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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 01.11.2022

Pronounced on: 16.12.2022

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W.P.(C) 18089/2004 and C.M. Nos. 13649/2004 & 13650/2004

MANGT. OF M/S D.T.C.

..... Petitioner

Through: Mr. Uday N. Tiwari and
Ms. Saloni Singh, Advocates

versus

DHARAM PAL SINGH & ANR.

..... Respondents

Through: Mr. Sameer Vashisht, ASC with
Ms. Sanjana Nangia, Advocate
for R-2

CORAM:

HON'BLE MR. JUSTICE GAURANG KANTH

J U D G M E N T

GAURANG KANTH, J.

1. The present Writ Petition emanates from the order dated 09.07.2004 (“**Impugned order**”) passed by Respondent No. 2, i.e, Controlling Authority under the Payment of Gratuity Act, 1972, Office of Assistant Labor Commissioner, Central District Employment Office Bhawan, Pusa Campus, New Delhi in Case No. Gratuity/21/02/CD/1451 titled as *Sh. Dharampal Singh, Traffic Supervisor v. M/s Delhi Transport Commissioner*.
2. Vide the Impugned order, Respondent No.2 held that Respondent No.1 is entitled to the gratuity as per the Payment of Gratuity Act, 1972 (“**the Act**”). In view of the same, Respondent No.2

directed the Petitioner to pay Respondent No.1 the differential gratuity amount of Rs. 61,987/- with an interest @ 10% from 01.02.2002 till the date of actual payment.

FACTS GERMANE TO THE PRESENT WRIT PETITION ARE AS FOLLOWS:

3. Respondent No.1 joined the service of the Petitioner as a Traffic Supervisor on 15.05.1962 and retired from the service on 31.12.2001. Pertinently the last drawn salary of Respondent No.1 was Rs. 9,425/-.
4. It is the case of Respondent No.1 that after his retirement, he was entitled to be paid for a sum of Rs. 2,17,500/- towards gratuity, whereas he was paid a sum of Rs. 1,55,513/-. Aggrieved by the same, Respondent No.1 preferred his case before Respondent No.2.
5. Pursuant to that, Respondent No.1 filed his Statement of Claim before Respondent No.2 and claimed Rs. 61,987/- towards the balance gratuity amount. The Petitioner filed its reply to the Statement of Claim stating that Respondent No.1 is entitled to a sum of Rs. 1,55,513/- as his gratuity and the said amount was already released to him.
6. On the basis of the pleadings of the parties, Respondent No.2 framed the following issue:

“Whether the employee is (covered, and) entitled to receive payment under Payment of Gratuity Act 1972 if yes then what the necessary directions in this regard.”

7. Both the parties adduced their respective evidence before Respondent No.2. Based on the documents and evidence adduced

by the parties, Respondent No.2 held that Respondent No.1 is entitled to claim gratuity as per the Act. Respondent No.2 further directed the Petitioner to release Rs. 61,987/- with 10% simple interest towards the differential amount of gratuity to Respondent No.1 from 01.02.2002 till the date of actual payment.

8. Aggrieved by the Impugned order, the Petitioner preferred the present Writ Petition challenging the Impugned order dated 09.07.2004.

SUBMISSIONS OF THE PETITIONER

9. Learned counsel for the Petitioner, Mr. Uday N. Tiwari initiated his arguments by submitting that the Impugned order is illegal and arbitrary.
10. He submitted that Respondent No. 1 was appointed as Traffic Supervisor on 15.05.1962 and retired from service on 31.12.2001. He was in service for **39 years 4 months and 28 days**. His last drawn salary was Rs.9,425/-. Upon his retirement, the Petitioner calculated and paid the gratuity amount of Rs.1,55,513/- to Respondent No. 1 in terms of the Petitioner's Office Order No. 11 dated 06.06.1991 applicable to the case of Respondent No.1 and all other similarly situated employees of the Petitioner.
11. It is the contention of the learned counsel for the Petitioner, Mr. Tiwari, that Respondent No.2 lacks inherent jurisdiction. It is his case that the rules governing the service conditions of Respondent No. 1, viz., the Petitioner's Office Order dated 06.06.1991, clearly states that *"The employees of the*

Corporation whose wages does not exceed Rs.2500/- p.m. as provided in the payment of Gratuity Act, 1972 be paid gratuity in accordance with the said Act. And, in respect of the other employees whose wages exceeds Rs.2500/- p.m. gratuity should be paid in accordance with the instructions contained in (Annexure 'D') of BPE's O.M. dated 23.6.88 which envisages the provisions that the gratuity will be equal to 15/26 days emoluments for each completed year of service or part thereof in excess of six months subject to maximum of 16 & 1/2 times the emoluments or Rs. 1,00,000/- whichever is less".

