

(2010) 04 GUJ CK 0004
In the Gujarat High Court
Case No : S.C.A. No. 3491 of 2010

Rajnagar Textile Mills

APPELLANT

Vs

Gunvant Lalchanddas Kayastha

RESPONDENT

Date of Decision : 06-04-2010

Acts Referred:

Central Civil Services (Pension) Rules, 1972 — Rule 3, 69(1), 71, 73, 9
Constitution of India, 1950 — Article 227
Payment of Gratuity Act, 1972 — Section 14, 4(1), 4(6), 7(2)
Rashtriya Chemicals and Fertilizers Employees (Conduct, Discipline and Appeal) Rules, 1993 — Rule 38, 45

Citation : (2010) 127 FLR 1011 : (2010) 4 LLJ 415

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : R.S. Sanjanwala, for the Appellant;

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Heard learned Advocate Mr. R.S. Sanjanwala on behalf of Petitioner.

2. The Petitioner Rajnagar Textile Mills Ltd has challenged order passed by Controlling Authority (Central) under Payment of Gratuity Act, 1972 dated December 16, 2008 in application No. 48(11)/2008 and also challenging order passed by Appellate Authority (Central) under Payment of Gratuity Act being appeal No. 48(2)/2008 dated June 10, 2008.

3. The Controlling Authority directed to Petitioner to pay Rs. 3,50,000/- + 10% simple interest from date of superannuation of Respondent dated May 31, 2008 till date of payment. The Appellate Authority has dismissed appeal preferred by Petitioner.

4. Learned Advocate Mr. Sanjanwala submitted that Respondent, who was working as Store Officer superannuated on May 31, 2008. Since CBI filed case against Respondent being RC/2/1988, amount of gratuity was not paid to

Respondent. The Controlling Authority has granted gratuity amount which confirmed by Appellate Authority and at the time of filing appeal before Appellate Authority, Petitioner has deposited said amount as per order passed by Controlling Authority before Appellate Authority. The only contention raised before this Court as it was raised before Controlling Authority by Petitioner that case of CBI had initiated criminal prosecution after thorough investigation and criminal case has been registered and same is yet to be decided by competent authority. In this circumstances, Mills company is not in a position to pay amount of gratuity. Therefore, question is whether Petitioner is entitled to withheld amount of gratuity or not because of CBI had initiated criminal prosecution against present Respondent and criminal case has been registered and pending before competent authority.

5. Learned Advocate Mr. Sanjanwala submitted that one order has been passed by this Court in case of Jahangir Textile Mills in S.C.A. No. 11124/2008, where amount of gratuity has been withheld by Mills company because of residential accommodation has not been vacated by concerned employee. That question has been referred to larger Bench by aforesaid order dated August 12, 2009, wherein para 5 to 7 are relevant, therefore, quoted as under:

5. Shri Vasavada has further relied upon decision of this Court in case of Anapol Vs. J.S.E.B. and Others, wherein this Court (Coram: D.H. Waghela, J) has held that the amount due to ex-employee cannot be adjusted against amount of rent due to employer for unauthorised detention of premises by the employee.

6. In view of these two views expressed by different Benches of this Court, I am of the view that this matter deserves to be referred to Larger Bench, so as to bring to an end to the uncertainty prevalent with regard to position of law in such a situation.

7. Hence, office is directed to place this matter before the Honourable The Chief Justice for passing appropriate order in light of the aforesaid observations.

6. In view of above observation made by this Court, matter has been placed before Honourable the Chief Justice for passing appropriate order in light of observation made by this Court as referred above. Therefore, learned Advocate Mr. Sanjanwala submitted that this matter may be also referred to bench of Honourable the Chief Justice to place before Division Bench of this Court because of uncertainty and having two different view of Learned single Judge in respect to question of withholding gratuity by employer. Except that no other submission is made by learned Advocate Mr. Sanjanwala before this Court.

