Bombay High Court
Mumbai-400 005 vs Shri A.D. Noel Henriques on 9 February, 2012
Bench: A.A. Sayed

IN THE HIGH COURT OF JUDICUATE AT bOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 3163 OF 2006

Ethiopian Airlines, having its office at
30-B, World Trade Centre, Cuffe Parade

Mumbai-400 005 ...Petitioner
Vs.
1. Shri A.D. Noel Henriques,
6, Jumbo Co-operative Houisng,

Road No.1,Mumbai- 400 050

2.

Shri A.K. Agarwal, the Appellate Authority
under the Gratuity Act & Regional Labour
Commissioner (Central), Mumbai

having its office at 3rd Floor,
Shram Shakti Bhavan,Sion Trombay
Road, Mumbai-400 071 ...Respondents

Ms. Khooshrum Daviervala with Mr. Manish Trivedi and Sandeep Goyal

for the Petitioner.

Mr. S.C. Naidu with Mr. Saurabh Kulkarni i/by C.R.Naidu & Co. for the Respondent No.1.

CORAM : A.A. SAYED, J.

DATE : 9TH FEBRUARY, 2012.

ORAL JUDGMENT

1. The Petition impugns an order dated 7th September, 2006, 2 wp3163.06.sxw passed by Respondent No.2, who is the Appellate Authority under the Payment of Gratuity Act, 1972. By the said order the Appellate Authority confirmed the order of the Controlling Authority dated 5th March, 2001, which held that the Respondent-employee was entitled to gratuity of Rs.

2,59,409.49p.

2. The question which arises for consideration in the Petition is whether the Respondent-employee is entitled to a higher gratuity or is the amount of gratuity subject to the ceiling limit as prescribed under section 4(3) of the Payment of Gratuity Act, 1972 (hereinafter referred to as said Act).

3. There is no dispute about the fact that the Respondent was an employee of the Petitioner-company and he was entitled to gratuity. It is only the quantum of entitlement which is in dispute. According to the Petitioner-company, the Respondent-employee was governed by the Personnel Policy of the company which interalia states that the payment of gratuity to the employees would be governed by Payment of Gratuity Act, 1972 and therefore the Respondent-employee was not entitled to gratuity over and above the ceiling limit as specified in Section 4(3) of the said Act.

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4. According to the Respondent-employee, however, it was the letter dated 29th January, 1992, which set out the terms of the contract of employment between the Petitioner-company and him that would govern the quantum of entitlement of gratuity. It is the Respondent-employee's case that the said letter would constitute an agreement between the parties and since the terms set out in the said letter were better than what has been statutorily provided, having regard to section 4(5) of the said Act, which saves the right of an employee to receive the better terms of gratuity, he was entitled gratuity amount computed on the basis of the said letter.

5. I have heard the learned Counsel for the parties and perused the record including impugned order dated 7th September, 2006 passed by the Appellate Authority.

6. The statutory ceiling under the Payment of Gratuity Act, 1972 at the relevant time when the Respondent-employee retired on attaining superannuation was Rs. 1 lac. The dispute is therefore whether the Petitioner is entitled to Rs. 2,59, 409.49 (without application of statutory ceiling) or Rs. 1 lac (applying statutory ceiling).

7. The material portion of the Personnel Policy (as revised on 1st 4 wp3163.06.sxw August, 1988) of the Petitioner-company with regard to the payment of gratuity to its employees reads thus:

" Payment of Gratuity Gratuity shall be payable to employees who have served the Company over five (5) years and whose monthly wages are less than 2500 Rupees and provided that the employment contracts terminate on the basis of the following reasons:

(a) Retirement or Resignation

(b) Death or disability to perform his duty due to accident or illness.

The scale of gratuity payment and the definition of continuous years of service shall be governed by the Payment of Gratuity Act of 1972 and Industrial Dispute Act of 1947 or subsequent amendments thereafter"

8. The letter dated 29th January, 1992, which according to the Respondent-employee sets out the terms and conditions of the employment, reads as follows:

"Ethiopian, Airlines S.C.

Going to great lengths to please

To : Mr. Noel Henriques
Sales Manager
City: Bombay.

From : Area Manager-India
City : Bombay

Date : January 29, 1992

Sub: GENERAL SALARY ADJUSTMENT EFF DEC 1, 1991 5 wp3163.06.sxw It gives me great pleasure to advise you that our Management has approved a General Salary Adjustment for Bombay

based staff effective December 1, 1991.

This is to inform you that your salary has been increased by 20% and herebelow please find the detailed breakdown.

1.	Monthly Salary	: INR 15,236,64 (inclusive of Housing Allowance)
2.	Housing Allowance	: INR 825.00
3.	Meal Reimbursement for each day worked ig	: INR 40/-
4.	Bonus	: One month's salary
5.	Vacation Allowance	: Half Month's salary
6.	Provident Fund	: Employee - 10% Employer - 10% (increased from 8.33)
7.	Gratuity	: 15 days salary per year on 26 days month basis (New).
8.	Transportation Allowance per month	: INR 800/- (New)

For your information, the 20% General Salary Adjustment (GSA) and the newly added benefits are made in recognition of your hard work and also to serve as an incentive to do more with added zeal and enthusiasm. I would like to take this opportunity to thank you and wish you all the very best in

your endeavours.

