

**IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
(Constitutional Writ Jurisdiction)
APPELLATE SIDE**

Present:

The Hon'ble Justice Krishna Rao

WPA 1199 of 2023

**FIS Payment Solutions and Services India
Private Limited**

-Versus-

**The Assistant Labour Commissioner Central
Siliguri & Ors.**

Mr. Soumya Majumder
Mr. Soumalya Ganguli
Mr. Jeevan Ballav Panda
Ms. Shreya Singh
Mr. Vishal Sinha
Ms. Nikita Rathi
Mr. Dhriti Mehta

.....For the Petitioner.

Mr. Utpal Saha

.....For the respondent no. 5.

Hearing Concluded On :14.06.2023

Judgment on :16.06.2023

Krishna Rao, J.:

1. Affidavit of service filed by the petitioner be kept with the record. In spite of service of notice, none appears on behalf of the respondents except Respondent No.5.
2. The petitioner has filed the present writ application challenging the Recovery Certificate dated March 9, 2023, order dated March 31, 2022 and the notice of payment of gratuity dated March 31, 2022 and December 22, 2022 passed by the Controlling Authority i.e. the Respondent No.1 under the Payment of Gratuity Act, 1972.
3. Mr. Soumya Mazumder, learned Advocate representing the petitioner submits that in course of its business, the Petitioner Company entered into a Service Agreement with the Respondent Bank (Respondent No.5 herein) with effect from April 1, 2006 and installed Automated Teller Machine (ATMs) in the State of West Bengal. As per the terms of the conditions of the Service Agreement, the petitioner company was also responsible for providing caretaking services to the Respondent No.5. The agreement was extended from time to time by the agreement dated June 16, 2015.
4. Mr. Mazumder submits that for the purpose of rendering caretaker services to the Respondent No. 5, the Petitioner Company executed a Service Level Agreement with the Respondent No. 4 with the consent and knowledge of the Respondent No. 5.

- 5.** As per the terms of the Service Agreement between the petitioner company and the Respondent No. 5, the Respondent No.5 was liable to pay to the petitioner company fixed fees on monthly basis of taxes, charges, services, rents and transportations etc. for providing caretaking services, after making the reduction of tax (TDS). The fees for the services have been specifically mentioned in Schedule-I with the Service Agreement between the Respondent No.5 and the Petitioner Company.
- 6.** The respondent no. 4 had appointed the respondent no. 3 on purely contractual basis with effect from June 26, 2008. At the instance of respondent no. 3, the proceeding under the Payment of Gratuity Act, 1972 had been initiated in which the respondent no.1 had passed the impugned order.
- 7.** Though the Petitioner Company and the Respondent No. 5 have renewed the Service Agreement from time to time but by a communication dated May 31, 2017, the parties mutually agreed to terminate the Service Agreement dated April 1, 2006 with effect from May 31, 2017. Consequent to the mutual termination of the Service Agreement, the Petitioner Company by letter dated March 31, 2019 terminated the Service Level Agreement with the respondent no. 4 with effect from April 1, 2019.

- 8.** From the impugned order dated March 31, 2022, the Petitioner Company came to know the respondent no.4 had terminated the service of the respondent no.3 by a letter dated July 14, 2017.
- 9.** Mr. Mazumder relying upon Clause 2(c) of the Agreement dated January 18, 2016, executed between the Petitioner Company and the Respondent No. 4, it is submitted that it was the responsibility of the respondent no.4 to adhere and comply with the statutory liabilities, inter alia, including mandatory deductions, payments, incentives, contributions, fees and dues as stipulated by the client and this includes Contract Labour (Regulation and Abolition) Act, 1970, Shops and Commercial Establishments Act, The Employees Provident Funds and Miscellaneous, Act, 1952, The Employees State Insurance Act, 1948, The Workmen's Compensation Act, 1923, The Payment of Gratuity Act, The Payment of Wages, Act, 1936, The Payment of Bonus Act, 1965 and The Minimum Wages Act, 1948 etc. the client shall in not even be responsible to pay any such statutory benefits to the caretakers, if there is any such claims, the service provider shall indemnify the client.
- 10.** Mr. Mazumder submits that the respondent no. 3, who had been engaged by the respondent no.4 had initiated a proceeding under Section 7 of The Payment of Gratuity Act by filing an application in Form "N" before the Controlling Authority and in the said proceeding, the Petitioner Company was made as opposite party no.1 and referred

to as main contractor, though the employer respondent no. 3 was made party as opposite party no. 2.

- 11.** Mr. Mazumder submits that the controlling authority, while fastening the liability on the petitioner, was aware of the fact that there was no subsisting employee and employer relationship was in existence between the Petitioner Company and the Respondent No. 3. He further submitted that the controlling authority, while fastening a liability upon the petitioner, took aid of the Contract Labour (Regulation and Abolition) Act, 1970 and treated the Petitioner Company as principal employer and held that the petitioner is liable to pay gratuity.
- 12.** Mr. Mazumder relied on Sections 2 (e) and 2(f) of the said Act and submits that existence of employee and employer relationship is the basic foundation for initiating proceedings under the said Act. He further submitted that the said Act, despite being a beneficial piece of legislation, does not provide for fastening of liability on the principal employer.
- 13.** Mr. Mazumder relying upon Section 4 of the said Act and submitted that the gratuity is payable to an employee or in case of his death to nominee or other legal heirs as the case may be. He submits that since, the petitioner has no contractual relationship for employment with the respondent no. 3, the respondent no. 3 does not become an employee of the petitioner.

