

***HON'BLE SRI JUSTICE RAVI NATH TILHARI**

+WRIT PETITION No.22498 of 2021

%22.04.2022

The Executive Engineer, BRR
Vamsadhara Project,
Amadalavalasa, Srikakulam
District and another.

....Petitioners.

And:

1. Jogi Ramulu and others.

.....Respondents

! Counsel for the petitioners : G.P for Services-II
^ Counsel for the respondents : Sri V. Sudhakar Reddy for
1st respondent

< Gist:
> Head Note:

? Cases referred:
1.2021 SCC OnLine SC 829
2. AIR 1979SC 1981
3. 2013(2) ALD 325
4.1988(2)SCC 537
5.978 (2) SCC 213

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....Respondents

DATE OF JUDGMENT PRONOUNCED: 22.04.2022.

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE RAVI NATH TILHARI

- | | |
|---|--------|
| 1. Whether Reporters of Local newspapers may be allowed to see the Judgments? | Yes/No |
| 2. Whether the copies of judgment may be Marked to Law Reporters/Journals | Yes/No |
| 3. Whether Your Lordships wish to see the fair Copy of the Judgment? | Yes/No |

RAVI NATH TILHARI, J

HON'BLE SRI JUSTICE RAVI NATH TILHARI**WRIT PETITION No.22498 OF 2021****JUDGMENT:**

1. Heard learned Government Pleader for Services-III for the petitioners and Sri V. Sudhakar Reddy, learned counsel for the 1st respondent. The respondents 2 and 3 are the authorities who have passed the orders under challenge.

2. Learned Government Pleader for the petitioners submits that the 1st respondent herein was initially appointed as Nominal Muster Roll (NMR) Man Mazdoor in the year 1972. He worked up to June, 1984 and thereafter his services were terminated against which he approached the Industrial Tribunal-cum-Labour Court, Visakhapatnam in I.D.No.51 of 1991 in which the award dated 25.09.1996 was passed directing the petitioners herein to reinstate the first respondent into duty within two months. Challenging the said award, the petitioners filed the Writ Petition No.13371 of 1997 which was dismissed on 14.07.2003. Thereafter, the first respondent was reinstated into duty. Again his services were terminated on 05.01.2005. Challenging the said action, the 1st respondent filed Writ Petition No.1498 of 2005 which was disposed of vide judgment dated 31.03.2010 directing the petitioners herein to consider him for regularization. Alleging disobedience of the order dated 31.03.2010, the 1st respondent filed C.C.No.1373 of 2011 in which the petitioners have filed their response. The first respondent retired on 31.01.2015 on attaining the age of superannuation.

3. After his retirement, the first respondent filed P.G.No.1 of 2015 before the Assistant Commissioner of Labour, Srikakulam under the Payment of Gratuity Act, 1972 (for short, "the Act 1972") for payment of gratuity of Rs.2,05,962/- in which the petitioners filed their written statement *inter alia* stating that the 1st respondent was not entitled for

payment of any gratuity. However, the Assistant Commissioner of Labour, Srikakulam-3rd respondent passed the award dated 20.08.2017 directing the first petitioner herein to pay an amount of Rs.2,05,962/- to the 1st respondent together with interest at the rate of 12% per annum from the date of retirement. The award was challenged by the petitioners in P.G.F.A.No.1 of 2019 which was dismissed by the appellate authority under the Act, 1972 and the Deputy Commissioner of Labour (FAC), Srikakulam-2nd respondent, vide order dated 01.06.2020.

4. Challenging the aforesaid orders, the present writ petition under Article 226 of the Constitution of India was filed for the following reliefs:

“It is hereby prayed that this Hon’ble Court may be pleased to issue a Writ of Certiorari and call for the record relating to P.G.No.01 of 2015 dated 28.03.2017 passed by the 3rd respondent and further confirmed in PGFA No.1 of 2019 dated 01.06.2020 by the 2nd respondent and to quash or set aside the same by holding as erroneous and contrary to the provisions payment of Gratuity Act, 1972.”

