

(2003) 05 GUJ CK 0010
In the Gujarat High Court

Case No : Special Civil Application No. 9335, 9344, 8577, 8578 and 8579 of 2002 with Civil Application No. 1244, 1245, 1246 and 2781 of 2003

Surendranagar Dudhrej Nagar Palika

APPELLANT

Vs

Motiben Danabhai

RESPONDENT

Date of Decision : 01-05-2003

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Limitation Act, 1963 — Section 5
Payment of Gratuity Act, 1972 — Section 4, 4(2), 4(4)

Citation : (2003) 05 GUJ CK 0010

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : D.A. Surani, in Special Civil application No. 9335, 9343, 9344 of 2002, Y.V. Shah, in Special Civil applications No. 8577, 8578, 8579 of 2002 and Civil applications No. 1244, 1245, 1246, 2781 of 2003, for the Appellant; Y.V. Shah, in Special Civil Application No. 9335, 9343, 9344 of 2002, D.A. Surani, for Respondent No.1. and H.D. Dave, AGP for Respondent No.2. in Special Civil Applications No. 8577, 8578, 8579 of 2002 and Civil Applications No. 1244, 1245, 1246, 2781 of 2003, for the Respondent

Judgement

H.K. Rathod, J.—Heard learned advocate Mr. D.A. Surani on behalf of the petitioner i.e. Surendranagar Dudhrej Nagar Palika in all the group of petitions and learned advocate Mr. Y.V. Shah appearing on behalf of respondent workmen.

2. In respect to SCA No. 9335/2002, Nagarpalika has challenged the order passed by the Controlling Authority under the Payment of Gratuity Act, 1972 in Gratuity Application No. 68/2000 dtd. 27.03.2001 wherein Controlling Authority has granted the amount of gratuity to the respondent workman Rs. 1,02,345,80ps. and 10% interest with effect from 01.08.2000.

3. In respect to SCA No. 9343/2002, the Nagarpalika has challenged the order passed by the Controlling Authority under the Payment of Gratuity Act, 1972 in Gratuity Application No. 12/2001 dtd. 25.09.2001 wherein Controlling Authority

has directed to the petitioner to pay the amount of gratuity of Rs.1,44,244.80ps. to the respondent workman with 10% interest with effect from 01.07.2000 is ordered by the Controlling Authority.

4. In respect to SCA No. 9344/2002, the Nagarpalika has challenged the order passed by the Controlling Authority in Gratuity Application No. 6/2001 dtd. 25.09.2001 wherein the Controlling Authority has granted the amount of gratuity to the respondent workman Rs.1,07,222/- and with effect from 31.07.2000, 10% interest has been awarded by the Controlling Authority.

5. Learned advocate Mr. D.A. Surani has submitted that Nagarpalika has paid the amount of gratuity to the respondent workman, namely, Motiben in respect to SCA No. 9335/2002 of Rs.60,300/- and in respect to SCA No. 9343/2002, Nagarpalika has paid the amount of gratuity of Rs. 68,329.80ps. to the respondent workman named Amrabhai Hirabhai and in respect to SCA No. 9344/2002, Nagarpalika has paid the amount of gratuity of Rs. 63,945/- to the respondent workman named Shantiben Palabhai. This amount has been received by the respondent workmen and learned advocate Mr. Y.V. Shah appearing on behalf of the respondent workmen is not disputing this statement made by learned advocate Mr. D.A. Surani.

6. Learned advocate Mr. D.A. Surani appearing on behalf of the petitioner Nagarpalika has submitted that at the time of issuing rule by this Court on 28.09.2002, the submissions made by learned advocate Mr. D.A. Surani to the effect that whatever the orders has been passed by the Controlling Authority that is an additional amount in comparison to the fact that amount of gratuity is already paid by the Nagarpalika to the respondent workmen. He also raised one contention before this Court in respect to the 5th Pay Commission whether applicable to the respondent workmen or not or other similar situated workmen of Nagarpalika or not and that question is still pending before the LPA Bench and not decided by the LPA Bench. These two submissions were made before this Court and on that basis, rule has been issued by this Court and ad-interim relief in terms of paragraph 17 (C) has been granted by order dtd. 20.09.2002.

