

(2018) 11 DEL CK 0118

In the Delhi High Court

Case No : Letter Petent Appeal No. 291 Of 2018

Rajiv Saxena

APPELLANT

Vs

Chief General Manager & Ors

RESPONDENT

Date of Decision : 14-11-2018

Acts Referred:

Indian Penal Code, 1860 — Section 420, 468, 471
Prevention of Corruption Act, 1988 — Section 13(1)(d), 13(2)
Payment of Gratuity Act, 1972 — Section 4, 4(6)(a), 4(6)(b)(ii)

Citation : (2018) 11 DEL CK 0118

Hon'ble Judges : S. Muralidhar, J; Sanjeev Narula, J

Bench : Division Bench

Advocate : Trideep Pais, Sanya Sud, Devashish Chauhan, Bhupender Singh Chauhan

Final Decision : Disposed Off

Judgement

CM APPL. 21234/2018 (delay)

1. For the reasons stated in the application, the delay in filing the appeal is condoned and the application is disposed of.

LPA 291/2018 & CM APPL. 21233/2018

2. The challenge in this appeal is to an order dated 9th March 2018 passed by a learned Single Judge of this Court dismissing the W.P.(C) 2156/2018

whereby the Appellant sought to challenge the order No. ZO:ND:ZVD:17 dated 30th July 2016 passed by the Disciplinary Authority of the Bank of

Baroda (â??respondent-Bankâ?) imposing the penalty of compulsory retirement on the Appellant consequent to the findings returned by the Inquiry

Officer.

3. The inquiry against the Appellant was for as many as seven charges. Inter alia

the charges were that he had not discharged his duties with devotion and diligence and â??took such actions and committed such omissions which showed lack of care, caution, or reasonable judgment and were grossly negligent in natureâ?. In an elaborate order dated 30th July 2016, the Disciplinary Authority discussed in detail the findings in the Inquiry Report and concluded that the Appellant â??did reckless financingâ?, â??did not care for the rules and procedures of the Bankâ?, â??misused his positionâ? and ultimately concluded that his acts were â??unbecoming of an officerâ?. The Disciplinary Authority held that the ends of justice would be met by inflicting upon the Appellant the punishment of compulsory retirement.

4. Soon after the Disciplinary Authority passed the above order on 30 th July 2016, a criminal case was registered by the Central Bureau of Investigation (â??CBIâ?) in Ghaziabad on 28th September 2016 under Sections 420, 468, and 471 IPC read with Sections 13(2) and 13(1)(d) of the Prevention of Corruption Act 1988 (â??PC Actâ??).

5. Two consequential actions followed. One was that in the pension payment order dated 10th July 2017, there was a cut in the pension payable to the Appellant. However, that does not form the subject matter of the present appeal since, admittedly, the Appellant has challenged that order separately in a writ petition which is pending before the High Court of Judicature at Allahabad and in which notice has been issued on 18th September 2017.

6. The other action was that a show cause notice was issued on 7th December 2016 by the respondent-Bank to the Appellant who replied to the same on 25th January 2017. After considering the said reply, by letter No. ZO:NZ:HRM:208/5879 dated 15th February 2017 issued to the Appellant, the Respondent Bank stated as under:

â??A show cause notice dated 07.12.2016 was served on you for forfeiture of full amount of gratuity payable to you.â??

â??You have submitted your reply vide letter dated 25.01.2017 in response to the said show cause notice. Your reply has been considered and

keeping in view all facts and circumstances in the matter, it is observed that there is no merit in your contentions and therefore it is decided to forfeit

full amount of gratuity under Section 4(6)(b) of Payment of Gratuity Act, 1972.â??

7. Thus, it is seen that the respondent-Bank invoked Section 4(6)(b) of the

Payment of Gratuity Act 1972 (â??PG Act?) in deciding to forfeit the full amount of gratuity payable to the Appellant.

