IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.4270 OF 2017

The Nashik Jilha Stariya Samiti … Petitioner
Vs.
Chagan Fakira Rathod … Respondent

WITH

WRIT PETITION NO.4233 OF 2017

The Nashik Jilha Stariya Samiti … Petitioner
Vs.
Pandhrinath Ramchandra Thube … Respondent

WITH

WRIT PETITION NO.4235 OF 2017

The Nashik Jilha Stariya Samiti … Petitioner
Vs.
Dashrath Lahanu Thete … Respondent

WITH

WRIT PETITION NO.4236 OF 2017

The Nashik Jilha Stariya Samiti … Petitioner
Vs.
Murlidhar Ganpat Patil … Respondent

WITH

WRIT PETITION NO.4238 OF 2017

The Nashik Jilha Stariya Samiti … Petitioner
Vs.
Nivrutti Pundlik Shinde … Respondent

WITH

WRIT PETITION NO.4239 OF 2017

The Nashik Jilha Stariya Samiti … Petitioner
Vs.
Manohar Nivrutti Gajare … Respondent

WITH

WRIT PETITION NO.4240 OF 2017

The Nashik Jilha Stariya Samiti … Petitioner
Vs.
Somnath Gangadhar Virgaonkar … Respondent

WITH

WRIT PETITION NO.4250 OF 2017

The Nashik Jilha Stariya Samiti … Petitioner

Vs.
Popat Haribhau Thorat … Respondent

WITH
WRIT PETITION NO.4252 OF 2017

The Nashik Jilha Stariya Samiti … Petitioner
Vs.
Kashinath Govinda Nanaware … Respondent

Mr. Pramod Narayan Joshi for Petitioner in all the Petitions.
Mr. Yogendra Pendse for Respondents in all the Petitions.

CORAM : R. G. KETKAR, J.
DATE : AUGUST 1, 2017

P.C. :

Heard Mr. Joshi, learned Counsel for petitioner and Mr. Pendse, learned Counsel for respondents in all the Petitions at length.

2. By these Petitions under Articles 226 and 227 of the Constitution of India, petitioner in each Petition, has challenged the judgment and order dated 03.10.2015 passed by the Controlling Authority under the Payment of Gratuity Act, 1972 (for short 'Act') / Judge of the Second Labour Court, Nashik (for short 'Controlling Authority') as also the judgment and order dated 11.01.2017 passed by the Appellate Authority under the Act and Member, Industrial Court at Nashik (for short 'Appellate Authority'). By these orders, the Authorities below have allowed the applications made by the respondent in each Petition for paying difference of the gratuity together with interest @ 10% from the date of retirement till realization of the amount. As all these Petitions raise common questions of law and fact, the same can conveniently be disposed of by this common order. For appreciating the controversy raised in these Petitions, the facts from Writ Petition No.4233 of 2017 are taken into consideration.

3. The petitioner is a Co-operative Society, which was initially

constituted as member under Section 69-A of the Maharashtra Co-operative Societies Act, 1960 (for short 'Co-operative Societies Act'). Under Section 69-A, Cadre of Secretaries of primary agricultural societies was established and supervision thereof was entrusted to the different societies. The working of the petitioner is covered by various provisions of law as also government circulars issued from time to time. Presently, the Committee is established to have necessary control and to keep alive the Cadre of Secretaries. The Committee also deals with the appeals in respect of grievances of the employees. The petitioner has to employ its staff for the purpose of its administration and has to spend for the establishment and administration of its own institute which in turn supervises service conditions of the Secretaries of Primary Agricultural Co-operative Societies. The Secretaries are paid from the amount received from the Primary Agricultural Co-operative Societies of the petitioners on the basis of prevailing government circulars and / or resolutions. In the present case, respondent was appointed on 23.03.1974 by the petitioner. After putting in 38 years service, he attained superannuation on 31.10.2011. It is the case of the respondent that his last drawn wages comprised of following:

Rs.16990/-	Basic Pay
Rs. 8665/-	Dearness Allowance

Rs.25655/-	

4. Accordingly, he claimed gratuity of Rs.5,62,590/-. Out of that, he had received Rs.2,30,781/-. Respondent, therefore, claimed difference of Rs.3,31,809/- along with 10% interest with effect from 31.10.2011 by filing application on 16.09.2013 under Section 7 of the Act before the Controlling Authority. In paragraph 7, respondent asserted that petitioner herein did not give notice under Section 7(2) of the Act read with Rule 8(5) of the Payment of Gratuity (Maharashtra) Rules, 1972

(for short 'Rules'). In accordance with the proviso to Rule 10, the limitation to file application does not apply. The petitioner filed reply on 25.11.2013 resisting the application. It was contended that the respondent was paid for last 37 years and as on the basis of salary of Rs.10,118/- inclusive of dearness allowance as on 31.10.2010. The said pay-scale was revised and for a period of one and half year, respondent was paid salary of Rs.25,655/-. Having regard to his salary of Rs.10,118/-, he was paid gratuity of Rs.2,30,781/-. The petitioner, therefore, contended that respondent is not entitled to claim difference of gratuity.

