
(2016) 05 GUJ CK 0021

In the Gujarat High Court

Case No : Special Civil Application No. 8729 of 2013

Simandharswami Jinmandir Pedhi

APPELLANT

Vs

Pravinchandra Babaldas Shah

RESPONDENT

Date of Decision : 05-05-2016

Acts Referred:

Citation : (2016) LIC 3030

Hon'ble Judges : K.M. Thaker, J.

Bench : Single Bench

Advocate : Mr. D.G. Shukla, Advocate, for the Appellant; Mr. Amit Barot, AGP, Mr. Prabhakar Upadhyay, Advocate, for the Respondent

Final Decision : Partly Allowed

Judgement

K.M. Thaker, J.(Oral)—The litigation with regard to the respondent's claim for unpaid gratuity which commenced in 2001 when the respondent filed an application before the Controlling Authority under provisions of the Payment of Gratuity Act, 1972 (the Act for short), has continued for 15 years and is still pending in May 2016 in form of and by way of this petition.

2. The respondent has raised two contentions against the order passed by the Controlling Authority and confirmed the Appellate Authority and claimed that the petitioner is not an establishment as contemplated under section 1(3(b) of the Act. It is further claimed that the respondent had filed the application before the Controlling Authority after delay of about 4 years and the Controlling Authority condoned the delay without sufficient cause and without satisfactory explanation and that the authority ought not have entertained application after such unreasonable delay of almost 4 years.

3. In this background, it is necessary to note that an undertaking/establishment in the name and style of Shri Simandharswami Jinmandir Pedhi has taken out present petition against order dated 24.11.2011 passed by the Controlling Authority appointed under the Act whereby the Controlling Authority directed

present petitioner to pay Rs. 38,365/to present respondent towards gratuity with interest @ 10% to be calculated from 2.12.2007.

3.1 The said order was carried in appeal by present petitioner and the Appellate Authority rejected the appeal vide order dated 13.2.2013. The said order dated 13.2.2013 is also challenged in present petition.

3.2 From the facts of the case, it has emerged that the respondent herein was employed by the petitioner Pedhi and he retired from the service of the petitioner on and from 1.12.2007 after rendering service for about 22 years (from 1.12.1998 to 1.12.2007).

3.3 It appears that at the relevant time, i.e. when the respondent retired from service, he was drawing salary @ Rs. 3,500/It also appears that when he was relieved from the service, the petitioner did not pay gratuity to the respondent.

3.4 After waiting for some time, the respondent filed an application before the Controlling Authority in 2011. The said application, which was filed under section 7(4)(b) read with Rule 7 of the Act, was registered as Payment of Gratuity Application No. 67 of 2011.

3.5 The petitioner opposed the application on the ground that the it was filed after delay of about 4 years. The petitioner also opposed the application on the ground that the petitioner ?Pedhi? does not come within the purview of the term ? establishment? as defined under the Act and therefore, the Act is not applicable to it.

3.6 The Controlling Authority heard the parties in respect of the said contention and with its order dated 24.11.2011 the authority considered it appropriate to condone delay and consequently delay came to be condoned. With further order, the Controlling Authority reached to the conclusion that the establishment was covered under provisions of the Act and would come within the purview of the term ?Establishment? as defined under section 1(3)(b) of the Act and that the claimant was entitled to receive Rs. 38,365/towards gratuity. Therefore, the authority directed the petitioner to pay said amount to the respondent.

3.7 Against the said order dated 24.11.2011, the petitioner approached the Appellate Authority. The Appeal was registered as Appeal No. 3 of 2012.

3.8 The Appellate Authority did not find any defect in the order of the Controlling Authority and vide order dated 13.2.2013, the Appellate Authority confirmed the order of the Controlling Authority and rejected the appeal.

3.9 Now, the petitioner is before this Court.

4. Mr. Shukla, learned advocate for the petitioner assailed the order and submitted that the authorities have committed error in condoning delay of 4 years caused in filing the application. He submitted that the authorities should not have condoned the delay caused in filing the application and the application should have been rejected on that ground alone. Mr. Shukla, learned advocate

for the petitioner raised second contention against the order and submitted that the authorities erred in not appreciating that the petitioner is not a commercial establishment and therefore, the Act will not be applicable to the petitioner and consequently, the authorities could not have exercised jurisdiction and have passed any order under the provisions of the Act. Learned advocate for the petitioner submitted that the impugned orders are erroneous, arbitrary and contrary to the provisions of the Act and therefore, the same may be set aside.

