(2016) 09 CAL CK 0008

In the Calcutta High Court

Case No : MAT No. 1298 of 2012 with CAN No. 7976 of 2012

UCO Bank APPELLANT

Vs

Nityananda Paul RESPONDENT

Date of Decision : 29-09-2016

Acts Referred:
Payment of Gratuity Act, 1972 — Section 1(3), Section 5

Citation : (2016) 151 FLR 1031 : (2017) LabLR 559 : (2017) LIC 271 : (2016) 4 LLN 625

Hon'ble Judges : Nishita Mhatre and Tapabrata Chakraborty, JJ.

Bench : Division Bench

Advocate : Rajsekhar Mantha and Gopa Chakraborty, Advocates, for the Appellants; Soumya Majumder and Victor Chatterjee, Advocates, for the Respondent No. 1

Final Decision : Dismissed

Judgement

Nishita Mhatre, J. - The questions which arise in the present appeal are (i) whether the employees of the UCO Bank are entitled to payment of gratuity under the Payment of Gratuity Act, 1972 or under the UCO Bank Officer Employees'' (Conduct) Regulations, 1976; (ii) whether gratuity can be denied to an employee only because he has been held guilty of having committed a misconduct without quantifying the actual loss suffered by the employer before imposing any punishment on him; (iii) whether a separate enquiry can be held by the employer for quantifying the loss suffered by the employer after imposing the punishment of removal, dismissal etc. on the employee.

2. A few facts which are necessary to decide these issues are as under:

The respondent employee was working with the appellant Bank when he was issued a charge-sheet on 20th November, 1992. A disciplinary enquiry was held against him, pursuant to which he was removed from service. The removal order indicates that he had with mala fide intentions committed the following acts: (i) allowed excess drawings beyond the sanctioned limit; (ii) continued allowing over-withdrawal in various accounts despite receiving instructions to the contrary; and (iii) deliberately failed to report irregularities through the monthly statements with an ulterior motive.

Having been found guilty of all the charges, the employee was removed from service. He moved this Court by filing WP 2329 of 1994 challenging the order of removal. However, that writ petition was dismissed on 13th June, 2006 and the appeal preferred by the employee was also dismissed. Thus the finding that the employee had committed the aforesaid acts of misconduct was not disturbed and the punishment imposed on him attained finality.

3. The employee sought settlement of his dues such as provident fund, gratuity and leave wages. He submitted the requisite forms for the same in the year 2008 and then again in the year 2009. By a communication dated 15th February, 2010 the Bank called upon the employee to show cause why his gratuity should not be forfeited. The employee submitted an elaborate reply asserting that his gratuity and provident fund could not be forfeited. On 12th July, 2010 the Bank informed the employee that he had already been paid his contribution towards the provident fund and that he was not entitled to the Bank''s contribution as the Trustees of the provident fund had denied him the same. Similarly he was informed that the Trustees of the gratuity fund had also declined to pay gratuity to him. It appears that the employee''s contribution to the provident fund was credited to his account without the interest for the delay in payment.

4. A writ petition was filed by the employee seeking a declaration that Rule 18 of the UCO Bank Employees'' Provident Fund Rules was ultra vires Section 10 of the Employees'' Provident Fund and Miscellaneous Provision Act, 1952 and Article 21 of the Constitution of India. The employee further sought a direction to the Bank to release the Bank''s share or contribution of the provident fund, along with the accrued interest thereon, and the gratuity and leave salary together with interest on each of the amounts.

5. The writ petition was decided on 29th March, 2012 by the learned Single Judge of this Court. It was held that the denial of the Bank''s contribution towards provident fund and the interest on the delayed payment of the employee''s share of provident fund was illegal. The Court noted that the employee''s claim for leave encashment was undisputed and therefore directed the Bank to grant the benefit. As regards gratuity, the Court held that the Bank could not forfeit the same as the employee''s services were not terminated either for wilful omission or negligence causing financial loss to the Bank or for an offence involving moral turpitude. The Court held that the Payment of Gratuity Act did not apply to the employee. However, the learned Single Judge permitted the Bank to re-examine the issue with respect to the adjustments of the housing loan availed of by the employee from his share of the provident fund contribution.