5. The parties adduced evidence in support of their case. On the basis of evidence on record, the Controlling Authority allowed the application. Aggrieved by that decision, petitioner preferred appeal under Section 7(7) of the Act before the Appellate Authority. The Appellate Authority dismissed the appeal. It is against these orders, petitioner has instituted the present Petition.

6. In support of this Petition, Mr. Joshi strenuously contended that petitioner is constituted under Section 69-A of the Co-operative Societies At. Section 69-A(1) lays down that a a Co-operative State Cadre of Secretaries of primary agricultural credit societies, multipurpose co-operative societies and service co-operative and such other classes of societies as may be prescribed in this behalf shall be constituted consisting of persons recruited for that purpose by the Central Societies notified in this behalf by the State Government. Sub-section (2) thereof empowers the Central Society to depute any person appointed by it to that Cadre to work under any society referred to in sub-section (1), as it may consider necessary. Where any such person is posted to work under any society, his services shall be taken over by the

society on such post, for such period and on such other terms and conditions, as the Central Society may determine, but the person so posted shall draw his salary and allowances from the Fund established under Sub-section (3). Sub-section (2-A) lays down that the immediate initial supervisory control on the person appointed to the cadre and deputed or posted to work as secretary under each of the societies referred to in sub-section (1) shall be with the Taluka Supervision Society consisting of the societies, in each respective Taluka to which such persons are deputed, as members thereof and registered for the purpose. The Taluka Supervision Society, shall exercise such powers and discharge such functions or perform such duties as may be conferred or imposed on it by the bye-laws of such society. Sub-section (3) thereof lays down that an Apex society notified in this behalf by the State Government shall establish a Fund to be called "the Co-operative State Cadre Employment Fund," (for short 'said Fund') which, when established, shall be deemed to have been established with effect from the 1st day of July 1973. It shall be utilized for meeting the expenses on the salaries, allowances and other emoluments to be paid to the persons appointed to the Co-operative State Cadre and the expenditure relating to the Cadre. Entities specified in clauses (a) and (b) of sub-section (4) and which are notified by the State Government in this behalf has to, from time to time, by general or special order, with effect from the 1st day of July 1977, contribute annually to the said Fund, at such rate and in such manner as may be prescribed.

7. Mr. Joshi submitted that Section 69-A was deleted by Maharashtra Act No.16 of 2013 dated 13.08.2013 with effect from 14.02.2013. He submitted that in terms of sub-section (4), the petitioner collects annually, contribution from the respective primary agricultural co-operative societies and the same is credited to the said Fund. He

submitted that as per the salary of Rs.10,118/- of the respondent, he was paid gratuity by the petitioner. The petitioner had already collected contribution annually from the respective primary agricultural co-operative society, and therefore, it will not be in a position to make payment of difference of gratuity that too on the basis of last pay drawn of Rs.25,655/-. He submitted that the financial condition of the petitioner is not sound so as to bear this expenditure.

8. Mr. Joshi further submitted that as per Section 7(1) of the Act, respondent did not approach the petitioner by making application. He directly approached the Controlling Authority, which is impermissible in law. He further submitted that Rule 7 of the Rules provides for 30 days for making application from the date the gratuity became payable in Form I to the employer. In the present case, respondent retired on 31.10.2011 and the application under Section 7 is made on 16.09.2013. The application was clearly beyond 30 days and was therefore, barred by limitation. No application for condonation of delay was made. The Controlling Authority as also the Appellate Authority committed serious error in entertaining the application, which was beyond the period of limitation. The orders passed by these Authorities are, therefore, without jurisdiction. Mr. Joshi has taken me through the application made by the respondent, written statement filed by the petitioner, evidence adduced on behalf of the petitioner to show the working of the petitioner society. In any case, he submitted that in case the Court is not inclined to interfere with the impugned orders, liberty may be reserved to the petitioner to recover the amount from the respective society where the respondent was deputed.

9. On the other hand, Mr. Pendse supported the impugned orders. He submitted that Section 7(2) of the Act casts obligation on the

employer to determine gratuity, whether application under sub-section (1) is made or not. He also relied upon Rule 8(5) and second proviso to Rule 10 to contend that as the petitioner failed to give notice under Section 7(2) read with Rule 8(5), no limitation for filing an application is prescribed. Mr. Pendse further submitted that in fact the petitioner had entered into settlement with similarly situated employees and the said fact was placed on record before the Authorities below. The Appellate Authority has also dealt with this aspect. He further submitted that provisions of the Act and the Rules have been given overriding effect over any other Act or instrument or contract. He, therefore, submitted that provisions of the Act will override Section 69-A of the Co-operative Societies Act.

