

(1994) 01 BOM CK 0039

In the Bombay High Court

Case No : Writ Petition No. 1469 of 1990

Shri Gurudeo Ayurved Mahavidyalaya and Another

APPELLANT

Vs

Madhav Narayan Mahakode and Others

RESPONDENT

Date of Decision : 25-01-1994

Acts Referred:

Payment of Gratuity (Amendment) Act, 1987 — Section 7(3)(A), 7(7), 8
Payment of Gratuity Act, 1972 — Section 1(3), 13, 2, 2(4), 2(8)

Citation : (1994) 3 BomCR 27 : (1996) 1 LLJ 515

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

Bench : Single Bench

Advocate : J.N. Chandurkar, for the Appellant; A.M. Gordey and R.C. Madkholkar, AGP, for the Respondent

Final Decision : Partly Allowed

Judgement

V.S. Sirpurkar, J.—In this writ petition, the petitioners, Shri Gurudeo Ayurved Mahavidhyalaya, Gurukunj Ashram, taluka Chandur Railway, District Amravati, through its Principal and Akhil Bhartiya Shri Gurudeo Seva Mandal, Gurukunj Ashram, Taluka Chandur Railway, District Amravati (hereinafter called "the employers"), challenged firstly the order passed by the Industrial Court, Amravati, by which it has dismissed the appeal filed under the provisions of Sub-section (7) of the Section 7 of the Payment of Gratuity Act, holding it to be barred by time. The said appeal was against the order passed by the Controlling authority under the Payment of Gratuity Act (Labour Court, Amravati). Secondly, this very order of the Controlling Authority is challenged directly on merits.

2. The basic facts are as under:

Respondent Madhao Narayan Mahakode was working in the post of Accountant in the Ayurved Maha Vidhyalaya, which is run by petitioner No. 2 society. Admittedly, Petitioner No. 2 is a registered society and petitioner No. 1 is the college run under the auspices of the same. The respondent retired on April 30, 1986. He was inducted into the service on April 1, 1955. In that view of the

matter, after retirement, he made an application, firstly, to his employers that he was entitled to the gratuity on the basis of 31 years of service rendered by him. He claimed in that application the amount of his wages, last drawn, was Rs. 1,703.40 and that the amount of gratuity to which he was entitled was Rs. 22,402.50. The said amount of gratuity claimed by him, not having been given to him, he approached the controlling authority under the Payment of Gratuity Act, which happened to be the Labour Court. In his application, he claimed that he had put in about 32 years of service and that he was "employee" within the meaning of the definition u/s 2 of the Payment of Gratuity Act and that he was entitled to the payment of gratuity.

3. This application came to be opposed, firstly, on the ground that the employee-respondent No. 1 at the time of this superannuation, was drawing more wages than Rs. 1,600/- and as such he was not entitled to any benefits under the payment of gratuity Act. It was also suggested by the employers that it was not a commercial establishment and, therefore, it was not liable to make any payment of gratuity. It claimed that it was governed by the Non- agricultural Universities and Affiliated Colleges Standard Code Rules, 1984 and in that view of Rule 116-D thereof, the employees of such colleges were not entitled to be paid any gratuity. In the view of this, the dismissal of the application was prayed.

4. Before the controlling authority, it seems that it was an admitted position that the last pay of the respondent No. 1 employee was Rs. 1,594/- per mensem. The controlling authority also came to the conclusion that since the pay was below Rs. 1,600/- per mensem, which was the limit fixed u/s 2(e) of the Payment of Gratuity Act, the respondent was an employee and as such he was entitled to get the gratuity as prayed for. The controlling authority came to the conclusion that respondent No. 1 employee had put in 31 years of service, and this 31 years of service was computable for arriving at the amount of gratuity payable to him. As regards the objection regarding Rule 116-D of the Rules of 1984, the controlling authority found that the said rule did not deal with the payment of gratuity and as such there was no question of he said rule coming in the way of the employee's getting the gratuity. It also came to the conclusion that the non-applicants to the application., being a registered society under the Societies Registration Act and also the society undertaking charitable or other type of services, it was covered under the term "commercial establishment" of the Bombay Shops and Establishments Act. It, therefore, gave a clear-cut finding that the society was a commercial establishment and, therefore, the staff working in the said College, if otherwise found entitled, was liable to get the benefit of the Payment of Gratuity Act. Ultimately, the controlling authority came to the conclusion that since 31 years of service was rendered by the employee, the total amount of gratuity would be Rs. 28,508.00. In the final order, the controlling authority also directed that this amount should carry the compound interest at the rate of 9% per annum from the date of the application, i.e., January 28, 1986, till the date of actual payment. This order was passed on July 14, 1987.

