

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5645 OF 2022

Noor Mohammed Abdul Rehman Mulla
Aged 74 years, Occupation : Retired
R/o. 5/3, Palm Spring, Almeda Park,
Bandra (West) Mumbai 400 050.

...Petitioner

Versus

1. BCJ Hospital an Asha Parekh Research Center
S. V. Road, Corner of Tilak Road,
Santacruz (W), Mumbai 400 54.

2. C. E. O.
BCJ Hospital an Asha Parekh Research Center
S. V. Road, Corner of Tilak Road,
Santacruz (W), Mumbai 400 54.

...Respondents.

Mr. A. S. Peerzada, i/b. Iqbal Shaikh for the Petitioner.

Mr. S. C. Naidu, a/w. Mr. Manoj Gujar a/w. Mr. T. R. Yadav a/w. Mr. Abhishek Ingale a/w. Mr. Pradeep Kumar i/b. C. R. Naidu & Co. for Respondents.

CORAM : SANDEEP V. MARNE, J.

RESERVED ON : 24 AUGUST 2023.

PRONOUNCED ON : 01 SEPTEMBER 2023.

JUDGMENT:

1. **Rule.**

2. Rule is made returnable forthwith. With the consent of parties, petition is taken up for final hearing.

3. By this petition, Petitioner challenges judgment and order dated 26 March 2021 passed by the Industrial Court, Mumbai in Appeal No.55 of 2019. The appeal was filed by Respondents under the provisions of Section 7(vii) of the Payments of Gratuity Act 1972 challenging the judgment and order dated 26 July 2019 passed by the Controlling Authority & Labour Court, Mumbai (**Controlling Authority**), by which Petitioner was held to be entitled to receive gratuity of Rs.2,69,165/- alongwith interest at the rate of 10%. By judgment and order dated 26 March 2021 impugned in the present petition, the Industrial Court has proceeded to allow the appeal of Respondents and has set aside Controlling Authority's order dated 26 July 2019. Aggrieved by the judgment and order dated 26 March 2021 of the Industrial Court Petitioner has filed the present petition.

4. Briefly stated, facts of the case are that Petitioner was an employee of Bombay Mercantile Co-operative Bank and held the post of Regional Manager. Respondent No. 1 is the hospital run by the Santacruz Residents' Association. Considering Petitioner's expertise in valuation and procurement of machines, Respondents decided to utilize

his services. Petitioner claims to have joined services of Respondent hospital with effect from 26 November 2007 as Director and Administrator and worked with them for 9 years and 02 months until his retirement on 01 February 2017. Since he was not paid gratuity by the Respondent hospital, Petitioner filed application dated 01 August 2017 before the Controlling Authority under the Payment of Gratuity Act claiming gratuity. The Respondent hospital filed its written statement on 08 November 2017. Petitioner and Respondents led their respective evidence. The Controlling Authority passed judgment and order dated 26 July 2019 partly allowing the Petitioner's application held him entitled to receive gratuity amount of Rs.2,59,165/- with interest at the rate of 10% per annum with effect from 02 February 2017 till the date of payment.

5. Respondents challenged the order of the Controlling Authority dated 26 July 2019 by filing appeal (PGA) No.55 of 2019 before the Industrial Court. By its judgment and order dated 26 March 2021, the Industrial Court has reversed the decision of the Controlling Authority while allowing Respondents' appeal and has set aside the same. Petitioner has accordingly filed present petition challenging judgment and order dated 26 March 2021 passed by the Industrial Court.

6. Appearing for Petitioner, Mr. Peerzada the learned counsel would submit that Petitioner was engaged as an employee of the Respondent hospital. That he was given designation as Director-

Administrator. He was also allotted a cabin in the Respondent hospital and that he was reporting to the trustees. That he was assigned clerical work during the course of his service with the hospital. He would also submit that the Controlling Authority considered the evidence on record and arrived at a finding that Petitioner was an employee of the Respondent and rejected their theory of Petitioner's engagement as professional consultant. He was paid salary of Rs.50,000/- per month at the time of association of his employment as professional or consultant. That the Industrial Court erred in reversing the order of the Controlling authority. Mere filing of return in a particular Form or reflection of amounts received under various headings could not be a reason for the purpose of coming to the conclusion that Petitioner's engagement with the Respondent-Hospital was of professional basis. That payment of fixed salary every month, accord of designation and provision of cabin, Petitioner had proved beyond any iota of doubt that Petitioner was an employee of Respondent-Hospital. He would submit that Trial Court has erroneously reversed the order of the Controlling Authority and would therefore pray for setting aside the order passed by the Industrial Court.

