(2018) 04 CHH CK 0292

In the Chhattisgarh High Court

Case No : Writ Petition (L) No.226 of 2011

Zafar Ali APPELLANT

Vs

M/S Gagandeep Home Solutions, RESPONDENT

Date of Decision : 24-04-2018

Acts Referred:

Payment of Gratuity Act, 1972 — Section 4, 5, 7, 7 (3), 7(3A), 13, 14
Constitution of India, 1950 — Article 38, 41

Citation : (2018) 04 CHH CK 0292

Hon'ble Judges : SANJAY K. AGRAWAL, J

Bench : Single Bench

Advocate : Gary Mukhopadhyay, N.K. Shukla, Vikram??Sharma, Ajay Lakra

Final Decision : Allowed

Judgement

1. With the consent of parties, the matter is heard finally.

2. Learned counsel appearing for the petitioner submits that though the petitioner retired from South Eastern Coalfields Limited (SECL) as Senior

Mechanic on 5-5-2000, but he was not paid the amount of gratuity. The petitioner moved application before the controlling authority for payment of

gratuity and interest on delayed payment, that was allowed and the amount of gratuity was directed to be paid along with interest against which the

SECL preferred an appeal and the appellate authority held that the petitioner will only be entitled for the amount of gratuity, not the interest and

directed that the said amount will be paid only if he vacates the accommodation allotted to him against which this writ petition has been preferred.

3. Learned counsel appearing for the respondent â?" SECL would submit that the petitioner was allotted SECL quarter which he has not vacated till

this date, therefore, the amount of gratuity has not been paid.

4. I have heard learned counsel for the parties and considered the rival submissions made herein-above and also went though the record with utmost

circumspection.

5. The first question would be, whether the amount of gratuity of an employee can be withheld for non-vacation of quarter allotted to him while he

was in service.

6. It is not in dispute that there is no notification under Section 5 of the Payment of Gratuity Act, 1972 (for short, 'the Act of 1972') and Section 4 of

the said Act is applicable and gratuity was payable to the petitioner on the date of his superannuation on 31-12-2014, but he was not paid gratuity and

other benefits on account of retention of SECL quarter.

7. The Payment of Gratuity Act, 1972 was enacted to provide for a scheme for the payment of gratuity to employees engaged in factories, mines,

oilfields, plantations, ports, railway companies, shops or other establishments and for matters connected therewith or incident thereto.

8. In the matter of Bakshish Singh v. M/s. Darshan Engineering Works and others1, Their Lordships of the Supreme Court have analysed number of

judgments dealing with the concept of gratuity and it has been observed that the Act was placed on the statute book as a welfare measure to improve

the service conditions of the employees. Their Lordships further held that the Payment of Gratuity Act is of the genre of Minimum Wages Act, the

Payment of Bonus Act, the Provident Funds Act, Employees State Insurance Act and other like statutes. In this judgment, Their Lordships referred to

Article 38 of the Constitution of India and mentioned that the requirement of the State to strive to promote the welfare of the people by securing and

protecting as effectively as it may, a social order in which, among other things, social and economic justice shall inform all the institutions of the normal

life. Reference was also made in the aforesaid case to Articles 39 and 41 of the Constitution.

9. In the matter of D.V. Kapoor v. Union of India and others2, Their Lordships of the Supreme Court have categorically held that in order to deprive

an employee of the amount of pension as well as of gratuity, deprivation should be in accordance with the procedure established by law and also held

that right to gratuity is also a statutory right. Their Lordships observed as under: -

Â â??10. Rule 9 of the Rules empowers the President only to withhold or withdraw pension permanently or for a specified period in whole or in part

or to order recovery of pecuniary loss caused to the State in whole or in part subject to minimum. The employee's right to pension is a statutory right.

The measure of deprivation therefore, must be correlative to or commensurate with the gravity of the grave misconduct

1 AIR 1994 SC 251

2 (1990) 4 SCC 314 or irregularity as it offends the right to assistance at the evening of his life as assured under Article 41 of the Constitution. The

impugned order discloses that the President withheld on permanent basis the payment of gratuity in addition to pension. The right to gratuity is also a

statutory right. The appellant was not charged with nor was given an opportunity that his gratuity would be withheld as a measure of punishment. No

provision of law has been brought to our notice under which, the President is empowered to withhold gratuity as well, after his retirement 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.â??

10. The aforesaid note clearly indicates that the Payment of Gratuity Act, 1972 is a welfare legislation and the amount of gratuity can be withheld only

in accordance with the procedure established by law.

