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ORISSA HIGH COURT: CUTTACK

W.P.(C) No. 19346 of 2021

In the matter of an application under Articles 226 and 227 of the Constitution of India

Manager Director, Odisha Petitioner
Small Industries Corporation
Ltd., Industrial Estate, Cuttack

-Versus-

Abhay Kumar Samantray Opp. Party

Advocates appeared through Hybrid Mode:

For Petitioner : Mr. J.K. Mohapatra

For Opp. Parties : Mr. L. M. Nanda

P R E S E N T:

THE HONOURABLE MR. JUSTICE SANJAY KUMAR MISHRA

Date of Hearing and Judgment: 14.09.2022

Mr. S.K. Mishra, J. Being aggrieved by the judgment dated 14.08.2020 passed by the Controlling Authority under Payment of Gratuity Act-Cum-Divisional Labour Commissioner, Cuttack, in P.G. Case No.06 of 2019, as at Annexure-4, so also Order dated 13.04.2021 passed by the Appellate Authority under Payment of Gratuity Act-Cum-Joint Labour Commissioner, Cuttack, in P.G. Appeal No.1 of 2021, as at Annexure-6, the Petitioner has preferred the present Writ Petition.

2. The factual matrix leading to filing of the present Writ Petition in brief is that Opposite Party No.1, after retirement

from service w.e.f. 31.03.2018, because of non-payment of Gratuity by the Petitioner-Corporation, preferred application in Form 'N' in terms of Rule-10(1) of the Orissa Payment of Gratuity Rules, 1974 on 22.02.2019 claiming therein an amount of Rs.5,42,055/- towards Gratuity with accrued interest on the ground that his initial appointment being 14.11.1991 and date of superannuation being 31.03.2018, he is entitled to the said Gratuity amount in terms of the last wages drawn by him, i.e. Rs.36,137/-, for the total period of 26 years of service.

3. Being noticed, the Petitioner-Corporation appeared before the Controlling Authority and filed its Written Statement, as at Annexure-3, taking a plea therein that since Opposite Party was appointed in the regular establishment on 04.06.2015 and retired on 31.03.2018, after completion of 2 years 9 months and 27 days of regular service and in terms of Section-4 of the Payment of Gratuity Act, 1972, shortly, the P.G. Act, 1972, he has not filed any application for payment of Gratuity before 30 days of his superannuation i.e. on or before 01.03.2018, the said application in Form 'N' in terms of Rule-10(1) of the Orissa Payment of Gratuity Rules, 1974 filed on 22.02.2019 is not maintainable.

4. Based on the pleadings of the Parties, issues were framed and present Opposite Party examined himself as the sole witness and exhibited documents, as Exhibits 1 to 4, to prove his employment under the Petitioner-Corporation, whereas the Petitioner-Corporation did not examine any witness in the said proceeding, although it was accorded necessary opportunity to do so. Finally, based on the pleadings and evidence on record,

the Controlling Authority under the P.G. Act, 1972 passed the judgment on 14.08.2020, as at Annexure-4.

5. Based on the said findings, the Controlling Authority, taking into consideration the last drawn wages of the present Opposite Party and his qualifying period of service as 26 years, determined Gratuity amount payable to the present Opposite Party to be Rs.5,42,055/-. That apart, in view of Provision enshrined under Section 7(3-A) of the P.G. Act, 1972, so also based on the judgments of the apex Court, the Controlling Authority ordered that the Opposite Party is entitled to get Rs. 1,28,608/- towards interest and in toto, he is entitled to get Rs.6,70,663/-. Accordingly, a direction was given to make such payment to the present Opposite Party within 30 days from the date of pronouncement of the judgment, failing which simple interest @ 10% per annum would be charged further till the actual payment is made.

6. Being aggrieved by the said judgment dated 14.08.2020 passed in P.G. Case No.06 of 2019, the Petitioner approached this Court in W.P.(C) No.25919 of 2020, which was disposed of on 22.03.2021, giving opportunity to the Petitioner-Corporation to prefer an Appeal before the Appellate Authority. Accordingly, the Petitioner-Corporation preferred P.G. Appeal No.1 of 2021 before the Appellate Authority under P.G. Act-Cum-Joint Labour Commissioner, Cuttack. However, in view of non-deposit of the awarded amount in terms of Section 7(7) of the P.G. Act, 1972, the said Appeal was dismissed vide Order dated 13.04.2021, as at Annexure-6.

7. Aggrieved by the said judgment dated 14.08.2020 passed in P.G. Case No.06 of 2019, so also Order of dismissal dated 13.04.2021 passed in P.G. Appeal No.1 of 2021, the present Writ Petition has been filed by the Petitioner-Corporation on the plea that both the impugned Orders suffer from irregularity, illegality and are arbitrary, so also contrary to the statutory provision.

