(2013) 02 AHC CK 0222

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 31744 of 2011

Rehmat Ullah Khan APPELLANT

Vs

Bundelkhand University Jhansi and Others RESPONDENT

Date of Decision : 14-02-2013

Acts Referred:

Constitution of India, 1950 — Article 226
Payment of Gratuity Act, 1972 — Section 14, 2(e), 3, 4, 4(1)
Penal Code, 1860 (IPC) — Section 193, 196, 228

Citation : (2013) 3 ADJ 7

Hon'ble Judges : V.K. Shukla, J

Bench : Single Bench

Advocate : J.H. Khan, Gulrez Khan, S. Khan and W.H. Khan, for the Appellant; Neeraj Tiwari and S.C., for the Respondent

Final Decision : Dismissed

Judgement

V.K. Shukla, J.—Present writ petition in question has been filed by the petitioner questioning the validity of the order dated 4th September, 2008 passed by the Registrar of Bundelkhand University, Jhansi informing the petitioner that no amount whatsoever is admissible to him and entire amount as was liable to be paid, already stands paid to petitioner. Petitioner was working on the post of Senior Office Superintendent in the University concerned and disciplinary proceedings had been undertaken against him and an order of compulsory retirement was passed. Petitioner had proceeded to question the validity of the same by preferring Civil Misc. Writ Petition No. 17910 of 2005 and the said writ petition in question was allowed on 18.10.2005 leaving it open to the University to impose any of the punishment permissible under Statute 2.6 (2), if petitioner was found guilty of any of the charges mentioned in the charge-sheet. Petitioner submits that he had retired from service on 30th April, 2006 and on his retirement he became entitle for gratuity, leave encashment and other post retrial benefits. Petitioner had filed Civil Misc. Writ Petition No. 58008 of 2006 and the said writ petition was disposed of on 21st July, 2008 directing the respondents to take final decision regarding payment of gratuity, leave encashment and of providing Form 16 to petitioner. Against the said order in question, petitioner has preferred Special Appeal No. 1377 of 2008 wherein an interim order was passed directing the authorities concerned to make aforesaid payment or show-cause.

2. In the said special appeal counter-affidavit has been filed informing that Form 16 has been delivered to petitioner and the payment of leave encashment has already been made and the claim of petitioner for gratuity has been rejected by the order dated 4th September, 2008, the order impugned in the present writ petition. Thereafter, Special Appeal No. 1377 of 2008 has been dismissed by this Court on 25th March, 2011 without going into the merits of the said appeal. Petitioner, thereafter, filed review application and the same, has been dismissed on 13th May, 2011 with an observation that if any order has been passed regarding the rejection of the claim of petitioner, it would be open to petitioner to take legal proceedings against the same. Petitioner, thereafter, is before this Court contending therein that his claim for gratuity has wrongly been turned down and under the provisions of Payment of Gratuity Act, 1972 he is entitled for gratuity.

3. Claim of petitioner has been resisted by the University concerned by contending that employee has been defined u/s 2(e) of the Payment of Gratuity Act, 1972 and as petitioner has been an employee of the University, he is not at all governed by the provisions of the aforementioned act as he has been holding the post under the State Government and was being governed by other rules for payment of gratuity and further petitioner has accepted the said benefits without any reservation and as such no relief or re-(sic) should be given to petitioner.

4. Supplementary counter-affidavit has been filed appending therein a copy of the Government Order dated 18th November, 2004 wherein provision has been made for attaining the age of superannuation at the age of 60 years with gratuity benefits.

5. By means of rejoinder-affidavit the averments made on behalf of University has been rebutted and it has been reiterated that the said Government Order only provides two different options of payment of certain retirement benefits for the employee already employed and the said Government Order nowhere exempts the employees from the applicability of the Act of 1972, as Act of 1972 would prevail over the same.

6. After pleadings mentioned above have been exchanged, present writ petition has been taken up for final hearing and disposal with the consent of parties.

