

(2010) 06 CAL CK 0024
In the Calcutta High Court
Case No : Writ Petition No. 2904 (W) of 2006

Sailen Seth

APPELLANT

Vs

Dy. Labour Commissioner and Others

RESPONDENT

Date of Decision : 30-06-2010

Acts Referred:

Constitution of India, 1950 — Article 43, 43A
Payment of Gratuity Act, 1972 — Section 1, 1(3), 2, 2(f), 2(s)
West Bengal Shops and Establishments Act, 1963 — Section 2(4)

Citation : (2010) 126 FLR 923

Hon'ble Judges : Girish Chandra Gupta, J

Bench : Single Bench

Advocate : L.K. Gupta and Dilip Kumar Kundu, for the Appellant; N.C. Bhattacharya, B.K. Banerjee, K.H. Dasan and Mala Chakraborty, for the Respondent

Final Decision : Dismissed

Judgement

Girish Chandra Gupta, J.

The subject-matter of challenge in this writ petition is an order dated 13th December, 2005 passed by the Appellate Authority under the Payment of Gratuity Act, 1972 and also a notice dated 30th December, 2005 issued by the Controlling Authority under the Payment of Gratuity Act, 1972 directing the petitioner to pay a sum of Rs. 8,80,499.87 paise together with admissible interest to Shri Ajit Kumar Roy and 115 others namely the respondents Nos. 6-121 herein. The respondents Nos. 3 and 4 are the Steel Authority of India Limited and its Assistant General Manager. The respondent No. 5 is the State of West Bengal and the respondents Nos. 1 and 2 are the authorities under the Payment of Gratuity Act, 1972.

The case of the petitioner briefly stated is as follows:-

1. The petitioner Sailen Seth, carrying on business under the name and style of

Seth and Associates, undertook the job of handling of iron and steel materials at the home sales stockyards of the Steel Authority of India Limited at Durgapur for the period between 14th May, 1984 and 31st December, 1986. A further contract for a period of 5 years commencing from 1st January, 1987 was entered into between the parties the duration whereof was extended by mutual consent up to 31st March, 1992. Further case of the petitioner is that although the handling contractors were changed from time to time the labour force working under different contractors continued to remain same. After the contract between the petitioner and the Steel Authority of India Limited came to an end the labourers raised their grievance as regards non-payment of gratuity. The petitioner's consistent case has been and still is that he is not liable to make any payment on account of gratuity. The Steel Authority of India Limited withheld a sum of Rs. 3,16,858.50 paise from out of the money payable to the petitioner because of the pendency of the aforesaid claim. A certificate for recovery of the aforesaid sum of Rs. 8,80,499.87 paise was issued against the petitioner which was challenged in this Court by a writ petition which was registered as Company 14303 (W) of 1995. On 12th September, 1995 a conditional interim relief was granted to the petitioner subject to his furnishing a bank guarantee for a sum of Rs. 4 lakhs which the writ petitioner duly furnished. On 9th October, 2001 the writ petition was dismissed on the ground that the impugned order was appealable u/s 7(7) of the Payment of Gratuity Act. The petitioner applied for recalling the order which culminated in an order dated 13th March, 2003 by which the petitioner was directed to deposit the balance amount in cash. Aggrieved by the aforesaid order the petitioner preferred an appeal. The Appellate Court disposed of the appeal by an order dated 3rd September, 2003 by which the Steel Authority of India was directed to release the amount to the petitioner which had been withheld by them. The petitioner duly recovered the amount from the Steel Authority and furnished a further bank guarantee for Rs. 4,80,500/- in addition to the one for Rs. 4 lakhs already furnished in favour of the Controlling Authority, Durgapur. The appeal was thereafter heard by the Appellate Authority and the impugned order was passed on 13th December, 2005.

2. The sum and substance of the submissions made by Mr. Gupta, learned Senior Advocate appearing for the petitioner is that there is no employer-employee relationship between the petitioner on the one hand and the respondents Nos. 6-121 and therefore the petitioner is not liable to make payment of any gratuity.

