(2010) 06 GAU CK 0063

In the Gauhati High Court

Case No : Writ Petition (C) No. 3189 of 2008

Bijan Dhar APPELLANT

Vs

Central Bank of India and Others RESPONDENT

Date of Decision : 04-06-2010

Acts Referred:

Central Bank of India Employees Provident Fund Rules — Rule 11, 12, 14, 15, 9
Central Bank of India Officer Employees (Discipline and Appeal) Regulations, 1976 — Regulation 24, 3, 3(1), 4
Payment of Gratuity Act, 1972 — Section 4, 4(6), 7

Citation : (2011) 1 GLR 316

Hon'ble Judges : Anima Hazarika, J

Bench : Single Bench

Advocate : B. Banerjee, J. Laskar and A. Dey, for the Appellant; N.C. Das and M.K. Misra, for the Respondent

Final Decision : Allowed

Judgement

Anima Hazarika, J.—The Petitioner herein, who has been compulsorily retired from service in a disciplinary proceeding holding the charges of imputation of misconduct proved, questioned the legality and validity of withholding the following benefits viz.,

(a) Subsistence allowance for 17 days, i.e., till 17.3.2007 when the order of punishment of compulsory retirement was served upon him;

(b) Interest accrued on his own contribution relating to Provident Fund from 17.3.2007 to 6.8.2007, i.e., the date of releasing his own contribution along with interest at the rate of 18%;

(c) Interest accrued on Bank''s contribution towards Provident Fund from 17.3.2007 to 19.5.2009, i.e., date of releasing Bank''s contribution along with interest @ 18%;

(d) Leave Encashment for 8 months; and

(e) Gratuity for 15(fifteen) months along with the interest accrued thereon.

2. In order to determine the claim and counterclaim along with the pleadings set forth in the writ petition it would be appropriate to summarize the facts in a nutshell which is depicted hereinbelow:

The Petitioner who was holding the post of Chief Manager, Zonal Office, Muzaffarpur was put under suspension vide order dated 14.2.2006 wherein it was alleged that while he was Chief Manager, Siliguri Branch, Central Bank of India, has committed serious irregularities in making advances further stating therein that the departmental inquiry against him for his omission and commission will be initiated in due course. Accordingly the authority issued the charge sheet No. 253 dated 15.6.2006 along with articles of charges wherein 6(six) charges were leveled and he was asked to submit his written statement in defence within 15(fifteen) days of receipt of the charge sheet.

3. On receipt of charge sheet the Petitioner submitted his written statement in defence denying the allegations, which, however, the Disciplinary Authority did not accept and proceeded to hold the inquiry. The inquiry started on 7.9.2006 and completed on 14.11.2006. The Disciplinary Authority passed the final order on 26.2.2007 holding that all the six(6) charges were proved and passed the consolidated punishment which reads as under:

Compulsory retirement in terms of Regulation 4(h) of Central Bank of India Officer Employees'' (D&A) Regulations 1976 with amendments thereto.

4. The said award of compulsory retirement from service was issued on 1.3.2007 which was served upon the Petitioner on 17.3.2007 and the contribution towards his own contribution relating to Provident Fund was received vide cheque dated 6.8.2007 on 6.8.2007 itself and no other benefits under the service regulations was made available to him though vide communication dated 28.8.2007, the Petitioner prayed for other benefits entitled under the law and on getting no response the Petitioner has approached this Court seeking a writ of Mandamus for a direction to release the retiral benefits as indicated above. However, during the pendency of the writ petition, the Bank''s contribution towards Provident Fund was released on 11.4.2009 which has been received on 19.5.2009 amounting to Rs. 7,05,075/85.

5. I have heard Mr. B. Banerjee, advocate appearing on behalf of the Petitioner. Also heard Mr. N.C. Das, learned senior advocate assisted by Mr. M.K. Misra, advocate for the Respondent Bank.

6. Mr. Banerjee learned Counsel appearing for the Petitioner contended that the order of compulsory retirement was issued on 1.3.2007 but not communicated till 17.3.2007 which has no valid existence in the eye of law and, therefore, the Petitioner is entitled to get the subsistence allowance at the rate of half of the basic pay, which he was drawing prior to his date of suspension and other allowances except conveyance/ entertainment and special allowance on reduced

pay as indicated in the suspension order dated 14.2.2006. In support of his contention, Mr. Banerjee has referred to a decision in State of West Bengal etc. Vs. M.R. Mondal and Another, wherein at para 16, it was held that an order passed but retained in file without being communicated to the Plaintiff can have no force or authority whatsoever and the same has no valid existence in the eye of law or claim to have come into operation and effect.

