IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.10447 OF 2024

M/s. Oceaneering International GMBH ....Petitioner
V/S
Gitam Singh Solanki ....Respondent

Mr. Hasit Seth a/w Mr. Nikhil Shirsekar i/b Mr. Mustafa Motiwala *for the Petitioner.*
Mr. Niranjan Kandade a/w Mr. Mallika Pujari *for Respondent.*

CORAM: SANDEEP V. MARNE, J.
DATE : 29 AUGUST 2024.

P.C.:

1 By this Petition, Petitioner-employer has challenged the order dated 21 February 2023 passed by Controlling Authority under the Payment of Gratuity Act and Judge, Fifth Labour Court, Mumbai, by which the Petitioner-employer is directed to pay to the Respondent gratuity amount of Rs.3,71,471/- alongwith 10% interest from 31 December 2013 till the date of payment.

2 Ordinarily this Court would have been loath in entertaining a Petition challenging order passed by the Controlling Authority in the light of remedy of Appeal available under section 7 of the Payment of Gratuity Act, 1972. However in the present case it appears that the Application (PGA) No.650 of

2021 was decided by the Controlling Authority in absence of the Petitioner-employer and the Petitioner-employer was apparently unaware about passing of order dated 21 February 2023. There is no dispute to the position that by now the maximum permissible condonable period under the provisions of sub-section 7 of section 7 of the Payment of Gratuity Act, 1972 (**Act**) has expired. At the same time the Respondent-employee is also unable to enjoy the payment of gratuity. It is on account of these peculiar circumstances and by way of an exception, I am inclined to entertain these Petitions as the Petitioner-employer is not in a position to avail the remedy of Appeal at this juncture.

3 It appears that the Respondent's claim for gratuity before the Controlling Authority was based on clause 7 of the Appointment Order dated 17 March 2008 which reads thus:

> "7. **Gratuity:**
>
> Company has a gratuity scheme as follows:
>
> You will be entitled to one month extra pay as gratuity for every year of service in Oceaneering. This amount will be equivalent to sum of respective calendar year's offshore and onshore payment divided by twelve. The terms and conditions will be as follows:
>
> a. You will be entitled to gratuity if you remain in the service of Company for an uninterrupted period of 7 years from first date offshore.
>
> b. The gratuity will be paid as follows:
>
> . You can withdraw 25% of accumulated amount on completion of 7 years in service.
>
> . You can withdraw 25% of the balance amount on completion of 9 years in service.

. The balance amount can be withdrawn anytime after 10 years in service."

4 However, it is an admitted fact that Respondent-employee did not complete seven years of service with the Petitioner-employer. The agreement between the parties under clause 7 of the Appointment Order would constitute better terms of payment of gratuity under provisions of sub-section (5) of section 4 of the Act. However since the Respondent-employee admittedly did not complete seven years of service, he would not be entitled to payment of gratuity on the basis of agreement under section 4(5) of the Act. This however would not mean that the Respondent-employee would not be entitled to payment of any gratuity at all. His entitlement for gratuity would then be as per the formula provided under sub section (2) of section 4 of the Act, which is payment of gratuity at the rate of 15 days wages for every completed year of service.

5 There appears to be dispute amongst the Petitioner-employer and Respondent-employee about the last drawn wages for the purpose of computation of amount of gratuity under section 4(2) of the Act. The learned counsel for the Petitioner-employer invites my attention to the Form 26AS filed for Financial Year 2013-14 under which the last payment made to the Respondent-employee in January 2014 was Rs.40,000/-. On the contrary relying on the same document, the learned counsel for the Respondent-employee would submit that being employed in Shipping Industry, the Respondent's wages were not static and depended on various duties

performed by him from time to time. He would submit that in October 2013 the Respondent-employee was paid salary of Rs.1,90,000/-. The learned counsel for the Petitioner-employer would submit that what is paid as Rs.1,90,000/- are not the basic wages but includes various allowances which are irrelevant for the purpose of computation of gratuity under section 4(2) of the Act.

6 Admittedly there is nothing on record produced by the Respondent-employee to indicate that he was drawing wages in excess of Rs.40,000/- at the time of his termination/resignation. In absence of any specific document, except Form 26AS, the learned counsel for the Respondent-employee would seek to rely upon order passed by the Labour Court in Application (IDA) No.102 of 2015 in which the Respondent-employee was held entitled to notice pay of Rs.75,000/-. He would accordingly urge that since the Labour Court has upheld that the claim towards notice pay at Rs.75,000/-, the last drawn wages of the Respondent-employee may also be considered as Rs.75,000/- for the purpose of computing his gratuity under section 4(2) of the Act. I am unable to agree. The amount awarded by the Labour Court while treating the termination as unlawful for awarding notice pay cannot be treated as last drawn wages within the meaning of section 4(2) of the Act. Under definition of the term “wages” under section 2(s) of the Payment of Gratuity Act, the wages include only the emoluments paid and dearness allowance. The term excludes all other amounts towards bonus, commission, house rent allowance, over time wages and any other allowances. Therefore it was incumbent for the Respondent-employee to prove before the Controlling Authority that he drew

wages in excess of Rs.40,000/- within the meaning of section 2(s) of the Act. It appears that no dearness allowance was payable to the Respondent-employee in the present case and the last drawn wages appear to be Rs.40,000/-. In that view of the matter, Respondent's entitlement for gratuity will have to be computed on the basis of last drawn wages of Rs.40,000/-.

7 After computing Respondent's entitlement for gratuity by considering his last drawn wages at Rs.40,000/- by applying the formula under section 4(2) of the Act, the amount of gratuity comes to Rs.1,38,462/-. In my view, therefore, the Respondent-employee became entitled for payment of gratuity of Rs.1,38,462/- on 30 December 2013 when his services were terminated.

8 I accordingly proceed to pass the following order:

ORDER

i) Judgment and order dated 21 February 2023 passed by the Controlling Authority shall stand modified by holding that the Respondent-employee shall be entitled to gratuity amount of Rs.1,38,462/- alongwith 10% interest from 31 December 2013 till the date of payment;

ii) The above determined gratuity amount alongwith interest shall be paid by Petitioner-employer to the Respondent-employee within a period of four weeks from today.

9 With the above directions, the Writ Petition is partly allowed. There shall be no order as to costs.

10 In view of modification of the order passed by the Controlling Authority, coupled with further directions of this Court to pay the determined amount of gratuity alongwith interest within four weeks, the execution proceedings initiated by the Respondent-employee shall stand terminated.

(SANDEEP V. MARNE, J.)

SUDARSHAN RAJALINGAM KATKAM

Digitally signed by SUDARSHAN RAJALINGAM KATKAM
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