

(2015) 08 AHC CK 0107
In the Allahabad High Court
Case No : Writ C. No. 45515 of 2015

St. Joseph's College and Others

APPELLANT

Vs

Appellate Authority/Dy. Labour Commissioner and Others

RESPONDENT

Date of Decision : 19-08-2015

Acts Referred:

Payment of Gratuity Act, 1972 — Section 1, 2(c), 2(e), 2-A, 4

Citation : (2015) 6 AWC 5728 : (2015) 147 FLR 179 : (2016) 1 LLN 45

Hon'ble Judges : Suneet Kumar, J.

Bench : Single Bench

Advocate : Subhash Ghosh and Ashok Khare, for the Appellant; Vivek Ratan Agrawal, for the Respondent

Final Decision : Allowed

Judgement

Suneet Kumar, J.—Supplementary affidavit filed today is taken on record. The petitioner institution is assailing the order dated 20 July, 2015 passed in F.G. Appeal No. 1/2015 and in P.G. (Cross) Appeal No. 2/2015 passed by the first respondent Appellate Authority/Deputy Labour Commissioner under the Payment of Gratuity Act, 1972.1

2. The petitioner is an Intermediate College being administered by the second petitioner "Gyandeep Vidya Society" registered under the Societies Registration Act, 1886. The third respondent was appointed teacher vide contract dated 1 July, 1976. She retired from service on attaining the age of superannuation on 31 March, 2003.

3. The submission of the learned Senior Counsel for the petitioner is that against the order of the Controlling Authority, two separate appeals were preferred, one by the petitioner being P.G. Appeal No. 1/2015 and the other being P.G. Appeal No. 2/2015 filed by the third respondent. Both the appeals were heard together. It is contended that the appeal of the third respondent has been decided on merits but the contentions raised in the memo of appeal by the petitioner

institution has not been considered nor noticed by the Appellate Authority. The main grievance of the petitioner is that the teachers were brought under the ambit of the Act 1972 by Payment of Gratuity (Amendment) Act, 2009,2 (No. 47 of 2009), as per section 13-A, the teachers were entitled to gratuity with effect from 3 April, 1997 which is a sync with the Government of India notification referred to in section 13-A, which reads as follows:

"13-A Notwithstanding anything contained in any judgment, decree or order of any Court for the period commencing on and from the 3rd of April 1997 and ending on the day on which the Payment of Gratuity (Amendment) Act, 2009, receives the assent of the President, the gratuity shall be payable to an employee in pursuance of the notification of the Government of India in the Ministry of Labour and Employment vide number S.O. 1080, dated the 3rd day of April, 1997 and the said notification shall be valid and shall be deemed always to have been valid as if the Payment of Gratuity (Amendment) Act, 2009 had been in force at all material times and the gratuity shall be payable accordingly."

4. The Government of India notification referred to in section 13-A, reads as follows:

"In exercise of the powers conferred by clause (c) of sub-section (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. No. 239, dated 8th January, 1982."

5. It is, therefore, contended that the entire service rendered by the third respondent was computed by the Authorities while calculating the gratuity is erroneous. The third respondent is entitled to count her service for the purpose of gratuity since 1997. Further, submission advanced, is based on the document at Annexure 4 of the record, which reflects that Rs. 1,35,000/- was paid to the third respondent on the date of superannuation in settlement of gratuity which was rightly deducted by the Controlling Authority from the total sum of gratuity computed, however, it was erroneously ignored by the Appellate Authority.

6. The learned Counsel appearing for the third respondent would not dispute that the contentions and arguments advanced on behalf of the Institution has not been considered by the Appellate Authority. On the contrary, it is submitted that the contentions being advanced before this Court was not raised by the petitioner before the Appellate Authority, it is for the first time the legal issues are being pressed before this Court. Shri Agrawal would submit that in terms of section 2-A of Act 1972, the third respondent is entitled to gratuity upon computing the entire continuous service rendered by the third respondent which would include service rendered prior to 1997. He would further contend that there is no

illegality or infirmity in the impugned order.

7. Rival submissions call for consideration.

The Supreme Court in the matter of Ahmedabad Pvt. Primary Teachers' Association Vs. Administrative Officer and Others, , held that the definition of employee under section 2(e) does not cover teachers. Subsequently, the Government amended the definition of employee under the Act 1972 to include teachers. The said amendment comes into force with retrospective effect from 3 April 1997. As per the amended provisions of section 2(e) , a teacher is covered within the definition of employee.

8. It is not in dispute between the parties that the Act 1972 is applicable upon the third respondent who is an employee/teacher of the petitioner institution.

9. Learned Counsel for the petitioner relying on the decision rendered in Management of Goodyear India Limited Vs. K.G. Devessar, , would submit that by the Amendment of 2009, teachers were brought within the ambit of the Act 1972 with retrospective effect from 3 April 1997, therefore, the service rendered by the third respondent prior to 1997 would not be considered for payment of gratuity.

10. The Supreme Court in Coodyear's case (supra), held that the date of coming into force of the Act has relevance to the date on which gratuity becomes payable. Gratuity becomes payable on the termination of employment and therefore, in order to be eligible to payment of gratuity, the termination of employment whether it be due to superannuation or retirement or resignation or death or disablement, has to be after the date of coming into force of the Act. The Court observed as follows:

"We think the only reasonable way of construing section 4 in the light of the definition of employee in section 2(e) is to hold that a person whose services are terminated for any of the reasons mentioned in section 4(1) , after the coming into force of the Act is entitled to the payment of gratuity, if he has rendered continuous service for not less than five years, for that period during which he satisfied the definition of employee under section 2(e) of the Act."

