

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

WRIT PETITION NO. 7360 OF 2019

Motel Sunny __ Vs. __ Naresh Shankarrao Mhaiskar thr L.Rs. And others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Mr. M.R.Puranik, Advocate for petitioner

Mr. D.S.Lambat, Advocate for L.Rs. Of respondent no. 1.

CORAM : AVINASH G. GHAROTE, J.

DATE : 15/06/2023

1] Heard Mr. Puranik, learned counsel for the petitioner and Mr. Lambat, learned counsel for the respondent.

2] The petition questions the judgment dated 26.3.2018 passed by the Controlling Authority under Section 7 of the Payment of Gratuity Act [for short "The PG Act"] whereby the claim made by the respondents for gratuity has been granted (pg. 69). The appeal there against by the present petitioner under Section 7(7) of the PG Act, has been dismissed by the judgment dated 19.10.2019 (pg. 111).

3] Mr. Puranik, learned counsel for the petitioner submits that there is a jurisdictional lacunae inasmuch as there is no material on record to indicate that the petitioner at any point of time had ever employed more than 10 persons, which is the basic

requirement for attracting the provisions of the PG Act. It is also contended by him that merely because the petitioner establishment had sought registration under the Employees' Provident Fund Act (in short the EPF Act), that by itself would not lead to a presumption that there were more than 10 persons employed by the petitioner-establishment, in view of the provisions of Section 1(4) of the EPF Act. It is further contended that though material has been brought on record to indicate that the establishment by name Hotel Ashok had more than 20 employees, that was a separate establishment altogether inasmuch as it was the proprietary concern (pg.51) of the petitioner, whereas Motel Sunny was the partnership firm (pg. 49) and the mixing of both the establishments for the purpose of applying the PG Act did not arise at all. He therefore submits that the impugned judgments cannot be sustained and needs to be quashed and set aside.

4] Mr. Lambat, learned counsel for the respondents justifies the impugned judgments and contends that the very registration of Motel Sunny under the EPF Act would indicate the satisfaction of the requirement for the applicability of the PG Act of there being 10 or more employees. He further submits that though the petitioner was given a notice to produce documents, the same were not produced on account of a plea that due to passage of time the same had been lost.

He further submits that the cross examination of the respondent and the evidence of PW-1 would support the contention that the petitioner establishment had more than 10 employees.

5] Learned AGP appearing for respondent nos.2 & 3 supports the impugned judgments.

6] For the PG Act to be applicable, in view of the language of Section 1(3) of the PG Act, it is necessary for there to be 10 employees employed by the establishment in the preceding calendar year. In view of the language of Section (1) 3A, the Act would be applicable notwithstanding that the number of persons employed at any time after the Act became applicable, falls below 10. It is therefore apparent that to invoke the jurisdiction of the Controlling Authority under the PG Act, a jurisdictional fact of 10 employees having been employed by the establishment at any point of time has to be established on record. A perusal of the complaint (pg.23) would indicate that no such statement has been made, neither does such a statement find place in the affidavit evidence of the respondent. So also no document has been placed on record except the one with Exh.16 (pg.43) in support of the plea that the jurisdictional fact has been satisfied. A perusal of the document at Exh. 16 (pg.43) would indicate that the said document relates to registration of the petitioner

establishment with the Employees' Provident Fund Organization. It however indicates that there are only 8 number of persons shown to have been employed therein. The said document also does not indicate for which duration the said information is there. Presuming the document to be correct, that however, does not satisfy the requirement of Section 1(3) of the PG Act for the reason that Section 1(4) of the EPF Act permits the EPF Act to be applicable even if the number of employees are below the statutory requirement as contained therein, if there is an agreement to that effect.

7] It is therefore apparent that the basic jurisdictional fact that there were minimum 10 numbers of employees employed by the petitioner establishment at any point of time has neither been pleaded nor established, which would indicate that the jurisdiction of the Controlling Authority could not have been invoked.

8] Merely because in pursuance to the notice administered by the respondent to the petitioner, the documents were not produced on account of they being claimed to have been lost, by itself cannot give a presumption of the applicability of the Act, more so when the documents were of the duration 1988 to 2012, the complaint having been filed in 2016. In fact it was open for the respondent-complainant to have procured those documents from the EPF Office or to have examined

someone from the EPF Office to establish the plea raised regarding applicability of the PG Act. That, however, has not been done. The oral evidence of PW-2 is in fact in contradiction to the plea raised by the respondent himself, inasmuch as in his cross examination, he says that the respondent was working in Motel Sunny with him for two years only after which he was working in Hotel Ashoka. It is also cannot be in dispute that both these establishments viz. Motel Sunny and Hotel Ashoka are separate establishments and therefore, there is no question of the employees of Hotel Ashoka being considered for the purpose of determining the applicability of the PG Act to Motel Sunny.

9] Perusal of both the judgments impugned indicates that this basic requirement of existence of establishment of the jurisdictional fact regarding the applicability of the PG Act has not been considered at all and the Courts below have merely gone upon the presumption that the Act was applicable.

10] In my considered opinion for the Controlling Authority to invoke its jurisdiction, there has to be a pleading satisfying the requirement in that regard, contained in the complaint itself, with sufficient details, the existence of which, then would give jurisdiction to the Controlling Authority to exercise its powers under the PG Act.

11] It is therefore apparent that in absence of the pleadings and establishment of the necessary jurisdictional facts as indicated above, it was not permissible for the Controlling Authority to have exercised the jurisdiction, in view of which the impugned judgments cannot be sustained. They are accordingly quashed and set aside and the complaint filed by the respondent is dismissed.

12] The amount deposited before the appellate Authority is permitted to be withdrawn by the petitioner with accrued interest, if any.

13] Petition is allowed in above terms. No costs.

JUDGE

Rvjalit