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(2022) 05 CAL CK 0025

In the Calcutta High Court

Case No : FMA No. 652 Of 2019, IA No.CAN 2 Of 2018 (Old No.CAN 7657 Of 2018)

State Bank Of India & Ors. APPELLANT

Vs

Ratan Kumar Rababi & Ors. RESPONDENT

Date of Decision : 13-05-2022

Acts Referred:

State Bank of India Officers? Service Rules, 1992 — Rule 19, 19(3), 67(1)
Payment of Gratuity Act, 1972 — Section 4, 4(6), 4(6)(a), 4(6)(b), 13

Citation : (2022) 05 CAL CK 0025

Hon'ble Judges : T. S. Sivagnanam, J;Hiranmay Bhattacharyya, J

Bench : Single Bench

Advocate : Soumya Majumder, Susanta Pal, S. Pal Chowdhury, Kallol Basu, Suvadip Bhattacharjee, Swapnamoy Sarkar

Final Decision : Allowed

Judgement

Hiranmay Bhattacharyya, J

1. This intra court appeal is directed against a judgment and order dated July 30, 2018 passed by a learned Single Judge in WP 4229 (W) of 2018.

2. The short question that arises for consideration in the instant appeal is whether the appellant/employer was justified in withholding the payment of gratuity of the respondent no. 1/ employee even after his superannuation from service on the ground of pendency of disciplinary proceedings.

3. The facts in a nutshell that are necessary for the consideration of the above issue are as follows:-

The respondent no. 1 (for short “the employee”) joined the service of the State Bank of India (for short “the employer”) as a cashier cum clerk cum typist and he ultimately held the post as Chief Manager (Audit). During his posting at Kolkata, local head office, he was served with a chargesheet on 22.10.2011. The respondent employee retired from service on superannuation with effect from

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30.11.2011. After completion of the departmental enquiry, the disciplinary authority proposed to impose major penalty of "removal from service" under Rule 67(1) of State Bank of India Officers' Service Rules, 1992 (for short "SBIOSR") and "for forfeiture of entire gratuity" in terms of Section 4 of the Payment of Gratuity Act, 1972 (for short "the 1972 Act"). By a letter dated 07.08.2012 an order of major penalty was passed on 10.08.2012 whereby the chargesheeted officer was inflicted with punishment of "removal from service" under Rule 67(1) of SBIOSR and "for forfeiture of entire gratuity" in terms of Section 4 of the Payment of Gratuity Act, 1972. The respondent preferred a departmental appeal which stood rejected on 19.12.2013. The employee submitted Form N before the Controlling Authority under the Payment of Gratuity Act, 1972 praying for a direction upon the employer to pay gratuity to him. Controlling Authority, by an order dated August 22, 2016, rejected the claim of the respondent against which the employee approached the appellate authority under the 1972 Act. Appellate authority, by an order dated December 14.12.2017, held that the employee is entitled to be paid gratuity of Rs. 10,00,000/- along with simple interest from the date of superannuation till the date of payment after setting aside the order passed by the Controlling Authority. Employer challenged the order dated December 14, 2017 passed by appellate authority under the 1972 Act by filing a writ petition being WP 4229(W) of 2018 which was dismissed by a learned Single Judge by a judgment and order dated July 30, 2018. Being aggrieved, employer preferred this intra court appeal.

4. Mr. Majumder, learned advocate for the appellant contended that since the penalty order attained finality, the authority under the 1972 Act exceeded its jurisdiction by holding that the respondent is entitled to gratuity which would amount to modifying the penalty order. He further submitted that once the employee accepted the penalty order, his right to claim gratuity stood forfeited. He further submitted that the appellate authority under the 1972 Act as well as the learned Single Judge while passing the order impugned relied upon the judgment of the Hon'ble Supreme Court of India in the case of Jaswant Singh Gill vs. Bharat Coking Coal Ltd. reported at (2007) 1 SCC 663 which has since been overruled by a larger bench of the Hon'ble Supreme Court of India in the case of Chairman-Cum-Managing Director, Mahanadi Coalfields Limited vs. Rabindratnath Choubey reported at AIR 2020 SC 2978. He further submitted that in Rabindranath Choubey (supra) it has been held that gratuity can be withheld in case a disciplinary proceeding is pending against an employee.