7. I have perused order passed by Controlling authority and by Appellate authority. In light of contention raised by learned Advocate Mr. Sanjanwala, question is whether Petitioner Mills Company entitled to withhold amount of gratuity, which has been found to be due in favour of Respondent under provision of Payment of Gratuity Act because CBI had initiated criminal prosecution and criminal case is registered against Respondent, which is pending

before competent authority. It is not in dispute between parties that application was made by Respondent before Controlling authority on July 5, 2008. The Respondent joined establishment on April 1, 1972 and superannuated on May 31, 2008. His last drawn wages was Rs. 34,468/- per month and he had completed 31 year of continuous service in establishment. So, there is no dispute in respect to date of joining, date of retirement and salary which was received by Respondent on the date on which, he retired from service. The relevant discussion made in para 5 to 12 by Controlling authority are quoted as under:

5. Thereafter the matter was taken up for hearing. It was submitted on behalf of the applicant that he was superannuated on May 31, 2008 and that his last drawn pay was Rs. 34,468/-. The applicant relied upon the judgment of the Honourable Supreme Court in *Jaswant Singh Gill v. Bharat Coking Coal Ltd.* (2007) 1 SCC 663 : 2007 I LLJ 795 and submitted that "as far as the provisions of the Payment of Gratuity Act 1972 (as amended from time-to-time) it is no longer in the realm of charity but an authority right provided in favour of the employee" Relying on para 18 of the judgment it is pointed out that "once the applicant had retired from service there was no authority vested in the employer for continuing the departmental enquiry if any even for the purpose of imposing any reduction on the benefits payable to the Appellant. In the absence of such an authority it must be held that the enquiry had lapsed on the applicant was entitled to full retiral benefits on retirement." Etc.

6. In reply to the above contention the non applicant contended that the pay of the applicant was Rs. 34,233/- (Basic Rs. 23288/- + DA Rs. 10,954/-), date of joining of the applicant was April 1, 1972 and date of superannuation was May 31, 2008. It is further submitted that on account of short fall in Color Chemical, after investigation in to the matter CBI filed a case No. RC/2/88 in the special CBI Court at Ahmedabad. The case is still pending before the said Court for suitable decision in the matter. On the basis of the said case the Management has withheld the payable gratuity as the case is sub-judice.

7. In rejoinder to the above arguments, it was contended on behalf of the applicant that till date he had not received any notice/charge sheet from the Management of the Rajnagar Textile Mills Ahmedabad, that no notice regarding withholding of gratuity was ever issued/received by him, that in a similar case of shortfall in color chemicals where one Shri Bhavsar Vyas, the co-accused with the applicant, his case had already been disposed off by the Controlling authority under Payment of Gratuity Act 1972 in case No. ALC/ADI/48(503)/2002 and thereafter in appeal also the case was decided in favour of the applicant in case No. AH/RLC/48(9)/2004 that till date no charge sheet has been issued by the CBI. The applicant also prayed for interest on the payable gratuity at 10%.

8. The non applicant again submitted that the investigation into the matter is in progress and the CBI has filed criminal case in CBI Special Court. That till date the Court has not passed any acquittal order in case of the applicant and hence the establishment is not in a position to release his gratuity.

9. I have gone through the application and the written statement submitted by the non applicant and carefully considered the contentions of both parties. The fact that the applicant had joined in the establishment on April 1, 1972 and that he was allowed to retire on superannuation on May 31, 2008 has not been disputed. The claim of Rs. 3.5 Lakhs being the maximum limit of payment is also not disputed. The dispute regarding difference in last pay drawn being frivolous is not relevant at present and hence needs to be ignored.

10. During the course of proceedings, the non applicant has not been able to point out that the gratuity had been withheld with due authority and under intimation to the applicant. The non applicant also did not point out any specific provision under which the authority is prohibited in deciding the case under the provisions of Payment of Gratuity Act 1972 or that the jurisdiction of the authority stood withdrawn etc. On the contrary the applicant emphatically submitted that he had not received any intimation whatsoever regarding any such withholding or forfeiting of gratuity and relying on the judgment of the Apex Court (supra) contended that the non applicant had no authority to withhold the gratuity which had become payable under the Act.