5. Learned counsel for the petitioner submits that the Irrigation Department is not an establishment under Section 1(3)(b) of the Act, 1972. He further submits that the 1st respondent hereinbeing Nominal Muster Roll (NMR) is not an employee under Section 2(e) of the Act, 1972. Consequently the first respondent is not entitled to the payment of any gratuity under the Act, 1972. The orders under challenge deserve to be quashed. He has placed reliance on the judgment of the Hon’ble Apex Court in case of **State of Madhya Pradesh and others vs. Somdutt Sharma**¹.

6. Sri V. Sudhakar Reddy, learned counsel for the first respondent submits that the Irrigation Department is an ‘establishment’ within the meaning of Section 1(3)(b) of the Act, 1972. He further submits that the

¹ 2021 SCC OnLine SC 829

first respondent is an ‘employee’ within the meaning of Section 2(e) of the Act, 1972. Consequently, the 1st respondent is entitled for payment of gratuity under Section 4 of the Act, 1972. There is no illegality in the orders impugned in the writ petition. He has placed reliance on the judgments in the cases of **State of Punjab vs. Labour Court Jullunder and others**² and **Nihal Ahmed Siddiqi and another vs. Bharat Heavy Electricals Ltd., Hyderabad and another**³, in support of his contentions.

7. I have considered the submissions advanced by the learned counsels for the parties and perused the material available on record.

8. In view of the submissions advanced by the learned counsels for the parties, the following points arise for consideration:-

- i) Whether the Irrigation Department is an ‘establishment’ under Section 1(3)(b) of the Act, 1972?
- ii) Whether the 1st respondent on Nominal Muster Roll (NMR) Man Mazdoor, is an ‘employee’ within the meaning of Section 2(e) of the Act, 1972?
- iii) Whether the impugned orders call for any interference in the exercise of writ jurisdiction under Article 226 of the Constitution of India?

9. To decide the first point, it is relevant to reproduce Section 1(3)(b) of the Act, 1972, which defines ‘establishment’ as under:-

Section.1

Short title, extent, application and commencement.

(1)

(2)

(3) It shall apply to—

(a) every factory, mine, oilfield, plantation, port and railway company;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;

(c)

² AIR 1979SC 1981

³ 2013(2) ALD 325

(3A) A shop or establishment to which this Act has become applicable shall continue to be governed by this Act notwithstanding that the number of persons employed therein at any time after it has become so applicable falls below ten.]

(4).....”

10. Learned counsel for the petitioners submits that “any law for the time being in force in relation to Shops and Establishments in a State” as used in Clause (b), in respect of the State of Andhra Pradesh, would refer to the A.P Shops and Establishment Act, 1988” (In short, “the Act, 1988”) which defines ‘Establishment’ under Section 2(10) of the Act, 1988 as under:

Section 2 definitions :-

In this Act unless the context otherwise requires:-

“(10).Establishment’ means a shop, restaurant, eating-house, residential hotel, lodging house, theatre or any place of public amusement or entertainment and includes a commercial establishment and such other establishment as the Government may by notification, declare to be an establishment for the purposes of this Act.”

Based on the aforesaid definition, learned counsel for the petitioners submits that the Irrigation Department is neither a shop as defined under Section 2(21) nor is a restaurant, eating house, residential hotel, lodging, lodging house, theatre as defined in Section 2(22), or any place of public amusement or entertainment nor a Commercial Establishment as defined under Section 2(5) of the Act, 1988. He submits that any notification by the State Government to declare the Irrigation Department as an establishment, has also not been issued. Consequently, the Irrigation Department is not an establishment under Section 1(3)(b) of the Act, 1972.

11. The aforesaid submission of the learned counsel for the petitioners based on Section 2(10) of the Act, 1988 deserves rejection as being without any substance.

12. A bare reading of the Clause (b) of Sub Section (3) of Section 1 of the Act, 1972 shows that the payment of Gratuity Act, 1972 applies to every shop or ‘establishment’ within the meaning of any law for the time being in force in relation to Shops and Establishment in a State in

which 10 or more persons are employed or were employed on any day of the preceding twelve months.