14. He submits that as per Section 7 of the said Act, it is for the employer to make payment of the gratuity amount to its employees. He submits that as per Sub-Section 4 (a) of Section 7 of the said Act, the word '*dispute*' as referred to in the said Sub-Section is in relation to the payment of gratuity to an employee by an employer including admissibility of such claim or entitlement to receive the same. He further submitted that unless an employee and employer relationship is established and a finding returned by the controlling authority, the petitioner company cannot be saddled with the liability of payment of gratuity.

15. Mr. Mazumder submitted that though the Act provides for a provision of appeal under Sub-Section (7) of Section 7 of the said Act but on scrutiny of the provisions of Sub-Section (4) (a) of Section 7 of the said Act and Sub-Section (7) of Section 7 of the said Act makes it clear that right to prefer an appeal by a person aggrieved would mean and include either the employee or its heirs or nominees and the employer and not by any third party. He submits that there was no contractual relationship by an between the petitioner and the respondent no.3, thus, the controlling authority has no jurisdiction to decide or determine the gratuity payable by the petitioner to the respondent no. 3.

16. Mr. Mazumder relied upon the judgment passed by this Court reported in **2010 (3) CHN (Cal) 899 (Sailen Seth -vs- Deputy Labour Commissioner & Ors.)** and submitted that the controlling authority

by an order dated March 9, 2023 has not only determined the amount of gratuity payable to the respondent no.3 but has also saddled the petitioner with such liability though the controlling authority was aware of the fact that there was no subsisting employee and employer relationship between the petitioner and the respondent no.3.

17. Mr. Mazumder also relied upon the unreported judgment passed by the Hon'ble Division Bench of this Court in ***MAT No. 247 of 2021 (FIS Paymeny Solutions and Services Private Limited -vs- Parwez Alam & Ors.)*** dated January 7, 2022 and submitted that on the similar issue the Hon'ble Division Bench had set aside the order of the controlling authority and had remanded the matter to the controlling authority for fresh consideration to decide all legal and factual issues.
18. Heard the learned counsel for the petitioner and considered the materials on record. Admittedly, the petitioner company entered into an agreement on January 18, 2016 with the respondent no. 4 with the knowledge and consent of the respondent no. 5 and in terms of the said agreement, the respondent no.4 had engaged the respondent no.3 on the purely contractual basis with effect from June 26, 2008.
19. Clause 2 (c) of the said agreement reads as follows:

“2. The Service provider shall provide Caretaker Services as per the Scope of Work (Schedule I) through its uniformed and trained personnel (hereinafter referred to as “Caretaker Personnel”). The Caretaker personnel deployed shall be the employees of the Service Provider. With respect to

the Caretaker Personnel, the obligations of the Service Provider include but are not limited to :

c) To adhere and comply with all statutory liabilities, mandatory, deductions, payments, incentives, contributions, fees and dues as per law and as stipulated by the Client and this includes Contract Labour (Regulation and Abolition) Act, 1970, Shops and Commercial Establishments Act, The Employees Provident Funds and Miscellaneous Act, 1952, The Employees State Insurance Act, 1948, The Workmen's Compensation Act, 1923, The Payment of Gratuity Act, The payment of wages Act, 1936, the Payment of Bonus Act, 1965, The Minimum Wages Act 1948, etc. The Client shall in not event be responsible to pay any such statutory benefits to the Caretakers, if there is any such claims, the Service Provider shall indemnify the Client."

20. As per the provisions of the said Act, there must be a relationship between the employee and the employer which may be expressed or may implied for the provisions of the said Act to apply. In the agreement dated January 18, 2016 the responsibility of the respondent no. 4 to comply with the provision of The Payment of Gratuity Act and not the petitioner company.

21. In the impugned order the respondent no. 1 recorded that the respondent no.3 had submitted following documents in regard to his demand:

- a. Termination letter dt.14.07.2017 issued by the respondent no.2 (respondent no. 4 in the present proceeding)*
- b.*
- c.*
- d.*
- e. Identity Card issued by the respondent no.2 (Respondent no.4 herein).*

- 22.** By an e-mail dated February 6, 2023 the petitioner company has highlighted about all the facts as well as the judgment passed by this Court that the pay liability to pay gratuity cannot be fall upon the principal employer as the liability to pay gratuity is only that of the immediate employer but the respondent no. 1 has not considered the facts and the law.
- 23.** The Coordinate Bench of this Court in the case of **Sailen Seth (Supra)** held that *“Even assuming that the real employer is the Steel Authority of India Limited and further assuming that the petitioner is a mere intermediary it cannot be held that in this case the liability to pay gratuity is that of the Steel Authority of India Limited and not the petitioner.”*
- 24.** In the present case also the as per the agreement entered between the petitioner and the respondent no. 4, the respondent no. 4 had engaged the respondent no. 3 but the respondent no.1 has not taken into consideration.
- 25.** In view of the above, this Court finds that the manner in which the Controlling Authority has decided the claim petition of the respondent no. 3 is not correct. Therefore, the Controlling Authority is required to be decided the claim of the respondent no. 3 a fresh. The order impugned passed by the Controlling Authority is set aside and remanded the matter back to the Controlling Authority for consideration a fresh to decide all the legal and factual issues after giving an opportunity of hearing to all parties. The Controlling authority is requested to decide the issues within in a period of ten

weeks from the date of deposit of the amount calculated by the controlling authority by the petitioner.

- 26.** The petitioner is directed to deposit the amount with the Controlling Authority within 10 days from the date of the order and in the event of deposit as aforesaid is made, the Controlling Authority shall invest the same in any interest bearing fixed deposit account in any nationalized bank.

- 27. WPA No. 1199 of 2023** is this **disposed of**.

Parties shall be entitled to act on the basis of a server copy of the Judgment placed on the official website of the Court.

Urgent Xerox certified photocopies of this Judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

(Krishna Rao, J.)