AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

WA No. 257 of 2019

- Kamla Bai W/o Late Kirtan Aged About 60 Years S/o Khetro, R/o Kumda Colony, Via-Bisrampur, P.O. Kumda Colony, District Surajpur, Chhattisgarh 497226

---- Appellant

Versus

1. Sub-Area Manager South Eastern Coalfields Limited Chhal, Sub-Area, Raigarh Area, P.O. Navapara, District Raigarh Chhattisgarh. 496665
2. Appellate Authority Under The Payment Of Gratuity Act/ Dy. Chief Labour Commissioner (Central, Raipur Chhattisgarh. 492001
3. Controlling Authority Under The Payment Of Gratuity Act / Regional Labour Commissioner (Central, Bilaspur Chhattisgarh. 495001

---- Respondents

For Appellant	:	Shri Gary Mukhopadhyay, Advocate
For Respondent	:	Shri Vivek Chopda, Advocate

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice
Hon'ble Shri Prashant Kumar Mishra, Judge

Judgment on Board

Per, P.R. Ramachandra Menon, Chief Justice

10.05.2019

1. The interference made by the learned Single Judge, though it may appear to be for a limited extent, causing remand of the proceedings to re-calculate the gratuity to be paid to the Appellant, is under challenge, both on legal and factual grounds. When the matter is taken up for consideration at the time of admission, Shri Vivek Chopda entered appearance on behalf of the Respondent and accordingly, as agreed by both the sides, we thought it appropriate to have the matter heard finally and it was heard accordingly.

2. The sequence of events reveal that the Appellant's husband, who is no more, was an employee of the Respondent. His service was terminated on 31.12.2002 on the ground of absenteeism. It also remains a fact that the employee passed away on 09.08.2005. By virtue of the long service the Appellant/Widow of the employee filed an application before the Controlling Authority for payment of

gratuity in terms of the relevant provisions of law. There was a serious dispute from the part of the Respondent with regard to the status of the employee, as well as in relation to the last drawn wages. The Controlling Authority give opportunity to the Respondent to produce the relevant records in support of their contention and after considering the materials on record, order was passed on 27.11.2017 (Annexure-P/2), whereby the amount payable was fixed as Rs.1,46,160/- and it was directed to be paid accordingly.

3. This was to the chagrin of the Respondent who sought to prefer a statutory appeal before the Appellate Authority, but the appeal obviously was belated by more than 120 days. Maintainability was questioned by the Appellant pointing out that the statutory limit was 60 days, with a further period of 60 days of delay, to be condoned, if at all explained properly. Considering the legal position, indifference was declined and appeal was dismissed by the Appellate Authority, which was sought to be challenged by the Respondent by filing Writ Petition (L) No. 76 of 2019 before this Court.

4. When the matter was taken up for hearing, the appellant contented that the writ petition was not maintainable, as the statutory appeal had already been dismissed as belated. Under such circumstances, by virtue of the law declared by the Apex Court and also by this Court, the merit of the case on any ground could never been examined and the writ petition was liable to be dismissed. However, based on the submission made by the learned counsel for the Respondent that endeavour of the Respondent was not to cause the merit of the case to be reconsidered, but to rectify the calculation mistake with reference to the 'per day wage' based on a document produced as 'wage slip' of the employee alongwith the writ petition. Relief was moulded to some

extent and the writ petition was disposed off, virtually remanding the matter to the Controlling Authority to effect a re-calculation. This made the Appellant to feel aggrieved and hence the appeal.

5. We have gone through the pleadings and proceedings and also through the verdict passed by the Controlling Authority. It is seen that the Controlling Authority had granted sufficient time to the Respondent to produce the relevant records in support of their contentions. The factual position is disclosed from the discussion made by the Controlling Authority in the opening paragraph itself. It will be worthwhile to have the same extracted herein, so as to have clarity of thoughts and deliberation.

