

The Commissioner, Vs. 1.The Appellate Authority Under

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Court : Chennai

Decided On : Mar-04-2013

Judge : T.S.Sivagnanam

Appellant : The Commissioner,

Respondent : 1.The Appellate Authority Under

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED:

04. 03/2013 CORAM THE HON'BLE MR. JUSTICE T.S.SIVAGNANAM W.P.(MD) No.333 of 2007 W.P.(MD) Nos.334 to 344 of 2007 W.P/(MD).No.333 of 2007 The Commissioner, Trichirapalli Corporation, Trichirapalli. ... Petitioner vs 1.The Appellate Authority Under Payment of Gratuity Act and Joint Commissioner of Labour, Madurai - 20. 2.The Controlling Authority Under the Payment of Gratuity Act and Assistant Commissioner of Labour, Kajamalai, Trichy - 20. 3.Marammal ... Respondents Prayerin W.P.(MD).No.333 of 2007 The Writ Petition filed under Article 226 of the Constitution of India for issue of Writ of Certiorarified Mandamus, to call for the records of the first respondent relating to the order dated 26.09.2006, made in I.A.No.1 of 2006, quash the same and consequently, direct the first respondent to number the appeal filed by the petitioner against the order of second respondent made in P.G.No.8 of 1999, dated 31.10.2001 and hear and dispose the same. !For Petitioner ... Mr.P.Srinivas ^For Respondents... Mr.G.Muthukannan G.A., for RR1&2 Mr.T.Murugan for R3 :COMMON ORDER In all these writ petitions as the relief sought for is identical and the petitioner

Municipal Corporation has challenged the order passed by the first respondent dated 26.09.2006, which is a common order in all these cases, the writ petitions were heard together and are disposed of by this common order.

2. The third respondent in all these writ petitions filed applications before the second respondent under the provisions of the Payment of Gratuity Act (hereinafter referred to as the 'Act'), claiming gratuity on the ground that they have all worked as Sanitary Workers for a total period of 40 years. The petitioner Municipal Corporation resisted the claim by filing a counter affidavit disputing the period of service as well as the last drawn wages claimed to have been drawn by them. Further, it was submitted that each of them were paid Rs.8174/- as DCRG and therefore, the claim made by them is not tenable. It was further stated in the counter statement that the Payment of Gratuity Act cannot be applied as the third respondent would not come under the definition of 'employee'. The second respondent by common order dated 31.10.2001, allowed the claim petitions and computed the gratuity payable to each of the third respondents. The petitioner Municipal Corporation preferred appeal before the first respondent under Section 7(7) of the Act. The appeal was presented during April 2002 and it is an admitted case that the appeal was presented within the period of 60 days as the petitioner Municipal Corporation is stated to have received the order of the second respondent dated 31.10.2001, on 13.03.2002. Therefore, the petitioner corporation could have presented the appeal before 12.04.2002. Though the appeal was presented before the first respondent, the petitioner Municipal Corporation failed to deposit the amount as required under the Act for the purpose of entertaining the appeal. It is stated by the petitioner Corporation that due to financial constraints, they were not able to comply with the condition and deposit a total sum of Rs.4,54,139/-, and consequently, the appeal was returned on 15.04.2002, for not depositing the amount. Being aggrieved by such order, the petitioner Corporation filed W.P.Nos.32236 to 32237 of 2002, before this Court. The writ petitions were dismissed by this Court, by order dated 07.08.2002. Therefore, the petitioner Corporation ought to have represented the appeal immediately complied with the condition namely the pre-deposit required to be done under the Act and then contest the matter on merits. However, they did not re-present the same for nearly four years and represented the papers only on 22.12.2005 along with applications

to condone the delay in I.A.Nos.1 to 12 of 2006. The only reason assigned in the affidavit is that as on the date of the representation, gratuity amount as ordered by the second respondent has been deposited and the appeal was initially presented in time and therefore, the delay in representation has to be condoned. The first respondent by order dated 26.09.2006, dismissed the applications. Aggrieved by the same, the present writ petitions have been filed.