7. Shri Gulrej Khan, learned counsel for the petitioner, submitted with vehemence that Payment of Gratuity Act, 1972 is a social welfare legislation and same deserves liberal interpretation and as per the same as pension scheme which is applicable in the University concerned does not provide for payment of gratuity, same cannot be compared with gratuity payable under the Act, in view

of this as Section 14 of Payment of Gratuity Act, 1972 has a over-riding effect, the University is obliged to pay the gratuity u/s 4 (1) of the Payment of Gratuity Act, 1972 in the absence of any exemption obtained u/s 5(1) of the said Act and such obligation to pay the gratuity continues to exist and accordingly present writ petition deserves to be allowed.

8. Countering the said submission Shri Neeraj Tiwari, Advocate submitted that petitioner is not at all entitled for gratuity under the provisions of Payment of Gratuity Act, 1972 as petitioner does not fall within the definition of employee as defined u/s 2(e) of the Payment of Gratuity Act, 1972 as petitioner has been holding the post in question under the State Government and is governed by the other set of rules providing for payment of gratuity and in view of this claim in question is not acceptable and coupled with this it has also been stated that Payment of Gratuity Act, 1972 is a self contained act and in case petitioner claims that he is entitled for gratuity under the said act whereas the University is resisting the said claim, then such issue at the first instance has to be examined within the parameters of the provisions of the Payment of Gratuity Act, 1972 by the Controlling Authority, who has been conferred with wide authority u/s 7(4)(A) of the said Act, in view of this present writ petition is liable to be dismissed by this Court.

9. After respective arguments have been advanced the factual situation which is so emerging in the present case that petitioner had been performing and discharging his duties as Senior Office Superintendent and had attained his age of superannuation on 30th April, 2006.

10. In exercise of authority vested u/s 33 of U.P. State Universities Act, 1973, the State Government has issued order for ensuring payment of post retiral benefits Government Order dated 24th January, 1984 has been enforced and as per the same different benefits have been extended on opting for retirement at the age of 58 years and 60 years. The incumbents who opted to retire at the age of 58 years, they were entitled for pension, death-cum-retiral gratuity, family pension, general provident fund and the incumbents, who opted to retire at the age of 60 years, they were entitled for pension, family pension and general provident fund. The petitioner as per the Government Order dated 24th January, 1984 was mandatorily required to fill up the option form mentioning therein that whether he wanted to continue under the old scheme or wanted to continue with the scheme of pension, death-cum-retiral gratuity, family pension, general provident fund and thereafter petitioner had given his option. The said Government Order dated 24th January, 1984 has been modified on 18th November, 2004 and as per the said modification choice of option has been closed and it has been resolved to provide gratuity and other post retiral benefits and the date of superannuation had been decided to 60 years. Petitioner has been paid the benefits as per the option which has been filled up by him and his precise contention is that he is entitled for payment of gratuity also under the provisions of Payment of Gratuity Act, 1972 but the same has been arbitrarily

turned down by the Registrar of the University concerned. Petitioner''s submission before this Court is that law on the said subject stands clarified in the case of Allahabad Bank and Another Vs. All India Allahabad Bank Retired Emps. Assn., and in view of this payment of gratuity be ensured.

11. University has placed reliance on the judgment of the Apex Court in the case of C.V. Raman Vs. Management of Bank of India and Another, , to substantiate that strictly speaking the University may be a different entity as a corporate body for certain purpose but on over all consideration deep pervasive control of State Government is seen then it has to be accepted that the University is under the State Government and once the University is an establishment under the State Government, and State Government in exercise of its statutory power, has created a provision for gratuity, then the petitioner would not fall within the domain of employee u/s 2 (e) of the Payment of Gratuity Act, 1972 and accordingly gratuity cannot be ensured under the Act of 1972.

