

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Shampa Dutt (Paul)

WPA 25774 of 2024

Hindustan Petroleum Corporation Limited

Vs.

**The Appellate Authority under the Payment of Gratuity Act, 1972 &
Ors.**

For the Petitioner : Mr. Ranjay De, Sr. Adv.,
Mr. Basabjit Banerjee,
Mr. A.A. Bose.

For the Respondent : Mr. Santanu Talukdar.
No. 3

Hearing concluded on : 20.02.2025

Judgment on : 12.03.2025

Shampa Dutt (Paul), J.:

1. The present writ application has been preferred against the order dated 15.8.2023 passed by the Controlling Authority under the Payment of Gratuity Act, 1972 and Assistant Labour Commissioner (Central), Kolkata and the order of the Appellate Authority dated 29.7.2024.

2. The controlling authority vide order dated 15.05.2023 held that the application for gratuity was premature as the workers were still in service and there exists no cessation/termination of employment.
3. As the order of the Controlling Authority has now merged with the appeal only the order of the appellate authority is under challenge.
4. **The specific finding of the Appellate Authority is as follows:-**

“.....With a view to make an appeal against an order of the Controlling Authority many citations have been given by the Appellant. The same have been read and applied in their true nature. However, no where it has been disputed that the Appellant has engaged the workers through contractor for getting work done in their premises. The Appellant M/s. HPCL is the beneficiary of the worker's hard labour and they are paying the workers the wages through various contractors who keep on changing from time to time. In cases where the manufacturer or trade mark holder himself employs labour, there is direct relationship of master and servant. The liability for Payment of Gratuity is thereby attracted for that reasons of the relationship. However, the fact cannot be overseen that irrespective of the fact that direct relationship of master and servant the exchange of activity between the Principal Employer and the contractual worker is buffered by a contractor, therefore, even if they are not the direct employees of the Principal Employer, they are governed by the doctrine of “For whom, By whom”. The workers are being made payment by M/s. HPCL through various contractors who keep on changing from time to time. The Principal Employer thereby remains a permanent factor as does the workmen.

In the instant case the Respondents workers are still employed in the establishment of Appellate under the contractor and there is no cessation of employment in absence of which the question of payment of gratuity does not arise. However, it may be noted that as and when the payment of Gratuity is due to a worker working in the premises of M/s. HPCL, under a

*contractor, the Principal Employer shall become liable to make the payment of Gratuity to the worker either directly or through the contractor at that point of time. The workers working for the organization **through various contractors have been doing so continuously with the Principal Employer remaining the same.** Therefore it is only logical and prudent that the responsibility to make the payment of Gratuity (Gratuity being a social legislation) rest upon the Principal Employer only.*

The Appellant is therefore, directed to understand the order of the Controlling Authority in principle with reference to the above order and act accordingly.

This is my order on this day of 29th July, 2024.

Sd/-

**Dy. Chief Labour Commissioner (Central)
Kolkata and Appellate Authority under
The Payment of Gratuity Act, 1972.....”**

5. The specific case of the petitioner is that in accordance with purchase procedure they awarded a contract to M/s. NIS Management Limited/Respondent No. 3 through Purchase Order No. 18000260-OP-11600 dated 7.2.2019 for housekeeping job, which was valid until 31.11.2020. It is explicit there from that the contractor is required to comply with all statutory provisions under various applicable laws, including the Payment of Gratuity Act, the Contract Labour (Regulation and Abolition) Act, 1970, the Minimum Wages Act, the Employees' Provident Fund and Miscellaneous Provision Act, the Employee's State Insurance Act, and the Payment of Bonus Act.
6. It is the further case of the petitioner that the private respondents being Respondent Nos. 4 to 18 herein were the employees employed by M/s. NIS Management Limited, the said Contractor being Respondent

No. 3. As per the said purchase order the Respondent Nos. 4 to 18 were paid by the said contractor. Secondly, they were appointed by the said contractor being an establishment and lastly, the Respondent Nos. 4 to 18 were under absolute supervision and control of the said Contractor.

