

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

WRIT PETITION NO.306 OF 2018

Municipal Corporation of Greater Mumbai
Office of the Education Department ... Petitioner
Versus
Mrs. Vrunda Vijaykumar Kulkarni ... Respondent

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Mr. Suresh S. Pakale a/w Mr. Vinod Mahadik and Mr. Pradip Patil for the
Petitioner-MCGM.

Mr. Datta Naik a/w Mr. Hemant Salvi, Mr. Akshay Naik, Mr. Dharmapal
Dave I/b Naik Patil Salvi and Associates for the Respondent.

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CORAM : S.C.GUPTE, J.

DATE : 2 & 6 AUGUST 2018

Oral Judgment

. The present petition challenges orders passed by the controlling authority under the Payment of Gratuity Act, 1972 and the Industrial Court in an appeal from that order.

2 The Respondent was working as a teacher in a private aided primary school. She superannuated on 31 August 2013. She claimed gratuity from the Petitioner corporation as part of salary aid and approached the controlling authority under the Payment of Gratuity Act, 1972 ("Act") for the same. The learned Labour Judge, acting as controlling authority under the Act, issued notice to the Petitioner corporation. Since the corporation remained absent, the matter was heard *ex parte*. The controlling authority, by its impugned order, granted the Respondent's application for gratuity

and ordered the corporation to pay gratuity in the sum of Rs.10 lakhs to the Respondent. The corporation thereafter applied for setting aside of the *ex parte* order and restoration of the application. The application was rejected by the Labour Court. The corporation thereafter preferred an appeal under Section 7(7) of the Act challenging both orders, i.e. the order originally passed by the controlling authority under Section 7(4) and the order passed under Rule 11(5) of the Rules framed thereunder on the application for restoration. The Industrial Court dismissed the appeal. The Industrial Court upheld the order of the Labour Court rejecting the corporation's application for restoration, treating it as an application for review and, thus, barred under Rule 11(5). The court held that there was a delay of about 5 months and 17 days in filing the application for review. The court held that any application for review and rehearing of the application must be preferred within 30 days of the *ex parte* order under the proviso to Rule 11(5). The court also held that since the order passed by the controlling authority was not challenged before the Industrial Court under Section 7(7) of the Act within 120 days, the order had become final and could not be challenged by invoking the provisions of Rule 11(5). The court, though it found substance in the corporation's case on merits, considering, however, its conclusion that the appeal was not maintainable on account of the bar of limitation, was of the view that merits of the case could not be examined. The court, accordingly, dismissed the appeal. The corporation has approached this court challenging all three orders, namely, the order of the Labour Court under Section 7(4) of the Act, its order on the application for review and rehearing under the proviso to Rule 11(5) and the appellate order passed under Section 7(7) of the Act.

3 Though the impugned order of the Industrial Court in appeal cannot be faulted *per se* on consideration of Rule 11(5) of the Rules or, for that matter, the bar of limitation under Section 7(7) for filing an appeal from the original order, Mr.Pakale, learned Counsel appearing for the Petitioner, submits that since the order of the controlling authority is a complete nullity, the considerations of limitation apart, this court ought to quash the same on merits as an order non-est or wholly without jurisdiction.

4 Before we consider the relevant provisions of Payment of Gratuity Act and the position of the Respondent teacher *vis-a-vis* the Petitioner corporation under that Act, it must be noted that the corporation has its own rules, under which it pays gratuity to teachers of aided schools, who have completed ten years of service. These gratuity rules are contained in a circular issued by Municipal Corporation of Greater Mumbai on 31 October 1997. If one has regard to the history of terminal benefits extended by the Municipal Corporation to approved staff of private primary aided schools, it may be seen that the corporation did not have any scheme for payment of pension or gratuity to the staff of primary aided school of Greater Mumbai. It had pension rules for its own employees, that is to say, municipal servants, who hold lien on permanent post or would hold a lien on such pension or their lien had been in subsistence under the relevant municipal regulations. As a matter of fact, teachers of private primary schools were not covered even under the provisions of Payment of Gratuity Act, till the Act was amended by Act No.47 of 2009 on 31 December 2009. By amending the Act, the definition of 'employee' under clause (e) of Section 2 of the Payment of Gratuity Act was amended to include all persons, who were employed for wages in any establishment, to which the

Act applied. This definition is deemed to have been come into force on 3 April 1997. As far as approved staff of private primary aided schools in Greater Mumbai is concerned, the pension scheme was extended by MCGM to them by its circular dated 31 October 2017. This circular extended municipal corporation pension rules with certain changes to the approved staff of these schools. The scheme provided for pension, gratuity and family pension to the approved staff of private primary aided school in Greater Mumbai. It provided for calculations of the amount of pension as well as gratuity. The scheme applied to all full-time confirmed and approved teaching and non-teaching staff of private primary aided schools in Greater Mumbai, whose salary and allowances were admissible for grant-in-aid and claimed regularly by the school from MCGM, subject to a condition that such private primary aided schools had obtained exemption under Section 16(2) of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 ("EPF Act").