5. Per contra, Mr. Basu, learned advocate for the respondent contended that SBIOSR do not permit the authority to forfeit the gratuity in any circumstances whatsoever. He further submitted that his statutory right to get gratuity under the 1972 Act cannot be curtailed merely on the ground that the employee did not challenge the penalty order. He distinguished the judgment in the case Rabindranath Choubey (supra) by submitting that the said decision is not of any assistance to the appellant as Rule 34(3) of the CDA rules which was the Rule under consideration before the Hon'ble Supreme Court of India empowered the

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authority to forfeit the gratuity whereas Rule 19 of the SBIOSR do not empower the appellant to forfeit the gratuity. He also submitted that since the employer has not challenged the Recovery Certificate issued by the Controlling Authority under the 1972 Act, instant writ petition was not maintainable. He also submitted that the term "removal from service" after superannuation of an employee as per rule 19(3) does not come within any of the provisions enumerated in Section 4 of the 1972 Act. He also submitted that since the pecuniary loss suffered by the employer could not be ascertained and/or quantified, the gratuity could not be forfeited by the employer.

6. We have heard the learned counsels for the parties and perused the materials placed.

7. The question that falls for consideration in the instant appeal is whether an authority exercising power under the 1972 Act can modify and/or set aside the order of punishment passed by the disciplinary authority forfeiting the gratuity.

8. It is not in dispute that chargesheet was issued to the respondent no. 1 prior to his date of attaining the age of superannuation.

9. It is evident from the materials on record that the disciplinary authority by a letter dated November 22, 2011 informed the respondent employee that the appropriate authority has accorded approval for invocation of the provisions contained in Rule 19(3) of the SBIOSR and accordingly the service of the respondent in the bank has been extended for conducting the disciplinary proceedings under the service rules.

10. The disciplinary proceedings continued even after the superannuation of the employee by invoking Rule 19(3) of SBIOSR and the appointing authority after conclusion of the departmental enquiry passed the major penalty order on 10.08.2012. By the said order, punishment of removal from service under rule 67(i) of SBIOSR and forfeiture of entire gratuity in terms of Section 4 of the 1972 Act was inflicted upon the employee.

11. The contention of the respondent no. 1 is that gratuity under the 1972 Act could not be withheld by the employer on the ground of pendency of the disciplinary proceedings as the right to get gratuity accrued in terms of the 1972 Act immediately on the date of his superannuation that is on 30.11.2011. On the other hand the employer contended that an employee against whom disciplinary proceedings can continue even after superannuation in accordance with the service rules cannot be treated as a superannuated employee and punishment of dismissal/termination can be inflicted even after the superannuation. According to employer, an employee governed by the service rules could not have applied for gratuity before completion of the disciplinary proceedings.

12. The appellate authority under the 1972 Act held that the employee is entitled to gratuity. While arriving at the said finding, the appellate authority under the 1972 Act relied upon the judgment of the Hon'ble Supreme Court of India in the

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case of Jaswant Singh Gill (supra).

13. The learned Single Judge dismissed the writ petition by relying upon an observation of the Hon'ble Supreme Court of India in the case of Chairman-Cum-Managing Director vs. Mahanadi Coal Fields Limited vs. Rabindranath Choubey reported at (2013) 16 SCC 411 wherein the Hon'ble Supreme Court while referring the issue to be decided by a larger bench observed that Jaswant Singh Gill's case directly answered the question where in the scheme of the 1972 Act, gratuity has to be necessarily released to the employee concerned on his retirement even if departmental proceedings are pending against him. The learned Single Judge being conscious of the fact that the issue was referred to a larger bench was of the view that the order of the appellate authority under the 1972 Act speaks of a possible view.

