

(2010) 11 MAD CK 0443

In the Madras High Court

Case No : Writ Petition (MD) No's. 13903 and 13904 of 2010 and M.P. (MD) No's. 1 and 2 of 2010

The Administrative Officer, T.M.S.S.M. Library and Research Centre

APPELLANT

Vs

The Appellate Authority under Payment of Gratuity Act, The Joint Commissioner of Labour, T. Palaniyandi and Y. Adaikalasamy

RESPONDENT

Date of Decision : 24-11-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Payment of Gratuity Act, 1972 — Section 1(3), 14, 5, 7(7)
Payment of Wages Act, 1936 — Section 2
Provident Fund Regulations — Regulation 11, 3(A)(K), 37, 5

Citation : (2011) 1 CTC 154 : (2011) 128 FLR 724 : (2011) 3 LLJ 545 : (2011) LLR 351 : (2011) 3 MLJ 1067

Hon'ble Judges : K. Chandru, J

Bench : Single Bench

Advocate : S.C. Herold Singh, for the Appellant;

Final Decision : Dismissed

Judgement

K. Chandru, J.—The Petitioner in these two writ petitions is the very same officer of the Thanjavur Maharaja Sarfoji Sarasvati Mahal Library, Thanjavur. Aggrieved by the common order passed by the Appellate Authority under the Payment of Gratuity Act, 1972 in two gratuity appeals, dated 12.03.2010, the present writ petitions have been filed.

2. The Petitioner challenging the order passed by the controlling authority, dated 25.05.2006 granting gratuity for the contesting Respondents for the service rendered by them in the Petitioner library. The arguments of the Petitioner before the controlling authority was that the employees engaged by the library are covered by the Contributory Provident Fund Scheme and therefore, they are not eligible to get gratuity and hence the applications filed by the contesting

Respondents were not valid. However, the controlling authority found against the Petitioner by order, dated 25.05.2006 u/s 7(7) of the Payment of Gratuity Act and appeals will have to be filed before the appellate authority within 60 days and the said appellate authority has also got power to condone further period of 60 days and altogether the appeals will have to be filed within 120 days.

3. Further, the condition precedent for filing the appeals, the Appellant will have to deposit the entire gratuity amount before the controlling authority. As required under second proviso to Section 7(7) of the Act, the Petitioner did not deposit the entire deposit amount and rest contended by depositing only 50%, the appellate authority rejected the appeals on two grounds namely, i) the second proviso to Section 7(7) was not fulfilled inasmuch as the entire amount of gratuity was not deposited though the Petitioner claimed that due to paucity of funds, the act provides for exemption from such deposit, therefore, on that ground, the appeals filed by the Petitioner was non suited. The second ground urged by the Petitioner was that the delay in filing the appeals must be condoned. The authority found that in terms of Section 7(7), the first proviso to Section 7(7), he has power to only condone the delay of further 60 days whereas in the present case, as against the said order dated 25.05.2006 which was allegedly received by them on 06.07.2006.

4. The objection raised by the Respondents before the appellate authority that appeal has to be filed within two months and further period of two months delay can be condoned in filing the appeal ought on or before 03.11.2006, whereas the appeal has been filed in the present case only on 01.08.2007. Therefore, the authority rightly refused to condone the delay as he will act as per statutory power in entertaining the appeal. Aggrieved by the common order passed by the first Respondent appellate authority, the present writ petitions have been filed.

5. Mr. S.C. Herold Singh, learned Government Advocate appearing for the Petitioner reiterated the very same contentions raised before the controlling authority as well as the appellate authority.

6. When the statute provides an appeal in a particular mode and also provides for limitation then any person aggrieved ought to have filed appeal only within the time prescribed and the authority cannot condone the delay for the period which has not been authorised when once the statute covers the field, this Court under Article 226 cannot direct the authorities to extend the period of limitation which power this Court lacks completely. In essence this Court cannot direct the authority to do something which does not authorise in law. However, to find out whether the Petitioner had the arguable case, even before the appellate authority then the Court went to the objection raised by the Petitioner before the controlling authority.

7. The other contention was that the scheme of contributory provident fund scheme applicable to the employees, is the only terminal benefits to which the employees entitled to and the Payment of Gratuity Act will not apply. This

contention cannot be accepted. The Payment of Gratuity Act is a special enactment providing for terminal benefits for the employees for the long and meritorious service rendered by them and the said Act do not contemplate any contribution by the employees and it is altogether different benefits conferred by the Parliament. u/s 14 of the Payment of Gratuity Act, a overriding power has been given. Therefore, the contributory provident fund scheme is an entirely different concept and whether the employees contributed for the purpose of their post retirement expenditure and in which the employer may also have some share that no way compared with the provisions of the Provident Fund Act.

8. With reference to the applicability of the Provident Fund Act to the Petitioner library, the question is no longer res integra. The similar question came up before the Supreme Court in State of Punjab Vs. Labour Court Jullunder and Others, , the Supreme Court while considering the term of "establishment" found in Section 1(3)(b) of the Act, it also means any establishment under any law for the time being in force. The following passage found in 3 of the judgment may be usefully extracted hereunder:

3. ...Besides shops, it relates to commercial establishments alone. Had the intention of Parliament been, when enacting Section 1(3)(b), to refer to a law relating to commercial establishments, it would not have left the expression "establishments" unqualified. We have carefully examined the various provisions of the Payment of Gratuity Act, and we are unable to discern any reason for giving the limited meaning to Section 1(3)(b) urged before us on behalf of the Appellant. Section 1(3)(b) applies to every establishment within the meaning of any law for the time being in force in relation to establishments in a State. Such an establishment would include an industrial establishment within the meaning of Section 2(ii)(g) of the Payment of Wages Act. Accordingly, we are of opinion that the Payment of Gratuity Act applies to an establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on. The Hydel Upper Bari Doab Construction Project is such an establishment, and the Payment of Gratuity Act applies to it.

