Bombay High Court Premlata Digambar Rao Deo vs Principal, St. Philomine'S ... on 4 November, 1996 Equivalent citations: 1997 (2) BomCR 591, 1997 (75) FLR 897, (1997) IILLJ 1050 Bom Author: N Vyas Bench: S Nijjar, Y Vyas JUDGMENT N.D. VYAS, J. 1. By the present writ petition under Article 226 of the Constitution of India, the petitioner seeks a declaration to the effect that she is entitled to get gratuity "In the Ist Respondent School under the provisions of the Payment of Gratuity Act, 1972 (the Gratuity Act for short) and parys for certiorari for quashing and setting aside the judgment and Order dated September 10 11, 1987 passed by the Controlling Authority under the said Act and the Judgment and Order 10dated November 23, 1987 passed by the appellate authority under the said Act. The petitioner has also prayed for an appropriate order directing the Sth Respondent to issue necessary Notification as per the provisions of Section 1(3)(c) and 1(4) of the Gratuity Act covering Private Schools under the provisions of the said Act. However, at the time of arguments, this last prayer mentioned hereinabove was not 10 pressed. 2. Briefly stated the facts giving rise to the in, present petition are as under : The petitioner was employed by the Ist Respondent-Primary School, an unaided school. The 1st Respondent-School is a registered Society, registered under the Societies Registration Act, 1860. The petitioner was initially employed as a temporary teacher from June 13, 1967 and was later confirmed in the said Dost. She retired on superannuation on November 29, 1985, thus completing more than 17 years. After her retirement, the petitioner made an application to the 1 st Respondent demanding gratuity. Having failed in the attempt, she filed an application before the Controlling Authority under the said Act. The claim of the petitioner was for Rs. 13.084.20. The Controlling Authority dismissed the said application by its Judgment and Order dated September 11, 1987. An appeal therefrom preferred by the petitioner to the appellate authority under the said Act, was also dismissed. Hence the present petition. 3. Mr. Apte, the learned Advocate appearing for the petitioner submitted that the provisions of the Gratuity Act were applicable in the case of the petitioner inasmuch as that the Respondent School is an establishment to which the said Act is applicable and the petitioner being an 'employee' was entitled to benefits of gratuity as provided by the said Act. it was thus his submission that in the instant case, the required twin tests viz., the 1 st Respondent School being an 'establishment' and petitioner being an 'employee' were satisfied. On the other hand Mr. Bukhari, the learned Advocate 3 appearing for the 1 st Respondent-School joined issues with Mr. Apte and submitted that the I st Respondent-School was neither an 'establishment' to which the Act was applicable nor was the petitioner an 'employee' to whom benefits of gratuity under the Gratuity Act were available. It was further submitted by Mr. Bukhari that the service conditions of Private School are governed by the Maharashtra Employees of Private Schools (Conditions of Service) Regulations Act, 1977 which is a complete Code in itself. Therefore, the petitioner in any view of the matter was not entitled to claim benefit under the said Act. 4. Thus an important question of law is required to be determined viz., whether a teacher of a private school is entitled to gratuity under the Payment of Gratuity Act, 1972. 5. Before we deal with the rival con-

tentions of the parties, at the outset we wish to make it clear that the Payment of Gratuity Act, 1972 is a piece of social welfare legislation. It is intended to give benefit to employees working in establishments. Thus the provisions of the Act are required to be construed liberally. They should be so construed that the beneficial intention of the legislature is not frustrated by a strict 15 or narrow interpretation and the benefit of the Act reaches the maximum possible persons. This is settled position in law. It is not necessary to refer to the entire gamut of authorities cited in this behalf. Suffice to say that Mr. Apte was ao justified in relying on the decision of the Supreme Court in the matter of Royal Talkies, Hyderabad and Others v. Employees' State Insurance Corporation, reported in (1978-11-LLJ-390) where the Supreme Court while dealing with inter alia the definition of 'employee : given under Section 2(9) of the Employees State Insurance Act. 1948 held that the said definition had been cast deliberately in the widest terms and the draftsman had endeavoured to cover every possibility so as not to exclude even distant categories of men employed either in the primary work or cognate activities and that it would defeat the object of the Statute to "truncate its semantic sweep and throw out of its ambit those who obviousi are within the benign contemplation of the act." Further, we may also refer to a recent decision of the Supreme Court in the matter of Regional Provident Fund Commissioner, Jaipur v. Narayani Udyog, reported in (1996-11-LLJ-1063) wherein the Apex Court while dealing with the definition of 'establishment' with reference to Section 7A of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, inter alia held that the High Court had not considered in proper perspective the provisions of the said Employees' Provident Funds Act which was a beneficial legislation" to provide healthy security to the workmen. 