IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2346 OF 2006

Shri Ramsevak Sangram Yadav
Ramjivan Chawl, Room No.5,
Ranojiwadi, Rani Sati Road,
Malad (East), Mumbai .... Petitioner

Vs.

M/s National Textile Corporation (S.M.) Limited,
Apolo House, N.M. Joshi Marg,
Mumbai – 400 012. .... Respondents

(for it's units viz. M/s Podar Processors
& M/s Bharat Textile Mills).

Mr. S.N. Deshpande alongwith Mrs. Suvarna Munshi, Advocate for the Petitioner.

Ms. Meena Doshi, Advocate for the Respondents.

Coram : **Smt. R.P. SondurBaldota, J.**
Date : 8th May, 2015

<u>JUDGMENT</u> :

1 The petitioner-workman files this petition to challenge the order dtd. 13th July, 2006 passed by the Industrial Court, Mumbai in Complaint (ULP) No.173 of 2004 alleging unfair labour practice under Item 9 of Schedule IV of Maharashtra

Recognition of Trade Union and Prevention of Unfair Labour Practices Act, 1971 (“MRTU & PULP Act” for short).

2 The petitioner had joined services of M/s Potdar Processors and was later transferred to M/s Bharat Textile Mills. Subsequently both the companies were closed and the respondent, the undertaking of Central Government of India took over the mills. On 10th September, 2003, it issued notice offering voluntary retirement scheme (VRS) to the employees. The petitioner accepted the offer and was relieved from service from 29th November, 2003 on payment of Rs.1,83,989/-. According to the petitioner, the dues payable to him under the VRS were not correctly calculated. He was also not paid the gratuity. Therefore after some correspondence with the defendant, he filed complaint alleging unfair labour practice on the part of the respondent. In the complaint, he sought direction for payment of Rs.1,87,961.10 ps. consisting of gratuity of Rs.62,000.25 and additional ex-gratia amount under Clause I(ii) of the notice.

3 The respondent contested the complaint contending firstly that the complaint filed by the petitioner alleging unfair labour practice under Item 9 of Schedule IV of MRTU & PULP Act was not maintainable, since there was no agreement or settlement whatsoever with the petitioner. The demand for additional amount

made in the complaint by the petitioner was under the offer of voluntary retirement scheme given by the defendant. Therefore, it cannot be said that there was any breach of settlement or agreement by the respondent. The respondent claimed that the petitioner has mis-interpreted the scheme and that the payment made to him was as per correct calculations. As regards gratuity, the respondent contended that the petitioner is not entitled to get gratuity under the Payment of Gratuity Act. Therefore, it was rightly not given to him.

4 The parties led evidence in support of their respective claims. On appreciation of the evidence, the Industrial Court, by the judgment impugned in the petition, partly allowed the complaint and directed the respondent to pay a sum of Rs.1,05,037/- to the petitioner with interest @6% per annum from 29th November, 2003 till the actual payment, being the amount due to the petitioner on account of incorrect calculation of the ex-gratia amount. As regards the claim of gratuity, it held that it has no jurisdiction to consider the dispute relating thereto since a separate forum has been provided under Section 7(4)(b) of Payment of Gratuity Act, 1972. Therefore, the dispute needs to be decided by the controlling authority under the Payment of Gratuity Act. It nonetheless further observed that even if the argument of the petitioner as regards the jurisdiction of the Industrial Tribunal

to decide the dispute of gratuity is to be accepted and non-payment of gratuity is to be treated as violation of the agreement of voluntary retirement scheme, on the facts of the case, the petitioner was not entitled to gratuity. It noted that the petitioner was made permanent on 1st April, 2003. Prior to that, he was a badali worker. Section 2A of the Gratuity Act provides that interruption in service on account of sickness, accident, leave absence, lay-off, strike or lockout is to be excluded for calculation of uninterrupted service. Since the petitioner was a badali worker, he was not covered by any of the exceptions and as such had not completed uninterrupted service for more than five years to be eligible for the purpose of gratuity.

5 Mr. Deshpande, the learned advocate for the petitioner submits that the Industrial Tribunal firstly erred in holding that it had no jurisdiction to consider the dispute raised by the petitioner regarding payment of gratuity, when Section 28 read with Item 9 of Schedule IV of MRTU & PULP Act and Section 32 thereof gives necessary powers to the Industrial Tribunal. He argues that the gratuity was payable under the voluntary retirement scheme and not under the Payment of Gratuity Act. Secondly, he argues that the Industrial Tribunal erred in holding that even on the facts of the case, the petitioner was not entitled for gratuity.