3. I have heard the learned counsel appearing for the parties and carefully considered the submissions made on either side.

4. The first respondent in the impugned order took note of Section 7(7) of the Act, which states that any person aggrieved by an order passed under Sub- Section 4 of Section 7 may within 60 days from the date of receipt of the order prefer an appeal. The first proviso provides for condonation of delay of 60 days on the appellant showing sufficient cause for not preferring the appeal within 60 days. The second proviso states that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the employer/appellant either produces a certificate of the controlling authority to the effect that the employer/appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section 4 or deposits with the appellate authority such amount. After taking note of the conduct of the petitioner Municipal Corporation, the first respondent dismissed the applications holding that the appeal has been represented beyond time. In support of its conclusion, the first respondent relied upon the decision of the High Court of Madhya Pradesh in *Western Coalfields Ltd., vs. Controlling Authority & Ors.*, [2000 (86) FLR 312..

5. The learned counsel for the petitioner contended that appeal filed by the petitioner having been preferred within 60 days, the delay ought to have been condoned. Reliance was placed on the decision of this Court in *The Commissioner, Edapadi Municipality vs. The Joint Commissioner of Labour* [2007(5) CTC 559]. The facts in the said decision are entirely different and the delay was 399 days and this Court held that the appeal having been presented within a period of limitation, the appellate authority therein was not justified in rejecting the appeal as time barred. In the instant case, the conduct of the

petitioner assumes significance, firstly it has to be noted that the petitioner is a Municipal Corporation and they had the men and machinery to comply with the legal requirements. It is as if, the petitioner Municipal Corporation was unaware about the legal position and attempt was made by the petitioner to wriggle out of the statutory obligation under the second proviso of Section 7(7) of the Act and they filed writ petitions before this Court, which were dismissed on 07.08.2002. Immediately thereafter, no steps were taken by the petitioner Municipal Corporation, to represent the appeal by complying with the mandatory deposit. There is no explanation in the affidavit filed in support of I.A.Nos.1 to 12 of 2006 as to why they have not been able to represent the papers and make the mandatory deposit.

6. In *Special Officer vs. Appellate Authority under Payment of Gratuity Act*, [2001 (2) LLN 445.: [2001 (89) FLR 538], The Hon'ble Justice Mr.F.M.Ibrahim Kalifulla (as he then was) examined the correctness of the order passed by the appellate authority under the Act, which turned down the appeal filed by the Management on the ground that the amount had not been deposited before the stipulated period as required under the second proviso to Section 7(7) of the Act. While deciding the question, it was held that the Management in the said case had not deposited the amount within the period of 120 days and the deposit was made one year and 7 months after the date of receipt of the order and therefore, the appellate authority under the Act rightly rejected the appeal on the ground that the appeal has been filed beyond the period prescribed under the provisions of the Act and when the appeal was not filed in the manner in which it ought to have been filed, it cannot be held that even if the memorandum of appeal grounds had been filed within the stipulated time without necessary deposit, the appeal was filed within time. Accordingly, the order passed by the appellate authority was confirmed and the writ petition was filed by the Management was dismissed. At this stage, it would be beneficial to refer to the operative portion of the judgment:- 2. After hearing learned counsel for the both sides, I am of the view that the writ petition deserves to be dismissed for the reasons stated hereunder. Second proviso to Sub-section (7) of Section 7 of the Act reads as under:- "Any person aggrieved by an order under Sub-(4) may, within sixty days from the date of receipt of order, prefer an appeal to the appropriate Government or such other authority as may be specified

