

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 7867 OF 2003

Cummins (I) Limited	...Petitioner
vs.	
Industrial Cleaning Services & Others	...Respondents

**WITH
CIVIL APPLICATION NO.2745 OF 2003**

Shri Anata T. Bhoj And Others	...Applicants
vs.	
Cummins (I) Limited	...Respondent

**WITH
CIVIL APPLICATION NO.2767 OF 2008**

Shri Anata T. Bhoj And Others	...Applicants
vs.	
Industrial Cleaning Services And Another	...Respondents

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Mr.R.S. Pai, Senior Counsel with Mr.Anand Pai and Mr.A.K. Gopalan I/b. Haresh Mehta & Co. for Petitioner.
Mr.K.M. Naik, Senior Counsel I/b. Mr.S.P. Salkar with Ms.Priyanka Patil for Respondent No.1.
Ms.Seema Sarnaik for Respondent Nos.2, 3, 6 to 9, 11 to 14, 16, 17, 20, 22 to 24, 26 to 30, 32 to 34, 37 to 42, 44 to 52, 54 to 56, 58 to 64, 66, 68 to 72 and 77 and for Applicant in CAW 2745/2003 and CAW 2767/2008.

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CORAM : S.C. GUPTE, J.

RESERVED ON : 14 JUNE 2016

PRONOUNCED ON : 5 JANUARY 2017

JUDGMENT :

This petition filed under Article 226 of the Constitution of India challenges a common order and judgment dated 30 May 2003 passed on applications of individual workmen under Section 7 of the Payment of Gratuity Act, 1972 (“the Gratuity Act”). By the impugned order, the Controlling Authority under the Act directed the Petitioner herein (Opponent No.2 in the original applications) to pay the amount of gratuity in accordance with the determination of the Controlling Authority.

2 The facts of the Petitioner's case may be briefly stated as follows :

2.1 The Petitioner is an engineering company *inter alia* engaged in manufacture of diesel engines at its factory at Pune. Respondent No.1 is a partnership firm engaged in the business of providing ancillary services including cleaning and gardening, etc. to various companies in and around Pune.

2.2 The Petitioner had originally engaged one Dattatraya S. Vetel, who was running a proprietary firm in the name and style of “Industrial Cleaning Services” as a contractor for providing cleaning services at the former's factory at Pune.

2.3 This contract was terminated with effect from 31 December 1984. The cleaning services, however, were continued by another gentleman, one M.A. Pathak, in the name of “Industrial Cleaning Services” by taking over the business. Pathak agreed to continue the employment of all the then existing 74 employees employed by Vetel on the cleaning services at the Petitioner's

factory. There was an agreement dated 1 January 1985 between Vetel and Pathak setting out the terms and conditions of takeover. The agreement *inter alia* provided that the liability to pay gratuity to the employees engaged for cleaning services in the Petitioner's factory would be that of Pathak, i.e. the firm of Respondent No.1. A trust created for the purpose in the name of "Industrial Cleaning Services Employees Group Gratuity cum Life Assurance Trust", of which Vetel and his wife were originally trustees, was taken over by Pathak and his wife as new trustees in place and stead of the original trustees, in pursuance of the Agreement of 1 January 1985.

2.4 There were several agreements between the Petitioner and Respondent No.1 for providing cleaning services, the last of such agreements being of 2 February 1994. The workmen engaged by Respondent No.1 were all members of Kirloskar Cummins Employees' Union, Pune ("Union"). Their service conditions were governed by various settlements entered into between Respondent No.1 and the union from time to time, the last of such settlements being executed on 29 July 1993. Respondent No.1 had its own Provident Fund and ESI Numbers in respect of the workmen.

2.5 In December 1994, the Petitioner sought to terminate its contract with Respondent No.1. The union filed a complaint of unfair labour practices, being Complaint (ULP) No.316/1994, in the Industrial Court, Maharashtra, Pune, against the Petitioner as well as Respondent No.1. The complaint alleged illegal termination of services of the workmen of Respondent No.1 as also non-payment of bonus and ex-gratia amounts to the workmen. A specific contention was raised in that complaint by the Petitioner that there was no employer-employee relationship between the Petitioner and the concerned workmen and that the complaint was not

maintainable against the Petitioner.

