

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 12202 OF 2023**

Mercedes-Benz India Pvt. Ltd.

And Ors.

....Petitioner

V/s.

Noshir Nani Desai

....Respondent

ALONGWITH**WRIT PETITION NO. 12201 OF 2023**

Noshir Nani Desai

....Petitioner

V/s.

Mercedes-Benz India Pvt. Ltd.

And Ors.

....Respondents

Mr. D.J. Bhanage for the Petitioner in WP-12202 of 2023 and for Respondent in WP-12201 of 2023.

Mr. A.S. Rao, for Respondent in WP-12202 of 2023 and for Petitioner in WP-12201 of 2023.

CORAM : SANDEEP V. MARNE, J.

Dated : 15 January 2024.

ORAL JUDGMENT:

1. These are cross petitions filed by the Employer-Mercedes Benz India Pvt. Ltd and by its ex-employee, Mr. Noshir Nani Desai challenging the Judgment and Order dated 4 October 2021 passed by the 'Appellate Authority Under Payment of Gratuity Act, 1972 and Member, Industrial Court at Pune (**Appellate Authority**) by which the Appellate Authority has partly allowed the Appeal filed by the employer and has set aside the order

passed by the Controlling Authority on 17 December 2018 with further direction that the application filed by the employee shall stand remanded to the Controlling Authority for determination of the exact amount of gratuity payable to the him as per the provisions of the Payment of Gratuity Act, 1972 (**Gratuity Act**).

2. It appears that the Mr. Noshir Nani Desai (**Mr. Desai**) was in service of Mercedes Benz India Pvt. Ltd (**Mercedes-Benz**) during the period 1996 to 2004. Mercedes Benz decided to post him on foreign assignment with its group company Daimler AG in Germany (**Host Company**). Accordingly, an Agreement of Assignment of Contract of Appointment was executed between Mercedes Benz and Mr. Desai, by which his services were placed with the Host Company. Mr. Desai continued to work in terms of the said agreement upto to 25 June 2012 when he came to be relieved by the Host Company, consequent to the resignation tendered by him on 5 April 2012.

3. The dispute is about payment of gratuity in respect of the services rendered by the employee during 1996 to 2012. Mr. Desai filed an application before the Controlling Authority under the Gratuity Act. The Controlling Authority proceeded to allow the application and directed that gratuity demanded by him of Rs. 16,51,652/- be paid. Mercedes Benz filed appeal before the Appellate Authority, which has remanded the proceedings before the Controlling Authority for determination of exact amount of gratuity payable to Mr. Desai by recordings certain findings that there is continuity between two spells of services, that cap of Rs. 10 Lakh under Gratuity Act would apply, etc. Mercedes-Benz has challenged the Order of the Appellate authority to the extent of treating two spells of services as continuous and making it liable to pay further amount towards gratuity

over and above Rs.5,59,292 already paid by it. On the other hand, Mr. Desai is aggrieved by the Appellate Authority's Order as it seeks to set aside the Controlling Authority's Order.

4. I have heard Mr. Bhanage, the learned counsel appearing for Mercedes Benz and Mr. Rao, the learned counsel appearing for Mr. Desai.

5. The first objection of the Mercedes Benz is about severity of Mr. Desai's relationship with Mercedes Benz upon assignment of his service with Daimler AG w.e.f. 1 March 2004. The Controlling Authority has proceeded to treat the entire services rendered from 1996 to 2012 as continuous service for the purpose of determining the entitlement of Mr. Desai for gratuity. Though, Mr. Bhanage has attempted to urge before me that the two Companies are different and therefore there is no continuity in service, I am not inclined to accept the said argument on the basis of plain reading of the Agreement which is titled as 'Supplementary Agreement for an International Assignment (Transfer Long Term)'. The Agreement undoubtedly shows that Mercedes Benz continued to remain "Home Company" whereas Daimler AG was merely 'Host Company'. The Agreement clearly provided that the then existing Supplementary Agreement executed with Mercedes Benz was to operate even during currency of the long term transfer/assignment with the Host Company. Thus, there can be no doubt to the position that Mercedes Benz continued to be the parent employer even during assignment/long term transfer to Daimler AG. Furthermore use of the words 'assignment' and 'long term transfer' in the title of the agreement clearly suggests that the services of Mr. Desai were merely transferred with the Host Company.