13. The expression 'Law' as used in Section 1(3)(b) of the Act, 1972, was considered by the Hon'ble Apex Court, in the case of **State of Punjab** (supra), in which it has been held that the expression 'law', in the expression "any law for the time being in force in relation to the Shops and Establishment in a State" under Section 1(3)(b) of the Act, 1972 is comprehensive in its scope, and can mean, a law in relation to shops as well as separately, a law in relation to establishments, or a law in relation to shops and commercial establishments, and a law in relation to non commercial establishments. It was further held that Section 1(3)(b) of the Act, 1972 applies to every establishments within the meaning of any law for the time being in force in relation to establishments in a State. Such an establishment would include an Industrial Establishment within the meaning of Section 2(ii) of the Payment of Wages Act. It was further held that the Payment of Gratuity Act, 1972, shall apply to an establishment in which any work relating to construction, development or maintenance of buildings, roads, bridges or canals or relating to operations connected with navigation irrigation or the supply of water or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on.

14. Paragraph 3 of **State of Punjab** (supra) is reproduced as under:

"3. In this appeal, the learned Additional Solicitor- General contends on behalf of the appellant that the [Payment of Gratuity Act, 1972](#) cannot be invoked by the respondents because the Project does not fall within the scope of [Section 1\(3\)](#) of that Act. [Section 1\(3\)](#) provides that the Act will apply to :

"(a) every factory, mine, oilfield, plantation, port and railway company;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a

State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;

(c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf."

According to the parties, it is clause (b) alone which needs to be considered for deciding whether the Act applies to the Project. The Labour Court has held that the Project is an establishment within the meaning of the [Payment of Wages Act, section 2\(ii\) \(g\)](#) of which defines an "industrial establishment" to mean an "establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on." It is urged for the appellant that the [Payment of Wages Act](#) is not an enactment contemplated by [section 1\(3\)\(b\)](#) of the Payment of Gratuity Act. [The Payment of Wages Act](#), it is pointed out, is a central enactment and [section 1\(3\)\(b\)](#), it is said, refers to a law enacted by the State Legislature. We are unable to accept the contention. [Section 1\(3\) \(b\)](#) speaks of "any law for the time being in force in relation to shops and establishments in a State." There can be no dispute that the [Payment of Wages Act](#) is in force in the State of Punjab. Then, it is submitted, the [Payment of Wages Act](#) is not a law in relation to "shops and establishments". As to that, the [Payment of Wages Act](#) is a statute which, while it may not relate to shops, relates to a class of establishments, that is to say, industrial establishments. But, it is contended, the law referred to under [section 1\(3\) \(b\)](#) must be a law which relates to both shops and establishments, such as the Punjab Shops & Commercial Establishments Act, 1958. It is difficult to accept that contention because there is no warrant for so limiting the meaning of the expression "law" in [section 1\(3\) \(b\)](#). The expression is comprehensive in its scope, and can mean a law in relation to shops as well as, separately, a law in relation to establishments, or a law in relation to shops and commercial establishments and a law in relation to noncommercial establishments. Had [section 1\(3\)\(b\)](#) intended to refer to a single enactment, surely the appellant would have been able to point to such a statute, that is to say, a statute relating to shops and establishments, both commercial and non-commercial. The Punjab Shops & Commercial Establishments Act does not relate to all kinds of establishments. Besides shops, it relates to commercial establishments alone. Had the intention of Parliament been, when enacting [section 1\(3\)\(b\)](#), to refer to a law relating to commercial establishments, it would not have left the expression "establishments" unqualified. We have carefully examined

the various provisions of the [Payment of Gratuity Act](#), and we are unable to discern any reason for giving the limited meaning to [section 1\(3\) \(b\)](#) urged before us on behalf of the appellant. **Section 1(3) (b) applies to every establishment within the meaning of any law for the time being in force in relation to establishments in a State. Such an establishment would include an industrial establishment** within the meaning of [section 2\(ii\) \(g\)](#) of the [Payment of Wages Act](#). Accordingly, we are of opinion that the **Payment of Gratuity Act applies to an establishment in which any work relating to construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on.** The Hydel Upper Bari Doab Construction Project is such an establishment, and the [Payment of Gratuity Act](#) applies to it.”

