IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

REVIEW PETITION NO.47 OF 2017

IN

WRIT PETITION NO.4983 OF 2013

Vasant Maruti Chavan … Review Petitioner

Vs.

The Chief Executive Officer, Z.P., Sangli … Petitioner

Mr. Kuldep U. Nikam for Review Petitioner.
Mr. S. M. Katkar for Respondent.

CORAM : R. G. KETKAR, J.
DATE : JULY 05, 2017

P.C. :

Heard Mr. Nikam, learned Counsel for petitioner and Mr. Katkar, learned Counsel for respondent at length.

2. By this Petition under Section 114 read with Order XLVII of the Code of Civil Procedure, 1908, petitioner has sought review of the order dated 22.01.2015 passed by the Court in Writ Petition No.4983 of 2013. Writ Petition No.4983 of 2013 was instituted under Articles 226 and 227 of the Constitution of India by the respondent, Chief Executive Officer, Zilla Parishad, Sangli challenging the judgment and order dated 23.07.2007 passed by the Controlling Authority under the Payment of Gratuity Act, 1972 (for short 'Act') as also the judgment and order dated 30.08.2012 passed by the Appellate Authority under the Act in Appeal (P.G.A.) No.36 of 2007. By these orders, the authorities below directed the petitioner to pay gratuity of Rs.61,135/- together with simple interest @6% p.a. from 01.09.1993 till the payment is made.

3. Respondent / Petitioner relied upon decision of Punjab and Haryana High Court in the case of **Municipal Committee Vs. The**

Appellate Authority, *(1994) 107 PLR 65* and the decision of Karnataka High Court in the case of **Assistant Executive Engineer Vs. Deputy Labour Commissioner**, *2013 (137) FLR 292*, and in particular 20 thereof. Respondent contended that the application made by the petitioner herein under the provisions of the Act itself was not maintainable. Reliance was placed upon Section 2(e) of the Act, which defines the expression “employee”. The expression 'employee' does not include any person, who holds a post under the Central Government or the State Government or is governed by any other Act or by any rules providing for payment of gratuity. Reliance was also placed upon the provisions of the Maharashtra Civil Services (Pension) Rules, 1982 (for short 'Rules') and in particular Rules 111, 112, 113, 126 and 129-A. The matter was heard on 28.07.2014 when the statement on behalf of the respondent / petitioner that it is not averse to paying the amount calculated under the Rules towards the claim of gratuity was recorded. The statement made on behalf of the petitioner that he is agreeable for payment of gratuity as per the Rules was also noted. The matter was thereafter heard on 22.01.2015. Rule was partly made absolute in the following terms:

> “a. the petitioner shall calculate the amount of gratuity as per the Rules and pay the amount together with interest @ 10% p.a. for the period from 01.09.1993 to 27.09.2007. Let the calculation be made within 2 months from today;
>
> b. the amount of Rs.61,138/- deposited by the petitioner in the Labour Court, Pune shall be adjusted;
>
> c. if the amount of gratuity calculated as per the provisions of Rules is lesser than Rs.61,138/- with accrued interest, if any, then in that event, the petitioner shall be allowed to withdraw the remaining amount;
>
> d. if the amount of gratuity as per the Rules together with interest @10% for the period from 01.09.1993 to 27.09.2007 is more than Rs.61,138/- with accrued interest, if any, then the petitioner shall make the good within 3 months from today.”

4. In support of this Petition, Mr. Nikam relied upon the decision of the Apex Court in ***Municipal Corporation of Delhi Vs. Dharam Prakash Sharma***, **AIR 1999 SC 293** to contend that the provisions of the Act are applicable to the employees of Zilla Parishad. In particular, he relied upon paragraph 2 of that decision.

5. On the other hand, Mr. Katkar supported the order under review on the ground that no case is made out for reviewing the said order.

6. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, while disposing of the Petition, submission advanced on behalf of the respondent (petitioner therein) that it has adopted the provisions of the Rules and that it is governed by the Rules was noted. Reference was made to - (i) Rule 111 which provides for payment of retirement gratuity; (ii) Rule 112 which deals with persons to whom gratuity is payable; and (iii) Rule 113 which lays down persons, who are debarred from receiving gratuity. Reference was thereafter made to Rule 126, which provides for provisional pension and gratuity and Rule 129-A, which provides for payment of interest on delayed payment of gratuity. Sub-rule (2) thereof lays down that on an application made by the pensioner concerned, request for payment of interest can be considered and if the authority concerned is satisfied that there is delay in payment of gratuity on account of administrative lapse, the concerned authority can make recommendation to the concerned authority for the payment of interest. The submission on behalf of the respondent (petitioner therein) that review petitioner is governed by the provisions of the Pension Rules was accepted.

