

(2018) 02 DEL CK 0361

In the Delhi High Court

Case No : Civil Writ Petition No. 7762 Of 2015

Thai Airways International Public Company Ltd.

APPELLANT

Vs

Gurvinder Singh

RESPONDENT

Date of Decision : 13-02-2018

Acts Referred:

Constitution Of India, 1950 — Article 226, 227
Code Of Civil Procedure, 1908 — Section 115
Industrial Disputes Act, 1947 — Section 17B
Payment Of Gratuity Act, 1972 — Section 7, 7(4), 7(7)

Citation : (2018) 02 DEL CK 0361

Hon'ble Judges : Vinod Goel, J

Bench : Single Bench

Advocate : Ratna Dwivedi Dhingra, Bhavna Dhami, Ajay Pratap Singh, Rajat Arora

Final Decision : Dismissed

Judgement

Vinod Goel, J

1. The jurisdiction of this Court has been invoked by the petitioner under Article 226 and 227 of the Constitution of India challenging the order dated

27.05.2015 passed by the Assistant Labour Commissioner who is the Controlling Authority under The Payment of Gratuity Act, 1972 (in short the

Controlling Authority) in a Claim Petition No.ALC-I/36(457) of 2013 whereby the petitioner was directed to pay to the respondent a sum of

Rs.1,01,538/- as balance gratuity along with interest @10% per annum from 03.02.2006 till the date of payment.

2. The brief facts of the case are that the Government of NCT of Delhi had referred a Reference No.F.24 (271) 1988-Lab/3987-92 dated 24.02.1988

to the Labour Court-II, Karkardooma, Shahdara, Delhi in the following terms:-

Whether the dismissal of Shri Gurbinder Singh is illegal and/or unjustified and, if so to what relief is he entitled and what directions are necessary in this respect?

3. The learned Presiding Officer, Labour Court-II (in short Industrial Adjudicator) adjudicated the reference by award dated

03.02.2006 and found services of the respondent were terminated by the petitioner illegally and/or unjustifiably and since the respondent was near the

age of superannuation he was granted compensation of Rs.6 lakhs in lieu of reinstatement, back-wages, continuity of service and all other legal

benefits and accordingly answered the reference.

4. The petitioner challenged the award of the Industrial Adjudicator in a writ petition being WP(C) No.9656/2007. During the pendency of this writ

petition, the respondent filed an application under Section 17B of the Industrial Disputes Act, 1947 which was dismissed by the learned Single Judge of

this Court on 10.05.2010 which led the respondent to prefer LPA No.588/2010. There, the learned counsel for the petitioner herein stated that he has

no objection to pay the compensation of Rs.6 lakhs as awarded by the Labour Court and it should be treated as ex-gratia and accordingly the Division

Bench of this Court disposed of the LPA on 25.05.2011 with the direction to release the amount of Rs.6 lakhs by the Registry to the respondent herein

with interest accrued thereon and since nothing remained in WP(C) 9656/2007, the same was also ordered to be disposed of accordingly.

5. Subsequently, the respondent filed an application being CM APPL. 20700/2012 in the disposed of LPA No.588/2010 and claimed that besides the

awarded amount he is also entitled to retiral benefits i.e. gratuity etc. from the petitioner and sought a direction for payment of release thereof. The

Division Bench dismissed the application on 14.12.2012 with the liberty to the respondent to claim relief sought in the application in the appropriate

proceedings before the appropriate fora and in accordance with law.

6. The respondent filed a review application being RA No.68/2013 in LPA No.588/2010 and sought review of the order dated 14.12.2012 disposing of

CM APPL. 20700/2012 preferred by him. This review application was dismissed by the Division Bench on 24.05.2013.

7. The respondent preferred a claim application before the Controlling Authority for determination of the amount of gratuity payable to him. After

hearing both the parties, the Controlling Authority has passed the order which is impugned in this writ petition.

8. It is submitted by learned counsel for the petitioner that it was in full and final settlement before the High Court in LPA No.588/2010 decided on

25.05.2011. She submits that the respondent had never raised a claim for gratuity even after passing of the award dated 03.02.2006. She submits that

the impugned order is based on presumption and assumption that the award dated 03.02.2006 does not include the retiral benefits. She submits that if

there was ambiguity in the award dated 03.02.2006 the respondent should have sought a clarification from Industrial Adjudicator as to whether it

includes the retiral benefits. She submits that all other legal benefits cannot be stretched to such an extent so as to include even the terminal benefits

of gratuity. She submits that claim of gratuity is an afterthought to extract money from the petitioner.

9. Per contra, the learned counsel for the respondent has raised a preliminary objection about the maintainability of the writ petition. He submits that

the impugned order passed under sub-section (4) of Section 7 of the Payment of Gratuity Act, 1972 is appellable before the appropriate Government

or other authority as specified under sub-section (7) of Section 7 of the said Act and this writ petition is not maintainable as the effective alternative

remedy is available to the petitioner. Even on merits, he submits that it was not a settlement in the LPA and rather the learned counsel for the

petitioner stated before the Division Bench that this amount of compensation shall be treated as an exgratia. Even as per the award dated 03.02.2006,

the compensation of Rs.6 lakhs was granted to the respondent in lieu of his reinstatement, back-wages, continuity of service and all other legal

benefits. He submits that other legal benefits were not inclusive of benefit of the gratuity.

10. I have learned counsel for the parties. In order to appreciate the rival contentions of the parties, it would be beneficial to refer Section 7, 7(4) and

7(7) of the Payment of Gratuity Act, 1972 which reads as under:-

â??7. Determination of the amount of gratuity.â?"(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.

xxxx xxxx xxxx

(4)(a) If there is any dispute as 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.