11. Under the provisions of Section 4(6)(a) and 4(6)(b) of the Payment of Gratuity Act 1972, gratuity can be forfeited partially or wholly when the service of the employee is terminated for any act which constitute an offence involving moral turpitude provided such offence is committed by him in the course of employment. In the present case, the non applicant has stated that it was withholding the entire gratuity amount on the ground that a criminal case had been filed by the CBI before the special CBI Court and that no charge sheet had been issued against the applicant and even though he was superannuated from May 31, 2008, no intimation whatsoever was given regarding such withholding etc.

12. In view of the above discussion and circumstances of the case, I am of the opinion that the non applicant was not entitled to withhold the amount of gratuity and the same should have been released in favour of the applicant.

8. Thereafter, appellate authority has considered aforesaid contention raised by learned Advocate Mr. Sanjanwala where reasoning given by Appellate authority is quoted as under:

The Appellant have not cited any specific illegality or error in law in the order under challenge in this appeal except that the learned Controlling Authority has not considered the case law cited by the Appellate i.e. the Non applicant before the Controlling Authority. The record of the Controlling Authority shows that the Respondent had cited the only decision of Hon"ble Supreme Court of India in SLP 16827/2004 between Jaswant Singh Gill v. Bharat Coking Coal Ltd. (2007) 1 SCC 663. I find that the said decision of the Hon"ble Supreme Court has been duly considered and discussed in the order dated December 16, 2008 of the Controlling Authority more particularly at para 5 and thereafter and; it is the very

decision, after discussing which, the learned Controlling Authority has noted that once the Applicant had retired from service, there was no authority vested in the employer in continuing the departmental enquiry, if any, even for the purpose of imposing any reduction on the benefits payable to the employee. The learned Controlling Authority has further noted on the basis of very decision that the Non applicant before him had no authority to withhold the gratuity which had become payable under the Act. On perusal of the said decision, it is clear that the said decision rather helps the case of the employee than the case of the employer. Therefore, I find no reason to interfere with the order of the Controlling Authority on this ground.

The Appellant have also not pointed out the specific provisions of the P. G. Act 1972 which the Ld Controlling Authority has ignored in passing the order under challenge in this appeal. Even a cursory reading of the said order indicates that the learned Controlling Authority has referred to the relevant provisions of the P.G. Act 1972 for weighing the conflicting claims of the parties before him and coming to the conclusion that the Appellant employer was not justified in withholding the amount of gratuity, and I find no reason to interfere with the order of the Controlling Authority even on this ground.

The learned Controlling Authority has also referred to the submissions of the Appellant employer with reference to the provisions of the BIFR Act and SICA as also the pendency of a criminal case against the employee before the CBI Court, and has dealt with these issues in his order under challenge. I find no infirmity in the order of the learned Controlling Authority on this ground also. It is relevant to recall that Section 14 of the Payment of Gratuity Act 1972 gives over riding effect to the said Act over all other enactments or instruments or contracts having effect by virtue of any enactments other than the P. G. Act 1972. This being the case, there is no reason to allow the provisions of BIFR Act and SICA to come in the way of payment of gratuity to the employee in derogation of the P. G. Act 1972. Thus the order of the Controlling Authority and the ALC in this behalf is unassailable.

It is to be seen that the criminal case pending before the CBI Court was for offences alleged under relevant law which by itself provides for appropriate penalty for the offences, if proved and there can be no reason for withholding the gratuity as a measure of punishment. As observed in the case of D.V. Kapoor Vs. Union of India and others, No provisions of law has been brought to our notice under which provisions the employer is empowered to withhold the gratuity as well, if he retires, as a measure of punishment. Therefore, the order to withhold the gratuity as a measure of penalty is obviously illegal and is devoid of jurisdiction." The trial before the CBI case will have its own logical conclusion and, in case of conviction, the appropriate penalty be imposed on the accused without any relevance to the payment of gratuity.