- 7.** The petitioner further states that although the Private Respondent Nos. 4 to 18 were never an employee “employed for wages” by the petitioner company but all on a sudden the management of the petitioner was served with applications under the Payment of Gratuity Act, 1972 (FORM-N) of the Respondent Nos. 4 to 18, though at first, the Private Respondents filed FORM-I under the relevant statutory provision with their employer being Respondent No. 3.
- 8.** It is further stated that from the said FORM-N that the Private Respondents in the said FORM have described the contractor, the Respondent No. 3 to be their employer.
- 9.** The Controlling Authority in the present case under the Payment of Gratuity Act, 1972 being the Respondent No. 2 herein by an order dated 15.5.2023 held that the private respondents are the employees of the petitioner company for the purpose of the said Act of 1972.
- 10.** Being aggrieved with the said order the petitioner preferred an appeal wherein the learned Appellate Authority held as noted above.
- 11.** It is submitted that the impugned order is bad in law since the conclusion of the Respondent No. 2 pertaining to employer-employee

relationship is contrary to the law laid down by the Hon'ble Supreme Court in the case of ***(Bharat Heavy Electricals Ltd. Vs. Mahendra Prasad Jakhmola and Ors. Reported in 2019 LLR 515)***.

12. It is thus submitted that it is the responsibility of the contractor through whom the respondents are engaged to pay the gratuity and other benefits to which the respondents are entitled.

13. The Petitioner has relied upon the following judgments:-

- i. *Hindustan Steel Works Construction Limited vs Commissioner of Labour & Ors., (1996) 10 SCC 599, (Para 13).*
- ii. *FIS Payment Solutions and Services India Pvt. Ltd. vs The Assistant Labour Commissioner (Central)-II and Controlling Authority & Ors., 2024 LLR 21, (Para 16).*
- iii. *Kajal Bouri vs The Appellate Authority & Anr., 2024 LLR 400, (Para 9, 11).*
- iv. *Sailen Seth vs Deputy Labour Commissioner & Ors., 2010 SCC Online Cal 1763, (Para 6).*

14. The Respondent No. 3 has relied upon the following judgments:-

- i. *Hussainbhai, Calicut vs The Alath Factory Thezhilali Union, Kozhikode & Ors., (1978) 4 SCC 257, (Para 2).*
- ii. *Asha Sharma vs Chandigarh Administration & Ors, (2011) 10 SCC 86, (Para 12).*

- iii. *M.P. Power Management Company Limited, Jabalpur vs Sky Power Southeast Solar India Private Limited & Ors.*, (2023) 2 SCC 703 (Para 74, 82.3, 82.10).

15. The following is relevant from the judgments relied upon:-

- i. *Bharat Heavy Electricals Ltd. Vs. Mahendra Prasad Jakhmola and Ors.*, (2019) 13 SCC 82, the Supreme Court held:-**

“24. We may hasten to add that this view of the law has been reiterated in *Balwant Rai Saluja v. Air India Ltd.* [*Balwant Rai Saluja v. Air India Ltd.*, (2014) 9 SCC 407 : (2014) 2 SCC (L&S) 804] , as follows : (SCC pp. 437-38, para 65)

“65. Thus, it can be concluded that the relevant factors to be taken into consideration to establish an employer-employee relationship would include, *inter alia*:

- (i) who appoints the workers;
- (ii) who pays the salary/remuneration;
- (iii) who has the authority to dismiss;
- (iv) who can take disciplinary action;
- (v) whether there is continuity of service; and
- (vi) extent of control and supervision i.e. whether there exists complete control and supervision.

As regards extent of control and supervision, we have already taken note of the observations in *Bengal Nagpur Cotton Mills case* [*Bengal Nagpur Cotton Mills v. Bharat Lal*, (2011) 1 SCC 635 : (2011) 1 SCC (L&S) 16] , *International Airport Authority of India case* [*International Airport Authority of India v. International Air Cargo Workers' Union*, (2009) 13 SCC 374 : (2010) 1 SCC (L&S) 257] and *Nalco case* [*NALCO Ltd. v. Ananta Kishore Rout*, (2014) 6 SCC 756 : (2014) 2 SCC (L&S) 353] .”

ii. Hussainbhai, Calicut vs The Alath Factory Thezhilali

Union, Kozhikode & Ors., (1978) 4 SCC 257, the Supreme

Court held:-

“Held:

The facts found are that the work done by the workmen was an integral part of the industry concerned, that the raw material was supplied by the management, that the factory premises belonged to the management, that the equipment used also belonged to the management, and that the finished product was taken by the management for its own trade. The workmen were broadly under the control of the management and defective articles were directed to be rectified by the management. This concatenation of circumstances is conclusive that the workmen were the workmen of the petitioner.