6. Being aggrieved by the decision of the learned Single Judge the Bank has preferred this appeal.

7. The first argument of Mr. Rajsekhar Mantha, the learned Counsel on behalf of the Bank was that gratuity is payable to the employees of the Bank in terms of Regulation 46 of the UCO Bank (Officers'') Service Regulations, 1979 (hereinafter referred to as the Service Regulations). According to him, Regulation 46 empowers the Bank to forfeit the gratuity payable to an employee who has committed misconduct. Drawing our attention to Regulation 46, the learned Counsel submitted that the Bank is liable to pay gratuity only on retirement or death of an employee and in the case of a disablement which has rendered an employee or Officer unfit for further service as recorded by a Medical Officer approved by the Bank. Gratuity is payable on submitting a resignation after completion of 10 years of continuous service or on termination of service in any other way except by way of punishment after completion of 10 years of service. Therefore, according to Mr. Mantha, gratuity is not payable to an employee who has been removed from service by way of punishment. The learned Counsel submitted that the issue as to whether gratuity can be withheld is no longer res integra in view of the judgment of the Full Bench of the Punjab and Haryana High Court in the case of UCO Bank and Others v. Anju Mathur decided on 7th March, 2013 in Letters Patent Appeal No. 566 of 2012. The learned Counsel then submitted that even assuming the Regulations were not applicable and it is the Payment of Gratuity Act, 1972 which governs the payment of gratuity to the Officers of the Bank, Section 4(6) of the Act clearly permits the denial of gratuity in the event there was a misconduct involving moral turpitude or termination of service on the ground of negligence or a wilful omission causing any damage or loss or destruction of the property of the employer. The learned Counsel submitted that the charge against the employee clearly indicated that his actions had caused a loss to the Bank and therefore, the gratuity had been denied. He submitted that the order of the Disciplinary Authority clearly indicates the mala fide intention on the part of the employee which resulted in him deliberately causing a loss to the Bank and therefore the Bank was right in forfeiting the gratuity. The learned Counsel then submitted that instead of denying him the gratuity without affording a hearing to the employee, the Bank was willing, at this stage, to issue a show cause notice to him and decide whether gratuity should be paid to him as the trustees of the gratuity fund had declined to pay the gratuity on the basis of a note submitted by the Bank to them. The learned Counsel placed reliance on the judgment of the Supreme Court in the case of Disciplinary Authority-Cum-Regional Manager and Ors. v. Nikunja Bihari Patnaik reported in (1996) 9 SCC 69 to fortify his submission that the Bank was not required to quantify the loss caused to it and mention the figure in the charge-sheet issued to the employee. The Supreme Court has observed in the aforesaid judgement that when an employee acts beyond his authority that by itself was misconduct and there was no need to prove the actual loss caused to the Bank. He submitted that the loss caused to the Bank by the employee could not be quantified until the suits filed to recover the amount from various customers fructified in judgments. Mr. Mantha next submitted that the conduct of the employee could be best described as moral turpitude and therefore gratuity could

be denied to him, both under the Service Regulations as well as the Payment of Gratuity Act. He drew our attention to the judgment in the case of Pawan Kumar v. State of Haryana and Anr. reported in (1996) 4 SCC 17 and Ramchandra S. Joshi v. Bank of Baroda reported in 2010 (4) LLJ 119 (Bom) to support this argument. The learned counsel relied on Tara Chand Vyas v. Chairman & Disciplinary Authority and Ors. reported in (1997) 4 SCC 565 to submit that corruption in the Banking industry which damages, destroys, defeats or tends to defeat the constitutional objectives must be halted and unjust enrichment of an employee cannot be permitted at the cost of the society.

8. Mr. Soumya Majumder, learned Counsel appearing for the employee, drew our attention to the provisions of the Payment of Gratuity Act, 1972 and pointed out that the Act is applicable to an establishment unless an exemption from payment of gratuity under the Act has been granted by the appropriate Government under Section 5. He pointed out that admittedly no such exemption had been granted to the Bank and therefore, the Service Regulations with respect to payment of gratuity were not applicable and it is the Payment of Gratuity Act which governs the employees of the Bank. He then submitted that when the order of removal was passed without quantifying the loss caused to the Bank, it cannot hold any further enquiry to quantify the loss as that would mean the employee would have to undergo a fresh enquiry which is not contemplated in law. Further, he urged that the Act overrides any other enactment, instrument or conduct in view of the provisions of Section 14 of the Act.