7. In the case of **Municipal Corporation of Delhi** *(supra)*, the Apex

Court has observed in paragraph 2 thus,

> "2. The short question that arises for consideration is whether an employee of the MCD would be entitled to payment of gratuity under the Payment of Gratuity Act when the MCD itself has adopted the provisions of the CCS (Pension) Rules, 1972 (hereinafter referred to as "the Pension Rules"), whereunder there is a provision both for payment of pension as well as of gratuity. The contention of the learned counsel appearing for the appellant in this Court is 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 of payment of gratuity under the Payment of Gratuity Act cannot be held applicable. We have examined carefully the provisions of the Pension Rules as well as the provisions of the Payment of Gratuity Act. The Payment of Gratuity Act being a special provision for payment of gratuity, unless there is any provision therein which excludes its applicability to an employee who is otherwise governed by the provisions of the Pension Rules, it is not possible for us to hold that the respondent is not entitled to the gratuity under the Payment of Gratuity Act. The only provision which was pointed out is the definition of "employee" in Section 2(e) which excludes the employees of the Central Government and State Governments receiving pension and gratuity under the Pension Rules but not an employee of the MCD. The MCD employee, therefore, would be entitled to the payment of gratuity under the Payment of Gratuity Act. The mere fact that the gratuity is provided for under the Pension Rules will not disentitle him to get the payment of gratuity under the Payment of Gratuity Act. In view of the overriding provisions contained in Section 14 of the Payment of Gratuity Act, the provision for gratuity under the Pension Rules will have no effect. Possibly for this reason, Section 5 of the Payment of Gratuity Act has conferred authority on the appropriate Government to exempt any establishment from the operation of the provisions of the Act, if in its opinion the employees of such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act. Admittedly MCD has not taken any steps to invoke the power of the Central Government under Section 5 of the Payment of Gratuity Act. In the aforesaid premises, we are of the considered opinion that the employees of the MCD would be entitled to the payment of gratuity under the Payment of Gratuity Act notwithstanding the fact that the provisions of the Pension Rules have been made applicable to them for the purpose of determining the pension. Needless to mention that the employees cannot claim gratuity available

under the Pension Rules."

8. A perusal of the above extracted portion shows that employees of the Corporation are entitled to payment of gratuity under the Act notwithstanding the fact that provisions of the Pension Rules have been made applicable to them for the purpose of determining the pension. It was further held that employees cannot claim gratuity under the Pension Rules.

9. In the case of **Municipal Committee** *(supra)*, the Punjab and Haryana High Court has considered the provisions of Section 2(e) of the Act and it was observed that the municipal employee is not entitled to payment of gratuity under the provisions of the Act but as per the Rules framed by the State Government. In the case of **Assistant Executive Engineer** *(supra)*, the Karnataka High Court also held that the Controlling Authority under the Act is not vested with the power to order payment of gratuity in respect of employees under the State, who are governed by the Act and Rules governing the payment of gratuity. In view thereof, it has to be held that the authorities below committed error in entertaining the proceedings. In view of the decision of the Apex Court in the case of **Municipal Corporation of Delhi** *(supra)*, it cannot be said that the provisions of the Act are not applicable to the Zilla Parishad. The order under review was passed relying upon the decision of Punjab and Haryana High Court in **Municipal Committee** *(supra)* and Karnataka High Court in **Assistant Executive Engineer** *(supra).* The order under review was passed in ignorance of decision in **Municipal Corporation of Delhi** *(supra)* and is therefore, *per incurium.* This Court wrongly came to the conclusion that the provisions of the Act are not applicable to the petitioner. In my opinion, this was error apparent on the face of the record. It also constitutes

sufficient reason to recall the order. The order under review is, therefore, required to be recalled and is accordingly recalled. Petition instituted by the respondent is dismissed. Petitioner is entitled to payment of gratuity as per the Act. Review Petition is allowed accordingly with no order as to costs.

(R. G. KETKAR, J.)

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