> “Regarding the length of service the respondent employer's representative was advised to submit the last pay drawn and the continuous service of the deceased employee. The employer's authorised representative informed that there is no service book available with them and further they were advised to submit the last pay drawn and the length of service of the deceased employee, since no service book was available with them. Also the counsel submitted that whether NCWA has been made or not. The respondent authorized representative informed that the deceased employee Shri Kirtan was an underground driller and his basic was supposed to be Rs. 322/- per day as on 21-12-2002. When he was removed, FDA, SDA will also be included while calculating gratuity. The applicant's authorised representative submitted written comments dated 05.09.2017 alongwith copy or removal from service. The employee expired on 03.05.2005. The respondent's authorised representative on the other hand submitted that gratuity nomination form 'F' is not available with them. In service excerpt the name of Smt. Kamla (Wife), daughter Kumari Pushpa also appear. The applicant failed to submit the removal order issued by the employer. The employer further submitted that form 'F' in which gratuity nomination was filed is not available with them. Regarding last pay of the deceased employee, he was taken it from Annexure-V of the CMPS (Coal Mines Pension Scheme) treating to be the month and year as January, 2001. On the other hand the applicant's counsel pointed out that the name of Smt. Kamla Bai has been recorded as nominee for gratuity and the same has been certified by the Dy. Manager (Personnel) of Chhal Sub Area. He confirmed the date of removal as 16.01.2003. Regarding the last pay the respondent's

authorised representative took it granted to be Rs. 244.95/- per day as on January 2001. On the other hand applicant representative informed that the deceased employee was entitled for wages as per NCWA-VII. The applicant's representative pointed out that for D.C. Driller, cat-iv pay scale is Rs. 229.50 with increment of Rs. 5.74 and it is coming to Rs. 332.82/- per day. The respondent's authorised representative in this regard submitted that Rs.332.82 is maximum. On the other hand the respondent's authorised representative informed that the deceased employee was a piece rated loader as per the document of 2001. Therefore, the respondent's representative was advised to submit the proof that the deceased employee was piece rated loader on the date of removal. The applicant's representative failed to submit proof that the ex-deceased employee was cat-iv D.C. Driller. Accordingly the respondent's representative was advised to submit the last pay drawn sheet in respect of the deceased employee. The applicant also submitted counter written arguments which was handed over to the respondent's representative.

FINDINGS/DECISION OF THE CONTROLLING AUTHORITY

On 24.10.2017 the applicant's representative finally informed and confirmed that the date of removal in case of the deceased employee from service was 16.01.2003. Then provisions of NCWA-VII will apply which is in force from 01.07.2001. The respondent's contention is that the applicant was a piece rated loader, so minimum basic pay will be Rs.290.33 for work load of 100 cubic. Finally both the parties in the hearing came to the consensus that the basis pay in case of the deceased employee was the following and the underground allowance, 8% VDA and SDA also are given below:-

Basic	- Rs. 290/-
Under ground allowance	- Rs. 29.00/-
8% VDA	- Rs. 24.00/-
SDA	- Rs. 5.00/-
	Total = Rs. 348/-

While determining calculating the gratuity on per day basis on Rs. 348/- per day. It is observed the workman has worked for 28 years. Therefore, the calculation comes as under:-

Rs. 348*28(years)*15= Rs. 1,46,160/- (Rupees One lakh forty six thousand one hundred sixty). The applicant also claimed interest since the respondent employer has not paid the gratuity dues to the widow of the employee after the death of the employee on 09.08.2005. In this regard as far as nominee is concerned, the respondent has admitted that the nominee is Kamla Bai in gratuity nomination in service excerpt of the

> record of the management. The respondent agreed for gratuity payment of Rs.1,46,160/- whereas the applicant's authorised representative also agreed that the same amount is coming after gratuity calculation. The respondent did not agree for interest for the period 16.02.2003 to till the date of payment for delaying in making payment of gratuity, whereas the applicant's representative insisted for interest on gratuity payment, since as per his contention delay has occurred from the respondent side. As regard interest part, it is to submit that when the employee was removed from service, it was the duty on the part of the employer to pay the gratuity and afterwards the employee concerned has expired on 09.08.2005 as per the statement given by the applicant's representative in the course of hearing. As per Section 7(3-A) of PG act, it is mandatory on the part of the employer to pay the gratuity amount in time. Here it is necessary to discuss the provisions of Section 7 of payment of Gratuity Act, 1972."
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> "Section 7: Determination of the amount of Gratuity :- 1. A person who is eligible for payment of gratuity under this Act or any person authorized, in writing to act on his behalf shall send a written application to the employer, within such time and such form, as may be prescribed, for payment of such gratuity."

