



GAHC010121052020

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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3697/2020

BHABENDRA NATH SARMA AND 3 ORS.
S/O LT. MAHENDRA NATH SARMA, H.NO. 10, BYE LANE NO. 2, (BHASKAR
KALITA PATH), SHANTINAGAR, KAHILIPARA, GUWAHATI-781019 P.S.
DISPUR, DIST. KAMRUP (M), ASSAM, PIN-781019, PHONE- 9854369512

2: NRIPENDRA NATH BARMAN
S/O LT. MOTILAL BARMAN
KALYANINAGAR JENAKI PATH
H. NO. 62
KAHILIPARA
GUWAHATI
DIST. KAMRUP (M)
ASSAM
PIN-781019

3: SUBHAS SARMAH
S/O LT. KHAGESWAR SARMAD
VILL
BHATTAPARA
P.S. AZARA
DIST. KAMRUP (M)
ASSAM
PIN-781017

4: DEEPAK KR. DAS
S/O LT. PURNA CH. DAS
H. NO. 62
SOUTH SARANIA
P.O ULUBARI
P.S. PALTANBAZAR
DIST. KAMRUP (M)
GUWAHATI-781007
ASSA



VERSUS

THE STATE OF ASSAM AND 5 ORS.
DEPTT. OF PUBLIC ENTERPRISES THROUGH THE COMMISSIONER AND
SECRETARY OF PUBLIC ENTERPRISES DISPUR, GUWAHATI-6

2:THE COMMISSIONER AND SECRETARY
TO THE GOVT. OF ASSAM
DEPTT. OF FINANCE
DISPUR
GUWAHATI-6

3:ASSAM STATE FINANCIAL CORPORATION
VITTIYA BHAVAN
MD. SHAH ROAD
PALTAN BAZAR
GUWAHATI-781008
ASSAM
REP .BY ITS MANAGING DIRECTOR
ASSAM
FINANCIAL CORPORATION

4:MANAGING DIRECTOR
ASSAM FINANCIAL CORPORATION VITTIYA BHAVAN
MD. SHAH ROAD
PALTAN BAZAR
GUWAHATI-781008

5:THE TRUSTEE
ASSAM FINANCIAL CORPORATION
GROUP GRATUITY ACCUMULATION FUND
VITTIYA BHAVAN
MD. SHAH ROAD
PALTAN BAZAR
GUWAHATI-781008

6:LIFE INSURANCE CORPORATION OF INDIA
GUWAHATI
GUWAHATI DIVISIONAL OFFICE JEEVANPRAKASH
FANCY BAZAR
GUWAHATI-78100

Advocate for the Petitioner : MR. B SARMAH

Advocate for the Respondent : GA, ASSAM

BEFORE
HONOURABLE MR. JUSTICE ACHINTYA MALLA BUJOR BARUA

Date : 18-04-2022

JUDGMENT & ORDER (ORAL)

Heard Mr. B Sarmah, learned counsel for the petitioners, Mr. JK Goswami, learned Additional Senior Government Advocate for the respondent No. 1 being the Department of Public Enterprises, Mr. P Naik, learned counsel for the respondent No. 2, Finance Department, Mr. G Choudhury, learned counsel for the respondents No. 3, 4 and 5 being the authorities in the Assam Financial Corporation and Mr. AN Mondal, learned counsel for the respondent No. 6 being the authorities in the Life Insurance Corporation of India.

2. All the petitioners herein served as Staff Officers, Assistant Managers in the respondent Assam Financial Corporation (in short AFC) and had retired from service upon attaining the age of superannuation on different dates during the years 2018, 2019 and 2020. By the impugned communications, the petitioners were informed by the respondents in the AFC that the death-cum-retirement gratuity they would be entitled upon their superannuation from service would be limited to Rs. 7,00,000/- while allowing the revision of pay scale as per the Revision of Pay (RoP) Rules, 2017. The petitioners contend that the payment of death-cum-retirement gratuity benefit is governed by the Payment of Gratuity Act 1972 (in short Act of 1972) as amended from time to time and therefore, their entitlement for the gratuity benefit would be as provided under the Act of 1972.

3. The respondents in the AFC on the other hand relies upon the Assam Financial Corporation (Payment of Gratuity of Employees) Regulation, 1964 (in

short Regulation of 1964) as well as the Assam Financial Corporation (Amendment) Staffs Regulation 2007 (in short Regulation of 2007). As per the respondents in the AFC in paragraph 35 of their affidavit in opposition, the stand taken is that the last amendment to the Staff Regulation was made in the year 2007, wherein the maximum gratuity payable was fixed at Rs. 7,00,000/-. Accordingly, it is the stand that the entitlement of the petitioners would be a maximum of Rs. 7,00,000/- and not beyond that.

4. The respondents in the AFC also has an agreement with the respondent LICI for payment of gratuity to its employees upon their retirement. In view of such agreement, the LICI has also been arrayed as respondent No. 6 in this writ petition inasmuch as, under such arrangement, the amount of Rs. 7,00,000/-, which is determined to be the amount payable to the petitioners would be paid by the LICI.

