

Form No.J(2)

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

Present:

The Hon'ble Justice Raja Basu Chowdhury

WPA 19017 of 2023

M/s. Budge Budge Company Limited

Vs.

The State of West Bengal & Ors.

With

WPA 23207 of 2023

For the petitioner : Mr. Saptansu Basu, Sr. Advocate
Mr. Balai Chandra Paul
Mr. Debanshu Ghorai

For the State : Ms. Noelle Banerjee
Ms. Kalpita Paul

For the respondent : Mr. Rananeesh Guha Thakurta
No. 4 Ms. Senjuti Sengupta
Ms. Dona Ghosh
Ms. Dipa Roy

Heard on : 27th September, 2023.

Judgment on : **11th October, 2023.**

Raja Basu Chowdhury, J:

1. The present writ petition has been filed, *inter alia*, challenging the order dated 4th July, 2023 passed by the Appellate Authority under the Payment of Gratuity Act, 1972 (hereinafter referred to as the "said Act").

2. It is the petitioner's contention that the respondent no.4 was its employee. In ordinary course, subsequent to the retirement of the said employee, the petitioner had arranged and had disbursed a sum of Rs.65,750/- towards gratuity, in full and final settlement of his claim. Notwithstanding receipt of the aforesaid amount, the respondent no.4 had applied before the petitioner in Form 'I', *inter alia*, praying for additional amount on account of gratuity.
3. By a communication in writing dated 7th October, 2016, the petitioner was pleased to reject the same by observing that the respondent no.4, having accepted and received gratuity in full and final settlement of its claim, was not entitled to make any further claim.
4. The matter, however, did not rest there. The respondent no.4, had since, applied before the Controlling Authority by filing an application in Form 'N' on 15th November, 2016, *inter alia*, praying for determination of the gratuity payable to him. On contested hearing, by an order dated 28th April, 2022, the Controlling Authority upon determining the gratuity payable in favour of the respondent no.4, by a notice in Form 'R' of even date had called upon the petitioner to make payment of the balance sum of Rs.42,881/-, together with interest at the rate of 10 per cent per annum with a further direction to make payment of additional interest on account of delayed payment of gratuity.

5. Being aggrieved, the petitioner had preferred a statutory appeal before the Appellate Authority. The respondent no.4, had also filed an appeal challenging the quantum of determination so made by the Controlling Authority.
6. Both the aforesaid appeals were disposed of by the Appellate Authority by two separate orders, both dated 4th July, 2023.
7. Being aggrieved by the order passed by the Appellate Authority in connection with the appeal filed by the petitioner, the present writ petition, being WPA 19017 of 2023 has been filed.
8. The petitioner has, however, independently challenged the order passed by the Appellate Authority in the appeal filed by the respondent no.4, by filing a separate writ petition, which has been registered as WPA 23207 of 2023.
9. Both the aforesaid writ petitions are taken up together for consideration.
10. Mr. Basu, learned senior advocate representing the petitioner in both the writ petitions, by drawing attention of this Court to page 19 of the aforesaid writ petition, being WPA 19017 of 2023 submits that the respondent no.4 having accepted the gratuity in full and final settlement of his claim is not entitled to seek determination of gratuity by the Controlling Authority. By referring to the aforesaid document dated 4th September, 2016 annexed to the aforesaid writ petition he submits that the respondent no.4, by putting his signature on the said document

has acknowledged the contents of the said document. It is still further submitted that Section 7 of the said Act, does not authorize further determination of gratuity payable in favour of a workman who had already accepted the gratuity on the basis of a full and final settlement of his claim towards gratuity. In support of his aforesaid contention he has placed reliance on a judgment delivered by a Coordinate Bench of this Court in the case of ***Tushar Kanti Roy vs. Eighth Industrial Tribunal***, reported in **2013 (1) CHN 504**.

11. Independent of the aforesaid, Mr. Basu submits that the Appellate Authority exceeded its jurisdiction in directing not only payment of gratuity but also payment of interest, which is in excess of the principal amount. By placing reliance on the second proviso to Section 8 of the said Act, he submits that the scheme of the said Act, does not recognize payment of interest which exceeds the amount of gratuity payable under the said Act.
12. By referring to the provisions of Sections 7, 7(2), 7(3) and 7(3A) of the said Act, he submits that aforesaid sections have to be read conjointly with Section 8 of the said Act. If the aforesaid Sections are read together, the same will lead to an inevitable conclusion that no interest can be payable to the petitioner, under the said Act, which exceeds the amount of gratuity payable under the said Act.