6. In order to appreciate the rival contentions of the parties, it would be advantageous to refer to and reproduce where necessary, the relevant pro isions of the Gratuity Act. The preamble of the said Act states : "An Act to provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oil fields, plantations, ports, railway companies, shops or other establishments and for matter connected therewith or incidental thereto". As far as the extent, application and commencement of the said Act is concerned, Section 1 provides as follows : "1. Short title, extent, application and commencement. (1) This Act may be called the Payment of Gratuity Act, 1972. (2) It extends to the whole of India : Provided that in so far as it reflects to plantations or Ports it shall not extend to the State of Jammu and Kashmir. (3) It shall apply to (a) every factory, mine, oil field, 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 mondis; (c) such other establishment or class of establishnients, 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, 40 specify in this behalf. (3-A) 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) It shall come into force on such date as the Central Government may, by notification appoint." Section 2 deals with definitions and Section 2(c) defines 'employee' as follows : "(e)"Employee" means any person (other than an apprentice) employed on wages in any establishment, factory, mine, oil field, plantation, ort, railway company or shops, to do any stilted, semi-skilled or unskilled, manual, supervisory, technical or clerical work, whether the tenns 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 perso..i who holds a civil post under the Central Govermnent or a State Government, and is governed by any other Act or by any rules providing for payment or gratuity." As far as 'eniployer'is concerned, the same is defined in Section 2(f) to mean in relation to any establishment, factory, mine, oil field, plantation port, railway company or shop : (i) ..... (ii) ..... (iii) in any other case, the person, who or the authority which has the ultimate control over the affairs of the establishment, factory, mine, oil field, plantation, port railway company or shop and where the said affairs are entrusted to any other person, whether called a Manager or Managing Director or by any other name, such person." Section 2-A defines "Continuous Service". Section 3 provides for appointment by appropriate Government by notification of any officer to be Controlling Authority who would be responsible for the administration of the 'net. Section 4 provides that gratuity would be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years and this payment is to be made either on his superannuation or retirement, resignation or on his death or disablement due to accident or disease. Section 5 provides for exemption to any establishment, factory, mine, oil field, plantation, port, railway company or shop to which the said Act applies from the operation of the provisions of the Act if, in the opinion of the appropriate Government, the employees in such establishment etc., are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under the Act. Sub-section (2) thereof provides for similar exemption in respect of any employee or class of employees employed in any establishment etc., if in the opinion of the appropriate Government, such employee or class of employees are in receipt of gratuity or pensionary benefits not 1 less favourable than the benefits conferred under this Act. Section 6 provides for nomination by each employee. Section 7 provides for determination of the amount of gratuity. Section 8 provides for procedure for recovery of gratuity 1 payable under the Act. Section 10 provides for exemption from liability in certain cases. The above are some of the provisions of the said Act which in our view would show the Scheme of Act. 7. From the above provisions, it would appear that although 'employee' has been specifically defined in the Gratuity Act, as far as ,establishment' is concerned, it is not specifically defined. However, Section 1(3)(b) reproduced above would show that the Act would apply to every shop or establishment within the meaning ofany lawfor the time being inforce in relation to shops and establishments in a State 3 in which ten or more persons are employed, or were employed, on any day of the preceding twelve months. There is no dispute as to the fact that the School in question is run

in the State and that more than 10 persons are employed. There is no dispute either in respect of petitioner's length of service being more than the required period of five years. 8. Mr. Bukhari, the learned Advocate appearing for the 1 st Respondent submitted that" 'the petitioner being a teacher in a primary school established under the Maharashtra Employees' of Private Schools (Conditions of Service) Regulation Act, 1977 (Conditions of Service Act for short) was governed by the provisions thereof and the Rules made thereunder. It was his submission that the said Conditions of Service Act read with Rules farmed thereunder provided a complete Code in itself and that beyond the benefits provided for under the said Act or Rules, which excluded benefit like gratuity, the petitioner was not entitled to any other benefits. On the other hand Mr. Apte submitted that the provision, of the Payment of 10 Gratuity Act were enacted providing gratuity to an employee employed in an establishment who had rendered requisite number of years service. It was his submission that the petitioner came within the definition of employee which definiis tion according to him was wide enough to include all types of work including the work of teaching. As far as the definition of 'establishment' was