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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 4443 OF 2022**

PRAKASH DATTATRAYA CHOUGULE,
Age: 69 years, Occ: Registrar, R/at: Post
Gargoti, Taluka Bhudargad, District Kolhapur.

...Petitioner

~ VERSUS ~

- 1. THE STATE OF MAHARASHTRA,**
Through the Secretary,
Higher and Technical Education and
Employment Department, Mantralaya,
Mumbai 400 032.
- 2. THE DIRECTOR OF TECHNICAL
EDUCATION,**
3, Mahapalika Marg,
Mumbai 400001.
- 3. THE JOINT DIRECTOR,**
Technical Education, (Pune Region)
412, E Shivajinagar,
Pune 411 016.
- 4. SHRI MOUNI VIDYAPEETH,
GARGOTI,**
Through its Director, Gargoti,
Tal. Bhudargad, District Kolhapur.
- 5. INSTITUTE OF CIVIL AND RURAL
ENGG GARGOTI,**

Through its Principal,
Gargoti, Tal Bhudargad,
District Kolhapur.

...Respondents

APPEARANCES

FOR THE PETITIONER **Mr Vivek Punjabi.**

FOR RESPONDENT-STATE **Ms PN Diwan, AGP.**

FOR RESPONDENTS NOS. 4 & 5. **Mr Prashant Bhavke.**

**CORAM : G.S.Patel &
Neela Gokhale, JJ.**

DATED : 1st March 2023

ORAL JUDGMENT (Per GS Patel J):-

1. **Rule.** There are Affidavits in Reply. Rule is made returnable forthwith and the Petition is taken up for hearing and final disposal.

2. Prayer clauses (b) and (c) of the Petition at page 16 read thus:

“(b) that by issuing a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, the Respondent Nos. 1 to 3 hereinabove be directed to take appropriate coercive steps against the Respondent Nos. 4 and 5 hereinabove for not following the order dated 23.10.2019;

(c) by issuing writ, order or direction the Respondent Nos. 4 and 5 hereinabove be directed to forthwith pay an

amount of gratuity with 15% interest to the Petitioner.”

3. The 4th Respondent is the Trust which runs the 5th Respondent-Institute. Respondents Nos. 1, 2 and 3 are State authorities.

4. On 4th February 1975, the Petitioner was appointed as a junior clerk by the 5th Respondent-Institute. He worked with the 4th Respondent-Trust in the 5th Respondent-Institute occupying different posts at different times, until he finally retired from service on 31st May 2009, when he most latterly held the post of the Registrar of the 5th Respondent-Institute.

5. The 5th Respondent is a government-aided polytechnic entirely controlled by the 4th Respondent-Trust. The Trust has other educational institutions from Montessori to higher technical colleges. It also has a state-level training centres and so on.

6. By a Government Resolution (“GR”) dated 28th February 1985, the State Government, referencing the Maharashtra Civil Services (Pension) Rules, 1982 introduced a pension scheme for retiring employees i.e., those retiring from 1st October 1982. These employees were given an option to be exercised before 31st March 1986; but once exercised, that option could not be changed. One option was for an employee to select a Contributory Provident Fund (“CPF”) scheme. The Petitioner submitted a form on 9th December 1985 exercising this option. It is true that the Writ

Petitioner challenged this GR in Writ Petition No. 3796 of 2011. That challenge failed. So did a Special Leave Petition.

7. After these legal challenges failed, the Petitioner submitted an application on 20th March 2015, seeking a disbursement of his gratuity with interest at 15% per annum since 31st March 2009.

8. The 5th Respondent-Institute forwarded this to the 2nd Respondent, the Director of Technical Education on 1st April 2015. There was no dispute about the entitlement to gratuity. The question was who should make that payment. The Joint Director of Technical Education, Pune Region, processed the Petitioner's application and sent it on to the Director of Technical Education. The 5th Respondent-Institute sent a reminder on 30th June 1975 regarding the gratuity payment. Then the Petitioner learnt, in response to an RTI query, that since the Petitioner had opted for the CPF, it was the 4th Respondent-Trust or the 5th Respondent-Institute that would have to make the payment of the Petitioner's gratuity. The Joint Director of Technical Education by his communication dated 30th October 2015 told the Institute that the Petitioner was not a participant of the General Provident Fund ("GPF"). Being a member of the CPF, his contribution was being deposited at the institution level. Since the CPF amount was deposited in the joint account of the institute and the employee, the payment of gratuity had to be processed by the 5th Respondent through the 4th Respondent and was not the liability of the State Government, Respondents Nos. 1 to 3.

