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(2010) 09 GUJ CK 0053

In the Gujarat High Court

Case No : S.C.A. No. 4252 of 2004

New India Assurance Co. Ltd. — APPELLANT

Vs

Ashwin Chimanlal Sheth and Others — RESPONDENT

Date of Decision : 21-09-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Payment of Gratuity Act, 1972 — Section 4(6)

Citation : (2011) 1 LLJ 870

Hon'ble Judges : M.R. Shah, J

Bench : Single Bench

Advocate : Sandip C. Shah, for the Appellant; Dipak R. Dave, for the Respondent

Judgement

M.R. Shah, J.—By way of this petition under Article 226 and 227 of the Constitution of India, the Petitioner-New India Assurance Company Ltd., has prayed for an appropriate writ, direction and order quashing and setting aside the impugned orders passed by the Controlling Authority as well as Appellate Authority under the Payment of Gratuity Act, 1972 directing the Petitioner to pay an amount of gratuity to the Respondent.

2. Respondent was serving as Administrative Officer with the Petitioner-New India Assurance Company Ltd. That he was permitted to retire on attaining the age of superannuation on and from August 31, 2001, however in view of one criminal case pending against him with respect to misappropriation of the amount, he was not paid the amount of gratuity by the Petitioner and therefore, the Respondent approached Controlling Authority under the Payment of Gratuity Act and payable to him. That the said application was opposed by the Petitioner by submitting that criminal case is pending against the Respondent and the allegations against the Respondent had played fraud under the House Holders Insurance Policy resulting into huge financial loss to the Company and therefore, considering Rule 45(1) and (2) of General Insurance Employees Pension Scheme, 1995 the Petitioner is justified in withholding of the said amount until

the conclusion of proceedings against him. That the Controlling Authority under the payment of Gratuity Act by order dated August 14, 2003 allowed the said application being case No. 539/2002 directing the Petitioner to pay Rs. 3,50,000/- to the Respondent by way of amount of gratuity with 10% interest from August 31, 2001 till the date of gratuity is paid on the ground that as Petitioner has permitted the Respondent to retire on attaining the age of superannuation and that he has not been issued any chargesheet or show cause notice for the alleged involvement in the criminal case pending in the Court of law and that before retirement no charges have been proved and no quantum of loss due to the alleged fault/involvement of the Respondent could be determined, it is not open for Petitioner to withhold the gratuity. That being aggrieved and dissatisfied with order passed by the Controlling Authority under the Payment of Gratuity Act, 1972 directing the Petitioner to pay an amount of gratuity to the Respondent, Petitioner preferred appeal before the Appellate Authority under Payment of Gratuity Act, which came to be dismissed by the Appellate Authority by impugned order dated December 19, 2003. Being aggrieved and dissatisfied with the orders passed by both the authorities below under the Payment of Gratuity Act, 1972 directing the Petitioner to pay an amount of Rs. 3,50,000/- to the Respondent, the Petitioner has preferred present Special Civil Application under Articles 226 and 227 of the Constitution of India.

3. Shri Sandip Shah, learned advocate appearing for the Petitioner has vehemently submitted that as against the Respondent criminal case is pending for the serious allegations of fraud, cheating and criminal conspiracy etc. which has resulted into huge loss to the Petitioner-New India Assurance Company Ltd., both the authorities below have materially erred in directing to pay an amount of gratuity to the Respondent. It is submitted that considering the fact that the Respondent was working as an Administrative Officer because of his alleged involvement with the surveyors and other private persons in committing fraud under the House Holders Insurance Policy, resulting into huge financial loss to the Petitioner-company, considering Rule 45(1) and (2) of General Insurance Employees Pension Scheme, 1995 the Petitioner is justified in withholding of the said amount until the conclusion of proceedings against him. It is submitted that both the authorities below have materially erred in directing the Petitioner to pay an amount of gratuity which is just contrary to the Rule 45(1) and (2) of the General Insurance Employees Pension Scheme, 1995. It is further submitted by Shri Shah, learned advocate for the Petitioner as such there is no order of forfeiture of amount of gratuity, passed by the Petitioner and only it was decided to postpone the payment of amount of gratuity until the proceedings against Respondents are concluded. By making above submission, it requested to allow the present Special Civil Application.