8. After his appeal against the aforesaid decision was rejected by the Appellate Authority by an order dated 9th January 2018, the Appellant filed

W.P.(C) 2156/2018 before this Court which came to be dismissed by the learned Single Judge by the impugned judgment dated 9th March 2018.

While rejecting the plea of the Appellant that the penalty inflicted was not proportionate to the misconduct, the learned Single Judge was of the view

that it was â??commensurate with the misconduct committedâ? by the Appellant. The learned Single Judge further proceeded to observe that â??in

view of the aforesaid, I find that no case is made out for quashing the impugned orders and as such this petition and the application are dismissedâ?.

9. Insofar as the learned Single Judge has upheld the deduction of the 1/3rd of the Petitionerâ??s pension, it is apparent that the learned Single Judgeâ??s

attention was not drawn to the fact that a challenge by the Appellant on this very issue was pending in a separate writ petition in the High Court of

Judicature at Allahabad. Consequently, to the extent that the learned Single Judge has upheld the deduction of 1/3rd of the Appellantâ??s pension, the

impugned judgment of the learned Single Judge is set aside and it is clarified that this issue relating to the cut in pension will be decided on merits by

the High Court of Judicature at Allahabad in the writ petition pending before it.

10. Mr. Trideep Pais, learned counsel for the Appellant, has on instructions confined his challenge to the judgment of the learned Single Judge to the

extent that forfeiture of the entire gratuity payable to the Appellant has been upheld. He submits that there was no remedy available to the Appellant

under the PG Act regarding the forfeiture of gratuity. He referred to Section 4(6) (b) thereof and submitted that, in order to justify the forfeiture of the

gratuity, it was incumbent that the act for which his services had been terminated should constitute an offence involving moral turpitude. Relying on

the decision of the Supreme Court in Union Bank of India v. C. G. Ajay Babu (2018) 9 SCC 529, he submitted that what should constitute an offence

involving moral turpitude was in the realm of criminal law and it was for a criminal court to decide that issue. He submitted that after the order was

passed by the Disciplinary Authority, only an FIR was registered by the CBI and, therefore, it is premature for the respondent-Bank to invoke Section

4(6)(b) PG Act so as to forfeit the entire gratuity payable to the Appellant.

11. Without prejudice to the above submission, he further submitted that even if the respondent-Bank were to invoke Section 4(6)(a) PG Act, then

again, without quantifying the actual loss caused to the respondent-Bank, the gratuity could not have been forfeited. Drawing a distinction between the

exposure of the Bank to losses and the actual loss suffered by it, he placed reliance upon the decision of the Full Bench of Punjab & Haryana High

Court in *UCO Bank v. Anju Mathur* 2013 (5) LLN 382 (P&H).

12. Appearing on behalf of the respondent-Bank, Mr. Bhupender Singh Chauhan, learned counsel, submitted that there was a clear finding in the

Inquiry Report which has been affirmed by the Disciplinary Authority that the acts of the Appellant constituted moral turpitude and resulted in

financial loss to the respondent-Bank. He states that this actually resulted in the registration of the criminal case against the Appellant and certain

others and, therefore, according to him, the respondent-Bank was justified in invoking Section 4(6)(b) PG Act in forfeiting the gratuity payable to the

Appellant. He pointed out that it was only after issuing notice to the Appellant and considering his reply thereto that this action was taken.

13. At the outset, the Court would like to observe that the learned Single Judge was in error in observing that the Appellant had a remedy against the

forfeiture of the gratuity under PG Act. What the learned Single Judge perhaps overlooked was that there is no provision as such in the PG Act by

which a person against whom an action of forfeiture was taken under Section 4(6)(b) PG Act could approach an authority under the PG Act for

relief. Consequently, the question was required to be examined by the learned Single Judge in accordance with law.

