
(2008) 07 GUJ CK 0112
In the Gujarat High Court
Case No : S.C.A. No. 9697 of 2008

Narendrakumar Jayshankar Joshi

APPELLANT

Vs

General Manager, Panchmahal District Co-op. Bank Ltd.

RESPONDENT

Date of Decision : 28-07-2008

Acts Referred:

Gujarat Payment of Gratuity Act, 1972 — Section 4, 4(6), 7, 8
Gujarat Payment of Gratuity Rules, 1972 — Rule 11

Citation : (2008) 119 FLR 666 : (2009) 1 LLJ 263

Hon'ble Judges : K.M. Thaker, J

Bench : Single Bench

Advocate : S.J. Shah, N.D. Songara and Chetan J. Shah, for the Appellant;

Judgement

K.M. Thaker, J.—In this petition, the petitioner, who was at the relevant time, an Inspector in the respondent-co-operative bank has challenged, after 3 years, an order dated June 6, 2005 passed by the controlling authority whereby the controlling authority, upon application by the present petitioner, has directed the respondent-employer to pay 75% of the amount payable to the petitioner towards gratuity and has also permitted the respondent-employer to retain, as deposit, the balance 25% amount.

2. Aggrieved by the said order permitting the respondent-employer to retain the balance 25% of the amount payable towards the gratuity, the petitioner has preferred present petition after 3 years since the date of the order.

It transpires that the petitioner was, at the relevant time, working as Inspector and on certain allegations a notice dated September 11, 2003 was issued against the petitioner. It further appears from the record that the respondent had initiated or was contemplating to conduct departmental inquiry against the present petitioner in connection with the said notice dated September 11, 2003.

3. Before the departmental inquiry could be completed, the petitioner herein crossed the age of superannuation and accordingly, he was superannuated on

and from October 3, 2003. From the impugned order, it appears that the petitioner was allowed to retire on the condition of retaining retiral benefits. The impugned order also recites that during the preliminary inquiry, the petitioner, had admitted the irregularity which allegedly resulted into loss of about Rs. 1,22,900/- and it was in light of such; consequence, that the respondent-employer" purportedly invoked the provisions u/s 4(6) of the Payment of Gratuity (Gujarat) Act, 1972 (hereinafter referred to as "the Act of 1972" for short) and forfeited the amount payable towards the gratuity.

4. Aggrieved by such action, the petitioner approached the controlling authority under the provisions of the Act of 1972 and after considering the rival contentions, the controlling authority passed the impugned order.

5. In the present petition, the petitioner has not produced any material on record, including the termination/superannuation order and that therefore it is not possible to ascertain the observations made by the controlling authority that the petitioner was allowed to retire on the condition of retaining 25% of the amount payable towards retiral Benefits and it is also not possible to ascertain as to whether the said aspect is factually correct or not and whether the employer had mentioned such a condition and reserved such a right while allowing the petitioner to retire, or not. The impugned order also recites that in the preliminary inquiry, the petitioner had admitted the irregularity which allegedly resulted into loss of Rs. 1,22,900/-. Since any material as regards the said observation is also not produced by the petitioner, it is also not possible to ascertain the correctness of such observation in the order and whether the petitioner had admitted alleged irregularity or not. It appears from the record that the controlling authority proceeded on the premise that the departmental inquiry was pending and any final decision with regard to the departmental inquiry was, at the material point of time, not taken by the employer and that therefore, the controlling authority passed the impugned order permitting the respondent-employer to retain 25% of the amount payable towards gratuity.

6. Mr. Shah appearing for the petitioner submitted that even as of now i.e. even after 5 years since petitioner's retirement any regular charge sheet has not been issued against the petitioner nor the departmental inquiry is commenced. He also submitted that the action of the employer and the order by the controlling authority are bad in law. Mr. Shah also submitted that after the order was passed, the petitioner waited for considerable time in view of the statements made by the respondent-employer that departmental inquiry was to be initiated against the respondent, however, any step towards conducting departmental inquiry has yet not been taken by the respondent-employer. He submitted that the petitioner also preferred review application before the controlling authority, however, by order dated February 27, 2008, the controlling authority disposed off the said review application on the ground that the same was not maintainable in view of the provisions under Rule 11(v) of the Act of 1972. Mr. Shah further submitted that it is in such backdrop of facts that the petitioner has approached

this Court against the said order dated June 6, 2005 because neither any inquiry is initiated against the petitioner nor the said 25% of the amount towards gratuity has been paid to the petitioner.

7. In the petition, the petitioner has challenged the order dated June 6, 2005 permitting the respondent-employer to retain 25% of the amount payable towards gratuity. The petitioner has challenged the said order after period of 3 years. This Court is of the view that the subject petition does not deserve to be entertained against the order passed before 3 years. Further, though the statute provides for an appellate forum/remedy against an order passed by the controlling authority, the petitioner has not approached the appellate authority against the order passed by the controlling authority.