4. Petition is opposed by Shri D.R. Dave, learned advocate for the Respondent. It is submitted that admittedly Respondent has been permitted to retire on attaining the age of superannuation and as such there is no order passed by the Petitioner to forfeit the amount of gratuity and, therefore, both the authorities

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below are justified in directing the Petitioner to pay an amount of gratuity to the Respondent by holding that the Petitioner is not justified in withholding of said amount until the conclusion of the criminal proceedings in absence of any departmental inquiry and/or quantum of loss caused to the Insurance Company by misconduct on the part of the Respondent. Shri Dave, learned advocate appearing on behalf of the Respondent has heavily relied upon the decision of the Hon''ble Supreme Court in the case of Jaswant Singh Gill Vs. Bharat Coking Coal Ltd. and Others, as well as the decision of the the learned single Judge of this Court in the case of Gujarat State Road Transport Corporation Vs. Devendrabhai Mulvantrai Vaidya, as well as recent unreported decision of this Court rendered in Special Civil Application No. 7665/2010. By making above submissions and relying upon the above decisions, it is requested to dismiss the present Special Civil Application.

5. Heard the learned advocates for the respective parties at length. It is not in dispute that Respondent who was serving as an Administrative Officer is permitted to retire on and from August 31, 2001 on attaining the age of superannuation. It is also required to be noted that till date neither any departmental inquiry has been initiated against the Respondent nor any proceedings are initiated determining the quantum of alleged loss to the Petitioner due to the act and/or misconduct on the part of the Respondent. It is also an admitted position that till date no order has been passed by the Petitioner to forfeit the amount of gratuity due and payable to the Respondent. It appears that the amount of gratuity has not been paid to the Respondent and it is withheld solely on the ground that one criminal case is pending against the Respondent and allegations against the Respondent are with respect to fraud, cheating, criminal conspiracy etc. It appears that relying upon the Rule 45(1) and (2) of General Insurance Employees Pension Scheme, 1995 which provides that an employee who has retired on attaining the age of superannuation and against whom any departmental or judicial proceedings are instituted or any departmental proceedings were continued in such case, gratuity shall not been paid to such employee only conclusion of proceedings against him, the amount of gratuity is withheld by the Petitioner. As held by the Hon''ble Supreme Court in the case of Jaswant Singh Gill v. Bharat Coking Coal Ltd. (supra) provision of Payment of Gratuity Act, 1972 would prevail over rules and that unless and until loss or damage has been quantified, gratuity amount is not liable to be forfeited and that amount of gratuity is liable to be forfeited only to the extent of damage or loss caused. In the case of Gujarat State Road Transport Corporation v. Devendrabhai Mulvantrai Vaidya (supra) the learned single Judge has categorically held that amount of gratuity cannot be withheld by the employer except in the eventualities envisaged in the provision of Sub-section (6) of Section 4. In the case before the learned single Judge criminal case and departmental inquiry were pending against the employee and the amount of gratuity was withheld and the learned single Judge directed the employer to make the payment of gratuity. Similar view has been expressed by this Court in

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unreported decision of this Court rendered in Special Civil Application No. 7665/2010.

6. In the aforesaid facts and circumstances of the case, more particularly when as such there is no order of forfeiture by the employer and the Respondent is permitted to retire on attaining the age of superannuation, Respondent is entitled to amount of gratuity and no illegality has been committed by both the authorities below directing the Petitioner to pay sum of? 3,50,000/- by way of gratuity.

7. In view of above and for the reasons stated above and considering the aforesaid three decisions, petition fails and deserves to be dismissed and is accordingly dismissed. Rule discharged. Ad-interim relief granted earlier, if any, stands vacated forthwith. No costs.

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