12. The core issue is that once the Payment of Gratuity Act, 1972 is a self contained act wherein even the question of entitlement can be gone into by the Controlling Authority, even then this Court in its authority of judicial review proceed to bypass the authority of Controlling Authority to decide and adjudicate the dispute, in accordance with law. In order to answer such an issue Section 3, Section 4 and Section 7 is being quoted below;

3. Controlling authority.--The Appropriate Government may, by notification, appoint any officer to be a controlling authority, who shall be responsible for the administration of this Act and different authorities may be appointed for different areas.

4. Payment of gratuity.--(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,--

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement:

Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.

Explanation.--For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days'' wages based on the rate of wages last drawn by the employee concerned:

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account:

Provided further that in the case of 1[an employee who is employed in a seasonal establishment and who is not so employed throughout the year, the employer shall pay the gratuity at the rate of seven days'' wages for each season].

Explanation.--In the case of a monthly rated employee, the fifteen days'' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.

(3) The amount of gratuity payable to an employee shall not exceed [ten lakh rupees].

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced.

(5) Nothing in this section shall affect the right of an employee receive better terms of gratuity under any award or agreement or contract with the employer.

(6) Notwithstanding anything contained in sub-section (1),--

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee [may be wholly or partially forfeited]-

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.

7. Determination of the amount of gratuity.--(1) A person who is eligible for payment of gratuity under this Act or any person authorised, in writing, to act on his behalf shall send a written application to the employer, within such time and

in such form, as may be prescribed, for payment of such gratuity.

(2) As soon as gratuity becomes payable, the employer shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.

(3) The employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to the person to whom the gratuity is payable.

(3A) If the amount of gratuity payable under sub-section (3) is not paid by the 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, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify:

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.

(4) (a) If there is any dispute as to the amount of gratuity payable to an employee under this Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the employer shall deposit with the controlling authority such amount as he admits to be payable by him as gratuity.

(b) Where there is a dispute with regard to any matter or mattes specified in clause (a), the employer or employee or any other person raising the dispute may make an application to the controlling authority for deciding the dispute.

(c) The controlling authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as a result of such inquiry any amount is found to be payable to the employee, the controlling authority shall direct the employer to pay such amount or, as the case may be, such amount as reduced by the amount already deposited by the employer.

(d) The controlling authority shall pay the amount deposited, including the excess amount, if any, deposited by the employer, to the person entitled thereto.

(e) As soon as may be after a deposit is made under clause(a), the controlling authority shall pay the amount of the deposit--

(i) to the applicant where he is the employee; or

(ii) where the applicant is not the employee, to the nominee or, as the 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.

(5) For the purpose of conducting an inquiry under sub-section (4), the controlling authority shall have the same powers as are vested in a Court, while trying a suit, under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters, namely:-

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses.

(6) Any inquiry under this section shall be a judicial proceeding within the meaning of Sections 193 and 228, and for the purpose of Section 196, of the Indian Penal Code (45 of 1860).

(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 or such other authority as may be specified by 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 the appellate authority such amount.

(8) The appropriate Government or the appellate authority, as the case may be, may, after giving the parties to the appeal a reasonable opportunity of being heard, confirm, modify or reverse the decision of the controlling authority.

13. A bare perusal of the provisions of Section 3, quoted above, would go to show that there has to be appointment of any officer to be a Controlling Authority, who shall be responsible for the administration of this Act. Thus this much is clear that the Controlling Authority is responsible for the administration of the payment of gratuity. Section 4 talks about payment of gratuity to an employee on the termination of his employment and Section 7 deals with the determination of the amount of gratuity.