15. Section 2(ka) of the Industrial Disputes Act, 1947 defines Industrial Establishment as under:

"(ka) "Industrial establishment or undertaking" means an establishment or undertaking in which any industry is carried on: Provided that where several activities are carried on in an establishment or undertaking and only one or some of such activities is or are an industry or industries, then,--

(a) if any unit of such establishment or undertaking carrying on any activity, being an industry, is severable from the other unit or units of such establishment or undertaking, such unit shall be deemed to be a separate industrial establishment or undertaking.”

16. Section 2(j) of the Industrial Disputes Act, 1947 defines ‘industry’ as under:-

“(j) Industry" means any business, trade, undertaking, manufacture or calling of employers and includes any calling, service, employment, handicraft, or industrial occupation or avocation of workmen”

17. In **Des Raj and others vs. State of Punjab and others**⁴, the Hon'ble Apex Court held that the main functions of the Irrigation Department where subjected to the Dominant nature test clearly come within the ambit of industry. Paragraph 13 of **Des Raj** (supra) reads as under:

“13. The Administrative Report of the facts found by the High Court in the instant case have attempted to draw out certain special features. The legal position has been indicated in the earlier part of our judgment. On the tests, as already laid down in the judgments, we do not think these facts found in this case can take out the Irrigation Department outside the purview of the definition of 'industry'. We have already referred to the Dominant Nature test evolved by Krishna Iyer, J. The main functions of the Irrigation Department where subjected to the Dominant Nature test clearly come within the ambit of industry. We have not been able to gather as to why even six years after the amendment has been brought to the definition of industry in [section 2\(j\)](#) of the Act the same has not been brought into force. This Court on more than one occasion has indicated that the position should be clarified by an appropriate amendment and when keeping in view the opinion of this Court, the law was sought to be amended, it is appropriate that the same should be brought into force as such or with such further alterations as may be considered necessary, and the legislative view of the matter is made known and the confusion in the field is cleared up.”

18. The petitioners have not laid any foundation in the writ petition nor it has been contended by the learned counsel for the petitioners that the irrigation department in State of Andhra Pradesh discharges regal or sovereign functions of the State, nor that applying the 'Dominant nature test' as laid down in **Bangalore Water Supply and Sewerage Board vs. A. Rajappa**⁵, and applied in **Des Raj** (supra), the main functions of the Irrigation Department in State of Andhra Pradesh fall outside the purview of the definition of Industry.

19. Therefore, in view of the above pronouncement of law, the Irrigation Department of State of Andhra Pradesh is also an 'industry'

⁴ 1988(2)SCC 537

⁵ 1978 (2) SCC 213

under Section 2(j) of the Act, 1947. It being an industry would be an 'Industrial Establishment' under Section 2(ka) of the Act, 1947 and in view of the law laid down in the case of **State of Punjab** (supra) that Section 1(3)(b) of the Act, 1972 applies to every establishment within the meaning of any law for the time being in force in relation to establishments in a State, including industrial establishment; and the work of the Irrigation Department relating to the operations connected with Irrigation supply of water, the 'Irrigation Department' in the State of A.P is also an 'Establishment' under Section 1(3)(b) of the Payment of Gratuity Act, 1972.

20. In **Somdutt Sharma** (supra), upon which reliance has been placed by the learned counsel for the petitioners to submit that the Irrigation Department is not an Industrial Establishment, the expression 'industrial establishment' was under consideration in the context of Section 25(L) of the Industrial Disputes Act 1947.

21. Section 25(L) of the Industrial Disputes Act defines the Industrial Establishment as under:

"25L. Definitions.- For the purposes of this Chapter,--

(a) "Industrial Establishment" means--

(i) a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948);

(ii) a mine as defined in clause (i) of sub- section (1) of section 2 of the Mines Act, 1952 (35 of 1952); or

(iii) a plantation as defined in clause (f) of section 2 of the Plantations Labour Act, 1951 (69 of 1951);

(b) notwithstanding anything contained in sub- clause (ii) of clause (a) of section 2,--

(i) in relation to any company in which not less than fifty- one per- cent of the paid- up share capital is held by the Central Government, or

(ii) in relation to any corporation[not being a corporation referred to in sub- clause (i) of clause (a) of section 2] established by or under any law made by Parliament, the Central Government shall be appropriate Government."

