

(2005) 05 AHC CK 0184

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 34278 of 2004

Smt. Krishna Bembi

APPELLANT

Vs

Appellate Authority under the Payment of Gratuity Act, 1972,
Shri Ram Junior High School and Mawana Sugar Works (A
unit of erstwhile SIEL Ltd. Now a unit of SIEL Sugar Ltd.)

RESPONDENT

Date of Decision : 25-05-2005

Acts Referred:

Constitution of India, 1950 — Article 226
Minimum Wages Act, 1948 — Section 2, 27
Payment of Gratuity Act, 1972 — Section 1, 1(3), 2, 7(7)
Uttar Pradesh Industrial Disputes Act, 1947 — Section 2, 3

Citation : (2005) 4 AWC 3337 : (2005) 106 FLR 961

Hon'ble Judges : Sabhajeet Yadav, J

Bench : Single Bench

Advocate : Y.S. Bohra, for the Appellant; Sunita Agrawal and S.C., for the Respondent

Final Decision : Dismissed

Judgement

Sabhajeet Yadav, J.—By this petition, the petitioner has challenged the order dated 15.6.2004 passed by appellate authority under the Payment of Gratuity Act, 1972(herein after referred to as Act) whereby the order dated 6.12.2003 passed by Controlling Authority in favour of the petitioner under the aforesaid Act has been set aside.

2. The brief facts of the case are that while working as officiating Head Mistress in Sri Ram Junior High School, Mawana, District Meerut the petitioner was retired from service on attaining her age of superannuation on 1.7.2002. Initially the petitioner has joined the service as teacheress in Mawana Sugar Works Primary School run by Mawana Sugar Works, Mawana, district Meerut on 1.11.1966. Later on in the year 1974 Mawana Sugar Works Primary School was transferred under the management of Shri Ram School Society, Mawana. Consequently a letter dated 29.6.1974 was sent to the petitioner by the Chairman of Shri Ram

School Society, Meerut indicating the terms and conditions of the service and option was sought regarding the existing terms and conditions of services of the petitioner mentioned in the letter. Later on another letter to the same effect was also sent to the petitioner on 20.8.1974 whereby the petitioner was asked to give option as to whether the petitioner wants to accept the new terms and conditions of the service or would continue on the old terms and conditions. In pursuance thereof on 22.8.1974 the petitioner wrote a letter to General Manager, Mawana Sugar Works, Mawana giving here option that she would like to remain with Mawana Sugar Works, Mawana on the same terms and conditions of employment. The petitioner did not opt for new terms and conditions of service indicated in the letter referred earlier. Thereafter General Manager, Mawana Sugar Works wrote a letter on 26.9.1974 to the petitioner in pursuance of her option dated 22.8.1974 indicating therein that petitioner would continue under the existing terms and conditions of the service and there would be no change in the existing terms and conditions of service of petitioner. A true copy of letter dated 26.9.1974 is on record as Annexure-5 to the writ petition. On 1.11.1974 the petitioner wrote a letter to the General Manager, Mawana Sugar Works, Mawana mentioning therein that she would remain on the payroll of factory on the same terms and conditions of service. A true copy of the aforesaid letter is on record as Annexure-6 of the writ petition. On 23.11.1988 the petitioner was promoted as Head Mistress of Shri Ram Primary School, Mawana and on 29.8.2001 she was appointed as officiating Head Mistress of Shri Ram Junior High School without any change in the terms and conditions of employment of the petitioner. True copy of the aforesaid letters are on record as Annexures-7 and 8 respectively of the writ petition. It is also stated that the petitioner was being paid salary from Mawana Sugar Works, Mawana and the last cheque issued to the petitioner after retirement was signed by the official of Mawana Sugar Works, Mawana from the accounts of the factory. A Photostat copy of cheque dated 16.7.2002 is on record as Annexure-9 of the writ petition. The petitioner has further stated that she was member of DCM Employees Provident Fund Trust under Mawana Sugar Works, Mawana in which the petitioner's provident fund was deducted from her salary and equal amount was deposited by Mawana Sugar Works, Mawana.

