(2001) 06 BOM CK 0079

In the Bombay High Court

Case No : Writ Petition No. 1154 of 2001

Bank of India APPELLANT

Vs

Kamlakar Vishwambhar Joshi and Another RESPONDENT

Date of Decision : 25-06-2001

Acts Referred:

Bank of India Gratuity Fund Rules — Rule 8
Industrial Disputes Act, 1947 — Section 10
Payment of Gratuity Act, 1972 — Section 4(1), 4(6), 7(3A)

Citation : (2001) 4 ALLMR 663 : (2001) 4 BomCR 756 : (2001) 4 BOMLR 581 : (2001) 91 FLR 296 : (2001) 2 LLJ 1463 : (2001) 4 MhLj 591

Hon'ble Judges : D.Y. Chandrachud, J

Bench : Single Bench

Advocate : S.K. Talsania, instructed by S. Udeshi and Co, for the Appellant; Party in person, for the Respondent

Final Decision : Allowed

Judgement

D.Y. Chandrachud, J.—Rule, Returnable forthwith. The First Respondent, who is an Advocate, has appeared in person. The First Respondent waives service. By consent taken up for final hearing.

2. The First Respondent was appointed as a clerk in the Bank of India, which is the Petitioner before the Court, in 1966. In 1975, he was promoted to the Officers Cadre but, subsequently on 8th March, 1976, he was reverted back to the Clerical Cadre at his request. On 24th October, 1987, the First Respondent was placed under suspension on the charge of having misappropriated the funds of the Petitioner to the extent of Rs. 30,000/ -. A disciplinary enquiry came to be held thereafter, upon which, an order dated 2nd September. 1989 came to be passed, dismissing the First Respondent since the charge of misconduct was held to have been proved. An Industrial dispute was thereafter raised and referred to adjudication before the Central Government Industrial Tribunal. On 14th February, 1997, the Industrial Tribunal upheld the order of dismissal and came to

the conclusion that the finding of misconduct has been proved. It must be recorded that earlier, by a Part-I Award dated 18th August, 1995, the Industrial Tribunal had come to the conclusion that the disciplinary enquiry was vitiated by non-compliance of the principles of natural Justice. Consequently an opportunity was given to the employer, the Petitioner Bank, to lead evidence to substantiate the charge of misconduct. Evidence was thereafter adduced before the Industrial Tribunal which by its Award dated 14th February. 1997 held that the charge of misappropriation was proved. Consequently, the action of the Petitioner in terminating the services of the First Respondent was held to be justified. Writ Petition No. 1363 of 1998 filed by the First Respondent to challenge the award of the Tribunal is pending in this Court.

3. By a file note dated 21st March/24th April, 1997, the Assistant General Manager, in the Mumbai Main Branch of the Petitioner Bank, sought the approval of the Joint Zonal Manager in the Mumbai South Zone of the Bank for the forfeiture of an amount of Rs. 30,000/- from the gratuity that is payable to the First Respondent, being the extent of the financial loss suffered by the Bank. Though the First Respondent was eligible to receive gratuity in the total amount of Rs. 49, 110/- under the Payment of Gratuity Act, 1972, forfeiture was sought to the extent of the loss which had been suffered which was Rs. 30,000/-. On 13th May, 1997, the Joint Zonal Manager passed an order recording that the services of the First Respondent had been terminated for an act of gross misconduct due to which a loss of Rs. 30,000/- has been caused to the Bank. A decision was accordingly taken to recover the amount by forfeiting the said amount of Rs. 30,000/- from the gratuity of the First Respondent.

4. The First Respondent thereafter, filed an application before the Controlling Authority under the Payment of Gratuity Act, 1972 for a direction that the amount due and payable as and by way of gratuity be released to him. By an order dated 22nd December, 1998, the Controlling Authority allowed the application and directed that payment be made to the First Respondent. The Controlling Authority was of the view that the First Respondent was entitled to know the reasons for forfeiture and that "for want of specific order", the deduction/forfeiture of Rs. 30,000/- could not be sustained. Interest was directed to be paid at the rate of 10% on the amount of forfeited gratuity.

5. The Petitioner thereupon filed an appeal before the Regional Labour Commissioner (Central), Mumbai, who by his order dated 7th March, 2001 affirmed the order of the Controlling Authority. It must be noted that before the Appellate Authority, all the relevant documents in relation to the order of forfeiture were placed by the Bank. This was done in compliance with the direction Issued to the Bank and the application by which the relevant documents were filed are annexed at Exh. L to the Petition. These documents include the Receipts issued by the First Respondent for the balance amount of Rs. 19,100/- being the balance due and payable upon forfeiture of the sum of Rs. 30,000/-.

