IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY APPEAL NO. 65 OF 2014
IN
COMPANY APPLICATION NO. 59 OF 2014
IN
CLB COMPANY PETITION NO. 44 OF 2010
WITH
COMPANY APPLICATION NO. 47 OF 2014
WITH
COMPANY APPLICATION NO. 438 OF 2014

Ramchandar's Coaching Institute Pvt.Ltd. & Anr. …Appellants
vs.
Rakesh Ramchandar Nanda ...Respondent

Mr.Mayur Khandeparkar with M/s.T.N. Tripathi & Co. for Appellants.
Mr.P.D. Sampat i/b. Mr.Vilas A. Jadhav for Respondent.

CORAM : S.C. GUPTE, J.

10 JULY 2015

P.C. :

The Appellants challenge an order passed by the Company Law Board ('CLB') in a company application directing the Appellants (non-Applicants before the CLB) to make payment of gratuity to the Respondent (Applicant before the CLB).

2 The original company petition (in which the company application was taken out) was filed by Appellant No.2 before the CLB against Appellant No.1 and the Respondent herein under Sections 397 and 398 of the Companies Act,1956 alleging acts of oppression and mismanagement in the affairs of Appellant No.1. In the course of the hearing of the company petition, the parties arrived at a mutual settlement pursuant to which consent terms came to be filed by the parties in the company petition. The consent terms *inter alia* provided for exit of the Respondent from Appellant No.1 company, with exclusive charge and control of the management of the affairs of Appellant No.1 company being made

over to Appellant No.2. As part of this settlement, the consent terms *inter alia* provided for payment of gratuity and provident fund to the Respondent on account of his resignation from Appellant No.1 company. The relevant clause, namely, Clause No.17, in the consent terms provided as follows :

> "17. It is agreed and confirmed that the Gratuity and Provident Fund payable to the Respondent Nos.2 and 3 on account of their resignation from the Respondent No.1 company shall be processed and paid by the Respondent Company within two months from the date of handing over of management of the Respondent Company to the Petitioner."

Though the amount of provident fund was duly paid to the Respondent, the gratuity was not so paid. The Respondent, in the premises, applied for directions of the CLB for payment of gratuity in pursuance of the consent terms. The Appellants opposed this application. It was the case of the Appellants before the CLB that the Respondent, not being an employee of the company, was not entitled to payment of any gratuity under the provisions of the Payment of Gratuity Act, 1971 ("the Act"). The CLB, in the impugned order, rejected the contention of the Appellants, holding that having agreed to make payment of gratuity, making the same as part of the consent terms on which the original petition was disposed of, there was no force in the submission of the Appellants that the Respondent's claim for gratuity was not admissible. On the quantum of gratuity payable, the CLB came to a conclusion that the details and basis of calculation of the gratuity amount payable were indicated in the application (the last salary drawn of the Respondent being part of the record of the case), and the Appellants not having contested such details and basis of calculation or furnished any details of their own calculation, the quantum demanded in the application could be accepted. This order is impugned in the appeal herein.

3 In support of the appeal, it is submitted by learned Counsel for the Appellants, firstly, that the Respondent was an 'employer' rather than an 'employee' within the meaning of the Act. It is submitted that the payments made by the first Appellant company to the Respondent were in the nature of director's remuneration and not wages within the meaning of the Act, and there is, thus, no

gratuity payable under the Act. It is secondly submitted that any dispute as to either admissibility or quantum of gratuity payable to an employee could only be decided by the authorities under the Act and that the CLB did not have jurisdiction to do so. Learned Counsel relies upon the judgment of the Supreme Court in the case of **State of Punjab vs. Labour Court, Jullundur**[1] and the judgments of the Calcutta High Court in the case of **Monitron Securities Pvt.Ltd. and Mukundlal Khushalchand Dhavan**[2] and of the Gujarat High Court in the case of **Surendra Vikram Singh Agarwala vs. Kanhaya Lal Agarwalla**[3]**,** in support of his submissions.

4 On the other hand, it is submitted by learned Counsel for the Respondent that the Act does not cover all employees or entire liabilities borne by employers towards their employees. It is submitted that the company, as an employer, was within its rights to make any contract with any employee for payment of gratuity and it was bound to perform such contract irrespective of compulsory provisions concerning gratuity payable under the Act. It is submitted that the Respondent was not only a director but a bona fide whole-time employee of the company. It is submitted that the company had made suitable provisions towards payment of gratuity to its employees including whole time directiors till 2001 and thereafter, as part of the scheme of gratuity registered with the Life Insurance Corporation ('LIC') under Section 4-A of the Act. It is submitted that having regard to the consent terms containing an acknowledgement of admissibility of gratuity payable to the Respondent and an agreement to pay such gratuity, the Respondent could not be relegated to approaching the authorities under the Act for determination of any disputes and the CLB was well within its rights to adjudicate the matter, which anyway concerned enforcement of its own order passed by consent of parties.

