IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGAH

LPA No.529 of 2015 (O&M)
Date of decision: 07.04.2015.

M/s Paliwal Overseas Pvt. Ltd., G.T. Road, Panipat …… Appellant.

Versus

Ashutosh Kumar and others ….. Respondents.

CORAM: HON'BLE MR. JUSTICE S.S. SARON
HON'BLE MR. JUSTICE SURINDER GUPTA

Present: Mr. Vikas Chatrath, Advocate, for the appellant.

S.S. Saron, J.

The Letters Patent Appeal has been filed by M/s Paliwal Overseas Pvt. Ltd. ('Paliwal Overseas' - for short) (appellant) against the impugned judgment dated 15.01.2015 passed by the learned Single Judge in CWP No.20551 of 2011 whereby the learned Single Judge allowed the petition filed by Ashutosh Kumar (respondent No.1).

Along with the appeal, civil miscellaneous application, i.e. CM No.1075-LPA of 2015, has been filed seeking condonation of 15 days' delay in filing the appeal. It is submitted that the appellant was under the *bona fide* impression that limitation for filing the letters patent appeal was sixty days and, accordingly, it approached its advocate for filing the appeal. Therefore, inadvertently a delay of 15 days occurred in filing the appeal which is not intentional or *mala fide.*

We have heard learned counsel for the appellant and with his assistance gone through the records of the case.

Ashutosh Kumar (respondent No.1) filed a petition in this Court seeking quashing of the order dated 30.06.2011 (Annexure P3) passed by the learned Appellate Authority under the Payment of Gratuity Act-cum-Deputy Labour Commissioner, Panipat ('Appellate Authority' - for short) (respondent No.3) whereby the orders dated 22.09.2010 and 16.12.2010 (Annexures P1 and P2) passed by the learned Controlling Authority under the Payment of Gratuity Act, Circle Panipat ('Controlling Authority' - for short) (respondent No.4) were set aside and the case was remanded to the learned Controlling Authority (respondent No.4) with the direction to frame specific issues involved and decide the same. Respondent No.1 also prayed for quashing the order dated 16.12.2012 (Annexure P2) passed by the learned Controlling Authority (respondent No.4) thereby reviewing its own order dated 22.09.2010 (Annexure P1) on the quantum of payment payable by the respective parties alleging the same to be totally illegal, contrary to the statutory provisions, unjust, irrational, against principles of natural justice and not maintainable. A further prayer was made for quashing the order dated 22.09.2010 (Annexure P1) passed by the learned Controlling Authority (respondent No.4) to the extent that inadequate interest had been granted while allowing the claim to him (respondent No.1). A further prayer was made for directing Paliwal Overseas (appellant) and M/s Abhitex International (respondent No.2) to release the due amount of gratuity to respondent No.1 to the tune of Rs.88,269/- along with interest @ 10% per annum from the date of termination of his service, i.e. 30.09.2007, till the date of actual disbursement.

Respondent No.1 was appointed as an Accountant by the appellant on 01.01.1991. He continued in the said capacity with the appellant till 29.02.2004. According to him, his services were verbally transferred to M/s Abhitex International (respondent No.2), a sister concern of the appellant. He was asked to work with M/s Abhitex International (respondent No.2) which he duly abided and he worked from 01.03.2004 till 30.09.2007. On the latter date his services were terminated. He rendered seventeen years of continuous service without any break. A legal notice dated 21.11.2008 was served by him for release of his due amount of gratuity. This had no effect. He, therefore, filed a claim petition before the learned Controlling Authority (respondent No.4) on 06.02.2009.

In reply to the claim petition of respondent No.1, the appellant admitted his services w.e.f. 01.01.1991 to 29.02.2004 for thirteen years and two months and pleaded 'no objection' to release the gratuity accordingly for an amount of Rs.60,750/- only. It was, however, claimed that the appellant was a different entity from M/s Abhitex International (respondent No.2). M/s Abhitex International (respondent No.2) admitted the service of respondent No.1 w.e.f. 01.03.2004 to 30.09.2007. According to respondent No.1, both the replies, i.e. reply filed by the appellant and M/s Abhitex International (respondent No.2), were signed by the same person, i.e. Shri Avinash Chander Sharma. He signed the written statement on behalf of the appellant as its Director and the written statement on behalf of M/s Abhitex International (respondent No.2) as its Partner.