9. The learned Counsel then distinguished all the judgments cited by Mr. Mantha and reiterated his submission that the Gratuity Act is applicable by relying on the judgment of the Supreme Court in Allahabad Bank and Anr. v. All India Allahabad Bank Retired Employees Association reported in (2010) 2 SCC 44.

10. We have already mentioned the reasons for which the employee was removed from service. The argument of Mr. Mantha is that in view of the provisions of Regulation 46, the employee is not eligible for payment of gratuity as he was removed from service after holding an enquiry. The five eventualities which could make an Officer eligible for gratuity under the aforesaid Regulation are not applicable to the employee and therefore, he is not entitled to gratuity. It was also submitted that it is the trustees of the gratuity fund who have taken a decision not to pay gratuity to the employee, without affording an opportunity to the employee.

11. The learned Counsel has urged that in view of the Full Bench decision of the Punjab and Haryana High Court in Anju Mathur''s case (supra) where the Regulations applicable to the UCO Bank Officers were considered, the employee is not entitled to gratuity. However, as the Full Bench has held that it was incumbent on the Bank to mention specifically about the loss suffered by it, the Bank is willing to now issue a show cause notice to the employee before forfeiting his gratuity.

12. This argument of Mr. Mantha, in our opinion is not tenable. Admittedly, there is no exemption granted by the appropriate Government under Section 5 of the Payment of Gratuity Act. Therefore, the respondent who is an employee as defined under Section 2(e) of the Payment of Gratuity Act is entitled to gratuity under the aforesaid Act as the Gratuity Act is applicable to the Bank in terms of Section 1(3) of the Act.

13. When there is no exemption accorded, any provision of law which is inconsistent with the Payment of Gratuity Act cannot be acted upon in forfeiting the gratuity as that is clearly prohibited under Section 14 of the Act. The provisions of the Act have an overriding effect over other enactments which are inconsistent with the Act. In Anju Mathur''s case (supra), the Full Bench of the Punjab and Haryana High Court was not required to consider whether the Payment of Gratuity Act would take precedence over the UCO Bank (Officers'') Service Regulations, 1979. It proceeded on the basis that the Service Regulations would govern the payment of gratuity as the applicability of the Service Regulations was not in dispute. In the present case a specific contention has been raised about the non-applicability of the Service Regulations in so far as the payment of gratuity is concerned. Therefore this judgement does not assist the Bank.

14. Now, let us examine Mr. Mantha''s submission that even assuming the Payment of Gratuity Act applies, the Bank is entitled to issue a fresh show cause notice quantifying the loss caused to it and calling upon the employee to submit his explanation as to why gratuity should not be fortified to the extent of the loss caused by him. Mr. Mantha urged that even after completion of the disciplinary proceedings and the imposition of the punishment, it is always open to the Bank to hold a fresh enquiry by issuing a show cause notice permitting the employee to explain the manner in which the loss had occurred. He has drawn sustenance from the observations in Anju Mathur (supra).

15. Section 4(1) provides that gratuity is payable to an employee on his termination of employment, provided he has rendered continuous service for 5 years or more at the time of his (a) superannuation, (b) retirement or resignation or (c) death or disablement due to an accident or disease. Mr. Mantha has submitted that Section 4(1) does not cast a liability on the employer to pay gratuity to an employee who has either been dismissed or removed or discharged from service. This argument cannot be countenanced. Section 4 has to be read as a whole. Subsections (2) to (5) of Section 4 deal with the rate at which gratuity should be paid and the calculation of the gratuity payable. Sub-section (6) of Section 4 reads as under:

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

(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-

(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."