12. Relying on the above office order dated 06.06.1991, he submitted that in the present case, admittedly, the wages of Respondent No.1 exceeded Rs.2,500/- per month as it was Rs.9,425/- per month, and therefore, the Act had no application to the case of Respondent No.1. He further emphasized that it is not in dispute that the gratuity paid to Respondent No. 1 was in accordance with the Petitioner's Office Order dated 06.06.1991.
13. He further submitted that Section 3 read with Sections 7(1) and 7(4)(b) of the Act makes it clear that Respondent No.2 is “responsible for the administration of this Act” and has the power to decide disputes regarding payment of gratuity under the said Act. There is nothing in the Act that confers jurisdiction on Respondent No.2 to decide alleged disputes that are not covered by the Payment of Gratuity Act, viz., disputes arising out of the Petitioner's Office Order No. 11 dated 06.06.1991. *Ergo*, the

Impugned Judgment, being passed by an Authority who inherently lacked jurisdiction, is a nullity and void.

14. Further, he submitted that the contention of Respondent No.1 that the Petitioner has acquiesced to the proceedings before Respondent No.2 and cannot raise the objection for the first time at this stage, is contrary to settled law. It is his contention that it is no longer *res integra* that jurisdiction cannot be conferred by acquiescence on an authority who inherently lacks it. With regard to that, he referred to the judgment of the Hon'ble Supreme Court in *Hindustan Zinc Ltd. vs. Ajmer Vidut Bitran*, reported as (2019) 17 SCC 82, *Muthavalli of Sha Madhari Diwan Wakf S.J. Syed Zakrudeen & Anr. v. Syed Zindasha & Ors.* reported as (2009) 12 SCC 280.
15. Mr. Tiwari furthered his submissions by submitting that the observations of Respondent No.2 regarding the service period of Respondent No. 1 being 40 years as opposed to 39 years and 4 months as claimed by the Petitioner is irrelevant for the reason that Respondent No. 1 was paid the maximum permissible gratuity of 16 ½ times under the Office Order. Therefore, it is immaterial whether Respondent No.1 worked for 17 years or 39 years or 40 years, since the maximum payable is only 16 ½ times of the emoluments.
16. Further, learned counsel for the Petitioner veered his submissions, by submitting that the contention of Respondent No.1 that the case of Respondent No.1 is a case of gratuity amount of mere Rs. 61,987/- payable to a poor workman and

therefore this Hon'ble Court ought not to interfere, is a case of misplaced sympathy. *Firstly*, it is not in dispute that the Respondent No. 1 was duly paid the gratuity amount that was payable to him under the service conditions applicable to him. His claim is contrary to the service conditions, and therefore, an illegal demand. Respondent No. 1 cannot be permitted to benefit from a claim that is *de hors* the service conditions. *Secondly*, there would be other similarly situated retired employees who would have accepted the gratuity payable under the said Office Order dated 06.06.1991. Hence any interference will lead to discrimination. *Thirdly*, it is possible that relying on such non-interference by this Hon'ble Court, other similarly situated retired employees may approach the Courts/ Tribunals seeking parity, thereby, imposing a substantial financial burden on the Petitioner. *Fourthly*, the issue being one of illegal demand, the quantum of the amount would not be relevant.

SUBMISSIONS ON BEHALF OF RESPONDENT NO.2

17. *Per Contra*, learned counsel for Respondent No.2, Mr. Sameer Vashisht while relying on the Impugned order submitted that the present Writ Petition filed by the Petitioner is not maintainable and should be dismissed in *toto*.
18. Learned counsel for Respondent No. 2 submitted that the reliance of the Petitioner on Office Order No. 11 dated 06.06.1991 is misplaced.
19. Mr. Vashisht navigated the Court's attention by submitting that, the facts which have been stated in the present Writ Petition were

nowhere stated by the Petitioner in its reply before Respondent No. 2. Hence, a defence which was not setup by the Petitioner before Respondent No.2 cannot be permitted to be raised in the present Writ Petition. Further, he submitted that the conduct of the Petitioner is contrary to the public policy as well as principle of estoppel and fair play. Therefore, the present Writ Petition is liable to be dismissed on this ground alone.

