
(2011) 05 KL CK 0038

In the High Court Of Kerala

Case No : Writ Petition (C) No. 18749 of 2009

Dhanalakshmi Bank Ltd.

APPELLANT

Vs

N.R. Ramachandran and Another

RESPONDENT

Date of Decision : 23-05-2011

Acts Referred:

Industrial Disputes Act, 1947 — Section 11A

Payment of Gratuity Act, 1972 — Section 4, 4(1), 4(6), 4(6)(a), 4(6)(b)

Citation : (2012) 2 KLJ 236

Hon'ble Judges : P.N. Ravindran, J

Bench : Single Bench

Advocate : K. Anand and Latha Krishnan, for the Appellant; Anil Sivaraman and P.M. Manoj (GP), for the Respondent

Final Decision : Dismissed

Judgement

P.N. Ravindran. J.

1. The petitioner bank has filed this writ petition challenging Ext.P6 order passed by the appellate authority under the Payment of Gratuity Act, 1972 directing payment of gratuity to the first respondent. The brief facts of the case are as follows. The first respondent herein entered service in the petitioner bank on 15.7.1972. He was placed under suspension pending disciplinary action with effect from 16.2.1998. Shortly thereafter a memo of charges dated 11.3.1998 was issued. The charges levelled against the first respondent, who was then working as Assistant Manager, were as follows:-

a. That while working as joint custodian of the Branch, you surreptitiously removed the gold ornaments pledged by one Mr. Manoj V. Jose and re-pledged the same with private financiers for raising funds for your personal gains as detailed below:

Sl. No.

GLN.

Date of Pledge

Amount of Loan Rs.

1

115

20.07.1996

40000

2

189

12/09/1997

38500

3

190

12/09/1997

63500

4

17/97-98

30.04.1997

50000

b. That while holding charge of the branch, you yourself sanctioned and availed a Gold Loan in your name under G.L.No.259 dated 15.11.1997 for Rs. 1500/- abusing your powers contrary to the extant instructions with regard to sanctioning of such loans.

c. That you stealthily removed the gold loan pledge forms in respect of the gold loans, the gold packets of which were earlier removed by you, with ulterior motive of non-detection of your act at the time of surprise inspection on 11.12.1997.

d. That you willfully violated the extent instructions of Central Office regarding joint custody.

e. That you abused the opportunity given to you to act as joint custodian of the branch for your illegal personal gains.

f. That you did not comply with the instructions of your controlling authority in the matter of tallying of S.B. and Dhanachakra Schedules at the Branch.

g. That your above acts are highly dishonest, very much prejudicial, seriously

detrimental to the interests of the Bank, subversive of its discipline and also against the trust and confidence reposed on you.

h. That your above acts have adversely affected the image and reputation of the Bank.

i. That you have committed the above acts inspire of punishments inflicted on you for some other misconducts earlier and the opportunity given by the Bank for better conduct.

2. An enquiry officer was appointed to enquire into the charges levelled against the first respondent. The first respondent did not participate in the enquiry and therefore the enquiry was held ex parte. The enquiry officer submitted a report to the effect that the charges levelled against the first respondent have been proved. Based on the report, the disciplinary authority dismissed the first respondent from service as per proceedings dated 23.11.1998. Challenging the said order the first respondent filed an appeal before the Board of Directors of the petitioner bank. The Board of Directors that met on 23.1.1999 heard the first respondent and resolved to reject the appeal. The said decision was communicated to the first respondent along with Ext.PI letter dated 15.2.1999. The said order has become final.

3. Long afterwards, the first respondent filed Ext.P2 petition dated 7.1.2008 u/s 7(4)(b)(i) of the Payment of Gratuity Act, 1972 (hereinafter referred to as "the Act" for short) before the Controlling Authority under the Act [Assistant Labour Commissioner, (Central), Ernakulam] seeking payment of the sum of Rs. 2,25,000/- as gratuity. In that application he claimed that he had a total service of 26 years and the last drawn wages was Rs. 15,000/- per month. The petitioner bank resisted the said application by filing Ext.P3 objections wherein it was inter alia contended that under the provisions of the Group Gratuity Scheme of the bank and the Act an employee whose services have been terminated for fraud or misconduct is not entitled to gratuity and therefore the first respondent is not entitled to claim payment of gratuity. It was further contended that the misconduct committed by the first respondent was very grave and serious, that the misconduct alleged and proved in the enquiry involves moral turpitude and therefore he is not entitled to gratuity under the Act. It was also contended that the monthly wages of the first respondent was only Rs. 10,448/- and therefore the amount claimed is exorbitant.