(Para 2)

The true test is where a worker or group of workers labour to produce goods or services and these goods or services are for the business of another, that other is, in fact, the employer. He has economic control over the workers' subsistence, skill and continued employment. If he, for any reason, chokes off, the worker is virtually laid off. The presence of intermediate contractors with whom alone the workers have immediate or direct relationship ex contractu is of no consequence, when, on lifting the veil or looking at the conspectus of factors governing employment, the naked truth is discerned, and especially since it is one of the myriad devices resorted to by manage-ments to avoid the responsibility when labour legislation casts welfare obligations on the real employer based on Arts. 38, 32, 42, 43 and 43A. If livelihood of the workmen substantially depends on labour rendered to produce goods and services for the benefit and satisfaction of enterprise, the absence of direct relationship or the presence of dubious intermediaries cannot snap the real life-bond. If, however, there is total dissociation, in fact, between the disowning management and the aggrieved workmen, the employer is in substance and in real life-terms, by another.

(Paras 5 to 7)

Mangalore Ganesh Beedi Works v. Union of India, (1974) 4 SCC 43: 1974 SCC (L & S) 205, followed.”

16. In *Subramaniam S. Arjun & 15 Ors. vs Oil & Natural Gas Corporation Ltd. And.....*, decided on 23 August, 2023, the Bombay High Court held:-

“59. Having dealt with the rival submissions, this Court in exercise of plenary writ jurisdiction must look at the substance of the matter and where justice of the case lies. The petitioners rendered services as contract workmen to ONGC in excess of 15 years, on an average. **The petitioners services were so utilized through different contractors. The contractors changed but the principal employer remained constant.** ONGC had entered into a MoU to make a provision to extend the gratuity benefit to the contract-workmen. In this setting of the matter, if the submission on behalf of ONGC is to be accepted, the contractor through whom the services of the petitioner were being used on the date of the cessation of employment, would alone be the person liable to pay the gratuity for the entire service tenure and that would bring in the element of the liability of the last contractor to pay gratuity even in respect of the past service for which the contract employees were not employed by him. Such liability can only be fastened either under a statutory obligation or contractual stipulation. No statutory prescription to cover such liability could be pressed into service by the ONGC. Nor the Court finds any such contract between last contractor and the predecessor contractors, or for that matter, between the last contractor and ONGC. In contrast, in the case of Cummins (supra), the successor contractor had incurred an obligation pursuant to a contract with the predecessor contractor, to pay gratuity.

60. The conspectus of aforesaid consideration is that the Appellate Authority was in error in setting aside the order passed by the Controlling Authority fastening the liability on ONGC to pay gratuity. Petitions thus deserve to be allowed.”

17. In **Indian Institute of Technology Bombay vs Tanaji Babaji Lad & Ors., in Writ Petition No. 12746 of 2024**, the Bombay High Court held:-

*“31) When IIT, Bombay is specific in directing deposit of ESIC and PF contribution, it is incomprehensible as to why liability for payment of gratuity was not specifically incorporated in the Work Order. It appears that in the description of work appended to the contract, there is a condition for continuous deployment of workmen for maximum 89 days excluding Sundays and holidays against various requisition issued by the Estate Office. Far from engaging different workers for maximum tenure of 89 days, the Respondents continued to work with IIT, Bombay notwithstanding replacement of various contractors. In fact, if the tests laid down by the Apex Court in **Balwant Rai Saluja & Anr Etc.Etc vs Air India Ltd.& Ors, AIRONLINE 2013 SC 652**, Respondent would be in a position to satisfy most of the said tests for the purpose of establishment of employer –employee relationship even under the ID Act. Since the enquiry into existence of employeremployee relationship in the context of PG Act is summary or preliminary in nature, which does not bind parties outside the framework of PG Act, it is not necessary to satisfy all the tests laid down in **Balwant Rai Saluja (supra)**. Be that as it may. It is not necessary to delve deeper into the terms and conditions of Work Order to which Respondents are not parties. The present case involves peculiar facts and circumstances, **under which some workmen have continued with IIT-Bombay through multiple contractors. I am therefore, convinced that for the limited purpose of payment of gratuity, Respondents are required to be treated as employee of IIT Bombay. No interference is therefore warranted in the impugned orders.**”*

18. In **Balwant Rai Saluja & Anr. Etc. Etc vs Air India Ltd. & Ors., 2014 (9) SCC 407, on decided on 25 August, 2014**, the Supreme Court held:-

“1. In view of the difference of opinion by two learned Judges, and by referral order dated 13.11.2013 of this Court, these Civil Appeals are placed before us for our consideration and decision. The question before this bench

is whether the workmen engaged in statutory canteens, through a contractor, could be treated as employees of the principal establishment.

