IN THE HIGH COURT OF JUDICATURE AT BOMBAY

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CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO.1181 OF 2011
IN
WRIT PETITION NO.9039 OF 2007

Mrs. Ananta Vishwanathan .. Applicant.

V/s.

Shri Narayana Guru High School
& Others .. Respondents.

Mr. Y.C.Naidu a/w. Mr. T.R.Yadav i/b. M/s. C.R.Naidu, for the Applicant.
Mr. E.K.Sasidharan, for Respondent.
Mr. S.D.Rairikar, AGP for Respondent No.2.

CORAM : K.K.TATED, J.

DATE : 7th JULY, 2011.

P.C.:

1 Heard the learned counsel for the parties.

2 This Civil Application is preferred by the Original Respondent for allowing her to withdraw the amount deposited by Petitioner with Appellate Authority under the Payment of Gratuity Act, 1972.

3 A few facts of the matter are as under:-

By this Petition, under Articles 226 & 227 of the Constitution of India, the Respondent No.1-Original Petitioner, challenges the orders dated 29th July, 2003 and 6th October, 2007 passed by the Controlling Authority under the Payment of Gratuity Act, 1972, directing them to pay a sum of Rs.1,78,234/- to the Applicant towards gratuity amount.

4 Being aggrieved by the said orders, the Respondent No.1-Original Petitioner preferred present Writ Petition. The Writ Petition admitted on 17th December, 2007. At that time, ad-interim relief granted in terms of prayer clauses (c) & (d). At that time, the Apex Court in the matter of ***Ahmedabad Private Primary Teachers Association v/s. Administrative Officers & Others,*** reported in ***2004(100) FLR page 601*** held that the definition of employee under Section 2(e) does not cover the teachers. Therefore, on this limited point, Petition was admitted. Subsequently, the government amended definition of "employee" under Payment of Gratuity Act, 1972 which reads as under:-

> " 'employee' means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing payment of gratuity."

5 The said amendment comes into force with retrospective effect from 3rd April, 1997. As per the amended provision of Section 2(e), a teacher also falls within the definition of employee. The learned counsel appearing for the Applicant submits that in view of the amendment of section 2(e), nothing survives in the present Petition. He further submits that originally, Applicant was appointed as Assistant Teacher on 12th June, 1978 and, therefore, the said provision is applicable to the teacher on that date. In support of his submission, he relied on the judgment in the matter of ***Grindwell Norton Ltd v/s. N.L. Abhyankar & Another*** reported in ***1980 (40) FLR page 53***. In this authority, the Apex Court held that the reading of 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. The relevant portion reads as under:-

> " Section 4 is charging section and it provides that gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years, and the termination of the employment is either by superannuation, retirement or resignation, of 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 under the Act and the term "continuous service" have been defined under Section 2(c) of the Act. Relying upon this provision Mr. Khambatta submitted that on the date of coming into force of the Act, i.e. September

> 16, 1972, the respondent was not an employee as he was drawing wages in excess of Rs.1000/-. The submission is that the employee is entitled to gratuity provided his wages are less than Rs.1000/- on the date when the Act came into force. It is not possible to accept the submission of the learned Counsel. The President of the Industrial Court has relied upon the definition of 'continuous service' under Section 2(e) of the Act and provisions of Section 7 to hold that the respondent No.2 is entitled to the amount of gratuity. The provisions of Section 4 come into play not on the date when the Act came into force but only on the date of the resignation of respondent No.2. It is not in dispute that the Act is a piece of beneficial legislation and while continuing the provisions of such Act regard must be had to the intention of the legislature. 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. The President of the Industrial Court was right in holding that the right of gratuity is available provided two conditions are satisfied. First the employee concerned must have rendered five years continuous service and the wages drawn by him must not be in excess of Rs.1000/- per month during the period for which the claim of the gratuity is computed. The Respondent No.2 would obviously not be entitled to the gratuity amount from November 1970 onwards, but it is difficult to appreciate how his claim for an earlier period can be defeated."

