

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.1718 OF 2023

Ahmednagar Education Society's Ashokbhau
Firodia English Medium School and Junior
College, Vishrambaug, Ahmednagar.

...Petitioner
[Ori. Opponent]

Versus

Nandkishore Ambadas Bhavsar
64 years, Occ. Service,
R/o 201, 'C' Wing, Amrutvel Aptt,
Borude Mala, Balikashram Road,
Ahmednagar.

...Respondent
[Ori. Applicant]

Mr. V.N. Upadhye h/f. Mr. Dippak Changade, Advocate for the
petitioner.
Mr. P.V. Barde, Advocate for the respondent.

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[CORAM : NITIN B. SURYAWANSHI, J.]

DATE : 16th MARCH, 2023

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith. Heard with the
consent of the parties.

2. The petitioner is aggrieved by the judgment of the
Controlling Authority and Labour Court, Ahmednagar, in
Application PGA No. 93/2018 dated 21.10.2021 and judgment of
learned Member, Industrial Court, Ahmednagar, in Appeal PGA
No. 1/2022, dated 29.03.2022.

3. The petitioner is the education society running school in the name of Ashokbhau Firodia English Medium School and Junior College, Vishrambaug, Ahmednagar. The respondent was appointed in the said school as Principal on 27.11.1996. He joined the said post on 06.01.1997. He was superannuated on 30.06.2016. The petitioner assessed amount of gratuity of respondent in terms of Government Resolution dated 30.10.2009 at Rs. 3,05,330/-. Since said amount was not acceptable, respondent served notice dated 01.09.2016 on the petitioner and claimed amount of Rs. 8,12,158/- towards gratuity.

4. On failure of the petitioner to pay the said amount, respondent filed application under section 7 of the Payment of Gratuity Act, 1972, bearing Application PGA No. 93/2018, thereby claiming gratuity of Rs. 8,34,415/- along with interest at the rate of 10% per annum till realization. The petitioner resisted the said application by filing written say and claimed that respondent is entitled for Rs. 3,05,330/-. After the evidence was led and parties were heard, the Controlling Authority and learned Judge of First Labour Court, Ahmednagar, partly allowed the application and directed the petitioner to pay gratuity of Rs. 7,92,683.654/- to the respondent with interest of 7.1% per

annum from 30.06.2016 till its actual realization.

5. Being aggrieved, the petitioner filed Appeal PGA No. 1/2022 before the learned Member, Industrial Court, Ahmednagar. Said appeal came to be dismissed. Hence, the present petition.

6. Heard the learned advocate for the petitioner and learned advocate for the respondent. Perused the grounds raised in the petition, annexures thereto, impugned order and the citations relied on by both the sides.

7. The petitioner has contended that the respondent is covered by Government Resolution dated 30.10.2009 and he is not entitled for gratuity in terms of Payment of Gratuity Act, 1972. According to the petitioner calculations arrived at by the Trial Court and confirmed by the Appellate Court are wrong and respondent is not entitled for the said amount, but, he is only entitled for the calculation given by the petitioner i.e. Rs.3,05,330/-. In support of this submission learned advocate for the petitioner relied upon the calculations given by the petitioner in the appeal memo. He also relied on the decision of the Supreme Court in **Beed District Central Co-operative Bank**

Ltd., vs. State of Maharashtra and Others, (2006) 8 SCC 514.

According to him, both the Courts have erred in awarding exorbitant amount of gratuity and the calculations of the Trial Court are wrong.

8. Per contra, learned advocate for the respondent supported both the impugned decisions, by placing reliance on *Birla Institute of Technology vs. State of Jharkhand & Others*, AIR 2019 SC 1309.

9. The length of service rendered by the respondent is not disputed. It is also a matter of record that the petitioner's school wherein the respondent was working is unaided. After considering the evidence led by the petitioner and last drawn pay certificate produced on record by the respondent the Trial Court has recorded a finding that the basic pay of the respondent is shown as Rs. 32,140/- and dearness allowance is shown as Rs. 38,247/-. Considering the evidence of the opponent's witness Mr. Kailas Deshmukh, the Trial Court has observed that last drawn salary was paid along with dearness allowance which is calculated at the rate of 119%, which was infact 125%. Therefore, the Trial Court has calculated the dearness allowance for the last drawn salary at Rs. 40,175/-. Adding the same, the

last drawn salary of the respondent, is held to be Rs. 72,315/-.

The Trial Court therefore has calculated the gratuity as follows:-

$$72,315 \text{ (last drawn wages)} \times 15 \text{ (days)} = 41,720.1923 \times 19 \text{ (years of service)} \times 26 \text{ (monthly working days)}$$

$$\text{Total amount of gratuity} = 7,92,683.654/-$$

10. Though, the petitioner has contended that the Government Resolution dated 30.10.2009 is applicable to the case of the respondent, it has failed to substantiate the said contention. The evidence on record indicates that the last drawn salary of respondent was Rs. 72315/- and the Trial Court has rightly calculated the amount of gratuity payable to the respondent at Rs. 7,92,683.654/-.

11. The Appellate Court by considering the rulings cited before it has held that the government resolution is not applicable to the case of the respondent as the school where the respondent was working was un-aided private school and the said government resolution dated 30.10.2009 is applicable only to the employees of State Government and not applicable to the employees of un-aided school.

12. In Beed District Central Co-operative Bank Ltd.

(supra), the question before the Apex Court was whether keeping in view the provisions contended in sub section 5 of section 4 of 1972 Act, the respondents therein although would be entitled to the benefit of ceiling limit of 3.5 lakhs, the rate of gratuity should be calculated at the rate of 26 days' instead and in place of 15 days salary for every completed year of service in terms of the 1972 Act. While answering the question, blue pencil doctrine was taken into consideration and ultimately it is held that '*Sub-Section (5) of Section 4 of the 1972 Act does not contemplate that the workman would be at liberty to opt for better terms of the contract, while keeping the option open in respect of a part of the statute. While-reserving his right to opt for the beneficent provisions of the statute or the agreement, he has to opt for either of them and not the best of the terms of the statute as well as those of the contract. He cannot have both. If such an interpretation is given, the spirit of the Act shall be lost.*'

This ratio is distinguishable on facts.

13. Birla Institute of Technology (supra) is on the point of definition of employee as defined under section 2(e) which was amended w.e.f. 03.04.1997 retrospectively by which amendment benefit of said Act was already extended to the teachers from

03.04.1997. This ruling is also not necessary for decision of the present case.

14. It is a matter of record that the respondent was working in unaided school. Government resolution dated 30.10.2009 is applicable to the employees of State Government and same is not applicable to the employees of unaided school. The petitioner has failed to substantiate its contention that said government resolution is applicable to the case of respondent.

15. The competent authority has rightly calculated the gratuity amount of the respondent as per section 4(2) of Payment of Gratuity Act, 1972. The competent authority as well as the Appellate Court have passed well reasoned orders and have recorded concurrent finding of fact which are not liable to be interfered with in the extra ordinary writ jurisdiction. There is no illegality or perversity in the orders impugned in the present petition. The writ petition being devoid of merit is dismissed.

Rule is discharged.

[NITIN B. SURYAWANSHI, J.]