2. At the outset, it requires to be noticed that the learned Judges differed in their opinion regarding the liability of the principal employer running statutory canteens and further regarding the status of the workmen engaged thereof. The learned Judges differed on the aspect of supervision and control which was exercised by the Air India Ltd. (for short, "the Air India")- respondent No. 1, and the Hotel Corporations of India Ltd. (for short, "the HCI")-respondent No. 2, over the said workmen employed in these canteens. The learned Judges also had varying interpretations regarding the status of the HCI as a sham and camouflage subsidiary by the Air India created mainly to deprive the legitimate statutory and fundamental rights of the concerned workmen and the necessity to pierce the veil to ascertain their relation with the principal employer.

84. In our considered view, and in light of the principles applied in the Haldia case (supra), such control would have nothing to do with either the appointment, dismissal or removal from service, or the taking of disciplinary action against the workmen working in the canteen. The mere fact that the Air India has a certain degree of control over the HCI, does not mean that the employees working in the canteen are the Air India's employees. The Air India exercises control that is in the nature of supervision. Being the primary shareholder in the HCI and shouldering certain financial burdens such as providing with the subsidies as required by law, the Air India would be entitled to have an opinion or a say in ensuring effective utilization of resources, monetary or otherwise. The said supervision or control would appear to be merely to ensure due maintenance of standards and quality in the said canteen.

85. Therefore, in our considered view and in light of the above, the appellants-workmen could not be said to be under the effective and absolute control of Air India. The Air India merely has control of supervision over the working of the given statutory canteen. Issues regarding appointment of the said workmen, their dismissal, payment of their salaries, etc. are within the control of the HCI. It cannot be then said that the appellants are the workmen of Air India and therefore are entitled to regularization of their services.

86. It would be pertinent to mention, at this stage, that there is no parity in the nature of work, mode of appointment,

experience, qualifications, etc., between the regular employees of the Air India and the workers of the given canteen. Therefore, the appellants-workmen cannot be placed at the same footing as the Air India's regular employees, and thereby claim the same benefits as bestowed upon the latter. It would also be gainsaid to note the fact that the appellants-herein made no claim or prayer against either of the other respondents, that is, the HCI or the Chefair.

87. In terms of the above, the reference is answered as follows :

The workers engaged by a contractor to work in the statutory canteen of a factory would be the workers of the said factory, but only for the purposes of the Act, 1948, and not for other purposes, and further for the said workers, to be called the employees of the factory for all purposes, they would need to satisfy the test of employer-employee relationship and it must be shown that the employer exercises absolute and effective control over the said workers."

19. In the present case:-

- a) The workers were appointed through contractors (Identity Cards).
- b) Wages was paid by the contractor.
- c) The workers though working under one contractor after another, were with the same principal employer, the writ petitioner herein.

20. The orders of a Co-ordinate Bench in WP 2221(W) of 2015 and the order in Appeal in MAT 1858 of 2018 have been placed.

21. The Courts held as follows:-

“Single Bench:-

“.....Under the 21(4) of the Contract Labour (Regulation and Abolition) Act, 1970 the principal employer is to pay the wages of the contractor. Under Section 2(h) of the said Act wages have been assigned the same meaning as given to it by Clause (vi) of Section 2 of the Payment of Wages Act, 1936. Wages includes gratuity under Section 2(vi)(d) of the said Act.....”

“Division Bench:-

“Under the 21(4) of the Contract Labour (Regulation and Abolition) Act, 1970 the principal employer is to pay the wages of the contractor. Under Section 2(h) of the said Act wages have been assigned the same meaning as given to it by Clause (vi) of Section 2 of the Payment of Wages Act, 1936. Wages includes gratuity under Section 2(vi)(d) of the said Act.

In those circumstances, the respondent no. 5 is directed to pay the gratuity claim of the petitioners by 16th August, 2016. In default, the respondent no. 1 will have to pay this claim to the petitioners by 29th September, 2016.

All the papers are before this Court. 1 Affidavits were not invited. The allegations contained in the petition are deemed not to have been admitted.

This writ application is accordingly disposed of.”