concerned, Mr. Apte submitted that although there was no separate definition of 'establishment' given under the said Act, the same was to mean an establishment within the meaning of any law for the time being in force in relation to the shops and establishments in a State which meant Bombay Shops and Establishments Act in Section 2(8) thereof defines 'establishment' which meant a shop, commercial establishment, residential hotel, restaurant, eating house, theatre, 10 or other place of public amusement or entertainment to which the said Establishments Act applies and also includes such other establishments as the State Govermnent by notification declares to be an establishment for th purpose of that Act. Mr. Apte laid stress on the fact that Section 4 of the said Establishments Act provided for exemption. Under the said provision notwithstanding anything contained in the said Establishment Act, the provisions of the said Establishments Act mentioned in the third column of Schedule 11 would not apply to the establishments employees and other persons mentioned against them in the second column of the said Schedule. Proviso to the said provision provides for the notification to be published for adding to, omitting or altering any of the entries of the said Schedule. Thus Mr. Apte took us through Schedule 11 of the said Establishments Act and pointed out Item at Sr. No. 6F relating to establishments pertaining to any kind of educational activities. Thus an educational establishment, was exempted from the application of the provisions of the said Establishments Act. He relied on the decision of the Supreme Court in the matter of B. P. Hira, Works Manager, Central Railway. Parel, Bombay v. C. M. had reported in (1959-11-LLJ-397) and submitted that Section 4 of the Establishments Act grants exemptions to the establishments from the application of the provisions mentioned in col.3 of Schedule 11, and that itself postulated 10 that but for the exemption thus granted the provisions of the said Act would have applied to them. Thus it was his submission that by the very fact that under Schedule 11 of the Establishments Act Educational Institutions/Establishments were excluded from the operation of the Establishment Act meant that but for the said exemption, an

Educational Institution/ Establishment would be covered under the definition of establishment given in Section 2(8) of the said Establishments Act. He sought further support from a decision of a learned Single Judge of this Court (Nagpur Bench) in the matter of Principal, Bhartiya Mahavidyalaya, Amravati and Another v. Ranzkrishna Wasudeo Lahudkar, reported in (1994-11-LLJ-556) in which the learned Single Judge (Sirpurkar,J.) took a view inter alia relying upon (1959-11-LLJ-397) (supra) that the provisions of the Payment of Gratuity Act were applicable to an 30 educational establishment. Mr. Apte also relied on a decision of the Supreme Court in the matter of State of Punjab v. The Labour Court and Others reported in (1981-1-LLJ-354) wherein the Supreme Court inter alia held that Section 135(3)(b) of the said Gratuity Act applied to every establishment within the meaning of any law for the time being in force in relation to establishments in a State and such an establishment would include an industrial establishment 40 within the meaning of Section 2(ii)(g) of the Payment of Wages Act. 9. On the other hand, Mr. Bukhari in support of his contention that the 1st Respondent-School cannot be included within the definition of establishment, relied on several decisions. He first relied on the decision of a Division Bench of Gujarat High Court in the matter of Charutar Vidya Mandal v. Shri Mirannmiya Rehmumiya Malak and Others, reported in 1977 Lab I.C. 1647, wherein the Court was dealing with the Society registered under the Societies Registration Act whose principal activities were educational. However, the said Society was providing for transport vehicle for convenience of students and the Division Bench held that the Society was not liable to pay gratuity to the driver of the vehicle, as providing transport service to students so that they could without difficulty of having to waste their time in searching for some transport or other, was a very insignificant part in the scheme of the educational system and it would he unreasonable to lend any industrial colour to the driver's insignificant activity. In these circumstances, the Division commercial undertaking. Heavy reliance was placed on this authority inasmuch as it related to a Society registered under the Societies Registration Act of which principal activities were education. Mr. Bukhari next relied on the decision of the Andhra, Pradesh High Court in the matter of The Chairman, Government Body, S.M.V.M. Polytechnic, Tanuku and the Government of A. P. and other v. reported in (1989-11-LLJ-95) wherein a similar view was taken that although the educational institution was 'establishment' that the same was not commercial establishment. Next Mr. Bukhari relied on the Division Bench decision of this Court in the matter of S. D. Dhanawade v. The Commissioner, K,offiapur Municipal Corporation and others reported in 1991 11 CLR 231, wherein while dealing with a Medical Centre run by the Kolhapur Municipal Corporation. the Division Bench expressed an opinion that to accept the submission that the 10 Medical Centre was an establishment would amount to stretching credibility to its limits. 10. As far as above decisions are concerned, the same in our view cannot help Mr. Bukhari at all. The decision of the Division Bench of Gujarat High Court related to a driver employed by the Education Institute. The same did not deal with a teacher engaged for the purpose of teaching to the students which would have been in the; further ance of the main object of the said Ed-