3. After retirement of the petitioner on attaining her age of superannuation the respondents No. 2 and 3 did not pay any gratuity to her. In circumstances, the petitioner has approached the Controlling Authority under the Act and moved an application on 22.7.2002 for payment of gratuity, which was numbered as PGA Case No. 130 of 2002. A true copy of the application dated 22.7.2002 is on record as Annexure-10 of the writ petition. The employer respondents No. 2 and 3 filed their written statement inter alia alleging that Shri Ram School Society, Mawana was running the school and in view of the Supreme Court decision a "teacher" is not an "employee" as defined in Section 2(e) of Act and accordingly a "teacher" is not entitled for payment of gratuity under the Act. The written statement filed by the respondents No. 2 and 3 is on record as Annexure-11 of

the writ petition. The petitioner filed her rejoinder affidavit denying the allegations made by respondents No. 2 and 3 in the written statement and reiterated that she was covered by the provisions of Act and was entitled for the Payment of Gratuity under the Act. In support of her case the statement of petitioner was also recorded on 17.2.2003 before the Controlling Authority. After going through the material on record the Controlling Authority vide order dated 6.12.2003 allowed the application of petitioner and directed to pay the petitioner Gratuity amounting Rs. 1,71,346.15 with 10% interest thereon since the date of superannuation of the petitioner till the payment is made to her. Feeling aggrieved against the order dated 6.12.2003 the respondents No. 2 and 3 filed appeal before the respondent No. 1 on 7.1.2004 u/s 7(7) of the Act, before the appellate authority i.e. Additional Commissioner, Kanpur which was numbered as PGA Appeal No. 5 of 2004. The petitioner has filed objection before the appellate authority. Along with the objection the petitioner filed U.P. State Sugar Wage Board Order dated 27.11.1970, which was published in the gazette on 27.11.1970. According to para 1 (iv) of which the educational staff was covered by the order. According to para 8 all the sugar factories were required to introduce the scheme of payment of gratuity to their employees. The appellate authority has allowed the appeal and set aside the judgment and order passed by Controlling Authority vide impugned judgment and order dated 15.6.2004 hence this writ petition.

4. On behalf of respondents two detailed counter affidavits have been filed in the writ petition; one on behalf of respondent No. 2 and another on behalf of respondent No. 3. The replies made in both the counter affidavits are substantially the same. Before making parawise reply of the writ petition in para 2, 5 and 6 of the counter affidavit certain facts have been stated which are relevant for the question in controversy involved in the case as such the contents of para 2,5 and 6 of the counter affidavit filed by Sri R.K. Jha on behalf of respondent No. 3 is reproduced as under :

"2.a. That the deponent has read and understood the contents of the writ petition (hereinafter referred to as the petition) and is in a position to reply to the same. However, before giving parawise reply to the contents of the writ petition the preliminary objections are as follows:

b. That admittedly the petitioner was a teacher in Sri Ram Junior High School, Mawana, District Meerut. The school is run by a society namely Sri Ram School Society Registered under the Societies Registration Act, 1860. The petitioner being a teacher is not entitled to gratuity as the "teacher" does not fall under the definition of "Employee" as contained in Section 2(e) of Payment of Gratuity Act, 1972. The question has already been decided by the Hon"ble Supreme Court in the case of "Ahmedabad Pvt. Primary Teachers Association v. Administrative Officer". In view of the same, the instant writ petition is liable to be dismissed on this ground alone.

c. That so far as contention of the petitioner regarding applicability of the U.P.

Sugar Wage Board award dated 27.11.1970 is concerned, it is pertinent to mention here that the Sugar Wage Board dated 27.11.1970 is not applicable to a School or a Teacher. It is only applicable in the case of Sugar Industries. The Wage Board notification u/s 3 of U.P. Industrial Dispute Act, 1947 is not applicable in the case of School. Moreover, the petitioner has not raised said plea before the Controlling Authority under the Payment of Wages Act nor pleaded the same before even the appellate Authority. The petitioner is estopped from raising the said plea for the first time in the instant petition and thereby trying to build a new case. It is further submitted here that the Sugar Wage Board order dated 27.11.1970 has been superseded by the recommendation of third wage board published in the Gazette date 31.01.1991. It may be that recommendation of third wage board for the Sugar Industries were adopted and enforced by the State Govt. under Sub-clause (b) of Section 3 of U.P. Industrial Disputes Act, 1947 and same was published vide Notification dated 31.01.1991. As such the instant petition is liable to be dismissed on this ground alone.

d. That it is further relevant to mention here that the appointment letter dated 29.06.1974 issued to the petitioner by the society consequent upon the transfer of school under the management of Sri Ram School Society Mawana, District Meerut, clearly states as under :-

CONTINUITY OF SERVICE: In case any Gratuity Scheme is sanctioned to the teaching staff of our school, you will be given benefit of your previous service with Mawana Sugar Works in this regard i.e. from 1st November, 1966 to 30th June, 1974.