13. By placing reliance on a bipartite settlement entered into, by and between the petitioner and the workers' union he submits, admittedly, there was a lockout declared by the petitioner. When the petitioner's mill reopened, on the basis of a settlement, it was agreed by and between the parties that the workers shall not be entitled to statutory leave, gratuity and/or other benefits for the period of suspension of work. This aspect was not considered, both by the Controlling Authority as also by the Appellate Authority, though in respect of an independent proceeding which concerned similarly placed employee, the Controlling Authority by taking note of the aforesaid settlement, had declined to grant relief to the workman, for the aforesaid period of lockout, as indicated in the said settlement.
14. In the facts as stated above, he says that the order passed by the Appellate Authority, which is subject matter of challenge in these writ petitions, cannot be sustained and the same should be set aside.
15. *Per contra*, Mr. Guha Thakurta, learned advocate representing the respondent no.4, submits that his client, was never made aware by the petitioner, as to the actual amount of the gratuity payable to him. He had signed the papers made available to him on dotted lines when gratuity was disbursed. By referring to the cross-examination of the workman he submits that the respondent no.4 is unable to read or understand English and it is

for such reason without appreciating the contents of the document at page 19 of the writ petition, he executed the same. In any event, the aforesaid document does not and cannot stand in the way of the respondent no.4, claiming determination of gratuity since, acceptance of part payment of gratuity cannot stand in the way of the respondent no.4 praying for determination of gratuity by the Controlling Authority under Section 7 of the said Act.

16. By referring to the provisions of Section 14 of the said Act, he submits that Section 14 of the said Act has an overriding effect. In support of his aforesaid contention reliance has been placed on a judgment delivered by the High Court, at Madras in the case of ***Rajamoni vs. the Deputy Commissioner of Labour and Appellate Authority under Payment of Gratuity Act Tiruchirappalli & Ors.***, reported in **2001 (2) LLJ 1453**.
17. It is still further submitted that acceptance of a part of the gratuity, is not a bar to seek determination of gratuity. It is not the case of the petitioner that the respondent no.4, had foregone the higher amount of gratuity, despite being aware of actual amount payable to him.
18. By referring to page 84 of the writ petition he submits that the settlement as annexed, is not a settlement within the meaning of Section 2(p) or Section 12(3) of the Industrial Disputes Act, 1947 and as such, is not binding on the respondent no.4. Since, the

respondent no.4 is not a signatory to the same, the same cannot be enforced against him. In any event, it is submitted that the aforesaid document cannot override the provisions of the said Act.

19. He further submits that the respondent no. 4, is otherwise entitled to gratuity for the entire period for which he has rendered service i.e., between 1967 and 2016. Although, the Appellate Authority has refused to grant relief to the respondent no.4 for the entire period, this Court is competent to grant such relief.

20. In support of his contention he places reliance on the following judgments;-

- 1) **2015 (8) SCC 150 (Fisheries Department, State of Uttar Pradesh vs. Charan Singh);**
- 2) **2010 (4) LLJ, 337 (Bank of India vs. Central Government Industrial Tribunal & Ors.);** and
- 3) **1978 (1) LLJ 322 (K.C.P. Employees' Association, Madras vs. Management of K.C.P. Ltd., Madras & Ors.)**

21. Ms. Banerjee, learned advocate appearing on behalf of the State respondents submits that there is no irregularity in the order passed by the Appellate Authority. By placing reliance on a report she submits, that all aspects have been taken into consideration by the Appellate Authority while passing the order. The settlement as relied on by the petitioner, purportedly dated

30th August, 1994 does not and cannot have overriding effect in the light of Section 14 of the said Act. Having regard to the aforesaid, she submits that no case for interference has been made out by the petitioner. This Court ought not to entertain the writ petition. The present writ petition should be dismissed with cost.

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

23. From the submission made by the learned advocate for the petitioner, it appears that the petitioner is primarily aggrieved with the claim made by the respondent no.4, on account of gratuity in excess of the amount already paid, which was accepted by the respondent no.4 by acknowledging the same to be in full and final settlement, as also the consequential determination of gratuity by the Controlling Authority by order dated 28th April, 2022, which later merged with order passed by the Appellate Authority on 4th July, 2023.