11. At this stage, it would be appropriate to notice Section 13 of the Act of 1972 which states as under: -

â??13. Protection of gratuity .â?"No gratuity payable under this Act and no gratuity payable to an employee employed in any establishment, factory,

mine, oilfield, plantation, port, railway company or shop exempted under Section 5 shall be liable to attachment in execution of any decree or order of

any civil, revenue or criminal court.

12. A focused glance of the aforesaid provision would show that gratuity payable under this Act cannot be attached in execution of any decree or

order of any civil, revenue or criminal court. Likewise, Section 14 of the Act of 1972 provides that the provisions of the Act or any rule made

thereunder shall have overriding effect and is a provision inconsistent therewith. Section 14 of the Act of 1972 reads as follows: -

Â â??14. Act to override other enactments, etc.â?"The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other

than this Act.â??

13. Sections 13 and 14 of the Act of 1972 came-up for consideration before the Supreme Court in the matter of Calcutta Dock Labour Board and

another v. Smt. Sandhya Mitra and others3. In this case, the Supreme Court has held that once gratuity was payable to an employee in accordance

with the Act of 1972, he is entitled for immunity by virtue of the provisions contained in Section 13 of the Act and observed as under: -

â??In absence of any notification within the meaning of Section 5 of the Act the amendment is not relevant for consideration. Section 14 has

overriding effect and Section 13 gives total immunity to gratuity from attachment. The preamble of the Act clearly indicates the legislative intention

that the Act sought to provide a scheme for payment of gratuity to all employees engaged in, inter alia, ports and under this Act gratuity was payable

to workers like Md. Safiur Rehman. The gratuity which was payable to him squarely came within the purview of the Act and, therefore, became

entitled to immunity under Section 13 thereof.â??

14. Now, the question would be, whether the amount of gratuity can be withheld by the SECL for retention of SECL accommodation / quarter / non-

vacating the Governmental accommodation.

15. What flows from Section 13 of the Act of 1972 read with the intention of the Payment of Gratuity Act, 1972 being a welfare provision is when the

amount of gratuity is protected from any decree or order of any civil, revenue or criminal court, then by virtue of Section 13, the amount of gratuity is

protected from penal rent payable to the respondent SECL.

16. In the matter of R. Kapur v. Director of Inspection (Painting and Publication) Income Tax and another4, the Supreme Court has

3 (1985) 2 SCC 1

4 (1994) 6 SCC 589 clearly held that right of a retired employee to obtain gratuity is not dependent on vacating the Government accommodation and

imposed 18% interest on the authority concerned for non-payment of gratuity. Relevant paragraph of the report reads as follows: -

Â â??11. The Tribunal having come to the conclusion that DCRG cannot be withheld merely because the claim for damages for unauthorised occupation is pending, should in our considered opinion, have granted interest at the rate of 18% since right to gratuity is not dependent upon the

appellant vacating the official accommodation. Having regard to these circumstances, we feel that it is a fit case in which the award of 18% is

warranted and it is so ordered. The DCRG due to the appellant will carry interest at the rate of 18% per annum from 1-6-1986 till the date of

payment. Of course this shall be without prejudice to the right of the respondent to recover damages under Fundamental Rule 48-A. Thus, the civil

appeal is allowed. However, there shall be no order as to costs.â??

17. Likewise, in the matter of Gorakhpur University and others v. Dr. Shitla Prasad Nagendra and others5, the Supreme Court has held that pension

and gratuity are no longer matters of any bounty to be distributed by the Government but are valuable rights acquired and property in their hands and

any delay in settlement and disbursement whereof should be viewed seriously and dealt with severely by imposing penalty in the form of payment of

interest. Withholding of quarters allotted, while in service, even after retirement without vacating the same has been viewed to be not a valid ground to

withhold the disbursement of the terminal benefits. Such is the position with reference to amounts due towards provident fund, which is rendered

immune from attachment and deduction or adjustment as against any other dues from the employee. The Supreme Court upheld the order of the High

Court

5 (2001) 6 SCC 591 to pay interest on pension and provident fund in case of overstaying in the allotted accommodation.

18. In the matter of M/s Texmaco Limiteds v. Shri Roshan Singh and others6, a Division Bench of the Delhi High Court speaking through Dalveer

Bhandari, J, (as then His Lordships was) has clearly held that the Payment of Gratuity Act is a welfare legislation, the amount of payment of gratuity

cannot be withheld for non-vacation of the quarter allotted to a particular employee.

19. The Bombay High Court in the matter of Ramjilal Chimanlal Sharma v. M/s Elphinstone Spinning and Weaving Mill Co. Ltd. and another7 has

clearly held that it is not permissible under the Payment of Gratuity Act to withhold the amount for any reason. Even though the conduct of the

petitioner in holding back possession of the premises is not very praiseworthy still that is not a sufficient reason to deprive him of the right of gratuity.