14. For a better appreciation of the scheme of the provision invoked by the respondent-Bank in the present case, this Court sets out the relevant

portion of Section 4 PG Act as under:

4. Payment of gratuity.â?" (1) â?|. â?|.

(6) Notwithstanding anything contained in sub-section (1),â?

(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 â?

(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.

15. There are, therefore, three grounds on which gratuity payable to an employee whose services have been terminated can be forfeited by the

employer. The first is contained in Section 4(6)(a) PG Act where the reason for such forfeiture is that the act, wilful omission or negligence of the

employee which is the reason for the termination has caused â??any damage or loss to, or destruction of, property belonging to the employeeâ?. In

such a case, the forfeiture will be only to the â??extent of the damage or loss so causedâ?. In other words, unless there is a quantification of the

damage or loss caused to the bank in the present case, it would not be possible for the bank to invoke Section 4(6)(a) of the PG Act. As already

noticed, in the present case, in fact, the bank has not invoked Section 4(6)(a) PG Act. Therefore, this Court need go into any great detail in considering

this question or the decision in Anju Mathur (supra).

16. Turning now to Section 4(6)(b), it sets out two further grounds on which there can be a forfeiture of the gratuity payable to a terminated

employee. Sub-clause (i) permits forfeiture of gratuity wholly or partially if the reason for termination of the employeeâ?s services is for â??riotous or

disorderly conduct or any other act of violence on his partâ?. Clearly, there was no such charge against the Appellant in the present case regarding

any riotous or disorderly conduct or any other act of violence and, therefore, the question of sub-clause (i) being attracted in the present case does not

arise. In all fairness, even the learned counsel for the respondent-Bank did not suggest that the bank was relying on this sub-clause.

17. The third ground, as enumerated in sub-clause (ii), is where the termination of the employeeâ?s services was done for â??any act which

constitutes an offence involving moral turpitudeâ?? committed by the employee in the course of his employment.

18. There is clearly a distinction between the nature of acts enumerated in sub-clauses (i) and (ii). The expression â??constitutes an offence involving

moral turpitude? suggests that there is certainty that the act in question qualifies as such. In other words, the mere possibility of the employee having committed an act constituting an offence involving moral turpitude is not sufficient to attract the aforementioned provision.

19. In the facts of the present case, while it is not in issue that consequent upon the order of the Disciplinary Authority, the CBI registered a case on

28th September 2016 against the Appellant and certain others for the aforementioned offences under the IPC and the PC Act, that case has as of

now progressed only to the stage of filing of the charge sheet. The criminal court concerned will hereafter apply its mind to the contents of said

charge sheet and pass an order on charge. The progress of the criminal case will depend on whether charges are framed against the Appellant;

whether he is sent up for trial on those charges; whether he is convicted for the offences with which he is charged and whether such conviction

attains finality. A further question would then arise as to whether the offences for which the Appellant is ultimately convicted would involve moral

turpitude, as is mentioned in sub-clause (ii) of Section 4(6)(b) PG Act as discussed hereinbefore. Therefore, at this stage, it would be premature for

the respondent-Bank to conclude that the acts for which the Appellant's services were terminated constitute offences involving moral turpitude.

20. The Supreme Court has, in C. G. Ajay Babu (supra), interpreted Section 4(6) PG Act as under:

15. Under sub-Section (6)(a), also the gratuity can be forfeited only to the extent of damage or loss caused to the Bank. In case, the

termination of the employee is for any act or wilful omission or negligence causing any damage or loss to the employer or destruction of property

belonging to the employer, the loss can be recovered from the gratuity by way of forfeiture. Whereas under sub-Clause (b) of sub-Section (6), the

forfeiture of gratuity, either wholly or partially, is permissible under two situations" (i) in case the termination of an employee is on account of riotous

or disorderly conduct or any other act of violence on his part, (ii) if the termination is for any act which constitutes an offence involving moral turpitude

and the offence is committed by the employee in the course of his employment. Thus, sub-Clause (a) and sub-Clause (b) of sub-Section (6) of Section

4 of the Act operate in different fields and in different circumstances. Under sub-Clause (a), the forfeiture is to the extent of damage or loss caused

on account of the misconduct of the employee whereas under sub-Clause (b), forfeiture is permissible either wholly or partially in totally different circumstances. Sub-Clause (b) operates either when the termination is on account of- (i) riotous or (ii) disorderly or (iii) any other act of violence on the part of the employee, and under Sub-Clause (ii) of sub-Section (6)(b) when the termination is on account any act which constitutes an offence involving moral turpitude committed during the course of employment.