8. Being noticed, the sole Opposite Party, who was the applicant before the Controlling Authority, has filed Counter Affidavit stating therein that there is no infirmity in the impugned judgment passed by the Controlling Authority under the P.G. Act, 1972.

9. Heard learned Counsel for the Parties. Since pleadings have been completed, the Writ Petition is being disposed of finally at the stage of admission.

10. It is submitted by the learned Counsel for the Petitioner-Corporation that the Appellate Authority was not justified to dismiss the P.G. Appeal No.1 of 2021 because of non-deposit of Gratuity amount, as awarded by the Controlling Authority, in terms of Section 7(7) of P.G. Act, 1972.

11. Though no such plea has been taken in the Written Statement filed by the Petitioner-Corporation in P.G. Case No.6 of 2019, for the first time, it is submitted by the learned Counsel for the Petitioner that though Sub-Section (3-A) of Section 7 of the P.G. Act, 1972 prescribes for simple interest from the date the Gratuity is payable till the date, on which it is paid at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long

term deposits, as that Government may, by notification specify, the Controlling Authority was not justified to award 10% interest on the awarded Gratuity amount.

12. Learned Counsel for the Petitioner-Corporation further submits that though the Opposite Party had worked for 26 years, but his services were regularized only w.e.f. 04.06.2015 and after rendering only 2 years 9 months 27 days of total period of regular service, since the Opposite Party retired on 31.03.2018, he is not entitled to the Gratuity and the Corporation was justified not to deposit the awarded amount at the time of preferring P.G. Appeal No.1 of 2021 and the Appellate Authority was not justified to dismiss P.G. Appeal No.1 of 2021 solely on the ground of non-deposit of statutory amount within the period of limitation of 120 days, as has been indicated in the impugned Order dated 13.04.2021, as at Annexure-6.

13. Learned Counsel for the Opposite Party submits that in view of the settled position of law, so also pleadings and evidence on record, taking into his total period of employment, the Controlling Authority was justified to answer issue No.III in favour of the Opposite Party, so also award 10% interest on the said awarded amount in terms of Notification dated 01.10.1987 of the Central Government and the Appellate Authority was also justified to dismiss the said Appeal on the ground of non-deposit of the statutory amount in terms of Proviso under Section 7(7) of the P.G. Act, 1972 and the impugned Orders need no interference.

14. Admittedly, the present Petitioner-Corporation did not dispute as to the total period of employment of the Opposite Party, who was working as Production Supervisor on contract basis before regularization of his service as Junior Manager w.e.f 04.06.2015, though it was contended before the Controlling Authority that only the period of service after regularization of the services of the Petitioner should have been taken into consideration for the purpose of payment of Gratuity. That apart, with regard to the last drawn salary, the same was never disputed before the Controlling Authority by the Petitioner-Corporation nor it led any evidence in P.G. Case No.06 of 2019 and the Controlling Authority under the P. G. Act, 1972, after taking into consideration the evidence on record, answered Issue No.III with the following observations:

“ Issue No.III)

The applicant in his application has stated that the date of joining is 14.11.1991 and date of retirement is 31.03.2018 which he has corroborated in his evidence-in-chief. The Opp. Party has not disputed the same. Ext.1 is the letter issued by the Opp. Party which speaks that as per letter No.11958 dtd 01.11.1991 the applicant was appointed as production supervisor on contract basis and the office order No.1542 dtd 28.03.2018 is the superannuation letter which says his retirement on 31.03.2018. Hence, the total qualifying period of service of the applicant comes to 26 years 4 months and 17 days or says 26 years. The applicant in his evidence in chief has stated that he was receiving Rs.36,137/- towards salary from the Opp. Party when he was retired from service. The Opp. Party has not disputed the salary of the applicant. Hence, the qualifying period of service of the applicant is taken as 26 years last monthly wages at Rs.36,137/-.”

15. That apart, the Controlling Authority, while awarding 10% simple interest on the determined amount, relied on number of

judgments of the apex Court, as detailed in the impugned judgment, as at Annexure-4, and ordered that the present Opposite Party is entitled to receive the said unpaid Gratuity amount along with 10% interest on the said awarded amount for the period from 01.04.2018 till 14.08.2020..

16. As per the definition of Continuous Service under Section 2(c) of the P.G. Act, 1972, "Continuous Service" means continuous service as defined under Section 2-A of the P.G. Act, 1972, which reads as follows:

"2-A Continuous Service- For the purposes of this Act,-

(1) An employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence in respect of which an order [The words "imposing a punishment or penalty or" omitted by Act 22 of 1987, Section 3(w.e.f. 1-10-1987)] treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay-off, strike or a lock-out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act.