The learned Controlling Authority (respondent No.4), vide its order dated 22.09.2010 (Annexure P1), held that M/s Abhitex International (respondent No.2) could not establish on record that it had ever issued any fresh appointment letter to respondent No.1 at the time of his joining its service on 01.03.2004; besides, Paliwal Overseas (appellant) could not establish on record that on 29.02.2004, respondent No.1 had left its services and full and final account was settled with him on the said date, i.e. 29.02.2004. Thus, it was held that it could easily be inferred that respondent No.1 had not left the service of the appellant on 29.02.2004. Rather his services were transferred to M/s Abhitex International (respondent No.2) under the control of the same one person. It was consequently held that respondent No.1 had drawn last wages of Rs.9,000/; besides, had rendered continuous services for a period of seventeen years. The gratuity on the said basis payable to him worked out to Rs.88,269/-, which was awarded. Respondent No.1 was held entitled to the said amount @ 9% simple interest per annum which was allowed for a period of 1½ years out of the span of three years. He was also held entitled to an amount of Rs.1,00,185/-. Paliwal Overseas (appellant) and M/s Abhitex International (respondent No.2) were directed to deposit the amount before the learned Controlling Authority (respondent No.4) within thirty days failing which they were further liable to pay simple interest @ 9% per annum on the amount of gratuity only from the next day of the date of order till its realization.

After about three months of the passing of the order dated 22.09.2010 (Annexure P1), Paliwal Overseas (appellant) submitted an application dated 13.12.2010 before the learned Controlling Authority (respondent No.4) for clarification of the amount due payable to respondent No.1. It was primarily submitted by the appellant that it was liable to pay the amount towards gratuity only for the period service rendered by respondent No.1 with it. The learned Controlling Authority (respondent No.4), vide its order dated 16.12.2010 (Annexure P2) held that the appellant was liable to pay/deposit a sum of Rs.60,750/- only out of the total awarded amount. The application filed by Paliwal Overseas (appellant) was accordingly disposed of.

Paliwal Overseas (appellant) aggrieved against the orders dated 22.09.2010 and 16.12.2010 (Annexures P1 and P2) filed an appeal before the learned Appellate Authority (respondent No.3). The appeal was filed after an amount of Rs.60,750/- had been deposited. Respondent No.1 also filed a counter-appeal dated 22.02.2011 assailing the aforesaid orders (Annexures P1 and P2) passed by the learned Controlling Authority (respondent No.4). No appeal was filed by M/s Abhitex International (respondent No.2) and, according to respondent No.1, the order dated 22.09.2010 (Annexure P1) attained finality qua it.

Paliwal Overseas (appellant) in its appeal submitted that clubbing its company with M/s Abhitex International (respondent No.2) for the purpose of determining the length of service of respondent No.1 was bad in law and as such the order dated 22.09.2010 (Annexure P1) passed by the learned Controlling Authority (respondent No.4) was liable to be set aside. The learned Appellate Authority (respondent No.3) after consideration of the case held that the orders passed by the learned Controlling Authority (respondent No.4) were elusive and it had failed to strike issues involved in the case. In the absence of specific issues and on whom did the burden lie, it was said that it was hard to arrive at a decision on the factual position.

Therefore, the conclusions arrived at by the learned Controlling Authority (respondent No.4) were held to be not justified. It was also observed that an appeal had also been filed by respondent No.1 expressing his dissatisfaction with the aforesaid impugned orders passed by the learned Controlling Authority (respondent No.4). Therefore, it was held to be in the interest of justice that the said orders dated 22.09.2010 and 16.12.2010 (Annexures P1 and P2) passed by the learned Controlling Authority (respondent No.4) were set aside. The amount deposited by Paliwal Overseas (appellant), it was said that it shall remain deposited and should not be disbursed till final disposal of the main application.

Respondent No.1, as already noticed, assailed the aforesaid order dated 22.09.2010 to the extent that inadequate interest had been granted and order dated 16.12.2010 passed by the learned Controlling Authority as also the order dated 30.06.2011 (Annexure P3) passed by the learned Appellate Authority (respondent No.3) by way of writ petition in this Court.