(Emphasis added)

9. Therefore, the claim made by the Petitioner that the Petitioner is not establishment under very many enactments including z, Provident Fund Act, Subsistence Allowance Act, etc. Therefore, on that score, it cannot be held that the library is not covered by the provisions of the Act. As to whether, the Payment of Provident Fund in the form of contributory provident fund will exclude under the Payment of Gratuity Act also came to be considered by the supreme Court in Katheeya Bai Vs. Superintending Engineer and Others, In paragraphs 6 and 7, the Supreme Court had observed as follows:

6. We are unable to appreciate how the Electricity Board can avoid payment of the Special Contribution to Provident Fund under their own Provident Fund Regulations on the pretext that it is akin to or the same as gratuity payable under the Payment of Gratuity Act. In the first place, the Board, in their Regulations, have themselves labelled the Special Contribution under Regulation 37 as a Special Contribution to Provident Fund and not as gratuity. It is not as if they were unaware of the word "gratuity" and what it meant since we find that there is a reference in Regulation 5 to a Gratuity Scheme of the Tamil Nadu Government which had been adopted by the Board. The Special Contribution under Regulation 37 is part of a well thought out Provident Fund Scheme designed to benefit "good, efficient and faithful" employees (we borrow the words from the Regulation itself) by making annual contributions in addition to the monthly contributions under Regulation 11. This is what appears from Regulation 37 itself. We see no justification for first dubbing it as a gratuity on the ground that it has some of the known characteristics of gratuity and then proceeding to deny the employees the benefit of it on the ground that the Board are paying gratuity under the Payment of Gratuity Act. If the Special Contribution has some common features with gratuity, it has also distinctive features which distinguish it from gratuity payable under the Payment of Gratuity Act. For example, one important feature which discriminates the Special Contribution under Regulation 37 from gratuity under the Payment of Gratuity Act is that while the payment of the latter is obligatory and can only be denied if the employee's services have been terminated for his riotous or disorderly conduct or any other act of violence on his part or any act which constitutes an offence involving moral turpitude and can also be denied to the extent of the damage or loss caused by the employee, where the employee's services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, the payment of the former is discretionary and may not be made if the service of the employee has not been good, efficient and faithful. The employer has also the discretion to withhold or reduce the Special Contribution in any particular case. Of course, the employer cannot arbitrarily claim that the employee's service was not good, efficient and faithful, or withhold or reduce the Special Contribution in an arbitrary fashion. Even so, the distinction between the mandate of the Payment of Gratuity Act and the discretion involved in making the Special Contribution under Regulation 37 is intelligibly clear. Another feature which distinguishes the two is that the benefit of the Payment of Gratuity Act is confined to persons drawing wages not exceeding Rs 1000 and does not extend to persons employed in a managerial or administrative capacity whereas the Special Contribution under Regulation 37 is not so confined and extends to every employee of the Board except casual employees, State or Central Government employees employed with the Board on foreign service terms, etc. etc. For the purpose of contribution of Provident Fund under Regulation 11 or Regulation 37 it makes no difference that a person is employed in a managerial or administrative capacity or that he draws wages more than Rs 1000 per month. A third feature which

marks the two apart is that the contribution to the provident fund whether under Regulation 11 or Regulation 37 becomes part of the fund established by Regulation 3 and is to be managed and administered by trustees under Regulations 3-A to 3-K, whereas the Payment of Gratuity Act does not provide for the constitution of a fund to be managed and administered by trustees. In addition to these broad features, we have the outstanding circumstance that the Board themselves have described the contribution under Regulation 37 as a contribution to provident fund and have chosen to include it in their Provident Fund Scheme. That should conclude the matter.

7. Dr Chitale invited our attention to Section 14 of the Payment of Gratuity Act, 1972 which provides, "The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act." He argued that the provision for Special Contribution under Regulation 37 was inconsistent with the provisions of the Payment of Gratuity Act and therefore the latter should prevail to the exclusion of the former. This argument is dependent on the assumption that the Special Contribution under Regulation 37 is the same thing as the gratuity contemplated by the Payment of Gratuity Act. We have held that it is not and the argument, therefore, fails

10. Even very recently the Supreme Court in Allahabad Bank v. All India Allahabad Bank Retired Employees Association reported in Allahabad Bank and Another Vs. All India Allahabad Bank Retired Emps. Assn., has held that the gratuity can be received by an employee even if there is a scheme for pension, the gratuity and pension are two separate elements unless and until the employer is exempted in terms of Section 5 of the Payment of Gratuity Act, the employer is bound to pay the gratuity to their employees.

11. In the light of the above, the Petitioner library has not made out a case in both the writ petitions. The writ petition stands dismissed accordingly. No costs. Consequently connected miscellaneous petitions stand closed.