As a result of above, I find that the challenge to appeal does not survive on any of the grounds raised in the appeal, and therefore the appeal fails. Consequently,

the order of learned Controlling Authority is upheld in toto. No order as to cost.

9. The relevant provision of Section 4(6) of Payment of Gratuity Act is quoted as under:

4(6)...(a) the gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing 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 shall be wholly 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.

10. In Payment of Gratuity Act, 1972 only provision is made, which gives authority to employer to forfeit amount of gratuity in circumstances, which are mentioned in Sub-Section 6 of Section 4. The relevant is that service of such employee must have to be terminated by employer but in fact of this case, it is undisputed fact that service of Respondent was not terminated by Petitioner but Respondent was allowed to retire after reaching age of his superannuation/ Therefore, Section 4(6) is not applicable at all to facts of present case. There is no provision made under Payment of Gratuity Act which give authority or power to employer to withhold or forfeit amount of gratuity because of pending inquiry or pending criminal proceeding against Respondent.

11. This aspect has been examined by A.P. High Court in case of B. Mohan Reddy Vs. A.P. State Co-op. Marketing Federation Ltd., where it has been held that u/s 4 Sub-Section 6 -withholding of gratuity amount pending inquiry - not justifiable Section 4 Sub-Section 6 provides for forfeiture. So there is no provision at all made in payment of Gratuity Act which give power to employer to withhold amount of gratuity, only power is to forfeit or forfeited amount of gratuity in case of termination by employer for misconduct mentioned under Sub-Section 6 of Section 4 of Payment of Gratuity Act. The relevant discussion made in para 7 to 10 are quoted as under at p. 420:

7. Before me, the stand of the Respondent is sought to be justified u/s 4(6) of the Act. Sub-section (6) of Section 4 incorporates two situations in which the amount of gratuity can be forfeited either wholly or to the extent of the loss caused to the employer by the employee. It would be useful to extract here Sub-section (6) of Section (4) of the Act.

4(6)...(a) the gratuity of an employee, whose services have been terminated for any act, willful 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 shall be wholly 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. From a plain reading of Sub-section (6) of Section 4, it is obvious that it does not authorize an employer to withhold the amount of gratuity for any reason. It provides for forfeiture of gratuity either partially or wholly, as the case may be, in the following situation:

(i) where the services of an employee are terminated for any act, wilful omission or negligence which caused any damage or loss or destruction of property belonging to the employer, then only the employer can forfeit the amount of gratuity to the extent of the damage or loss so caused. In such a case the employer will have to specify the amount forfeited for the loss or damage caused by the employee from out of the amount determined under Sub-section (2) of the Section 7.

(ii) where the services of an employee are terminated for riotous or disorderly conduct or any other act of violence on his part.

(iii) where the services of an employee are 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.,

It is only when an employee's services are terminated for any of the reasons mentioned in (ii) and (iii) stated above that the gratuity payable to him can be wholly forfeited.

9. In this case, from a perusal of the order of the Respondent of August 2, 1984, terminating the services of the Petitioner, it is clear that his services are not terminated for any of the reasons stated in (i) to (iii) (specified in Sub-sections (6) (a) and (b) of Section 4).

10. From the above discussion, it follows that the Respondent is not entitled to withhold the amount of gratuity either on the ground of pendency of alleged enquiry into the pesticides affair or for any other reason. The Petitioner is therefore entitled to the amount of gratuity due to him under the Act.