14. In Jaswant Singh Gill (supra) the controlling authority and the appellate authority ordered the payment of gratuity on the ground that in the order passed by the departmental authority, the quantum of damage or loss caused was not indicated and it was not the case covered by Section 4(6)(a) and 4(6)(b) of the 1972 Act. The High Court opined that the controlling authority could not have gone into the validity of the dismissal order and forfeiture of the gratuity. On such facts the Hon'ble Supreme Court held that the provisions of Section 4(6) would prevail over the service rules governing such employee. It was further held that misconduct did not cover the grounds mentioned in Section 4(6)(a) for recovering the loss nor it was the case of misconduct in which gratuity could have been withheld wholly or partially in the exigencies as provided in Section 4(6)(b). It was further held that even if the disciplinary enquiry was initiated before the age of superannuation, if the employee attains the age of superannuation, the question of imposing a major penalty by removal or dismissal from service would not arise.

15. Three Hon'ble Judges of the Supreme Court of India in the case of Rabindranath Choubey (supra) after noticing the judgment delivered by three Hon'ble Judges of the Supreme Court in the case of State Bank of India vs. Ram Lal Bhaskar reported at (2011) AIR SCW 6577 held that if the service rules provide that a disciplinary proceedings initiated against an officer while in service may be continued and concluded even after the date when such employee shall attain the age of superannuation and major penalty could be inflicted provided the disciplinary proceedings were initiated by the employee while he was in service. It was further held that in such a case a major penalty which includes the dismissal from service can be imposed even after the employee has attained the age of superannuation and/ or was permitted to retire on attaining the age of superannuation, provided the disciplinary proceedings were initiated while the employee is in service. The Hon'ble Supreme Court further held that Subsection 6 of Section 4 of the 1972 Act shall be attracted in such a case and the amount of gratuity can be withheld till the disciplinary proceedings concluded. Thus, this court is unable to accept the contention of Mr. Bose that in the absence of any

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provision empowering the appellant to withhold the gratuity in the SBIOSR the authorities could not withhold the gratuity and the same became due and payable immediately on the date of his superannuation that is on 30.11.2011.

16. It was further held in Rabindranath Choubey (supra) that in a case where disciplinary proceedings were initiated for very serious allegations of misconduct which caused substantial loss to the employer and upon such being proved and the punishment is given, the provisions of subsection 6 of section 4 of the 1972 Act would be attracted and it would be within the discretion of the employer to forfeit the gratuity payable to the employee.

17. The judgment in Jaswant Singh Gill (supra) was overruled by the larger bench in Rabindranath Choubey (supra) inter alia for the reasons that the authority under the Payment of Gratuity Act, 1972 had no jurisdiction to go into the legality of the order of disciplinary authority which was not questioned. It was further observed that in Jaswant Singh Gill (supra) the court did not consider the scope of the provisions of the Payment of Gratuity Act, 1972 and the provisions of the service rules providing legal fiction of employee deemed to be in service even after superannuation.

18. In the case on hand the appointing authority in the order dated 10.08.2012 returned a finding that the chargesheeted officer has been chiefly responsible for the financial loss of Rs. 1. 90 crores to the bank. On such finding the chargesheeted officer was inflicted with the penalty of removal from service under Rule 67(i) of SBIOSR and forfeiture of entire gratuity in terms of Section 4 of the 1972 Act. The said order had attained finality and is thus binding upon the employee and the employer.

19. The principle laid down in Jaswant Singh Gill (supra) was the basis for passing the order by the appellate authority under the 1972 Act. The observations made in Rabindranath Choubey (supra) while overruling Jaswant Singh Gill (supra) are clearly applicable to the facts of the instant case as the order of punishment inflicted upon the employee is not under challenge. The reasons assigned by the appellate authority under the 1972 Act against forfeiture of gratuity was in view of the decision in Jaswant Singh Gill. Since Jaswant Singh Gill (supra) stands overruled, the order of the appellate authority under the 1972 Act cannot be sustained in the eye of law. In view of the observations in Rabindranath Choubey (supra) it cannot also be said that Jaswant Singh Gill's case is a possible view as held by the learned Single Judge and as such the same also calls for interference.