10. 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, respondent was appointed on 23.03.1974 and retired on 31.10.2011. There is no dispute about relationship of employer-employee. Even otherwise as per Section 69A(1), the petitioner has appointed the respondent. In terms of sub-section (2), he is deputed to other societies. Nonetheless, his salary and other allowances are paid from the said Fund. Respondent had filed application on 16.09.2013. In the application, and in particular paragraph 7, he specifically asserted that petitioner herein did not give notice under Section 7(2) of the Act read with Rule 8(5) of the Rules and therefore, in view of Rule 10, the limitation to file application does not apply. A perusal of paragraph 7 of the written statement filed on behalf of the petitioner shows that petitioner did not deny the said assertions. In other words, petitioner did not contend that they had issued notice under Section 7(2) pf the Act read with Rule 8(5) of the Rules.

11. Section 7(2) of the Act, Rule 8(5) of the Rules and second proviso to Rule 10 read thus,

> "7. Determination of the amount of Gratuity.- (1) …
>
> (2) As soon as gratuity becomes payable, the employer shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined."
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> 8. Notice for Payment of Gratuity.-(1) to (4) …
>
> (5) A notice under sub-section (2) of Section 7 shall be in Form 'L'.
>
> 10. Application to controlling authority for direction.- (1) …
>
> Provided further that, no limitation for filing an application under this rule shall apply if the employer has failed to give notice under sub-section (2) of section 7 read with sub-rule (5) of rule 8: "

12. Mr. Joshi submitted that respondent did not make application referred to in sub-section (1) of Section 7 to the petitioner and directly filed application before the Controlling Authority. It is not possible to accept this submission. Sub-section (2) lays down that as soon as gratuity becomes payable, the employer has to determine the amount of gratuity, whether an application referred to in sub-section (1) has been made or not and give notice in writing to the person to whom gratuity is payable and also the Controlling Authority, specifying the amount of gratuity so determined. In the present case, petitioner has not determined the amount of gratuity and also failed to give notice under sub-section (2) of Section 7 read with sub-rule (5) of Rule 8. In terms of second proviso to Rule 10, extracted hereinabove, no limitation for filing an application under Rule 10 will apply.

13. It is the case of the petitioner that they had paid gratuity to the tune of Rs.2,30,781/- on the basis of the respondent's salary of

Rs.10,118/- and respondent claimed gratuity on the basis of revised pay scale as per Sixth Pay Commission wherein he was paid Rs.25,655/-, inclusive of basic pay and dearness allowance. Mr. Joshi submitted that respondent hardly worked for 1½ years in the revised pay-scale and was drawing salary of Rs.25,655/-. He, therefore, submitted that the Authorities below committed error in awarding difference of gratuity. It is not possible to accept this submission. Section 2(s) of the Act defines the expression 'wages'. It reads thus,

> "(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 arc paid or arc 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."

14. Section 2(d) defines the expression "controlling authority" to mean an authority appointed by the appropriate Government under Section 3. Section 3 provides that the appropriate Government may, by notification, appoint any officer to be a controlling authority, who shall be responsible for the administration of this Act. In the present case, it is not in dispute that the learned Judge of the Labour Court is appointed as the Controlling Authority. Section 4(2) provides that for every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days wages **based on the rate of wages last drawn by the employee concerned**. Admittedly, at the time of attaining superannuation, respondent was drawing wages of Rs.25,655/-, inclusive of basic pay and dearness allowance. In view of Section 2(s) read with Section 4(2), the petitioner was not justified in determining gratuity on the basis of wages of Rs.10,118/-.

15. That apart, it has come on record that the petitioner had paid gratuity on the last drawn wages to several employees in terms of the

compromise entered with them. In those cases, the concerned employee was paid difference of gratuity upon giving up interest. The Appellate Authority has considered this aspect in paragraph 13 of the impugned order. In paragraph 13, the Appellate Authority considered the documents produced on record to establish that the petitioner employer had paid the amount of gratuity to one of its employees before the Labour Court under the settlement by taking into consideration basic pay, grade pay and dearness allowance.

16. Mr. Joshi submitted that financial condition of the petitioner is not sound so as to bear this expenditure. It is not possible to accept this submission as the petitioner had entered into settlement with other similarly situated employees and paid them amount of gratuity subject to their giving up interest.

17. In the light of the aforesaid discussion, I do not find that the authorities below committed any error in allowing the application made by the respondent. The petitioner was not in a position to demonstrate that the findings recorded by the Courts below are perverse being based upon no evidence or that they are contrary to the evidence on record. Petitioner was also not in a position to demonstrate that no reasonable or prudent person would have reached the conclusion arrived at by the Authorities below. Hence, Petitions fail and the same are dismissed reserving liberty to the petitioner to recover the difference of the gratuity amount from the respective Societies to whom respondent was deputed, if permissible in law.

18. At this stage, Mr. Joshi orally prays for stay of this order for a period of 8 weeks from today and assures that petitioner will not apply for further extension of interim relief. He submitted that petitioner has

already deposited amount awarded by the Authorities below in each case before the Controlling Authority. In view of this, subject to the petitioner not withdrawing the amount so deposited in each Petition, this order shall remain stayed for a period of 8 weeks from today with express understanding that no application for extension of interim order shall be made and entertained. Order accordingly.

(R. G. KETKAR, J.)

Minal Parab