4. By Ext.P4 order passed on 6.9.2008 the Controlling Authority held that as the first respondent was dismissed from service for an act of misconduct involving moral turpitude, the employer (the petitioner herein) has rightly forfeited the gratuity. The application for gratuity filed by the first respondent was accordingly dismissed. Aggrieved by Ext.P4 order the first respondent filed an appeal before the Regional Labour Commissioner (Central), Kochi. By Ext.P6 order passed on 20.4.2009 the appellate authority allowed the appeal and directed payment of the sum of Rs. 2,25,000/- together with simple interest thereon at 10% per

annum from 25.11.1998 till the date of payment. The appellate authority held that as no order of forfeiture was passed with notice to the first respondent, he is entitled to receive gratuity for the period during which he had served the bank. Hence this writ petition challenging Ext.P6 and seeking the following reliefs:-

- a) Call for the records leading to Ext.P6 and issue a writ of certiorari or any other appropriate writ, order or direction quashing the same.
- b) declare that the forfeiture of gratuity by the petitioner is legal and is in accordance with the provisions contained in the Payment of Gratuity Act.

5. The main contention raised by the petitioner is that as the service of the first respondent was terminated for the commission of a misconduct which constituted an offence involving moral turpitude, in the course of his employment, section 4(6) of the Act applies and the gratuity payable to the first respondent stands forfeited. It is contended that when the service of an employee has been terminated for committing an offence involving moral turpitude the gratuity is liable to be forfeited. The first respondent has filed a counter affidavit resisting the writ petition. It is contended that though after the order of termination was passed he had repeatedly requested the employer to pay gratuity, such payment was not effected and therefore he was constrained to move the Controlling Authority under the Act. It is also contended that the petitioner has not passed an order forfeiting the gratuity payable to the first respondent and therefore the petitioner is bound to pay gratuity computed in terms of the Act. The first respondent has also contended that as no decision forfeiting the gratuity payable to him was passed with notice to him and in compliance with the requirements of natural justice, the challenge to Ext.P6 is without any merit.

6. I heard Sri. K. Anand, learned counsel appearing for the petitioner, Sri. Anil Sivaraman, learned counsel appearing for the first respondent and Sri. P.M. Manoj, learned Government Pleader appearing for the second respondent. The learned counsel appearing for the petitioner contended that as the service of the first respondent was terminated after holding an enquiry into an allegation of misconduct which involved the commission of an offence involving moral turpitude, the gratuity payable to him stands forfeited and therefore a separate order forfeiting the gratuity payable to the employee is not required to be passed. Per contra, the learned counsel appearing for the first respondent contended that an order of forfeiture is required to be passed with notice to the employee, either under clause (a) of sub-section (6) of section 4 or under clause (b) thereof and that having not been done, the challenge to Ext.P6 is without any merit. The learned counsel appearing for the first respondent relied on the decisions of the Karnataka High Court in M/s. Bharat Gold Mines Ltd. v. Regional Labour Commissioner (Central) Bangalore, 1986 Lab.I.C. 1976, Vijaya Bank and Others Vs. Sri Mohan Das Ramana Shetty, , the decision of the Gujarat High Court in Ahmedabad Municipal Corporation v. Ellvina Samualbhai Christian. 2002 (I) LLJ 342 and the decision of the Allahabad High Court in Hindalco Industries

Ltd. v. Appellate Authority; 2004 (III) LU 148, in support of his contention.

7. I have considered the submissions made at the Bar by the learned counsel on either side. The short question that arises for consideration in this writ petition is whether, the gratuity payable to the first respondent stood forfeited automatically with the passing of the order terminating him from service for the commission of an act of misconduct which constitutes an offence involving moral turpitude. Section 4(1) of the Act stipulates 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, (a) on his superannuation, or (b) on his retirement or resignation, or (c) on his death or disablement due to accident or disease. Sub-section (1) of section 4 of the Act is extracted below :-

4. Payment of gratuity. - (1) 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,--

(a) on his superannuation, or

(b) on his retirement or resignation, or

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

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement:

Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.

Explanation.- For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

Sub-section (6) of section 4 which provides for forfeiture of the gratuity payable under sub-section (1) is extracted below:-

4(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.