6. Mr. Bhanage has relied upon Clause-5.6 of the Agreement dealing with termination and reintegration. According to Mr. Bhanage, at the end of the assignment with the Host Company, reintegration into Mercedes Benz was not automatic and the Agreement provides that merely efforts would be made for reintegration into Mercedes-Benz. In my view, Clause-5.6 cannot be read in isolation. In Clause-1 of the Agreement, there is a specific stipulation that “the provisions of the existing employment contract with the Home Company shall continue to apply unless this Supplementary Agreement provides otherwise”. Thus, there is a specific Clause in the Agreement under which Mr. Desai’s employment contract with Mercedes-Benz continued to operate even during his assignment/long term transfer with the Host Company.

7. It is also to be borne in mind that the ultimate management between both the companies is same, which possibly is the reason why Mr. Desai was ‘transferred’ to the host company. It is not a fresh recruitment with the host company. Mr. Desai never resigned from services of Mercedes Benz. In this regard, a useful reference can be made to the recent judgment delivered by me in *Terna Polytechnic Vs. Ravi Badrappa Randale*, Writ Petition No. 11864 of 2019 decided on 12 January 2024, in which this Court held as under:

18) I accordingly proceed to examine whether there is connectivity in the two spells of services in Terna Polytechnic and Terna Engineering College. Section 2-A of the Gratuity Act defines the expression “continuous service” as under:

“2-A. Continuous Service.—For the purposes of this Act,—
(1) An employee shall be said to be in continuous service for a period if he has, for that period, been in uninterrupted service, including service which may be interrupted on account of sickness, accident, leave, absence from duty without leave (not being absence

in respect of which an order treating the absence as break in service has been passed in accordance with the standing orders, rules or regulations governing the employees of the establishment), lay-off, strike or a lock-out or cessation of work not due to any fault of the employee, whether such uninterrupted or interrupted service was rendered before or after the commencement of this Act;

(2) where an employee (not being an employee employed in a seasonal establishment) is not in continuous service within the meaning of clause (1), for any period of one year or six months, he shall be deemed to be in continuous service under the employer—

(a) for the said period of one year, if the employee during the period of twelve calendar months preceding the date with reference to which calculation is to be made, has actually worked under the employer for not less than—

(i) one hundred and ninety days, in the case of any employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and
(ii) two hundred and forty days, in any other case;

(b) for the said period of six months, if the employee during the period of six calendar months preceding the date with reference to which the calculation is to be made, has actually worked under the employer for not less than—

(i) ninety-five days, in the case of an employee employed below the ground in a mine or in an establishment which works for less than six days in a week; and
(ii) one hundred and twenty days, in any other case;

[Explanation.—For the purposes of clause (2), the number of days on which an employee has actually worked under an employer shall include the days on which—

(i) he has been laid-off under an agreement or as permitted by standing orders made under the Industrial Employment (Standing Orders) Act, 1946 (20 of 1946), or under the Industrial Disputes Act, 1947 (14 of 1947), or under any other law applicable to the establishment;

(ii) he has been on leave with full wages, earned in the previous year;

(iii) he has been absent due to temporary disablement caused by accident arising out of and in the course of his employment; and

(iv) in the case of a female, she has been on maternity leave; so, however, that the total period of such maternity leave does not exceed twelve weeks.

(3) where an employee, employed in a seasonal establishment, is not in continuous service within the meaning of clause (1), for any

period of one year or six months, he shall be deemed to be in continuous service under the employer for such period if he has actually worked for not less than seventy- five per cent. of the number of days on which the establishment was in operation during such period.