It was urged on behalf of respondent No.1 in his writ petition that the learned Appellate Authority (respondent No.3) had remanded the case for fresh adjudication by the learned Controlling Authority (respondent No.4) on flimsy grounds. The learned Single Judge on perusal of the impugned order dated 30.06.2011 (Annexure P3) passed by the learned Appellate Authority (respondent No.3) observed that it revealed that the only reason assigned for remanding the case was that the Controlling Authority had failed to frame issues arising in the case and a direction thereby had been issued to the learned Controlling Authority (respondent No.4) to frame specific issues involved and to decide the same after allowing the parties to lead their respective evidence, if any. It was said that the order had been made applicable to the appeal filed by respondent No.1 as well and both the appeals had consequently been disposed of by a common order. It was further observed by the learned Single Judge that a perusal of the order dated 22.09.2010 (Annexure P1) passed by the learned Controlling Authority (respondent No.4) showed that two issues were framed; i.e. (i) Whether the applicant (now respondent No.1) was entitled to the amount of gratuity, as claimed? If so, to what amount? and (ii) The relief? These two issues in the considered opinion of the learned Single Judge were sufficient for the sum total adjudication of the rights of the respective parties and for them to know their respective cases and what evidence was required to be led by either in support of the cases, pro and contra. The learned Single Judge agreed with the contention of the learned counsel for respondent No.1 that the issues framed by the learned Controlling Authority (respondent No.4) upon which evidence was led and the case was decided in favour of respondent No.1, were broad enough for leading any evidence without remanding the case for no useful purpose. The parties, in fact, did lead evidence and it was not known from where the learned Appellate Authority (respondent No.3) had culled out the necessity for framing specific issues and that too without indicating what those issues may be. It was further observed that the exercise of jurisdiction by the learned Appellate Authority (respondent No.3) could not be based on principles of framing of issues as required under the Code of Civil Procedure, 1908. The learned Appellate Authority (respondent No.3), it was said, was deciding an appeal in a gratuity matter under the Payment of Gratuity Act, 1972 ('Act' - for short) and not in a civil suit. The irregular exercise of jurisdiction, it was said, had resulted in failure of justice where the learned Appellate Authority (respondent No.3) had even refused to release the admitted amount of gratuity as locked by it under the impugned order for fresh adjudication on remand directions. It was further said that there was sufficient evidence adduced before the learned Controlling Authority (respondent No.4) when it passed the first order, i.e. 22.09.2010 (Annexure P1), on the premise that there was no proof by way of documentary evidence of a transfer order in respect of respondent No.1 from Paliwal Overseas (appellant) to M/s Abhitex International (respondent No.2) involving his shifting from one to the other. If respondent No.1 was transferred by a verbal order, he had to comply quietly lest he lost his job on the wrath earned. It was, thus, thought fit by the learned Single Judge to lift the veil of the two entities and to go to the root of the matter and both were found to be one and the same thing insofar as respondent No.1/ claimant was concerned. The respondent No.1, it was said, was not to be denied the benefit of gratuity for the period of service he rendered with M/s Abhitex International (respondent No.2) by taking it as not reckonable towards total period for earning gratuity on the ground that the second part of the period of service was less than the minimum period of five years as prescribed in the Act for entitlement to payment of gratuity. It was held that there was indeed a definitive continuity of employment in the same premises run by the same man, who defended both the entities before the learned Controlling Authority (respondent No.4) in an effort to deny gratuity partially. Accordingly, the petition filed by respondent No.1 was allowed by the learned Single Judge and all the orders were set aside leaving only the order dated 22.09.2010 (Annexure P1) as enforceable subject to limitations as mentioned in the order. It was found that the amount of gratuity became due and payable on 30.09.2007, but Paliwal Overseas (appellant) did not care to deposit the same towards gratuity with the learned Controlling Authority (respondent No.4) which amount of money remained with them for three long years for them to enjoy its use which they could not. The amount was to be deposited by law within one month from the date of accrual of the *cause of action* brought about by termination of services of respondent No.1. Therefore, it was held that respondent No.1 ought to have been awarded interest @ 10%, which was prescribed under the Act and not 9% as awarded. Besides, the 9% interest awarded per annum had been restricted for a period of 1½ years out of the span of three years vide order dated 22.09.2010 (Annexure P1) on the fallacious reason that justice would prevail if it was so ordered. Both the said directions were consequently not found proper and were set aside. It was also held that respondent No.1 would be entitled to interest @ 10% on the principal amount by taking the total period of service as seventeen years from 01.01.1991 to 30.09.2007. It was further observed that the learned Controlling Authority (respondent No.4) in passing the order on the clarification application, i.e. order dated 16.12.2010 (Annexure P2), modified its final order and the order of the learned Appellate Authority (respondent No.3) had been wangled by Paliwal Overseas (appellant) for personal gain. For being compelled by the unwarranted litigation at the hands of the appellant after the passing of the first order by the Controlling Authority (respondent No.4), it was held that respondent No.1 had been seriously wronged by frivolous litigation initiated by Paliwal Overseas (appellant) and, therefore, for the time and money spent on the litigation, respondent No.1 was held entitled to compensatory damages costs of Rs.25,000/- to be paid by deposit before the learned Controlling Authority (respondent No.4). The amount of gratuity and interest thereon @ 10% as directed and Rs.25,000/- was ordered to be deposited by the appellant with the learned Controlling Authority (respondent No.4).

