

S-5C

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment reserved on: 31.03.2011

Judgment delivered on: 05.04.2011

+ **RSA No.58/2007 & CM No 2934-35/2007 & CM 7319/2010**

DELHI TRANSPORT CORPORATION Appellant

Through: Mr. Sumeet Pushkarna and Mr.
Jitender Kumar, Advocates for the
appellant along with Mr. Nand
Kishore, Manager (Accounts).

Versus

SHRI KHEMCHAND Respondent

Through: Mr. Pradeep Kumar, Advocate.

CORAM:

HON'BLE MS. JUSTICE INDERMEET KAUR

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

INDERMEET KAUR, J.

1 Present appeal has impugned the judgment and decree dated 28.10.2006 which had endorsed the findings of the trial Judge dated 24.12.2004 whereby the suit filed by the plaintiff Khem Chand seeking a declaration (to the effect that he is not a pension optee of the defendant department; his gratuity could not be denied; employer's share of contribution of the provident fund and interest accruing thereon be disbursed to him) had been decreed in his favour.

2 The case of the plaintiff was that he was an ex-driver of the Delhi Transport Corporation (DTC). He was appointed in the year 1981. He was governed by the Contributory Provident Fund (CPF) Scheme. He was removed from service on 03.01.1997. At the time of his removal, he was entitled to gratuity and provident fund; the employer's contribution of the provident fund was not paid. On 15.04.1999 (Ex. PW-1/1), he received a letter from the department whereby the department conveyed to him that his contribution towards the CPF is being released to him; there was a remark in the letter that he was a pension optee which was incorrect and misleading. Vide letter dated 18.05.1999, he was advised to collect his share of the CPF in terms of Ex. PW-1/1 i.e. an amount of Rs.36,944/-. The employer's contribution of the provident fund and interest has been denied to him. The plaintiff was also entitled to gratuity. Since inspite of demands and legal notice the amounts were not paid, the present suit was filed.

3 In defence, the defendant denied the contentions raised by the plaintiff. It was stated that the plaintiff was initially covered under the CPF scheme. After his removal on 03.01.1997, his own CPF share was released to him. No dues are pending qua the plaintiff. There was no provision for payment of gratuity to employees who had been removed; the plaintiff was accordingly not entitled to gratuity as per pension rules. It was submitted that the pension scheme had come into force in 1992; in terms of the circular dated 27.11.1992 if any employee of the DTC did not exercise his option within a prescribed period of 30 days, there was a deeming provision that he would have deemed to have opted for

the pension scheme; accordingly the plaintiff was treated as a pension optee. He was no longer under the CPF scheme.

4 On the pleading of the parties, the following six issues were framed:-

1. *Whether the suit has not been properly valued for the purpose of Court fees? OPD*
2. *Whether the court has no jurisdiction to try the present suit? OPD.*
3. *Whether the present suit filed by the plaintiff is no maintainable in the present form and is liable to be dismissed? OPD*
4. *Whether the plaintiff is entitled for decree for declaration as prayed for? OPP.*
5. *Whether the plaintiff is entitled for decree of mandatory injunction as prayed for? OPP*
6. *Relief.*

5 Issue Nos. 4 & 5 are relevant. The plaintiff in support of his case had proved various documents. Ex. PW-1/1 is an admitted document. It is letter dated 15.04.1999 issued about less than two years after the termination of the service of the plaintiff) to the plaintiff wherein he had been informed that his contribution towards the CPF was being released; there was a remark that he was a pension optee; he had been directed to collect his cheque and report to the accounts department; no other dues were payable to him. Ex. PW-1/2 dated 18.05.1999 was a reminder.

6 In defence, the defendant through the testimony of DW-1 had proved Ex. DW-1/1 and Ex. DW-1/2. Ex. DW-1/1 is an Office Order No. 16 dated 27.11.1992 relating to the introduction of the Pension Scheme. It is not in dispute that the pension scheme for the employees of the DTC had been sanctioned by the Central Government and it had been implemented w.e.f. 01.04.1993.

Ex.DW-1/1 spelt out that this pension scheme would be operated by the LIC on behalf of the DTC; it was compulsorily applicable to employees joining the DTC w.e.f. 23.11.1992; the employees already in service had an option. The said option in the pension scheme is contained in Clause 3 and 9. It reads as:-

"3. All the existing employees including those retired w.e.f. 03.08.1981 onwards would have the option to opt for the pension scheme or the Employees Contributory Provident Fund as at present, within 30 days from the date of issue of this O.O. for the implementation of the Pension Scheme as approved by the Govt. of India.

9. If any of the employee of DTC, who does not exercise any option within the prescribed period of 30 days or quit service or dies without exercising an option or whose option is incomplete or conditional or ambiguous, he shall be deemed to have opted the pension scheme benefits.