ucational Institute. As far as the decision of the Andhra Pradesh High Court reported in (1989II-LLJ-95) (supra) is concerned, it came to the conclusion that an educational establishment although an establishment could not be considered to be a commercial establishment and therefore did not come within the purview of the Payment of Gratuity Act. As far as the decision of the Division Bench of this Court is concerned viz., the decision reported in 1991 11 CLR 231 (supra), the said Division Bench although referred to several decisions cited before it including (1959-11-LLJ-397) (supra) and although expressing only an opinion that to consider the Medical Centre run by the Corporation an establishment, would be stretching credibility to its limits, did not dispose off the matter on that ground. This is apparent from the fact that in the penultimate paragraph of the said Judgment, the Division Bench stated that they were not recording any conclusive finding on the is sue of the applicability of the provisions Of the Payment of Gratuity Act to the establishment of the Corporation in that case as it was not necessary to deal with inter alia the decision of the Supreme Court in (1959-11-LU-397) (supra) cited before it. The decision of the Division Bench rested only on the ground that as there was a specific understanding that the petitioner therein would not claim pension or gratuity on reaching the age of superannuation that the said, benefit could not be claimed and was not available to him. In our opinion, the decision of the Supreme Court in (1959-11-LU-397) (supra) lends support to Mr. Apte's contention that an educational 'establishment' is an establishment 3, under the provisions of the Establishments Act. In this view of the matter, we cannot accede to the submission of Mr. Bukhari that the Ist Respondent-School is not an 'establishment' as contemplated by the said Act. 11. Mr. Bukhari next submitted that the definition of 'employee' would not include a teacher of an Educational Institute. It was his submission that the types of activities covered 4, by the said definition of 'employee' were identical to such activities covered within the definition of 'workman' given in Section 2(s) of the Industrial Disputes Act. He relied on several decisions. He relied on the decision of a Division Bench of this Court (Goa Bench) in thematter of Miss. A Sundarambal v. Government of Goa, Daman and Diu and others, reported in (1983-11-LU-491) wherein it was inter alia held that a teacher was not a 'workman' as defined in Section 2(s) of the Industrial Disputes Act as a person employed in an industry must he employed in one or the other of the four capacities mentioned in the definition, to be covered by the definition of 'workman' given in Section to 2(s) of the Industrial Disputes Act and that the work of a teacher did not fall under any of those four capacities. The said decision was confirmed by the Supreme Court in (1989-LLJ-61). From the perusal of the above decision, it is ts apparent that none of these decisions deal with the position of a teacher qua an educational establishment. The decisions cited by Mr. Bukhari are in respect of a 'workman' in relation to an industry. 12. As far as we are concerned, the Supreme Court in its decision reported in (1959-11-LLJ-397) (supra) has clearly laid down that an establishment which is exempted under Schedule 11, 1, of the Shops and Establislunents Act would show that but for that exemption, the same would be covered by the Shops and Establishments Act. The position would be clear if the relevant portions of the

Supreme Court decsion are reproduced below :" "(21) Incidentally the learned Attorney General suggested, though faintly, that the establishments mentioned at Sr. Nos. 1 to 6 in 35 column 2 of Schedule II are wider than and different from the establishment as defined by Section 2(s). We do not think that this suggestion is well founded. There can be no doui)t that Section 4 grants exemptions to the 40 said establishments from the application of the provisions mentioned in col. 3 of Schedule II; and that itself postulates that but for the exemption thus granted the provisions of the Act would have applied to them. Indeed the Scheme of Schedule II shows that whereas all the provisions of the Act are made inapplicable to the establishments and offices enumerated at serial Nos. 1 to 6 including 6(a) to 6 (k), in regard to the others which are enumerated at serial Nos. 7 to 55 it is only some provisions of the Act specified in col. 3 that are excluded. In other words, the remaining Sections not so specified would apply to them. If that is so, they would apply to them . If that is so they must be and are establishments under Section 2(8)5 of the Act. (22) In this connection it must be borne in mind that Section 2(8) empowers the State Government to include, by notification any office or institution within the definition of establishment and so the inclusion of any such office or institution in col. 2 of Schedule If would make it an establishment under the Act, and as such it would he governed 14 by it subject of course to the corresponding entry in col. 3. That is why we think that the suggestion of the learned Attorney General as the denotation and character of establishments enumerated in serial Nos. 1 to 5 in col. 2 of Schedule II cannot be accepted. All the o .fflces, establishments and other institutions