Learned counsel appearing for the appellant does not dispute the services rendered by respondent No.1 with Paliwal Overseas (appellant) from 01.01.1991 to 29.02.2004. The claim raised by him in this regard has been admitted by Paliwal Overseas (appellant). The amount payable for this period works out to Rs.60,750/-. The same was found payable to respondent No.1 towards gratuity. It is, however, submitted that M/s Abhitex International (respondent No.2) was an independent and distinct entity from the appellant, and respondent No.1 had rendered services with M/s Abhitex International (respondent No.2) from 01.03.2004 to 30.09.2007, which was less than five years. As such, gratuity was not payable to him for the said period as per the provisions of the Act. Therefore, respondent No.1, it is submitted, is not entitled to gratuity as per the provisions of the Act and the services rendered by him for the period with M/s Abhitex International (respondent No.2) could not be clubbed with the services rendered with Paliwal Overseas (appellant). It is submitted that it was for the said purpose that clarification was sought from the learned Controlling Authority (respondent No.4) as the amount payable by Paliwal Overseas (appellant) was only Rs.60,750/-, which was liable to be paid. It is primarily submitted on behalf of the appellant that the gratuity payable to respondent No.1 is for services rendered by him with Paliwal Overseas (appellant) only and this cannot be clubbed with the services rendered by him with M/s Abhitex International (respondent No.2), which is a separate and distinct legal entity. Therefore, it is submitted that the learned Appellate Authority (respondent No.3), vide order dated 30.06.2011 (Annexure P3), had rightly remanded the case to the learned Controlling Authority (respondent No.4) to decide the matter afresh after framing specific issues involved in the case. As such, there was no illegality or jurisdictional error in the order dated 30.06.2011 (Annexure P3) passed by the learned Appellate Authority (respondent No.3) under the Act. Learned counsel for the appellant in support of his contention cites Regional Provident Fund Commissioner v. M/s Raj's Continental Exports (P) Ltd., 2007 (2) S.C.T. 482 (S.C.) and also State Bank of Bikaner and Jaipur v. Om Prakash Sharma, 2006 (3) SCT 104 (SC). It is further submitted that respondent No.1 had different provident fund and Employees' State Insurance numbers with the appellant and M/s Abhitex International (respondent No.2). In fact, respondent No.1 had withdrawn the provident fund with the appellant in the year 2005 and withdrawn it from M/s Abhitex International (respondent No.2) in the year 2008. It is submitted that provident fund could be drawn on leaving the job and the relationship of master and servant had ceased in 2005 in respect of the appellant. A reference has been made to the instructions under Form No.19 of the Employees' Provident Fund Scheme, 1952. It is submitted that when respondent No.1 had joined M/s Abhitex International (respondent No.2) he was liable to transfer his provident fund by making an application in Form-13 and his failure to apply would show that there had been cessation of his services with the appellant.