6 He also relied on judgment in the matter of ***Duncan Agro Industries Limited v/s. Subbanna, B,*** reported in ***1984 (1) LLJ page-96***. In this case, the Andhra Pradesh High Court held that, the provisions of Gratuity Act are applicable to the employee since the date he comes into employment. Paragraph 7 of this judgment reads thus:-

> **"Para – 7-** The other aspect that survives for consideration is regarding the computation of service rendered anterior to coming into force of the Act. The essence of the contention of the petitioner is that the five years period of service should be reckoned from 16th September, 1972, only when the Act came into force and the consideration of service prior to 16th September, 1972, tantamounts to attributing retroactivity to the statute. The contention appears to be misconceived. The Act applies to the employees who are in service as on 16th September, 1972 and computation of service of five years for eligibility to gratuity should be the total duration of service rendered either prior to 16th September, 1972 or subsequent thereto. The computation of five years service from 16th September, 1972 only cannot be spelt out from any provision and the Act applies on and from 16th September, 1972 to the employees who have the credit of five years service. The position is made amply clear by the definition of continuous service contained in S.2(c) of the Act wherein it is stated that service, whether rendered prior or after the commencement of the Act, should be taken into consideration. The learned Government Pleader relied upon the decision of the Bombay High Court in *Grindwell Norton Limited v. N.L. Abhyankar (1980)40 F.L.R. 53,* wherein it is held that the period of employment for the purpose of gratuity comprises the period subsequent to and also prior to the commencement of the Act. In *C.B. of India v. T.K. Ramamoorthy (1978) 52 F.J.R. 490,* handed down by the Andhra Pradesh High Court, Madhusudan Rao, J., speaking for the Division Bench observed as follows at page 184:
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> > "The section does not say the gratuity is payable only to employees appointed after the Act came into force. On the other hand the words of the section are clear in directing payment of gratuity to an employee on his superannuation, retirement or resignation, provided, by the date of superannuation, retirement or resignation, he rendered continuous service of not less than five years."

7 On the basis of these submissions and two authorities cited herein above, the learned counsel for the Applicant submits that there is no substance in the Petition and same is to be disposed of at this stage itself.

In any case, Applicant is entitled to withdraw the amount deposited by Respondent No.1 with the authority. He further submits that the Applicant is a senior citizen and presently she is running 68th years of her age.

8 On other hand, the learned counsel appearing for Respondent No.1-Original Petitioner vehemently opposed the present Civil Application. He submits that originally Applicant was appointed as Assistant Teacher on 12th June, 1978. The amended provisions are not applicable from the date of appointment but same are applicable only from 3rd April, 1997 when the amendment of Section 2(e) came into force. Therefore, Applicant is not entitled to withdraw the amount of gratuity for the period from 12th June, 1978 to 2nd April, 1997.

9 Admittedly in the present case, the Applicant was appointed on 12th June, 1978 i.e. prior to issuance of date of amendment of Section 2(e) of Payment of Gratuity Act, 1972. It is to be noted that Section 2A of the Payment of Gratuity Act, 1972 states that continuity of service means the service rendered before or after commencement of this Act. Section 2A of the Payment of Gratuity Act, 1972 reads thus:-

> 2A. Continuous service.- For the purposes of this Act,--
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> (1) an employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not

being absence in respect of which an order 3[x x x]treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay- off, strike or a lock- out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act;

(2) where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer--

(a) for the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than--

(i) one hundred and ninety days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) two hundred and forty days, in any other case;

(b) for the said period of six months, if the employee during the period of six calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than--

(i) ninety- five days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) one hundred and twenty days, in any other case; 3[Explanation.-- For the purposes of clause (2), the number of days on which an employee has actually worked under an employer shall include the days on which--

(i) he has been laid- off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under the Industrial Disputes Act, 1947 or (14 of 1947), or under any other law applicable to the establishment;

(ii) he has been on leave with full wages, earned in the previous year;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.]

(3) where an employee, employed in a seasonal establishment, is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer for such period if he has actually worked for not less than seventy- five per cent. of the number of days on which the establishment was in operation during such period.]

10 It is clear from bare reading of Section 2A that provisions of the Act are made applicable to the employee for the service rendered before or after commencement of this Act. Not only that, the authority cited by the learned counsel appearing for the Applicant covers this issue.

11 Considering these submissions, it is not possible to accept the submission made by the learned counsel for the Respondent No.1- Original Petitioner that Applicant is not entitled for the benefit of Gratuity Act for the benefit of gratuity amount for the period from 12th June, 1978 to 2nd April, 1997.

12 Considering the submission made by the learned counsel appearing for the Applicant, Section 2A of the Payment of Gratuity Act, 1972 and authorities cited by him, I am of the opinion that Applicant is entitled for the gratuity from the date of her appointment i.e. 12th June, 1978 till the date of her retirement.

13 Therefore, Applicant is entitled to withdraw the amount of Rs. 1,78,234/- along with accrued interest, if any, deposited by Respondent No. 1 with the Appellate Authority under the Payment of Gratuity Act, 1972 in Appeal No. AA/YDN/05/03.

14 Civil Application is allowed accordingly.

(K.K.TATED, J.)