2.6 By its order dated 9 November 1995, the Industrial Court was pleased to hold that there was no employer-employee relationship between the Petitioner and the workmen of Respondent No.1 and dismissed the complaint as against the Petitioner. The Court, however, found unfair labour practices on the part of Respondent No.1 and directed Respondent No.1 to pay bonus and ex-gratia amounts to the workmen. The Court also issued directions in the order to the effect that if the Petitioner intended to cancel the contract of Respondent No.1 and give contract to another contractor in respect of the cleaning work, the Petitioner should insist on continuation by the new contractor of the existing 77 employees then working under Respondent No.1. This order has since been confirmed by a learned Single Judge as well as a Division Bench of this Court. Even a Special Leave Petition filed by Respondent No.1 herein against the order was rejected by the Supreme Court.

2.7 In the meantime, whilst the matter was pending before this court, the Union, by its letter dated 1 July 1996, raised a demand that the workmen employed by Respondent No.1 should be absorbed in the regular employment of the Petitioner and paid wages equal to those paid to other regular employees of the Petitioner. After negotiations, a Memorandum of Understanding was reached between the Petitioner and the union on 21 February 1997. Under this memorandum, the Petitioner agreed to take 73 workmen of Respondent No.1, as per a list attached to the memorandum, in the employment of the Petitioner. The workmen of Respondent No.1 thereupon submitted letters of resignation to Respondent No.1 and joined the Petitioner as its workmen.

2.8 In or about November 1999, in pursuance of their resignations, the workmen submitted applications in Form 'I' to Respondent No.1, claiming gratuity due to them, as provided under the Gratuity Act. Respondent No.1 having denied its liability to pay gratuity *inter alia* on the ground that it was not the employer within the meaning of Section 2(f) of the Gratuity Act, the workmen filed individual applications in Form 'N' before the Controlling Authority under the provisions of Section 7 of the Gratuity Act for directions to Respondent No.1 to pay the amount determined by the Authority with interest.

2.9 On 9 August 2000, Respondent No.1 made an application to the Controlling Authority for impleading the Petitioner as a party to the proceedings. The Controlling Authority, by its order dated 2 December 2000, was pleased to allow that application and implead the Petitioner. The parties thereafter led evidence and made submissions before the Authority.

2.10 By its impugned order dated 30 May 2003 passed as a common order on all the applications, the Authority determined the gratuity amount and directed the Petitioner to pay the same to the workmen.

2.11 The Petitioner has challenged the common judgment and order of the Authority on the grounds of want of jurisdiction and also on merits.

3 The submissions of Mr.Pai, learned Senior Counsel for the Petitioner, may be summarised as follows :

(i) It is submitted that under the Gratuity Act, particularly Section 7(4) (a), (b) and (c) thereof, the Controlling Authority has powers limited to determination of the amount of gratuity and the admissibility of the claims

of applicant employees and has no power to adjudicate on who was the employer of the applicants.

(ii) The order of the Industrial Court passed on the complaint of unfair labour practices by the Union under the MRTU & PULP Act, 1971, holding *inter alia* that there was no employer-employee relationship between the Petitioner and the concerned workmen had attained finality and that the Authority had no jurisdiction or power to go behind that finding.

(iii) The Petitioner was not an employer of the concerned workmen. It is submitted that under the Gratuity Act, the liability to pay gratuity is not on the principal employer but on the immediate employer of workmen.

(iv) Lastly, it is submitted that the findings of the Authority are perverse and liable to be interfered with by the Court in its jurisdiction under Article 226 of the Constitution of India.

4 Mr.Naik, learned Senior Counsel for Respondent No.1, in reply submits as follows :

(i) The Authority has power under Section 7 of the Gratuity Act to determine whether liability to pay gratuity can be foisted on the person, who is said to be an employer liable to pay the same to the applicant employees.