16. The Payment of Gratuity Act does not have any provision for establishing a trust for disbursement of gratuity or for empowering the trustees of such a trust to decide whether gratuity should be paid to an employee. Sub-section (6) of Section 4 starts with a non-obstante clause and provides that gratuity must be paid to an employee whose services have been terminated. However, if the termination was for any act, wilful omission or negligence which caused any damage or loss or destruction of the property belonging to the employer, the gratuity may be forfeited. The forfeiture of gratuity is permissible only to the extent of the damage or loss so caused. Thus the employer is not bound to forfeit the gratuity in every case of loss or damage. In the present case, the charge sheet issued to the employee does not indicate or quantify the loss allegedly caused to the Bank. The disciplinary enquiry was conducted on the basis of certain acts and omissions on the part of the employee which the Bank found were deliberate. The acts complained of were firstly, that he permitted customers to draw excess beyond the sanctioned limit and the power vested in the employee. Thus, he had failed to protect the interest of the Bank which was violative of Regulation 3 of the UCO Bank Officer Employees'' (Conduct) Regulations, 1976. Secondly, the employee had continued to permit over-drawing of amounts in various accounts despite receiving instructions to the contrary. It was again found to be violative of Section 3 of the aforesaid Regulations of 1976. The third charge was that the employee had deliberately not reported irregularities to his superiors with an ulterior motive which again constituted failure to discharge his duties with utmost integrity or devotion which was in breach of Clause 3 of the aforesaid Regulations of 1976. All these charges have been proved against the employee. However, not one of the charges mentions the actual loss caused to the Bank. In fact, the charge is that the employee''s acts indicate that he was guilty of having violated the provisions of Regulation 3 of the UCO Bank Officer Employees'' (Conduct) Regulations, 1976 and not for having caused any loss to the Bank. The disciplinary authority issued a show cause notice to the employee concerned before imposing the punishment. The loss caused to the Bank was not mentioned even in this notice. The submission of Mr. Mantha, that in view of the observations of the Supreme Court in Nikunja Bihari (supra), there is no need for a bank to mention the actual loss caused, is unsustainable. In the aforesaid case the Supreme Court was only concerned whether the acts of the employee constituted misconduct. It was not concerned with the deprivation of gratuity in that case. Therefore the judgement has no

application to the facts before us. Furthermore the submission that the employee''s conduct amounted to moral turpitude is also without merit. It is an afterthought. The employee was not charged for having committed acts which were perceived to be of moral turpitude on his part. The judgements cited by Mr. Mantha regarding what constitutes moral turpitude therefore have no application to the facts and circumstances in this case. The Bank cannot, in our opinion, forfeit the gratuity without following the provisions of Section 4(6) of the Gratuity Act.

17. The contention of Mr. Mantha that this denial of gratuity can be regularised by providing a fresh show cause to the employee at this stage, detailing the loss caused to the Bank and asking for his explanation before denying the gratuity, is, in our opinion, untenable. An employee cannot be subjected to two enquiries for the same acts of misconduct. The second enquiry is not envisaged in law. An employer cannot be permitted to keep holding enquiries in order to fix a liability on the employee. All allegations against the employee ought to have been mentioned in the charge-sheet which was issued to him before holding the disciplinary enquiry. Had the Bank been able to assess the loss caused to it, it should have been mentioned in the charge sheet. Having omitted to do so, the Bank cannot be afforded another chance to nail the employee and plug the lapses. If the Bank was of the opinion that the loss could not be ascertained at that stage, as submitted by Mr. Mantha, it could have mentioned so in the charge sheet. Even at the time of issuing the show cause notice to the employee on submission of the enquiry report, the Bank did not mention the loss. The Bank''s communication dated 15th February, 2010 only requires the employee to show cause why his gratuity should not be forfeited. It does not say anything about the actual loss caused to the Bank. There was no bar on the Bank when it issued the charge sheet or indeed the show cause notice before imposition of the punishment, on mentioning the loss caused to it. The Bank cannot be permitted to improve upon its case only in order to ensure that the gratuity is fortified. Moreover, the submission of Mr. Mantha that the show cause notice will be issued granting an opportunity to the employee to defend himself is also of no avail. The trustees of the gratuity fund who have issued the earlier show cause notice are not the employer of the respondent employee. They have no authority to issue any such show cause notice. Once the employer has held the employee guilty of conduct unbecoming of an Officer, no further action can be taken by the employer. A second enquiry to ensure the denial of gratuity is unacceptable.

18. In our opinion the learned single judge was right that the gratuity could not be denied to the employee. However we do not agree with his finding that gratuity is payable in terms of Regulation 46 of the Service Regulations.

