
(1990) 09 BOM CK 0061

In the Bombay High Court

Case No : Writ Petition No. 2261 of 1982

S.D. Dhanawade (Dr.)

APPELLANT

Vs

The Commissioner, Kolhapur Municipal Corpn. and Others

RESPONDENT

Date of Decision : 27-09-1990

Acts Referred:

Bombay Municipal Boroughs Act, 1925 — Section 58H

Citation : (1991) 63 FLR 510 : (1995) 3 LLJ 40

Hon'ble Judges : M.L. Pendse, J; E.D.D.S. Da'Silva, J

Bench : Division Bench

Advocate : S.M. Dharap, for the Appellant; A.V. Bandiwadekar, for R-1, for the Respondent

Final Decision : Dismissed

Judgement

Pendse, J.—The petitioner was appointed as Medical Officer in the Health Department of Kolhapur Municipal Corporation on March 1, 1953. The petitioner retired on reaching the age of superannuation on December 1, 1979. The last drawn salary of the petitioner was Rs. 967.80. The petitioner had put in a total period of service of 24 years and 9 months. On retirement, the petitioner was paid the amount available in the Provident Fund Account. On January 8, 1980 the petitioner sent application to the Municipal Corporation under Rule 7(i) demanding gratuity according to the provisions of the Payment of Gratuity Act, 1972. The petitioner thereafter filed an application under Rule 10(1) on June 18, 1980 before the Controlling Authority under the Payment of Gratuity Act, Kolhapur for recovery of Rs. 12,581.40. The claim was resisted by the Corporation on the ground that the provisions of the Act are not applicable to the Corporation and the provisions of Section 1(3) of the Act are not attracted. The Corporation also claimed that the petitioner had opted for contributory provident fund under the Rules in force and, therefore, is not entitled either to pension or gratuity. The service rules provided for payment of gratuity but the petitioner gave up the claim by opting for contributory provident fund and on realisation of

the amount from the Fund, the petitioner cannot turn round and claim gratuity. The Corporation also claimed that the claim made by the petitioner was barred by limitation. The Controlling Authority by order dated November 13, 1981 directed the Corporation to pay sum of Rs. 12,581.40, towards gratuity.

2. The Corporation carried appeal before the Appellate Authority under the Payment of Gratuity Act and the appeal was allowed by order dated March 29, 1982. The Appellate Authority held that the provisions of Payment of Gratuity Act are not applicable to the employees of the Corporation. The Appellate Authority also held that the pension and gratuity rules framed by the Corporation have no application in the case of an employee who had opted for Contributory Provident Fund. On the strength of this finding, the appeal was allowed and the order passed by the Controlling Authority was set aside. The order of the Appellate Authority is under challenge in this petition filed under Article 226 of the Constitution of India.

3. Shri Dharap, learned counsel appearing on behalf of the petitioner, submitted that the findings of the Appellate Authority that the employees of the Corporation are not covered by the provisions of the Act is not correct. Shri Dharap further submitted that the conclusion of the Appellate Authority that the petitioner had opted for Provident Fund contribution and, therefore, had given up the claim for pension and gratuity is also not correct. Shri Bandiwadekar, learned counsel appearing on behalf of the Corporation, on the other hand, submitted that the decision of the Appellate Authority does not suffer from any infirmity and is not required to be disturbed in exercise of writ jurisdiction. In our judgment, the order of the appellate authority can be sustained on the second ground that the petitioner had disintitiled himself from claiming gratuity or pension by opting for contributory Provident Fund Scheme provided under the statutory rules framed by the Corporation, and therefore the first contention urged by Mr. Dharap need not be determined.

In exercise of powers conferred u/s 58 (H) of the Bombay Municipal Boroughs Act, 1925, Kolhapur Municipal Corporation had framed Pension Rules and those Rules have been sanctioned by the Government Resolution dated May 28, 1957. The Bombay Municipal Boroughs Act, 1925 stands repealed after enactment of Bombay Provincial Municipal Corporations Act, 1949. The perusal of Pension Rules framed by Kolhapur Corporation clearly indicates that after the sanction of the Rules, the Corporation created Pension fund for payment of pension and gratuity to the employees. Rule 6 provides that separate account will be maintained in respect of pension fund and the amounts in this fund would be used for discharge of payment of pension and gratuity. Rule 6(2) provides that the employees of the Corporation were given an option to opt for the contributory Provident Fund Scheme or the Pension Scheme. In case, the employee opts for contributory Provident Fund Scheme, then the Corporation undertook to contribute 1/9th of the net wages payable to the employees to the Fund. Rule 7 provides that the Rules regarding pension, gratuity, death-cum

family pension, etc. would be regulated according to the Rules and the Schemes framed under Bombay Civil Service Rules. Rule 2(2) provides that an employee who will opt for contributory Provident Fund Scheme would not be entitled to claim for pension and gratuity. It is not in dispute that in accordance with the statutory rules, the petitioner opted for contributory Provident Fund Scheme and specifically gave up the claim for pension and gratuity on reaching the age of superannuation. It is also not in dispute that the Corporation contributed 1/9th amount of the net salary drawn by the petitioner in the fund created while the petitioner was in service. It is also not in dispute that on reaching the age of superannuation, the petitioner was paid the amount due to him under the contributory Provident Fund Scheme. On these undisputed facts, it was urged on behalf of the Corporation that the claim made by the petitioner to secure gratuity under the provisions of the Payment of Gratuity Act is not maintainable. We find considerable merit in the submission. The petitioner by exercising option to join the contributory Provident Fund Scheme specifically gave up the claim for pension and gratuity. It is not open for the petitioner to take advantage of the contributory Provident Fund Scheme and then turn round and claim that the petitioner is entitled to gratuity amount under the provisions of the Act. It is not permissible for the petitioner to approbate and reprobate. The application of the petitioner for gratuity is, therefore, required to be turned down on this count,