8. Clause (a) of sub-section (6) of section 4 of the Act stipulates that notwithstanding anything contained in sub-section (1), 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. In the instant case the petitioner has no case that the gratuity payable to the first respondent stood forfeited in terms of clause (a) of sub-section. (6) of section 4 of the Act. Clause (b) of sub-section (6) of section 4 of the Act as it originally stood, stipulated that the gratuity payable to an employee shall be wholly forfeited, if his services have been terminated for riotous or disorderly conduct or any act of violence on his part or if his services 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. The words "shall be wholly forfeited" were replaced by the words "may be wholly or partially forfeited" with effect from 1.7.1984 by Act 25 of 1984. It is relying on the second limb of clause (b) of subsection (6) of section 4 that the petitioner contends that the gratuity payable to the first respondent stood forfeited for the reason that his service was terminated for the commission of an offence involving moral turpitude. From the pleadings and the contentions advanced before me it is evident that it is relying on the order imposing the punishment of dismissal from service which was affirmed by Ext.PI order passed by the appellate authority that the petitioner has taken the stand that the gratuity payable to the first respondent stands forfeited. The petitioner has no case that an order forfeiting the gratuity payable to the first respondent was passed after notice to him simultaneous with the order dismissing him from service or at any time thereafter. The order passed by the disciplinary authority dismissing the first respondent from service has also not been placed on record. In any case, the petitioner has no case that an order forfeiting the gratuity was passed along with the order dismissing the first respondent from service.

9. In Bharat Gold Mines Ltd. (supra) a Division Bench of the Karnataka High Court considered the question whether theft is an offence involving moral turpitude and if the services of an employee had been terminated on the charge of theft committed by him in the course of his employment, the gratuity payable to him under the provisions of the Act stands wholly forfeited in view of S.4(6)(b) (ii) of the Act. The employee in that case was a workman in the service of Bharat Gold Mines. Disciplinary action was initiated against him on the charge that he committed theft of gold of the value of Rs. 155.61 in the course of his employment. Based on the report of the enquiry which found him guilty of the charge, the disciplinary authority dismissed him from service forfeiting all rights

and privileges that had accrued to him from his past service. The employee thereafter moved the Assistant Labour Commissioner claiming gratuity for the services rendered by him prior to the date of termination. The employer contended that as the employee was dismissed from service after finding him guilty of theft which constitutes an offence involving moral turpitude, the gratuity payable to him stood wholly forfeited in view of section 4(6)(b)(ii) of the Act, as it then stood. The Assistant Labour Commissioner held that as no show cause notice was issued to the employee, the forfeiture of gratuity was wrong. The application filed by the employee was accordingly allowed and the employer was directed to pay gratuity. Though an appeal was taken before the appellate authority it was dismissed relying on the decision of a learned single Judge of the Karnataka High Court in W.P.No. 13303 of 1978 wherein it had been held that the offence of theft did not involve moral turpitude and therefore section 4(6) (b)(ii) of the Act was not applicable. Overruling the said decision of the learned single Judge, a Division Bench of the Karnataka High Court in Bharat Gold Mines Ltd. (supra) held that when a person is found guilty of the charge of theft it means that he has acted dishonestly and therefore it follows that he has committed an offence involving moral turpitude. The Division Bench thereafter proceeded to hold that as the conditions necessary for the applicability of section 4(6)(b)(ii) of the Act existed, the employer was right in taking the stand that the gratuity payable to the employee stood wholly forfeited. The Division Bench also held that though for forfeiting gratuity u/s 4(6)(b) of the Act as it originally stood, it was unnecessary to comply with the rules of natural justice, in view of the amendment to section 4(6)(b) of the Act with effect from 1.7.1984 the position has changed and thereafter the employer has to take an independent decision after the termination of service of an employee as to whether the gratuity payable to the employee should be forfeited. The relevant portion of the judgment of the Division Bench is extracted below:-

14. Before concluding, it is necessary to observe that though complying with rules of natural justice was unnecessary, for forfeiting Gratuity under S.4(6)(b) of the Act as it stood. When the decision was taken by the appellant as it provided that the gratuity shall stand wholly forfeited under circumstances specified in cls. (i) ad (ii), the position has since changed in view of the amendment of S.4(6)(b) (ii) of the Act with effect from 1.7.1984. After the amendment, it reads thus:

4(6) Notwithstanding anything contained in sub-sec. (1)-

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(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 n offence involving moral turpitude, provided that such offence is committed by him in the course of his employment." (Underlined by us)

The change brought about is underlined. In view of this significant change it appears to us that an employer has to take an independent decision after the termination of service of an employee as to whether the Gratuity payable should at all be forfeited in cases which fall under sub-cl.(i) or (ii) and if so, to what extent. The decision must necessarily depend on the facts and circumstances of the case, such as, the length and past record of service, extent and magnitude of the offence and other relevant considerations. Therefore, it follows that the decision has to be taken after giving: notice of the proposal to the employee concerned and after due consideration of the reply furnished, if any. (emphasis supplied)