It further held, a right to secure gratuity amount cannot be defeated or cannot be used as lever by the employer for securing back possession of the

premises from the employee.

20. Similarly, in the matter of Swadeshi Cotton Mills v. Asstt. Labour Commissioner (Central) & Controlling Authority under Payment of Gratuity Act,

Allahabad and others8, it was observed that non-vacation of the quarter may not be a ground for withholding the payment of gratuity.

21. In the matter of Anirudh Pandey v. Bihar State Road Transport

6 (2001) II LLJ 982 Del

7 1984 Lab I.C. 1703

8 2000 (1) Lab. L.J. 1221 Corporation and another9, Their Lordships of the Supreme Court have taken the similar view that the Corporation cannot

withhold the post-retiral benefits of the appellant on the ground that the appellant had failed to vacate and surrender the house to the Corporation.

22. In view of the aforesaid decisions and taking into consideration the provisions contained in Section 14 of the Act of 1972 and considering that the

office memorandum dated 4-7-1977 issued by Coal India Limited for recovery of penal rent will hit by Section 14 of the Act of 1972, I am

unhesitatingly of the opinion that the amount of payment of gratuity of an employee cannot be withheld for non-vacation of Government quarter or the

alleged amount of penal rent cannot be deducted from the amount of gratuity, as the amount of gratuity is protected under Section 13 of the Act and

SECL cannot claim right of set-off in respect of its penal rent against the amount of gratuity payable on the said amount.

23. This brings me to the next question of payment of interest.

24. Section 7 of the Act of 1972 is the key provision which this Court is concerned in the present case, where the entitlement of statutory interest on

gratuity is in dispute. Sections 7(1) to 7(3-A) are reproduced herein-below for ready reference: -

Â â??7. Determination of the amount of gratuity.â?"(1) A person who is eligible for payment of gratuity under this Act or any person authorised, in

writing, to act on his behalf shall send a written application to the employer, within such time and in such form, as may be prescribed, for payment of such gratuity.

(2) As soon as gratuity becomes payable, the employer

9 AIR 1995 SC 1129 shall, whether an application referred to in sub-section

(1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the

controlling authority specifying the amount of gratuity so determined.

(3) The employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to the person to whom the gratuity is

payable.

(3-A) If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer

shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate

notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify:

Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained

permission in writing from the controlling authority for the delayed payment on this ground.â??

25. A focused and studied perusal of the aforesaid provisions would show that under Section 7 (3) of the Act of 1972, the employer is obliged to make

payment of gratuity within 30 days from the date it becomes due to the person to whom the gratuity is payable. So, thirty days' period has been given

to the employer to deposit the amount of gratuity once it becomes payable. Sub-section (3-A) of Section 7 provides for consequence of not making

payment of gratuity within 30 days from the date it becomes due and the employer is saddled with statutory interest at the simple rate, not exceeding

the rate notified by the Central Government. Therefore, once the peremptory provision incorporated in Section 7(3) of the Act of 1972 is not complied

with, the statutory consequence follows and the employer is statutorily bound to make payment of interest to the employee at simple rate, not

exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as the Government may, by notification

specify, as such, the provision is imperative in nature.

26. The question involved herein is no longer res integra, as the question of interest payable under sub-section (3-A) of Section 7 of the Act of 1972

came up for consideration before the Supreme Court in the matter of H. Gangahanume Gowda v. Karnataka Agro Industries Corpn. Ltd.10 in which

Their Lordships have held in no uncertain terms that payment of interest on delayed payment of gratuity in terms of Section 7 (3-A) is mandatory and

statutory compulsion, and pertinently observed as under in following two paragraphs of the said report: -

Â â??7. It is evident from Section 7(2) that as soon as gratuity becomes payable, the employer, whether any application has been made or not, is

obliged to determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority

specifying the amount of gratuity. Under Section 7(3), the employer shall arrange to pay the amount of gratuity within 30 days from the date it

becomes payable. Under sub-section (3-A) of Section 7, if the amount of gratuity is not paid by the employer within the period specified in sub-section

(3), he shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate not exceeding the

rate notified by the Central Government from time to time for repayment of long term deposits; provided that no such interest shall be payable if the

delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the

delayed payment on that ground. From the provisions made in Section 7, a clear command can be seen mandating the employer to pay the gratuity

within the specified time and to pay interest on the delayed payment of gratuity. No discretion is available to exempt or relieve the

