PETITIONER:
JOTINDRA NATH ROY

Vs.

RESPONDENT:
SURENDRA HIKRAM SINGH AGARWAL & ORS.

DATE OF JUDGMENT: 09/04/1996

BENCH:
FAIZAN UDDIN (J)
BENCH:
FAIZAN UDDIN (J)
KULDIP SINGH (J)

CITATION:
1996 AIR 1736 1996 SCC (4) 403
JT 1996 (4) 296 1996 SCALE (3)499

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

Faizan Uddin, J.

1. Leave Granted.

2. This appeal by one of the retired employees of the Trust created by one Later Babu Lal Agarwal has been directed against the order dated July 25, 1995 passed in appeal by the Division Bench of the Calcutta High Court setting aside the order passed on December 12, 1994 by a learned Single judge of that Court in Civil Suit No. 703/1993 whereby the learned Single judge has held that the appellant was entitled for the pension as well as the gratuity from the said Trust.

3. Late Babu Lal Agarwal, during his life time, had executed a Will and testament creating a Trust for religious and charitable purposes. In a suit between one Amrita Bibi the widow of the pre-deceased son of late Babu Lal Agarwal and his other heirs a comprehensive scheme was framed for administration of the Trust. Amongst other matters, the scheme provided for grant of pension and other facilities to the employees of the Trust and the relevant provisions in the said scheme were as under:-

> "(a) The Trustees at their discretion may grant to such of the employees of the Estate who have satisfactorily served with the Estate for a period of not less than 30 years, pension either by monthly payments or by payment of a lump sum.
>
> (b) The pension granted to an employee in case of monthly payments should not ordinarily be more than one third of his last pay and in case of lump sum payment should not be a sum more than four

thousand rupees.

(c) The Trustees may at their discretion also pay gratuity to such members of the family of an employee dying during his service with the Estate as they think fit. The amount of such gratuity shall not ordinarily exceed one year's full pay last drawn by such deceased employee."

4. The appellant being a retired employee of the Trust claimed pension and gratuity by contending that he had joined the employment of the Trust on April, 1950 and retired as Personal Assistant of the Trustees on April 8, 1993 while he was receiving a salary of Rs. 2322/- per month and that having regard to the relevant terms of the scheme prepared by the High Court and reproduced in the foregoing para, he is entitled to pension at the rate of one third of the last salary drawn by him and also the gratuity as per rules in accordance with the provisions of Payment of Gratuity Act, 1972. It was alleged that inspite of the demand having been made by the appellant the Trustees failed to release the amount of pension and gratuity payable to him and, therefore, the appellant approached the High Court for a direction to the Trustees to pay pension and gratuity with interest.

5. Learned Single Judge took the view that the retirement benefits are no longer bounty of the employers but they constitute a right under the law and and, therefore, the appellant was entitled for the pension. As regards the gratuity the learned Single Judge relying on the provisions of Section 14 of the Payment of Gratuity Act, 1972 took the view that the scheme being silent with regard to the payment of gratuity does not alter the situation in so far as entitlement of gratuity is concerned. On appeal being preferred by the respondent, one of the Trustees, the Division Bench of the High Court took a contrary view, set aside the order of the learned Single Judge and dismissed the appellant's claim for pension and gratuity. The Division Bench took the view that the Trust cannot be regarded as an establishment as defined in Section 2(5) of the West Bengal Shops and Establishment Act, 1963 and, therefore, the provisions of Payment of Gratuity Act, 1962 could not be attracted in the case of the appellant as the appellant did not fall in any of the categories mentioned in sub-clauses (a) and (c) of sub-section (3) of Section 1 of the Payment of Gratuity Act, 1972.

6. Learned counsel for the appellant assailed the view taken by the Division Bench of the High Court and urged that the Division Bench was patently wrong in holding that the appellant should have filed a suit for pension and the same could not be granted by the High Court in a petition filed to that affect. In our considered opinion there is much substance in this submission. The Division Bench has disallowed the claim of pension on the ground that according to the definition of an employee given in Section 2(e) of the Payment of Gratuity Act 1972 an employee means any person whose wages do not exceed Rs. 2500/- per mensum and as it was not certain whether the appellant was getting basic pay to the tune of Rs. 2322/- per month inclusive of D.A. or not, he could not be treated to be an employee. In our opinion it is clearly a mistaken view of the Division Bench as the appellant had asserted in the petition before the High Court supported by an affidavit that the last salary drawn by the appellant at the time of his retirement

was Rs. 2322/- per month only and this fact has neither been controverted by the respondent nor there is any assertion that the appellant was getting any O.A.over and above the aforesaid amount. In this view of the matter there was no occasion to assume that the appellant was getting wages exceeding Rs. 2500/-.

7. Apart from the above facts, the appellant had claimed pension on the basis of a provision to that effect in the scheme itself. There is no dispute about the said scheme nor the said scheme was sought to be amended by the appellant. Clauses (a) and (b) of the scheme reproduced in para 3 above clearly go to show that the appellant was entitled for the pension as he had served for a period of about 43 years, much beyond the requisite period of 30 years. In the absence of any material to show that the services of the appellant were unsatisfactory there is no reason to deny the exercise of discretion in favour of the appellant for grant of pension as envisaged in the scheme of the Trust sanctioned by the High Court itself.

8. Learned counsel for the appellant submitted that the Division Bench took an erroneous view that the religious and charitable Trust is not an Establishment within the meaning of Section 2(5) read with Section 2 (2) of West Bengal Shops and Establishment Act, 1963 and consequently the provisions of Payment of Gratuity Act were not attracted to the instant case.

9. After hearing the learned counsel for parties and on perusal of the record we are unable to persuade ourselves to accede to the view taken by the Division Bench in this behalf. A reading of the judgment of the learned Single Judge will go to show that it was nobody’s case that the provisions of Payment of Gratuity Act could not be pressed into service but the claim of gratuity was contested on the ground that the scheme of the Trust as framed by the High Court did not provide for payment of gratuity to the retired employees though in the event of an employee dying in harness, certain provisions have been made in the scheme for payment of gratuity to the members of the family of such employee. It appears that no assertion was made before the High Court that the Trust was not an Establishment within the meaning of the relevant provisions of the Payment of Gratuity Act. Neither any material has been placed before us nor any argument was advanced on behalf of the respondent that the Trust is not an Establishment as contemplated in the Payment of Gratuity Act. On the contrary the appellant has placed on record a notification dated July 16, 1972 published by the Government of India, Ministry of Labour and Rehabilitation Department published in Part 2, Section 3 (II) of the Gazette of India whereby the Trust Estate in question was treated to be an Establishment and the provisions of Employees Provident Funds and Family Pension Fund Act, 1952 were applied to the said Trust Estate of Babu Lal Agarwal in relation to employees of the said Trust treating it to be an Establishment under the said Act. A photo-copy of the said notification has been placed on record of this court, which has not been disputed by the respondent. This position further strengthens the fact that the Trust has been treated to be an Establishment. Consequently, the our opinion having regard to the facts and circumstances of the present case the provisions of the Payment of Gratuity Act would be attracted and the appellant would be entitled for the gratuity also.

10. For the aforesaid reasons the appeal succeeds and is hereby allowed with costs. The impugned order of the Division Bench is set aside and the order of learned Single

Judge is restored. Cost quantified at Rs. 2000/-.