

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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WP(C) No.4311/2003.

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Date of decision: 5th April, 2010

DELHI DEVELOPMENT AUTHORITY

..... Petitioner

Through: Mr. Arun Birbal, Advocate.

Versus

SHRI KUNDAN & ORS.

..... Respondents

Through: None.

AND

WP(C) No. 6886/2003.

DELHI DEVELOPMENT AUTHORITY

..... Petitioner

Through: Mr. Arun Birbal, Advocate.

Versus

SMT. LAXMI DEVI & ORS.

..... Respondents

Through: Mr. Anuj Aggarwal, Advocate.

AND

WP(C) No. 5343/2004.

DELHI DEVELOPMENT AUTHORITY

..... Petitioner

Through: Mr. Bhupesh Narula & Mr. Sunny Arora,
Advocates.

Versus

SHRI CHANDER

..... Respondents

Through: None.

CORAM :-

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

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| 1. | Whether reporters of Local papers may
be allowed to see the judgment? | YES |
| 2. | To be referred to the reporter or not? | YES |
| 3. | Whether the judgment should be reported
in the Digest? | YES |

RAJIV SAHAJ ENDLAW, J.

1. All the three writ petitions raise the common question, of applicability of the Payment of Gratuity Act, 1972 qua the employees of the petitioner DDA. The Authorities under the said Act whose orders are challenged in these writ petitions have held the petitioner DDA liable and directed payment of the additional amounts, due by way of gratuity under the Act, over and above the gratuity otherwise paid by the petitioner DDA under its rules and regulations to the respondents in each case.

2. Mr. Bhupesh Narula counsel for the petitioner DDA in W.P.(C) No.5343/2004 has argued that the DDA is neither a factory, mine, oilfield, plantation, port or railway company within the meaning of Section 1(3)(a) of the Gratuity Act, nor a shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in Delhi, within the meaning of Section 1(3)(b) nor has it been notified under Section 1(3)(c) of the Act and thus the provisions of the Act are not applicable. However, I find that this Court as far back as in ***Municipal Corporation of Delhi Vs. V.T. Naresh*** MANU/DE/0146/1985 held that merely because MCD is a local body or a local authority created by the Delhi Municipal Act, 1957 would not mean that it will not be an 'establishment' so long as it is so in relation to any law relating to 'establishment'. The MCD was thus held to be an establishment within the meaning of Section 1 (3) (b) of the Gratuity Act. The judgment of the single judge in ***V.T. Naresh*** was upheld by the Division Bench of this Court as recently as in ***MCD Vs. Rati Ram*** 153 (2008) DLT 284. What has been held qua MCD, applies equally to the petitioner DDA also. There is thus no merit in the said plea.

3. Mr. Bhupesh Narula, Advocate next contended that the matter is fully covered by the judgment in ***DTC Retired Employees' Association Vs. DTC*** AIR 2001 SC 1997. To appreciate the said contention, the case of the petitioner DDA may be set out as under:

- a. That under Section 2 (e) of the Gratuity Act, “employee” does not include any 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 for payment of gratuity. The employees of the Central Government and the State Government are governed by the CCS Rules framed under Article 309 of the Constitution of India and which *inter alia* provide for pension and which includes gratuity. Section 56 of the Delhi Development Act, 1957 under which the petitioner DDA has been constituted allows the Central Government to, after consultation with DDA, and by Notification in Official Gazette make rules to carry out the purposes of the Act including the rules as to the manner of constitution of the Pension and Provident Fund for whole time paid members, officers and other employees of DDA and the conditions subject to which such funds may be constituted. In exercise of powers conferred by Section 56 (1) and 56(2)(q) of the DDA Act the Central Government has framed the DDA (Pension) Rules 1967; by virtue thereof the CCS (Pension) Rules 1972 governing the Central Government employees were made applicable to the officers and other employees of the DDA. It is argued that the employees of DDA are thus governed by the same rules as the employees of the Central Government and are therefore not entitled to gratuity by virtue of Section 2 (e) of the Gratuity Act. It is urged that for this reason alone, the employees of the petitioner DDA would also not be entitled to gratuity under the Act.

- b. That under Section 5(1) of the Gratuity Act the Government is empowered to, by Notification, exempt any establishment to which the Act applies from the operation of the provisions of the Act, if in the opinion of the Government the employees in such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under the Gratuity Act. It is argued that the Notification dated 17th May, 1978 of the Government of India in exercise of powers under Section 56 (1) and 56(2)(q) of the DDA Act, making the CCS (Pension) Rules 1972 applicable to the employees of DDA is a Notification within the meaning of Section 51 (1) of the Gratuity Act. It is contended that the very fact that the CCS Pension Rules, on the basis whereof the Gratuity Act is not applicable to the Central Government employees, have been made applicable to the employees of the DDA is indicative of DDA also being exempted from the applicability of the Gratuity Act.
- c. Reliance is also placed on Section 4(5) of the Gratuity Act. It is contended that if this Court finds that the employees of DDA under the CCS Pension Rules are getting better terms than they are entitled to under the Gratuity Act, then also the petitioner DDA should be exempted from the applicability of the Gratuity Act.

