

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

WRIT PETITION NO.581 OF 2018

(PRAMOD TARACHANDJI MUNOT...VS.. LATE SMT. KUMUDINI VISHWANATH KULKARNI THR.
LR.SANDIP RAMESH KULKARNI)

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

Court's or Judge's orders

Shri N.R.Saboo, Advocate for Petitioner.
None for the Respondent.

CORAM : ANIL S. KILOR, J.
DATED : APRIL 03, 2023.

1. Heard learned counsel for the petitioner.
None for the respondent, though served long back.

2. In the present writ petition the order dated 03/11/2017 passed by appellate Authority under the Payment of Gratuity Act, 1972 (hereinafter referred to as “the Act of 1972”) upholding the order dated 01/04/2016 passed by the Controlling Authority directing the petitioner to pay the amount of gratuity on the basis of the last pay receivable by the respondent under the Minimum Wages Act, 1948 (hereinafter referred to as “the Act of 1948”), is under challenge.

3. The petitioner is a Charitable Trust and is running Maternity Home at Amravati. The respondent was appointed on 01/08/1959 and she was continued in service till June 2010. Thereafter, she moved an application on 30/04/2011 under Section 7 of the Act of

1972 claiming the gratuity. In the application under Section 7 of the Act of 1972 the last pay drawn was shown at Rs.850/- per month.

4. The Controlling Authority allowed the said application and directed the petitioner to pay gratuity calculated on the last pay receivable by the respondent i.e. Rs.4,602/- as per the Act of 1972.

5. Feeling aggrieved by the said order dated 01/04/2016, an appeal was preferred by the petitioner before the Appellate Authority, which came to be dismissed vide impugned order dated 03/11/2017. The said order is subject matter of the present writ petition.

6. Shri Saboo, learned counsel for the petitioner has submitted that the entire amount was deposited before the appellate Court, as directed by the Controlling Authority and out of the said amount, this Court allowed the respondent to withdraw the amount payable as per the last pay drawn by the respondent i.e. Rs.850/- per month.

7. The learned counsel for the petitioner submits that the learned Controlling Authority, while determining the amount of gratuity, has not considered the actual last pay drawn by the respondent but the Controlling Authority has calculated the last pay receivable by the respondent as per the provisions of the Minimum Wages

Act and on the basis of the same the amount of gratuity was determined. It is submitted that the Controlling Authority exceeded its jurisdiction by calculating the wages of the respondent under the Act of 1972.

8. It is further submitted that the Controlling Authority has relied upon the judgment of this Court as well as judgment of the Madras High Court. It is pointed out that in the judgment of Coordinate Bench of this Court the benefits were granted in view of the settlement between the employer and the employee.

9. So far as the judgment of Madras High Court is concerned, it is pointed out that in the subsequent judgment in the case of *Management MM 350 Vaijam ..vs.. Appellate Tribunal*, reported in **2014 III CLR 947**, the Madras High Court has taken another view. He, therefore, submits that the impugned order is illegal, bad in law and is liable to be quashed and set aside.

10. In the light of the submissions made by the learned counsel for the petitioner, I have perused the record and the impugned order.

11. Admittedly, the Controlling Authority, while determining the amount of gratuity, has not considered the last pay drawn by the respondent i.e. Rs.850/- per month, but considered the pay receivable by the

respondent under the provisions of the Act of 1948. The Controlling Authority went to the extent of determining the wages receivable by the respondent under the Act of 1948 and arrived at a figure of Rs.4,602/- as an amount receivable by the respondent per month as wages under the Act of 1948 and on the basis of the said amount, the amount of gratuity was determined.

12. The learned Controlling Authority while doing so, has relied upon the judgment of the Coordinate Bench of this Court in the case of *Transport Manager, Kolhapur Municipal Transport Undertaking..vs.. Pravin Bhabhutlal Shah and others*, reported in **2004(5) Bom. C.R. 10** and the judgment of the Madras High Court in the case of *Sampath A.M. ..vs.. Bank of Baroda*, reported in **2009-III-LLJ-555 (Mad)**.

13. The judgment of the Coordinate Bench of this Court in the case of *Transport Manager, Kolhapur* (supra) is distinguishable on facts, as it is based on the settlement, whereby it was agreed by the employer to pay gratuity at the rate of 21 days wages per year service but, while determining the gratuity, it was calculated on the basis of the 15 days wages per year service. Therefore, this Court in view of the settlement, granted gratuity at the rate of 21 days wages per year service. Thus, it is evident that the said judgment is not applicable to the present case.

14. As far as the judgment of the Madras High Court in the case of *Sampath A.M.* (supra), is concerned, subsequent to the same, in the another judgment the Court took a different view. In the subsequent judgment in the case of *Management, MM-350 Vaiyam* (supra) the Madras High Court has held thus :

“11. In my considered opinion, the authority under the Payment of Gratuity Act, 1972 is not competent to decide the correctness of the wages. Reducing of wages and benefits, which may amount to unfair labour practices, against which the remedy of the third respondent is before the Labour Court. As far as the competent Authority is concerned, he has to go only by the last drawn salary. Admittedly, his last drawn wages is Rs.6,198/-. Therefore, the gratuity should be calculated only on that basis. If that is done, the amount of gratuity shall be calculated as $\text{Rs.6,198} \times 15 \times \frac{33}{26} = \text{Rs.1,18,000/-}$. Therefore, the amount of gratuity should be modified to Rs.1,18,000/-.”

15. Whereas, in the first judgment, it is held that the term ‘wages’, which is defined under the Act of 1972, must include not only what is paid, but also what is payable to a workman.

16. Admittedly, no grievance was raised by the respondent at any time, agitating her right to receive the wages as per the provisions of the Act of 1948. In such matters the remedy is different and certainly not the Controlling Authority under the Act of 1948. Under the

provisions of the Minimum Wages Act, 1948, there is no provision permitting the Controlling Authority to calculate and determine the wages receivable by a workman under the provisions of the said Act.

17. In the above referred backdrop, it is necessary to refer to the provisions of Section 4(2) of the Act of 1972, which read thus:

“4. Payment of gratuity .-

(1) ...

(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.

Explanation .-In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.”

18. From the language of the provision it does not suggest that the words used 'at the rate of 15 days wages per year service, based on the rate of wages last drawn by the employee concerned', means the wages receivable by a workman under the provisions of the Act of 1948.

19. From the impugned order, it is apparent that both the authorities have not considered all the above referred aspects and by exceeding its jurisdiction calculated the minimum wages as per the provisions of the Act of 1948 and determined the amount of gratuity.

20. In that view of the matter, I am of the opinion that the matter needs to be remanded back to the Controlling Authority to decide the application under Section 7 of the Act of 1972 afresh, after hearing both the parties.

21. As the respondent has already received the amount of gratuity, based on the last pay drawn by the respondent @ Rs.850/- per month, no prejudice will be caused to the respondent, if the matter is remanded back for deciding afresh.

22. In the circumstances, I pass the following order:

- i) The Writ Petition is partly allowed.

- ii) The matter is remanded back. The learned Controlling Authority shall decide afresh the application filed by respondent under Section 7 of the Payment of Gratuity Act, 1972, as expeditiously possible and in any case within six months from today.

The writ petition is **disposed of** accordingly.
No order as to costs.

JUDGE

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