24. It is true that the respondent no.4 had at the time of acceptance of the gratuity, had signed the certificate captioned “to whom it may concern” which in no uncertain terms records as follows.

“I also hereby declare that after my superannuation I had approached the Company to provide me job purely on temporary basis and agreed to accept the payment of gratuity due amount on the date of Superannuation at the time of finally leaving the Mill/Company, without

claiming any further amount or interest thereon. I have received the amount in full and final settlement of my claim in respect of my Gratuity dues and not compelled by any means for my payment which is fully on my accord and will not produce for further claim in future before any appropriate authority through the proper form. If do so this document will be produced before the appropriate authority to nullify my claim."

The aforesaid document, however, appear to have been prepared as a proforma, where the blank spaces, such as the name, date, department, amount, period of service, have been later filled up.

25. Filling up the blanks and having such documents executed by the ex-employees of the petitioner towards acknowledgement of the receipt of the amount of gratuity, may or may not be irregular in ordinary course, however, the question that falls for consideration is whether the employer could obtain an acknowledgement of receipt of the amount of gratuity in derogation of the provisions of the said Act, and whether such an acknowledgement can be treated as waiver of the right of the respondent no.4, to receive gratuity as per the provisions of the said Act. It is well settled that right to receive gratuity is a recognised legal right, which ordinarily cannot be curtailed except in certain circumstances. The exceptional circumstances are provided in Section 4(6) of the said Act. The same are extracted herein below:

“Section 4(6):-

(6) Notwithstanding anything contained in sub-section (1),—

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee [may be wholly or partially forfeited]—

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment.”

Ordinarily, therefore, in absence of the events identified in the said Act, gratuity cannot be held back or short paid.

26. In legal parlance, waiver has been defined to mean relinquishment of a known right or advantage, benefit, claim or privilege, which the party without such waiver would have enjoyed. Thus, the party waiving such right, thereby, acknowledges his entitlement to get the right enforced, which he waived by his act. The Hon’ble Supreme Court in the case of **P. Dasa Muni Reddy v. P. Appa Rao**, reported in **AIR 1974 SC**

2089 in paragraph 13 was, *inter alia*, pleased to observe as under:

“13. Abandonment of right is much more than mere waiver, acquiescence or laches. The decision of the High Court in the present case is that the appellant has waived the right to evict the respondent. Waiver is an intentional relinquishment of a known right or advantage, benefit, claim or privilege which except for such waiver the party would have enjoyed. Waiver can also be a voluntary surrender of a right. The doctrine of waiver has been applied in cases where landlords claimed forfeiture of lease or tenancy because of breach of some condition in the contract of tenancy. The doctrine which the courts of law will recognise is a rule of judicial policy that a person will not be allowed to take inconsistent position to gain advantage through the aid of courts. Waiver some times partakes of the nature of an election. Waiver is consensual in nature. It implies a meeting of the minds. It is a matter of mutual intention. The doctrine does not depend on misrepresentation. Waiver actually requires two parties, one party waiving and another receiving the benefit of waiver. There can be waiver so intended by one party and so understood by the other. The essential element of waiver is that there must be a voluntary and intentional relinquishment of a right. The voluntary choice is the essence of waiver. There should exist an opportunity for choice between the relinquishment and an enforcement of the right in question. It cannot be held that there has been a waiver of valuable rights where the circumstances show that what was done was

involuntary. There can be no waiver of a non-existent right. Similarly, one cannot waive that which is not one's as a right at the time of waiver. Some mistake or misapprehension as to some facts which constitute the underlying assumption without which parties would not have made the contract may be sufficient to justify the court in saying that there was no consent.”

