Form No.J(2)

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Present:
THE HON'BLE JUSTICE RAJA BASU CHOWDHURY

WPA 10495 of 2022

FIS Payment Solutions and Services India Pvt. Ltd.

Versus

Tapan Roy & Ors.

For the petitioner	:	Mr. Soumya Majumder Mr. Soumalya Ganguli Mr. Jeewan Ballav Panda
For the respondent nos. 2 & 3	:	Mr. Avinash Kankani
For the respondent no.5	:	Mr. Abhishek Banerjee Ms. Parna Roychowdhury Banjeree
Heard on	:	12.09.2023
Judgment on	:	12.09.2023

Raja Basu Chowdhury, J:

1. The present writ petition has been filed, *inter alia*, challenging the order dated 21st April, 2022 passed by the respondent no. 2 in a proceeding under Section 7 of the Payment of Gratuity Act, 1972 (hereinafter referred to as the "said Act"). The petitioner claims to be engaged in the business of providing caretaker services and supply of Automated Teller Machines (ATMs) to banks and other financial

institutions. In course of its business dealings and transactions, the petitioner had entered into a service agreement with the respondent no. 5 and had installed ATMs at the locations provided by the respondent no. 5 in the State of West Bengal (hereinafter referred to as the said agreement).

2. In terms of the said agreement entered into by and between the petitioner and the respondent no. 5, the petitioner had engaged the respondent no. 4 as sub-contractor, with the knowledge and permission of the respondent no. 5, for rendering caretaker services in relation to the ATMs of the respondent no. 5. The agreement which was effective from 1st April, 2006, was extended and/or renewed from time to time and was effective up to 31st August, 2017, as would appear from the agreement dated 18th January, 2016.

3. It is the petitioner's case that in terms of the Clause 2.2.2(O) of the aforesaid agreement, the petitioner and in turn the respondent no. 4 under the sub contract was bound to adhere to and comply with the statutory liabilities, including mandatory deductions, payments, incentives, contributions, fees as also for payment of gratuity and other formalities. According to the petitioner it was, thus, the responsibility of the respondent no. 4 to make payment of gratuity of the respondent no. 1 who had been employed by the respondent no. 4 for providing caretaker services to the aforesaid ATMs of the respondent no. 5.

4. At the instance of the respondent no.1, a proceeding had been initiated before the Controlling Authority under the said Act for determination of gratuity payable to the respondent no.1. In such proceeding, the respondent no.4 being the employer of the respondent no. 1 as also the petitioner, were made parties. While the petitioner was identified as the main contractor, the respondent no. 4 was identified as an opposite party no.2 in the said proceeding.
5. Although, the petitioner had questioned the jurisdiction of the Controlling Authority to adjudicate upon the disputes *inter se* between the petitioner and the respondent no.1, the Controlling Authority by ignoring such objection was, *inter alia*, pleased to determine the gratuity payable in favour of the respondent no.1. While determining the gratuity payable to the respondent no.1, Controlling Authority had held the petitioner liable to make payment of such gratuity.
6. Being aggrieved with the illegal assumption of jurisdiction and consequential determination made by the Controlling Authority under Section 7 of the said Act, the present writ petition has been filed.
7. At the interim stage, this Court taking into consideration the case made out by the petitioner while admitting the writ petition, by overruling the preliminary objection as to maintainability of the writ petition, had passed a conditional order dated 29th September, 2022, thereby, restraining the respondents from enforcing the

determination made by the Controlling Authority. The petitioner had since, complied with the conditions set forth in the order and had deposited the entire amount, as determined by the Controlling Authority by its order dated 21st April, 2022 with the Learned Registrar General of this Court. The present writ petition has since come up for consideration at the final hearing stage.

8. Mr. Majumder, learned advocate appearing in support of the aforesaid writ petition, submits that the respondent no.1 who had been employed by the respondent no. 4, has no employee-employer relationship with the petitioner. It is submitted that the payment of gratuity to an employee is ordinarily made in terms of the provisions contained in the said Act. By referring to the provisions of Sections 2(e) and 2(f) of the said Act, it is submitted that existence of employee-employer relationship, is the basic foundation for initiation of a proceeding under the said Act. It is the contention of the petitioner that the said Act, despite being a beneficial piece of legislation, does not provide for fastening of liability on the principal employer. In fact, the said Act does not recognize the concept of a principal employer at all.

9. By referring to the provisions of Section 2(r) of the said Act, he says that the term "superannuation" in relation to an employee has been defined in the said Act, to mean "the attainment by the employee of such age as is fixed in the contract or conditions of service as the age on the attainment of which the employer shall vacate the

employment." By referring the provisions of the said Act, he submits that unless, there is a contract between the parties, as regards employment, the employee cannot be superannuated, nor can such an employee resign, for him to be entitled to gratuity.

