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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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+ **LPA 97/2019 & CM 6534/2019 (stay)**

BCH ELECTRIC LIMITED

..... Appellant

Through: Mr Sandeep Sethi, Senior Advocate
with Mr Gulshan Chawla, Advocate.

versus

PRADEEP MEHRA

..... Respondent

Through: Mr Saurabh Prakash and Mr Kunal
Gosain with Mr Utsav Jain,
Advocates.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE SANJEEV NARULA

ORDER

12.02.2019

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Dr. S. Muralidhar, J.:

1. This appeal is directed against the judgment dated 6th February, 2019 of the learned Single Judge dismissing the Appellant's writ petition being W.P.(C) No.3385/2018 thereby affirming an order dated 23rd March, 2018 passed by the Appellate Authority ('AA') under the Payment of Gratuity Act, 1972 ('PGA'). By the said order dated 23rd March, 2018, the AA had dismissed the appeal of the Appellant, thereby upholding an order dated 31st July, 2017 passed by the Controlling Authority ('CA') granting the Respondent Rs.1,73,75,000/- as balance gratuity along with simple interest @ 10 percent per annum from 1st June, 2012 till the date of payment.

2. The facts in brief are that the Respondent joined the Appellant as Chief

Operating Officer ('COO') on 12th June, 2000 at a starting salary of Rs.12.36 lakhs per annum. Clause 11 of the letter of appointment stated that the Respondent would be entitled to gratuity on becoming eligible 'as per laws'. The Respondent resigned from the services of the Appellant, more than twelve years later on 1st June 2012, which was accepted. Along with a letter dated 1st June 2012, the Appellant paid him Rs.36,70,015/-. On 9th August, 2012, the Appellant paid the Respondent Rs.10,19,452/- towards gratuity along with the interest from the due date till the date of payment. According to the Appellant, the said sum included the maximum gratuity payable under the PGA i.e. Rs.10 lakhs plus interest.

3. The case of the Respondent, on the other hand, was that he was entitled to a total of Rs.1,83,75,000/- as gratuity for the entire period of his service. He wrote three letters dated 31st August, 2012, 24th September, 2012 and 19th October, 2012 to the Appellant claiming that amount, but it was to no avail. This led the Respondent filing a claim before the CA under Section 7 of the PGA. On 31st July, 2017, based on the affidavits and documents filed before him, the CA passed an order allowing the Respondent's claim and directing the Appellant to pay the differential sum of Rs.1,73,75,000/- along with simple interest @ 10% per annum for the delayed payment.

4. One of the issues raised by the Appellant before the CA was that he had no jurisdiction to decide the case. The Appellant had an approved gratuity fund called the 'Bhartia Cutler Hammer Limited Employees Gratuity Fund', which regulates the gratuity scheme of the company, which was formulated in consonance with the provisions of the PGA. According to the Appellant,

Clause 15 read with Rule 6 (b) of the Scheme made it plain that the employees of the Appellant were entitled to gratuity in accordance with the PGA. It was accordingly contended by the Appellant that no amount higher than the maximum permissible under the PGA was payable to an employee as gratuity. An objection was also raised before the CA that he had no jurisdiction to decide the claim of the Respondent for an amount of gratuity beyond the maximum permissible under the PGA.

5. In negating the above contentions of the Appellant, the CA referred to the decisions in *Transport Manager, Kohlapur Municipal Transport Undertaking v. Pravin Bhabhutul Shah* 2005 (2) LLJ 104 (Bombay); *Ethiopian Islands v. A.N.D. Noel Enricks* 2012 3 LLJ 801 (Bombay), *Managing Director, Punjab State Cooperative Bank Limited v. Manjit Singh* (2011) 3 LLJ 615 (P&H), *State of Punjab v. Labour Court, Jullunder* AIR 1979 SC 181, *Eastern Coal Field Company Limited v Regional Labour Commissioner* 1982 (2) LLJ 324 (Cal), *Steel Authority of India v. Regional Labour Commissioner (Central)* 1995 (1) LLJ 1007 (Ori), *Ramji Lal Chiman Lai Sharma v. Elphinstone Spinning and Weaving Mills Co. Ltd* 1984 LAB IC 1704 (Bom) and concluded that in view of Section 4 (5) of the PGA, an employee could approach the CA to claim gratuity under the more beneficial settlement, award, rule or scheme. The CA held that the PGA permitted an employee to claim before the CA a sum as gratuity higher than the maximum permissible under the PGA. The CA also rejected the plea of the Appellant that merely because it had paid higher gratuity to some individuals, 'due to a mistake', it would not entitle the Respondent to claim a higher amount as a matter of right. The CA

noted that “in this case, the management has admitted that there were at least 10 such cases. This is not a small number. These were also not disclosed in the reply to the Claims Statement but later in answer to interrogatories. It must therefore be presumed that all payments were knowingly made. Hence such defence cannot be permitted”.