6 Mr. Deshpande submits that this court, in it's decision in Carona Limited vs. Sitaram Atmaram Ghag and Others, reported in 2000-II-CLR, page 295 has held in clear terms that the dispute regarding non-payment of gratuity is covered by Item 9 of Schedule IV of MRTU & PULP Act. The decision of this court in Carona case, was given at the stage of admission of the petition. The Court was considering whether the petitioner had made out a prima facie case for admission. The voluntary retirement scheme offered by the employer provided for gratuity as per the Gratuity Act. It further provided that for calculation of gratuity, the service period above six months would be treated as one completed year and period below six months would be ignored for the computation of gratuity. The gratuity was payable pursuant to the right created under the Payment of Gratuity Act. It was contended therein that a remedy has been provided under the Act and consequently no other authority except the authority under the Payment of Gratuity Act would have jurisdiction to recover gratuity payable under the Payment of Gratuity Act. This court by the decision cited held that the restrictions would be limited to the cases where parties seek to initiate proceedings for recovery of gratuity dues and not where the dues were sought to be recovered as part of payment to be recovered under the voluntary retirement scheme. Mr. Deshpande submits that the fact that the decision in the Carona case was at

the stage of admission of the petition and not the final decision would be immaterial for considering it's ratio on a question of law. He argues that once a point of law is decided by this court, whether at the admission stage, or at the final stage, it becomes a binding decision so long as the same is not set aside by the Division Bench or the Apex court. He seeks to draw support from a decision of the Apex Court in Shah Babulal Khimji Vs. Jayaben D. Kania and another, reported in AIR, 1981, Supreme Court, page 1786. In Shah Khimji's case, the Apex Court while interpreting the term 'judgment' for the purpose of appeal has observed that the judgment can be of three kinds : (i) final judgment, (ii) a preliminary judgment and (iii) intermediary or interlocutary judgment. The final judgment would be unquestionably a judgment from which an appeal would lie to a Division Bench. A preliminary judgment may be in two forms one is of dismissal of the suit on a preliminary objection without going into merits of the suit. Such decision would be a judgment finally deciding the suit. The other form is of rejecting the preliminary objections to the suit thereby keeping the suit alive. The Apex Court has observed that even such order which affects a vital right of the defendant would be appealable. As regards interlocutory judgment, it is observed that the same would be appealable if it falls within clauses (a) to (w) of Order 43, Rule 1 of Code of Civil Procedure. It would also be appealable if it has the trappings of finality.

7 In my considered opinion, Mr. Deshpande is right in his submission as regards the binding force of the decision on a question of law stated even in a interlocutory judgment. It is to be seen now, whether the decision in Carona case is applicable to the facts of the present case. Mrs. Doshi, the learned advocate for the respondents submits that this court by it's another decision of bench of Single Judge, which is earlier in point of time has held that the Payment of Gratuity Act is a self-contained and complete code and it's provisions impliedly exclude recourse to any other statute. The decision cited by her is in Rashtria Hair Cutting Saloon Vs. The Maharashtra Kamgar Sabha and Ors., reported in 1994 (3) L.L.J., page 1086. In that case, question of payment of gratuity arose out of a charter of demand for fixation of pay-scales by the union, which was referred for adjudication to Industrial Court. It was held that the Industrial Court has no jurisdiction to consider entitlement to the benefits of gratuity under the provisions of Payment of Gratuity Act. It is her argument that since the decision in Carona's case is contrary to this case, a reference may have to be made of the question to a larger bench.

8 Ms. Doshi also relies upon decision of the Apex Court in State of Punjab Vs. The Labour Court, Jullundur and others, reported in A.I.R. 1979 Supreme Court,page 1981, wherein the

workman, his claim for gratuity under the Payment of Gratuity Act being disputed, had applied under Section 33-C(2) of the Industrial Disputes Act. The claim made was as a part of retrenchment compensation. The Apex Court on careful perusal of the relevant provisions of the Payment of Gratuity Act held as follows:

> "7 It is apparent that the Payment of Gratuity Act enacts a complete Code containing detailed provisions covering all the essential features of a scheme for payment of gratuity. It creates the right to payment of gratuity, indicates when the right will accrue, and lays down the principles for quantification of the gratuity. It provides further for recovery of the amount, and contains an especial provision that compound interest at nine per cent per annum will be payable on delayed payment. For the enforcement of its provisions, the Act provides for the appointment of a controlling authority, who is entrusted with the task of administering the Act. The fulfilment of the rights and obligations of the parties are made his responsibility, and he has been invested with an amplitude of power for the full discharge of that responsibility. Any error committed by him can be corrected in appeal by the appropriate Government or an appellate authority particularly constituted under the Act.
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> 8 Upon all these considerations, the conclusion is inescapable that Parliament intended that proceedings for payment of gratuity due under the Payment of Gratuity Act must be taken under that Act and not under any other. That being so, it must be held that the

> applications filed by the employee respondents under Section 33-C(2) of the Industrial Disputes Act did not lie, and the Labour Court had no jurisdiction to entertain and dispose of them. On that ground, this appeal must succeed."