14. u/s 7 of the Payment of Gratuity Act 1972, a person who is eligible for payment of gratuity under this Act has to sent a written application to the employer within such time and in such form as may be prescribed for payment of such gratuity. Sub-section (2) of Section 7 obliges the employer on the gratuity

being payable to determine the gratuity and to give notice in writing to the person to whom the gratuity is payable and thereafter the employer is duty bound to arrange the amount of gratuity and pay the same within thirty days from the date it becomes payable to the person to whom the gratuity is payable. Sub-section (4) of Section 7 provides that if there is any dispute to the amount of gratuity payable to an employee under this act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the employer shall deposit with the Controlling Authority such amount as he admits to be payable by him as gratuity. Clause (b) of Sub-section 4 of Section 7 provides that where there is a dispute with regard to any matter or matters specified in Clause (a), the employer or employee or any other person raising the dispute may make an application to the Controlling Authority for deciding the dispute. Clause (c) of sub-section (4) of Section 7 provides that the Controlling Authority shall, after due enquiry and after giving the parties to dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as a result of such enquiry any amount is found to be payable to an employee, the Controlling Authority shall direct the employer to pay such amount or in case the amount is already deposited by the employer, the such amount to be reduced. Wide authority has been conferred upon the Controlling Authority as Sub-section (5) of Section 7 provides that for the purposes of conducting enquiry u/s 4, the Controlling Authority shall have the same powers as are vested in a Court, while trying a suit, under the Code of Civil Procedure. Not only this Sub-section (6) of Section 7 clearly proceeds to mention that the enquiry under the said section is a judicial proceedings and further against the orders passed by the Controlling Authority there is a provision of Appeal provided for. Section 8 even confers authority on Controlling Authority for recovery of gratuity.

15. Thus this much is clear that the provisions of Payment of Gratuity Act, 1972 is a self contained Act wherein all the issues including the issue of entitlement can be very well looked into, enquired and be adjudicated of and on gratuity being payable under the Act not being paid by employer, the gratuity amount can be recovered.

16. The question before this Court is that once the provisions of Payment of Gratuity Act, 1972 are self contained and in the present case the Registrar of the University concerned has proceeded to inform the petitioner that he is not entitled for gratuity, then should the petitioner permitted to by-pass the provisions of Payment of Gratuity Act, 1972. The answer would be no for the simple reason that once petitioner is claiming that he is entitled for gratuity under the provisions of Payment of Gratuity Act, 1972 and the other side is claiming that petitioner is not at all entitled for gratuity under the aforementioned act, then on refusal being made by the University concerned informing the petitioner that petitioner is not at all entitled for any amount by way of gratuity, the remedy of petitioner lies in approaching the Controlling Authority under the provisions of Payment of Gratuity Act, 1972 instead of filing

the present writ petition with a prayer that this Court should determine the question as to whether petitioner is entitled for gratuity or not under the provisions of Payment of Gratuity Act, 1972. Apex Court in the case of Champalal Binani Vs. The Commissioner of Income Tax, West Bengal and Others, , proceeded to emphasize that Income Tax Act provides a complete and self contained machinery for obtaining relief against improper action taken by departmental authorities, and in normal course of business party feeling aggrieved by such action cannot refuse to have recourse to that machinery and to approach the High Court directly against the action. Similar view has been reiterated in the case of U.P. State Spinning Co. Ltd. Vs. R.S. Pandey and Another, , by mentioning that writ petition under article 226 of Constitution should not be entertained when statutory remedy is available under the Act, unless exceptional circumstances are made out.

17. In view of this, as there is no exceptional circumstances to by-pass the said statutory forum of approaching the Controlling Authority, this Court is not at all going on the merits of the present case as to whether petitioner would be entitled for gratuity under the provisions of Payment of Gratuity Act, 1972 or not and as to whether petitioner is not at all entitled for any gratuity under the provisions of the aforementioned act, as is being contended by the University and to the contrary this Court relegates the petitioner to approach the authority, who is authorised to decide such disputes after making enquiry under the Payment of Gratuity Act, 1972, at the first instance. In view of this present writ petition, as it has been framed and drawn, is dismissed on the ground of equal and efficacious alternative remedy being available by approaching the Controlling Authority u/s 7(4) of the Payment of Gratuity Act, 1972.