9. The 5th Respondent by communication of 6th February 2016 to the Petitioner said that it had no liability to pay this gratuity. The reason given was that it was the Director of Technical Education wgi had passed orders, including of appointment. The option form had been submitted to the Government. According to the 5th Respondent, therefore, it was the Government that bore the sole responsibility for the payment of gratuity. A copy of this communication of 6th February 2016 is at Exhibit “G” to the Petition.

10. This brought the Petitioner to Court again. He filed another Writ Petition No 12976 of 2017 in this Court in February 2020, challenging the communication by the 3rd Respondent of 30th October 2015 and the 5th Respondent’s communication of 6th February 2016.

11. On that Petition, on 29th July 2019, the court made an order disposing of the Petition. The Court noted that it was desirable that the Petitioner, an employee of the Respondent, a private institution should approach the controlling authority under the Payment of Gratuity Act, 1972 (“**Gratuity Act**”) for redressal. If the Petitioner did so within eight weeks, the controlling authority was to extend an opportunity of hearing to all concerned, and render a decision as expeditiously as possible, preferably within three months. Accordingly, the Petition was disposed of.

12. This order has not been challenged by the Respondent. This is important because this order returns a finding that the Petitioner

is an employee of the 4th Respondent. We note this in view of the submission that is sought to be advanced before us by Mr Bhavake, which is directly to the contrary. There are other reasons to reject those submissions by Mr Bhavake. but this is perhaps the foremost amongst them.

13. On 28th August 2019, the Petitioner got a communication from Respondents Nos. 4 and 5 that the Petitioner had been paid all salaries and other dues that were funded by the State Government. That communication said that the Institute had no other source of income and therefore, for his gratuity, the Petitioner should approach the State Government. It seems that thereafter, hearings took place and at Exhibit “K” we find a copy of the communication dated 23rd October 2019. This is addressed to Respondents Nos. 4 and 5. It contains a direction under the Payment of Gratuity Act to Respondents Nos. 4 and 5 to make payment of gratuity demanded by the Petitioner.

14. This communication Exhibit “K” has not been challenged by Respondents Nos. 4 and 5 at all. The present Writ Petition seeks an order for its enforcement.

15. The stand of the State Government represented by Ms Diwan is clear. She submits that under Section 2(f) of the Gratuity Act, it is the 4th Respondent which is the employer of the Petitioner. Specifically, she draws attention to Section 2(f)(iii) which reads thus:

“2(f) “Employer” means, in relation to any establishment, factory, mine, oilfield, plantation, port, railway company or shop: -

(i)

(ii)

(iii) in any other case, the person, who, or the authority which, has the ultimate control over the affairs of the establishment, factory, mine, oilfield, plantation, port, railway company or shop, and where the said affairs are entrusted to any other person, whether called a manager, or managing director or by any other name, such person.”

16. Mrs Diwan also invites attention to Section 4 of the Gratuity Act, which provides for payment of gratuity. It read thus:

“4. Payment of Gratuity.—

(1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,—

(a) on his superannuation, or

(b) on his retirement or resignation,

(c) on his death or disablement due to accident or disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement:

Provided further that in case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is minor, the share of such minor shall be deposited with the Controlling

Authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.

(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned:

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account:

Provided further that in the case of an employee who is employed in a seasonal establishment, and who is not so employed throughout the year, the employer shall pay the gratuity at the rate of seven days' wages for each season.

(3) The amount of gratuity payable to an employee shall not exceed Ten lakh rupees.

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced.

(5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer.

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

(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.”

17. There is no exemption granted under Section 5. Section 7 deals with the question of determination of the amount of gratuity:

“7. Determination of the amount of Gratuity:- (1) A person who is eligible for payment of gratuity under this Act or any person authorised, in writing, to act on his behalf shall send a written application to the employer, within such time and in such form, as may be prescribed, for payment of such gratuity.

(2) As soon as gratuity becomes payable, the employer shall, whether an application referred to in sub-section (i) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.

(3) The employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable

to the person to whom the gratuity is payable.

(3-A) If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3) the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify:

Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the Controlling Authority for the delayed payment on this ground.