5. Unfortunately for the petitioners, they did not bother to file any appeal and, instead, filed a writ petition in the High Court, being Writ Petition No. 2694/87. The said writ petition was dismissed by this Court, observing that there was a remedy of appeal before the Industrial Court. The order, dismissing the petition was passed on June 14, 1988. The present petitioners thereafter claimed that they came to know of the order on June 19, 1988 and filed an appeal within 60 days thereafter.

6. It is the contention of the petitioners-employers before the appellate authority (Industrial Court) that, firstly, this appeal was admitted. It was also an admitted position at the time of filing the appeal that the payment was not deposited before the appellate authority. However, by its order dated April 5, 1990, the appellate authority came to the conclusion that the appeal itself was barred by limitation, as it was filed beyond the period of 120 days of the passing of the order. In that view of the matter, the appeal came to be dismissed on the question of limitation alone.

7. In the present petition, not only the appellate order but also the controlling authority's order has been challenged by the petitioners.

8. Shri Chandurkar, learned counsel appearing on behalf of the petitioners, contended that firstly the petitioner No. 2-Society, not being an establishment within the framework of the Bombay Shops and Establishments Act, the provision of the Payment of Gratuity Act were not attracted at all and the findings of the controlling authority in that behalf was not right. He further submitted that the appellate authority was not right in dismissing the appeal on the ground of limitation. He contended that the appellate authority should have considered the fact that the petitioners had filed a writ petition and the High Court had dismissed the same, observing that there was an alternative remedy available and, therefore, in that view of the High Court's order, the appellate authority should have condoned the delay, if any caused. Shri Chandurkar further argued that even if it is held that the appellate authority was right in dismissing the appeal, still, if it is found that the controlling authority was itself beyond its jurisdiction in grant of certain reliefs, then the order could still be challenged. In that view of the matter, the learned counsel made a point that the controlling authority could not have granted the 9% compound interest as it did, because there was no provision under the Payment of Gratuity Act, under which such interest could have been awarded. Thirdly, Shri Chandurkar contended that in fact, the calculation of the gratuity is itself incorrect as, in fact, for almost four years after 1981, the said employee was drawing admittedly more than Rs. 1000/-. He pointed out that initially when the Act came into force, only such employees were taken into its fold who were drawing less than Rs. 1000/- of pay. According to him, this Act came to be amended in the year 1984, when the limit of Rs. 1000/- was raised to Rs. 1600/-. His contention is that even assuming that the employee was drawing less than Rs. 1600/- on the day when he retired in the year 1986, yet from 1981 upto 1984, he was admittedly drawing more than

Rs. 1000/- and as such while calculating the gratuity payable to him, these four years will have to be excluded. In not excluding these four years, the controlling authority had committed an error of law, according to him. In fact, his main contention is that at the time of retirement, the wages of the employee admittedly exceeded Rs. 1600/-. He therefore contended that there are factual errors in the order of the controlling authority which can be corrected by this Court, in its jurisdiction, even if the appeal against that order has failed.