10. By drawing the attention of this Court to the provision of Section 4 of the said Act, it is submitted that gratuity is payable to an employee in case of his/her superannuation, resignation, disablement or death as the case may be. Since, the petitioner had no contractual relationship of employment with the respondent no. 1, the respondent no. 1 does not become an employee of the petitioner, for being entitled to gratuity or to seek determination of gratuity from the Controlling Authority, as against the petitioner.

11. By further drawing the attention of this Court to Sub-section (4)(a) of Section 7 of the said Act, it is submitted that the word "dispute" as referred to in the said Sub-section is in relation to payment of gratuity to an employee by an employer, including the admissibility of such claim and entitlement to receive the same. As such, unless an employee-employer relationship is established and a finding is returned by the Controlling Authority, the petitioner cannot be saddled with any liability on account of payment of gratuity.

12. Mr. Majumder submits that despite drawing attention of the Controlling Authority to the judgment of this Court delivered in the

case of ***Sailen Seth v. Deputy Labour Commissioner***, reported in **2010 (3) CHN (CAL) 899**, the Controlling Authority by ignoring the same has fastened the liability for payment of gratuity on the petitioner. The determination made by the Controlling Authority and fastening of liability on the petitioner, to make payment of gratuity is without jurisdiction, *de hors* the statutory provisions and cannot be acted upon. According to him, the Controlling Authority had no jurisdiction to direct payment of gratuity by a third party who is not the employer of the respondent no.1.

13. It is still further submitted that the Controlling Authority had no justification and it was improper on his part to construe the provision of the said Act with reference to the provisions of Contract Labour (Regulation and Abolition) Act, 1970. Objectively, the said two Acts are different and the judgment rendered by the Coordinate Bench of this Court in the case of ***Sailen Seth*** **(supra)** takes note of the aforesaid situation as well. Mr. Majumder, learned advocate, has also relied on an unreported judgment delivered by a Co-ordinate Bench of this Court, on 16th June, 2023, in the case of ***FIS Payment Solutions and Services India Private Limited v. The Assistant Labour Commissioner Central Siliguri & Ors.***, registered as **WPA 1199 of 2023**, in support of his contention that a right to receive gratuity cannot accrue, without an employee employer relationship. In the facts as noted hereinabove, it is submitted that the order

passed by the Controlling Authority cannot be sustained and same should be set aside.

14. *Per contra*, Mr. Kankani, learned advocate representing the respondent nos. 2 and 3, submits that the aforesaid order which forms the subject matter of challenge in this writ petition is an appealable order. Since, there is an Appellate Authority, the issue should be decided by the Appellate Authority. According to him, no case of violation of the principles of natural justice has been made out. No case of violation or enforcement of fundamental rights has also been made out. By placing reliance on Sub-section (7) of Section 7 of the said Act, Mr. Kankani submits that the words "any person aggrieved by an order under sub-section (4)" in the said Sub-section, is wide enough to mean and include even a third party. The same cannot be restricted to the employee or the employer nor can a restrictive meaning be given to the same. In any event, it is submitted that the petitioner is not a third party as the petitioner has been arrayed as a party in the proceeding before the Controlling Authority. As such, the petitioner has the right and the remedy to prefer an appeal. Further the order passed by the Controlling Authority is a reasoned order and the same has been passed after taking into consideration all aspects of the matter. This Court, in exercise of its extraordinary jurisdiction, ought not to interfere with the order impugned and the present petition should be dismissed.

15. Despite service the respondent nos.1 and 4 remain unrepresented.

16. Heard learned advocates appearing for the respective parties and considered the materials on record. The issue that falls for consideration in the present petition is whether, notwithstanding there being no employee employer relationship with the petitioner on one hand and the respondent no.1 on the other, the Controlling Authority could compel the petitioner to make payment of gratuity. A combined reading of the provisions of Section 2(e), 2(f) and Section 4(1) of the said Act, in no uncertain terms provide that for the provisions of the said Act, to apply there must be employee-employer relationship, which may be expressed or may be implied. Determination of gratuity, thus, cannot be divorced from the employee-employer relationship. In this case, I find that the petitioner in usual course of his business dealings and transactions has entered into an agreement with the respondent no.5 for providing caretaker services. Such agreement was valid till 30th August, 2017. During the pendency of the aforesaid agreement, the petitioner with the knowledge and consent of the respondent no.5 had entered into an agreement with the respondent no.4 and had engaged the respondent no.4 as a sub-contractor to provide caretaker services. The relevant clause which makes it obligatory for compliance of statutory formalities by the respondent no.4 is extracted hereunder.

