

Form No.J(2)

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

Present:

**The Hon'ble Justice Raja Basu Chowdhury**

**WPA 19482 of 2023**

**Food Corporation of India  
Versus  
Union of India & Ors.**

|                                   |   |                                                     |
|-----------------------------------|---|-----------------------------------------------------|
| For the petitioner                | : | Mr. Devajyoti Barman,<br>Ms. Sanjukta Basu Mallick, |
| For the respondent<br>nos. 1 to 3 | : | Ajit Kumar Mishra,<br>Mr. Abhishek Dey,             |
| Heard on                          | : | 18 <sup>th</sup> September, 2023.                   |
| Judgment on                       | : | <b>18<sup>th</sup> October, 2023.</b>               |

**Raja Basu Chowdhury, J:**

1. The present writ petition has been filed, *inter alia*, challenging the orders dated 27<sup>th</sup> February, 2023 passed by the Appellate Authority under the Payment of Gratuity Act, 1972 (hereinafter referred to as the "said Act") and the order dated 7<sup>th</sup> October, 2021, passed by the Controlling Authority under the said Act.
2. It is the petitioner's case that around 49 workmen were engaged by a rice mill set up by the Durgapur Food Corporation District

run under the name and style of Modern Rice Mill. The engagements of the workmen were through contractors. Consequent upon the closure of the said mill in the year 1990/1991 since, there was no requirement for engagement of the contractors, the aforesaid workmen were engaged by the petitioner on need basis and on daily rated, no work no pay system.

3. Since, the workmen demanded absorption, they had approached the Ministry of Labour, Government of India, whereupon an industrial dispute between the workmen and the petitioner, regarding regularisation of service of the workmen was referred by the Ministry of Labour, Government of India, in exercise of powers conferred on them by clause (d) of sub-section (1) and sub-section (2A) of Section 10 of the Industrial Disputes Act, 1947 (hereinafter referred to as the "said Act") to the Central Government Industrial Tribunal, Asansol, for adjudication by framing the following issues:

#### **SCHEDULE**

*"Whether the demand of Durgapur Casual Workers Union for absorption of 49 casual workmen as per list enclosed by the management of FCI, Durgapur is justified? If not, what relief they are entitled to?"*

4. On contest, by an award dated 9<sup>th</sup> June, 1999, the said reference was answered in the following terms: -

*“The demand of Durgapur Casual Workers’ Union for absorption of 49 casual workmen (as per list) by the management of F.C.I. Durgapur is justified. The concerned casual workmen be absorbed by the management within three months from the date of enforceability of this Award”.*

5. Although, a challenge to the Award was made by the petitioner, the challenge was ultimately set at rest by a judgment and order dated 9<sup>th</sup> December, 2014 in Civil Appeal No. 10856 of 2014, delivered by the Hon’ble Supreme Court, thereby, directing implementation of the award from its due date, as ordered by the Tribunal.
6. Pursuant to the aforesaid, by an office order dated 28<sup>th</sup> August, 2015, the petitioner offered to notionally fix the pay of the respondent no.4, with a rider that the monetary benefit shall be made available to the aforesaid workmen from the date of joining the post.
7. The respondent no.4, having since, accepted the offer and having discharged his duties in terms of the aforesaid office order, had subsequently superannuated from service on 31<sup>st</sup> July, 2018, whereupon he had applied for payment of gratuity.
8. Since, the claim for gratuity was refused, the respondent no.4 had applied before the Controlling Authority for determination of gratuity payable to him by filing an application in Form ‘N’.

9. The said application was disposed of by an order dated 7<sup>th</sup> October, 2021, *inter alia*, by directing the petitioner to make payment of a sum of Rs. 3,86,640/- together with interest at the rate of 10 per cent payable to the respondent no.4.
10. Challenging the said determination, an appeal was filed by the petitioner before the Appellate Authority under the said Act, *inter alia*, on the ground that gratuity is payable only to the permanent employee of the petitioner. Further the respondent no.4 having been notionally regularized pursuant to the office order dated 28<sup>th</sup> August, 2015, on 17<sup>th</sup> May, 2016 and having been superannuated on the expiry of 31<sup>st</sup> July, 2018, could not have been entitled to gratuity as he had not completed continuous service for a period of 5 years as provided under the said Act. The aforesaid appeal was, however, dismissed on contest by an order dated 27<sup>th</sup> February, 2023, by the Appellate Authority.
11. Being aggrieved, the present writ petition has been filed.
12. Mr. Barman, learned advocate representing the petitioner, by placing reliance on a judgment delivered by the Hon'ble Supreme Court on 11<sup>th</sup> May, 2016 passed in connection with IA No. 1 & 2 of 2016 submits that the Hon'ble Supreme Court by taking note of the direction issued by the petitioner, had confined payment of back wages to the aforesaid workmen for the period from 1<sup>st</sup> June, 2009 to 31<sup>st</sup> December, 2010. The Hon'ble Supreme Court did not grant back wages for any other period.