After giving our thoughtful consideration to the matter, it may be noticed that the issue involved in the case is that whether respondent No.1 is entitled for gratuity only for the period he served with Paliwal Overseas (appellant) from 01.01.1991 to 29.02.2004 and whether he is also entitled for gratuity for the subsequent period of service rendered by him with M/s Abhitex International (respondent No.2) from 01.03.2004 to 30.09.2007 being a separate and distinct legal entity.

From the facts that are on record, it is quite evident that when the services of respondent No.1 were transferred to M/s Abhitex International (respondent No.2) on 01.03.2004, there was no order of transfer given to him and neither has any order been produced by Paliwal Overseas (appellant) transferring him or terminating his services on the said date. The learned Single Judge considered it fit to lift the veil of the two entities and go to the root of the matter and found both the entities to be one and the same thing insofar as respondent No.1 was concerned. It was held that in definitive continuity of employment in the same premises run by the same man, who defended both the entities before the learned Controlling Authority (respondent No.4) in an effort to deny gratuity partially. Paliwal Overseas (appellant) has not been able to dispute that the written statements filed before the learned Controlling Authority (respondent No.4) by it and by M/s Abhitex International (respondent No.2) were filed by the same person, namely, Shri Avinash Chander Sharma, who signed the written statement on behalf of Paliwal Overseas (appellant) as its Director and that of M/s Abhitex International (respondent No.2) as a Partner. The stand taken by Paliwal Overseas (appellant) in its written statement in this regard is that Paliwal

Overseas (appellant) and M/s Abhitex International (respondent No.2) are separate and distinct legal entities. It is submitted that Paliwal Overseas (appellant) is a private limited company whereas M/s Abhitex International (respondent No.2) is a partnership concern. It is stated that they have common signatories for the purpose of litigation and this could not by any stretch of imagination be a basis for declaring them to be under one control; besides, the learned Controlling Authority (respondent No.4) did not frame any clear issue whether these could be considered under one control for the purpose of calculating the service duration of respondent No.1. The reply that has been filed in fact is quite evasive and the benefit of gratuity is not liable to be denied to respondent No.1 to which he is statutorily entitled to under the law.

Issues in fact were indeed framed by the learned Controlling Authority (respondent No.4), i.e.

(i) Whether the applicant (respondent No.1) is entitled for the amount of gratuity, as claimed? If so, to what amount? and

(ii) Relief.

The remanding of the case by the learned Appellate Authority (respondent No.3) in pursuance of its order dated 30.06.2011 (Annexure P3) on the premise that the issues were not framed was wholly improper. Even otherwise, where the parties are alive to the issues involved, the Court can adjudicate upon the same.

In Kunju Kesavan v. M.M. Philip and others, AIR 1964 S.C. 164, it was said that the parties in the said case went to trial, fully understanding the central fact whether the succession as laid down in the

Ezhava Act applied to Bhagvathi Valli or not. The absence of an issue, it was held, therefore, did not lead to a mis-trial sufficient to vitiate the decision.

In the present case, a perusal of the order dated 22.09.2010 (Annexure P1) passed by the learned Controlling Authority (respondent No.4) would show that respondent No.1 appeared as AW1 and stated that he joined Paliwal Overseas (appellant) w.e.f. 01.01.1991 and he worked till 29.02.2004. Thereafter, his name was entered with M/s Abhitex International (respondent No.2) where he worked till 30.09.2007. He stated that he did work in Paliwal Overseas (appellant) and his last salary was Rs.9,000/- per month and the service period came to seventeen years. He was cross-examined in which he *inter alia* stated that he had left the services of Paliwal Overseas (appellant) but was working in M/s Abhitex International (respondent No.2) and his name was transferred to it. Jage Ram appeared as RW1 for Paliwal Overseas (appellant). He stated that respondent No.1 had worked with them from 01.01.1991 to 29.02.2004 for thirteen years and two months and the applicant (respondent No.1) had not filled Form-I for gratuity and it was ready to pay gratuity of Rs.60,750/-. In cross-examination, he admitted that written statements filed by Paliwal Overseas (appellant) and M/s Abhitex International (respondent No.2) bear signatures of one and the same person. The written statement of M/s Abhitex International (respondent No.2) was signed as a Partner and the written statement of Paliwal Overseas (appellant) was signed as a Director. He admitted that Shri Avinash Chander Sharma was the Director of Paliwal Overseas (appellant). Ashwani Kumar appeared as RW1/1 and he tendered a copy of partnership-deed as Mark A. He stated that respondent No.1 had joined their firm, i.e. M/s Abhitex International (respondent No.2), on 01.03.2004 and he worked up to 30.09.2007 for a period of three years and seven months. During cross-examination, he admitted that the learned counsel appearing for Paliwal Overseas (appellant) and M/s Abhitex International (respondent No.2) was the same. He admitted that Shri Avinash Chander Sharma was a partner with M/s Abhitex International (respondent No.2). He admitted that Shri Avinash Chander Shamra had given power of attorney to the applicant, i.e. respondent No.1, which was Ex.A2 and the original power of attorney bears the signatures of Shri Avinash Chander Sharma.