11. The Supreme Court in Grindwell Norton Ltd. v. N.L. Abhyankar and another 1980 (40) FLR 53, held that reading of the relevant provisions of the Act 1972 would clearly indicate that the period of employment to be taken into consideration for determination of the amount of gratuity is not restricted only to the period subsequent to the coming into force of the Act, but the period of employment prior to that date has to be taken into consideration. Section 4 is charging section and it provides that gratuity shall be payable to an employee on the termination of his employment, and the termination of the employment is either by superannuation, retirement or resignation, or his death or disablement due to accident or disease. This section requires that employee must have put a continuous service of 5 years for entitlement of gratuity and the term

"continuous service" have been defined under section 2(c) of the Act. The provisions of section 4 comes into play not on the date when the Act came into force but only on the date of the termination of employment. The Court observed as follows:

"The reading of the relevant provisions clearly indicates that the period of employment to be taken into consideration for the purpose of determination of the amount of gratuity is not restricted only to the period subsequent to the coming into force of the Act, but the period of employment prior to that date has to be taken into consideration."

12. The Court, therefore, held that the service rendered by the workman prior to coming into force of Act 1972 was to be considered regarding computation of service rendered anterior to coming into force of the Act.

13. The Bombay High Court in *Ms. Ananta Vishivanathan v. Shri Narayana Guru High School and others* 2012 (1) LLJ 350 (Bom), relying upon several judgments of the Supreme Court held that the notification dated 3 April 1997 read with section 2(c) of the Act 1972 are made applicable to the employee for the service rendered before or after commencement of this Act, I do not find any reason to take a different view, accordingly, hold that the service rendered by the third respondent prior to 1997 would be considered while computing the gratuity.

14. The learned Appellate Authority did not concur with the Controlling Authority that the sum of Rs. 1,35,000/- paid by the institution to the third respondent was gratuity merely for the reason that the provisions of the Act 1972 was not applicable at the relevant point, therefore, the sum paid was not taken to be a sum towards gratuity. The plea is not sustainable. The document at Annexure 4 of the record would reflect that the sum was paid towards gratuity and for settlement of all retiral benefits upon the retirement of the third respondent. Upon enforcement of the Act 1972 on the teachers, the legislature ensured (1) that teachers are entitled to gratuity, (2) the minimum amount of gratuity as prescribed under the Act 1972 is payable[sub-section (3) of section 4]. The provisions of sub-section (5) of section 4 provides that the section shall not affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer.

15. In *Workmen of Metro Theatre, Bombay Vs. Metro Theatre Ltd., Bombay*, , it was held:

"the view taken by the Tribunal that it could not go beyond the scheme of gratuity contemplated by the Act is clearly erroneous. The Act enacts a complete Code containing detailed provisions covering all essential features of the scheme for payment of gratuity. But the scheme envisaged by the enactment secures the minimum for the employees in that behalf and express provisions are found in the Act under which, better terms of gratuity, if already existing, should be conferred on the employees. It was held that the scheme of gratuity under the Act clearly suggests that no standardization of the gratuity scheme contemplated

by the Act was intended by the legislature."

16. It follows that the scheme if framed by the employer does not provide for the minimum sum of gratuity as contemplated under sub-section (3) of section 4 upon enforcement of the Act 1972, then in that eventuality the employee would be entitled to the balance sum.

17. In the facts of the case at hand, the Controlling Authority had deducted the sum of Rs. 135,000/- paid to the third respondent towards gratuity by the employer from the sum due under the Act 1972. The Appellate Authority, whereas, has rejected the deduction by merely stating that, since the Act 1972 was not applicable upon the teachers, therefore, the sum paid by the institution would not be taken to be sum paid towards gratuity. The view taken by the Appellate Authority is untenable for the reason that the case of the institution is that the third respondent was paid gratuity as per the scheme applicable, further, the records would reveal that the third respondent had accepted the sum upon superannuation towards gratuity. In the event of the third respondent disputing the sum so received is not gratuity but ex-gratia payment then the onus is upon the employee to prove the plea being raised by her, which being a question of fact has to be determined by the Authority upon material and evidence that may be led by the respective parties.

18. The Appellate Authority has enhanced the rate of interest from 8% to 12% which is not in terms of sub-section (3-A) of section 7 . The enhanced rate of interest has been granted on a vague observation of the Appellate Authority that it is as per the directions/orders rendered by Courts from time to time. The statutory mandate requires that the employer is liable to pay interest, provided the gratuity payable within the period specified in sub-section (3) is not paid by the employer, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment on long term deposits, as that Govt. may by notification specify. The Authorities have no choice but to grant interest as notified by the Government.

19. Having due regard to the facts of the case, it is provided that the first respondent Appellate Authority/Deputy Labour Commissioner shall decide both the appeals afresh, the respective parties undertake to file their written statement within fifteen days from today, in the event of compliance, it is expected that the Appellate Authority shall conclude and decide the appeal by a reasoned and speaking order within eight weeks thereafter, the order dated 20 July 2015 passed in both the appeals is set aside. Subject to the above, the writ petition is allowed.

No order as to costs.

1Act 1972.

2Amendment Act 2009.