8. It is, no doubt, settled legal position that if any specific order, for withholding the amount payable towards gratuity for reasons covered u/s 4(6) of the Act of 1972, is not passed by the employer after issuing specific notice for taking such action and if the employee is not heard with regard to such notice, then the amount payable towards gratuity cannot be withheld or forfeited by the employer.

9. In present case, it appears that the respondent-employer has not passed any specific order withholding/forfeiting the amount payable towards gratuity. It also appears that the petitioner has been paid only 75% of the amount payable towards gratuity. Further, from the record of petition and from the submissions it also appears that in the earlier notice dated September 11, 2003 there was no suggestion with regard to the proposal to withhold or forfeit any amount towards gratuity and in absence of such notice, both actions namely, the action by the employer of not making payment towards gratuity and the direction by the controlling authority permitting the respondent-employer to retain 25% of the amount payable towards the gratuity, appear to be against law also without jurisdiction inasmuch as if no specific order expressly withholding/forfeiting amount payable towards gratuity is passed by the respondent-employer, the provisions u/s 4(6) of the Act of 1972 cannot be invoked and the controlling authority in anticipation that an order is likely to be passed by the respondent-employer u/s 4(vi) of the Act of 1972 cannot permit retention of any amount payable towards gratuity. Under the circumstances, it prima facie appears that short payment is made by the respondent-employer to the petitioner qua the amount payable towards gratuity. The provisions under the Act of 1972 are clear and it covers not only default in payment but short payment also. In the present case, the petitioner crossed the age of superannuation on October 3, 2003. Under the circumstances, the amount payable towards gratuity in accordance with the Act of 1972 was required to be paid by the respondent-employer immediately after petitioner's retirement. It appears that on the date on which the petitioner retired, no order, pursuant to notice for such purpose and after hearing the petitioner, withholding or forfeiting the amount payable towards gratuity was passed by the respondent-employer and/or any inquiry also does not appear to have been conducted and that therefore, Mr. Shah appears to be

right in his submission that the respondent-employer could not have withheld or forfeited the amount payable towards the gratuity.

10. However, all the aforesaid aspects, such as whether notice intimating loss and withholding gratuity equivalent to the alleged loss is issued or not, whether loss has actually occurred or not and if yes; to what extent and whether any order to forfeit or withhold gratuity is passed or not and whether the inquiry pursuant to the notice dated September 11, 2003; is conducted or not, are all questions of fact, and that too, at this disputed questions of fact and they can not be examined in proceedings of writ petition, more so, when they are not examined by the controlling authority or the appellate authority under the Act of 1972.

11. The Act of 1972 is a complete code which provides for right and also remedy. As per the provisions u/s 7 of the Act of 1972, the controlling authority is, required to: determine, on application from the employee, amount payable towards gratuity in the event there is dispute between the employee and employer with regard to the amount payable towards gratuity or in the event of non-payment of gratuity, the said provisions would take in its fold short payment also. Under the provisions of Section 8 of the Act of 1972, the employee can approach the controlling authority by way of an application seeking certificate for the amount payable towards gratuity if such" amount is not paid by the employer. Section 4 read with. Section 7 would also cover the cases where short payment is made by the employer and employee would be entitled to approach the controlling authority with a grievance that the amount payable towards the gratuity has not been paid in accordance with the provisions under the Act of 1972. Since the quantification of the amount payable towards gratuity and interest on account of delay, if any, etc. also would involve disputed questions of facts this Court is not inclined to entertain the present petition.

12. It is clarified that the present petition is not entertained only for the reason that the petitioner, instead of approaching the controlling authority or the appellate authority constituted under the statute, has approached this Court against the order passed in June, 2005 i. e. after 3 years and for the reason that the claim of the employee to receive particular amount towards gratuity would involve question of facts, however, this order is not to be construed as an order pertaining to or denying petitioner's option of appropriate application/appeal before the appropriate forum for redressal of his grievance of non-payment of the amount payable towards gratuity. The apprehension of the petitioner that his application before the controlling authority may be rejected on the ground of res judicata, prima facie appears to be unnecessary and unjustified apprehension since the authority does not appear to have decided the issue on merits and no adjudication, much less on merits, has been undertaken at all by the authority and no finding on merits is recorded with regard to the 25% amount of gratuity and the authority has yet to examine as to whether any inquiry pursuant to notice dated September 11, 2003 and/or pursuant to any notice for withholding/

forfeiting gratuity is held or not. As per the petitioner's claim, any inquiry has not been initiated or completed by the employer either with regard to the notice dated September 11, 2003 or any other notice, much less for withholding/ forfeiting gratuity.

13. It is also clarified that if and when such an application is made by the petitioner, the same may be heard and decided, in accordance with law, expeditiously inasmuch as almost 5 years have already passed-by since the date of petitioner's superannuation and the petitioner, unfortunately has been denied the benefit of full amount towards gratuity.

14. With the aforesaid observations and reasons, present petition is not entertained at this stage and is disposed off.