The learned Controlling Authority (respondent No.4) considered the said evidence in its order dated 22.09.2010 (Annexure P1) and observed that from the cross-examination of RW1 and RW2, it was proved that Shri Avinash Chander Sharma was the Director of Paliwal Overseas (appellant) and he was a Partner with M/s Abhitex International (respondent No.2) and the same person had signed the written statement on behalf of both although signed in the capacity of Director and Partner and, thus, it could be inferred that both the firms were controlled by the same one person. It was also held that M/s Abhitex International (respondent No.2) could not establish on record that they ever issued any fresh appointment letter to respondent No.1 at the time of his joining service with it w.e.f. 01.03.2004. It was also held that Paliwal Overseas (appellant) could not establish on record that respondent No.1 left its services on 29.02.2004 and his full and final account was settled on the said date. Thus, it was held that it could not easily be inferred that respondent No.1 had not left its services on 29.02.2004 and his services were transferred to M/s Abhitex International (respondent No.2) under the control of one and the same person.

The above facts are quite clear and adjudicate the issue as regards Paliwal Overseas (appellant) and M/s Abhitex International (respondent No.2) not being two different entities but one entity. Indeed, the conclusion arrived at by the learned Single Judge that Paliwal Overseas (appellant) and M/s Abhitex International (respondent No.2) were one and the same entity is based on the pleadings and the evidence that has been led on record. In the circumstances, the question whether the case was liable to be remanded by the learned Appellate Authority (respondent No.3) to the learned Controlling Authority (respondent No.4) was not required to be undertaken.

In P. Purushottam Reddy and another v. Pratap Steel Ltd., (2002) 2 SCC 686, Hon'ble the Supreme Court said that assuming that there was any deficiency in the pleadings and also an omission on the part of the trial Court to frame a specific issue, the case it was observed was one where the applicability of the law laid down in Nagubai Ammal v. R. Shama Rao, AIR 1956 S.C. 593, was squarely attracted. In Nagubai's case (supra), Hon'ble the Supreme Court was called upon to examine if the plea of *lis pendens* was not open to the plaintiff in the said case on the ground that it had not been raised in the pleadings. The plaint or the reply statement of the plaintiff contained any averment that the sale was affected by the rule of *lis pendens*. There was no specific issue directed to that question. However, evidence was adduced by the plaintiff on the plea of *lis pendens,* which was not objected to by the defendants. The question was argued and tested by taking into consideration the evidence that the proceedings were collusive in character with a view to avoid the operation of Section 52 of the Transfer of Property Act. Hon'ble the Supreme Court felt satisfied that the defendants went to trial with full knowledge that the question of *lis pendens* was in issue and they had ample opportunity to adduce their evidence thereon and fully availed themselves of the opportunity. In the circumstances of the case, it was opined that absence of a specific pleading on the question was a mere irregularity which resulted in no prejudice to the defendants therein. After having noticed the rule of pleadings as applicable to civil law that "no amount of evidence can be looked into upon a plea which was never put forward", Hon'ble the Supreme Court in Nagubai's case (supra) in para 12, held as under:-

> "The true scope of this rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue, which was not present in the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto."

In the present case as well, the parties had pleaded and also led evidence on the question as to whether Paliwal Overseas (appellant) and M/s Abhitex International (respondent No.2) were one and the same entity or were different entities. The issue that was framed, as already noticed, was whether the applicant (respondent No.1) was entitled for the amount of gratuity as claimed and, if so, to what amount. It is in the context of the said issue that Paliwal Overseas (appellant) sought to partially deny the benefit of gratuity for the period respondent No.1 worked with M/s Abhitex International (respondent No.2) on the plea that it was a separate entity. The parties were, therefore, alive to the issue and they had led evidence in this regard. As such, there was indeed no need for the learned Appellate Authority (respondent No.3) to remand the case to the learned Controlling Authority (respondent No.4) for framing specific issues.