5. Mr. Upadhyay, learned advocate for the respondent submitted that the petitioner is an establishment as contemplated under section 1(3) (b) and the Controlling Authority has not committed any error in entertaining the application. He further submitted that the Controlling Authority found justification in the petitioner's claim and also with regard to the submission in respect of the delay caused in filing the application and that, therefore, the Controlling Authority exercised the discretion and jurisdiction available under the Act and condoned the delay. Therefore, there is no illegality or error in the order and the decision of the authority condoning the delay caused in filing the application cannot be termed as an order without jurisdiction. Mr. Upadhyay, learned advocate for the respondent submitted that there is no infirmity in the order and that , therefore, the petition may be rejected.

6. I have heard and considered the rival submissions by learned advocates and I have also considered the orders passed by the Authorities and other material on record.

7. So far as the contention arising from the delay caused in filing the application is concerned, the factual aspects are not in dispute inasmuch as it is not in dispute that the claimant was relieved from service on reaching age of superannuation on and from 1.12.2007.

7.1 It is also not in dispute that the respondent, i.e. original claimant for the first time served a notice under Form I to the employer, i.e. present petitioner in 2011 and thereafter he filed the application before the Controlling Authority under section 7 of the Act. Thus, the application was filed about 4 years after the cause of action i.e. claim for gratuity arose.

8. In the light of this undisputed fact, the petitioner herein opposed the application before the Controlling Authority on ground of delay. The Controlling Authority heard the parties on that count and considered it appropriate to condone delay.

9. Now, learned advocate for the petitioner would contend that the respondent had failed to offer satisfactory explanation and the Controlling Authority, in absence of satisfactory explanation and sufficient cause condoned the delay without any justification and without any basis and that, therefore, the order passed by the Controlling Authority is unsustainable.

9.1 In this context it is relevant to take into account the provisions under section

4(1), section 7(1), section 7(3), section 7(3A), section 7(4)(a) and (b) and Rule 7(1) and Rule 7(5). The said provisions read thus:

The Payment of Gratuity Act, 1972

"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.

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.

(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 subsection (3) is not paid by the employer within the period specified in subsection (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 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 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."

The Payment of Gratuity (Central) Rules, 1972

"7. Application for gratuity -

(1) An employee who is eligible for payment of gratuity under the Act, or any person authorised, in writing, to act on his behalf, shall apply, ordinarily within thirty days from the date the gratuity became payable, in Form ?I? to the employer.

Provided that where the date of superannuation or retirement of an employee is known, the employee may apply to the employer before thirty days of the date of superannuation or retirement"

(5) An application for payment of gratuity filed after the expiry of the periods specified in this rule shall also be entertained by the employer, if the applicant adduces sufficient cause for the delay in preferring his claim, and no claim for gratuity under the Act shall be invalid merely because the claimant failed to present his application within the specified period Any dispute in this regard shall be referred to the controlling authority for his decision."

9.2 From the above quoted provisions, it emerges that the obligation to pay gratuity to an employee arises on occurrence of any of the eventualities mentioned in section 4(1) of the Act and the obligation to pay gratuity within the time limit specified under section 7(3) of the Act, is on the employer (defined under section 2(f) of the Act). The employer must immediately or within 30 days after the day on which gratuity becomes payable as per section 4(1) of the Act, pay the gratuity to the employee (defined under section 2(e) of the Act). If the employer fails in its obligation and does not pay the gratuity, then the right to file application before the Controlling Authority accrues to the employee. In such cases, the unpaid ?employee? can file, in light of the provision under section 7(4) (b) read with Rule 7(1) and Rule 7(5), an application within 30 days from the date when the gratuity became payable.

9.3 Sub-Rule (5) of Rule 7 framed under the Act provides that the Controlling Authority is conferred with the power to condone delay. Therefore, so far as the Act is concerned, the authority appointed under the Act does not lack the power and is not without authority to condone delay. The said power is not even circumscribed by any provision or condition which would restrict the authority to condone delay upto specified period/days and that, therefore, this is not a case

where the Controlling Authority cannot condone delay or could not have condoned the delay and cannot entertain an application filed beyond the period specified under the Act or the Rules. The Controlling Authority under the Act has discretion to condone delay.

9.4 However, the said power cannot be exercised arbitrarily and the power is not absolute and/or unguided power. The said power must be exercised judiciously. The provision, more particularly the words "adduces sufficient cause for the delay in preferring his claim ..." make it clear that the applicant is obliged to make out "sufficient cause" and the authority cannot, in absence of sufficient cause and satisfactory explanation and/or suo motu proceed and condone delay. The said words also explain that the authority can act and condone delay only on application which spell out the explanation for the delay. The authority should be satisfied with the explanation and only then it can condone delay.

9.5 Thus, the applicant/claimant must submit an application seeking condonation of delay with proper and supporting reasons and explanation. Differently put, the application claiming gratuity should be accompanied with application seeking condonation of delay.