(ii) The order of the Industrial Court on the Union's complaint of unfair labour practices was beyond jurisdiction and not in any way binding on the Authority.

(iii) Under the provisions of the Gratuity Act as also the Contract Labour (Regulation and Abolition) Act, 1970 (“the Contract Labour Act”), liability to pay gratuity is generally upon the principal employer. Alternatively, it is submitted that under the contract between the parties, the liability in this case was squarely on the Petitioner.

(iv) The findings of the Authority are proper and correct and ought not to be interfered with by this Court.

5 The chief controversy between the parties concerns the liability of the Petitioner as the principal employer to pay gratuity to the employees of Respondent No.1, a contractor engaged by the Petitioner. What is at issue at the very outset is the jurisdiction of the Authority to determine the liability of the Petitioner as a principal employer. The submission of Mr.Pai is that the aspects with which the Authority is concerned in an application under Section 7(4) are (a) the admissibility of the claim of an employee and (b) the determination of the amount of gratuity. Learned Counsel submits that all that the Authority has to decide is whether the applicant is a person entitled to receive gratuity and what is the amount of such gratuity payable to him. The Authority, it is submitted, cannot embark upon an inquiry as to who is the employer - whether it is the contractor who engages the workman or the principal employer who engages the contractor. Besides, it is submitted, the issue as to whether there is an employer-employee relationship between the Petitioner and the concerned workmen has attained finality and is no more *res integra* before the Authority. Mr.Pai also submits that the application under Form 'I' for payment of gratuity was made by individual workmen to Respondent No.1. Individual applications in Form 'N' before the Authority were also filed by workmen against

Respondent No.1. The Petitioner was joined to the applications at the behest of Respondent No.1. It is submitted that the Petitioner had opposed its impleadment. It is submitted that at the time of arguing the impleadment, Respondent No.1 had admitted that it was the immediate employer of the concerned workmen. What was alleged by it was that the gratuity amount due to the workmen was to be reimbursed by the Petitioner under the contract between the parties. It is submitted that the impleadment order made it clear that the liability to pay gratuity could be fastened upon the Petitioner only if Respondent No.1 succeeds in proving that the Petitioner had undertaken to reimburse the gratuity. In other words, the application for impleadment was not made or allowed on the basis that the Petitioner was the principal employer and liable to pay gratuity to the workmen but that under the contract between the parties, the Petitioner was liable to reimburse the amount of gratuity paid by Respondent No.1 to its workmen.

6 In the first place, it is rather odd that in an application for payment of gratuity under Section 7 of the Gratuity Act against the applicant's admitted employer, i.e. Respondent No.1, the Authority should have impleaded the Petitioner expressly on the footing that the liability of payment of gratuity can be fastened upon the Petitioner only on the basis of a contractual commitment as between the admitted employer and the Petitioner, and then decided on the Petitioner's liability as the 'employer' itself. That would be impermissible. Considering, however, the extensive arguments advanced at the Bar on the jurisdiction of the Authority to determine the identity of the employer and merits of such determination, I propose to consider the matter fully and on a wider footing.

7 Section 4 of the Gratuity Act provides for payment of gratuity to

an employee on the termination of his employment after he has rendered continuous service for not less than five years – (a) on his superannuation, (b) on his retirement or resignation, or (c) on his death or disablement due to accident or disease. The liability to pay gratuity at the rate of 15 day's wages based on the rate of wages last drawn by the employee concerned for every completed year of service or part thereof in excess of six months, is cast on the employer. Clauses (e) and (f) of Section 2, respectively, define “employee” and “employer” as under :

“(e) “employee” means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment, to which this Act applies, but does not include any such person who hold 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.”