5 This scheme was applicable with a cut off date of 1 April 1979 on which it came into effect. The scheme provides for compulsory coverage of approved members of staff of private primary aided schools appointed on or after 1 April 1979. They would have no option to retain contributory provident fund benefits. As far as approved staff engaged before 31 March 1979, and who were in service as on that day were concerned, their coverage was to be optional. They had to opt for the option in writing in a proforma prescribed by MGCM within a period of six months from the date of approval of the scheme by the corporation. Such option, once exercised, would be final. The scheme provided for the manner in which the option was to be exercised and processed.

6 It is an admitted position that the Respondent in the present case did not opt for this scheme. In her case, the application for gratuity is not under this scheme, but under the Payment of Gratuity Act, 1972.

7 As far as the Payment of Gratuity Act is concerned, it 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, either on superannuation or on his retirement or resignation or on his death or disablement due to accident or disease. Such gratuity is payable by the employer. In other words, there must be a relationship of employer and employee between the applicant and the respondent, against whom gratuity may be sought under Section 4 of the Payment of Gratuity Act. An employer in relation to any establishment not belonging to, or under the control of, the Central Government or the State Government or a local authority, is the person who has ultimate control over the affairs of the establishment. In other words, to have a successful claim against MCGM, the claimant teacher on the staff of a private primary aided school must show that the school, in which he or she was working, was under the ultimate control of MCGM over its affairs. Merely because the municipal corporation performs certain duties and exercises certain powers under a regulatory framework of law vis-a-vis private primary aided schools and provides grant in aid to such schools, it cannot be said that it has ultimate control over the affairs of these schools. It does not, in other words, qualify as an employer vis-a-vis any employee of such school including both teaching and non-teaching staff. No employee of such school may have a claim against the municipal corporation, in the premises, under the Payment of Gratuity Act or indeed any claim outside the provisions of the

scheme of 31 October 1997.

8 Learned Counsel for the Respondent relies on the judgment of a learned single judge of this court in the case of **The Municipal Corporation of Greater Mumbai Vs. Ganesh Narayan Vaze**¹. Relying on this case, it is submitted that due to absence of employer-employee relationship between the corporation and employees of a private primary aided school, the corporation is not absolved from payment of gratuity. In that case, the courts below had held the corporation to be liable to pay gratuity. The court in that case proceeded on a concession made by learned Counsel for the corporation that in respect of private primary aided schools getting 100 per cent grant-in-aid from corporation, it is the corporation who pays gratuity. This liability of the corporation, as I have noted above, arises from the scheme of 31 October 1997 and not *dehors* that scheme or particularly, under the Payment of Gratuity Act. Anyway, this court has not considered any liability of the corporation under the Payment of Gratuity Act in that case. As I have noted above, there is no liability of the corporation under that Act vis-a-vis approved staff of private primary aided schools in Greater Mumbai.

9 In the premises, it is beyond any pale of doubt that the controlling authority under the Payment of Gratuity Act has absolutely no jurisdiction or power to consider or grant any order for payment of gratuity against the MCGM on an application of any teaching or non-teaching staff member of a private primary aided school outside the scheme of 31 October 1997 and the impugned orders are non-est, and deserve to be set aside. The

1 W.P. No.702/15 dated 13 February 2015

employee may have a claim only against the school, i.e. his or her employer and not the corporation.

10. It is, however, seen from the impugned order of the controlling authority, which was upheld by the appellate authority in the present case, that though the Respondent, as a complainant before the authority, had arraigned both the corporation and the school in which she was employed as opponents to her application, the order of gratuity was passed only against the Municipal Corporation, though interest on the gratuity amount was liable to be paid by the school. Though these orders are quashed and set aside in the present order, it will have to be clarified that the Respondent will be entitled to make a claim for payment of gratuity against the school, who was in real term her employer.

10 In the premises, the following order is passed :

(i) The impugned order of the Controlling Authority under the Payment of Gratuity Act, 1972 dated 30 August 2016, the order of the Controlling Authority dated 14 August 2017 and the order of the Industrial Court dated 12 December 2017, are quashed and set aside;

(ii) Application (PGA) No.92 of 2015 is dismissed against the Petitioner herein (Respondent No.1 to the application);

(iii) Application (PGA) No.92 of 2015 is remanded to the Controlling Authority under the Payment of Gratuity Act, 1972 and Judge, 10th Labour Court at Mumbai, only against Opponent Nos.2 and 3 thereto;

(iv) Application (PGA) No.92 of 2015 shall be decided on its own merits after hearing both parties;

(v) The parties shall present themselves before the Controlling Authority and Judge, 10th Labour Court at Mumbai on 14 August 2018 at 11.00 a.m. and produce an authenticated copy of this order. The authority shall thereupon issue directions for hearing of the application. The application shall be disposed of as expeditiously as possible and preferably within a period of three months from today;

(vi) The writ petition is disposed of in above terms.

(S.C. GUPTE, J.)

Rajesh
Vasant
Chittewan

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by Rajesh Vasant
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