6. Section 4(1) of the Payment of Gratuity Act, 1972 lays down that gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years. Gratuity is payable upon superannuation, retirement, resignation , death or disablement, as the case may be. Sub-section (6) of Section 4 of the Act is relevant insofar as these proceedings are concerned, and provides as follows :

"(6) Notwithstanding anything contained in Sub-section (1),-

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee may be wholly or partially forfeited-(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of Such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

7. The Bank of India has formulated certain Rules, called, "The Bank of India Gratuity Fund Rules" to govern and regulate the payment of gratuity under the fund constituted by the Bank. The proviso to Rule 8 lays down that "there will be no forfeiture of gratuity for dismissal on account of misconduct except in cases where such misconduct causes financial loss to the Bank and in that case to that extent only."

8. In the present case. It is common ground that the disciplinary enquiry came to be conducted specifically on the charge of misconduct involving misappropriation of the funds of the Bank. Upon the charge of misconduct being held to be proved, an order of dismissal came to be passed against the First Respondent. The Central Government Industrial Tribunal before whom a reference to adjudication came to be made u/s 10 of the Industrial Disputes Act, 1947, permitted the employer to lead evidence in support of the charge of misconduct, in view of the fact that the disciplinary enquiry was found to be vitiated by non-compliance of the principles of natural justice. After evidence was adduced, the Tribunal came to the conclusion that the charge of misconduct was established and that the dismissal from service was consequently justified, the First Respondent has filed a Writ Petition in this Court, to challenge the award of the Tribunal, being Writ Petition No. 1363 of 1998, which is pending. Essentially the question as to whether the Petitioner is entitled to forfeit the gratuity of the First Respondent would depend upon whether the order of dismissal is held to be sustainable or otherwise in the pending Writ Petition which has been filed by the First Respondent. In the event that this Court in the Writ Petitioner No. 1363 of 1998 filed by the First Respondent comes to the conclusion that the Award of the Industrial Tribunal is liable to be set aside, then clearly the forfeiture of gratuity

would not be justified. If on the other hand, the award of the Industrial Tribunal is affirmed and the charge of misconduct is held to be established, the Petitioner would clearly be entitled to forfeit the gratuity since the charge of misconduct in the present case is one involving misappropriation to the extent of Rs. 30,000/- of the funds belonging to the Bank. At present, the award of the Tribunal holds the field, though it is subject to the outcome of the pending Writ Petition. The learned Counsel appearing on behalf of the Petitioner has stated that in the event that the First Respondent succeeds before this Court in pending Writ Petition No. 1363 of 1998, the Petitioner shall refund the amount of gratuity to the First Respondent with interest at the applicable rate of interest prescribed u/s 7(3A) of the Act.

9. Insofar as the impugned orders passed by the Controlling Authority and by the Appellate Authority under the Act are concerned, both the orders in my view are legally perverse and ex-facie show a complete non-application of mind to the relevant provisions of the Payment of Gratuity Act, 1972. The employer is under the provisions of Sub-section (6) of Section 4 clearly entitled to forfeit gratuity in the case of an employee whose services have been terminated for any act, omission or negligence for causing any damage or loss to the employer to the extent of damage or loss so caused. In the present case, clause (a) of Sub-section (6) of Section 4 of the Act was clearly attracted. The fact that the dismissal from service was justified on account of the act or omission of the First Respondent which had caused damage or loss to the Petitioner has been adjudicated upon by the Tribunal in the pending proceedings. The order of the Tribunal continues to govern the field and has not been set aside. Therefore, during the subsistence of the order passed by the Industrial Tribunal, the order of forfeiture cannot be found fault with. The question as to whether the First Respondent was guilty of misappropriation and whether the misappropriation as alleged by the Bank in the amount of Rs. 30,000/ was established, was the subject matter of the adjudication before the Industrial Tribunal. The charge of misappropriation was established after evidence was adduced in the course of adjudication in which the First Respondent had fully participated. Therefore, so long as the Award of the Industrial Tribunal continues to govern the field, it would be impossible to direct the employer to refund the amount of Rs. 30,000/-.

10. In the circumstances, the Writ Petition is allowed and the impugned orders dated 22nd December, 1998 and 9th March, 2001 are quashed and set aside. It is, however, directed that in the event that the award of the Industrial Tribunal upholding the dismissal of the First Respondent is set aside by this Court in Writ Petition No. 1363 of 1998, or in proceedings consequent thereto, the Petitioner shall refund the gratuity due and payable to the First Respondent and which has been forfeited together with interest as provided for u/s 7(3A) of the Act. During the pendency of the appellate proceedings before the Appellate Authority under Act, the Petitioner was required to deposit the amount of Rs. 30,000/-together with interest before the authority. The Petitioner would at liberty to withdraw the said amount.

11. Rule made absolute in the above terms. There shall be no order as to costs.

12. Parties to act on a copy of this order duly authenticated by the Associate of this Court on payment of usual copying charges.