(4)

(a) If there is any dispute as to the amount of gratuity payable to an employee under this Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the employer shall deposit with the Controlling Authority such amount as he admits to being payable by him as gratuity.

(b) Where there is a dispute with regard to any matter or matters specified in Clause (a), the employer or employee or any other person raising the dispute may make an application to the Controlling Authority for deciding the dispute.

(c) The Controlling Authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and, if, as a result of such inquiry any amount is found to be payable to the

employee, the Controlling Authority shall direct the employer to pay such amount or, as the case may be, such amount as reduced by the amount already deposited by the employer.

(d) The Controlling Authority shall pay the amount deposited, including the excess amount, if any, deposited by the employer, to the person entitled thereto.

(e) As soon as may be after a deposit is made under Clause (a), the Controlling Authority shall pay the amount of the deposit—

(i) to the applicant where he is the employee; or

(ii) where the applicant is the employee, to the nominee or, as the case may be, the guardian of such nominee or heir of the employee if the Controlling Authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity.

(5) For the purpose of conducting an inquiry under Sub-Section (4), the controlling authority shall have the same powers as are vested in a Court, while trying a suit, under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters namely:—

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses.

(6) Any inquiry under this Section shall be a judicial proceeding within the meaning of Sections 193 and 228, and for the purpose of Section 196, of the Indian Penal Code, 1860 (45 of 1860).

(7) Any person aggrieved by an order under sub-section (4), may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf:

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days.

Provided further that no appeal by an employer shall be admitted unless, at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under subsection (4), or deposits with the appellate authority such amount.

(8) The appropriate Government or the appellate authority, as the case may be, may, after giving the parties to the appeal a reasonable opportunity of being heard, confirm, modify or reverse the decision of the controlling authority.”

18. Section 8 speaks of recovery of gratuity and reads thus:

“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 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:

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.”

19. Ms Diwan’s submission is, therefore, that the Petitioner is correct in demanding the gratuity from the 4th Respondent, his employer. That gratuity has been in fact determined. There is an order that can be treated as equivalent to an order under Section 8. That is the order at Exhibit “K”.

20. All that the 4th Respondent Institute has done is to deny liability to the Petitioner, its own employee. It has not challenged the order at Exhibit “K”. It has filed no proceedings of its own. It simply refuses to pay.

21. It is her submission that this approach cannot be accepted and should not be permitted by the Court because nothing is shown to indicate how in law the Petitioner becomes an employee of the State Government. The mere fact that the 5th Respondent is an aided institution, or even a fully aided institution does not make the Petitioner an employee of the State Government. The Petitioner

was not appointed by the State Government. His appointment may have been approved as required in law but the appointment and the terms of the appointment were issued by Respondents Nos. 4 and 5. It cannot logically be said that the Petitioner has rendered service to the State Government. He has in fact served the 5th Respondent Institute as an employee of the 4th Respondent. It would be straining the boundaries of law, she submits, and we think quite correctly, if every funded or aided institute or trust was to suddenly say that all their employees were employees of the State Government.

22. We believe Ms Diwan is correct. She does not go quite as far as to make the next logical submission, which is that if this approach is to be adopted, then the State Government's simplest solution is to withhold all funding immediately. We agree with her that it is inconceivable that as the Respondent in the Petitioner's Writ Petition, Respondents Nos. 4 and 5 can seek substantive reliefs against Respondents Nos. 1 to 3.

23. The Affidavits in Reply by Respondents Nos. 4 and 5 makes for curious reading. At the heart of this Affidavit is a submission which runs like this: The Petitioner may have been appointed by Respondents Nos. 4 and 5. But since his appointment was subject to approval by Respondents Nos. 1 to 3 and since his salaries and benefits were paid from aid accorded by the State Government, then irrespective of whatever the Gratuity Act says, the Petitioner (and presumably all others like him), are and must be deemed to be, and

must be deemed always to have been, direct employees of the State Government.

24. This submission has only to be stated to be rejected. It is contrary to the plain language of the Gratuity Act. It is inconceivable that an aided institute can ever raise such a ground. The consequences of this submission are in fact far more serious than can possibly be described in a few sentences. No institute will be able to go through an appointment procedure whether by advertisement, selection, promotion or otherwise. It is the Government and the Government alone that will effectively take over the running of every aided institution whether it is a Montessori or a Polytechnic. Then this will render redundant the establishing of educational institutions by Trusts. If trusts cannot set up those institutes then the trust might as well not exist.