3. Mr. Das, learned Advocate appearing for the respondents Nos. 6-121 has disputed this submission. So did Mr. Bhattacharya, learned Advocate appearing for the Steel Authority of India Limited. It is not the contention of Mr Gupta that no gratuity is payable. His contention is that the gratuity is not payable by the petitioner and same is payable by the Steel Authority of India Limited which the latter has disputed

4. Mr. Gupta drew my attention to sub-section (3) of section 1 of the Payment of Gratuity Act which provides as follows:-

It shall apply to-

- (a) every factory, mine, oilfield, plantation, port and railway company;
- (b) every shop or establishment within the meaning of any law for the time being in force in relation to 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) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf.

5. Mr. Gupta contended that establishment contemplated by Clause (c) of sub-section 3 of section 1 is the establishment of the Steel Authority of India Limited.

He then drew my attention to Clause (f) of section 2 of the aforesaid Act wherein the expression "employer" is defined as follows:-

employer" means, in relation to any establishment, factory, mine, oilfield, plantation, port, railway company or shop-

(i) belonging to, or under the control of the Central Government or a State Government, a person or authority appointed by the appropriate Government for the supervision and control of employees, or where no person or authority has been so appointed, the head of the Ministry or the Department concerned.

(ii) belonging to, or under the control of, any local authority, the person appointed by such authority for the supervision and control of employees or where no person has been so appointed, the chief executive officer of the local authority,

(iii) in any other case, the person, who or the authority which, has the ultimate control over the affairs of the establishment, factory, mine, oilfield, plantation, port, railway company or shop, and where the said affairs are entrusted to any other person, whether called a manager, managing director or by any other name, such person,

6. Mr Gupta contended that one of the factors for deciding as to who the employer is, is to ascertain as to who has, the ultimate control over the activities of the establishment. He in this regard drew my attention to the judgment in the case of Hussainbhai, Calicut Vs. The Alath Factory Thezhilali Union, Kozhikode and Others, , wherein the following view was adopted:-

The true test may, with brevity, be indicated once again. Where a worker or group of workers labours to produce-goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the worker's subsistence, skill, and continued employment. If he, for any reason, chokes off, the worker is, virtually, laid off. The presence of intermediate contractors with whom alone the workers have

immediate or direct relationship ex contractu is of no consequence when, on lifting the veil or looking at the conspectus of factors governing employment, we discern the naked truth, though draped in different perfect paper arrangement, that the real employer is the Management, not the immediate contractor. Myriad devices, half-hidden in fold after fold of legal form depending on the degree of concealment needed, the type of industry, the local conditions and the like, may be resorted to when labour legislation casts welfare obligations on the real employer, based on Arts. 38-39-42, 43 and 43A of the Constitution. The Court must be astute to avoid the mischief and achieve the purpose of the law and not be misled by the maya of legal appearances.

7. Mr. Gupta then drew my attention to the definition of the expression "contractor" and "establishment" from the Contract Labour (Regulation and Abolition) Act, 1970 wherein the expression "contractor" has been defined as follows:-

"contractor", in relation to an establishment, means a person who undertakes to produce a given result for the establishment, other than a mere supply of goods or articles of manufacture to such establishment, through contract labour or who supplies contract labour for any work of the establishment and includes a sub-contractor;

8. The expression "establishment" as defined in the aforesaid Act is as follows:-

"establishment" means-

- (i) any office or department of the Government or a local authority, or
- (ii) any place where any industry, trade, business, manufacturer or occupation is carried on,

9. The next submission advanced by Mr. Gupta was that: the gratuity is not payable by the petitioner because gratuity is not a component of wages u/s 2(s) of the Payment of Gratuity Act, 1972. Wages in the aforesaid Act has been defined as follows:-

"wages" means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and" any other allowance.

He submitted that the Appellate Authority fell into a grievous error in borrowing the definition of wages from the Payment of Wages Act.