19) In the present case, Petitioner has shifted from the services of Terna Polytechnic to Terna Engineering College on 1 July 2004. Till 30 June 2004, he was in service in Terna Polytechnic. There is no break in service between the two spells. Though Petitioners are at pains to demonstrate before this Court that the two Educational Institutions are distinct legal entities, it is the case of Respondent that he was 'transferred' from Terna Polytechnic to Terna Engineering College by the management. There is no dispute to the position that the same management operates both institutions. The Appellate Authority, while deciding previous rounds of Appeals by Order dated 13 January 2017, has gone into the issue of continuity between two services. It has placed reliance on the relieving letter referring to the Order of Terna Public Charitable Trust dated 5 June 2004. On the basis of said relieving letter, the Appellate Authority had drawn an inference that there was the 'transfer' of services of Respondent from Terna Polytechnic to Terna Engineering College. No serious challenge made to the said observations of the Appellate Authority. To prove that the services rendered in the two colleges are distinct, it was incumbent for Petitioners to prove that Respondent made an application to Terna Engineering College for appointment, either in pursuance of an advertisement or otherwise. That he was subjected to selection process or atleast interviewed and then offered an appointment. The appointment order, if any, issued by Terna Engineering College is not placed on record. It is therefore difficult to hold that Respondent was freshly 'recruited' in Terna Engineering College. From the contents of the relieving letter as well as absence of any gap between the two spells of services, in my view, no serious error can be found in the Appellate Authority's conclusion that services of the Respondent were actually 'transferred' from Terna Polytechnic to Terna Engineering College. I am therefore of the view that there is continuity of service between the two spells.

8. Thus mere transfer between two establishments owned by same management does not result in break in service and the services in the two spells remain continuous within the meaning of Section 2A of the Gratuity Act. Therefore, I do not find any serious error in the order of the Controlling Authority in treating the entire service from 1996 to 2012 to be

continuous, which has remained undisturbed by the Appellate Authority's Order.

9. The next aspect is about the correctness of amount of gratuity which is payable to Mr. Desai. He demanded amount of Rs.16,51,652/- towards gratuity by taking into consideration not only the entire period of service from 1996 to 2012 but his annual 'base salary' payable at Daimler AG of Rs. 28,74,231/-. On the contrary, it is the contention of Mercedes Benz that 'basic salary' drawn by him would form basis for determining the gratuity payable to him. It is the contention of Mercedes Benz that an amount of Rs.5,59,292/- has already been paid to him towards gratuity, which is actually more than his entitlement.

10. On the other hand, in Writ Petition No. 12201 of 2021 filed by the Mr. Desai, he is aggrieved by capping of Rs.10,00,000/- by the Appellate Authority while determining the entitlement of employee towards gratuity. According to Mr. Rao, there is email correspondence between the parties which clearly provided for payment of higher amount of gratuity and according to him, the same would constitute an exception within the meaning of Section 4(5) of the Gratuity Act. Sub-Section 5 of Section 4 reads thus:

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

11. It is therefore necessary to examine whether there is any agreement between the parties for payment of higher amount of gratuity than the one provided under the Gratuity Act. I have gone through the

email communications dated 24 October 2012 and 31 October 2012 which reads thus :

“Payment of Gratuity- Even the gratuity was considered as part of retirals which were added in the post salary.... However, we have taken the reasonable approach and decided to pay gratuity on basis of your current salary as of 2012 **which is over and above the amount legally payable to you**”.

(emphasis added.)