20. This Court is, therefore, of the considered view that the Appellate Authority while exercising its power under the 1972 Act cannot act as the Appellate Authority of the disciplinary authority imposing the punishment. An authority exercising powers under 1972 Act, which in the instant case is the appellate authority, had no jurisdiction to deal with the order of punishment passed by the disciplinary authority. The said authority could not sit in appeal over the order of

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punishment of the disciplinary authority and modify or set aside the order of the disciplinary authority forfeiting the gratuity. Since the order of punishment is not the subject matter of challenge in this appeal, this Court does not deem necessary to deal with the argument of Mr. Basu that the gratuity could not have been forfeited in a case of removal from service.

21. Now, this Court shall deal with the decisions cited by Mr. Basu in support of his contention. A co-ordinate bench of this court by a judgment dated 17.11.2021 passed in W.P.C.T. No. 140 of 2019 in the case of In Union of India and Ors. vs. Gurtiboina Appaia V.G. Shankar while dealing with the right of the railway administration to withhold, recover or adjust from the death cum retirement gratuity to adjust, the normal rent and any other amounts as may be due from the ex-employee on vacation of the railway accommodation held that Section 4(6) and 13 of the 1972 Act overrides the Railway Service (Pension Rules, 1993) as well as other statutes. The said decision was not on the issue as to whether the employer has a right to withhold gratuity during pendency of a disciplinary proceedings even after his superannuation in view of the legal fiction in the service rules. Thus, the said decision has no manner of application to the facts of the instant case.

22. A co-ordinate bench of this Court by a judgment dated 18.01.2018 passed in MAT No. 1522 of 2017 with CAN No. 8857 of 2017 in the case of United Bank of India vs. Bidyut Baran Haldar and ors. while dealing with an issue whether the bank could attach/adjust the gratuity payable to the employee upon termination of his service on the ground that monies are due and payable by the employee to the bank on account of loan that had been advanced by the bank to the employee during the pendency of his service held that since the bank did not prefer any appeal from the order of the Controlling Authority holding that adjustment of gratuity amount against the outstanding loan is against the provisions of 1972 Act and the certificate issued by such authority in pursuant to such order was also not under challenge, the co-ordinate bench, on such facts, held that the bank was bound by the order of the controlling authority. The facts of the said case is distinguishable as in the case on hand the order of the appellate authority under the 1972 Act has been challenged by the appellant. Certificate proceeding is in the nature of execution proceedings and once the executable order has been challenged, the certificate issued by the controlling authority need not be challenged separately. Thus, this court do not find any substance in the argument of Mr. Bose that the writ petition at the instance of the appellant herein was not maintainable for not having challenged the certificate issued by the controlling authority.

23. A Division Bench of the Madras High Court by a judgment dated 23.08.2021 passed in W.A. No. 1558 of 2011 and M.P. No. 1 of 2011 in the case of The Management, Coimbatore District Central Co-operative Bank Ltd. vs. N. Somasundaram and ors. while dealing with a case involving recovery of loss caused to the bank held that since the surcharge proceedings has come to an

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end it was open to the authorities to recover the loss by invoking the provisions of the Revenue Recovery Act from the employee but the gratuity cannot be withheld in view of Section 13 of the Payment of Gratuity Act. The said decision is distinguishable on facts and as such the same has no manner of application to the facts of the instant case.

24. For the reasons as aforesaid the order of the learned Single Judge dated July 30,2018 and the order dated December 14, 2017 passed by the appellate authority under the 1972 Act are set aside and quashed. Consequently, the order of the Controlling Authority dated August 22, 2016 stands revived. All consequential steps, if any, taken by the authorities under the 1972 Act pursuant to the order of the Appellate Authority dated December 14, 2017 and/or the order passed by the learned Single Judge dated July 30, 2018 also stands set aside and quashed. The appeal, thus, stands allowed. There shall be however, no order as to costs. The application also stands disposed of accordingly.

25. Urgent photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

I agree.

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