“(f) “Employer” means, in relation to any establishment, factory, mine, oilfield, plantation, port, railway company or shop—

(i) belonging to, or under the control of, the Central Government or a State Government a person or authority appointed by the appropriate Government for the supervision and control of employees, or where no person or authority has been so appointed, the head of the Ministry or Department concerned,

(ii) belonging to, or under the control of, any local authority, the person appointed by such authority for the supervision and control of employees or where no person has been so appointed, the chief executive officer of the local authority,

(iii) in any other case, the person, who, or the authority which, has the ultimate control over the affairs of the establishment, factory, mine, oilfield, plantation, port, railway company or shop, and where the said affairs are entrusted to any other person, whether called a manager, or managing director or by any other name, such person.”

Section 7 of the Gratuity Act enables the person, who is eligible to receive gratuity, to apply to the employer within such time and in such form, as may be prescribed, for payment of such gratuity. Whether such application has been made or not, the employer is, as soon as gratuity becomes payable, required to determine the amount of gratuity and give a notice in writing to the person entitled to the same and also to the Controlling Authority specifying the amount of gratuity so determined. The employer is required to pay the amount of gratuity within thirty days from the date it becomes payable. If the amount is not so paid by the employer, there is liability to pay simple interest at such rate not exceeding the rate notified by the Central Government for repayment of long term deposits, as the Government may by notification specify. Sub-section (4) of Section 7, which deals with determination of disputes in this behalf by the Controlling Authority, provides as follows :

“(4)(a) If there is any dispute to the amount of gratuity payable to an employee under this Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the employer shall deposit with the controlling authority such amount as he admits to be payable by him as gratuity.

(b) Where there is a dispute with regard to any matter or matters specified in Clause (a), the employer or employee or any other person raising the dispute may make an application to the Controlling Authority for deciding the dispute.

(c) The Controlling Authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as a result of such inquiry any amount is found to be payable to the employee, the controlling authority shall direct the employer to pay such amount or, as the case may be, such amount as reduced by the amount already deposited by the employer.

(d) The controlling authority shall pay the amount deposited, including the excess amount, if any, deposited by the employer, to the

person entitled thereto.

(e) As soon as may be after a deposit is made under Clause (a), the controlling authority shall pay the amount of the deposit—

(i) to the applicant where he is the employee; or

(ii) where the applicant is the employee, to the nominee or, as the case may be, the guardian of such nominee or heir of the employee if the controlling authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity.”

8 As the scheme of Sections 4 and 7 read with the definitions of 'employee' and 'employer' under Clauses (e) and (f) of Section 2 suggests, the liability to pay gratuity to an employee on termination of his employment after continuous service of not less than five years, is cast on the employer as defined in Clause (f) of Section 2. The employer has to himself determine the amount of gratuity and arrange to pay the same within thirty days of it becoming payable. Any dispute as to the admissibility of any claim of gratuity is required to be determined by the Controlling Authority after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard. If, as a result of any inquiry, any amount is found to be payable to the employee, the Controlling Authority under Clause (c) of sub-section (4) of Section 7 is required to direct the employer to pay such amount. What is implicit in this scheme is that all questions as to the entitlement of the applicant to payment of gratuity as an employee as well as the liability of the person to pay such gratuity as the employer of the applicant and the quantum of gratuity payable, are matters to be determined by the Controlling Authority. The entitlement of the applicant is based on his status as an employee and his fulfilling the conditions laid down in sub-section (1) of Section 4, whereas the liability of the opponent is founded upon his being an employer. The quantum of gratuity and interest payable, in turn, depends upon the conditions laid

down in sub-sections (3), (4) and (5) of Section 7. All these matters are part of such inquiry. There is no reason to restrict this inquiry to only entitlement to receive gratuity as an employee and the amount of gratuity payable. Mr.Naik, in this behalf, relied on the judgments in **Vividh Kamgar Sabha vs. Kalyani Steels Ltd.**¹, **Cipla Limited vs. Maharashtra General Kamgar Union**², **Sarva Shramik Sangh vs. Indian Smelting Refining**³ and **Hydroflex (India) vs. A.D. Shelar**⁴. These judgments are all under Section 28 of the M.R.T.U. & P.U.L.P. Act, 1971, and hold that unless the question of relationship of employer and employee is determined before a proper forum, a complaint under the M.R.T.U. & P.U.L.P. Act is not maintainable. These judgments have no bearing on the facts of our case. Under the M.R.T.U. & P.U.L.P. Act, its provisions can only be invoked by persons who are admittedly workmen. If there is any dispute as to whether they are employees of a particular employer, that question must first be got resolved by raising a dispute before an appropriate forum. There is no such requirement under the Gratuity Act. The existence of a relationship of employer and employee is a matter to be determined by the Authority itself under the Gratuity Act.