Learned counsel for the appellant has placed reliance on State Bank of Bikaner and Jaipur v. Om Prakash Sharma (supra) to contend that the issues which ought to be formulated by the authorities were not formulated and the learned Controlling Authority (respondent No.4) had gone beyond the reference and erred in observing that respondent No.1 had rendered seventeen years of continuous service by clubbing the services rendered by him with the appellant. The said contention is without basis as the said case related to an award of the Labour Court where its jurisdiction emanated from the order of reference made under the provisions of the Industrial Disputes Act, 1947. It was held that the Labour Court could not have passed the order going beyond the terms of reference. In the present case, the decision has been taken on the basis of the issues that were framed; besides, the parties were alive to the questions that were involved and had led evidence as to whether the appellant and M/s Abhitex International (respondent No.2) were distinct and separate entities or not. There was no order of reference that was made to the learned Controlling Authority (respondent No.4) as had been made by the 'appropriate government' in the case State Bank of Bikaner and Jaipur v. Om Prakash Sharma (supra).

Learned counsel for the appellant also relies on Regional Provident Fund Commissioner v. M/s Raj's Continental Exports (P) Ltd. (supra). The respondent therein claimed that it, i.e. M/s Raj Continental Exports (P) Ltd., was an extension of the branch of M/s Continental Exporters, a proprietorship concern of one Sampathraj Jain, who was the Managing Director of the respondent company. The Regional Provident Fund Commissioner's view was that the respondent was nothing but a department of the M/s Continental Exporters. Assailing the adjudication, the respondent filed a writ petition stating that there was no financial integrity. It was separately registered under the Factories Act; the Central Sales Act, 1956; the Income Tax Act, 1961 and the Employees' State Insurance Act. The concerns were separate and distinct. They had separate balance-sheets and audited statements. The High Court accepted the contention of the respondents in the said case and held that there was total independent exercise of power in the two concerns and though the manufacturing of goods was in respect of the same article but that by itself, it was said, was not sufficient to hold that the respondent was a branch or a department of M/s Continental Exporters. The High Court as a matter of fact found that there was total independent exercise of management and control of the affairs, the employees were separately appointed and controlled. Taking into account the said facts, it was held that the respondent company and M/s Continental Exporters were not one and the same. The said findings of the learned Single Judge were assailed in appeal. The High Court after analyzing the factual position came to hold that there was nothing in common between the two establishments and merely because the proprietor of the one concern was the Managing Director of the other that by itself was not sufficient to establish that one was branch of the other. The appeal was accordingly dismissed.

In S.L.P. before Hon'ble the Supreme Court, reliance was placed on the judgment in Pratap Press etc. v. Their Workmen, 1960 (1) LLJ 497 : AIR 1960 SC 1213, wherein it was held as follows:-

> "The question whether the two activities in which the single owner is engaged are one industrial unit or two distinct industrial units is not always easy of solution. No hard and fast rule can be laid down for the decision of the question and each case has to be decided on its own peculiar facts. In some cases the two activities each of which by itself comes within the definition of "industry" are so closely linked together that no reasonable man would consider them as independent industries. There may be other cases where the connection between the two activities is not by itself sufficient to justify an answer one way or the other, but the employer's own conduct in mixing up or not mixing up the capital, staff and management may often provide a certain answer."

A perusal of the above shows that there is no hard and fast rule that can be laid down for the decision of the question as to whether two activities in which the single owner is engaged are one industrial unit or two distinct industrial units; besides, this was not always an easy solution. Each case had to be decided on its own peculiar facts.

Reliance was also placed by the Supreme Court on Regional Provident Fund Commissioner and another v. Dharamsi Morarji Chemical Co. Ltd., (1998) 2 SCC 446, it was held in the said case that unless there is clear evidence to show that there was any supervisory financial or managerial control, it could not be said that one was the branch of the other. In the case before Hon'ble the Supreme Court, it was noticed that the learned Single Judge had observed that the respondent therein was separately registered under the Factories Act; the Central Sales Act, 1956; the Income Tax Act, 1961 and the Employees' State Insurance Act.