9. Shri Gordey, learned counsel appearing on behalf of the respondent, pointed out that firstly the appellate authority was right in dismissing the appeal on the ground of limitation alone. He pointed out that there is not only a complete lack of bona fides in the petitioners, but there is also a provision of law, prohibiting the condonation of delay of more than 120 days. In view of this, he contended that the order of the controlling authority since was confirmed and had become final, now, there was no question of any interference with that order. He, therefore, contended that even if there are any errors committed by the controlling authority, such errors now could not be corrected, in view of that order having attained irreversible finality. According to him, there are no errors in both the orders and the petition was liable to be dismissed.

10. Considering firstly the question of the applicability of the Payment of Gratuity Act, it will have to be considered whether the petitioner College can be said to be an establishment as per Section 1(3)(b) of the said Act. Admittedly, the Bombay Shops and Establishments Act is the law in force in the State of Maharashtra relating to shops and establishments. If the petitioner is covered under the definition of "establishment" as defined u/s 2(8), then the provisions of the Payment of Gratuity Act would be applicable. An "establishment" u/s 2(8), amongst others, also means a commercial establishment as defined in Section 2(4) of the Bombay Shops and Establishments Act. The definition is as given below:

"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 practitioners 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 or public amusement or entertainment."

According to the learned counsel for the petitioners, a college run by a registered society would not be covered under this definition. He contended that an educational activity cannot be termed to be a business, trade or profession, nor can it be said that the petitioners carry any work in connection with, or incidental

or ancillary to, any business, trade or profession.

11. If the language of Section 2(4) above is closely examined, it will be seen that the society registered under the Societies Registration Act, 1866, has been independently treated as an establishment. A society so registered does not have to carry on business, trade or profession nor does it have to carry on work ancillary or incidental thereto. That is simply not the import of the language of the section. Such requirement is only in case of a Charitable or other trust, whether registered or not. It will have to be appreciated that the phraseology at the end of that section qualifies only a registered or unregistered trust and not the society registered under the Societies Registration Act. A look at the section would show that after the words, "Societies Registration Act, 1866", a new clause begins with the word "and". There is further construction of words "which carries on", and this construction clearly applies to the trust alone, as it is a singular construction.

If the Legislature had thought of making the last words applicable to both "society" and "trust", then it would not have used a singular construction. The last words following the words "for gains or not" and ending with the words "incidental or ancillary thereto" must, therefore, be taken to qualify only the trust and not a society.

12. That apart, as has already been considered in Principal, Bhartiya Mahavidyalaya and Another Vs. Ramakrishna Wasudeo Lahudkar, the educational institutions are exempted u/s 4 of the Bombay Shops and Establishments Act. The language of Section 4 itself signifies that for being exempted from the operation of the Act, it has to be an establishment first. In that case, this Court has taken a view that though educational institutions have been exempted from the operation of the Act, they are nonetheless establishments within the meaning of that Act and hence are covered by the language of Section 1(3)(b) of the Payment of Gratuity Act, 1972. In that view of the matter, it will have to be held that the controlling authority was right in holding that the petitioner - College run by the Society is an establishment.

13. On the question of limitation, it will be seen that an appeal is provided against the order of the competent authority u/s 7(7) of the payment of Gratuity Act. Section 7(7) itself provides that any person aggrieved by order under Sub-section (4) of Section 7, may prefer an appeal within sixty days from the date of receipt of the order. The said appeal is to be made to the appropriate Government or to such other authority as may be specified in this behalf. There is a proviso to this sub-section, which runs as under:-

"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 a sufficient cause for preferring an appeal within sixty days, extend time by a further period of sixty days."

It is, therefore, clear that the total period, during which the appeal could be filed,