12. The Bombay High Court has considered same aspect in case of Rajendra Kumar Nangia v. Rashtriya Chemicals and Fertilizers Limited 2002 I LLJ 648 . The relevant para 4 and 5 are quoted as under at p. 650:

4. It would be seen that Sub-Section 1 of Section 4 of the Payment of Gratuity Act 1972 provides that gratuity shall be payable to an employee on termination

of his employment after he has rendered continuous service for not less than five years. The termination of the employment may be on superannuation or on retirement or resignation or death or disablement due to accident or disease of employee. Thus, an employee become entitled to payment of gratuity under this statute. Sub-Section 6 is an exception to Sub-Section 1 and make provisions of forfeiture of the gratuity wholly or partially in the circumstances mentioned therein. According to Sub-Section 6, gratuity of an employee may be forfeited to the extent of damage or loss caused to the employer if service of that employee has been terminated for any act, wilful omission or negligence on that ground. The gratuity payable to an employee may also be forfeited wholly or partially if the service of such employee has been terminated for his riotous or disorderly conduct or any other act of violence on his part or service of such employee has been terminated for any act constituting an offence involving moral turpitude. Though criminal case was registered against the Petitioner by CBI in the year 1993, the fact is Petitioner service have been terminated simpliciter on his superannuation and not for any of the grounds mentioned under Sub-Section 6 of Section 4 of the Payment of Gratuity Act, 1972. As a matter of fact, admittedly till Petitioner's superannuation and even till date no departmental proceeding of misconduct has been initiated against the Petitioner. In this back drop of facts, it was not open to the Respondents to refuse to release the gratuity amount to the Petitioner.

5. The learned Counsel for the Respondent heavily relied on the judgment of the Apex Court in *Jarnail Singh Vs. The Secretary, Ministry of Home Affairs and others*, In support of his contention that gratuity can be withheld by the employer Respondent if any judicial proceeding are pending against the Petitioner relating to his misconduct for negligence during the period of his service. We are afraid the judgment of the Apex Court in *Jarnail Singh v. Secretary, Ministry of Home Affairs and Ors.* (supra) has no application in the facts and circumstances of the case before us. The Apex Court in the case of *Jarnail Singh v. Secretary, Ministry of Home Affairs and Ors.* (supra) was concerned with the provisions of Central Civil Services (Pension) Rules 1972 and in the light of this specific Rules 3, 9, 69(1)(c), 71 and 73 held that there was nothing wrong in the order of the president in withholding the gratuity of the employee. In the present case none of Rules under consideration before Apex Court or the similar rules are applicable but the Petitioner is governed by the provisions of the 1972 Act. And as per Section 4 sub Clause (1) Petitioner has statutory right to receive gratuity from his employer save and except in the circumstances provided in the Sub-Section 6 of Section 4. We have already indicated that none of the circumstances provided in Sub-Section 6 is applicable in the present case and therefore we do not find any justifiable cause on the part of the Respondent in withholding gratuity. Mere pendency of criminal case lodged by CBI shall not disentitle the Petitioner from receiving gratuity nor snail entitle the Respondent not to release the gratuity to the Petitioner as Petitioner's service came to an end on his attaining superannuation simpliciter. We may note

that Rule 45 of the R.C. F. employees (Conduct, Discipline, and Appeal) Rules 1993 does provide for departmental action against retired employees. Clause 3 of Rule 45 provides that in case of an officer who has already retired on superannuation before instituting any departmental proceeding and who has received all retrial benefits as far as possible only criminal prosecution can be recommended against him. Even Clause 2 of Rule 45, it appears that now no departmental action can be initiated against present Petitioner as it provides that if departmental proceeding had not been instituted while the officer is in service, proceeding under Rule 38 for imposing of major penalties can be initiated only by or sanction of the board of Director and in respect of cause of action which arose or in respect of an offence which took place not earlier than four years before institution of the proceeding. The Petitioner was superannuated in the year 1994. The criminal case was registered against him in the year 1995 before his superannuation but till date i.e. more than seven years of his superannuation, no departmental action has been initiated and therefore such action has become beyond time provided in Clause 2 of Rule 45 of the RCF Employees Rule 1993.