5. In the aforesaid circumstance, the question for determination before this Court would be whether the payment of gratuity to the retired petitioners would be governed as per the provisions of the Act of 1972 or it would be governed by the aforesaid two Regulations namely Regulation of 1964 and Regulation of 2007 framed by the AFC.

6. In order to appreciate the contention of the respondents in the AFC, we have to understand that by referring to the aforesaid two Regulations, it is the stand of the AFC that for the purpose of payment of gratuity, they are not governed by the Act of 1972, but would be governed by their own Regulations.

7. In support of the contention of the respondents in the AFC, Mr. P Naik, learned counsel for the Finance Department refers to the provisions of Section 2(e) of the Act of 1972 to contend that the petitioners are not employees within

the meaning of 'employee' as defined in Section 2(e) of the Act of 1972 and therefore, they would not be governed by the provisions of the Act of 1972 and on the other hand, as provided in Section 2(e) itself, they would be governed by the set of Regulations framed by the respondents in the AFC for the purpose of payment of gratuity.

8. We have heard the learned counsel for the respective parties. On the question as to whether the petitioners being retired employees of the respondents AFC would be governed by the provisions of the Act of 1972 or they would be governed by the provisions of the Regulations framed by the respondents in the AFC for the purpose of gratuity, we take note of the long title of the Act of 1972, which is extracted as below:-

“An Act to provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto.”

9. A reading of the long title to the Act of 1972 would make it apparent that the provisions of the Act of 1972 would be applicable in respect of payment of gratuity to the employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incidental thereto. In the context of the provisions of the long title to the Act of 1972, we examined as to whether the respondents in the AFC would be an entity included under the expression 'other establishments' as provided in the long title to the Act of 1972.

10. Mr. G Choudhury, learned counsel for the respondents AFC refers to the definition of establishment as provided in the Assam Shops and Establishments Act, 1971 (in short Act of 1971) to raise a contention that the expression 'other establishments' appearing in the long title to the Act of 1972 would also have to

be given the same meaning. Section 2(8) of the Act of 1971 defines establishment to mean an establishment or a commercial establishment for a public entertainment or amusement.

11. We are unable to accept the said contention of Mr. G Choudhury, learned counsel for the respondents in the AFC that by referring to the definition of establishment under the Act of 1971, the meaning of 'other establishments' as provided in the long title to the Act of 1972 can also be given the same meaning. Our reasons for disagreeing with Mr. G Choudhury, learned counsel is that the Act of 1971 is an Act to consolidate and amend the law relating to regulations of conditions of work and employment in shops and commercial establishments and establishments for public entertainment or amusements in the State of Assam where the meaning of 'establishment' is circumscribed. In the said context, Section 2(8) of the Act of 1971 defined establishments to restrict it to mean an establishment or commercial establishment or an establishment for public entertainment or amusement. But in the context of the Act of 1972, for the purpose of payment of gratuity, we have to understand the meaning of the expression 'other establishments, as has been contemplated in the Act of 1972 itself.

12. Mr. P Naik, learned counsel for the Finance Department of the Government of Assam refers to the definition of 'employee' as provided in Section 2(e) of the Act of 1972, which is extracted as below:-

“2(e) "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applied, 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.”

13. By referring to the definition of ‘employee’, Mr. P. Naik, learned counsel submits that the Act of 1972 does not contemplate a person to be an employee if such person holds a post under the Central or State Government and is governed by any other Act or any other Rules providing for payment of gratuity. It is the submission that in the instant case, the two Regulations namely Regulation of 1964 and Regulation of 2007 provides for the payment of gratuity and therefore, the petitioners being persons who hold a post under the respondents in the AFC would be excluded from the purview of the definition of ‘employee’ under the Act of 1972 and therefore, the provisions thereof would be inapplicable to the petitioners.

14. We have considered the submission of Mr. P Naik, learned counsel for the Finance Department. A reading of the definition of ‘employee’ in Section 2(e) of the Act of 1972 provides that an employee means any person other than an apprentice who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which the Act of 1972 applies, 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. In other words, the meaning given to the expression ‘employee’ under the Act of 1972 would be a broad based definition which also includes amongst others, a person who holds a post under any other establishments, other than those establishments mentioned in the

definition itself except for a person, who holds a post under the Central or State Government.

15. In the instant case, admittedly the petitioners were holding a post under the respondents in the AFC, which is admittedly as per all the parties to the litigation, to be a Company registered under the Companies Act, where the major share holders are of the Government of Assam, Government of Manipur, Government of Tripura, Government of Nagaland and Government of Meghalaya. In view of the above, the respondent AFC being a Company registered under the Companies Act with the share holders being the aforementioned State Governments, it would be understood that the person who works in a post under the respondent AFC cannot be construed to be a person who holds a post under the Central Government or a State Government.

16. It being so, the obvious conclusion therefore would be that a person who holds a post under the respondent AFC would not be included in the exception carved out in the definition of 'employee' in Section 2(e) of the Act of 1972. In other words, a person holding a post under the respondent AFC would be an employee in any 'other establishments' to which the Act of 1972 would apply.