9 Coming now to the merits, the person liable to pay gratuity must be an “employer” as defined in Clause (f) of Section 2. Just as the employee is a person employed for wages in, or in connection with the work of, an establishment, to which the Gratuity Act applies, the employer must be a person, who had the ultimate control over the affairs of the establishment. It is not disputed that the employees, with whom we are concerned in the present case, were employed in the firm of Respondent

1 2001 I CLR 532

2 2001 I CLR 754

3 2003 III CLR 949

4 2005 I CLR 48

No.1. It is this firm, which is the establishment for the purposes of gratuity so far as these employees are concerned. It is Respondent No.1 or its partners who had the ultimate control over the affairs of this establishment and it is Respondent No.1 who alone could be termed as an employer in relation to the establishment. Respondent no.1 may be carrying on business at its own business premises or at the factory of the Petitioner. That is quite besides the point. The authority in its impugned order seems to have proceeded on the footing that in the present case, all Applicants were working inside the factory premises of the Petitioner and never on the premises of Respondent No.1 and that the employer in respect of these workmen was accordingly the Petitioner who had ultimate control over the affairs of the factory. This reasoning is essentially fallacious in that it disregards that as far as the Applicants are concerned, the establishment in which the Applicants were employed was the establishment of Respondent No.1, though they may be physically working at another establishment as part of their duties with the former establishment. The mere fact that they were designated to work inside the factory premises of the Petitioner does not make the factory premises an “establishment” as far as these employees are concerned. The Authority was not right in holding that for deciding the liability of gratuity under the provisions of the Gratuity Act, it was immaterial as to who was the immediate employer of the Applicants or that the employer in respect of any person, who works inside factory premises, is the occupier of the factory premises.

10 Mr.Naik for Respondent No.1 suggests that though Respondent No.1 was the contractor who had engaged the Applicants as employees, it is the Petitioner who was the principal employer. He refers in this connection to the definition of 'principal employer' under the Contract Labour Act.

There is no reason to import the definition of 'principal employer' in Clause (f) of Section 2 of the Gratuity Act. The Supreme Court in the case of **Ahmedabad Primary Teachers' Association vs. Administrative Officer**⁵ considered the definition of "employee" in clause (e) of Section 2 of the Gratuity Act. Definitions of the word "employee" in diverse labour enactments including the Employees' Provident Funds Act, 1952 were cited before the Court and the Court was urged to construe the word "employee" in clause (e) of Section 2 of the Gratuity Act widely and include teachers within it. The Supreme Court rejected the wide construction suggested in that case, holding that the *"legislature was alive to various kinds of definitions of the word 'employee' contained in various previous labour enactments when the Act (i.e. the Gratuity Act) was passed in 1972. If it intended to cover in the definition of 'employee' all kinds of employees, it could have as well used such wide language as is contained in section 2(1) of the Employees' Provident Funds Act, 1952 which defines 'employee to mean 'any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishmentNon-use of such wide language in definition of 'employee' in section 2(e) of the Act of 1972 reinforces our conclusion that teachers are clearly not covered in the definition."* Even here, the legislature whilst defining the word "employer" in the Gratuity act, had before it various templates of definitions of "employer" in different labour law legislations including the concept of "principal employer" under the Contract Labour Act. It advisedly did not use these templates or introduce the concept of "principal employer" in the definition of "employer" in clause (e) of Section 2. The Contract Labour Act envisages 'contract labour' as a workman employed in connection with the work of an establishment where he is hired in or in connection with the work of an establishment by or