would be firstly sixty days, and the said period of sixty days could be extended at the most by another period of sixty days. Beyond this extended period of sixty days, however, the period of filing the appeal cannot be further extended. Shri Chandurkar contended that as a matter of fact, this was a special law and therefore, by the residuary provisions u/s 5 of the Indian Limitation Act, the further period also could be condoned by the appellate authority. He pointed out that he had, in fact, filed a writ petition, and in that writ petition itself, it was observed that the petitioner therein had an alternative remedy of an appeal. This, according to him, was a good circumstance for condonation of delay by exercising powers u/s 5 of the India Limitation Act. According to Sri. Chandurkar the appellate authority has committed an error of jurisdiction in not condoning the delay. It will have to be seen firstly whether the appellate authority was right in not condoning the delay. Merely because the appellate authority, without examining the question of limitation, had admitted the appeal, could it be said to be justified in not condoning the delay? If the appellate authority had admitted the appeal, it was not powerless to consider the question of condonation of delay, if that question went to the exercise of jurisdiction itself. Therefore, there was nothing wrong by the appellate authority in firstly considering the question of condonation of delay, though it had admitted the appeal for final hearing. That contentions of Shri Chandurkar must be repelled as not correct.

14. Secondly, it will have to be seen whether powers u/s 5 of the Indian Limitation Act were available to the appellate authority. Shri Gordey relied on the Division Bench judgment of the Calcutta High Court reported in City College Vs. State of West Bengal and Others, . The Division Bench of the Calcutta High Court has taken a view that the provisions of Section 5 of the Limitation Act cannot be invoked for condoning the delay caused in filing the appeal u/s 7, under Payment of Gratuity Act. The learned Judges therein have held that the provisions of Section 5 of the Limitation Act were applicable only to the Court and appellate authority under the provisions of Section 7(7) of the Payment of Gratuity Act could not be said to be the Court. The learned Judges have also further held that having regard to the language of Section 7(7), the maximum period during which the appeal could be filed, could be firstly sixty days and the said period of sixty days could be extended only by further sixty days and that the proviso to that sub-section has provided a specific bar to the condonation of delay beyond 120 days. In view of these two reasons, the learned Judges came to the conclusion that there could be no condonation of delay when the delay exceeded 120 days. I am in respectful agreement with the ratio of this case. In that view of the matter, it must be held that the delay was not liable to be condoned at all, and the appellate authority was right in not condoning the delay.

15. The appellate authority, in its order, has found that though the decision of the controlling authority was passed on July 19, 1987, the writ petition was presented in the High Court on December 21, 1987 and was ultimately decided on June 14, 1988. Thus, even the writ petition was filed beyond the period of 120 days. In that view of the matter, the appellate authority found that there

were no bona fides in the appellants therein. The argument by the learned counsel regarding the delay not being condoned, will, therefore, have to be repelled.

16. The learned counsel for the petitioners, thereafter, argued on merits also. He pointed out that in fact the respondent No. 1/employee was not entitled to be covered within the definition of "employee" as at the time of his retirement, he was drawing more than Rs. 1600/- per month. Now, the controlling authority has already recorded that it was an admitted position that the last wages drawn by the employee were Rs. 1594/- per month. Under such circumstances now when the facts cannot be reopened, the employers cannot be heard to say that the controlling authority had not properly recorded the calculation, or the controlling authority was in any way incorrect in holding that the employee ; was drawing less than Rs. 1600/- which was the ultimate limit for being covered under the provisions of the Payment of Gratuity Act. In this view of the matter, this argument of the learned counsel is also repelled.

17. Shri Chandurkar, learned counsel for the petitioners, also pointed out that the controlling authority had not properly calculated the amount of gratuity. According to him, the employee was drawing more than Rs. 1000/- between 1981 and 1984 and, therefore at least for that period, when his salary was above Rs. 1000/- the employee could not be said to be entitled to payment of gratuity. Shri Chandurkar, therefore, contended that for that period employee was not entitled to the payment of gratuity. He, therefore, contended that those years should have been excluded for the calculation of payment of gratuity. Firstly, such argument cannot be allowed to be raised on merits for the simple reason that the appeal has been dismissed and the controlling authority's order had been finalised. Even if there was any mistake in the calculation, such mistake could not have been corrected, unless it was a jurisdictional error by the controlling authority. This is not a jurisdictional error. Even if the contention were to be accepted, it would, at the most, amount to an error in calculation of the payment of gratuity. However, even the contention is not right as, there is clear provision in shape of Sub-section (7) of Section 4, which runs as under:

"4(7) For the removal of doubts, it is hereby declared that the gratuity determined in accordance with the provisions of Explanation to Clause (e) of Section 2 shall be payable to an employee referred to in that clause notwithstanding that immediately, or at any time, before the termination of his employment in the manner specified in Clause (a) or Clause (b) or Clause (c) of Sub-section (1), he was in receipt of-

(i) Where such termination of his employment is before the commencement of the Payment of Gratuity (Amendment) Act, 1984, wages exceeding one thousand rupees per month, and

(ii) where such termination of his employment is after such commencement, wages exceeding one thousand and six hundred rupees per month"

It will be seen that this sub-section has been introduced by Amending Act, 25 of 1984 from July 1, 1984. Since the employee has retired after this, i.e. on April 30, 1986, this sub-section would be straightaway applicable. The import of the sub-section is that the fact that the employee drew more than the limit fixed, in the past, has to be ignored, if ultimately it is to be found that he is entitled to the payment of gratuity.

18. Shri Chandurkar has relied upon Section 2(e) which concerns the definition of "employee" and stressed that the employee was a person whose salary was less than a particular limit. If the person concerned was not an employee for particular years, prior to his retirement, then in fact calculation of his payment of gratuity for those years should be ignored. He drew the attention of the Court to the explanation clause which runs as under:

"Explanation :- In the case of an employee, who having been employed for a period of not less than five years on wages not exceeding the amount for the time being specified by or under Clause (e), is employed at any time thereafter on wages exceeding that amount, gratuity, in respect of the period during which such employee was employed on wages not exceeding that amount, shall be determined on the basis of the wages received by him during that period."

Relying on these words alone, Shri Chandurkar submitted that, therefore, the gratuity is to be decided only for the period when the employee was not drawing the salary more than the limit fixed by the payment of Gratuity Act. This will not be a correct interpretation. The Explanation only sanctions that where the employee, at the time of his retirement, was drawing more than the wages fixed by the Act, shall not be barred solely on that ground if it was found that he has at least put in five years of service when his wages were not exceeding the limit of the Act. Thereby the Act brings in the employee who was otherwise not entitled for the payment of gratuity, by providing this Explanation. However, the contrary of this is not true, because that is not the import of the language of Explanation. Therefore, an employee, who being otherwise entitled to payment of gratuity, was not so entitled to prior to his retirement, for some time because of higher salary, cannot be deprived of the benefit, because, firstly that is not the import of the language of Section 2(e) - Explanation, and secondly the positive language used in Sub-section (7) of Section 4 completely prohibits such course. Indeed, thus Sub-section (7) of Section 4 has been added to remedy this very mischief by which an employee could be deprived of a substantial part of his gratuity amount. In that view of the matter, this contention of Shri Chandurkar will have to be repelled even on merits.

19. Shri Chandurkar, in support of his contention relied on the Division Bench judgment of this Court reported in Vasant Industrial and Engineering Works v. Narayan Damodar Desai, 1980 MLJ.32. However, the controversy in the reported judgment is entirely different. The facts are also different and the ratio in that judgment will not apply. That was not a case where the employee was otherwise entitled on account of his salary being less than the limit and at the same time

was drawing more than the prescribed limit for some years prior to his retirement. That was not a question for consideration, hence the ratio of that judgment will not apply in this case. Apart from, that, the advantage of the language of Sub-section (7) of Section 4 was also not available to the employee in that case. In that view of the matter, the Division Bench judgment is of no use to the petitioners.