13. The High Court of Calcutta has observed similar question in case of Madan Mohan Laik Vs. Coal India Ltd. and Others, The relevant observation made in para 10 and 11 are quoted as under at pp. 1059 & 1060:

10. Admittedly, the Petitioner's service have not been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer. The Petitioner's services have not been terminated for his riotous or disorderly conduct or any other act of violence on his part. The Petitioner's services have not been terminated for any act which constitutes an offence involving moral turpitude. Therefore, provision relating to forfeiture of gratuity as contemplated in Sub-Section 6 of Section 4 of the said Act have no manner of application in the facts and circumstances of the instance case. No provision of the said act has been brought to the notice of this Court which confers right upon the employer to withhold gratuity of an employee. The Respondent No. 1 to 6 as stated earlier have admitted that the Petitioner handed over his quarter to Shri Anup Kumar Benarji after his superannuation.

11. In Ramjilal v. Elphinstone Spg. Wvg. Mill Company Ltd. (1984) Lab IC 1703, Pendse, J. of the Bombay High Court in para 5 of the report, inter alia observed as follows:

The contention can not be accepted because the right to the amount of gratuity is not circumscribe or made dependent on the conduct of the employee subsequent to the date of his retirement. Right to secure gratuity amount can not be defeated or can not be used as lever by the employer for securing back possession of the premises from the Petitioner. It is not permissible under the said Act to withhold the amount for any reason and in my judgment even though the conduct of the Petitioner in holding back possession of the primises is not very praiseworthy still that is not the sufficient reason to deprive him of the right to gratuity.

14. In case of M.C. Chamaraju Vs. Hind Nippon Rural Industrial (P) Ltd., The relevant para 15 is quoted as under:

75. There is another aspect also which is relevant. The act has been enacted with a view to grant benefit to workers, a weaker Section in industrial adjudicatory process. In interpreting the provisions of such beneficial legislation, therefore, liberal view should be taken. The benefit has been extended by the authorities under the Act to the workman by recording of finding that the applicant (Appellant herein) had completed requisite service of five years to be eligible to get gratuity. In that case, even if another view was possible a Division Bench should not have set aside finding recorded by the authorities under the Act and confirmed by a single Judge by allowing the appeal of the employer.

15. In view of aforesaid reasoning given by Controlling authority as well as confirmed by Appellate authority and considering same contention that criminal case is pending before competent authority, can not give any authority to employer to withhold amount of gratuity, which has been found to be due in favour of Respondent under provision of Payment of Gratuity Act, 1972. There is no provision made in Gratuity Act which give power to employer to withhold amount of Gratuity. There is only provision made in Section 4(6) which give power to employer to forfeiture of amounts of gratuity but there is distinction between forfeiture and to withhold amount of gratuity. Therefore, action of Petitioner withholding amounts of gratuity because of CBI case is pending is without jurisdiction and contrary to provision of Gratuity Act, 1972. The reasoning given by both authority with application of mind and none of authority has committed error, which would require interference by this Court under Article 227 of Constitution of India. The decision of this Court which has been relied looking to facts which are on record is not applicable and having no identical question involved in facts of present case. Therefore, it is not necessary to refer this matter before Honourable the Chief Justice as per decision given by this Court in S.C.A. No. 11124/2008 dated August 12, 2009. According to my opinion, matter is not required to be placed before Honourable the Chief Justice of this Court.

16. Learned Advocate Mr. Sanjanwala has not cited any other decision wherein having similar facts of this case before this Court which referred for decision of Honourable the Chief Justice of this Court. Therefore, contention raised by learned Advocate Mr. Sanjanwala can not be accepted. Hence, rejected.

17. There is no substance in present petition. Accordingly, present petition is dismissed. It is directed to Appellate authority (Central) whatever amount has been deposited by Petitioner let entire amount may be paid by A/c payee cheque in name of Shri Gunavant Lalchanddas Kayastha after proper verification without any delay.