Therefore, we are of the view that the appellant can be directed to pay the gratuity amount to the widow of the deceased employee within 60 days from the date of receipt of the copy of this order and upon payment of the same to the widow of the deceased employee, the appellants are granted liberty to recover the said amount from the said contractor who is impleaded as the fifth respondent in the writ petition namely, M/s. Radha Mohan Singh having its office at Chasnala main road, P.O. Chasnala, Dist. Dhanbad, Jharkhand, Pin 828835.”

22. Section 21(4) of the Contract Labour (Regulation and Abolition) Act, 1970, lays down:-

“Section 21(4) *In case the contractor fails to make payment of wages within the prescribed period or makes short payment, then the principal employer shall be liable to make payment of wages in full or the unpaid balance due, as the case may be, to the contract labour employed by the contractor and recover the amount so paid from the contractor either by deduction from any amount payable to the contractor under any contract or as a debt payable by the contractor.”*

23. Section 2 Payment of wages Act, 1936, lays down:-

“Section 2. Definitions:-

.....

(vi) "wages" means all remuneration (whether by way of salary, allowances, or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment, and includes-

(a)any remuneration payable under any award or settlement between the parties or order of a Court;

(b)any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period;

(c)any additional remuneration payable under the terms of employment (whether called a bonus or by any other name);

(d)any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum, whether with or without deductions, but does not provide for the time within which the payment is to be made;

(e)any sum to which the person employed is entitled under any scheme framed under any law for the time being in force,

but does not include-

(1) any bonus (whether under a scheme of profit-sharing or otherwise) which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a Court;

(2) the value of any house-accommodation, or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of the [appropriate Government];

(3) any contribution paid by the employer to any pension or provident fund, and the interest which may have accrued thereon;

(4) any travelling allowance or the value of any travelling concession;

(5) any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment; or

(6) any gratuity payable on the termination of employment in cases other than those specified in sub-clause (d)."

- 24.** Gratuity, payable under the Payment of Gratuity Act, 1972, is a gratuitous payment required to be made by an employer to his employee at the time of termination of services of the employee or upon such employee's death.

Section 21 (4) of the Contract Labour (Regulation and Abolition) Act, 1970 (CLRA), mandates that a principal employer is responsible for the payment of 'wages' to a contract employee in the event of a contractor's failure to pay within the stipulated timelines or in the event of a contractor making a short payment. The principal employer then has the ability to recover the amount paid as 'wages', from the

contractor. Section 2(h) of the CLRA defines the term 'wages' as all remuneration (whether by salary, allowances or otherwise) expressed in terms of money or capable of being so expressed, which would if the terms of employment, expressed or implied, were fulfilled, be payable to a person employed in respect of his employment or of work done in such employment and includes, among others, "(d) any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment...". However, it excludes "(6) any gratuity payable on the termination of employees in cases other than those specified in (d)." In ***Superintending Engineer, Mettur Thermal Power Station, Mettur vs. Appellate Authority, Joint Commissioner of Labour, Coimbatore & Anr, 2012 LLR 1160***, it has been held that gratuity payable under the Payment of Gratuity Act, 1972 falls within this definition of 'wages'.

- 25.** The principal employer or the contractor may be liable to pay gratuity to contract employees, depending on the circumstances.

Principal employer

- The principal employer is liable to pay gratuity to contract employees if the contractor fails to pay.
- The principal employer is liable to pay gratuity if the contractor makes a short payment.

- The principal employer is liable to pay gratuity if the contractor terminates the services of the contract employee.
- The principal employer is liable to pay gratuity if the contract employee works for multiple contractors.

Contractor

- The contractor is liable to pay gratuity to contract employees if they have worked for at least five years and the contract is separate from the company.
- The contractor is liable to pay gratuity to contract employees who have rendered continuous service.

The Contract Labour (Regulation and Abolition) Act, 1970 (CLRA) and the Payment of Gratuity Act, 1972 govern the payment of gratuity to contract employees.

26. Therefore the order of the Appellate Authority dated 29.07.2024 which is under challenge is **modified** to the extent that as and when the petitioner has to make the payment of gratuity, when the employment ceases, he shall be at liberty to recover the said amount from the contractor (respondent no. 3) herein.

27. WPA 25774 of 2024 is disposed of.

28. All connected applications, if any, stand disposed of.

29. Interim order, if any, stands vacated.

30. Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties, expeditiously after complying with all necessary legal formalities.

(Shampa Dutt (Paul), J.)