10. The same view was reiterated by another Division Bench of the Karnataka High Court in *Vijaya Bank and Others Vs. Sri Mohan Das Ramana Shetty*, . In that case an employee of the Vijaya Bank was removed from service after holding a domestic enquiry. The said order was upheld by the appellate authority. One of the charges against the employee was that his acts had caused pecuniary loss to the bank. Though in the enquiry, the employee had admitted the charges levelled against him, he challenged the orders passed by the disciplinary authority/appellate authority by filing a writ petition in the Karnataka High Court. The decisions of the disciplinary authority and the appellate authority removing the employee from service were upheld. However the learned single Judge of the Karnataka High Court directed the employer bank to pay gratuity, leave encashment benefits and the contribution to the provident fund with statutory interest. Aggrieved thereby the employer bank preferred an appeal. Relying on section 4(6)(a) of the Act, the bank contended that as the acts of misconduct committed by the employee had caused loss to the bank, the gratuity payable to him is liable to be forfeited and therefore the direction issued by the learned single Judge to pay gratuity is liable to be set aside. On appeal, a Division Bench of the Karnataka High Court held that before passing an order forfeiting gratuity on the ground that the act or omission of the employee had caused loss to the employer, the employee is entitled to be put on notice and that having not been done, the direction issued by the learned single Judge does not merit interference. The Division Bench in *Vijaya Bank v. Mohan Das Ramana Shetty* (supra) held as follows:-

8. The object of having gratuity scheme is to provide a retiring benefit to the workman who has rendered long and unblemished service to the employer and thereby contributed to the prosperity of the employer; but it is not correct to say that any misconduct, however grave, may not be visited with the forfeiture of gratuity in view of Section 4(6) of the Act as rightly pointed out by the learned counsel for the appellant. In other words, if the workman is guilty of serious misconduct, then the gratuity can be forfeited in its entirety vide *Management of Tournamulla Estate v. Their Workmen*, AIR 1973 SC 2344 : (1973) 2 SCC 502 : 1973-II-LLJ-241. It is also a settled law that a bare looking at Section 4(6)(a) shows that the right of the employer to forfeit the amount of earned gratuity sine qua non to the extent of damage or loss so caused but such a power in our

considered opinion is not automatic. If the employer fails to prove before the Controlling Authority which is functioning under the Act the extent of damage or loss so caused by the employee because of his act of alleged major misconduct, the right to forfeit the gratuity u/s 4(6)(a) is not available to the employer. In other words, before forfeiting the gratuity amount, the employer should afford an opportunity to the employee to the extent why his amount of gratuity be not forfeited, which leads to the conclusion that if no material is brought on record to show that the service of the employee was terminated for any act, willful omission or negligence causing damage, loss or destruction of the employer's property, and if the extent of such damage is not quantified, the provisions of Section 4(6)(a) do not come into operation. The statutory provision for forfeiture of gratuity therefore, must be construed strictly and the employer, in the eye of law, has to prove before the Controlling Authority, the extent of damages or loss so caused by the employee, because of his act of alleged misconduct, or/and otherwise the employer is not entitled to invoke Section 4(6)(a). Such proof presupposes a statutory requirement of giving an opportunity to the employee before the Controlling Authority. In short, the decision to forfeit can be taken only after assessing the loss, which can be arrived at only after affording an opportunity to the employee concerned to be heard, which is mandatory before taking such a decision. It is only under such context and background of the case and well-settled principle laid down on the point, the learned single Judge had, in our considered opinion, rightly directed:

(b) The respondent-Bank shall pay the gratuity, leave encashment and their contribution towards the Provident Fund with interest under the regulation within eight weeks from the date of receipt of this order.

(c) It is clarified that it is only the provident fund, which will carry interest as regulated by the Bank.

(d) The petitioner shall execute an indemnity bond for the said amount i.e., the amount payable by the Bank towards their contribution of the Provident Fund." safeguarding the interest of the parties.