19A. Lastly, the learned Counsel appearing on behalf of the petitioners argued that the controlling authority itself had no jurisdiction to grant 9% compound interest as it had done. He claimed that though the appeal has been dismissed and the order has attained the finality, even then if the controlling authority under the Payment of Gratuity Act has granted some relief which was beyond its jurisdiction, then this Court could certainly correct the said error of jurisdiction. The order was passed by the controlling authority in the year 1987. The relevant date which will have to be taken into consideration, will be the date on which the employee retired from the services. In this case, the employee has retired from service on April 30, 1986. It was on that day that he became entitled to the payment of gratuity under the Act. Shri Chandurkar invited my attention to the provisions of Section 7, as it stood on that date. The reason, why Shri Chandurkar invited my attention to the provisions of that section, is obvious, because the section has been amended by Act No. XXII of 1987 with effect from October 1, 1987. Prior to the addition of Sub-section (3 A) to Section 7, the amount of gratuity payable under Sub-section (3) was not liable to carry any interest, though after the introduction of Sub-section (3A), the controlling authority could grant simple interest at such rate not exceeding the rate notified by the Central Government, from time to time, for payment of long term deposits. Shri Chandurkar, therefore, pointed out that there was no sanction in law to the grant of 9% compound interest on the whole amount of gratuity which was found to be payable to the respondent - employee. A reference in this behalf was made to Section 8 of the Payment of Gratuity Act, whereby the Collector who is entrusted with the duty to recover the amount of gratuity is given a discretion to charge the compound interest of 9%. Shri Chandurkar pointed out that the stage u/s (8) would come only after a certificate in that behalf was issued by the controlling authority and it was at the time of recovery of that amount displayed in the certificate that the Collector could charge the 9% interest. Section 8 runs as under:-

"8. If the amount of gratuity payable under this Act is not paid by the employer, within the prescribed time, to the person entitled thereto, the controlling authority shall, on an application made to it in this behalf by the aggrieved person, issue a certificate for that amount to the Collector, who shall recover the same, together with compound interest thereon at such rate as the Central Government may, by notification, specify, from the date of expiry of the prescribed time, as arrears of land revenue and pay the same to the person entitled thereto:

Provided that the controlling authority shall, before issuing a certificate under this Section, give the employer a reasonable opportunity of showing cause against the issue of such certificate.

Provided further that the amount of interest payable under this Section shall, in no case, exceed the amount of gratuity payable under this Act."

It is to be found that probably the controlling authority relied on this language of Section 8 for granting the 9% compound interest on the amount payable. Shri Chandurkar relied on a decision of the Supreme Court reported in Charan Singh Vs. Birla Textiles and Another, . The facts and controversy involved therein are totally similar to the present case. The Supreme Court held that the law as it stood before the amendment did not provide for payment of any interest and it is only for that reason that Sub-section (3A) was added by Amending Act XXII of 1987, to Section 7. The Supreme Court also held that Sub-section (3A) was prospective. The ratio is binding on this Court. Admittedly, the employee had retired on April 30, 1986, i.e. prior to this amendment and as such he could not have been given the additional amount of interest. Shri Gordey, learned counsel appearing on behalf of respondent No. 1 employee pointed out that in fact because of the dismissal of appeal, the order passed by the controlling authority had become final and as such it could not now be interfered by this Court in its writ jurisdiction. No doubt, this argument is attractive. However, it will have to be considered that the controlling authority had no power whatsoever to grant any interest, as it did. The grant of interest, therefore, was beyond the jurisdiction and the power of the controlling authority and in that view, the controlling authority had acted in excess of its powers. Even if the order was finalised, in the sense that the appeal against the same was dismissed, the fact remains that the controlling authority had no jurisdiction and powers to grant the compound interest at 9% as it did. It does appear that the compound interest which has been given by the controlling authority, has been given under the misconception of law, as it wrongly relied upon Section 8. In that view of the matter, the jurisdictional error can always be corrected in this writ jurisdiction. Therefore, it will have to be held that the grant of compound interest at 9% per annum was beyond the powers of the controlling authority and it could not have granted the same. The argument to that limited extent will have to be accepted.

20. In the result, the petition is partly allowed. The only correction, which is required to be made in the order of the controlling authority, is that the direction covered by paragraph 15(ii) shall be deleted.

It is reported that Rs. 10,000/- have already been paid by the interim order of this Court. Rest of the amount shall be paid within three months from today.

The rule is made absolute in the above terms only. No order as to the cost of this writ petition.