20. Further, with regard to the argument of the Petitioner that the present issue which has been raised in the present Writ Petition is legal in nature and therefore it can be adjudicated by this Court in the present Writ Petition, learned counsel for Respondent No.2 submitted that since the Petitioner failed to take the stand about the fact of the passing of the Office Order dated 06.06.1991 before Respondent No. 2, therefore, the Petitioner is now precluded from raising such a plea before this Hon'ble Court.
21. Learned counsel for Respondent No.2 relied upon the judgment of the Hon'ble Supreme Court in the matter of ***Chimajirao Kanhojirao Shirke v. Oriental Fire & General Insurance Co. Ltd.*** reported as **(2000) 6 SCC 622**.
22. Lastly, learned counsel for Respondent No.2 submitted that it is not the case of the Petitioner that Respondent No. 2 had no jurisdiction at all to decide the claim raised by Respondent No. 1. Even as per the office orders relied upon by the Petitioner, Respondent No.2 had the authority, but the gratuity payment was to be decided as per the Office Orders. Therefore, once the Petitioner has not raised the defense of the office orders, it cannot

be permitted to plead and argue the same in the present Writ Petition. In this background, it is submitted that Section 115 of the Indian Evidence Act, 1872 bars the same. Henceforth, the present Writ Petition is not maintainable and is liable to be dismissed.

LEGAL ANALYSIS

23. This Court had heard the arguments advanced by the learned counsels for both the parties and perused the documents on record and Judgments relied upon by the parties.
24. The short question to be decided in the present matter is whether Respondent No.1 is entitled to receive the gratuity under the Payment of Gratuity Act, 1972 or not.
25. According to the Respondents, Respondent No.1 is entitled to receive the gratuity of Rs. 2,12,063/- under the Act. Whereas it is the case of the Petitioner that Respondent No.1 is entitled to receive the gratuity of Rs.1,55,513/- as per Office Order No. 11 dated 06.06.1991.
26. Before advertng to the legal position regarding the payment of gratuity, it is important to examine the contention of the Petitioner in detail. As per the Office order No.11 dated 06.06.1991, the DTC Board vide its meeting held on 30.05.1991 vide Resolution No.83/91 decided as under:

"The employees of the Corporation whose wages does not exceed Rs.2500/- p.m. as provided in the payment of Gratuity Act, 1972 be paid gratuity in accordance with the said Act. And, in respect of the other employees whose wages exceeds Rs.2500/- p.m. gratuity should be paid in accordance with the instructions contained in (Annexure 'D') of BPE's O.M. dated

23.6.88 which envisages the provisions that the gratuity will be equal to 15/26 days emoluments for each completed year of service or part thereof in excess of six months subject to maximum of 16 1/2 times the emoluments or Rs . 1, 00, 000/- whichever is less".

The ceiling limit of Rs.1,00,000/- was subsequently increased to Rs.3,50,000/- vide office order No.5 dated 09.08.2000. Admittedly, Respondent No.1's monthly emolument was Rs.9,425/- and he has completed 39 years of service with the Petitioner. Therefore, according to the Petitioner, the calculation for the payment of gratuity is as follows:

$$\text{Rs. } 9,425 \times 39 \times 15/26 = \text{Rs. } 2,12,062.5 \text{ /-}$$

(subject to a maximum of Rs. $9,425 \times 16 \frac{1}{2} = \text{Rs. } 1,55,512.5$ or Rs. 3,50,000/- whichever is less).

According to the Petitioner, the maximum ceiling limit was Rs.1,55,513/-, hence Respondent No.1 was paid gratuity as Rs.1,55,513/- in accordance with Office order No.11 dated 06.06.1991.

27.Learned counsel for Respondent No.2 argued that the Petitioner never raised these points before Respondent No.2 and hence the said plea cannot be allowed to be taken before this Court. However, on perusal of the Reply filed by the Petitioner before Respondent No.2 reveals that the Petitioner explained the above-mentioned calculation before Respondent No.2. However, there is no mention of this fact in the impugned order. Hence this Court is of the view that it is not correct to say that the Petitioner has taken altogether new plea before this Court.

28. In view of the same, now the question to be considered is whether Respondent No.1 is entitled for the gratuity as per the Payment of Gratuity Act, 1972 or as per Office order No.11 dated 06.06.1991.

29. Payment of Gratuity Act, 1972 is a Central legislation. Section 5 of the said Act empowers the appropriate Government to exempt any establishment from the applicability of the said Act. Therefore, unless an establishment is expressly exempted by the appropriate Government by Notification issued under Section 5 of the Act, such establishment would be liable to pay gratuity to its retired employees in accordance with the Act. This position is reiterated by the Hon'ble Supreme Court in ***Municipal Corporation of Delhi vs. Dharam Prakash Sharma and Ors*** reported as **1998 (7) SCC 221**.