9 As regards the special jurisdiction of the forums provided under the Payment of Gratuity Act, Ms. Doshi also submits that where an Act creates an obligation and enforces performance in a specified manner, the general rule is that the performance can not be enforced in any other manner. In support, she relies upon decision of the Apex Court in The Premier Automobiles Limited vs. Kamlakar Shantaram Wadke and others, reported in A.I.R., 1975 Supreme Court, page 2238, where the Apex Court while deciding the question of jurisdiction of the Civil Court in relation to industrial disputes considered broad and general division of cases into three classes- i) where there is liability existing at common law, which is only re-enacted by the statute with a special form of remedy without special words to exclude common law remedy, ii) where statute has created a liability but has given no special remedy and iii) where statutes creates liability not existing in common law and also gives a particular remedy to enforce it. After consideration of various Indian and English decisions cited before it, the Apex Court laid down following principles to govern the field.

> "23 To sum up, the principles applicable to the jurisdiction of the Civil Court in relation to an industrial dispute may be stated thus:
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> (1). If the dispute is not an industrial dispute, nor does it relate to enforcement of any other right under the Act, the remedy lies only in the civil court.
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> (2). If the dispute is an industrial dispute arising out of a right or liability under the general or common law and not under the Act, the jurisdiction of the civil court is alternative, leaving it to the election of the suitor concerned to choose his remedy for the relief which is competent to be granted in a particular remedy.
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> (3). If the industrial dispute relates to the enforcement of a right or an obligation created under the Act, then the only remedy available to the suitor is to get an adjudication under the Act.
>
> (4). If the right which is sought to be enforced is a right created under the Act, such as Chapter VA then the remedy for its enforcement is either Section 33C or the raising of an industrial dispute, as the case may be."

10 Application of the ratio in Carona's case must be considered in the light of the above principles. It's careful perusal shows that the facts of the case before the court therein have not been fully stated, in the decision. It is not known whether the

dispute was about the entitlement for gratuity or non-payment of it, or incorrect computation of gratuity amount or combination of all. If the entitlement is not disputed and a complaint of either non-payment or incorrect payment is made, for which complaint of unfair labour practice is filed, the same can be maintained in view of Section 30 of the MRTU & PULP Act as held in Carona case. But if the entitlement is disputed, as in the present case, the remedy provided under the Payment of Gratuity Act must be followed for determination of the eligibility for gratuity.

11 Mr. Deshpande, then submits that the MRTU & PULP Act is a special act enacted by the State, which specifically deals with the unfair labour practice committed or being committed by both employer and the employees. Since the complaint filed by the petitioner was under Item 9 of Schedule IV of MRTU & PULP Act alleging that the respondent had failed to implement the agreement of voluntary retirement scheme and payment of gratuity under the Payment of Gratuity Act being part of the scheme, the jurisdiction of the special court to consider the same cannot be denied. His second submission made across the bar is that the gratuity payable to the petitioner was as per the agreement between Rastriya Mill Mazdoor Sangh and Mill Owners Association. According to him, the gratuity offered under the voluntary retirement scheme was pursuant to that agreement and

not as statutory liability under the Payment of Gratuity Act. Since the petitioner accepted the offer of receiving gratuity amount under the scheme of voluntary retirement, his right flows from the offer of voluntary retirement scheme and it's acceptance by the petitioner. Ms. Doshi, points out that it is not the case of the petitioner in the complaint that the gratuity payable to the petitioner was under the agreement between Rastriya Mill Mazdoor Sangh and Mill Owners Association. Besides, relying upon the decision of the Apex Court in Shramik Uttarsh Sabha vs. Raymond Woollen Mills Limited and Others, reported in (1995) 3 Supreme Court Cases, page 78, she submits that Bombay Industrial Relations Act and MRTU & PULP Act do not operate in different fields and the obvious intent of the legislature was that they should operate in tandem and compliment each other in respect of industries to which BIR Act had been made applicable. Therefore the two statutes must be read together. I find substance in the submission advanced by Ms. Doshi.

12 In all the above circumstances, in my opinion, the finding of the Industrial Tribunal that it had no jurisdiction to consider the dispute raised by the petitioner regarding payment of gratuity is correct. The finding of the Industrial Tribunal on the merit of the claim of the petitioner to gratuity is also correct and proper. Undisputedly the petitioner was a badli worker until 1st

April, 2003 could not be considered as continuously in service for a period of more than 5 years for the purpose of gratuity.

13 The Writ Petition is therefore dismissed.

(Smt. R.P. SondurBaldota, J.)

CERTIFICATE

Certified to be true and correct copy of the original signed judgment.