9.6 True it is that discretion lies with the Controlling Authority and the Controlling Authority, upon being satisfied, can condone delay but it cannot act suo motu and cannot, on its own, condone the delay without application and in absence of request by the application which must be supported by ?satisfactory explanation? which should constitute ?sufficient cause?.

10. In present case the record does not reflect that the applicant had filed any application with a request to condone delay.

10.1 In response to the query by the Court, the respondent admitted that any application with request to condone delay was not filed by the respondent. The learned advocate submitted that if he is given an opportunity the respondent will submit proper application and such chance may be given so that he can justify his request and claim the gratuity.

11. The question before this Court, therefore, is that whether this Court should frustrate the applicant's claim and deprive him of his right only on the ground that the applicant failed to submit an application with a request to condone delay caused in filing application claiming gratuity or the Court should grant opportunity to the applicant, who served the employer for about 22 years and is yet litigating for his claim to appear before the Controlling Authority and submit an application with request to condone delay so that the authority can consider the application and the request in accordance with law and decide the same after considering the objection of the establishment.

11.1 If this Court holds that the said opportunity could not be granted to the applicant, i.e. present respondent, then he would be deprived of gratuity for all times. On the other hand, if the opportunity to the respondent is granted, then

the petitioner will have an opportunity to oppose the application on all grounds as may be available in law.

11.2 In this view of the matter, the Court is of the view that the order of the Controlling Authority condoning delay is not sustainable in view of the fact that the Controlling Authority passed the said order and condoned the delay in absence of any application by the applicant and therefore, the said order cannot be sustained.

11.3 However, in the interest of justice, the proceeding deserves to be remanded to the Controlling Authority to consider the applicant's request to condone delay.

12. At this stage, a question would arise that such a course of action may be adopted by the Court if the petitioner establishment is covered under the provisions of the Act and if the Act is applicable to the petitioner establishment. Otherwise, the order of the Controlling Authority even after receiving the application seeking condonation of delay would be without jurisdiction on the ground that the Act is not applicable to the establishment. Therefore, it is necessary to also decide the second contention raised by the petitioner.

13. So as to decide the said second contention, it is necessary to take into account the definition of the term 'establishment'. It is pertinent to mention that though the definition of the term 'employer' defined under section 2(f) of the Act as well as the definition of the term 'employee' under section 2(e) of the Act, employs the term 'establishment', the said term 'establishment' is not defined under the Act. However, section 1(3)(b) of the Act is relevant for the purpose on hand. The said section 1 makes provision in relation to the applicability and the subsection reads thus:

"1(3)(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishment in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;"

14. A glance at the said section brings out that the Act applies to a factory or a mine or oil field or a plantation or a part and railway company or every shop or every establishment. As mentioned earlier, the terms 'shop' and 'establishment' are not defined under the Act. The Act provides that the meaning of the term or expression 'shop' or 'establishment' would depend upon the definition of the said term as contained in any law which may be enforced for the time being in the State.

15. In this view of the matter, reference will have to be made to the Bombay Shops and Establishments Act, 1948. The said Act is applicable and enforced in the State so far as shop and establishment are concerned. The said terms are defined in sections 2(4) and 2(8) of the said Act. The said sections of the Bombay Shops and Establishments Act read thus:

"2(4)"Commercial establishment" means an establishment which carries on, any

business, trade or profession or any work in connection with, or incidental or ancillary to, any business, trade or profession (and includes establishment of any legal practitioner, medical practitioner, architect, engineer, accountant, tax consultant or any other technical or professional consultant and also includes) a society registered under the Societies Registration Act, 1866 (XXI of 1860), and charitable or other trust, whether registered or not, which carries on (whether for purposes of gain or not) any business, trade or profession or work in connection with or incidental or ancillary thereto but does not include a factory, shop, residential hotel, restaurant, eating house, theatre or other place of public amusement or entertainment;

2(8) "Establishment" means a shop, commercial establishment, residential hotel, restaurant, eating house, theatre, or other place of public amusement or entertainment to which this Act applies and includes such other establishment as the [State] Government may, by notification in the Official Gazette, declare to be an establishment for the purposes of this Act."

16. The term 'establishment' is defined to take into account a shop or a commercial establishment or a restaurant or an eating house or residential quarter, theater or any place of public amusement or entertainment and would include such establishment as may be notified by the State Government.