GENERAL: You will abide by rules and regulations issued by the Society from time to time.

The aforesaid condition of payment of gratuity was accepted by the petitioner without protest, the petitioner is estopped from raising such a clean now. It is pertinent to mention here that no benefit of payment of gratuity was given by the answering respondent to any of its teaching staff. The instant petition is frivolous in nature and is liable to be dismissed with cost through out."

"5. That with regard to the contents of paragraphs 3 and 4 to the petition it may be stated that Mawana Sugar Works Primary School, as it was then known was transferred with effect from 22.3.1974 under the Management of Sri Ram School Society, Mawana, which was a society registered under the Societies Registration Act 1960. Consequent upon the transfer of the School under the management of Sri Ram School Society, Mawana, the Society issued another appointment letter dated 29.6.1974 to the petitioner. Vide appointment letter dated 29.6.1974, the petitioner was appointed afresh as Assistant Teacher in Sri Ram Junior High School, Mawana w.e.f. 01.07.1974. The appointment letter was duly signed by the General Manager of Mawana Sugar Works, a Unit of Mawana Sugars Limited, Mawana who was Ex-Officio Chairman of Sri Ram School Society, Mawana: The appointment letter issued by the Society was accepted by the petitioner. It is

incorrect to suggest that any option was sought from the petitioner regarding the acceptance of terms and conditions of the appointment letter dated 29.06.1974."

"6 That the contents of paragraphs 5, 6 and 7 of the petition call for no specific reply. However, in this behalf it may be stated that so far as option exercised by the petitioner to continue to remain in the then existing terms and conditions of Mawana Sugar Works, a Unit of Mawana Sugars Limited, Mawana is concerned, it may be stated that the said option is not at all relevant so far as claim of the petitioner for gratuity is concerned. By giving option to continue with the old terms and conditions of service, the petitioner would not be entitled for gratuity. At this state it is relevant to mention here that the teachers are not covered within the definition of "employee" as contained in Section 2(e) of payment of gratuity Act and hence can raise no claim to gratuity under the Act. "

5. The petitioner has also filed rejoinder affidavit against the aforesaid counter affidavits filed by the respondents No. 2 and 3. Since the affidavits have been exchanged between the parties and the case is ripe for final disposal, therefore, the case has been heard finally with the consent of the counsels appearing for both the sides. I have heard Sri Y.S. Bohra, learned counsel for the petitioner and learned Standing counsel for respondent No. 1 as well as Smt. Sunita Agarwal for respondents No. 2 and 3 and have also gone through the records.

6. The main submission of learned counsel for the petitioner is that while attaining the age of superannuation as Head Mistress the petitioner was on payroll of Mawana Sugar Works, Mawana as an employee of the aforesaid unit and in view of U.P. State Sugar Wage Board order dated 27.11.1970 which was applicable to the employees of Mawana Sugar Works, Mawana has also covered the educational institution thereunder, therefore, the petitioner is also entitled for payment of gratuity in view of the aforesaid order of Wage Board, under the provision of the Act. Contrary to it learned counsel appealing for respondents has vehemently contended that in view of various pronouncement of the Hon'ble Apex Court since the "teachers" are not covered under the definition of "employees" described in definition clause of the Act, therefore, the petitioner was not entitled for payment of gratuity under the aforesaid Act. Thus the order passed by controlling authority under the Act was wholly erroneous, misconceived without jurisdiction and same was rightly set aside by the Appellate Authority under the Act. In support of her submission learned counsel for respondents has relied upon the decision of the Hon'ble Apex Court rendered in Ahmedabad Private Primary Teachers' Association v. Administrative Officer and others reported in 2004(100) FLR 601.

7. In view of rival submissions of the learned counsel for the parties a moot question arises for consideration of this Court as to whether the expression "teacher" is covered under the definition of "employee" given u/s 2(e) of the Act or not and as to whether the petitioner who was teacher retired from an institution run and controlled by a registered society of respondent No. 2 and 3 is

entitled for payment of gratuity under the provisions of Act or not? And further whether it would make any difference on account of fact that institution in question was run and managed by a society registered under the Societies Registration Act or by the Mawana Sugar Works, Mawana which is a factory under the Factories Act, 1948.