6. The CA then noted that in the pay slip of the Respondent for April, 2012, his basic salary was shown as Rs.24, 50,000/-, which was released to him as salary. This was taken to be the last-drawn salary and the gratuity was, therefore, determined on that basis. Relying upon the judgment of the Supreme Court *H. Gangahanume Gowda v Karnataka Agro Industries Corpn. Ltd.* (order dated 5th February, 2003 in Civil Appeal No.1024/2003) where it was held that awarding interest under Section 7 (3A) of the PGA is a ‘statutory compulsion’. It was held that the Appellant is bound to pay interest on the delayed payment of gratuity.

7. The appeal filed by the Appellant was dismissed by the AA by an order dated 23rd March, 2018. The AA concurred with the CA and held that the ceiling limit of Rs.10 lakhs provided under Section 4 (3) PGA was not applicable if there was an award, an agreement or a contract between the employer and an employee, which provided for better terms of gratuity. It was noted that the Appellant had allocated 4.81% of the basic wage earned by the Respondent to the gratuity fund. The gratuity fund so created provided better terms of gratuity. It did not provide any ceiling limit to the amount of gratuity.

8. The Appellant then filed W.P. (C) No.3385/2018 in this Court. In support

of its plea that the CA had no jurisdiction to entertain the claim of the Respondent, reliance was placed on the judgment of the Supreme Court in *Allahabad Bank v. All India Allahabad Bank Retired Employees Association (2010) 2 SCC 44*. The learned Single Judge formulated two issues for consideration as under:

“I. In the facts of the present case, can the respondent claim gratuity in excess of the ceiling limit prescribed under Section 4(3) of the Payment of Gratuity Act, 1972?

II. While exercising its powers under Section 7(4)(a) and 7(4)(b) of the PGA does the Controlling Authority have the jurisdiction to decide claims in excess of the ceiling limit prescribed under Section 4(3)?”

9. The learned Single Judge, in the impugned judgment, answered the first issue in the affirmative by referring to Sections 4 (3) and (5) read with Section 7 (4a) and (4b) PGA; Clause 15 of the Appellant’s Gratuity Fund and Rule 6 of the Rules. Reference was also made to para 8 of the decision of the Supreme Court in *Workman of Metro Theatre, Bombay v. Metro Theatre Limited, Mumbai, (1981) 3 SCC 596* which reads thus:

“8. The very fact that under the above provision better terms of gratuity could be obtained by an employee by an agreement or contract with the employer notwithstanding the scheme of gratuity' obtaining under the Act clearly suggests that no standardisation of the gratuity scheme contemplated power upon the appropriate Government to exempt any establishment to which the Act applies from the operation of the provisions of the Act if in its opinion the employees in such establishment, are in receipt of gratuity' benefits not less favourable than the benefits conferred under the Act... It is true, as has been observed, by this Court in *State of Punjab V. Labour Court, Jullundur [(1980) 1 SCC 4* that the Act enacts a complete Code containing detailed provisions covering all essential features of

the scheme for payment of gratuity. But it is also clear that the scheme envisaged by the enactment secures the minimum for the employees in that behalf and express provisions are found in the Act under which better terms of gratuity if already existing are not merely preserved but better terms could be conferred on the employee in future... "

10. As regards the second issue, the learned Single Judge noted that as per the Appellant's own understanding of its Trust Deed dated 19th March, 1979 and the Rules thereunder, "payment of gratuity to the Respondent was never subject to the statutory ceiling limit". It was noted that while the gratuity of the Respondent was calculated in terms of the rate prescribed under Section 4 (2) of the PGA, the ceiling limit under Section 4 (3) of the PGA was never applied to him during his tenure. Accordingly, it was held that the Respondent was entitled to gratuity as per the rates mentioned in his Executive Emolument Sheets (EES) i.e. 4.81% of his annual basic pay which was consistent with the terms of his appointment, the Trust Deed dated 19th March, 1979 and the rules thereunder but also with the provisions of the PGA. The learned Single Judge also discussed the decision of the Supreme Court in *Allahabad Bank* (*supra*) and noted that it was not applicable to the facts of the present case. Likewise, the learned Single Judge also distinguished the decision in *Beed District Central Co-operative Bank Ltd. v. State of Maharashtra (2006) 8 SCC 514* and held that it was not applicable to the facts in the present case.