17. A reading of the definition of 'employee' under Section 2(e) of the Act of 1972 makes it discernible that in order to be carved out from the purview of the definition of employee under the Act of 1972, the person concerned must hold a post under the Central Government or a State Government and further be governed by any other Act or by any Rules providing for payment of gratuity. Upon the satisfaction of the two conditions precedent as indicated above, we have to understand that such a person would be carved out from the definition of 'employee' under Section 2(e) in order to make the Act of 1972 inapplicable for such person.

18. In view of the above, the conclusion we can arrive at is that the present petitioners in the context of their employment would be covered by the provisions of the Act of 1972.

19. The next question for determination would be whether the gratuity payable to the petitioners would be circumscribed by the provisions of the two Regulations namely Regulation of 1964 and Regulation of 2007 of the respondents AFC. In order to arrive at an answer to the said question, we need not to go beyond the provisions of Section 14 of the Act of 1972, which is extracted as under:-

“Act to override other enactments, etc.- the provisions of this Act or any rule made there-under shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act.”

20. A reading of Section 14 of the Act of 1972 goes to show that the provisions of the Act of 1972 or any rules framed thereunder shall have its effect notwithstanding anything inconsistent in any enactment other than the Act of 1972 or in any instrument or contract having effect by virtue of any enactment other than the Act of 1972. Clearly the two Regulations namely Regulation of 1964 and Regulation of 2007 of the respondents AFC would be an enactment or instrument or contract having its effect by virtue of any enactment other than the Act of 1972.

21. By the provisions 'notwithstanding' which by itself is a non-obstante provisions, we have to understand that in spite of the existence of the two Regulations namely Regulation of 1964 and Regulation of 2007 of the respondents AFC, the payment of gratuity to the petitioners would be governed by the Act of 1972.

22. Section 4(2) of the Act of 1972 provides for the payment of gratuity to an employee who is governed by the Act of 1972 under the provisions thereof which are extracted as below:-

“For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days wages based on the rate of wages last drawn by the employee concerned:

Provided that in the case of a price-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account.

Provided further that in the case of [an employee who is employed in a seasonal establishment and who is not so employed throughout the year], the employer shall pay the gratuity at the rate of seven days, wages for each season.

Explanation.- In the case of a monthly rated employee, the fifteen days, wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty six and multiplying the quotient by fifteen.”

23. A reading of Section 4(2) of the Act of 1972 provides that for every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days wages based on the rate of wages last drawn by the employee concerned. The expression ‘rate of wages last drawn by the employee concerned’ would have to be understood the wages that were paid to the employee concerned in the last month of the employment with the employer. The Exception to Section 4(2) of the Act of 1972 further provides that in order to arrive at the ‘rate of fifteen days wages’ in case of a monthly rated employee, the fifteen days wages shall be calculated by

dividing the monthly rate of wages last drawn by the employee by twenty six and multiply the same by fifteen.

24. A comprehensive reading of the provisions of Section 4(2) of the Act of 1972 including the Exception thereof would lead us to a conclusion that the petitioners would be entitled to the payment of gratuity at the monthly rate of the wages drawn by them in the last month of their employment, which would be divided by twenty six and thereafter multiplied by fifteen. Whatever would be the amount that may be arrived at shall be the payment of gratuity for one year of service and again the same have to be multiplied by the number of years the petitioners have served. For every complete year and thereafter if for the uncompleted year, the period of service was more than six months, it would be construed to be another completed year and if it is less than six months, it shall not be so construed.

25. Accordingly, having answered the question raised in this writ petition, we remand the matter back to the authorities in the respondent AFC to re-calculate the payment of gratuity that the petitioners would be entitled in the facts and circumstances of their respective cases. The calculation be done within a period of fifteen days from the date of receipt of a certified copy of this order and if the calculation so arrived requires some further amount to be paid to the petitioners, the same be paid to the petitioners within a period of three months thereafter. On the other hand, if the amount arrived at would be less than what have already been paid to the petitioners, the same may not be recovered. The said provision would also be in conformity with the provisions of Section 5(1) of the Act of 1972, which provides for an exemption of any establishment from the operation of the provisions of the Act, if in the opinion of the appropriate Government, the employees of such establishments are in receipt of gratuity or



pensionary benefits not less favourable than the benefits conferred under the Act. If the petitioners are further aggrieved by the amount that may be arrived at, the petitioners may take recourse to the provisions of section 7(4) of the Act of 1972.

26. Any subsequent calculation that may be arrived at pursuant to this order would prevail over the impugned communications dated 17.10.2019 in respect of the petitioner No. 1 Sri Bhabendra Nath Sarma and other similar communications in respect of the other petitioners. If upon making the calculation strictly under the provisions of Section 4(2) of the Act of 1972 including the Exception thereof, it is found that some further amounts are required to be paid, it will be open between the respondent AFC and the respondent LICICI to settle it amongst themselves as to who will make the payment.

27. The writ petition is allowed as indicated above.

JUDGE

Comparing Assistant