10 (2003) 3 SCC 40 employer from payment of gratuity with or without interest as the case may be. However, under the proviso to Section 7(3-A), no

interest shall be payable if delay in payment of gratuity is due to the fault of the employee and further condition that the employer has obtained

permission in writing from the controlling authority for the delayed payment on that ground. Under Section 8, provision is made for recovery of gratuity

payable under the Act, if not paid by the employer within the prescribed time. The Collector shall recover the amount of gratuity with compound

interest thereon as arrears of land revenue and pay the same to the person entitled. A penal provision is also made in Section 9 for non-payment of gratuity. Payment of gratuity with or without interest, as the case may be, does not lie in the domain of discretion but it is a statutory compulsion.

Specific benefits expressly given in a social beneficial legislation cannot be ordinarily denied. Employees on retirement have valuable rights to get

gratuity and any culpable delay in payment of gratuity must be visited with the penalty of payment of interest was the view taken in State of Kerala v.

M. Padmanabhan Nair11. Earlier there was no provision for payment of interest on the delayed payment of gratuity. Sub-section (3-A) was added to

Section 7 by an amendment, which came into force with effect from 1-10-1987. In the case of Charan Singh v. Birla Textiles12 this aspect was

noticed in the following words: (SCC pp. 214-15, para 4)

4. There was no provision in the Act for payment of interest when the same was quantified by the controlling authority and before the Collector was

approached for its realization. In fact, it is on the acceptance of the position that there was a lacuna in the law that Act 22 of 1987 brought about the

incorporation of sub-section (3-A) in Section 7. That provision has prospective application.

9. ... It was not the case of the respondent that the delay in the payment of gratuity was due to the fault of the employee and that it had obtained

permission in writing from the controlling authority for the delayed payment on that ground. ...â??

27. The aforesaid judgment has been followed by this Court in the matter of Vandana Vidhut Limited, Bilaspur (CG) v. O/o. Labour Commissioner,

Raipur (CG) and another13.

11 (1985) 1 SCC 429

12 (1988) 4 SCC 212

13 2016 LAB. I. C. 629

28. The above determination would bring me to the proviso to sub-section (3-A) of Section 7 of the Act of 1972 which provides that no such interest

shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling

authority for the delayed payment on this ground. So, the sine qua non to escape payment of statutory interest in terms of proviso to sub-section (3-A)

of Section 7 is two fold, firstly, that the delay in payment of gratuity must be attributable to the fault of the employee and secondly, that the employer has obtained permission in writing from the controlling authority for the delayed payment. Unless the above-said two conditions are satisfied, the

employer is bound to make payment of interest on the amount of gratuity to the employee who is entitled for gratuity.

29. Their Lordships of the Supreme Court had an occasion to consider the proviso to sub-section (3-A) of Section 7 of the Act of 1972 in the matter

of Kerala State Cashew Development Corporation Limited and another v. N. Asokan14 and it has been held that no permission having been taken by

employer from controlling authority for delayed payment of gratuity and provision contained in Section 7 (3-A) being mandatory in nature, sub-section

(3-A) of Section 7 is squarely attracted and employer is liable to make payment of interest on delayed amount of gratuity as per the rate specified in

Section 7 (3-A), and succinctly observed as under: -

Â â??4. ... On a plain reading of this provision, as noted hereinabove, it is absolutely clear that if any amount of gratuity, which is payable under

Section 7 is not paid

14 (2009) 16 SCC 758 by the employer within the period specified in sub-section (3), the employer is liable to pay interest from the date on which the

gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from

time to time for repayment of long-term deposits, but on those delayed payments, where the employer has obtained permission in writing from the

controlling authority for delayed payment, in that case, no such interest shall be payable to the employee. So far as the present case is concerned, no

such permission was obtained by the employer in writing from the controlling authority and, therefore, sub-section (3-A) and its term would be

squarely applicable in the facts of this case.

5. â?¦ However, considering the aforesaid mandatory provision of Section 7(3-A) of the Act and considering the fact that more than eight years have

elapsed since the retirement of the respondent, we are of the view that the High Court was perfectly justified in dismissing the appeal and affirming

the judgment of the learned Single Judge which also directed payment of interest to the respondent.â??

30. Recently, in the matter of Y.K. Singla v. Punjab National Bank and others15, Their Lordships of the Supreme Court revisited the scope and extent

of interest on payment of gratuity amount and condensely held as under: -

Â â??18. Sub-section (3-A) of Section 7 of the Gratuity Act is the most relevant provision for the determination of the present controversy. A perusal

of the sub-section (3-A) leaves no room for any doubt that in case gratuity is not released to an employee within 30 days from the date the same

becomes payable under sub-section (3) of Section 7, the employee in question would be entitled to â??â?¦ simple interest at such rate, not exceeding

the rate notified by the Central Government from time to time for repayment of long-term loans, as the Government may, by notification specifyâ?.