10. Lastly he submitted that the Appellate Authority grossly erred in holding that there was employer-employee relationship between the petitioner on the one hand and the respondents Nos. 6-121. The Appellate Authority has to be precise opined in that regard as follows:-

Learned Counsel for the appellant-company again held that there was no employer-employee relations between the appellant-company and the respondents and as such there was also no control over the workmen under the contract. Learned Counsel also maintains that the appellant-company is not an employer.

I find no merit in the contention raised above by the learned Counsel for the appellant-company. The term "employer" used in various statutes where the term "establishment" have been defined needs to be examined closely. Section 2(f) of the Payment of Gratuity Act, 1972 defines the term "employer" as under:

(f) "employer" means, in relation to any establishment, factory, mine, oilfield, plantation, port, railway company or shop-

(iii) in any other case, the person, who, or the authority which, has the ultimate control over the affairs of the establishment, factory, mine, oilfield, plantation, port, railway company or shop, and where the said affairs are entrusted to any other person, whether called a manager, managing director or by any other name, such person;

West Bengal Shops and Establishments Act, 1963 in its section 2(4) defines the term "employer" which reads as under:

(4)"employer" means a person owning or having charge of an establishment and includes an agent or a manager of, and any other person acting on behalf of such person in the general management or control of such establishment.

In view of the above discussion the contention of the learned Counsel is rejected.

It is not in dispute that the appellant engaged the workmen, sent them to the premises of SAIL at their Stockyard for getting the work done for SAIL.

The appellant-company maintains an office at Karangapara, Durgapur and operates its business from there. The appellant-company regulates the employment of the workmen and their conditions of service. A systematic activity existed there. The appellant-company had the authority to engage, disengage, regulate the movement of its workmen and their conditions of service. Therefore there cannot be any doubt as to the master-servant relationship existing between the appellant-company and the workmen. There also remains no doubt as to the fact that the appellant-company exercised full and ultimate control over the workmen though the appellant-company was under the obligation to engage them under a contract with SAIL. The above discussion again justifies rejection of the contention of the learned Counsel.

11. Mr. Gupta in support of his submission relied on a judgment in the case of Mangalore Ganesh Beedi Works and Others Vs. Union of India (UOI) and Others, ,He also relied on a judgment of a Division Bench of the Gujarat High Court in the case of Patel Hiralal Randal v. Chandbibi 1981 LIC 790, He also relied on a judgment in the case of S. Vhakshinamurthy v. Deputy Commissioner

of Labour 2002 (4) LLN 398, Lastly he drew my attention to the judgment in the case of Madras Fertilisers Limited Vs. The Controlling Authority, Assistant Commissioner of Labour (Gratuity), The Deputy Commissioner of Labour (Appeals), Appellate Authority, The Management of Bharath Transport, N.E. Nilavazhagan, C. Gunasekaran, S. Anthony, P. Paramasivam, C. Pandiyan, P. Rajendran, M. Ramalingam, K. Dayalan, T. Badrachalam, George V. Philips, G. Elumalai, R. Manoharan, C. Ganesan, S. Varadan, S. Veeraraghavan, V.K. Vaidyalingam, S. Kalyanasundaram, C. Selvaraj, C. Dhakshnamoorthy, V. Venkatesan, S. Muralidharan, P. Nethaji, P. Kapali, G. Easu Patham, E. Mohan, G. Selvaraj, N. Govindasamy, R. Duraivelu, G. Easuadiyan, A.P. Ethiraj, S.R. Raman, M. Alphonse, T.R. Samy, G. Radhakrishnan, M. Nallamal, G. Yasodha, V. Murugesan and N. Nithyanandam, , rendered by the Hon"ble Justice Sirpurkar who until recently was the Chief Justice of this Court and is now adorning the Bench of the Supreme Court of India. It was held by His Lordship in that case that it is the Contractor who is liable for payment of gratuity. Mr. Gupta submitted that this judgment by which a dissenting note was struck is patently opposed to the views expressed by the Supreme Court in the Constitution Bench judgment noticed above.