5 (2004) 1 Supreme Court Cases 755

through a contractor. The Contract Labour Act defines both “contractor” and “principal employer” in relation to the “establishment”. An 'establishment' implies any place where any industry, trade, business, manufacture or occupation is carried on. A 'contractor' in relation to such establishment is a person who undertakes to produce a given result for the establishment through contract labour or who supplies contract labour for any work of the establishment, whereas a 'principal employer' in relation to the establishment is a person responsible for the supervision and control of the establishment. There is no reason why this dichotomy between a contractor and a principal employer should be imported into the definition of “employer” under the Gratuity Act. The Gratuity Act simply refers to an “establishment” and an “employee” as a person employed in or in connection with such establishment and an “employer” as a person having the ultimate control over the affairs of the establishment. The 'establishment' contemplated under these definitions is any business establishment which employs the employee. That establishment is obviously the firm of Respondent No.1 here, and not the factory of the Petitioner.

11 Mr.Naik relies on Section 21 of the Contract Labour Act and submits that in any event, the responsibility to pay 'gratuity' as part of 'wages' is on the 'principal employer' as defined under the Contract Labour Act and the Petitioner as such principal employer is bound to pay the gratuity to the concerned workmen even if they be employed by the contractor. In other words, the argument is that, if not under the Gratuity Act, the liability to gratuity can certainly be fastened unto the Petitioner under the Contract Labour Act. That may be so. Still, this liability does not arise under the Gratuity Act and there is certainly no jurisdiction or authority in the Controlling Authority to determine whether any liability

could be fastened unto the Petitioner under Section 21 of the Contract Labour Act as the principal employer under that Act. That would require the Authority to embark on an inquiry as to whether Respondent No.1 is a 'contractor' and the Petitioner is a 'principal employer' within the meaning of that Act and whether gratuity as 'wages' is payable and not paid by Respondent No.1 within the meaning of that Act. These inquiries are foreign to the Controlling Authority operating under the Gratuity Act and determining matters specified in Clause (a) of sub-section (4) of Section 7 thereof. As I have noted above, the matters to be determined by the Authority are simply the following : (i) Whether the applicant is an "employee" as defined in clause (e) of Section 2 of the Gratuity Act, (ii) Whether the opponent is an "employer" as defined in clause (f) of Section 2, (iii) Whether the conditions for entitlement to receive gratuity under sub-section (1) of Section 4 of the Gratuity Act are satisfied, and (iv) What is the quantum of such gratuity and interest thereon, if any, having regard to sub-sections (3), (4) and (5) of Section 7 of the Gratuity Act. Non-payment of wages, or of gratuity as part of wages, may invite an action under Section 15 of the Payment of Wages Act read with Section 21 of the Contract Labour Act or alternatively, under Section 33-C of the Industrial Disputes Act. In either case, the Authority under the Gratuity Act is not the forum.

12 Mr.Naik relies on the judgments of Madras High Court in the cases of **Superintending Engineer, Mettur Thermal Power Station, Mettur vs. Appellate Authority Joint Commissioner of Labour, Coimbatore**⁶ and **The Management of Cruickshank and Company Ltd. vs. The Appellate Authority under Payment of Gratuity Act, 1991**⁷ in support of his contention that when a contractor who engages workmen does not