4. Shri Dharap relied upon the decision of the Supreme Court in the case of *Katheeraj Bai Vs. Superintending Engineer and Others*, to urge that the contributory Provident Fund and gratuity are two different concepts. There cannot be any debate on this contention. In the case before the Supreme Court, the employee's widow was paid gratuity under the Act and that amount was tried to be adjusted while making payment of funds available under contributory Provident Fund Scheme. The Supreme Court held that the contributory Provident Fund Scheme floated by the employer had no element whatsoever with the right to claim gratuity and, therefore, the payment of gratuity under the Act cannot entitle the employer to withhold the part of the amount under the contributory Provident Fund Scheme. We fail to appreciate how the decision of the Supreme Court will support the petitioner. In the present case, the petitioner exercised the option to join the contributory Provident Fund Scheme and invited the employer Corporation to deposit certain amount in that fund on specific understanding that the petitioner will not claim pension or gratuity on reaching the age of superannuation. It is, therefore, obvious that the contributory Provident Fund Scheme to which the petitioner opted deprives him from claiming pension or gratuity. In our judgment, the decision of the Supreme Court has no application whatsoever to the facts of the present case. The reliance was also placed on the decision of the Division Bench of this Court in the case of *United India Insurance Co. Ltd. etc. Vs. H.K. Khatau and others*, , but here again, we are unable to appreciate how the decision would assist the petitioner in the contention that in spite of exercising the option, the petitioner is entitled to claim gratuity under the Act. In case, the claim of the petitioner is accepted, then the petitioner can claim

not only the gratuity put also the pension and that would completely defeat the Pension Rules and the Provident Fund Scheme set up by the Corporation by framing statutory rules. We are, therefore, unable to accede to the submission of Shri Dharap that in spite of exercising the option, the petitioner has right to seek gratuity under the provisions of the Payment of Gratuity Act.

5. In view of our findings, that the petitioner's claim for gratuity is not maintainable, it is really not necessary to examine other contentions urged by Shri Dharap about the applicability of the Act to the employees of the Corporation. Shri Dharap invited us to briefly refer to his submission and out of respect for submission urged by the learned counsel we are making a brief reference to the contention urged. The Appellate Authority held that the provisions of the Act are not applicable to the employees of the Corporation and to challenge that conclusion reliance was placed on provisions of Section 1(3)(b) or the Act. Subsection (3) provides that the Act shall apply to every shop or establishment within the meaning of any law for the time being in force in relation to the shops and establishments in a State in which 10 or more persons are employed on any day preceding 12 months. It is not in dispute that the law in force in relation to shops and establishments in the State of Maharashtra is the Bombay Shops and Establishments Act, 1948. The expression "establishment" is defined u/s 2(8) of the Act and means a shop, commercial establishment residential hotel, restaurant, eating house, theatre or other places of public amusement or entertainment to which the Act applies. The definition of "establishment" is exhaustive. The expression "shop" is defined u/s 2(27) of the Act and means any premises where the goods are sold either by retail or wholesale or where services are rendered to customers and include an office, a store room, kitchen, warehouse or work place in the same premises or otherwise, mainly used in connection with such trade or business. Shri Dharap very fairly stated that it is difficult to suggest that the medical centres set up by the Corporation would fall either under the definition "shop" or "establishment" given under this Act. The learned counsel urged that Section 4 provides for exemption to establishments which are set out in Schedule 2 to the Act. Item No. 1 of Schedule deals with establishment of the Central Government. Item No. 2 with State Government and Item No. 3 with local authorities and application of all provisions of the Act are excluded to the establishment of these authorities. Shri Dharap submitted that the Kolhapur Municipal Corporation is local authority and if the establishment of this authority is excluded from application of Bombay Shops and Establishments Act, then it must be inferred that medical centre run by the Corporation is an establishment. It is very difficult to accept the submission unless we stretch credibility to its limits. We are not sure whether medical center run by the Corporation is an establishment but even otherwise as all the establishments of local authorities are exempted from application of Shops and Establishments Act, it is difficult to accept the contention that to such establishments the provisions of Payment of Gratuity Act would be applicable. Shri Dharap submitted that once an establishment is covered by Bombay Shops

and Establishments Act merely because the provisions are exempted by reference to Section 4 will not take away such establishment from the sweep of Section 1(3) of the Payment of Gratuity Act. The learned counsel relied upon the decisions of the Supreme Court reported in , State of Punjab Vs. Labour Court Jullunder and Others, and on the decision of this Court reported in B.N. Sarda Pvt. Ltd. v. Kisan K. Borade 1980 MLJ 721 and the decision of the Delhi High Court reported in Municipal Corporation, Delhi v. V.T. Naresh 1986 (52) F.L.R. 335. As we are not recording any conclusive finding on the issue of the applicability of the provisions of the Payment of Gratuity Act to the establishment of the Corporation in the present case, it is not necessary to deal with these decisions extensively. We make it clear that we are specifically leaving the question open for determination in a proper case.

6. Accordingly, petition fails and rule is discharged but there will be no order as to costs.