27. Taking note of the above definition of waiver, the case made out by the parties, it does not appear from the certificate dated 4th September, 2016, that the respondent no.4 was conscious of his rightful entitlement of gratuity and had exercised a choice in the essence of waiver. The aforesaid document does not pass the test of constituting waiver. Execution of such a document, thus, cannot stand in the way of the respondent no. 4, to claim the balance of the gratuity amount from the petitioner or to seek determination of the gratuity from the Controlling Authority.
28. The judgment of **Tushar Kanti Roy (supra)** relied on by the petitioner concerned a challenge to an Award arising out of a reference under the relevant Section of the Industrial Disputes Act, 1947. The petitioner there was a workman, who was dismissed from service after an enquiry. Although, the Tribunal had held that, the guilt could not be established, in the facts of the case while declining to grant full back wages, granted the petitioner 50 per cent of the back wages/salary from the date of dismissal. After publication of the Award, by three several

cheques the aforesaid amount was made over to the workman, who after accepting the same in full and final settlement of his claim had challenged the Award. It is in the factual backdrop as aforesaid the Co-ordinate Bench of this Court had observed as follows:

“It will thus be inequitable to admit the writ petition challenging the Award the benefit of which has already been taken by the petitioner in full and final satisfaction of the dues.”

The aforesaid judgment does not assist the petitioner.

29. The next point urged by the petitioner concerns the bipartite settlement. The learned advocates for the respondent no.4, in course of arguments had strenuously contended that the said settlement, not being a settlement within the meaning of Section 2(p) of the Industrial Disputes Act, 1947, is not enforceable as against the respondent no.4. I find force in such submission, in absence of any document or statement to substantiate that the same was a settlement within the meaning of Section 2(p) of the Industrial Disputes Act, 1947, the same cannot be enforced to deny the respondent no.4 of his rightful entitlement as regards payment of gratuity.
30. Lastly, it has been contented by Mr. Basu, by relying on the second proviso to Section 8 of the Act, the Controlling Authority was incompetent to grant interest exceeding the principal amount of gratuity payable under the Act. To appreciate the aforesaid

contention, it must be noted that the said Act is a self-contained code. While Section 4 of the said Act provide for the right to be entitled to gratuity, Section 7 and its various subsections, not only provide for the obligation to pay the gratuity, the period within which payment is to be made, but a mechanism to determine the quantum of gratuity payable and the appeal thereto. Section 8 of the said Act, provides for the manner of enforcement of the determination made under Section 7 of the said Act. It is while enforcing a determination of gratuity under the said Act that the legislature has provided for payment of compound interest recoverable by the Collector on the certificate due. It is in relation to the aforesaid section that a stipulation as indicated by Mr. Basu, in the second proviso to such section has been provided for. The relevant section being Section 8 of the said Act is extracted below:

“8. Recovery of gratuity.—*If the amount of gratuity payable under this Act is not paid by the employer, within the prescribed time, to the person entitled thereto, the controlling authority shall, on an application made to it in this behalf by the aggrieved person, issue a certificate for that amount to the Collector, who shall recover the same, together with compound interest thereon ¹[at such rate as the Central Government may, by notification, specify], from the date of expiry of the prescribed time as arrears of land revenue and pay the same to the person entitled thereto:*

²[Provided that the controlling authority shall, before issuing a certificate under this section, give the employer a reasonable opportunity of showing cause against the issue of such certificate:

Provided further that the amount of interest payable under this section shall, in no case exceed the amount of gratuity payable under this Act.]”

31. Incidentally no such stipulation is found in Section 7 of the said Act. In the light of the deliberations noted above, I am afraid and am unable to accept the contention raised by Mr. Basu. The writ petition fails, the same is accordingly dismissed.
32. Before parting I must note that Mr. Guha Thakurta has contended that in as much as the respondent no.4 had rendered service between 1967 and 2016, he is entitled to gratuity for the entire period. Incidentally, apart from making such an assertion, no attempt has been made by the respondent no.4 to challenge the finding made by the Appellate Authority. In absence of any challenge, the order of the Appellate Authority has become final and binding, at least on the respondent no.4. The judgment delivered in the case of **Fisheries Department (supra)** concerns an industrial dispute in relation to termination of service of workman. The facts in which the above judgment was delivered is clearly distinguishable. The case of **Bank of India (supra)** also concerns a challenge to an Award. None of the judgments cited by the respondent no.4 comes in his aid. It is well settled that a judgment is an authority for what it decides. A slight variation in

the facts may alter the final result. The respondent no.4 having not challenged the order dated 4th July, 2023 passed by the Appellate Authority, is bound by the decision so taken. The contention for grant of additional benefits from 1967 to 2016, as urged by Mr. Guha Thakurta also fails.

33. There shall be no order as to costs.
34. Urgent Photostat certified copy of this order, if applied for, be made available to the parties on priority basis upon compliance of all formalities.

(Raja Basu Chowdhury, J.)

sb.