8. In order to answer this question it is necessary to point out that an identical question has received consideration of Hon"ble Apex Court in case of Ahmedabad Private Primary Teachers" Association (supra). In para 7 of the aforesaid decision the Hon"ble Apex Court has taken note of earlier decision rendered in Miss A. Sundarambal Vs. Government of Goa, Daman and Diu and Others, wherein Hon"ble Apex Court had negated the claim of teachers that they are covered by the definition of "workman" under the Industrial Disputes Act irrespective of the fact that the educational institution was treated to be an Industry yet the teachers were not treated to be workmen. In para 8 of the judgment the reference of Haryana Unrecognised Schools Association Vs. State of Haryana, has been made where the Apex Court has considered the definitions of "employee" as contained u/s 2(i) of the Minimum Wages Act, 1948 and held that as "teachers" are not employed for any "skilled", "semi-skilled" or "unskilled", manual or clerical work, it is not open to the State Government to include their employment as a scheduled employment under the Minimum Wages Act. In para 12 of the decision Hon"ble the Apex Court has taken note of the notification dated 3rd April, 1997 issued in exercise of powers u/s 1(3)(c) of the Payment of Gratuity Act, 1972 whereby the provisions of Gratuity Act was extended to educational institutions in which ten or more persons are employed or were employed on the day preceding 12 months. In para 13 of the decision it is held that the teaching staff being not covered by the definition of "employee" can get no advantage merely because by notification educational institutions as establishments are covered by the provisions of the Act. In para 14 of the decision it is held that even on plain construction of the words and expression used in definition Clause u/s 2(e) of the Act, "teacher::," who are mainly employed for imparting education are not intended to be covered for extending gratuity benefits under the Act. Teachers do not answer the description of being employees who are "skilled", "semi-skilled" or "unskilled". In concluding part of the decision it is held that the teachers are not entitled for any gratuity benefits under the aforesaid Act.

9. For ready reference para 7, 8, 12, 13 and 14 of the aforesaid decision are reproduced as under :

"7. The definition of "workman" contained in Section 2(s) of the Industrial Disputes Act, 1947 meaning "any person employed in any industry to do any skilled or unskilled manual, supervisory, technical, operational, or clerical work" came up for consideration before this Court when teachers claimed that they are covered by the definition of the Industrial Disputes Act. In the case of A. Sundarambal v. Government of Goa, Daman and Diu, this Court negated the

claim of teachers that they are covered by the definition of "workman" under Industrial Disputes Act thus:-

"Even though an educational institution has to be treated as an "industry", teachers in an educational institution cannot be considered as workman.

The teachers employed by educational institutions whether the said institutions are imparting primary, secondary, graduate or postgraduate education cannot be called as "workman" within the meaning of Section 2(s) of the Act. Imparting of education which is the main function of teachers cannot be considered as skilled or unskilled manual work or supervisory work or technical work or clerical work. Imparting of education is in the nature of a mission or a noble vocation. The clerical work, if any, they may do, is only incidental to their principal work of teaching."

"8. The definition of "employee" as contained in Section 2(i) of the Minimum Wages Act, 1948 came up for consideration before this Court in the case of Haryana Unrecognised Schools Association Vs. State of Haryana, In Section 2(i) of the Minimum Wages Act, the word "employee" is defined to mean: "any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical, in a scheduled employment in respect of which minimum rates of wages have fixed". This Court held that as teachers are not employed for any skilled or unskilled, manual or clerical work, it is not open to the State Government to include their employment as a scheduled employment under the Minimum Wages Act. The relevant observations need to be quoted:-

"A combined reading of Sections 3, 2(i) and 27 of the Minimum Wages Act, 1948 and the Statement of Objects and Reasons of the legislation makes it explicitly clear that the State Government can add to either part of the Schedule any employment where persons are employed for hire or reward to do any work skilled or unskilled, manual or clerical. If the persons employed do not do the work, of any skilled or unskilled or of a manual or clerical nature then it would not be possible for the State Government to include such an employment in the Schedule in exercise of power u/s 27 of the Act. Since the teachers of an educational institution are not employed to do any skilled or unskilled or manual or clerical work and therefore, could not be held to be an employee u/s 2(i) of the Act, it is beyond the competence of the State Government to bring them under the purview of the Act by adding the employment in educational institution in the Schedule in exercise of power u/s 27 of the Act. Hence, the State Government in exercise of powers under the Act is not entitled to fix the minimum wage of such teachers. The impugned notifications so far as the teachers of the educational institution concerned are accordingly quashed."