5 At the outset, it needs to be noted that the Act provides for gratuity to be paid to an employee on termination of his employment. The employee is defined under Section 2(e) of the Act as follows :

1 **AIR 1979 SC 1981**
2 **(2001) ILLJ924Guj**
3 **(1999) IIILLJ 404Cal**

> “(e) "employee" means any person (other than an apprentice) who is employed on wages, whether the terms of such employment are express or implied, in any kind or 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 hold a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity.”

Wages are defined under Section 2(s) of the Act as follows :

> “(s) "wages" means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance.”

The Act provides for payment of gratuity for every completed year of service or part thereof in excess of six months at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned. The Act also provides for compulsory insurance for the employer's liability of payment of gratuity under the Act. Such insurance has to be obtained from the LIC. It is the case of the Appellants that the first Appellant company has obtained such insurance and that there is a scheme of gratuity prepared in that behalf. The scheme is in the form of a trust deed between the employer, i.e. the first Appellant company, and the trustees. This trust deed has various clauses which *inter alia* include the definition of employees, which is in the following terms:

> ““**Employees**” shall mean the employees participating in the Gratuity Fund other than personal and domestic servants and shall be deemed to include the Directors who are wholetime bonafide employee of the Company and do not beneficially own shares in the Company carrying more than 5% voting rights in the Company.”

The submission is that the Respondent, being a director of the company carrying more than 5% voting rights in the company (he admittedly has 33.33% shareholding in the company), is not entitled to be treated as an employee under this scheme even if he be a whole-time bona fide employee of the company. This argument has no force for two reasons. Firstly, any scheme made by an employer for the purposes of compulsory insurance under Section 4-A of the Act is not exhaustive of the rights and liabilities of the parties concerning payment of gratuity. In fact, sub-section (5) of Section 4 of the Act, which deals with payment of gratuity, makes it clear that nothing in that section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer. Even if an employee does not fall within the meaning of the definition provided in the trust deed prepared for the purposes for Section 4-A of the Act, nothing prevents an employer company from entering into any agreement with an employee for payment of gratuity. For this purpose, the 'employee' means any person who is employed for wages in or in connection with the work of any establishment in accordance with the definition in the Act noted above and 'wages' means all emoluments earned by an employee also as noted above. Appellant No.1 ran an establishment to which the Act applied; the Respondent was employed with Appellant No.1 and received regular emoluments. There is no reason why he should not be treated as an employee for the purposes of the Act. There is no reason to import the definition of 'employee' under the trust deed for this purpose. That definition, providing for not more than 5% voting rights for a director employee, may be relevant for the purposes of compulsory insurance under Section 4-A of the Act, but does not generally govern the meaning of the word 'employee' for the purposes of gratuity payable under the Act. Nothing therefore prevents Appellant No.1 company from entering into a separate contract for payment of gratuity with a whole-time employee who has been holding more than 5 per cent voting rights in the company. Secondly, it has been brought out on record by the Respondent before the CLB that whereas there were suitable provisions made towards the company's liability to pay gratuity to the employees including whole time directors prior to the scheme, i.e. till the year 2001, with effect from the year 2001 an appropriate provision was made by depositing suitable amounts towards gratuity

payable to the employees including the Respondent with the LIC. There is an admitted document on record in this behalf, namely, the letter dated 3 January 2014 addressed by the LIC that the total accumulation value of gratuity payable to the Respondent as on 1 November 2012 was Rs.10 lakh as per the scheme rules. This was in response to a query addressed by the Respondent to the LIC under Master Policy No. GGCA/658728 taken by the Appellant company from the LIC in relation to gratuity payable by it to its employees. Then, there are also other documents on record which show that the Respondent was actually included in the gratuity scheme and policy taken from the LIC in connection with the scheme. There is a letter addressed by Appellant No.1 to the Respondent on 30 November 2012, writing to him about the former having forwarded his request for payment of gratuity to the LIC - Group Gratuity Scheme. There is also another letter on record, namely, letter dated 1 November 2011 addressed by Appellant No.1 to the LIC in connection with the Group Gratuity Scheme giving a list of its employees on its payroll as on 1 November 2011. This list shows the name of the Respondent as an employee with salary of Rs.2 lakh per month as part of the Gratuity Scheme. This clearly shows that not only was the Respondent entitled to receive gratuity but that suitable provisions were made throughout towards payment of such gratuity. The last clinching evidence in this behalf is the consent terms themselves where there is an unequivocal admission of liability to pay gratuity to the Respondent coupled with a promise to pay the same.