16. "Offence" is defined, under The General Clause Act, 1897, to mean any act or omission made punishable by any law for the time being in force.

17. Though the learned Counsel for the appellant-Bank has contended that the conduct of the respondent-employee, which leads to the framing of charges in the departmental proceedings involves moral turpitude, we are afraid the contention cannot be appreciated. It is not the conduct of a person involving moral turpitude that is required for forfeiture of gratuity but the conduct or the act should constitute an offence involving moral turpitude. To be an offence, the act should be made punishable under law. That is absolutely in the realm of criminal law. It is not for the Bank to decide whether an offence has been committed. It is for the court. Apart from the disciplinary proceedings initiated by the appellant Bank, the Bank has not set the criminal law in motion either by registering an FIR or by filing a criminal complaint so as to establish that the misconduct leading to dismissal is an offence involving moral turpitude. Under sub-Section (6)(b)(ii) of the Act, forfeiture of gratuity is permissible only if the termination of an employee is for any misconduct which constitutes an offence involving moral turpitude, and convicted accordingly by a court of competent jurisdiction.

21. The above decision, therefore, clearly explained that the "offence" referred to in sub-clause (ii) of Section 4(6)(b) PG Act is that which is punishable in law which, in this case, would be the penal laws invoked by the CBI, viz. the IPC and the PC Act. Again, as pointed out by the Supreme Court, it is not for the bank to decide whether an offence has been committed. It is for the Court. It is for this reason that the Supreme Court has observed that forfeiture of gratuity is permissible only if the termination of an employee is for any misconduct which constitutes an offence involving moral turpitude, and convicted accordingly by a court of competent

jurisdictionâ??. (emphasis supplied)

22. The decision in C. G. Ajay Babu (supra), therefore, clearly explains that the action of forfeiting the gratuity payable to an employee cannot be

taken at the stage when there is no final determination that such acts of the employee in fact constitute an offence involving moral turpitude. That

determination can only be made by a criminal court and, thereafter, that determination must attain finality.

23. The net result, as far as the present case is concerned, is that the impugned decision of the respondent-Bank in forfeiting the entire gratuity of the

Appellant was premature and could not have been taken at the stage at which it was, i.e. even before the determination by a criminal court that the

act committed by the Appellant constituted an offence involving moral turpitude.

24. Consequently, the impugned order of the learned Single Judge of this Court dated 9th March 2018 and, consequently, the order of the respondent-

Bank dated 15th February 2017 by which the entire amount of gratuity payable to the Appellant was forfeited under Section 4(6)(b) of the PG Act are

hereby set aside.

25. It is further clarified that if and when there is a final determination by the competent criminal court on the acts allegedly committed by the

Appellant which purportedly constitute offences involving moral turpitude, it would be open to the respondent-Bank to initiate action under the PG Act

for forfeiture of the gratuity. Such action, however, would not preclude the right of the Appellant to challenge such forfeiture on the grounds available

to him in accordance with law.

26. It is reiterated that this Court has not expressed any view as regards the action of the Respondent Bank in withholding part of the Appellantâ?s

pension. That question is left open to be decided in the writ petition pending before the High Court of Judicature at Allahabad.

27. The gratuity amount withheld shall now be released to the Appellant by the Respondent no later than four weeks from today.

28. The appeal is disposed of in the above terms.