7. The Controlling Authority who has passed the orders on the basis of the last drawn wages received by the respondent workmen, it is not in dispute between the parties including Nagarpalika and that at the age of superannuation, all the respondent workmen, all the three workmen were received the salary on the basis of the 5th Pay Commission and that salary was paid by the Nagarpalika to the each respondent workman. Therefore, Controlling Authority has calculated the amount of gratuity on the basis of last drawn wages received by each respondent and, therefore, the amount of gratuity is little enhanced by the Controlling Authority on that ground. The payment of gratuity which has been made by the Nagarpalika to the respondent that was on the basis of the 4th Pay Commission salary which was received by the workmen prior to receiving the salary of 5th Pay Commission. Therefore, this difference has been occurred because of the facts that Nagarpalika has taken the salary of 4th Pay

Commission and Controlling Authority has taken into account the salary of 5th Pay Commission. The Controlling Authority has considered the record which was produced by the workman and date of appointment and age of superannuation and last drawn wages are not in dispute between the parties and, therefore, relying upon that the Controlling Authority has passed an order. This fact has been narrated by the Controlling Authority in the second paragraph of order that there was no dispute between the parties in respect to the last drawn salary, date of retirement, date of appointment and continue service of respondent workmen. Certain records have been produced by the respondent workmen and ultimately, according to the law, the Controlling Authority has calculated the amount of gratuity considering the last drawn wages received by each respondent workman.

8. Learned advocate Mr. D.A. Surani has submitted that against the order of the Controlling Authority, the appeal is available to the Nagarpalika, but that was not filed because of the delay in filing the appeal and Appellate Authority has no power to extend the period of delay more than 120 days that is a statutory provision and, therefore, present petition is filed challenging the order of Controlling Authority. Except that no other submission has been made by learned advocate Mr. D.A. Surani, appearing on behalf of petitioner.

9. Learned advocate Mr. Y.V. Shah appearing on behalf of respondent has submitted that salary of each respondent workman has been revised while made applicable 5th Pay Commission and on that basis, the workmen received the salary which were available to them under the 5th Pay Commission and at the time of retirement also, that salary was received by the respondent and according to the Provisions of the Gratuity Act, Controlling Authority has to taken into account the last wages received by the workmen. Therefore, Controlling Authority has rightly relied upon the last wages though it may be in dispute and pending before the LPA Bench, but that dispute have no effect to the legal rights of the workmen because this amount of salary has been received by the respondent workmen without any dispute, without any objection from the Nagarpalika because same was fixed by the Nagarpalika and paid by the Nagarpalika. He also submitted that once the alternative remedy is available to the petitioner Nagarpalika to file appeal against the order of Controlling Authority u/s 7(7), then limitation is specifically prescribed where initially appeal is required to file within 60 days and, thereafter, appellate authority has power to condone further extension of 60 days. But beyond that, total 120 days, appellate authority has no power to condone the delay. Mr. Y.V. Shah has submitted that whenever the limitation is prescribed under the statutory provision, then Limitation Act is not applicable and that is the settled law laid down by the Apex Court. Therefore, he submitted that there is some purpose to fix the time limit for filing the appeal in Gratuity Act because it is a beneficiary act and respondent workmen is entitled the amount after retirement and there may not be any delay in making the payment of retirement dues to the respondent workmen and that is how that very purpose, the total period of 120 days has been given to the

employer to file appeal and beyond that no power is given to the appellate authority to condone the delay. Therefore, when appeal is not filed and appeal is now not maintainable because of limitation, then present petition is not maintainable and, therefore, same is required to be rejected.

10. I have considered the submissions made by both the learned advocates. I have considered the relevant Provision of the Payment of Gratuity Act. Section 4 of the Gratuity Act where the amount of gratuity is required to be determined by the Controlling Authority, the relevant Sub-section 4 (2) are incorporated as under :-

"(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days" wages based on the rate of wages last drawn by the employee concerned:

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account.

Provided further that in the case of (an employee who is employed in a seasonal establishment and who is not so employed throughout the year), the employer shall pay the gratuity at the rate of seven days" wages for each season."