by the appropriate Government in this behalf: Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days. Provided further that no appeal....." A reading of the second proviso makes it clear that in order to entertain an appeal by an employer under the said provision, the deposit of the amount ordered by the controlling authority is mandatory. Sub-section (7) stipulates that any person aggrieved by an order made under Section 4 can prefer the appeal within the 60 days and the first proviso to Sub-section (7) provides for further period of 60 days within which if the appeal had been filed with sufficient explanation for not preferring the appeal within the first period of 60 days, the appeal could be entertained. But in either case, if the deposit of the amount ordered by the controlling authority is not made as provided under the second proviso to Sub-section (7) or the first proviso to the sub-section there would be no scope for the first respondent to entertain the appeal. Admittedly, the petitioner has not deposited the amount ordered by the controlling authority within the said period of 120 days as provided under Sub-section (7). On the other hand, it is established beyond doubt that the deposit was made nearly one year and seven months after the date of receipt of the order of the controlling authority. The first respondent therefore rightly rejected the appeal on that sole ground that the appeal had been filed beyond the period prescribed under the provisions of the Act. When the appeal was not filed in the manner in which it ought to have been filed, it cannot be held that even if the memorandum of appeal grounds had been filed within the stipulated time without necessary deposit to be made under the second proviso to Section 7(7), the appeal was filed within time. When statute has prescribed a specific period and also made it mandatory for the party intending to prefer an appeal against the order of the controlling authority that along with the appeal the proof for deposit of the amount ordered by the controlling authority should be enclosed, it is incumbent on the party concerned to comply with the said provision in letter and spirit in order to make him eligible to be heard by the appellate authority. When the petitioner failed to comply with the mandatory provision, he cannot be heard to complain against the action of the statutory authority functioning under the Act. In such circumstances, the order of

the first respondent in rejecting the appeal which was admittedly not filed in the manner prescribed under the relevant provision, there is no scope for interfering with the said order of the first respondent. Therefore, the writ petition fails and the same is dismissed.

7. Similar view was taken by the Bombay High Court in *Pharma Base India Pvt. Ltd., vs. State of Maharashtra & Anr.*, [2008 (116) FLR 815], and the learned Single Judge held the appeal cannot be treated as preferred within the period of limitation unless the appellant deposits as contemplated under Section 7(7) of the Act and in such case, the date of deposit only would be treated as the date of preferring an appeal. It was further held that the appeal preferred without deposit is not a valid appeal and the period of limitation in such eventually would not stop to run. The petitioner in the above referred decision of the Bombay High Court preferred appeal to the Hon'ble Division Bench of the Bombay High Court, which considered the question in *Pharma Base India Pvt. Ltd., vs. State of Maharashtra & Anr.*, [2009 (120) FLR 634], and the Hon'ble Division Bench confirmed the order passed by the learned Single Judge in the decision referred supra and held as follows:- 9. The plain reading of above said proviso will reveal that any person aggrieved by an order, under sub-clause 4 of Section 7, may within 60 days from the receipt of the order, prefer an appeal to the Appellate Authority. However, the Appellate Authority is at liberty, if a sufficient cause is shown, to extend the period of 60 days for further period of days. The Second proviso of section 7(7) provides that no appeal by an employer shall be admitted unless, at the time of preferring an appeal, the appellant either produce a certificate of controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity, required to be deposited under section 7(4) with the Appellate Authority or deposit with the Appellate Authority such amount. Thus, this proviso has imposed fetter on the employers right to file an appeal. It is amply clear, that employer is obliged to deposit the amount or produce the certificate of the controlling authority as the case may be at the time of preferring an appeal.

13. The petitioners second submission namely the production of certificate from the controlling authority or deposit of the amount of gratuity as contemplated under 2nd proviso of section 7(7) required to be complied with at the time of admission of

the appeal and not at the time of institution of appeal also devoid of merit, in view of the specific provisions 8. Therefore, the contention raised by the learned counsel appearing for the petitioner Municipal Corporation that production of a certificate as required under the second proviso to Section 7(7) of the Act is required only at the time of admission of the appeal and not at the time of institution of the appeal is absolutely devoid of merits and liable to be rejected.

9. Therefore, if the petitioner had failed to comply with, the mandatory condition as provided in the second proviso to Section 7(7), the appeal filed by the petitioner is no appeal in the eye of law, rather it would be like a case, where a suit is filed before a Civil Court without payment of any Court fee. A distinction is sought to be drawn by the learned counsel appearing for the petitioner stating that the mandatory pre-deposit is a condition precedent only for the admission of the appeal and not for filing the appeal. Mere pendency of the appeal will not amount to stay of the order passed by the controlling authority. Therefore, if the petitioner takes a stand that they have preferred an appeal, it shall be read to mean a properly presented appeal more particularly the compliance of the mandatory deposit. Such interpretation alone will sub-serve the purposes of the legislation, which is a Labour Welfare Legislation.