(2) Where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer-

(a) For the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than-

(i) one hundred and ninety days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) two hundred and forty days, in any other case;

(b) For the said period of six months, if the employee during the period of six calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than-

(i) ninety-five days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and

(ii) one hundred and twenty days, in any other case.

[Explanation- For the purposes of clause (2), the number of days on which an employee has actually worked under an employer shall include the days on which-

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under the Industrial Disputes Act, 1947 (14 of 1947), or under any other law applicable to the establishment;

(ii) he has been on leave with full wages, earned in the previous year;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed [such period as may be notified by the Central Government from time to time]

(3) Where an employee, employed in a seasonal establishment, is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer for such period if he has actually worked for not less than seventy five per cent, of the number of days on which the establishment was in operation during such period."

17. Similarly, the word "employee" has been defined under Section 2(e) of the P.G. Act, 1972, which reads as follows:

"(e) "employee" means any person (other than an apprentice), who is employed on 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 holds 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;"

(Emphasis supplied)

18. It is amply clear from the definition of "employee", as defined under Section 2(e) of the P.G. Act, 1972, that the employee means any person other than an apprentice, employed on wages, in any establishment, factory, mine etc., to do any skilled, semi-skilled, or an unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, but does not include any such person, who holds a post of Central Government or State Government and is governed by any Act or by any rules providing for payment of Gratuity.

19. Admittedly, the P.G. Act, 1972 is applicable to the Petitioner's establishment. There is no such provision under the P.G. Act, 1972 that the same is only applicable to permanent employee of an Establishment. Rather, from the definition of "employee" as defined under Section 2(e) of the P.G. Act, 1972, it is amply clear that, except apprentice, the definition of Employee covers all persons.

20. So far as awarding 10% simple interest on the determined amount, it may not be out of place to mention that the Central Government, in exercise of the powers conferred by Sub-Section (3-A) of Section 7 of the P.G. Act, 1972, vide Notification dated 01.10.1987, notified as follows:

"TO BE PUBLISHED IN PART II, SECTION 3, SUB-SECTION (II)
OF THE GAZETTE OF INDIA-EXTRAORDINARY) PUBLISHED ON
01.10.1987

New Delhi, the 1st October, 87

NOTIFICATION

S.O. 874(E), In exercise of the powers conferred by sub-section (3A) of section 7 of the Payment of Gratuity Act, 1972 (39 of 1972), the Central hereby specifies ten percent per annum as the rate of simple interest payable for the time being by the employer to his employee in cases where the gratuity is not paid within the specified period.

2. This notification shall come into force on the date of its publication in the Official Gazette.”

(No.S-70012/6/87.SS-II)

(A.K. Bhattarai)
Under Secretary”

21. Admittedly, the said Notification dated 01.10.1987 is still in force not being superseded by any fresh Notification varying the rate of interest as was notified by the Government of India on 01.10.1987.

22. Hence, this Court is of the view that the Controlling Authority under P.G. Act-Cum-Divisional Labour Commissioner, Cuttack, was justified to take into consideration the total period of service of the Opposite Party from the date of his initial engagement (14.11.1991) till the date of his superannuation (31.03.2018), so also award 10% simple interest on the awarded amount for the delayed period, so also ordering to pay further simple interest @ 10% per annum till the payment is made, if the Petitioner-Corporation fails to deposit the said ordered amount within 30 days from the date of pronouncement of the judgment.

23. Admittedly, though opportunity was given by this Court in W.P. No.25919 of 2020 on 12.02.2021 to the Petitioner-Corporation to approach the Appellate Authority under the P.G. Act, 1972, misinterpreting the said Order of this Court, the

Petitioner-Corporation preferred P.G. Appeal No.1 of 2021 without depositing the statutory amount, as has been prescribed in the Proviso under Section 7(7) of the P. G. Act, 1972, which reads as follows:

“ Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4), or deposits with the appellate authority such amount.”

(Emphasis supplied)

24. In view of the specific provision as to deposit the statutory amount, because of non-deposit of the awarded amount in terms of Section 7(7) of the P.G. Act, 1972, the Appellate Authority was justified to dismiss P.G. Appeal No.1 of 2021 vide Order dated 13.04.2021.

25. In view of the observations as detailed above, there being no infirmity or illegal in the impugned judgment dated 14.08.2020 passed in P.G. Case No.6 of 2019, so also Order dated 13.04.2021 passed in P.G. Appeal No.1 of 2021, this Court is not inclined to interfere with regard to the impugned Orders, as at Annexures 4 and 6.

26. Accordingly, the Writ Petition stands dismissed. No Order as to cost.

(S.K. MISHRA)
JUDGE