7. Drawing the attention of this Court to the provisions of Central Bank of India Employees Provident Fund Rules, (''Rules''), more particularly Rules 9, 11, 14 and 15 of the Rules along with the provisions of Section 4 of the Payment of Gratuity Act, 1972, Mr. Banerjee has contended that the payment of Gratuity cannot be withheld without following the procedure prescribed u/s 4(6)(a) of the Payment of Gratuity Act, 1972. The counsel has further drawn the attention of the court to the analogous provisions of Rule 15 of the Rules along with Rule 12 of the Central Bank of India Employees'' Gratuity Fund Rules. As per Rule 15 of the Rules the Management of the Bank is empowered to recover from the contributions made by the Bank to the individual account of the contributor and the interest (simple/compound) credited in respect of such contributions, any loss or damage resulting to the bank from the cause which entailed such dismissal meaning thereby, that if the bank sustained loss due to the misconduct by the contributor, the bank ought to have recovered from the contributions of the contributor. Simultaneously Rule 12 of the Gratuity Rules provides that in case of termination of service of the member on account of proven misconduct, gratuity payable shall not be forfeited except where such misconduct causes financial loss to the bank and in that case the forfeiture of the gratuity shall be to the extent of the financial loss only which is not the case in hand since the amount of provident fund contributions made by the bank has been released and, therefore, would urge that without determining the loss sustained by the bank, the bank has no power to withhold the payment of gratuity and that too, without affording any opportunity to the Petitioner. In support of his contentions, he has referred a decision reported in Jaswant Singh Gill v. Bharat Cooking Coal Ltd. and Ors. (2007) 1 SCC 663.

8. Mr. Banerjee has further contended that admittedly the amount towards his own contributions relating to Provident Fund has been released on 6.8.2007 and Bank''s contribution on 19.5.2009 and, therefore, the Petitioner is entitled to get the interest at the rate, notified by the central government for repayment of long term deposits which may be quantified at the rate of 10% per annum and his entitlement cannot be denied in the facts and circumstances of the case. However, the question of leave encashment has not been pressed before the court.

9. Countering the arguments advanced by Mr. Banerjee, Mr. N.C. Das, learned senior advocate has conceded that the Petitioner is entitled to get the subsistence allowance till 17.3.2007, i.e., the date of receipt of the order of compulsory retirement. His main thrust is relating to forfeiture of gratuity, which

according to the learned Counsel has rightly been withheld. Drawing the attention of the court, Mr. Das has referred to Section 7 of the Payment of Gratuity Act, 1972 and contended that since the Petitioner has failed to take recourse to the aforesaid provision, the writ petition claiming the release of gratuity amount is not permissible. Mr. Das has further contended that the Central Bank of India Employees'' Gratuity Fund Rules provides for forfeiture of gratuity and the employer is within the domain to forfeit the gratuity where such misconduct causes financial loss to the bank and the bank has sustained loss for the proven misconduct of the Petitioner thereby justified the action of the bank in withholding the amount of gratuity. In support of his contentions, Mr. Das has referred the decision in Secretary, O.N.G.C. Ltd. and Another Vs. V.U. Warrier,

10. Heard the learned Counsels at length. Perused the pleadings of the parties along with the relevant provisions of the Act and the Rules referred during the course of argument. Admittedly the Petitioner was compulsorily retired under Regulation 4(h) of the Central Bank of India Officers Employees (Discipline and Appeal) Regulations, 1976 in a disciplinary proceeding for the acts of omission and commission during his tenure as Chief Manager at Siliguri where 6(six) charges were brought against him and all the charges brought were proved. The said proceedings is not under challenge before this Court and, therefore, only question left for determination is as to whether the Petitioner is entitled to get the relief as sought for in the writ petition. The relief as sought for is answered hereunder:

(a) Admittedly the Petitioner was not paid the subsistence allowance from 1.3.2007 to 17.3.2007, i.e., the date of communication of the order of punishment of compulsory retirement and the said relief has been conceded by the counsel representing the bank and, therefore, there is no impediment to direct the bank to release the subsistence allowance from 1.3.2007 to 17.3.2007 at the rate of half of the basic pay which he was drawing prior to the date of suspension and other allowance excepting conveyance/entertainment and special allowance on reduced pay as conveyed in the suspension order dated 14.2.2006.

(b) Interest on delayed payment on his own contribution to his Provident Fund from 17.3.2007 to 6.8.2007, i.e., the date of release and on bank''s contribution from 17.3.2007 to 19.5.2009, i.e., the date of release of Provident Fund, the Petitioner would be entitled interest at the rate of 10% on the ground of delayed payment of Provident Fund.