7 Vehement contention of the appellant is that an option had been given to the existing employees to opt for the pension scheme or the CPF and in case they did not exercise their option within the prescribed period of 30 days, they shall be deemed to have opted for the pension scheme. This deeming provision had ensued in faovur of the plaintiff; he was deemed to be a pension optee.

Clause 5 of this scheme is also relevant. It reads as under:-

"5. The pension scheme would be operated by the LIC on behalf of the DTC. The employers share in the EPC A/c of the DTC employees, who opt for pension scheme would be transferred to the LIC, for operating the pension scheme on behalf of DTC and the amount deposited in the Central Govt./State Govt./Guaranteed Securities would be encahsed on maturity."

8 Learned counsel for the respondent has pointed out that as per Ex. DW-1/1 this pension scheme was to be operated by the LIC; the employer's share in the EPF of the DTC employees who opt for pension scheme would be transferred to the LIC. It is submitted that there is no evidence with the defendant to support his

submission that the share of the employer's contribution qua the plaintiff had been transferred to the LIC; this was clearly for the reason that the plaintiff had in fact never opted for the pension scheme; he continued to be governed by the CPF scheme.

9 This is a second appeal. It had been admitted and on 26.02.2007, the following two substantial questions of law were formulated:-

"1. Whether the courts below were right in ignoring the specific terms and conditions or employment and regulations of the corporation and choosing some CCS rules out of context and without application.

2. Whether the courts below were right in not considering the fact, that the workman was removed by way of penalty imposed by virtue of clause 15 (2)(iv) of the DRTA (Conditions of Appointment and Services) Regulations, 1952, which was not being challenged by the workman and what is its effect."

10 On 31.03.2011, the following additional substantial question of law was formulated:-

"Whether the findings in the impugned judgment dated 28.10.2006 are perverse and if so, its effect?"

11 The argument as aforementioned is the only argument addressed before this Court. Learned counsel for the appellant has pointed out that the judgment of the Apex Court reported in AIR 2001 SC 1997 D.T.C. Retired Employees' Association & Ors. Vs. Delhi Transport Corporation has upheld the validity of this Pension Scheme; a person who has not opted within 30 days for either of the two options i.e. either the CPF or the pension scheme, was deemed to be a pension optee which is clearly so in this case. In the concluding para of his judgment, the Apex Court has noted that the employees who had received the benefit of employer's provident fund scheme and had failed to exercise their option to

opt for the pension scheme have in fact disentitled themselves for getting the pension benefit. Learned counsel for the appellant has contended that the pension scheme in fact is a more beneficial scheme, The plaintiff however wants to opt out of the pension scheme only for the reason that he has been terminated from service and as such is disentitled to pension; in this eventuality, he is now opting for the CPF scheme.

12 Be that as it may, this second appellate court cannot delve into findings of fact. It has to answer the substantial questions of law which have been formulated in terms of the arguments which have been urged.

13 The first two substantial questions of law do not emanate from the pleadings of the parties. An argument urged before a second appellate court which does not emanate from the pleadings of the parties does not amount to a substantial question of law. This has been reiterated by Hon'ble Supreme Court in (2001) 3 SCC 179 Santosh Hazari Vs. Purushottam Tiwari where it was held that a plea not emanating from the pleadings between the parties cannot be raised for the first time before the second appellate court; such a plea would not amount to a substantial question of law.

14 The record does not substantiate the case of the appellant. Ex. PW-1/1 is a communication dated 15.04.1999 addressed to the plaintiff wherein it is specifically pointed out that his contribution of provident fund is being released to him; the same has admittedly been paid to him. The Pension Scheme had come into force w.e.f. 01.04.1993; Ex.PW-1/1 dated 15.04.1999 shows that even after implementation of this scheme, CPF was being deducted from the

account of the plaintiff; this was obviously for the reason that the plaintiff was being treated as a CPF optee and not as a pension optee. Contention of the respondent that in terms of Clause 5 of Ex. DW-1/1 where a person had opted for the pension scheme, his employer's share of provident fund would be transferred to the LIC account and there is no such evidence of transfer of this share and hence being no documentary evidence to this effect had rightly been noted by the trial Judge. Thus in these circumstances, by no stretch of imagination can it be said that the plaintiff was a pension optee and not a CPF optee. Ex.PW-1/1 which is the communication of the defendant does not in any manner support this stand of the appellant. Had the plaintiff been treated as a pension optee, there was no question of deducting provident fund contribution from his account even after 01.04.1993. The plaintiff was thus entitled to the share of the employer's share of contribution fund which had not been paid to him.