13. Having regard to the aforesaid, since, the absorption of the respondent no.4 was in terms of office order dated 28<sup>th</sup> August, 2015, which categorically provided that payment of monetary benefit would be from the date of joining the post and the appointment would be notionally effective from 9<sup>th</sup> June, 1999, the respondent no.4 having acted in terms of the said notice, is not entitled to payment of gratuity, apart from the period for which he had actually worked after absorption.
14. It is still further submitted that the respondent no.4 having joined the post on 17<sup>th</sup> May, 2016 and having been superannuated from service on 31st July, 2018, under no stretch of imagination can be entitled to payment of gratuity since, the respondent no.4 did not work continuously for a period of 5 years.
15. It is submitted that since, absorption of the petitioner was in the post of helper notionally, with effect from 9<sup>th</sup> June, 1999, with actual monetary benefit payable from the date of joining the post, the petitioner cannot be entitled to gratuity for the period for which he has been given notional benefit. Reliance has been placed on a judgment delivered by the Hon'ble Supreme Court in the case of ***State of Haryana & Ors. v. O.P. Gupta etc.***, reported in (1996) 7 SCC 533 as also the case of ***Paluru Ramkrishnaiah and others v. Union of India & Anr.***, reported in (1989) 2 SCC 541

16. The aforesaid aspect was not considered by the Controlling Authority or the Appellate Authority in its proper perspective. The orders passed by the Controlling Authority and by the Appellate Authority, thus, cannot be sustained. Both the aforesaid orders should be set aside and quashed.
17. *Per contra*, Mr. Ajit Kumar Mishra, learned advocate representing the respondent no.4, submits that the Hon'ble Supreme Court by the judgment and order dated 9<sup>th</sup> December, 2014 had directed implementation of the award from its due date as ordered by the Tribunal. By referring to the award passed by the Tribunal on 9<sup>th</sup> June, 1999, it is submitted that the respondent no.4 was directed to be absorbed within three months from the date of enforceability of the award. If the petitioner had chosen not to absorb the respondent no.4, despite direction, the respondent no.4 cannot be made to suffer therefor.
18. By drawing attention of this Court to the office order dated 31<sup>st</sup> May, 2016, it is still further submitted that the said office order does not provide for break in service. The same only provides that the respondent no.4 shall be absorbed in service with effect from 9<sup>th</sup> June, 1999 and the monetary benefits arising out of the implementation of the award shall only be afforded to the respective workmen from the date of joining. It is not the case of the petitioner that the respondent no.4 did not work with the petitioner prior to the office order dated 31<sup>st</sup> May, 2016.

19. Having regard to the aforesaid, it is submitted that the petitioner ought not to have denied payment of gratuity in favour of the respondent no.4 at the first instance. Since, the gratuity was denied, the respondent no.4 was compelled to approach the Controlling Authority. There is no irregularity on the part of the Controlling Authority in determining the gratuity payable to the respondent no.4, by concluding that the respondent no.4 had worked with the petitioner without any break from 9<sup>th</sup> June, 1999 and was admittedly superannuated on 31<sup>st</sup> July, 2018.. The Appellate Authority has also confirmed the order passed by the Controlling Authority.
20. It is submitted that the present writ petition does not deserve any further consideration and should be dismissed with costs.
21. Heard learned advocates appearing for the respective parties and considered the materials on record.
22. Admittedly, in this case, I find that there was some sort of employee employer relationship between the petitioner on the one hand and the 49 workmen on the other, prior to the award dated 9<sup>th</sup> June, 1999. Since, a dispute as regards absorption of the aforesaid 49 workmen was raised, the same was referred by the Central Government vide order dated 18<sup>th</sup> July, 1996, to the Central Government Industrial Tribunal, Asansol, for adjudication of the issues referred. On contested hearing, the learned Central Government Industrial Tribunal, by an award

dated 9<sup>th</sup> June, 1999, was, *inter alia*, pleased to observe that the demand of Durgapur Casual Workers Union for absorption of 49 workmen as per list by the management of F.C.I. is justified and consequently directed the concerned causal workmen to be absorbed by the management within three months from the date of enforceability of the said award.