10. Be that as it may, there is no explanation given by the petitioner Corporation for the delay of about 4 years in representing the papers, and no reasons have been assigned in the affidavit filed in support of the condone delay petition. The Hon'ble Division Bench of this Court in M.Subramania Mudaliar vs. K.Janardhanam & Ors., [1994-1-MLJ-152] considered the correctness of an order passed by the Deputy Registrar of the High Court making an endorsement and granting 10 days time for presenting a plaint before proper Court, when there was a delay of six years in representation. Considering the entire facts, the Hon'ble Division Bench held that inaction for over three years on the part of the appellant therein remained unexplained and there was no valid explanation for the inordinate delay in representation and if the facts stated in the affidavit filed therein were true, they prove gross negligence and callous indifference on the part of the appellant therein and even assuming that there is negligence, it is not a valid ground for condoning such a long delay in representing the appeal.

11. The said decision of the Hon'ble Division Bench could be squarely applied to the facts and circumstances of these cases as the delay of nearly four years remained unexplained and in the light of the fact that the matter concerns payment of gratuity and the claimants, who were Sanitary Workers, who had worked for 40 years having obtained a favourable order from the controlling authority in 2001, were dragged into a unnecessary litigation by the petitioner Municipal Corporation in attempting to by-pass the mandatory statutory requirement. Therefore no indulgence can be granted to the petitioner and the impugned orders do not call for any interference. Before the appellant authority, the petitioner Municipal Corporation contended that the provisions of the Payment of Gratuity Act is not applicable to them and that the third respondents in all these writ petitions were paid DCRG. Identical contention was raised by other Municipal Corporation in Commissioner of Mettupalayam Municipality vs. Assistant Commissioner of Labour [2002-2-LLJ-937]. The Hon'ble Mr.Justice P.Sathasivan (as he then was) while rejecting the contention raised by the Mettupalayam Municipality held as follows:- 20. Next, I shall consider the other contention that the applicants are not employees within the meaning of Section 2(e) of the Act. I have already referred to the definition of "employee" in Section 2(e) of the Act. By drawing my attention to the last part of the definition, i.e.: "... but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity." Would contend that, in view of the other schemes, namely, D.C.R.G. and disbursement of other retirement benefits, the applicants are not employees within the meaning of Section 2(e) of the Act. I am unable to accept the said contention. The perusal of the said provision, namely last three lines in Sub- clause (e) of Section 2 of the Act clearly show that the exclusion clause should be read in conjunction with Central and State Government employees and not as contented by the learned counsel for the petitioners.

21. Coming to the contention based on G.O. Ms. No. 2469 Health and Family Planning Department, dated October 1, 1973, namely that the sanitary workers were regularised only from the date of the said Government Order i.e., October 1, 1973, here again, as rightly contended by Sri P.K. Rajagopal Clause (4) of the said Government Order though refers "regularisation of sanitary workers," it is made

clear that, from October 1, 1973, the sanitary workers were granted time-sale of pay, accordingly it cannot be contended that only from October 1, 1973 their services have to be counted for the purpose of gratuity and absolutely there is basis for such conclusion.

12. For all the above reasons, the writ petitions being devoid of merits and thoroughly misconceived, are dismissed.

13. It is submitted that the entire amount of gratuity as computed by the controlling authority has been deposited by the petitioner Corporation, if that be so, the third respondents in all these writ petitions or their legal heirs are entitled to withdraw the amount by filing appropriate application before the said authority. No costs. Consequently, connected miscellaneous petitions are closed. pbn Copy to:- 1.The Appellate Authority Under Payment of Gratuity Act and Joint Commissioner of Labour, Madurai - 20. 2.The Controlling Authority Under the Payment of Gratuity Act and Assistant Commissioner of Labour, Kajamalai, Trichy - 20.

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