15 Gratuity was also payable to him. The Circular of the Department had been examined in the impugned judgment wherein it was contended that the Department is entitled to forfeit the gratuity amount; the impugned judgment had held otherwise. The relevant extract of the impugned judgment is noted herein as follows:-

"4. The other contentions of the Id.Counsel for the appellant was, that that in view of the circular dated 21.2.1995 bearing no.Admni-3(29)/95(Pc)/99 issued by DTC the appellant having not been specifically informed the appellant, that the respondent would not opt for the pension, he was want entitled to the release of all the contributory fund and gratuity. There is nothing on record which may show, that the respondent opted for the pension. CPF used to be deducted from his salary up to the date of his removal. The appellant was also depositing his respective contribution along with the contribution deducted from the salary of the respondent. Thus, in these circumstances it can be presumed, that the

respondent was not opting for pension. Ld.Counsel for the respondent has also made a statement today which is to the following effect:

Statement of Sh.Pradeep Kumar Advocate for the respondent

Without oath

Under instructions from my client I state that my client shall not be claiming pension but only wants the CPF deposited by the appellant along with the CPF deducted from the salary of the employee along with interest might have accrued in accordance with law as on the date of my removal from the service.

R.O.& A.C.

ARCT/28.10.2006

In these circumstances, the direction of the Civil Judge directing the appellant to release their share of contributory provident fund is upheld for the release of this amount by appropriate authority. The appellant shall issue a NOC to the respondent/authority concerned.

Coming to the claim of gratuity. I have been taken through the provision of payment of Gratuity Act. Section 4 Sub Clause 6 of the aforesaid Act 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 cause.

(b) the gratuity payable to an employee [may be wholly or partially forfeited].

(i) If the services of such employee have been terminate 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."

7. The appellant also does not dispute the aforesaid provision and only submits, that by their own circular dated 21.2.1995 the competent authority is entitled to forfeit the gratuity and pension. The relevant circular is reproduced hereunder:

DELHI TRANSPORT CORPORATION

(A GOVT. OF INDIA UNDERTAKINGS)
I.P. ESTATE NEW DELHI

No.Admnl-3(29)/95 (PC)/99

Dated 21.2.1995

In continuation of O.M. No.7/2/93-P &P [(F)] dated 19.10.1993 circulated vide No.Admn I-3(29)/94 dated 02.9.94, it is clarified that the emoluments including 20% of Basic Pay treating as dearness pay be taken into count for calculating gratuity subject to entitlement of gratuity under the CCS (Pension) Rule, 41 in respect of dismissed/removed employees who had opted pension scheme which is reproduced below :-

"41. COMPANSSIONATE ALLOWANCE:

(1) A Government servant who is dismissed or removed from service shall forfeit his pension and gratuity:

Provided that the authority competent to dismiss or remove him service may, if the case is deserving of special consideration sanction a compassionate allowance not exceeding two thirds of pension or gratuity or both which would have been admissible to him, if he has retired on compensation pension.

(2) A compassionate allowance sanctioned under proviso to sub rule (1) shall not be less than the amount of Rupees three hundred and seventy five per mensem."

Similarly, the cases of employees who opted pension and registered from the services of this Corporation will be dealt with in accordance with Rule 26 of the CCS (Pension) Rules which is also reproduced below:-

"26. FORFEITURE OF SERVICE ON RESIGNATION

- (1) Resignation from a service or a post, unless it is allowed to be withdrawn in the public interest by the appointing authority, entails forfeiture of post service*
- (2) A resignation shall not entail forfeiture of past service if it has been submitted to take up, with proper permission, another appointment, whether temporary or permanent under the Government where service qualifies."*

In all other cases except above, 20% of basic pay shall be treated as dearness pay as mentioned in O.M. No.7/293-P & PW(F) dated 19.10.1993.

(L.C.GOYAL)
DY. CHIEF GENERAL
MANAGER (P & A)

ALL UNIT OFFICERS

C.C. To: S.M.(A) Scindia House- for information

8. *This circular is apparently contrary to section 4 Sub clause 6 of the payment Gratuity Act. Admittedly, in this case, the respondent has not been removed from the services on account of any righteous act or on account of his having been punished for any other violent act or for his involvement in an offence involving in moral turpitude. Thus, in these circumstances, the respondent becomes entitled to release of the gratuity subject to recovery of loss and damages, if any, caused by the respondent but for the aforesaid purpose it was incumbent upon the appellant to pass an order which has not been down believed to do whereas as the respondent is not in service from 13.1.1997. In these circumstances, the appellant is not entitled to any relief and they are directed to release the gratuity in accordance with law.*

9. *In these circumstances, I do not find any reason to interfere with the judgment of the trial court. Hence, the appeal is dismissed."*

16 There is no infirmity in this finding. In no manner can it be said that this finding is perverse. The impugned judgment had noted that the respondent has not been removed from the service for his involvement in a case of moral turpitude. In 1984 LLN 734 Jayachandran (K.) Vs. Canara Bank a Bench of Kerala High Court has held that a gratuity is a terminal benefit earned for past services rendered and paid when services are terminated. Dismissal does not disqualify for gratuity and misconduct does not entail its forfeiture; gratuity is not a functional charity.

17 There is no merit in this appeal. Substantial question of law is answered accordingly. Appeal as also pending applications are dismissed.

(INDERMEET KAUR)
JUDGE

APRIL 05, 2011
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