"12. It is not disputed that by notification dated 3rd April, 1997, issued in exercise of powers u/s 1(3)(c) of the Payment of Gratuity Act, 1972, the Gratuity Act is extended to educational institutions in which ten or more persons are employed or were employed on any day preceding 12 months. The relevant part

of the notification reads as under :-

APPLICABILITY OF THE PAYMENT OF GRATUITY ACT, 1972

IN

EDUCATIONAL INSTITUTIONS

"NOTIFICATION NO. 5-42013/1/95-SS II. DATED 3rd APRIL, 1997.- In exercise of the powers conferred by Clause (sic) of Sub-clause (3) of Section 1 of the Payment of Gratuity Act, 1972 (39 of 1972), the Central Government hereby specifies the educational institutions in which ten or more persons are employed or were employed on any day preceding 12 months as a class of establishments to which the said Act shall apply with effect from the date of publication of this notification:

Provided that nothing contained in this notification shall affect the operation of the notification of the Ministry of Labour S.O. 239 dated 8th January, 1982."

"13. An educational institution, therefore, is an "establishment" notified u/s 1(3) (c) of the Payment of Gratuity Act, 1972. On behalf of the Municipal Corporation, it is contended that the only beneficial effect of the Notification issued u/s 1(3)(c) of the Act of 1972, is that such non-teaching staff of educational institutions as answer the description of any of the employments contained in the definition Clause 2(e), would be covered by the provisions of the Act. The teaching staff being not covered by the definition of "employee" can get no advantage merely because by notification "educational institutions", as establishments are covered by the provisions of the Act."

"14. Having thus compared the various definition clauses of word "employee" in different enactments, with due regard to the different aims and objects of the various labour legislations, we are of the view that even on plain construction of the words and expression used in definition Clause 2(e) of the Act, "teaches" who are mainly employed for imparting education are not intruded to be covered for extending gratuity benefits under the Act. Teachers do not answer description of being employees who are "skilled", "semi-skilled" or "unskilled"

10. Thus from a close analysis of law laid by Hon"ble Apex Court in case of Ahmedabad Private Primary Teachers' Association and other decisions referred therein it is clear that even if the institution is treated to be industry as held by Hon"ble Apex Court in A. Sundarambal case (supra) and in view of the fact of Ahmedabad Private Primary Teachers' Association case (supra) wherein in para 12 of the decision Hon"ble Apex Court has noticed the notification dated 3rd April, 1997 issued in exercise of powers u/s 1(3)(c) of the Payment of Gratuity Act which has extended the Act to the educational institutions also in which ten or more persons are employed nevertheless Hon"ble Apex Court has held that since the expression "teachers" do not answer the description of "employee" given in definition clause of Section 2(e) of the Act, therefore, the teachers would not be entitled to get the benefit of provisions of Act despite the provisions of Act

has been extended to the educational institution also. Thus I am of considered opinion that even if the order of Wage Board dated 27th November, 1970 has been made applicable to the employees of school or educational staff of the factory, the same cannot confer any benefit of Payment of Gratuity under the Act upon the teacher. It is immaterial that the institution is run and controlled by the society registered under the Societies Registration Act or it is a part and parcel of the Mawana Sugar Works, Mawana which is a factory under the Factories Act.

11. Thus in view of law laid down by the Hon"ble Apex Court, it is clear that the petitioner who was employee/teacher of the institution run by a society registered under the Societies Registration Act of Mawana Sugar Works, Mawana, Meerut can not be held to be covered under the "expression" of "employee" as given in definition clause of the Act even if by the order of Wage Board dated 27th November, 1970 the gratuity payable to the workmen or employees of factory has been made payable to the staff of the educational institution also as contained in Annexure-17 of the writ petition. Thus being a retired teacher of the institution the petitioner is not entitled for gratuity under the provisions of the Act.

12. Thus on the basis of discussion made herein before the order passed by appellate authority under the provisions of the Act impugned in the writ petition is perfectly justified in given facts and circumstances of the case and cannot call for any interference under writ jurisdiction under Article 226 of the Constitution of India. Since this court has been called upon to decide the validity and legality of orders passed by Controlling Authority and Appellate Authority under the provisions of Act and not the whole entitlement of the petitioner for payment of gratuity under any other statute or law if applicable to such teachers, therefore, I should not be understood to have decided the entitlement of petitioner in respect of payment of gratuity to the petitioner, if she is entitled for payment of gratuity otherwise in any other statute or law applicable to her. Therefore, observations made herein above will not preclude the petitioner for claiming gratuity benefits, if the petitioner is otherwise entitled for the same under any other law, enactment or rules applicable to the teachers like the petitioner at appropriate forum. Thus in view of the aforesaid discussions and observations made, the writ petition fails hence dismissed.

13. There shall be no order as to costs.