has been given to the State Government to exempt certain establishments or a class of establishments. Now this could not really be an incidental mention or incidental existence of those terms in the Act, In fact, the Bombay Shops and Establishments Act is meant to control and to provide the conditions of service, etc. in those establishments or commercial establishments, as the case may be. The reported decision, therefore, cannot apply to the present case as the mention or existence of the "establishments" in the Bombay Shops and Establishments Act is not incidental as was the case in the transaction in the case before the Supreme Court. The argument, therefore, must fail. There is a second answer also to the effect that if the State Legislature itself thought it fit to provide the power of exempting certain establishments from the operation, then unless these were establishments within the meaning of the Act, they could not have been so exempted by the State Government. The very fact that these establishments have been exempted and for that purpose Section 4 has been used to put them in the Second Schedule of the Act would prima facie establish that those are firstly the establishments within the meaning of the Act. The present establishment will, therefore, have to be held as an establishment within the meaning of the Act, i.e. the Bombay Shops and Establishments Act.

13. Shri A.G. Majumdar, the learned counsel for the respondent, tried to reiterate his argument that the present establishment very much came within the words expressed by Section 1(3)(b) of the Gratuity Act by relying upon the decision reported in the case of Principal, S.D. Kanya Vidyalaya, Jammu v. Authority under the Payment of Gratuity Act and Anr. 1983 LAB.I.C. 1263. This was a case in which a question fell for consideration whether the Payment of Gratuity Act was applicable to the private educational institutions. Shri Majumdar more particularly relied upon the following observations of the Court:-

"8. A bare reference to Section 1(3)(b) of the Payment of Gratuity Act, 1972, reveals that the Gratuity Act applies to "every shop or establishment within the meaning of any law for the time being in force in relation to shops and

establishments in the State..."It is, therefore, obvious that the Gratuity Act would apply to the petitioner school if it falls within the definition of "shop or establishment" under the J and K Shops and Establishments Act, 1966. Vide SRO-740(Supra) among others, Private Educational Institutions were declared as the establishments under the J and K Shops and Establishments Act, 1966. According to Mr. Sharma even though Private Educational Institutions stand covered by SRO-740, yet the school of the petitioner does not fall in the category of a "Private Educational Institution", on the ground that the petitioner school is recognised by the Government of J and K and under the Private Educational Institutions (Regulation and Control) Act, 1967, such educational institutions as are recognised institutions are not categorised as "private educational institutions". In other words, Mr. Sharma seeks to import the definition of a "Private Educational Institution" from (Regulation and Control) Act, 1967 into SRO-740 and thereby to oust the application of Payment of Gratuity Act, 1972 to the school of the petitioner."

"9. Indeed, the expression "private educational institute"" has not been defined under the J and K Shops and Establishments Act. However, the use of the expression "Private Educational Institution" in SRO-740 has been made in common parlance. Private Educational Institutions, as used in SRO-740, when read in connection with the other establishments brought under the purview of Shops and Establishments Act, shows that the Government has used that expression in contradistinction to Govt. educational institutions. The question whether or not a private educational institution is recognised by the Government is irrelevant in so far as SRO-740 is concerned and incidentally also in so far as the Payment of Gratuity Act of 1972 is concerned....."

The logic of this decision is undoubtedly in favour of the respondent and it goes to show that the fact that the establishment of the petitioners was later on exempted from the operation of the Bombay Shops and Establishments Act is really irrelevant for the purpose of interpretation and application of Section 1(3) (b) of the Gratuity Act.

14. Apart from this, there is one more decision on the subject of the Apex Court which is reported in State of Punjab Vs. Labour Court Jullunder and Others, . However, in that decision the Apex Court has ordained that the term, any law for the time being in force in relation to shops and establishments in a State, could not mean only the Shops and Establishments Act as was applicable in State of Punjab but even any other law like the provisions of the Payment of Wages Act could be pressed into service and if the connected establishment was an establishment within the meaning of Payment of Wages Act, even then the Payment of Gratuity Act would be applicable. Since the controversy in this case has not taken into its fold this question, the reliance of Shri Majumdar on this case is really not called for.

15. In the result, therefore, it will have to be held that the establishment of the petitioners is well covered under the provisions of Section 1(3)(b) of the Payment

of Gratuity Act and both the Authorities below were right in granting the gratuity as has been done by them to the respondent. The petition, therefore, must fail and is ordered to be dismissed. However, in the circumstances of the case, there shall be no order as to costs. Rule stands discharged.