

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present :

The Hon'ble Justice Raja Basu Chowdhury

**WPA 5745 of 2023
Gautam Sarkar
Vs.
The State of West Bengal & Ors.
with
WPA 8114 of 2023
Managing Committee of Aditya Birla
Vani Bharati School & Anr.
Vs.
The State of West Bengal & Ors.**

For the petitioners	:	Mr. Soumya Majumdar Mr. Arnab Dutta
For the State respondents	:	Mr. Avishek Prasad
For the respondent no. 4	:	Mr. Sudipta Dasgupta Mr. Arka Nandi Ms. Dipa Acharyya Mr. Saikat Sutradhar Mr. Somdwip Sutradhar Ms. Shalini Ghosh
Heard on	:	04.07.2023
Judgment on	:	04.07.2023

Raja Basu Chowdhury, J:

1. Two separate writ applications have been filed on behalf of Aditya Birla Vani Bharati School (hereinafter referred to as the "school"). In the first writ application, the school has challenged the order dated 20th February 2023 passed by the Certificate

Officer in Certificate case no. 197 (M) of 2021-2022 as also the order dated 25th February 2020 passed by the Controlling authority under the Payment of Gratuity Act, 1972 (hereinafter referred to as the “said Act”). The first writ application has been filed through the principal of the school, who is also the secretary of the managing committee of the school.

2. The second writ application has been filed by the managing committee of the school, challenging the self-same orders, although, the grounds of challenge in the second writ application is different from the first. The respondent no. 4 in both the aforesaid writ applications is Gadadhar Paul (hereinafter referred to as the “teacher”), who admittedly was a teacher of the school and had served school for the period between 1968 and 2006.
3. Since both the writ applications raise common questions, those are taken up for hearing together.
4. Although, the school initially did not adhere to the teacher’s request for payment of gratuity, records would reveal that sometimes in or about 11th December 2015, a sum of Rs.1,09,113/- was disbursed in favour of the teacher on account of gratuity, as determined by the school. Since, according to the teacher, the school had made short payment of gratuity, the teacher filed an application in Form-‘N’ before the Controlling Authority for determination of gratuity payable to

the teacher. The said proceedings were contested by the school and ultimately, by order dated 25th February 2020, the Controlling Authority was, inter alia, pleased to pass an order in Form-‘N’ and by issuing notice in Form-‘R’ dated 6th March 2020, had called upon the school to make payment of Rs.3,05,518/- towards the differential amount of gratuity payable to the teacher after giving credit to the sum of Rs.1,09,113/- already paid.

5. Since, the school authorities, despite notice, did not disburse the gratuity, at the instance of the teacher, the Controlling Authority was, inter alia, pleased to issue a certificate under Section 8 of the said Act and the same was remitted to the office of the Certificate Officer for execution. It would appear that, despite receipt of such certificate, the Certificate Officer instead of executing the certificate by letter dated 29th July 2022, had called upon the Controlling Authority to appropriately clarify the circumstances under which the certificate has been issued.
6. Challenging the same, a writ application was filed before this Court. The school, despite being a party to such proceeding and despite service of notice, did not contest. As such, by an order dated 8th February 2023, this Court taking into consideration the fact that there had been no challenge to the determination made by the Controlling Authority was, inter alia, pleased to direct the Certificate Officer to dispose of the certificate case

pending before him, without calling for any further clarification either from the Controlling Authority or from the Deputy Director, School Education. It was, however, clarified that the Certificate Officer shall consider the objection, if any, raised by the certificate debtor, being the school authorities and shall dispose of such case in accordance with law.

7. Pursuant to the aforesaid direction, the certificate proceedings were ultimately disposed of by order dated 20th February 2023, inter alia, by directing the certificate debtor being the school to pay a sum of Rs.8,63,529/- towards the certificate dues.
8. It is only upon such determination and the direction issued on the certificate debtor, the school has filed the present set of writ applications, challenging not only the order passed by the Certificate Officer but also the parent determination made by the Controlling Authority.
9. During pendency of the aforesaid writ applications, a sum of Rs.3,34,667/- has been disbursed by the school in favour of the teacher towards unpaid gratuity. The matter has since come up for final disposal, as the learned advocate appearing for the respective parties have submitted that these writ applications can be decided on the basis of the documents already available on record.
10. Mr. Majumdar, learned advocate appearing for the school has advanced elaborate arguments. It is his contention that the

teacher during his service tenure was not covered by the Provisions of the said Act. In support of his aforesaid contention he has placed reliance on the judgment delivered by the Hon'ble Supreme Court in the case of **Ahmedabad Pvt. Primary Teachers' Assn. v. Administrative Officer and others**¹ and the judgment delivered in the case of **Y.K.Singla v. Punjab National Bank and others**.², to drive home the point that right to receive gratuity can only accrue provided the teacher was an employee within the meaning of the said Act.