6 As for the argument that disputes between an employer and an employee concerning payment of gratuity, either regarding admissibility of such payment or as regards the quantum of such payment, can only be entertained by the authorities under the Act, it is pertinent to note that this is not a case for payment of gratuity under an application made under the Act. Here is a case where the parties have solemnly agreed on the aspect of the admissibility of the payment of gratuity. Under the consent terms filed before the CLB, it was agreed and confirmed that gratuity shall be paid to the Respondent on account of his resignation from the first Appellant company within two months from the date of handing over of the management by the Respondent. There is no need to take the dispute before the authorities under the Act. This is rather a case for

enforcement of consent terms filed before the CLB. There cannot possibly be any dispute as to the admissibility of the liability, and as far as the question of quantum is concerned, even that hardly admits of any dispute since the approved balance sheet of the company for the year ending 31 March 2012 is on record (annexed to the consent terms) and this balance sheet discloses that the Respondent's last drawn salary was Rs.24 lakhs per annum. On the basis of this last drawn salary and an admitted liability to pay gratuity, working out of the quantum of gratuity payable was a ministerial exercise, which in the facts of the case, the CLB was entitled to undertake.

7 The judgments of the Supreme Court and Calcutta High Court in **State of Punjab vs. Labour Court, Jullundur** and **Surendra Vikram Singh Agarwala** do not support the Appellant's case. In **State of Punjab** case, employees of an establishment, who were retrenched against payment of retrenchment compensation, claimed gratuity under the Act. This claim being disputed, the employees applied to the Labour Court for the gratuity denied to them, under Section 33-C(2) of the Industrial Disputes Act, 1947. The employer's contention that the application did not lie before the Labour Court under the Industrial Disputes Act, was accepted by the Supreme Court. The Court held that the Payment of Gratuity Act was a complete code covering all essential features of a scheme for payment of gratuity. The task of administering this scheme was entrusted under the Act to a controlling authority, thus intending that all proceedings for payment of gratuity must be taken under the Act and before the controlling authority. To the same effect are the observations of the Calcutta High Court in **Surendra Vikram Singh Agarwala**'s case. There a retired employee had applied for payment of his gratuity dues in a civil suit. A scheme was framed by the Court in a civil suit for administration of a public trust for religious and charitable purposes. It was the case of the applicant that under this scheme, he as an employee of the trust was entitled to receive gratuity upon his superannuation. The learned trial judge allowed the application, under Section 92 of the Code of Civil Procedure. On appeal, Calcutta High Court held that the provisions of the payment of Gratuity Act had an overriding effect and no civil court could exercise jurisdiction to adjudicate any matter covered by that Act. An

application for payment of gratuity, no doubt, must be made under the Act and before the authorities under the Act. But this is not an application for payment of gratuity requiring adjudication under the Act. As noted above, there is already an order of the CLB passed on consent of the parties for exit of the Respondent from the first Appellant company *inter alia* against payment of compensation and such compensation included the gratuity. There is, in other words, an order for payment of gratuity as part of an order under Section 402 of the Companies Act. Nobody disputes that this order was correctly passed and was within jurisdiction. This order was not implemented. The company application was filed for implementation of that order. The CLB clearly had the jurisdiction to order such implementation. This is something that arose out of its order and the CLB could decide it. It cannot be suggested that the CLB ought to have treated this as a dispute concerning gratuity arising under the Payment of Gratuity Act and ordered the parties to approach the authorities under that Act to resolve that dispute.

8 Considering the fact that the details and basis of the calculations of gratuity contained in the application were not contested by showing any mistake therein or pleading any contrary details, the CLB was entitled to accept the calculation of the gratuity made by the Respondent. No error of law can be found with respect to the same.

9 In the premises, there is no infirmity in the order of the CLB. There is no error of law committed by the CLB in passing the impugned order. The appeal is, accordingly, dismissed.

10 On the application of the learned Counsel for the Appellants, it is ordered that the impugned order of the CLB shall not be executed for a period of four weeks from today.

11 In view of the dismissal of the appeal, Company Application Nos.47 of 2014 and 438 of 2014 are also dismissed.

(S.C. Gupte, J.)