6 2012 III CLR 242

7 MANU/TN/7635/2006

pay the amount of gratuity to workers engaged by him, by virtue of Section 21(4) of the Contract Labour Act, the principal employer is liable to pay all dues including the amount of gratuity to the contractor's workers. The Madras High Court relying on Section 21(4) of the Contract Labour Act has affirmed the liability of the principal employer to pay gratuity to contractor's workers. There is no dispute about the principal employer's liability to pay gratuity to contractor's workmen under Section 21(4) of the Contract Labour Act. The point is, whether the Controlling Authority acting under the Gratuity Act has the jurisdiction to enforce this liability, which arises under Section 21(4) of the Contract Labour Act. There is no discussion in the Madras judgments referred to above on this point. Apparently, this point was not even argued in those cases. The existence of such jurisdiction may, however, be said to be implicit in those judgments. The earliest of Madras High Court judgments on this point brought to my notice is the case of **Madras Fertilisers Ltd. vs. Controlling Authority under Payment of Gratuity Act.**⁸ In that judgment, the Madras High Court considered whether gratuity is excluded from the definition of wages under clause (vi) of Section 2 of the Payment of Wages Act by reason of the exclusion contained in sub-clause (6) thereof. The definition of wages in Clause (vi) of Section 2 of that Act includes in sub-clause (d), *“any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum, whether with or without deductions but does not provide for the time within which the payment is to be made.”* Sub-clause (6), however, excludes *“any gratuity payable on the termination of employment in cases other than those specified in sub-clause (d).”* The court held that on a correct reading of sub-clause (6), it was clear that gratuity would be excluded from the wages only if such gratuity was

8 2003-I-LLJ Madras - 325

not covered in sub-clause (d). The Court reiterated that the plain meaning of the clause would be that where any sum was payable on termination of employment of the person under any law (in this case, the Payment of Gratuity Act), it would be covered under sub-clause (d), and therefore, excluded from the operation of sub-clause (6) and would amount to “wages”. Based on this conclusion, the Court further held that once this construction was accepted, it was clear that it would be the responsibility of the principal employer under Section 21(4) of the Contract Labour Act to make the payment of gratuity to the contractor's workmen and thereafter to recover the same from the contractor, since the initial responsibility to make payment of gratuity lied with the contractor. It is not clear as how the Madras High Court proceeded to thereafter consider the power of the Controlling Authority under the Gratuity Act to order such payment against the principal employer within the jurisdiction conferred to it under clause (c) of sub-section (4) of Section 7 of the Gratuity Act. The judgment of **Madras Fertilisers Ltd.** seems to have been followed by that court in the later cases of the **Superintending Engineer, Mettur Thermal Power Station** and **The Management of Cruickshank and Company Ltd.** (supra). Even these later cases do not consider the further question as to whether the authority under the Gratuity Act can determine the liability of the principal employer within the meaning of Section 21(4) of the Contract Labour Act read with definition of “wages” in clause (vi) of Section 2 of the Payment of Wages Act. I am of the view that this aspect of the matter was not, in terms, decided by the Madras High Court but insofar as it can be said to be implicit in those decisions, I am in respectful disagreement with that implicit conclusion. Section 7 of the Gratuity Act, which provides for the jurisdiction of the Authority to determine the amount of gratuity, makes it clear that it deals with eligibility of a person “*for payment of gratuity under this Act*” (see,

sub-section (1) of Section 7); that the disputes that the Authority decides are “*with regard to any matter or matters specified in Clause (a)*” of sub-section (4) of Section 7 (See, clause (b) of Section 7(4)); that clause (a) specifies matters including the liability of the “employer” as defined under the Gratuity Act to pay gratuity and interest (see, sub-sections (3) and (3A) of Section 7). As I have explained above, there is no scope for determining liability of any other person to pay gratuity by virtue of any other law insofar as the Authority under the Gratuity Act is concerned.

13 It is lastly submitted by Mr.Naik that gratuity payable to the concerned employees by Respondent No.1 is liable to be reimbursed to it by the Petitioner under the contract between the parties. That may or may not be so. But it is not in the province of the Controlling Authority to enforce such contract, if at all there is any. If there is such contract, it would give rise to a contractual claim as between Respondent No.1 and the Petitioner for a debt. The Controlling Authority under the Gratuity Act is not concerned with this debt.