4. Attention of Mr. Bhupesh Narula, Advocate was invited to ***D.P. Kansal Vs. Delhi Jal Board*** MANU/DE/8393/2007 where a single judge of this Court after considering the DTC case (supra) nevertheless held the Gratuity Act applicable to the Delhi Jal Board. It was enquired as to how the DDA is different from the Delhi Jal Board.

5. Mr. Arun Birbal counsel for the petitioner DDA in the other two cases has very fairly and as is expected of an advocate, and more from an advocate of a Public

Undertaking or a Government, has taken me through the judgments on the basis whereof he pleads his case and also through the judgments which take a contrary view in the matter. Such assistance from the Bar definitely saves the precious time of the Court and I cannot but express appreciation for the exemplary advocacy shown by Mr. Arun Birbal, Advocate. From the list of judgments, Mr. Arun Birbal first draws attention to ***Municipal Corporation of Delhi Vs. Dharam Prakash Sharma*** AIR 1999 SC 293 where the employees of MCD which has also adopted the provisions of the CCS (Pension) Rules 1972 were held entitled to gratuity under the Gratuity Act. In that case also the contention of the counsel for the MCD was that the payment of pension and gratuity under the Pension Rules is a package by itself and once that package is made applicable to the employees of the MCD, the provisions for payment of gratuity under the Gratuity Act cannot be held applicable. The Supreme Court held that Gratuity Act being a special law, unless there is any provision therein excluding its applicability to an employee who is otherwise governed by the Pension Rules, it is not possible to hold the employees of MCD to be not entitled to gratuity under the Gratuity Act. It was held that the exclusion under Section 2(e) of the Gratuity Act being confined to employees of Central Government and State Government could not be extended to the employees of MCD. The provision for gratuity under the Pension Rules was held to be of no effect. It was held that the exemption from applicability of the Gratuity Act could be granted only under Section 5(1) and MCD having not taken any steps to invoke the powers of the Central Government under Section 5 (1), could not be heard to argue that the provisions of the Act were not applicable to it. It was however observed that the employees cannot claim gratuity available under the Pension Rules once they were provided the benefits under the Gratuity Act. I may notice that Delhi Jal Board has since been exempted under Section 5 (1) of the Gratuity Act vide Notification dated 12th June, 2003 and similarly vide Notification dated 22nd July, 2005 MCD has also been exempted from the

applicability of the Gratuity Act. The petitioner DDA also, if of the view that the gratuity and pensionary benefits given by it to its employees under the CCS Pension Rules are not less favourable than the benefits under the Gratuity Act, ought to satisfy the Central Government in this regard under Section 5(1) of the Act. I also find that the Division Bench of this Court in ***Rati Ram*** (supra) has reiterated the applicability of the Gratuity Act to the employees of MCD for the period prior to the exemption granted in the year 2005.

6. In ***DTC Retired Employee's Association*** (supra), the Supreme Court was concerned with a Pension Scheme for its retired employees floated by the DTC in the year 1992. The option to be included in the said scheme was given also to the employees who had retired prior to coming into force of the said scheme but subject to their returning *inter alia* the gratuity received by them at the time of their retirement, together with interest thereon. The said requirement for refund of gratuity with interest was challenged. It was contended that gratuity paid under the provisions of the Gratuity Act could not be required to be refunded. It was in that context that the Supreme Court observed that the employees cannot have the benefit of both pension and gratuity and with reference to Section 4 (5) of the Gratuity Act held that the pension which under the new scheme was being made payable, was a similar relief as intended to be given by payment of gratuity.

7. I am unable to agree with the contention of Mr. Bhupesh Narula, Advocate that the present lis is fully covered by the judgment in ***DTC Retired Employee's Association***. The observations therein have to be read in context in which they were made. The employees of the DTC had been paid gratuity as was their right under the Gratuity Act. At that time they were not entitled to pension. The employees who had already retired would not have become entitled to pension under the scheme after their retirement.

