

30.01.2024

Amitava Nag
Sl. No. 17
Ct. No. 02

**In the Calcutta High Court
Circuit Bench at Jalpaiguri
Appellate Side**

WPA 2942 of 2023

Divisional Manager,
Food Corporation of India

-Versus-

The Assistant Labour Commissioner, Central & ors

Mr. Jagriti Mishra

Mr. Suman Saha

Ms. Ananya Bhattacharya

Ms. Mrinmayee Das

Ms. Kanika Sarkar

... for the petitioner

Mr. P. K. Roy

Mr. Debjit Kundu

... for respondent nos. 4 & 5

It is submitted that 5th respondent is an employee of the 4th respondent who is the contractor of the petitioner. According to the 5th respondent, he was appointed on 07.04.2012 and on 25.02.2022, he was terminated. The 5th respondent filed an application in Form-N under the Payment of Gratuity Act, 1972 claiming payment of gratuity on the ground that he was an employee of the 4th respondent, the contractor of the petitioner who supply security guards to the petitioner. The 4th respondent supplied the 5th respondent as security guard to the petitioner. The 5th respondent claimed gratuity stating that he worked for more than 9 years and 10 months and his last drawn salary was Rs. 18,824/-.

On receipt of the application in Form-N, the 1st respondent, the controlling authority issued Form-

O under the Payment of Gratuity Act, 1972 to the petitioner and respondent nos. 4 and 5 calling upon them to appear on 17.06.2022 and on that date only the petitioner and the 5th respondent appeared and the 4th respondent did not appear before the 1st respondent, the controlling authority. After certain adjournments, on 15.11.2022, all the parties appeared before the 1st respondent.

The 1st respondent after considering the materials placed before him, held that the petitioner is the principal employer and the 4th respondent is the contractor under the Contract Labour (Regulation and Abolition) Act, 1970. The 1st respondent also held that the 5th respondent is entitled to get gratuity as he worked for more than 5 years. The 1st respondent held that the 4th respondent is liable to pay gratuity and recover the same from the petitioner. If the 4th respondent fails to pay the gratuity to the 5th respondent, the petitioner being the principal employer is liable to pay the gratuity amount. Due to delay in payment of gratuity, the 1st respondent also directed to pay 10% interest to the 5th respondent.

Challenging the said order, the writ petitioner has come out with this present petition.

Mr. Jagriti Mishra, learned counsel appearing for the petitioner submits that though finding is against the petitioner, there is no direction issued to

the petitioner to pay the gratuity amount and hence he is incapacitated to file any appeal before the appellate authority under the Payment of Gratuity Act, 1972 and prayed for setting aside the finding of the 1st respondent.

Mr. P. K. Roy, learned counsel for the respondent nos. 4 & 5 submits that the 1st respondent, the controlling authority held that the 1st respondent is the contractor and the 2nd respondent is the principal employer and directed the 1st respondent to pay gratuity and recover the same from the petitioner. The 1st respondent also directed the petitioner to pay the amount in case of failure on the part of the 4th respondent to pay the gratuity to the 5th respondent. The petitioner has alternative remedy of appeal against the order of the 1st respondent and without availing the said remedy of appeal, the petitioner has approached this Court by way of this writ petition which is not maintainable. He also submits that the 4th respondent has already filed appeal against the order of the 1st respondent and the same is pending for consideration.

Heard the learned counsel for the respective parties and perused the entire materials on record.

The contention of Mr. Mishra that there is no direction against the petitioner and hence he cannot file appeal is not correct. The 1st respondent in the

order dated 23.11.2022 at page 53 of the paperbook of the writ petition held as follows:

“Now, it can safely concluded that the Respondent No. 1 is legally bound to pay gratuity to the Applicant, on his termination of employment on the ground of superannuation. The onus of payment of gratuity in respect of Applicant lies upon Respondent No. 1 first and in case of non-payment by him, the Respondent No. 2 is supposed to make the same. The Respondent No. 1 is a mere commission agent to supply manpower in the establishment of Respondent No. 2 and get reimbursed all the wages and other statutory payments like PF and bonus etc. made to the Applicant by the Respondent No. 2. As such, the denial of Respondent No. 2 as Principal Employer to pay gratuity under the Payment of Gratuity Act, 1972 to the Applicant on the ground that there was no direct master-servant relationship between them, is not justified and fair.

In view of the above discussion and findings, I am in the opinion that the Applicant is entitled to gratuity for his entire service period of Ten (10) years to be paid by Respondent No. 1 and get reimburse from Respondent No. 2 like way other statutory payments like bonus and PF etc. However, in case of failure by the Respondent No. 1, the Respondent No. 2 shall liable to pay the due gratuity to the Applicant.

In so far as third issue is concerned as framed above, as per Section 7(3) of the Payment of Gratuity Act, 1972, 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. As per Section 7(3A), if the amount of gratuity is not paid within 30 days, the employer is liable to pay interest from the date on which 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 per the Central

Government Notification No. S.O. 874(E) dated 01.10.1987, the rate of interest is 10% per annum. As such the Applicant is entitled to get interest @ 10% per annum for the period of delay in payment of gratuity i.e. from 01.04.2022 upto the date on which the gratuity is actually paid.”

In view of the said finding and order, the contention of the learned counsel for the petitioner that the petitioner is incapacitated to file any appeal, cannot be accepted.

From the reasons given herein above and considering the application filed by the 5th respondent under the Payment of Gratuity Act, the 1st respondent, the controlling authority by order dated 23.11.2022 is directed payment of gratuity to 5th respondent together with interest at 10% interest per annum amounting to Rs. 1,14,935/-. Under Section 7(7) of Payment of Gratuity Act, the said order is an appealable one and the petitioner has come out with the present petition without exhausting alternative and effective appellate remedy. In view of statutory provisions of appeal, the writ petition is not maintainable.

For the above reasons, the instant writ petition stands **dismissed** as not maintainable, however, without any order as to costs.

(V.M. Velumani, J.)