11. The reading of Section 4(2) wherein it is specifically made it clear that for every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of 15 days wages based on the rate of wages last drawn by the employee concerned. So, when there is a specific provision has been made in the statutory Provision, then Controlling Authority has right in taking into account the wages last drawn received by the workmen.

12. In respect to the Provisions of appeal, Section 7(7) which is quoted as under :-

"(7) Any person aggrieved by an order under sub-section (4), may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf:

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 sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days.

(Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-

section (4), or deposits with the appellate authority such amount.)"

13. As per Section 7 of the Gratuity Act, 1972 any person aggrieved by an order u/s 4 may within 60 days from the date of receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf. 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 sufficient cause from preferring the appeal within the said period of 60 days, extend the said period of further period of 60 days. The further provision is that appeal is required to be filed after depositing the amount as determined by the Controlling Authority u/s 4(4) of the Gratuity Act, 1972. The law on this point is very clear to the effect that once the Limitation is prescribed under the statutory provision, then appellate authority is not entitled to invoke Section 5 of the Limitation Act, 1963 to condone the delay of more than 120 days in preferring the appeal that view has been taken by the Calcutta High Court Division Bench in case of City College Vs. State of West Bengal and Others, and recently also, Bombay High Court has also taken the same view in case of Shri Gurudeo Ayurved Mahavidyalaya, Gurukunj Ashram and another V/s. Madhav and others reported in 1994 L. I.C. 1542 and it is decided that u/s 7(7), Proviso - Appeal - Limitation - Appeal filed beyond prescribed period of 120 days - Delay cannot be condoned - Section 5 of Limitation Act, not applicable. Therefore, once limitation is prescribed by the statutory provision and appeal is not filed within that time limit, then petitioner is not entitled to challenge the said order before this Court. When alternative effective statutory remedy of appeal is available and petitioner fails to avail the said remedy, then direct petition under Article 226/227 of the Constitution of India cannot be entertained and maintainable.

14. In respect to the contention that whether 5th Pay Commission is available to the workmen working with the petitioner or not, that entire question is pending before the LPA Bench. But one fact is undisputed that whatever the salary has been fixed by the Nagarpalika in respect to each respondent workman, for that there was no dispute raised by the petitioner at the time of fixing the salary and at the time of making the payment to the respondent workmen. Therefore, considering this fact, according to my opinion, the Controlling Authority has rightly decided the matter and determined the amount of gratuity as per the provisions made under the Payment of Gratuity Act, 1972 and for that Controlling Authority has not committed any error and no any procedural irregularity committed by the Controlling Authority. However, considering the fact that the present petition is not maintainable and cannot be entertained by this Court. But RULE has been issued by this Court. Therefore, I have also examined the merits of the matter and I have passed this reasoned order and considered the fact that no any error has been committed by the Controlling Authority while determining the amount of gratuity in favour of the workmen. According to my opinion, no error has been committed by the Controlling Authority and it is strictly in accordance with law the order has been passed by the Controlling Authority.

Therefore, there is no substance in these three petitions, i.e. SCA No. 9335/2002, SCA No. 9343/2002, SCA No. 9344/2002 and, therefore, all these three petitions are dismissed. Rule discharged in each petition. Ad-interim relief granted earlier shall stand vacated in each petition.

15. In view of these facts, it is directed to the petitioner Nagarpalika to pay the amount of gratuity as determined by Controlling Authority in respect to each respondent workman as per the order passed by the Controlling Authority after deducting whatever the amount has been paid by the Nagarpalika to each respondent workman within a period of 3 months from the date of receiving the copy of the said order. In view of the above observation and direction, SCA No. 8577/2002, SCA No. 8578/2002 and SCA No. 8579/2002 filed by the respondent workmen with a prayer to implement the Recovery Certificate does not survive and all these three petitions are disposed of accordingly.

16. Similarly, Civil Applications No. 1244/2003, 1245/2003, 1246/2003, 2781/2003 which has been filed by the respondent workmen with a prayer to vacate the ad-interim order which has been passed by this Court in SCA No. 9335/2002, SCA No. 9343/2002, SCA No. 9344/2002 does not survive in view of the order passed on today in these Special Civil applications and, therefore, these civil applications are disposed of accordingly.