9. Therefore, having no reason to interfere with the order of the learned single Judge, the writ appeal is dismissed.

11. In Ahmedabad Municipal Corporation v. Ellvina Samualbhai Christian, 2002 (I) LLJ 342 an employee of the Ahmedabad Municipal Corporation was dismissed from service after holding a domestic enquiry. The employee thereafter moved the Controlling Authority under the Act seeking payment of gratuity. It was contended that gratuity has not been paid though no order of forfeiture had been passed. The Controlling Authority passed an order directing the employer to pay gratuity. The appeal therefrom was dismissed by the appellate authority. The Ahmedabad Municipal Corporation thereupon moved the High Court of Gujarat challenging those orders. A learned single Judge of the Gujarat High Court held that unless a specific order for forfeiture of gratuity, either in part or as a whole,

has been passed by the employer, the employee is entitled to receive gratuity. A similar view was taken by a learned single Judge of the Allahabad High Court in Hindalco Industries Ltd. Vs. Appellate Authority, under the Payment of Gratuity Act and Others, . It was held that right to receive gratuity is a statutory right and therefore, to forfeit the gratuity which an employee is entitled to, an order is required to be passed determining the quantum of gratuity forfeited after giving an opportunity to the employee. The relevant portion of the judgment is as follows:-

4. The Payment of Gratuity Act, 1972, gives a statutory right to an employee for payment of gratuity on his superannuation, retirement or resignation, or on his death or disablement due to accident or disease. Section 4 (6)(a) of the Act provides that 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. Subsection 6(b), provides that 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.

5. The scheme of the Act and the provisions of Section 4(6)(a) and (b) shows that for depriving an employee his statutory right to receive gratuity, an order must be passed forfeiting gratuity, and conscious decision to be taken with regard to reasons specified in subsection (a) and to damage or loss so caused. The sub-section (b) after its amendment by Act No. 26 of 1984 (with effect from February 11, 1981) to the effect that gratuity must be wholly or in part forfeited, gives discretion to the employer and thus postulates application of mind and recording of reasons.

6. In the present case there is no averment that any express order was passed by the employer forfeiting petitioner's right to receive gratuity. In Remington Rand of India Ltd. Vs. The Workmen, , the Supreme Court considered the qualifying period for payment of gratuity, and the consequences of payment of gratuity on the termination of services for misconduct. It was held that gratuity is paid to ensure good conduct throughout the period that the workman serves his employer is an accepted proposition. The clause as to misconduct covers the act which may vary in degree of gravity, nature and its impact on the discipline and the working of the concern. All these acts may not result in loss capable to being calculated in terms of money. There may be an action which may forthwith disentitle the workman from retaining his employment and justifying his dismissal. It appears that after this pronouncement, the Act was amended and that a provision was made u/s 4(6)(b) for forfeiture of gratuity either wholly or partially. The discretion given to the employer must be based upon the material

and the reasons recorded, after serving principle of natural justice and these conditions postulate an order to be passed by the employer. The termination of services of an employee on the grounds contemplated u/s 4(6)(a) and (b), by Itself does not entitle the employer to forfeit gratuity payable to an employee. The right of an employer to terminate the services of an employee under the Certified Standing Orders, or Service Conditions on any such act given in Section 4(6)(a) and (b), of the Act of 1972, is circumscribed and restricted to holding a just and fair domestic enquiry serving principles of natural justice, which may be examined and justified in industrial adjudication, in which the proportionality of punishment may be examined u/s 11A of the Industrial Disputes Act, 1947. The Industrial adjudicature may find the domestic enquiry and punishment to be just, fair and proper, but these findings by themselves do not serve the requirements of Section 4(6)(a) and (b) of the Payment of Gratuity Act, 1972. The right to receive gratuity is a statutory right. It is not subservient to the common law rights of the employer to terminate the services of an employee. In order to forfeit the statutory right of gratuity, qualified by expression "to the extent of damage or loss so caused in sub-section (6) (b), the quantum of forfeiture has to be determined, and thus it requires an order, which can only be passed after giving opportunity to one employee. When the forfeiture, even if by an express and reasoned order is challenged before the Controlling Authority under the Act, the employer must satisfy the authority in proceedings u/s 7(4) of the Act, with the justification of forfeiture.

In the instant case the petitioner has no case that an order forfeiting the gratuity had been passed with notice to the employee. The petitioner has also no case that an order forfeiting the gratuity had been passed even initially while dismissing the employee from service. In other words the petitioner has not established the fact that an order forfeiting the whole of the gratuity payable to the first respondent had been passed with notice to him. Such being the situation, as the employer has not passed an order forfeiting the whole or any part of the gratuity payable to the first respondent after putting him on notice, I hold following the principles laid down in the decisions referred to above that the direction issued by the appellate authority under the Act in Ext.P6 order does not merit interference.

I accordingly hold that no grounds have been made out warranting interference with the impugned order. The writ petition fails and is accordingly dismissed. No costs.