19. As regards the payment of the provident fund contribution of the employee, the learned Counsel, Mr. Mantha has relied on Rule 17 of the UCO Bank Employees Provident Fund Rules which permits the trustees of the provident fund to deny a contributor the provident fund, if he has been dismissed for fraud or

misconduct by the Bank, to the extent of the loss caused to the Bank.

20. Mr. Majumdar, on the other hand submitted that the trustees of the provident fund cannot deny payment of the employee''s contribution when the loss has not been quantified.

21. Provident fund is payable to employees under the Employees Provident Fund and Miscellaneous Provisions Act 1952. The Act enables employers to set up their own Provident Fund Trusts on obtaining an exemption under Section 17 of the Act from the appropriate Government. Such exemption may be afforded only if the scheme under the private trust is more beneficial to the employees than the Employees Provident Funds Scheme framed under the Act. No material has been brought to our notice to indicate that the exemption was not granted to the UCO Bank Employees'' Provident Fund. The parties before us have proceeded on the basis that disbursement of provident fund to the employees of the Bank is governed by the UCO Bank Employees'' Provident Fund Rules. Under Rule 16 any contributor or employee who is discharged for negligence or incompetence or who is adjudged insolvent is entitled to only his own contribution with the interest accrued thereon and the Bank''s contribution lapses to the fund. Rule 17 speaks about a contributor who is dismissed for insubordination, misconduct, fraud or any other cause of a like nature or who retires from the Bank as a consequence thereof would be entitled to payment of his own contribution with interest accrued thereon. The Rule also makes it explicit that the trustees of the provident fund would judge the sufficiency of the cause of the dismissal or retirement of any contributor in any of these cases. Under Rule 18 if a contributor is dismissed for fraud or misconduct, the Bank is entitled to recover from the contribution made by the Bank to the Provident Fund Account of the individual, any loss or damage resulting to the Bank on the basis of which the employee has been dismissed. The Board of Directors of the Bank is entitled to declare the amount of loss or damage caused to the Bank and the amount so declared is to be paid to the Bank. The facts in this case indicate as mentioned earlier that the dismissal was because the conduct of the employee was not conducive to the Bank''s business and his continuance in employment would be violative of Clause 3 of the Conduct Regulations, 1976. As stated earlier, the Bank has not quantified the loss if any caused due to the acts of omission or commission of the employee. Therefore, none of the clauses of the Provident Fund Rules will apply in this case for denying him the provident fund contribution of the Bank. The expression used in Rules 17 and 18 is ''dismissal'' and not ''removal''. The employee in this case has been removed from service rather than being dismissed. Therefore, the Bank''s contribution cannot be denied to the employee. Furthermore, the submission of Mr. Mantha that it is Rule 17 of the Provident Fund Rules which applies and not Rule 18 also does not take the Bank''s case any further. Even under Rule 17, the word used is ''dismissed''. Besides, the trustees of the fund cannot be the sole arbiter as to whether the employee is entitled to the employer''s contribution to the provident fund, only because the trustees may be the Directors of the Bank. Their role as trustees

cannot be the same as that of an employer. This is because had the trust not been exempted under the Employees'' Provident Fund and Miscellaneous Provisions Act, 1952, the Regional Provident Fund Commissioner could not have had any say as to whether the contribution made by an employer should be paid to the employee on his dismissal or discharge from service. It is only the employer who has a right to decide whether there can be a forfeiture of such contribution. That decision has to be taken in accordance with law. Therefore, merely because the trust is private, different standards cannot be applied for deciding whether the employer''s contribution should be paid to the employee. As rightly observed by the learned single judge the removal of the employee from service was not because he had caused a loss to the bank. Therefore the question of retaining the employer''s contribution does not arise. The finding of the learned single judge that the employee is entitled to the employer''s contribution together with the accrued interest is correct on the delayed payment as well.

22. In our opinion, therefore, there is no need to differ with the findings of the learned Single Judge in the writ petition. The appeal is dismissed. The order of the learned Single Judge shall be implemented within eight weeks from today.

23. Since the appeal has been dismissed, the application for stay, being C.A.N. No. 7976 of 2012, has become infructuous and the same is also dismissed.

24. Urgent certified photocopies of this judgment, if applied for, be given to the learned Advocates for the parties upon compliance of all formalities.