“The short question that arises for consideration is whether an employee of the MCD would be entitled to payment of gratuity under the Payment of Gratuity Act when the MCD itself has adopted the provisions of the CCS (Pension) Rules, 1972 (hereinafter referred to as "the Pension Rules"), whereunder there is a provision both for payment of pension as well as of gratuity. The contention of the learned counsel appearing for the appellant in this Court is that the payment of pension and gratuity under the Pension Rules is a package by itself and once that package is made applicable to the employees of the MCD, the provisions of payment of gratuity under the Payment of Gratuity Act cannot be held applicable. We have examined carefully the provisions of the Pension Rules as well as the provisions of the Payment of Gratuity Act. The Payment of Gratuity Act being a special provision for payment of gratuity, unless there is any provision therein which excludes its applicability to an employee who is otherwise governed by the provisions of the Pension Rules, it is not possible for us to hold that the respondent is not entitled to the gratuity under the Payment of Gratuity Act. The only provision which was pointed out is the definition of

"employee" in Section 2(e) which excludes the employees of the Central Government and State Governments receiving pension and gratuity under the Pension Rules but not an employee of the MCD. The MCD employee, therefore, would be entitled to the payment of gratuity under the Payment of Gratuity Act. The mere fact that the gratuity is provided for under the Pension Rules will not disentitle him to get the payment of gratuity under the Payment of Gratuity Act. In view of the overriding provisions contained in Section 14 of the Payment of Gratuity Act, the provision for gratuity under the Pension Rules will have no effect. Possibly for this reason, Section 5 of the Payment of Gratuity Act has conferred authority on the appropriate Government to exempt any establishment from the operation of the provisions of the Act, if in its opinion the employees of such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act. Admittedly MCD has not taken any steps to invoke the power of the Central Government under Section 5 of the Payment of Gratuity Act. In the aforesaid premises, we are of the considered opinion that the employees of the MCD would be entitled to the payment of gratuity under the Payment of Gratuity Act notwithstanding the fact that the provisions of the Pension Rules have been made applicable to them for the purpose of determining the pension. Needless to mention that the employees cannot claim gratuity available under the Pension Rules.

30. It is not the case of the Petitioner before Respondent No.2 or before this Court that the Petitioner is exempted from the operation of the provisions of the Act as envisaged by Section 5 of the Act. In the absence of the exemption specifically granted under Section 5, the Petitioner is duty bound to pay its employees gratuity in accordance with the Act.

31. As per Section 4(5) of the Act '*Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer*'.

Therefore, it is evident that it is the option of the employee to

choose the gratuity scheme which is beneficial for him. This Court has considered a similar issue in the matter of ***Municipal Corporation of Delhi Vs. V.T. Naresh and Ors.*** reported as **1985 (9) DRJ 173** and held *inter alia*, as follows:

“Coming to the second point, even if Municipal Corporation of Delhi has certain schemes, it is no bar to the applicability of the employees of the petitioner-Corporation. It is only common which can be said that an employee cannot have benefit of both under Payment of Gratuity Act as well as scheme of regulations/pension framed by the Corporation but if he has availed of the benefit under Payment of Gratuity Act, to that extent benefit will be denied to him under the regulations/pension scheme framed by the Corporation. If the Scheme framed by the Corporation gives higher benefit to the extent the employee obtains benefit under the 'Payment of Gratuity Act, to that extent those benefits will be adjusted while claiming benefit under the Scheme of Regulations/pensions framed by the Corporation. The employee cannot have complete benefit under both the Payment of Gratuity Act as well as under the Scheme of regulations/pensions. The extent the benefit has been granted to him under the Payment of Gratuity Act, only to that extent the benefit will be adjusted while enforcing the scheme of regulations/pension framed by the Corporation. Similarly, if under a Scheme framed by the Corporation the benefit is less than that which is available in the Payment of Gratuity Act, the employee will be entitled to claim difference under the Payment of Gratuity Act.”

32. In the present matter, Respondent No.1 never opted for the payment of gratuity as per the Petitioner's Scheme, i.e. Office Order No.11 dated 06.06.1991. Even otherwise also, the gratuity as per Office order No.11 dated 06.06.1991 is not beneficial to Respondent No.1. Hence applying the law laid down by this Court in ***V.T Naresh (Supra) & Dharam Prakash Sharma (Supra)***, the gratuity payable under the Act is more than the

gratuity as per the Scheme applicable to the Petitioner, Respondent No.1 is entitled to *claim the difference*.

33.In the present case, gratuity payable as per the Act is Rs.2,12,063/- whereas per Office Order No.11 dated 06.06.1991 is Rs. 1,55,513/-. Hence in view of the legal position as discussed herein above, Respondent No.1 is entitled to claim the difference, i.e. Rs. 61,987/-

34.The impugned Order passed by Respondent No.2 is based on the settled position of law and there is no perversity or impunity in the said order. Hence this Court, while exercising the jurisdiction under Article 226 of the Constitution of India is not inclined to interfere with the impugned order.

35.In view of the detailed discussion held herein above, the present Writ Petition is dismissed. No order as to costs.

GAURANG KANTH, J.

DECEMBER 16, 2022
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