11. The case of **Management of Goodyear India Limited v. K.G.Deveessar** ³, has been relied on to contend that since, gratuity becomes payable on the termination of employment, in order to be eligible for payment of gratuity, the termination of employment, whether it be due to superannuation or retirement or resignation or death or disablement, has to be after the date of coming into force of the Act.

12. By placing reliance on a notification published by the Ministry of Law and Justice, Legislative Department on 31st December 2009 he says that by the Payment of Gratuity (Amendment) Act, 2009 (No. 47 of 2009), the said Act was amended so as to substitute Section 2 clause (e), for the following clause which is reproduced hereinbelow:

¹ (2004) 1 SCC 755

² (2013) 3 SCC 472

³ (1985) 4 SCC 45

“(e) “employee” means any person (other than an apprentice) who is employed for 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 the Act applies, but does not include any such person who holds a post under the Central Government or a State Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity.”

13. That by the self same amending Act, Section 13A has been inserted after Section 13 in the principal Act to the following effect:

“13A. Validation of payment of gratuity: Notwithstanding anything contained in any judgment, decree or order of any court, for the period commencing on and from the 3rd day of April 1997 and ending on the day on which the Payment of Gratuity (Amendment) Act, 2009 receives the assent of the President, the gratuity shall be payable to an employee in pursuance of the notification of the Government of India in the Ministry of Labour and Employment vide number S.O. 1080, dated the 3rd day of April 1997 and the said notification shall be valid and shall be deemed always to have been valid as if the Payment of Gratuity (Amendment) Act, 2009 had been in force at all material times and the gratuity shall be payable accordingly:

Provided that nothing contained in this section shall extend, or be construed to extend, to affect any person

with any punishment or penalty whatsoever by reason of the non-payment by him of the gratuity during the period specified in this section which shall become due in pursuance of the said notification.”

14. By further referring to the aforesaid Amendment Act, he says that the aforesaid Amendment Act, by reasons of the deeming provision inserted in the said Act, the same has come into effect on and from 3rd April, 1997. However, the aforesaid amendment had been brought into effect on 31st December 2009. As such, as on the date, the teacher had superannuated, the teacher was not an employee, within the meaning of the said Act. Consequentially, he has no authority to claim gratuity.

15. It is submitted that the Hon’ble Supreme Court in the case of ***Birla Institute of Technology v. State of Jharkhand and others***, reported in **(2019) 4 SCC 513**, has declared that the effect of amendment made in the said Act, vide Amending Act 47 of 2009 on 31st December 2009 was two-fold. Firstly, the law laid down by the Hon’ble Supreme Court in ***Ahmedabad Pvt. Primary Teachers’ Assn (Supra)*** was no longer applicable against the teachers and secondly, the teachers were entitled to claim amount of gratuity. It is the school’s contention that all along the school had proceeded on the premise that the teacher did not qualify as an employee within the meaning of Section

2(e) of the said Act and as such, the school cannot be faulted for not having made payment of gratuity.

16. To make out a case that payment made by the school to the teacher was on a mistaken premise, reliance has been placed in the case of ***Independent Schools' Federation of India (Regd.) v. Union of India & another***⁴ to contend that the Hon'ble Supreme Court had also approved the view taken in the case of ***Management of Goodyear (supra)***. The determination made by the Controlling Authority under the said Act and order passed by the Certificate Officer do not have any basis and should be set aside.

17. *Per contra*, Mr. Dasgupta, learned advocate representing the teacher/respondent no. 4 submits that the conduct of the school has been bad. Although, the school was under an obligation to make payment of gratuity, the same had not been paid in time. It was only when the teacher approached this Court that a sum of Rs.1,09,113/- was disbursed in favour of the teacher on 11th December 2015. Since, the aforesaid payment fell short of the gratuity payable to the teacher, the teacher had applied before the Controlling Authority under the said Act.

18. On contest, the Controlling authority had passed an order and by issuing a notice in Form-'R' had called upon the school to make

⁴ 2022 SCC Online SC 1113

payment. The school did not bother to adhere to the same. Even after, a certificate was issued by the Controlling Authority and the certificate was transmitted to the Certificate Officer for execution, no steps were taken by the school. The school did not bother to contest the writ application filed by the teacher before this Court, seeking enforcement of the certificate through the Certificate Officer. Such fact would corroborate from the order dated 8th February 2023. It was only thereafter when in the certificate proceedings, when the school was directed to make payment of the certificate amount, the aforesaid writ applications have been filed.

19. He says that the arguments advanced by Mr. Majumder, do not also find place in the aforesaid writ applications. The school authorities did not question the right of the teacher to receive gratuity. What has been questioned in the writ applications is the right to receive gratuity prior to 1997.

20. Heard the learned advocates appearing for the respective parties and considered the materials on record.

21. Admittedly, in this case, I find that the teacher was in employment of the school. It is true that at the time of superannuation the teacher did not qualify as an employee within the meaning of the said Act, however, with the amendment of the said Act by the Payment of Gratuity (Amendment) Act, 2009, the definition of employee was

substituted so as to bring within its fold, the teachers working in the educational institutions from 3rd April 1997.