7. *Per contra* Mr. Naidu the learned counsel appearing for Respondents would oppose the petition and support the order passed by the Industrial Court. He would submit that Petitioner was engaged only for the purpose of advising the management for purchase of various machinery considering his expertise in procurement of machinery. That Petitioner was never appointed on any post by the Respondent-Hospital

and no appointment order or retirement order was issued. That the income tax returns filed by Petitioner would indicate that he was receiving additional income through his consultancy profession. That designation was accorded to Petitioner only for the purpose of communication with the supplier of machinery. That a fixed amount was being paid to Petitioner every month as a consultancy services and not as salary. That Petitioner filed his returns in Form 16A, which shows receipt of professional income. That he did not file returns in Form 16 which would indicate that he was not a salaried employee. That Petitioner gave several admissions in his cross examination which would clearly indicate that he was engaged by the Respondent-Hospital merely on professional and consultancy basis and not in capacity as an employee. He would refer to definitions of 'employee' and 'wages' under the Payment of Gratuity Act in support of his contention that neither Petitioner comes within the definition of employee nor the amount paid to him as consultancy charges fall within the term 'wages'.

8. Mr. Naidu would further submit that the Industrial Court has considered entire documents and evidence on record and has recorded a finding of fact that Petitioner was employed on professional basis. That this Court, in exercise of power of judicial review, cannot interfere with the said finding in absence of any manifest error being demonstrated by Petitioner. In support of his contention he would rely upon judgment of *Union of India Vs. M/s. Mustafa & Najibai Trading Co.*, AIR 1998 SC 2526.

9. I have given my anxious consideration to rival submissions canvassed by the learned counsel and have considered pleadings, evidence and documents on record. The short issue that arises for determination before the Controlling Authority and the Industrial Court and which again arises for my consideration is whether Petitioner can be termed as an ‘employee’ within the meaning of Section 2(e) of the Payment of Gratuity Act. The term is defined under Section 2(e) of the Act is under:

“[2(e) ‘employee’ means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity;]”

10. As per the definition, the terms of employment can be either be express or implied. Admittedly, no appointment order was issued by Respondent-Hospital appointing Petitioner. Therefore the Petitioner is drawing an inference that he is an employee. It was also necessary for Petitioner to demonstrate that he was employed for wages. The term ‘wages’ is defined under Section 2(s) of the Act as under:

“2(s) ‘wages’ means all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are

payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any bonus, commission, house rent allowance, overtime wages and any other allowance.”

11. It is Respondent’s case that Petitioner was being paid fixed sum every month towards consultancy charges whereas the Petitioner terms the same as salary.

12. It is common ground that though no appointment order was issued in favour of Petitioner he was designated as Director-Administration in the Respondent-Hospital. He was also allotted cabin in the office of the Hospital. He was reporting to Trustees and was receiving a fixed sum every month. These facts are admitted by Respondent in the written statement. Therefore in ordinary course of things, the combined effect of these factors may imply that Petitioner was an employee. However, there are other factors, which are also required to be taken into consideration for determining the issue.

13. Respondents have taken a defence that petitioner was engaged as a professional or a consultant and not as an employee. They have relied upon income tax returns filed by him. There is no dispute to the position that the income tax returns have been filed in Form 16A and that the said Form is meant for professionals. It is Respondent’s contention that if Petitioner was an employee, income tax returns ought to have been filed in Form 16. The Petitioner on the other hand has