6. From the above, it is quite obvious that the Respondent failed to produce the relevant materials with regard to the actual last drawn wage, if it were something different from the finding made by the Controlling Authority, based on the facts and figures as put-forth by both the sides. It is more discernible from the position extracted as above that the final figure was fixed by the Controlling Authority as <u>Rs.348/- per day</u>, based on all the materials on record as referred to therein and also with reference to the provisions of NCWA-VII (National Coal Wage Agreement-VII) which was in force from 01.07.2001 (and the minimum basic pay as referred to therein). It is also relevant to note that the Controlling Authority has specifically observed that the such finding was arrived at also <u>on the basis of consensus</u> that the basic pay in the case of the deceased employee was as given therein (with the splits of figures already extracted above). This being the position, the order

passed by the Controlling Authority on the basis of 'consensus' was not liable to be challenged, either on merit or in law, under any circumstance.

7. There is no dispute that the appeal preferred by the Respondent was belated. As per the relevant provisions of law, appeal has to be filed by the aggrieved party within 60 days from the relevant date and if there is any delay, it can be condoned to a maximum period of 60 days by virtue of the provisions thereunder. The question whether the statutory authority is having any wider power to condone the delay beyond the extent as mentioned in the statute by invoking the power of Section 5 of the Limitation Act, 2005 or such other count had come up for consideration before the Apex Court. As per the verdict passed by the Apex Court in the case of **Oil and Natural Gas Corporation Limited v. Gujarat Energy Transmission Corporation Limited and Others, (2017) 5 SCC 42** the question was answered in 'negative' also observing that even the Hon'ble Apex Court could not do so by invoking the power under Article 142 of the Constitution of India. This being the position, the dismissal of the appeal preferred by the Respondent by the Appellate Authority had become final and not assailable on any ground.

8. Having said so, the question is whether the writ petition was maintainable under the extraordinary jurisdiction invoking Article 226 or the supervisory jurisdiction under Article 227 of the Constitution of India. It is true that the merit of the case was stated as not sought to be challenged. But the effect of the verdict now passed by the learned Single Judge is that, there has to be a 're-calculation' with reference to a new document produced by the Respondent-Management along with writ petition. Whether such a course is possible or permissible is the only aspect to be considered and answered. As mentioned already, the issue had already become final and when no

appeal was liable to be sustained under any circumstances, no scrutiny is possible even in respect of any re-calculation. If there was any 'error apparent on the face of record' and the statute provided any specific power of review, it would sometimes be possible for the Respondent to put up such a challenge. Even if a review petition is maintainable, the power of review could only be to correct an error apparent on the face of record and it cannot be a substitute for appeal. We find force in this regard by the law declared by the Apex Court in case of ***Meera Bhanja vs Nirmala Kumari Choudhury, AIR (1995) SC 455*** and several other judgments. Above all, as mentioned already, the verdict passed by the Controlling Authority was <u>on the basis of a 'consensus'</u> and as such, it was never open for the Respondent to have challenged the impugned orders by filing a writ petition. We do not require any second thought to hold that the verdict passed by the learned Single Judge has exceeded jurisdiction and the same is not liable to be sustained.

9. In the said circumstances, the judgment dated 15.04.2019 passed by the learned Single Judge in Writ Petition (L) No. 76 of 2019 is set aside. The writ petition stands dismissed. The writ appeal is allowed. No costs.

10. In view of the submission made by the learned counsel for the parties that the amount covered by the order passed by the Controlling Authority has already been deposited before the said Authority, the Appellant is set at liberty to withdraw the amount due.

Sd/-
(P.R. Ramachandra Menon)
Chief Justice

Sd/-
(Prashant Kumar Mishra)
Judge

Chandra