> *"2.2.2(O) Caretakers Services will be provided and Bidder will be responsible for compliance with all regulatory/labour laws. Bank may ask the bidder to provide caretaker Service for one/two or three shifts".*

17. Thus, ordinarily, although it was obligatory on the part of the petitioner to provide for compliance of all statutory formalities, however, by reasons of engagement of the sub-contractor with the knowledge and consent of the respondent no.5 the said responsibility may have been entrusted on the respondent no.4. I, however, find that the Controlling Authority by the aforesaid order while determining the liability did not conclude that the petitioner had any employee-employer relationship implied or otherwise with the respondent no.1. On the contrary, despite arriving at a specific finding that the respondent no.1 was under the direct employment of the respondent no.4, the Controlling Authority had fastened liability for making payment of gratuity on the petitioner. As such despite the fact that the Controlling Authority having not found any direct employee-employer relationship between the petitioner and the respondent no.1, had fastened liability on the petitioner for payment of gratuity. The aforesaid finding and the consequential direction are contrary to the provisions of the said Act and the judgment delivered by this Hon'ble Court in the case of ***Sailen Seth* (supra)**. In the said judgment this Hon'ble Court while taking note of the provisions of the said Act and the Contract Labour (Regulation and Abolition) Act, 1970 (in short the "Contract Labour Act") had

returned the finding that the said Act and the Contract Labour Act, seeks to achieve different objects and as such it would be improper to direct payment of gratuity, with reference to the Contract Labour Act. I also find that a coordinate Bench of this Court in the case of ***FIS Payment Solutions and Services India Private Limited*** **(supra)** has also taken a view that there must be an employee-employer relationship, which may be expressed or implied, for the provisions of the said Act to apply. Although, Mr. Kankani, learned advocate contended that the present writ petition ought not to be entertained in view of the efficacious alternative remedy available to the petitioner, I am of the view that since, the writ petition raises jurisdictional issues, this Court in exercise of its extra-ordinary jurisdiction is competent to go into such question. It is well-settled that an alternative remedy is not an absolute bar. It has long been recognized by the Hon'ble Supreme Court in the case of ***Whirlpool Corporation v. Registrar of Trade Marks, Mumbai & Ors.***, reported in **(1998) 8 SCC 1**, that in the event, the order passed is wholly without jurisdiction or ultra vires of an Act; or the order is violative of principles of natural justice; or the petitioner seeks enforcement of any fundamental rights, the issue of alternative remedy may not stand in the way of a Court, to exercise jurisdiction. In this case, at the interim stage, this Court by an order dated 29th September, 2022 had, *inter alia,* been pleased to entertain the writ petition by overruling the objection raised by the learned advocate appearing for the respondents.

18. Having regard to the aforesaid, I am of the view that the alternative remedy cannot stand in the way of the petitioner maintaining the present writ petition, especially when the direction, for payment of gratuity had been issued by the Controlling Authority without first determining employee-employer relationship as between the petitioner and the respondent no.1. The Controlling Authority having not determined the very jurisdiction issue for it to direct payment of gratuity, the order impugned is *de hors* the provisions of the said Act. In the light of the aforesaid, the issue as to whether the petitioner has the right or the remedy of an appeal pales into insignificance.

19. Having regard to the aforesaid, the order dated 21st April, 2022 issued by the Controlling Authority cannot be sustained. The same is accordingly, set aside. The matter is accordingly remanded back to the Controlling Authority for deciding afresh, after giving opportunity of hearing to the parties.

20. The learned Registrar General of this Court is directed to en-cash the fixed deposit prematurely, if required, and to refund the same to the petitioner along with interest accrued thereon, if any, after deducting the commission payable.

21. The petitioner is, however, directed to deposit the entire amount already determined by the Controlling Authority with the office of the Controlling Authority within a period of two weeks from the date of release of the amount by the office of the learned Registrar General, High Court, Calcutta. In default of the deposit by the petitioner within the period as indicated above, the order passed by the Controlling Authority shall automatically revive and be enforceable as against the petitioner.

22. In the event, however, there is compliance of the direction for deposit by the petitioner as noted above, the Controlling Authority is directed to re-determine the gratuity payable to the respondent no.1, in the light of the observations made herein above, within a period of eight weeks from the date of such deposit.

23. The Controlling Authority upon determining the gratuity shall call upon the person liable to make payment of the gratuity along with interest as is statutorily payable.

24. With the aforesaid observations/directions, the writ petition stands disposed of.

25. There shall, however, be no order as to costs.

26. Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of necessary formalities.

(Raja Basu Chowdhury, J.)

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