contended that choice of the ITR Form by Petitioner would not be conclusive factor to decide nature of his engagement. Mr Peerzada has gone to the extent of contending that Petitioner erroneously filed returns in Form 16A. I therefore momentarily ignore the type of Form, in which returns were filed by Petitioner for the purpose of deciding nature of his engagement with Respondents. In income tax returns for the year 2007-08, Petitioner has shown income from business / profession through 'M/s. Grand International Corp – CONSULTANCY - Consultancy Services' under the heading 'net profit as per profit loss account' of Rs.2,68,072. The said firm is Petitioner's consultancy firm. In every subsequent years, Petitioner has filed income tax returns showing receipt of professional income. At the time of termination of his association with Respondents, Petitioner was drawing an amount of Rs.50,000/- per month from the Respondent-Hospital. However the amount shown as professional fees receipts in his income tax returns exceed the said amount paid by the Respondent-Hospital during relevant years. This would show that Petitioner was engaged in providing consultancy services to other establishments. To make things worse, there is specific admission on the part of Petitioner in his cross examination that 'my another income source in that period was agricultural as well as my consultancy services'. Thus there is a specific admission on the part of Petitioner that his services were not restricted to Respondent-Hospital alone and that he was providing consultancy service to other

establishments as well. This would rebut the presumption sought to be raised by Petitioner that he was an employee of Respondent-Hospital.

14. It also appears that Petitioner admitted during the course of his cross examination that he never signed any muster register or wage register. He also admitted that other employees of the hospital were receiving Form 16 from the hospital but he never received the same. These admissions would further contribute to the conclusion that Petitioner was engaged merely as a consultant by the Respondent-Hospital and his engagement was not in the capacity as an employee.

15. The Industrial Court has appreciated the material placed on record and has recorded following findings-

“21. I have given thoughtful consideration to the arguments advanced by both the Ld. Counsels. I have also gone through the oral and documentary evidence placed on record by both the parties before the Ld. Controlling Authority and which have also been referred by me in the above paras. No doubt, the Applicant was associated with the Opponents, but it appears that he has been paid amount towards professional charges. He was designated as Director Administrative since 26.11.2007 and he gave the service till 01.02.2017. It is pertinent to note that right from the day-one of his association with the Opponents, the Opponents were deducting TDS from the payments made to the Applicant and Form Nos. 16-A were also issued to the Applicant by the Opponents. Further the income-tax returns filed on record also support the contention of the Opponents that the Applicant was not drawing wages, but he was paid certain amount towards his professional charges. Further I am also guided by the ratio laid down by the Hon'ble Apex Court in Muir Mill's case (cited supra), wherein it is laid down that professional cannot be termed as a "workman" under any law and as such even the Payment of

Gratuity Act would not be an exception to the same and hence the Applicant would not be entitled for gratuity.

22. Considering the facts and circumstances of the case and the evidence adduced on record, I find that the Ld. Controlling Authority has not considered all these aspects in proper sense. There is inconsistency in the finding drawn by the Ld. Controlling Authority vis-a-vis the evidence on record. Hence, I am of the opinion that interference is required, as prayed by the Opponents. I find that the impugned judgment is not legal and proper and that the same is perverse. Hence, I answer Point No.1 in the Negative.”

16. The scope of judicial review by this Court over findings recorded by the Industrial Court would be in a narrow compass. In this regard reliance by Mr. Naidu on the judgment in **Mustafa & Najibai Trading Co.** (supra) is apposite in which the Apex Court held in para 21 as under-

“21. While exercising its jurisdiction under Articles 226 and 227 of the Constitution it is not open to the High Court to re-appreciate the evidence produced before the subordinate 8). tribunal and on the basis of such re-appreciation of the evidence to arrive at a finding different from that recorded by such tribunal. The finding of fact recorded by the subordinate tribunal can be interfered with by the High Court only if it is found to be based on no evidence or if such a finding can be regarded as perverse. The High ble Court cannot convert itself into a court of appeal. ext Reference, in this context, may be made to the decision of this Court in Collector of Customs, the Madras vs. D. Bhoomull, (1974). 2 SCC 544: dly (AIR 1974 SC 859), wherein it has been said.”

17. Thus, this Court is not expected to reappreciate the evidence while determining correctness of finding recorded by the Industrial Court in exercise of jurisdiction under Article 227 of the Constitution of India. I do not find any perversity in the findings recorded by the Industrial Court.

18. After considering the entire conspectus of the case, I have no hesitation in holding that judgment and order passed by the Industrial Court is unexceptionable. Writ Petition, being devoid of merits, is dismissed with no order as to costs.

19. Rule is discharged.

SANDEEP V. MARNE, J.

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