

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.11225 OF 2017**

Balak Vihar Primary Division

.. Petitioner

Vs.

Sushma Ashok Khanolkar

.. Respondent

Mr. Rahul Nerlekar for the petitioner.

Mr. Ashok D. Shetty a/w Swapnil P. Kamble for the respondent.

CORAM : A.K. MENON, J.

DATED : 15TH JANUARY, 2018.

P.C. ,

1. The challenge in this petition is to the judgment dated 5th January, 2011 passed by the Controlling Authority under the payment of Gratuity Act, order dated 17th November, 2011 passed by the Appellate Authority and judgment dated 22nd July, 2013 passed by the Controlling Authority holding the petitioner liable under the Act. It is the petitioner's case that the Act is not applicable since the number of employees in the school has never crossed the statutory requirement of 10 employees.
2. It is the case of the petitioner that the petitioner has always had only 9 employees in its primary division. The impugned order while dismissing the appeal grants permission to the applicant to withdraw the amount deposited by the school and interest thereon. Mr. Nerlekar, the learned counsel for the petitioner submits that the school never had

more than 9 employees and the finding that the manager of the school was an employee, is erroneous inasmuch as manager Mr. Bharat Sathe has been granted Letters of Administration by this Court in Testamentary Petition no.185 of 1992. The Letters of Administration have been granted in respect of the estate of late Smt. Sudha Pradeep Sathe who was the proprietor of the petitioner's school and Head Mistress of Balak Vihar Vidhyala, the secondary school under the same management but which is not before this Court.

3. At the hearing of this matter, both counsel agreed that this petition should be disposed of finally.
4. The principal contention of the petitioner is that the person described as "Manager" is one of the administrators of the school under the grant dated 24th December, 1992 issued by this Court in the aforesaid Testamentary Petition. An administrator of the estate could never never been shown as an employee since he is administering the estate of the deceased-proprietor. The said Manager is admittedly the son of the deceased-proprietor and Head Mistress aforesaid.
5. Mr. Shetty, the learned counsel on behalf of the respondent has disputed this on the basis of documents filed in the proceedings below.

He submits that it can be demonstrated that there were 9 employees and the 10th employee was Mr. Bharat Sathe who is the manager and administrator. He relied upon an extract from the "Attendance Record Appendix-X" in the compilation tendered wherein the persons who have signed the attendance register were 10 in number. Mr. Nerlekar submitted that the total number as on June 1995 is also incorrect since one of the employees had retired in the month of May and the person replacing him joined on 13th June, 1995 and that Smt. Saroj Naik had retired in May.

6. This aspect of the matter has not been considered in the Courts below and in my view no purpose would be served by admitting this petition unless this factual aspect is determined. It is therefore appropriate that the matter be remanded with liberty to the parties to lead fresh evidence only on this aspect to determine the number of employees in the petitioner's school. In the circumstances, I pass the following order:-

(i) Impugned orders dated 5th January, 2011, 22nd July, 2013 and 24th August, 2017 are hereby set aside.

(ii) It is made clear that the evidence recorded, if any, shall only be supplement to the deposition recorded on the number of persons employed in the 1st respondent at the material time preserving the

right for cross examination to both parties.

(iii) In the meantime, the amount deposited with the Industrial Court shall not be withdrawn till further orders of that Court and shall remain invested subject to further orders to be passed.

(iv) With the aforesaid direction, writ petition is disposed of.

(v) No orders as to costs.

(A.K. MENON, J.)

wadhwa