12. Mr. Das, learned Advocate for the respondents Nos. 6-121 has drawn my attention to some judgments which are not of much assistance for resolving the controversy. Similarly Mr. Bhattacharya has also relied on some judgments which also have hardly any relevance insofar as the present controversy is concerned.

13. The main thrust of the submissions on behalf of the petitioner is that the real employer is the Steel Authority of India Limited and therefore the liability to pay the gratuity is also of the real employer and not of the intermediary who the petitioner is. This submission, according to me, is incorrect. Even assuming that the real employer is the Steel Authority of India Limited and further assuming that the petitioner is a mere intermediary it cannot be held that in this case the liability to pay gratuity is that of the Steel Authority of India Limited and not of the petitioner.

14. The parent judgment in the case of Mangalore Ganesh Beedi Works and others v. Union of India (supra) has no manner of application to the present controversy for the simple reason that the question for consideration before Their Lordships was the constitutional validity of Beedi and Cigar Workers (Conditions of Employment) Act, 1966. The aforesaid Act ""speaks of the principal employer in relation to contract labour and employer in relation to other labour. When a contractor engages labour for or on behalf of another person that other person becomes the principal employer. The Attorney General rightly said that if it were established on the facts of any particular case that a person engaged labour for himself he would be the principal employer of contract labour. In such an instance there is no question of agency on behalf of another person". Whereas the Payment of Gratuity Act does not even remotely contemplate existence of any principal employer: the distinctly between an employer and a principal

employer has not been recognised by Payment of Gratuity Act, 1972. The present controversy has to be resolved with the Four Corners of the Payment of Gratuity Act. The definition of the term "employer" has already been noticed above. Mr. Gupta contended that even the definition of the term employer under the Payment of Gratuity Act contemplate an authority which is in ultimate control of the activities. He would therefore contend that the ultimate control is with the Steel Authority of India Limited and therefore they are liable to pay gratuity. I am unable to accept the submission for the simple reason that the expression "ultimate control" has been used in relation to affairs of the establishment. We already have noticed above that, under section" 1(3) of the Payment of Gratuity Act, by the expression establishment the legislature contemplated not any particular establishment but an establishment within the meaning of any law. Any law would certainly include West Bengal Shops and Establishments Act, 1963 which defines a commercial establishment as follows:-

"Commercial establishment" means an advertising, commission, forwarding or commercial agency, or a clerical department of a factory or any industrial or commercial undertaking, an insurance company, joint stock company, bank, broker's office or exchange, and 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 an establishment of any legal practitioner, medical practitioner architect, engineer, accountant, tax consultant or any other technical or professional consultant, a society registered under any enactment in force for the time being, charitable or other trust, whether registered or not, which carries on, whether for purposes of gain or not, any business," trade or profession or and work in connection with, or incidental or ancillary to any business, trade or profession and such other class or classes of concerns or undertakings as the State Government may, after taking into consideration the nature of their work, by notification, declare to be commercial establishments for the purposes of this Act, but does not include a shop or an establishment for public entertainment or amusement

15. It would appear that a commercial agency and any business, trade or profession or any work in connection with or incidental or ancillary to any business is covered within the definition of commercial establishment. The second requirement in order to become an establishment within the meaning of section 1(3) of the Payment of Gratuity Act is that there should be employed ten persons on any day of the preceding twelve months.