(c) Relating to forfeiture of gratuity, the court has carefully gone through the provisions of the payment of Gratuity Act, 1972 and the provisions of the Employees Provident Fund Rules along with the charge sheet drawn against the Petitioner. A reading of the charge sheet dated 15.6.2006 would show that the Petitioner was charged under Regulations 3(1) and (3) read with Regulation 24 of the Central Bank of India Officers Employees (Conduct) Regulations, 1976. The relevant provisions are quoted hereunder -

3(1). Every officer employee shall, at all times take all possible steps to ensure and protect the interests of the bank and discharge his duties with utmost integrity, honesty, devotion and diligence and do nothing which is unbecoming of a bank officer.

3(3) No officer employee shall in the performance of his official duties or in the exercise of powers conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior.

24. A breach of any of the provisions of these regulations shall be deemed to constitute a misconduct punishable under the Central Bank of India Officer Employees''(Discipline and Appeal) regulation, 1976.

11. Six charges were brought against the Petitioner wherein it is spelt out for the acts of omissions and commissions the bank''s interest is jeopardized. But the authority has not charged him relating to the quantum of loss sustained by the bank due to his proven misconduct nor any opportunity was given to him before forfeiture of gratuity. Moreover, in the order dated 26.2.2007, nowhere it was mentioned that the Bank sustained loss save and except the words "the bank is likely to suffer loss to the tune of Rs. one crore which is at present outstanding in the account".

12. In this regard, it would be relevant to refer Rule 12 of the Central Bank of India Employees'' Gratuity Fund Rules along with Rule 15 of the Employees'' Provident Fund Rules.

Rule 12 of the Central Bank of India Employees'' Gratuity Fund Rules states as under:

12. In case of termination of service of the member on account of proven misconduct, Gratuity payable shall not be forfeited, except where such misconduct causes financial loss to the Bank and in that case the forfeiture of the gratuity shall be to the extent of the financial loss only,

Whereas Rule 15 of the Employees'' Provident Fund Rules provides as under:

15. If a contributor is dismissed for fraud or misconduct the bank shall be entitled to recover from the contributions made by the Bank to the individual account of the contributor and the interest (simple/compound) credited in respect of such contributions, any loss or damage resulting to the bank from the cause which entailed such dismissal. The Board shall be entitled to declare the amount of loss or damage so resulting and their declaration in that behalf shall be final and conclusive and the amount so declared shall be paid to the bank.

A reading of the aforesaid two provisions of Rules would amply demonstrate that the Bank is empowered to recover the amount of loss sustained by the bank or forfeit the amount of gratuity where the bank sustained financial loss to the extent of loss only. The Respondent Bank had initially withheld their own contributions relating to Provident Fund but ultimately released their contributions on 19.5.2009. Thus, it may be presumed that bank has not sustained loss and the Bank has not quantified the loss sustained by the bank due to proven misconduct.

13. It may be examined from another angle, viz., from the perspective of Section 4 of the Payment of Gratuity Act, 1972. Section 4(6)(a) of the Payment of Gratuity Act, 1972 provides that the gratuity can be forfeited to the extent of the damage or loss so caused, meaning thereby, the Bank before forfeiting the gratuity must cause an inquiry relating to the extent of loss sustained by the bank with an opportunity rendered to him to answer the loss which has not been done in the instant case. The reference made in Jaswant Singh Gill (supra) would go to show that the provisions of the Act would prevail over Rule 12 of the Central Bank of India Employees'' Gratuity Fund Rules wherein the Apex Court has held that the conditions laid down in Section 4(6) of the Payment of Gratuity Act must be fulfilled which has not been done in the instant case. The other reference made by the Respondent bank reported in Secretary, ONGC Ltd. (supra) relating to observation made in paragraph 20 was quoted from the decision rendered by the Apex Court relying on a decision reported in Calcutta Insurance Co. Ltd. Vs. Their Workmen, when the Payment of Gratuity Act was not in existence and, hence, the Secretary ONGC Ltd. (supra) referred to on behalf of the bank is not applicable in the instant case though it has been held that gratuity is not paid gratuitously.

14. In view of the discussions made above and by taking into consideration the decisions of the Apex Court referred to by the parties, a mandamus is issued to the Respondent bank to release the following amounts, viz.,

(a) The subsistence allowance from 1.3.2007 to 17.3.2007;

(b) The interest at the rate of 7% on delayed payment in respect of the Petitioner''s own contributions towards Provident Fund with effect from 17.3.2007 to 6.8.2007 along with the same interest with effect from 17.3.2007 to 19.5.2009 relating to the bank''s own contribution towards Provident Fund till payment is made;

(c) The payment of gratuity along with 7% interest on the amount of gratuity for illegal withholding and/or forfeiting the payment of gratuity till the payment is made.

The court was told that the Petitioner is suffering from various ailments and, therefore, it is directed that the whole exercise would be completed within a period of three months from the date of receipt of a copy of this order.

15. The writ petition is accordingly allowed as indicated hereinabove. The parties are left to bear their own costs.