22. Although, it has been strenuously argued by the school by placing reliance on the judgment delivered in the case of ***Management of Goodyear India Limited (supra)*** that unless the teacher was in employment as on the date when the definition of employee was substituted so as to bring the teachers within the meaning of the term “employee” as defined under Section 2(e) of the said Act, the benefit of the said Act cannot be made applicable to the teacher, since, the amendment was introduced after the date of superannuation of the teacher, I am afraid and I am unable to accept such contention.

23. The issue whether the teacher would be entitled to the benefit of Section 2(e) of the said Act, notwithstanding the teacher not being employed or being superannuated or terminated, prior to the Amendment Act of 2009 having come into force is no longer *res integra*, the same has already been decided and explained in the case of ***Independent Schools’ Federation of India (Regd.) (supra)***. The Hon’ble Supreme Court, while negating a similar contention, in paragraph 19 and 23 of the aforesaid judgment and while distinguishing the judgment of ***Management of Goodyear India Limited (supra)***, has held that the reasonable way to construe Section 4 of the said Act, in the light of amendment of Section 2(e) of the said Act, would be to hold that

when the employee's services were terminated for any reasons mentioned in Section 4 of the said Act, after coming into force of the Act, the employee would be entitled to payment of gratuity, if he has rendered continuous service of not less than 5 years and for that period during which he satisfies the definition of Section 2(e) of the said Act, it does not matter whether the period comes before the commencement of the Act. Provided, however, the said Act even post the retrospective amendments, will apply only to those teachers who were in service as on 3rd April, 1997 and at the time of termination have rendered service of not less than 5 years. Once, the condition is satisfied, the next question would be regarding amount of gratuity payable.

24. The ratio of the said judgment delivered in the case of ***Management of Goodyear India Limited (supra)*** having, thus, been explained, leaves no room for doubt that the teacher, at all material points of time, was to be accounted as employees within the meaning of Section 2(e) of the said Act, having completed 5 years of service including service prior to 3rd April, 1997.

25. Admittedly, in this case the school, despite being obliged under Section 7(2) of the said Act, to determine the gratuity payable by the employer, chose not to determine the same. The gratuity was not disbursed in favour of the teacher till such time the teacher had approached this Court. Admittedly, the gratuity was

for the first time disbursed in favour of the teacher on 11th December 2015. Since, according to the teacher, the school had made short payment, the teacher had applied in Form-N before the Controlling Authority.

26. The Controlling Authority on contest had determined the gratuity payable to the teacher and had called upon the school by issuing notice in Form-R dated 6th March 2020, to make payment of a sum of Rs.3,05,518/-. The school did not challenge the said order. Records would reveal that since the gratuity remains unpaid, the teacher was compelled to apply before the Controlling Authority for issuance of the certificate under Section 8 of the said Act.

27. A perusal of the provision of the Act and the Rules framed thereunder would demonstrate service of notice even at the stage of issuance of certificate. It is not the case of the school that it had no notice of proceedings. It appears that ultimately a certificate was issued by the Controlling Authority and the same was forwarded to the Certificate Officer for execution. Since, the Certificate Officer was not executing the said certificate and had sought for clarification from the Controlling Authority, the teacher had approached this Court by filing a writ application being WPA 26505 of 2022.

28. Despite service, the school did not contest such writ application. By order dated 8th February 2023, this Court had directed the

Certificate Officer to dispose of the proceedings pending before him without calling for any clarification from the Controlling Authority or from the Deputy Director of School Education, with a further direction to consider objections, if any, raised by the certificate debtor and to dispose of the same in accordance with law. The school did not bother to avail this opportunity as well.

29. No submission was advanced on behalf of the school that the school was not aware with regard to the proceedings either before the Controlling Authority or the Certificate Officer or before this Court when the order dated 8th February 2023 was passed. When the aforesaid writ applications were previously heard the school had on the basis of computations made by the school had made over Rs. 3,34,667/- to the teacher towards unpaid gratuity. The present attempt made by the school to stall the execution of the certificate by, inter alia, contending that school is not liable to make payment of the gratuity to the teacher and that the amount paid to the teacher has been paid mistakenly, lacks in bonafide.

30. The school was and/or is aware that the teacher is more than 77 years old. Notwithstanding the aforesaid, the school has filed two separate writ applications and has advanced arguments, during final hearing, based on grounds which even did not find place in the writ applications.

31. Having regard to the aforesaid the orders passed by the Controlling Authority, or the Certificate Officer, do not appear to be perverse or without jurisdiction. As such I am not inclined to interfere with the directions issued either by the Certificate Officer or by the Controlling authority.
32. In view thereof, the writ applications fail and are accordingly ***dismissed*** without any order as to costs.
33. Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis upon compliance of requisite formalities.

(Raja Basu Chowdhury, J.)

Saswata
Assistant Registrar (Court)