25. These are only some of the immediately apparent perils of accepting such a submission by Respondents Nos. 4 and 5. We do not see how the Petitioner can be made to run from pillar to post like this by Respondents Nos. 4 and 5. That he has rendered service to Respondents Nos. 4 and 5 is not disputed by anybody. That he exercised an option under a government scheme is also not disputed. The Petitioner has turned to his employer (as defined in the Gratuity Act) for payment of his legitimate dues under that Act. The State Government itself has, in exercise of powers under that Act, directed the payment of the Petitioner's gratuity claim by Respondents Nos. 4 and 5 — and, at the cost of repetition, Respondents Nos. 4 and 5 have never challenged this.

26. It is impossible to accept the opposition of Respondents Nos. 4 and 5. Ms Diwan is correct in saying that there is no question of the Government being liable. Mr Vivek Punjabi for the Petitioner completely supports the stand taken by the State Government. It actually does not matter to him where the gratuity comes from, but he maintains the position that he was an employee of the 4th Respondent. How the 4th Respondent received aid or funding is not his concern. In fact, he puts it slightly differently. The role of relationship of employer and employee cannot change because there is external funding. Hypothetically, had the 5th Respondent-Institute being entirely unaided, then there would have been no question of the State Government being his “employer”. In that scenario, the relationship of employer and employee would have been between the 4th Respondent and the Petitioner alone. That relationship does not change, nor is it differently coloured only because the State Government as a matter of policy to encourage education provides financial assistance to specifying educational institutes or to trusts running those institutes. Mr Punjabi is correct also in saying that the 5th Respondent is not run by the State Government at all but is in fact run and managed by the 4th Respondent. Lastly, he concurs that his Petition cannot be defeated by Respondents Nos. 4 and 5 today saying on Affidavit or across the Bar that the 23rd October 2019 order at Exhibit “K” is not binding or is contrary to law or is otherwise unlawful. Nobody has ever questioned it.

27. We believe that Mr Punjabi and Ms Diwan are both correct. We accept the submissions of the Petitioner and also the State Government, and it is at this stage, that Mr Bhavke makes now a more interesting submission which is to suggest that no Writ will

issue to Respondents Nos. 4 and 5 because they are not instrumentalities of the State within the meaning of Article 12 of the Constitution of India. But there is yet another danger in making such an argument. A person who does is, as Shakespeare would say, “hoist by his own petard”. On the one hand, the institute says that its employees are those of the Government and therefore it serves a public function. On the other hand, it says it is entirely private. If it is entirely private and it is not an instrumentality of the State then the liability for gratuity is entirely that of the 4th Respondent. Whichever way one looks at it, the 4th Respondent is wrong. In any case, this question about enforcement of fundamental rights in some cases even against private parties is now settled by the majority decision of a 5-Judge bench of the Supreme Court in *Kaushal Kishore v State of Uttar Pradesh and Ors.*¹ The Trust can hardly be heard to take not just contradictory but mutually destructive stands.

28. What the Petitioner seeks now to enforce is an order of 23rd October 2019. This is the last string to Mr Bhavke’s bow. For he now says that nearly four years after the event, the Petitioner must now get a certificate issued to the Collector and the Collector must then proceed to recover it ‘as arrears of land revenue’. We must question whether Mr Bhavke’s clients seriously want ‘recovery as arrears of land revenue’ which could inter alia be attachment and sale of their immovable property. Perhaps they have also missed the provision in Section 8 for compound interest. This will go back to the date of the Petitioner’s claim of gratuity as on the date of his retirement which was in 2009. If interest is compounded from 2009

1 2023 SCC OnLine SC 6.

to 2023, the 4th Respondent's liability to pay interest alone will be more than double the amount of the gratuity.

29. On this realisation, and on this being pointed out, Mr Bhavke say that he has instructions not to press the point. So noted.

30. In view of this, Rule is made absolute in terms of prayer clauses (b) and (c), except that so far as prayer clause (c) is concerned, interest must indeed run, but it will run, in view of the facts and circumstances of the case, only at 9% per annum simple interest and not at a higher rate as prayed by the Petitioner

31. The Petition is disposed of with a final clarification that if the amount is not paid within four weeks from today, this order itself will be executable as an order of this Court.

(Neela Gokhale, J)

(G. S. Patel, J)