16. There is no doubt that the petitioner-employed more than 10 persons for more than five years. We have before us 116 claimants of gratuity. All of them, were employed by the petitioner. It would appear from the cause title of the writ petition that the petitioner is carrying on business under the name and style of M/s. Seth & Associates as sole proprietor thereof having his office at Karanga Para, Durgapur. Therefore all the prerequisites for the applicability of the Payment of Gratuity Act u/s 1 of the aforesaid Act are present in this case. It is futile to

compare the provisions of the Payment of Gratuity Act, 1977 with those of the Contract Labour (Regulation and Abolition) Act, 1970. The former Act was enacted with an object to "provide for a scheme for the payment, gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith of incidental thereto" whereas the latter Act was enacted with an object to "regulate the employment of contract labour in certain establishments and to provide for its abolition in certain circumstances and for matters connected therewith". These are therefore two separate Acts seeking to achieve two different objectives. It would be improper to construe the provisions of the Payment of Gratuity Act with reference to the provisions of Contract Labour (Regulation & Abolition) Act, 1970.

17. The fact that the petitioner has expressly undertaken to meet the statutory liability in that regard would be evident from Clause 20 of the contract entered into between the parties, disclosed by way of an annexure to a supplementary affidavit pursuant to an order of Court, which insofar as material for our purpose provides as follows:-

The contractor shall carry out, perform and observe the provisions of the Shops and Establishment Act, Workmen" Compensation Act and Contract Labour (Regulation and Abolition) Act, 1970, Employees Provident Fund Act, 1952 or any other enactment passed by the Parliament or State Legislature and any rules made thereunder by the appropriate Government (s) in any way affecting the labourers employed by the Contractors) and also indemnify the company against any liability that may be imposed by law or by the Government for non-observance of any of the Act or. Contract Labour (Regulation and Abolition) Act, 1970, Employees Provident Fund Act, 1952 or any other enactment passed by Parliament or State Legislature which applies or affects to the labourers employed by the Contractor.

18. In order to indemnify itself against any loss arising out of non-payment of gratuity by the petitioner the Steel Authority had withheld part of the dues of the petitioner which they were made to refund to the petitioner on the basis of an order obtained by the latter from the Appellate Court.

The attempt of the writ petitioner to pass on the liability to pay gratuity to the Steel Authority is therefore anything but bona fide.

19. The contention put forward by Mr Gupta that gratuity is not payable by the petitioner because gratuity is not a component of wages u/s 2 of the Payment of Gratuity Act is without any merit. The definition of the term "wages" under the aforesaid Act has been quoted above. The Legislature has provided for payment of gratuity u/s 4 of the aforesaid Act, 1972. The quantum of gratuity is 15 days wages for every completed year of service. What did the legislature mean by the expression "wages" in sub-section 2 of section 4 of the Payment of Gratuity Act, 1972 would be evident from the definition of the term "wages" appearing in

section 2 There was as such no scope for inclusion of gratuity within the definition of the term wages in the aforesaid Act. Therefore the submission advanced by Mr. Gupta, I am sorry to say, is without any substance altogether.

20. The judgment in the case of Patel Hiralal Ramlal (supra) was rendered in respect of workers engaged in the activity of manufacturing beedi. With respect to that activity the provisions of Beedi and Cigar Workers (Conditions of Employment) Act, 1966 would be applicable. That Act we already have noticed contemplates principal employer and therefore liability in those cases will remain with the principal employers. Therefore that judgment has no manner of application to the facts of this case.

21. The judgment in the case of Dhakshinamurthy (supra) is also with respect to the workers of the Trade Mark Holder and manufacturer of Beedis. Therefore that judgment will also have no application to the case in hand.

The judgment in the case of Hussain Bhai (supra) was rendered dealing with challenge to an industrial award. 29 workmen were denied employment which led to the reference. The Tribunal came to the conclusion that there was employer-employee relationship and therefore the Industrial Law was applicable. Therefore that judgment has no manner of application to the facts and circumstances of this case. It is therefore futile to suggest that the petitioner is not, liable to pay the aforesaid dues of the respondents No. 6-121.

22. For the aforesaid reasons this petition fails and is dismissed with costs assessed at Rs. 20,000/- to be shared equally by the respondents No. 6-121 on the one hand and the respondents No. 3-4 on the other.

Urgent xerox certified copy of this judgment, be delivered to the learned Advocates for the parties, if applied for, upon compliance with all formalities.