17. From the impugned orders or the material available on record of the petition, it does not come out as to whether the petitioner Pedhi can be categorized as shop or not because any evidence as regards activities undertaken by the petitioner establishment was not placed on record before the Controlling Authority or the Appellate Authority. It, however, appears from the submission by learned advocate for the petitioner that the petitioner Pedhi would, at least, not come within the purview of the terms restaurant or eating house or residential hotel or theater or place of public amusement or entertainment. Therefore, the term which requires consideration would be shop or commercial establishment.

18. Before proceeding further, it is also relevant to note at this stage that according to said section 1(3)(b) of the Act, the employer in respect of the applicant should be a shop or establishment where ten or more persons are in employment at the relevant time. Therefore, the details as to total number of employees employed with the petitioner at the relevant time should be available on record, however, in present case, it appears that the said details were not placed on record and the orders or the material on record do not clarify the total number of employees employed by the petitioner Pedhi at the time when the petitioner was relieved from the service on superannuation.

19. Now, when the definition of the term 'commercial establishment' is taken into account, it emerges that the said definition takes in its fold a 'society' registered under the Societies Registration Act as well as a charitable or other trust whether registered or not which carries on business, trade or profession or work in connection with the incidental or ancillary thereto.

20. From the said definition, it becomes clear that whether the activities are undertaken for the purpose of profit or otherwise is not relevant criterion. Besides this, it also comes out that the definition employs, along with the terms ?business?, ?trade? or ?profession?, the term ?work?. The said term ?work? is of wide amplitude and would take in its sweep, various activities more particularly because it is not necessary that the activities should be carried on for the purpose of gain.

21. On conjoint reading of the definition of the said two terms, it becomes clear that the said two terms are assigned very wide meaning and connotation and they comprehend many activities and works. At this stage, it will not be out of place to mention that in case of Ahmedabad Panjrapole Sanstha v. Misc. Mazdoor Sabha and Others [1986 GLH 585], this Court has, having regard to the nature of activities of the petitioner Panjrapole, Division Bench held that the Panjrapole fall within the term ?commercial establishment?. Thus, what is relevant and necessary is that the nature and type of activities should be taken into consideration.

22. So as to determine as to whether particular establishment is commercial establishment or not, it will have to be examined as to whether the establishment undertakes systemic or habitual activity which would part take character of business or trade or profession, however, it would not matter as to whether the activity undertaken by it is carried on with the purpose of profit or not. With reference to the petitioner, these aspects can be determined only if relevant and substantive details and evidence with regard to its activities is available on record. Unfortunately, that is not the position in present case. Actually, these aspects have not been addressed by the authorities in the orders in question and therefore, neither there is any reference of any evidence with regard to the activities of the petitioner Pedhi nor there is any discussion in respect of these aspects.

23. It is plain and apparent that without considering and deciding the said vital aspect, the application filed by the claimant, i.e. present respondent could not have been, and cannot be, decided finally, i.e. without having regard to these aspects, the application cannot be rejected or allowed finally. Further, without proper and sufficient evidence with regard to the activity of the petitioner Pedhi, the said issues cannot be determined. On record of present petition, the relevant material is not available and that, therefore, it is not possible to determine above discussed aspects at this stage and in present proceeding.

24. In that view of the matter, the said aspect also will have to be examined by the Controlling Authority in the light of the evidence which may be made available by both the sides with regard to the activities of the petitioner Pedhi.

25. The foregoing discussion brings out that the matter deserves reconsideration by the Controlling Authority after considering the respondent?s application and the request to condone delay and also after considering the petitioner?s

objection that its activities do not fall within the purview of the term 'commercial establishment'. For the said purpose the matter deserves to be remanded to the Controlling Authority.

26. For the aforesaid purpose and in the light of the foregoing discussion, following order is passed.

27. The orders passed by the Controlling Authority and the Appellate Authority are set aside.

28. The matter is remanded to the Controlling Authority for reconsideration.

29. The Controlling Authority will consider above discussed two issues after permitting the parties, if they so desire, to lead evidence.

30. It will be open to both sides to support/oppose the said application on all grounds as may be available in law.

31. It will be open to the petitioner to raise objection on the ground that the petitioner does not come within the term 'commercial establishment' and therefore, the Act is not applicable and it will be open to the respondent to oppose the said contention on all grounds as may be available in law. The respondent may file application with prayer to condone delay caused in filing the claim application and it shall be decided on merits and in accordance with law after hearing the parties.

32. So as support/oppose the said contention if it is necessary to lead and record evidence, the Controlling Authority will permit the parties to lead evidence and thereafter decide the said issues afresh after hearing the parties and in accordance with the law.

33. It is necessary to clarify that foregoing discussion is only for the purpose of deciding the petition and this Court has not expressed any view with regard to the said two issues.

34. With the aforesaid clarifications, directions and observations, the petition is partly allowed and Rule is made absolute to the aforesaid extent.