

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, AT NAGPUR.**

Writ Petition No. 2585 of 2018

M/s Mand Valley Minerals Private
Limited,
Through its Director
Office at Plot No. 1062
West High Court Road, Dharampeth
Nagpur.

... Petitioner

... Versus ...

Mr. Dhairendra S. Barling,
aged about 68 yrs, Occ. Nil
R/o : Mitra Labh,
S. K. Barlinge Road,
902 Khare Town, Dharampeth,
Nagpur.

... Respondent

Mr. S. S. Ghate, Advocate for the petitioner
Ku. K. K. Pathak, Advocate for the respondent

CORAM : ROHIT B. DEO, J.

DATED : 1-4-2022

ORAL JUDGMENT

Rule. Rule made returnable forthwith. With consent, the petition is finally heard.

2. The petitioner is questioning the judgment dated 26-7-2016 rendered by the Controlling Authority under the Payment of Gratuity Act, 1972 (Act) in Application PGA 43/2015 whereby the

application preferred by the respondent – employee under Section 4 read with Section 7 of the Act is allowed. The petitioner assailed the said judgment in Appeal (PGA) 05/2016 which is dismissed by the Appellate Authority (Industrial Court), Nagpur vide judgment dated 17-3-2018.

3. The concurrent view taken by the authorities under the Act is assailed in writ and supervisory jurisdiction on the ground that the employee is not entitled to gratuity. The entitlement is disputed on the premise that while the factory of the petitioner-company is situated in the State of Madhya Pradesh, the employee was working at the Head Office at Nagpur in which the strength of employees did not exceed 9 on any day of the preceding twelve months.

4. Learned counsel for the petitioner, Mr. Ghate invites my attention to Section 1(3) of the Act *which reads thus* :

“(3) It shall apply to -

(a) every factory, mine, oilfield, plantation, port and railway company;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months ;

(c) such other establishments or class of establishments, in which ten or more employees are

employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf.

[(3-A) A shop or establishment to which this Act has become applicable shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time after it has become so applicable falls below ten.]”

5. Referring to the provisions reproduced supra, Mr. Ghatge would submit that the Head Office is an establishment registered under the Maharashtra Shops and Establishments Act and the strength of the employees did not exceed 9 on any given day of the preceding twelve months, and therefore, the employee was not entitled to gratuity.

6. In the context of the sole submission canvassed while assailing the judgments impugned, I have perused the written statement filed by the petitioner - employer in Application PGA 43/2015. While a vague statement is found in paragraph 1 that the employee must plead and prove that the Act is applicable, there is not even whisper in the entire written statement that the strength of the employees at the Head Office was not 10 or more on any given day in the preceding twelve months. It is axiomatic that if the applicability of the Act is challenged on the premise that the strength of the employees did not exceed prescribed figure, it was incumbent for the employer to plead and then

prove that such was the case and a vague assertion that the applicant must prove the applicability of the Act without any further elaboration is neither here nor there. Considering that the employer did not plead the necessary foundational facts, the objection could have been rejected on that ground alone.

7. I further note that while the employee entered the witness box, the employer did not adduce evidence. The authorities below have rightly found that even on facts, the objection premised on the lack of strength of employees at the Head Office is unsustainable. While the first authority has not considered the said objection specifically, the entitlement of the employee is found established. The appellate authority has, however, considered the objections premised on the lack of strength of the employees elaborately, and consideration reads thus :

“13] It will not be out of place to mention here that, though the opponent objected the applicability of the P.G. Act to their establishment, however, the applicability of the P.G. act to their establishment was never objected by the opponent in the proceeding before the Controlling Authority. Not only this but the applicant has specifically pleaded in the application before the Authority that the opponent establishment is a commercial establishment to which the provisions of P.G. Act is not applicable. There is no specific denial to these contentions of the applicant in reply filed by the opponent before the Authority. Moreover, the opponent stated in the reply that, “in order to establish that, the applicant is entitled for gratuity it has to plead and prove

about the applicability of the Act.” However, there is no whisper in the reply about the reason for non applicability of the P.G. Act to their establishment.

14] I have gone through the oral evidence of the applicant adduced before the Authority in which the applicant admitted that, he was sitting in the office. In this office 7-8 employees were working. However, the applicant also stated during cross-examination earlier that, there were 30-35 employees working with the opponent. In such circumstances onus shifted on the opponent to demonstrate before the court about strength of the employees working with the opponent, however, no such attempts were made on behalf of the opponent to bring on record about the strength of employees. Not only this but, no documentary evidence was placed before the Authority nor before this court in respect of strength of employee i.e. less than 10. Even accepting that, the opponent has never paid any gratuity amount to any of its employees but it does not mean that only on that ground the provisions of P.G. Act are not applicable to the establishment of the opponent. The opponent miserably failed to establish before the Authority as well as before this court that, P.G. Act is not applicable to their establishment, therefore, it is very difficult to accept that, the order under appeal suffers from perversity or error apparent on the face of record.”

8. I do not find any error in the view taken concurrently, much less, an error warranting interference in writ jurisdiction.

9. The petition is dismissed.

JUDGE