There is, however, one exception to the payment of interest envisaged under sub- section (3) of Section 7 of the Gratuity Act. The aforesaid exception

is provided for in the proviso under sub-section (3-A) of Section 7. A perusal of the said proviso reveals, that no interest would be payable â??â?¦ if

the delay in the payment is due to the fault of the employee and the employer has

15 (2013) 3 SCC 472 obtained permission in writing from the controlling authority for the delayed payment on this groundâ?. The exception

contemplated in the proviso under sub-section (3-A) of Section 7 of the Gratuity Act incorporates two ingredients. Where the two ingredients

contemplated in the proviso under sub-section (3-A) are fulfilled, the employee concerned can be denied interest despite delayed payment of gratuity.

Having carefully examined the proviso under sub-section (3-A) of Section 7 of the Gratuity Act, we are of the view that:

(i) The first ingredient is that payment of gratuity to the employee was delayed because of some fault of the employee himself.

(ii) The second ingredient is that the controlling authority should have approved such withholding of gratuity (of the employee concerned) on the basis

of the alleged fault of the employee himself.

None of the other sub-sections of Section 7 of the Gratuity Act would have the effect of negating the conclusion drawn herein-above.

23. Based on the conclusions drawn hereinabove, we shall endeavour to determine the present controversy. First and foremost, we have concluded on

the basis of Section 4 of the Gratuity Act that an employee has the right to make a choice of being governed by some alternative provision/instrument

other than the Gratuity Act, for drawing the benefit of gratuity. If an employee makes such a choice, he is provided with a statutory protection,

namely, that the employee concerned would be entitled to receive better terms of gratuity under the said provision/instrument, in comparison to his

entitlement under the Gratuity Act. This protection has been provided through Section 4(5) of the Gratuity Act.

25. We, therefore, have no hesitation in concluding that even though the provisions of the 1995 Regulations are silent on the issue of payment of

interest, the least that the appellant would be entitled to are terms equal to the benefits envisaged under the Gratuity Act. Under the Gratuity Act, the

appellant would be entitled to interest on account of delayed payment of gratuity (as has already been concluded above). We therefore hold that the

appellant herein is entitled to interest on account of delayed payment, in consonance with sub-section

(3-A) of Section 7 of the Gratuity Act.â??

31. The proposition of law laid down in M. Padmanabhan Nair's case (supra) and in Y.K. Singla (supra) has been followed with approval by Their

Lordships of the Supreme Court in the matter of State of Uttar Pradesh and others v. Dhirendra Pal Singh16.

32. Following the principles of law laid down in the aforesaid cases, I am unhesitatingly as well as unreservedly of the considered opinion that unless

the delay in payment of gratuity is attributable to the fault of the employee and necessary permission in terms of proviso to sub-section (3-A) of

Section 7 of the Act of 1972 is obtained by the employer in writing from the controlling authority for delayed payment, the payment of interest in terms

of Section 7 (3-

A) of the Act of 1972 is imperative and the employer is statutorily liable to make payment of interest and he cannot escape the liability to make

payment of interest on the amount of gratuity.

33. Thus, in the instant case, the petitioner having superannuated from SECL on 5-5-2000, gratuity becomes due on 5-6-2000, but same was not paid

within one month from the same date as required under Section 7(3) of the Act of 1972 and no leave from the controlling authority has been obtained

in writing by the SECL for delayed payment in terms of the proviso to sub-section (3A) of Section 7 of the Act of 1972 attributing the cause of delay

to the petitioner herein. Therefore, the SECL is liable to make payment of interest on the amount of gratuity in terms of sub-section (3A) of Section 7

of the Act of 1972.

16 (2017) 1 SCC 49

34. In view of the aforesaid analysis, the writ petition is allowed. The order passed by the appellate authority to the extent of holding that the petitioner

will not be entitled for interest on the gratuity amount and directing for vacation of quarter is set aside and the order is partly modified. It is directed

that the petitioner be paid 8% interest per annum on the amount of gratuity from 5-6-2000 till the date of payment along with the principal amount of

gratuity, if not already paid. It is made clear that this will not bar the respondent SECL to initiate proceeding under the Public Premises (Eviction of

Unauthorised Occupants) Act, 1971 for eviction of the petitioner or any other proceeding in accordance with law for eviction. No order as to cost(s).