14 None of the judgments cited by Mr.Naik on the question of scope of interference by a writ court with findings of fact recorded by the Industrial Tribunal takes his case any further. The cases of **Indian Overseas Bank vs. IOB Staff Canteen Workers Union**⁹, **State of Karnataka vs. K.G.S.D. Canteen Employees Welfare Association**¹⁰ and **Amrit Vanaspati Co.Ltd. vs. Khem Chand**¹¹ *inter alia* deal with factual determinations of fact recorded by the Industrial Tribunal based on evidence. What they hold is that such findings cannot be interfered with unless the findings can be said

9 2000-I-LLJ Supreme Court 224

10 2006-I-LLJ Supreme Court 155

11 2006-III-LLJ Supreme Court 72

to be based on no evidence. This proposition is too well established to require any analysis. The infirmity in the impugned order found by me, however, is not about any finding of fact but a matter of law and jurisdiction where the Authority under the Gratuity Act has determined liability arising under another legislation (namely, the Contract Labour Act) and which is required to be enforced by recourse to the provisions of yet another legislation (namely, the Payment of Wages Act or the Industrial Disputes Act).

15 The impugned order of the Authority, accordingly, cannot be sustained.

16 The question now is what relief should be granted on this petition. The Petitioner has simply prayed for quashing of the impugned order. That would, however, be unfair to the workmen whose claim of gratuity on merits is practically uncontested by Respondent No.1, their immediate employer, who, at any rate, is clearly liable to pay the same. The only contest before the Authority and also in this petition is on the liability of the Petitioner as the alleged principal employer of these workmen to pay gratuity within the frame work of the Gratuity Act. Whether or not the Petitioner is the principal employer and whether or not as such principal employer, it is liable to pay gratuity under Section 21(4) of the Contract Labour Act, the primary liability of Respondent No.1, as the admitted immediate employer of these workmen, was never really in doubt. In fact, there is no reason why the Authority should not have, in the first place, held Respondent No.1 so liable, even if the Authority were to additionally hold the Petitioner liable in the event of the former's failure to pay gratuity to its workmen. Justice of the case requires this Court to substitute the directions

issued to the Petitioner to pay the gratuity determined by the Authority with similar directions to Respondent No.1. There is no issue concerning either the eligibility of the workmen to receive the gratuity or as to the quantum of the amount payable towards it. The identity of the employer liable to pay the same being now finally decided on the workmen's applications under Section 7 of the Gratuity Act, such order must follow.

17 In the premises, the petition is disposed of in terms of the following order :

(i) The impugned order dated 30 May 2003 passed by the Controlling Authority in Application (PGA) Nos.16 to 91 is quashed and set aside;

(ii) Respondent No.1 shall pay the amount of gratuity and interest determined by the Controlling Authority in the impugned order dated 30 May 2003 to the Applicants in Application (PGA) Nos. 16 to 91, i.e. Respondent Nos.2 to 77 herein;

(iii) The amount deposited by Respondent No.1 in pursuance of the interim order passed by this Court on 30 December 2008, shall be adjusted towards such payment;

(iv) The Registrar shall accordingly permit withdrawal of the amount deposited in this Court,

together with accrued interest, if any. For the convenience of such withdrawal and disbursal of the amount amongst the original Applicants, the Registrar shall permit the representative union of the Applicants, namely, Kirloskar Cummins Employees' Union, Pune to withdraw the amount with accrued interest. The Union shall file an appropriate resolution passed by it in this behalf in this Court within a period of two weeks from today;

(v) In the event of failure of Respondent No.1 to pay the amount of gratuity and interest as ordered herein, Respondent Nos.2 to 77 as well as their Union, shall be at liberty to adopt such proceedings as may be available to them in law against the Petitioner herein under the provisions of The Contract Labour (Regulation and Abolition) Act, 1970, read with The Payment of Wages Act, 1936;

(vi) In view of the disposal of the petition, the interim applications by way of Civil Application No.2745 of 2003 and Civil Application No.2767 of 2008, do not survive and the same are disposed of;

(vii) No order as to costs.

18 On the application of Respondent No.1, the directions against it for payment of the amount of gratuity and interest in terms of clause (ii) of paragraph 17 above, shall not be implemented for a period of eight weeks from today. This, however, shall not come in the way of the Union applying for withdrawal of the amount deposited and the Registrar of this Court acting on such application in terms of clauses (iii) and (iv) of paragraph 17 above.

(S.C. Gupte, J.)