Kebede Bekele"

9. Section 4(3) and 4(5) of the Payment of Gratuity Act as it stood at the relevant time when the Respondent-employee attained superannuation 6 wp3163.06.sxw (i.e. 15th December, 1996) reads as under :

> Section 4(3) "The amount of gratuity payable to an employee shall not exceed one lakh"
>
> Section 4(5) "Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employee."

10. The letter dated 29th January, 1992 is not disputed. The terms and conditions mentioned in the letter dated 29th January, 1992, in my view, clearly formed a 'contract of service' which reflects the understanding between the parties and would prevail over the Personnel Policy of the Petitioner-company. There is no qualification in this letter that the gratuity is subject to ceiling prescribed under the said Act. The Respondent-employee would therefore be entitled to gratuity as set out in this letter which was posterior to and which contained better terms than provided in the Personnel Policy as revised in the year 1988. The learned Counsel for the Petitioner-

company sought to argue that the word "New" in parenthesis in clause 7 of the said letter dated 29-01-1992 is indicative of applicability of the ceiling limit as and when 'new' amendments are brought into force in the said Act.

I am however unable to accept the submission in absence of any pleading 7 wp3163.06.sxw and evidence having been led by the Petitioner-company in this regard.

11. It is to be borne in mind that the Payment of Gratuity Act, 1972 is a beneficial piece of legislation. It is an admitted position that there were only 20 employees at the relevant time employed with the Petitioner-

company and the Respondent-employee had joined service on 1st November, 1972 and retired on attaining superannuation on 15th December, 1996 as a Sales Manager and that before him only four people had retired. It is also not in dispute that out of those four employees, two employees whose amount of gratuity was above the statutory ceiling limit, were in fact given the benefit of gratuity over and above the limit prescribed. To get over this, it is stated on behalf of the Petitioner-company that this was because of a mistake committed by their Chartered Accountant. It is however required to be noted that the said Chartered Accountant has not been examined as a witness nor is such plea of mistake found in the Written Statement filed on behalf of the Petitioner-company. Infact the Petitioner-company has not led any evidence and no witness at all has been examined on their behalf.

As indicated earlier, the letter dated 29th January, 1992 does not reflect the applicability of ceiling prescribed under the said Act to the terms stated therein. Apart from the above, the finding of fact of the Appellate Authority to the effect that it was beyond doubt and dispute that the Petitioner-

8 wp3163.06.sxw company agreed in principle to give the benefit of favourable and better terms of the gratuity payment to other employees also on the basis of the employees' contract of services and therefore the Respondent-employee is entitled to higher gratuity over and above ceiling/limit prescribed under the Act, is not liable to be disturbed in writ jurisdiction, in absence of any perversity or palpable illegality having been pointed out.

12. The learned Counsel for the Petitioner-company has relied upon Videsh Sanchar Nigam Ltd. Vs. Ajit Kumar Kar, (2008) 11 SCC 591.

The said case was pertaining to a bonafide mistake or error committed by the Company in making "extra payments" to the employees. The said decision would have no application to the facts of the present case, inasmuch as in the present case no such plea of mistake or error was taken in the pleading of the Petitioner-company.

13. In Digambar Yeshwantrao Watane Vs. Agricultural Produce Market Committee, Achalpur, 2004 III CLR 161, it was observed by the learned Single Judge of this Court (Nagpur Bench) as follows:

> "It can thus be seen that the sub-section (2) of section provides 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 fifteen days' wages based on the rate of wages last drawn by the employee concerned. Sub-section (3) of said 9 wp3163.06.sxw section provides that the amount of gratuity payable to an employees shall not exceed three lakhs and fifty thousand rupees. At the relevant time, when the petitioner opted for voluntary retirement, the said amount was Rs. 50,000/-. Sub-
>
> section (5) provides that nothing in this section shall affect the right of an employee to receive better terms of gratuity under any ward or agreement or contract with the employer. Thus, it can be seen that the term used by the legislature is not given any restrictive meaning. Even otherwise, it is a settled law that when the provisions of beneficial legislation are interpreted, they have to be given the liberal meaning."

14. In Steel Authority of India Vs. ig Regional Labour Commissioner (Central), 1995 ILLJ 1007, it was held by the Division Bench of the Orissa High Court as under:

> "Section 4(5) provides that nothing in Section 4 shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer. It means that if under any award or agreement or contract with the employer higher amount of gratuity is available, Section 4 of the Act cannot stand on the way of the employee's right in getting such favourable terms."

I am in respectful agreement with the views of their Lordships in the aforesaid decisions.

15. For the reasons stated above, I find no justification to disturb the well-reasoned order of the Appellate Authority which has confirmed the finding of the Lower Authority and the impugned order does not warrant any interference at the hands of this Court.

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16. The Petition is dismissed. Rule is discharged. In the facts and circumstances of the case there shall be no order as to costs.

17. The Respondent-employee shall be entitled to withdraw the amount deposited by the Petitioner-company with the Controlling Authority.

If the Controlling Authority has invested the amount in a fixed deposit, the Respondent-employee shall also be entitled to the interest accrued thereon.

(A.A. SAYED, J.)