22. A perusal of the above definition of 'industrial establishment' shows that it is only for the purposes of Chapter-V of B of the I.D. Act.

23. According to Section 25(L)(a)(i), 'Industrial Establishment' means a factory as defined in Clause (m) of Section 2 of the Factories Act, 1948.

24. In **Somdutt Sharma** (supra), the Hon'ble Apex Court recorded that there was no finding that the Irrigation department was doing manufacturing activity as provided in Sub Clause (k) of Section 2 of the Factories Act; it was in the context of Section 25 L(a)(i) of Section 2(k) of the Factories Act. The definition of 'Industrial Establishment' under Section 2(ka) of the Industrial Disputes Act, 1947, is a wider definition than under Section 25L of I.D Act.

25. I am of the considered view that the Irrigation Department is an industry covered under the expression 'Industrial Establishment' under Section 2(ka) of the Act, 1947 and therefore it would also be an 'establishment' under Section 1(3)(b) of the Act, 1972, in view of the law laid down in **State of Punjab** (supra), even if it may not be an industrial establishment under Section 25L for the purposes of Chapter-V B of the I.D Act.

26. Now coming to the next point whether 1st respondent is an employee under Section 2(e) of the Act, 1972 or not.

27. Section 2(e) of the Act, 1972 defines 'employee' as under:

“(e) “employee” means any person (other than an apprentice) employed on wages, in any establishment, factory, mine, oilfield, plantation, port, railway company or shop, to do any skilled, semi-skilled, or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, and whether or not such person is employed in a managerial or administrative capacity, 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.”

28. Learned counsel for the petitioners submits that the 1st respondent is not an employee within the meaning of Section 2(e) of the Act, 1972 as the 1st respondent is a Nominal Muster Roll (NMR).

29. The point is no more *res integra* as in the case of **Nihal Ahmed Sidiqi** (supra), this Court held that the definition of the expression 'employee' in Section 2(e) of the Act, 1972 is liberal and in wide terms. Any person employed on wages in any establishment or factory to do any skilled, semi skilled or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied is an employee. It was further held that the services rendered by an employee on N.M.R basis or on work-charged establishment cannot be ignored completely for the purposes of payment of gratuity by the establishment and for the services rendered by an employee on NMR basis or on work charged establishment, he earns a right to seek gratuity for the corresponding length of service put up by him.

30. Paragraphs 15 to 17 of **NihalAhmed Sidiqi** supra) are being reproduced as under:

“15. When we look at the definition of the expression 'employee' as defined in Section 2(e) of the Payment of Gratuity Act, 1972, one would appreciate that that it is couched in very liberal and in wide terms. Any person employed on wages in any establishment or factory to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, he answers the definition of the expression 'employee'.

16. As per Section 4 of the Payment of Gratuity Act, Gratuity becomes payable to such an employee on termination of his employment after he has rendered continuous services for not less than five years.

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease.

17. It therefore becomes imminently clear that for the service rendered by an employee on Nominal Muster Roll basis or on Work-charged establishment, he earns a right to receive gratuity for the corresponding length of service put in by him. In the instant case, the service rendered by the petitioners on NMR basis or work-charged establishment could not have been ignored completely for the purposes of payment of gratuity by BHEL, upon accepting their offer to retire voluntarily.”

31. In view of the aforesaid, for the services rendered by the 1st respondent as NMR he is entitled for payment of gratuity.

32. Thus considered on **point No.1** it is held that the irrigation department is an establishment under Section 1(3)(b) of the Payment of Gratuity Act, 1972. On **point No.2** it is held that an employee is entitled for gratuity under the provisions of the Act, 1972 even for the services rendered by him as N.M.R basis or on work charged establishment. Accordingly, on **point No.3**, it is held that the impugned orders do not suffer from any illegality and call for no interference in the exercise of writ jurisdiction.

33. The writ petition lacks merit and is dismissed. No order as to costs.

Consequently, the Miscellaneous Petitions, if any, shall also stand closed.

RAVI NATH TILHARI, J

Date:22.04.2022,

Note:

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HON'BLE SRI JUSTICE RAVI NATH TILHARI

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22.04.2022

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