12. Perusal of the above email communication does not indicate, in any manner, that there is any agreement or settlement for payment of higher amount of gratuity than the one payable under the provisions of the Gratuity Act. Mr. Rao would rely upon the judgment of this Court in ***Transport Manager, Kolhapur Municipal Transport Undertaking, Kolhapur***¹. In that case, there was a settlement providing for payment of gratuity at the rate of 21 days wages per year which is better as compared to 15 days' wages per year as per Gratuity Act. It is in the light of such settlement that this Court held that the Respondent therein was entitled to better terms of gratuity under Section 4(5) of the Gratuity Act. The judgment would have no application to the present case, where there is no settlement or agreement for payment of higher/better gratuity than the one provided for in the Act. I therefore do not find any serious flaw in the view taken by the Appellate Authority in holding that the email-communication cannot be termed as contract admitting better terms under Section 4(5) of the Gratuity Act.

13. In paras-25 and 26 of its Judgment and Order, the Appellate Authority has held as under :

¹ Transport Manager, Kolhapur Municipal Transport Undertaking, Kolhapur Vs. Pravin Bhabhutlal Shah and others. 2005 I CLR 998

25. Now, coming to the objection that whether the Id Authority has computed gratuity as per the provisions of the It is incumbent upon the Controlling Authority under the Payment of Gratuity Act to have a computation of gratuity amount keeping in mind term "wages" defined in section 2 (s) of the Act. The applicant has calculated his gratuity as per notice in form on the basis of his last drawn wages of 2012. The Id. Controlling Authority has not taken into consideration difference between "base salary" on the basis of which the applicant has calculated his gratuity amount and "basic salary" which is required to be calculated as per provisions of the Act. The Ld. Controlling Authority even has not computed the actual amount of gratuity as per provisions of the Act which was essential while determining exact amount of gratuity.

26. Therefore, it becomes clear that the Ld Authority has granted relief as prayed by the without considering the provisions of the Act. As such, in my opinion, the impugned order to the extent of direction to pay gratuity amount as prayed by the applicant in his original application, requires to be set aside with direction to the Id. Controlling Authority to decide the said aspect of computation of gratuity on the basis of provisions of Section 4 more particularly Section 4 (2) with Explanation. **The Ld. Controlling Authority is also expected to calculate the amount of the gratuity in the light of definition of "wages" as contemplated under Section 2(s) of the Act. Needless to mention here that both the parties will be at liberty to lead evidence only to that extent, if they desire. The Ld. Labour Court is expected to decide the matter keeping in mind upper limit of amount of gratuity laid down under Section 4(3) of the Act.**

(emphasis added)

14. Thus, the complaint has been remanded for the purpose of computing the exact amount of gratuity payable to the employee by taking into consideration the basic salary drawn by him as per the provisions of the Gratuity Act. In my view, the gratuity is required to be determined as per the definition of the term 'wages' under Section 2(s) of the Gratuity Act. The same would mean emoluments earned by an employee including Dearness Allowance but excluding the other allowances. The Controlling Authority would accordingly determine the exact emoluments that were drawn by him at the time of cessation of his services within the meaning of

Section 2(s) of the Gratuity Act. The Appellate Authority has rightly held that the 'base salary' drawn by him with Daimler AG cannot be taken into consideration as 'wages' within the meaning of Section 2(s) of the Act. Both parties have been given an opportunity to lead evidence to prove the exact 'wages' drawn by Mr. Desai at the time of his resignation. The Controlling Authority would accordingly determine the 'wages' drawn by him for the purpose of drawl of gratuity.

15. In my view, the directions issued by the Appellate Authority in paras-25 and 26 of its order would enable the Controlling Authority to compute the exact amount payable to Mr. Desai towards gratuity under the Act. It appears that an amount of Rs.5,59,292/- has already been paid by the Mercedes Benz to him. I am sure that the Controlling Authority will take the said payment into consideration and that amount would actually act as a set-off towards amount of gratuity to which Mr. Desai would ultimately be found entitled under the Act.

16. No interference is therefore warranted in the order passed by the Appellate Authority. Both Writ Petitions are accordingly **disposed of**.

NEETA
SHAILESH
SAWANT

Digitally
signed by
NEETA
SHAILESH
SAWANT
Date:
2024.01.19
13:56:48
+0530

SANDEEP V. MARNE, J.