23. I find, challenge to the said award was ultimately set at rest by a judgment and order delivered by the Hon'ble Supreme Court on 9<sup>th</sup> December, 2014 in Civil Appeal No.10856 of 2014, whereby the Hon'ble Supreme Court had directed the petitioner to implement the award from its due date as ordered by the Tribunal. Incidentally, the petitioner by an order dated 28<sup>th</sup> August, 2015 had offered to absorb the respondent no.4 notionally, with effect from 9<sup>th</sup> June, 1999, with monetary benefit from the date of joining the post.

24. Although, Mr. Barman, learned advocate representing the petitioner, contends that that the respondent no.4 is not entitled to payment of gratuity inasmuch as, he had joined the post on 17<sup>th</sup> May, 2016 and was superannuated on 31<sup>st</sup> July, 2018, thus, having not rendered continuous service for a period of 5 years, he is not entitled to gratuity, I am afraid and am unable to accept such contention. Having regard to the direction issued by the Hon'ble Supreme Court on 9<sup>th</sup> December, 2014, the letter dated

28<sup>th</sup> August, 2015 provided notional absorption with effect from 9<sup>th</sup> June, 1999, without any break in service. The letter dated 28<sup>th</sup> August, 2015, thus, did not disentitle the respondent no. 4 to be entitled to payment of gratuity. Insofar as the direction issued by the Hon'ble Supreme Court for payment of back wages is concerned for the period from 1<sup>st</sup> June, 2009 to 31<sup>st</sup> December, 2010, I am of the view that the same does not interfere with the petitioner's substantive right to be entitled to the payment of gratuity. The aforesaid order cannot be read in isolation to deny the statutory benefit in the form of payment of gratuity. Taking into consideration the definition of continuous service as provided in Section 2A of said Act, I am of the view that gratuity could not have been denied to the respondent no.4, *inter alia*, by contending that he had joined the service only on 17<sup>th</sup> May, 2016. Admittedly, it is not the case of the petitioner that there had been break in service of the respondent no.4, in terms of the office order which seeks to implement the award of the Tribunal dated 9<sup>th</sup> June, 1999. The Hon'ble Supreme Court by its judgment and order dated 9<sup>th</sup> December, 2014, had directed implementation of the award from the due date as directed by the learned Tribunal. The offer letter dated 28<sup>th</sup> August, 2015 does not also interfere with the past service of the respondent no.4. The petitioner, thus, cannot be permitted to contend that since, the respondent no.4 had been absorbed sometime in the year 2016, he was not in

continuous service for a period of 5 years, as he had been superannuated on 31<sup>st</sup> July, 2018.

25. I find that the Appellate Authority by its order dated 27<sup>th</sup> February, 2022, had on the basis of materials available decided that the respondent no.4 had joined in service on 9<sup>th</sup> June, 1999. The judgment relied on by the petitioner in the case of **Paluru Ramkrishnaiah (supra)** deals with payments of wages, in relation to notional promotion. The Hon'ble Supreme Court in the facts of the case held that such persons will not be entitled to any pay and allowances during the period for which they did not perform the duty for any higher post. When their seniority is fixed notionally. The aforesaid judgment does not deal with payment of gratuity. In the of case of **State of Haryana & Ors. (supra)**, the Hon'ble Supreme Court in paragraph 7 was, *inter alia*, pleased to observe as follows:

*“7. This Court in Paluru Ramkrishnaiah v. Union of India considered the direction issued by the High Court and upheld that there has to be “no pay for no work”, i.e., a person will not be entitled to any pay and allowance during the period for which he did not perform the duties of higher post, although after due consideration, he was given a proper place in the gradation list having been deemed to be promoted to the higher post with effect from the date his junior was promoted. He will be entitled only to step up the scale of pay retrospectively from the deemed date but is not entitled to the payment of arrears of the salary. The*

*same ratio was reiterated in Virender Kumar, G.M., N. Rlys. v. Avinash Chandra Chadha.”*

26. As would appear from the above the aforesaid judgments were delivered in different set of facts not concerning payment of gratuity. The same also did not deal with the provisions of Section 2A of the said Act. In the light of the deliberations made hereinabove, the findings rendered by the Controlling Authority or Appellate Authority cannot be said to be perverse.
27. Having regard to the same, I am of the view that the objection put forward by the petitioner cannot be sustained. The orders passed by the Controlling Authority and by the Appellate Authority do not call for interference. The petitioner has also not been able to identify any jurisdictional error committed either by the Controlling Authority or the Appellate Authority. The writ petition fails and is accordingly dismissed.
28. There shall, however, be no order as to costs.
29. Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of necessary formalities.

**(Raja Basu Chowdhury, J.)**