In the present case, there is no evidence shown by the appellant that the two entities, i.e. Paliwal Overseas (appellant) and M/s Abhitex International (respondent No.2) were separately registered under the Factories Act; the Central Sales Act, 1956; the Income Tax Act, 1961 and the Employees' State Insurance Act. Besides, it is the stand of the appellant that the two entities were separate and independent and it desires the Court to hold that there these are separate; therefore, the burden of proving the said facts that it asserts lay on it and it has not led any evidence in support of the same. Besides, the case referred to on behalf of the appellant related to a case under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952. Therefore, the ratio of the said judgment would be inapplicable to the facts and circumstances of the present case.

It is further submitted on behalf of the appellant that respondent No.1 had different provident fund and Employees' State Insurance numbers with the appellant and M/s Abhitex International (respondent No.2). In fact, respondent No.1 had withdrawn the provident fund with the appellant in the year 2005 and withdrawn it from M/s Abhitex International (respondent No.2) in the year 2008. It is submitted that provident fund could be drawn on leaving the job and the relationship of master and servant between the appellant and respondent No.1 had ceased in 2005. A reference has been made to the instructions under Form No.19 of the Employees' Provident Fund Scheme, 1952. It is submitted that when respondent No.1 had joined M/s Abhitex International (respondent No.2) he was liable to transfer his provident fund by making an application in Form-13 and his failure to apply would in any case show that there had been cessation of his services with the appellant.

The said submissions of the appellant relate to provident fund and the ESI Scheme and not to gratuity under the Act. The learned Controlling Authority (respondent No.4) in its initial order dated 22.09.2010 (Annexure P1) on the basis of evidence that had been led held both the entities to be the same and under control of the same one person. The written statements on behalf of the appellant and M/s Abhitex International (respondent No.2) were filed by one and the same person. It held that it could easily be inferred that respondent No.1 had not left the services of the appellant and rather his services were transferred to M/s Abhitex International (respondent No.2) under the control of one and the same person. Reliance was placed by the learned Controlling Authority (respondent No.4) on Chander Sain v. State of Haryana and others, AIR 1994 SC 972, wherein the appellant joined service as Director of Physical Education in a Government aided college which was subsequently taken over by the State Government and he was absorbed in service of the government. It was held that the gratuity payable to him after retirement would be computed on the basis of the entire period of service covering the period of service rendered by him while the college was under private management as well as service rendered by him after the college was taken over by the State Government.

The learned Single Judge also considered the question as to whether Paliwal Overseas (appellant) and M/s Abhitex International (respondent No.2) were one and the same entity or distinct and after lifting the veil of the two entities so as to go to the root of the matter found them to be one and the same thing insofar as respondent No.1-claimant was concerned so that he is not denied the benefit of gratuity for the period of service with M/s Abhitex International (respondent No.2) as not reckonable towards total period for earning gratuity on the ground that the second part of the period of service was less than the minimum period of five years as prescribed in the Act for entitlement to gratuity. It was held that indeed there was a definitive continuity of employment in the same premises run by the same man who defended both the entities before the learned Controlling Authority (respondent No.4) in an effort to deny gratuity partially.

Therefore, the question whether the two entities were separate or distinct has been adjudicated upon by the learned Controlling Authority (respondent No.4) as also by the learned Single Judge. These have been held to be the same. The provisions of the Act have been enacted with a view to grant benefit to weaker sections in the adjudicatory process of the industries. The benefit of the provisions of the Act has been extended to respondent No.1

who was an employee by recording findings based on cogent and convincing evidence. As such, no interference is called for with the sound reasons recorded by the learned Single Judge in granting the benefit of gratuity to respondent No.1.

In the facts and circumstances, there is no merit in the appeal and the same is liable to be dismissed and is accordingly dismissed. Considering that the appeal has been dismissed on merit, the question of delay in filing the appeal is only academic and accordingly the application seeking condonation of delay is also dismissed.

(S.S. SARON)
JUDGE

(SURINDER GUPTA)
JUDGE

07.04.2015
Ramesh/A.Kaundal