However DTC decided to give opportunity of availing pension to such already retired employees also, subject however to their refunding the gratuity already received. The refund of gratuity therein was a condition imposed for availing pension to which retired employees were otherwise not entitled. There was no compulsion on the already retired employees who had received gratuity to join the pension scheme. They could retain their gratuity and not avail of the pension. If they desired to avail of the pension, they had to fulfill the condition therefor. The said judgment cannot be read as laying down that the employees can never be entitled to both pension and gratuity. I may in this regard also notice that Section 4(5) of the Gratuity Act only seeks to preserve the right of the employee to receive better terms of gratuity than under the Act under any award or agreement or contract with the employer and is a beneficial provision and cannot be read as limiting or taking away the benefit of gratuity given under the Act. Further Section 4 (5) only refers to better terms of gratuity and does not refer to better terms of cessation of employment or better terms of pension. Thus it appears that the employer of an establishment otherwise covered by the Gratuity Act cannot escape the payment of gratuity, relying on Section 4(5), by contending that since he is giving other terminal benefits to the employee, he is not liable to pay gratuity under the Act.

8. Mr. Arun Birbal, Advocate next draws attention to *Beed District Central Co-operative Bank Ltd. Vs. State of Maharashtra* (2006) 8 SCC 514 also holding that even while interpreting a beneficent statute like the Gratuity Act, either a contract has to be given effect to or the statute; the provisions of the Gratuity Act envisage for one scheme; Section 4(5) of the Gratuity Act does not contemplate that the workman would be at liberty to opt for better terms of the contract while keeping the option open in respect of a part of the statute; he has to opt for either of them and not the best of the terms of the statute as well as those of the contract, he cannot have both. Mr. Arun Birbal however points out that though the said judgment is in his favour but has been dealt with in a

subsequent recent judgment dated 15th December, 2009 in Civil Appeal No.1478/2004 of the Supreme Court of India title **Allahabad Bank Vs. All India Allahabad Bank Retired Employees' Association**. The Supreme Court therein held that there is no escape from the payment of gratuity under the provisions of the Gratuity Act unless the establishment is granted exemption under Section 5 (1) of the Act. A distinction was drawn between pension and gratuity. **DTC Retired Employee's Association** and **Beed District Central Co-operative Bank Ltd.** (supra) were held to have been decided in their peculiar facts. Mr. Arun Birbal however seeks to show an observation in the judgment in Allahabad Bank where it was observed that in that case at the time of superannuation there was no scheme for payment of gratuity. It is contended that in the present case the CCS (Pension) Rules also providing for gratuity were available at the time of superannuation. The Supreme Court in **Allahabad Bank** however also held that the court has no power under Section 4(5) of the Act to grant exemption to the employer for the reason of any better terms being offered to the employee. The judgment in **Dharam Prakash Sharma** (supra) was reaffirmed.

9. That brings me to the judgment of the single judge of this Court in **Delhi Jal Board** (supra). In that case the authorities under the Gratuity Act relying on the judgment in **DTC Retired Employee's Association** had dismissed the claim of the petitioner for gratuity. The Delhi Jal Board also raised a plea that its employees were government employees and the provisions of the Gratuity Act are not applicable to them. The said plea was not accepted notwithstanding Section 51(3) of the Delhi Water Board Act stipulating that the terms and conditions of the services of employees of the Board shall be governed by the terms & conditions of service and rules and regulations applicable to government employees and by the orders and directions issued by the Central Government from time to time. The judgment in **DTC Retired Employees Association** was held to be not applicable to the employees of the Delhi Jal Board.

10. Mr. Arun Birbal points out that though the judgment of the single judge in ***Delhi Jal Board*** has been upheld by the Division Bench vide judgment dated 13th January, 2009 in LPA No.780/2008 titled ***Delhi Jal Board Vs. Gulshan Kumar Oberoi***, an SLP there against being SLP Civil No.4451/2009 is pending before the Supreme Court and contempt proceedings before this Court have been stayed. However as far as this Court is concerned, the said judgment is final and squarely applies to the petitioner DDA.

11. In view of the judgments and the discussion thereon herein above, the question of applicability of the Gratuity Act to employees of petitioner DDA is no longer *res integra* and the same is held applicable to the petitioner DDA. The writ petitions thus have to fail.

12. Before parting with the case I may notice that Mr. Arun Birbal at the commencement of hearing had also drawn attention to the fact that the respondents in these petitions had approached the authorities under the Gratuity Act after a long delay of 2 to 8 years and that the appeals preferred by the DDA against the order of the Controlling Authority had also been dismissed for the reason of having been filed beyond the time prescribed in the proviso to Section 7(7) of the Act. However Mr. Anuj Aggarwal, Advocate for the respondent in W.P.(C) No.6886/2003 has stated that in view of the legal question involved, he is not pressing the said plea and would like the matter to be decided on merits. The respondents in the other two petitions are *ex parte*.

All the writ petitions are in the circumstances dismissed.

However no order as to costs.

**RAJIV SAHAI ENDLAW
(JUDGE)**

5th April, 2010
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