11. Mr Sandeep Sethi, learned Senior Counsel for the Appellant submitted that a conjoint reading of Sections 4 (3) and (5) read with Section 7 PGA did not lead to the conclusion that the CA had jurisdiction to entertain claims

that were beyond the maximum ceiling of Rs.10 lakhs under the PGA. He placed extensive reliance on the decision of the Supreme Court in *Allahabad Bank v. All India Allahabad Bank Retired Employees Association* (*supra*).

12. On examining the said decision, it is seen that the issue before the Supreme Court was somewhat different from the issue that arises in the present case. Paragraph 2 of the judgment sets out the question that arose there: “Whether the retired employees of the Appellant bank are entitled to payment of gratuity” under the PGA? The contention of the retired employees of the Bank was that the consent given by them to opt for the pension scheme would not disentitle them to receive gratuity in terms of the PGA. When the Bank rejected this claim, the retired employees’ Association filed a writ petition in the High Court of Allahabad. The Bank in resisting the writ petition contended that that the pension scheme was more advantageous to the retired employees than that of gratuity. The writ petition was allowed by the High Court holding that the retired employees were entitled to the benefit of gratuity in terms of the PGA and directed the Bank to pay them gratuity within a fixed time frame. Aggrieved by the decision of the High Court, the Bank appealed to the Supreme Court.

13. During the pendency of the appeal in the Supreme Court, an order was passed by the Supreme Court directing the parties to appear before the CA and requiring the CA to decide whether the benefits under the pension scheme were more beneficial when compared to the payment of gratuity under the PGA. The CA held that the amount received by the employees under the pension scheme was more than what they could have receive

under the PGA. The Retired Employees Association and the Retirees Association filed two writ petitions challenging the order of the CA. These writ petitions were then heard with the pending appeal.

14. The Supreme Court in *Allahabad Bank* (*supra*) first agreed with the retired employees' Association that "that pension and gratuity are separate retiral benefits and right to gratuity is a statutory right." The Supreme Court rejected the contention of the Bank that its pension scheme was more advantageous than the provisions of the gratuity and that those who had volunteered for the pension were also not entitled to receive gratuity. It was held as under:

30.....it is for the appropriate Government to form the requisite opinion that the employees were in receipt of gratuity or pensionary benefits which were more favourable than the benefits conferred under the Act and therefore, the establishment must be exempted from the operation of the provisions of the Act. The Bank having failed to obtain exemption from the operation of the provisions of the Act cannot be permitted to raise this plea.

31. No establishment can decide for itself that employees in such establishments were in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under the Act. Sub-section (5) of Section 4 protects the rights of an employee to receive better terms of gratuity from its employer under any Award or agreement or contract as the case may be. Admittedly the Scheme under which the employees of the Bank received the pension was in lieu of gratuity. There is no question of comparing the said Scheme and arrive at any conclusion that what they have received was much better in terms than the benefits conferred under the Act. Reliance upon sub-section (5) of Section 4 is therefore unsustainable."

15. Therefore, the question before the Supreme Court in *Allahabad Bank (supra)* was whether the retired employees were entitled to receive gratuity in addition to the pension they had opted for under the pension scheme. That was answered in the affirmative. It was emphasised that the determination whether the pension scheme was more advantageous when compared to the provisions of the gratuity under the PGA had to be done by the appropriate government. It was in that context, while dealing with the challenge laid by the retired employees' Association to the order of the CA, the Supreme Court observed as under:

“44. Sub-section (7) of Section 7, provides for an appeal against the order of the Controlling Authority. The Act, nowhere confers any jurisdiction upon the Controlling Authority to deal with any issue under sub-section (5) of Section 4 as to whether the terms of gratuity payable under any Award or agreement or contract is more beneficial to employees than the one provided for payment of gratuity under the Act. This Court's order could not have conferred any such jurisdiction upon the Controlling Authority to decide any matter under sub-section (5) of Section 4, since the Parliament in its wisdom had chosen to confer such jurisdiction only upon the appropriate Government and that too for the purposes of considering to grant exemption from the operation of the provisions of the Act.”