mentioned in col. 2 of Schedule II are and must be held to be establishments under Section 2(8). From the above, it is clear that the Supreme Court held that Section 4 of the Shops and Establishments Act granted exemption to the establishments from the application of the provisions mentioned in col 3. of Schedule II and that postulated that but for the exemption thus granted the provisions of the Shops and Establishinents Act would have applied to them. The Supreme Court further at the end of para 22 has specifically held that all the offices, establishments and other institutions mentioned in col. 2 of Schedule 11 are and must be held to be establishments under Section 2(8) of the Bombay Shops and Establishments Act. Entry 6F added by G.N., lab D-No 8148-1 dated April 28, 1949 deals with establishments pertaining to any kind of educational activities (excepting certain coaching or tuition classes) and exempts them from application of all the provisions of the said Establishments Act. In the light of the clear pronouncement by the Supreme Court in the matter it has done as shown above, we are not at all impressed by the submission made by Mr. Bukhari. 13. In our opinion, if the construction of definition of the word 'employee' was required to be made with reference to the scheme of the object of the Act, it cannot be gainsaid that the object of the Act is to provide for a scheme for the payment of gratuity to certain categories of employees engaged in certain specified types of concerns. The gratuity is, in its essence, a payment in consideration of past services paid only at the end of the said service when the employment terminates. The definition of 'employees' is wide enough to include a teacher indulging in teaching activities in an Educa-

tional Institute which in our view would be clearly covered by the definition of establishment. An effort was made by Mr. Bukhari by relying on the decision of the Supreme Court in the matter of Unni Kdshnan v. State of Andhra Pradesh, , to buttress his submission that educational activity was neither a business, trade or profession.The Supreme Court in the case of Unni Krishnan while dealing with inter alia the question of capitation fees held :"While we do not wish to express any opinion on the question whether the right to establish an educational institution can be said to be carrying on any "occupation' within the meaning of Article 19(1)(g), perhaps, it is-we are certainly of the opinion that such activity can neither be a trade nor business not can it be a profession within the meaning of Article 19(1)(g). Trade or business normally connotes an activity carried on with a profit motive. Education has never been commerce in this country. Making it one is opposed to the ethos, tradition and sensibilities of this nation. The argument to the contrary has an unholy ring to it. Imparting of education has never been treated as trade or business in this country since time immemorial. It has been treated as a religious duty. It has been treated as a charitable activity. We agree with Gajendragadkar.J. that"education in its true aspect is more a mission and a vocation rather than a profession or trade or business however wide may be the denotation of the two latter words.." (See University of Delhi, AIR 1963 SC 50 1873)." In our opinion, the ratio of the Judgment in the case of Unni Krishnan is not applicable in the instant case before us. We are dealing with a case where the question is whether the gratuity provided by a social welfare legislation would be available to a teacher working in an educational institution or not. As indicated at the out set, the Act being a beneficial piece of legisiation, is intended to give benefit to a large number of persons and that is the reason why the word, 'employee' has been defined in such wide terms. Had it been the intention of the legislation to confine such benefit only to a particular class of employees nothing prevented the legisaation from SIMPI saying that it would apply to,.'workman' as deined under the Industrial Disputes Act. The legisalutre has also chosen not to define 'establishment' but in order to give a widest possible meaning it has provided for reference to any law for the time being in force in relation to the Shops and Establishments in a State. 14. Before we conclude, we may record that there is no dispute as to the fact that to the teachers working in primary schools which are receiving grant-in-aid from the State Government and are thus aided primary schools, gratuity is made available. The same is also available to teachers of Government Schools. That leaves out only the schools which are unaided . The provisions of the said Gratuity Act are in addition to the rights conferred on an employee under the conditions of service contained in any contract or any Act. Section 5 of the said Gratuity Act specifically provides for exemption to an establishment and/or to an employee or class of employees only when such employee or class of employees are in receipt of gratuity or pensionary benefits not less favourable than the nenefits conferred under this Act. The intention of the legislature is clear as not to confer double benefit to an employee. 15. In our opinion, the petitioner has made out a case for grant of relief as prayed. Petition is thus made absolute in terms of prayers (a) and (b). We direct the 1

st Respondent to pay the gratuity claimed by the petitioner within a period of three months hereafter. Failure to do so would entail payment of the same with interest at the, rate of 18% p.a. Thus petition made absolute. No order as to costs.