(c) The controlling authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard,

determine the matter or matters in dispute and if, as a result of such inquiry any amount is found to be payable to the employee, the

controlling authority shall direct the employer to pay such amount or, as the case may be, such amount as reduced by the amount already

deposited by the employer.

(d) The controlling authority shall pay the amount deposited, including the excess amount, if any, deposited by the employer, to the person

entitled thereto.

(e) As soon as may be after a deposit is made under clause (a), the controlling authority shall pay the amount of the depositâ?

(i) to the applicant where he is the employee; or

(ii) where the applicant is not the employee, to the 7 [nominee or, as the case may be, the guardian of such nominee or] heir of the employee

if the controlling authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity.

xxxx xxxx xxxx

(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: 1

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.â??

11. It is clear from the above said provision that the petitioner if aggrieved by an order passed under sub-section (4) of Section 7 could prefer an appeal within 60 days from the date of receipt of the order to the appropriate Government or such other authority as has been specified by the Government.

12. It is trite that when the petitioner is having an alternative effective statutory remedy of appeal, the writ petition under Article 226/227 of the Constitution of India cannot be allowed to be entertained.

13. In a case before the Honâ??ble Supreme Court in *Sadhna Lodh vs. National Insurance Company Ltd.* 2003 (3) SCC 524, where instead of challenging the award of MACT by way of appeal, the insurer preferred a writ petition under Article 226/227 of the Constitution of India on the ground that the insurer has limited grounds available to challenge the award of the Tribunal. The Honâ??ble Supreme Court has held:-

â??6. The right of appeal is a statutory right and where the law provides remedy by filing an appeal on limited grounds, the grounds of challenge cannot be enlarged by filing a petition under Articles 226/227 of the Constitution on the premise that the insurer has limited grounds available for challenging the award given by the Tribunal. Section 149(2) of the Act limits the insurer to file an appeal on those enumerated grounds and the appeal being a product of the statute it is not open to an insurer to take any plea other than those provided under Section 149(2) of the Act (see *National Insurance Co. Ltd. v. Nicolletta Rohtagi* [(2002) 7 SCC 456 : 2002 SCC (Cri) 1788]). This being the legal position, the petition filed under Article 227 of the Constitution by the insurer was wholly misconceived. Where a statutory

right to file an appeal has been provided for, it is not open to the High Court to entertain a petition under Article 227 of the Constitution.

Even if where a remedy by way of an appeal has not been provided for against the order and judgment of a District Judge, the remedy

available to the aggrieved person is to file a revision before the High Court under Section 115 of the Code of Civil Procedure. Where

remedy for filing a revision before the High Court under Section 115 CPC has been expressly barred by a State enactment, only in such

case a petition under Article 227 of the Constitution would lie and not under Article 226 of the Constitution. As a matter of illustration,

where a trial court in a civil suit refused to grant temporary injunction and an appeal against refusal to grant injunction has been rejected,

and a State enactment has barred the remedy of filing revision under Section 115 CPC, in such a situation a writ petition under Article 227

would lie and not under Article 226 of the Constitution. Thus, where the State Legislature has barred a remedy of filing a revision petition

before the High Court under Section 115 CPC, no petition under Article 226 of the Constitution would lie for the reason that a mere wrong

decision without anything more is not enough to attract jurisdiction of the High Court under Article 226 of the Constitution.

7. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is confined only to see whether an

inferior court or tribunal has proceeded within its parameters and not to correct an error apparent on the face of the record, much less of

an error of law. In exercising the supervisory power under Article 227 of the Constitution, the High Court does not act as an appellate

court or the tribunal. It is also not permissible to a High Court on a petition filed under Article 227 of the Constitution to review or reweigh

the evidence upon which the inferior court or tribunal purports to have passed the order or to correct errors of law in the decision.

8. For the aforesaid reasons, we are of the view that since the insurer has a remedy by filing an appeal before the High Court, the High

Court ought not to have entertained the petition under Articles 226/227 of the Constitution and for that reason, the judgment and order

under challenge deserves to be set aside. We, accordingly, set aside the judgment and order under appeal. The appeal is allowed. There

shall be no order as to costs. However, it would be open to the insurer to file an appeal if it is permissible under the law.â??

14. Similarly in *Transport & Dock Workers Union vs. Mumbai Port Trust* 2011 (2) SCC 575, the Honâ??ble Supreme Court held that:-

â??14. In our opinion the writ petition filed by the appellants should have been dismissed by the High Court on the ground of existence of

an alternative remedy under the Industrial Disputes Act. It is well settled that writ jurisdiction is discretionary jurisdiction, and the

discretion should not ordinarily be exercised if there is an alternative remedy available to the appellant. In this case there was a clear

alternative remedy available to the appellants by raising an industrial dispute and hence we fail to understand why the High Court

entertained the writ petition. It seems to us that some High Courts by adopting an over liberal approach are unnecessarily adding to their

load of arrears instead of observing judicial discipline in following settled legal principles. However, we may also consider the case on

merits.â??

15. In the circumstances when the petitioner is having an alternative effective statutory remedy of appeal available against the impugned order passed

by the Controlling Authority under Section 7(4) of the Payment of Gratuity Act, 1972 to prefer an appeal to the appropriate Government or such other

authorities as may be specified under sub-section (7) of Section 7, the present writ petition cannot be entertained by this Court under Article 226/227

of the Constitution of India.

16. The writ petition is accordingly dismissed.