16. Therefore, it is clear that the above observations of the Supreme Court were in the context of an employer being granted exemption from applicability of the PGA and not so much as the jurisdiction of the CA to decide a claim made by an employee for gratuity with reference to a scheme of an employer which provided better terms of gratuity. As rightly concluded by the learned Single Judge, all that was held in *Allahabad Bank (supra)* was that the CA did not have the power to decide “whether an

employer is exempt from paying gratuity under the said Act, merely because it finds that the employer's internal scheme for pensionary benefits is better than the statutory scheme for gratuity". Such power had been granted only to the appropriate government. On this proposition, there is no difficulty whatsoever.

17. However, in the present case, the issue is something else. Having considered the submissions of learned counsel for the parties, the Court is not persuaded to differ from the concurrent views expressed by the CA, the Appellate Authority and the learned Single Judge that there is no restriction of the jurisdiction of the CA under Section 7 PGA to entertain a claim for gratuity which may be beyond the upper limit payable under the PGA.

18. The decision in ***Beed District Central Co-operative Bank Ltd. v. State of Maharashtra*** (*supra*) also turned on a different set of facts. There, the employees had opted for the Scheme of the Management which was less advantageous than the PGA. Their plea that they should be given gratuity as per the then upper limit as per the PGA was negated. It was held by the Supreme Court that an employee while reserving his right to opt for the beneficent provisions of the statute or the agreement had to opt "for either of them and not the best of the terms of the statute as well as those of the contract." In the present case, the Appellant's Gratuity Scheme, which was relied upon by the Respondent, itself provided for the rates as per Section 4 (2) of the PGA but without the upper limit under Section 4 (3) PGA. By opting for the Appellant's Scheme, the Respondent did not lose the benefit of Section 4 (2) PGA.

19. Mr. Sethi then submitted that under the Gratuity Scheme of the Appellant what was payable, even after applying the rates under the PGA, was not more than 4.81% of the basic salary of the respondent for all the years of his service which, according to the Appellant worked out to only Rs. 57.07 lakhs. In other words, he questioned the calculation of gratuity by the Appellant.

20. The Court finds that not all elements of the PGA have been adopted in the Gratuity Scheme of the Appellant. While the 'rate' stipulated under Section 4(2) PGA has been adopted, the ceiling limit under Section 4(3) of the PGA has not. As noted both by the CA and the learned Single Judge, has noted how the Appellant itself calculated the gratuity not just in the case of the Respondent but in the cases of ten other employees. The Chairman and Managing Director (CMD) of the Appellant would decide the emoluments of the Respondent and issue EES which invariably contained an entry towards gratuity, which amount was computed at the rate of 4.81% of the Respondent's annual basic salary. The EES were issued under the signature of the CMD before being handed over to the Respondent in original, thereby becoming a part of the contract between the Appellant and the Respondent. In 2007-08 the gratuity amount was Rs.6,34,920/-, which was nearly twice the then ceiling limit of Rs.3.5 lakhs under the PGA. In 2011-12 it was Rs. 11,54,400/- which was higher than the ceiling limit of Rs. 10 lakhs.

21. The CA has in his order dealt with the calculation of the gratuity amount payable to the Respondent in some detail. He noted that the Appellant had produced his pay slip for the month of April 2102 which showed his

monthly basic salary to be Rs. 24,50,000. The increase in salary, according to the Respondent, was authorised by the CMD in 2011 and was in fact paid to him. The CA then observed: “once the payment has been released to the employee towards salary, the burden to prove that that it was not actual salary lies on the management and presumption arises that the amount actually drawn was his salary.” The CA noted that the Appellant “failed to clarify in their pleadings as well as in their evidence as to how the said amount was unauthorizedly paid.” The CA then proceeded to compute the gratuity by taking Rs. 24,50,000 to be the last drawn salary of the respondent and applying the rate as per Section 4 (2) PGA. This being a purely factual determination, on the basis of the evidence placed before the CA, the learned Single Judge could not possibly have interfered with it while exercising jurisdiction under Article 226 of the Constitution.

22. There are no grounds made out for interference with the impugned order of the learned Single Judge. The appeal is accordingly dismissed. The application for stay is also dismissed.

CMs 6535-6536/2019 (exemption)

23. Allowed, subject to all just exceptions.

S. MURALIDHAR, J.

SANJEEV NARULA, J.

FEBRUARY 12, 2019/rd