

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

+ **LPA No.2369 of 2006**

With

LPA No.2372 of 2006

Reserved on: February 09, 2012

% Pronounced on: April 20, 2012

SHRI MASHKOOR AHMED . . . APPELLANT

Through: Mr. V. Shekhar, Sr. Advocate
with Ms. Deepakshi Jain,
Advocate.

VERSUS

UNION OF INDIA & ORS. . . .RESPONDENTS

Through: Mr. Sunil Ahuja, Advocate.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI (ACTING CHIEF JUSTICE)

1. The appellant herein is the Ex-Chairman-cum-Managing Director (CMD) of National Small Industries Corporation Ltd. ('NSIC' for brevity). NSIC had taken departmental action against the appellant by serving charge memo dated 16.7.2002. In this charge sheet, as many as 5 articles of charges were framed against the appellant which related to financial assistance/credit facilities to one M/s. Sleep Complaint Forms (P) Ltd. resulting in huge loss to NSIC. Inquiry was held. The appellant participated in the said inquiry. While this inquiry was still on, the appellant retired from service on attaining the age of superannuation with effect from 31.8.2002. The inquiry was concluded; Inquiry Officer (IO) submitted his report on 03.10.2002; as per the report, all other charges except Charge No.2 stood proved. The Disciplinary

Authority agreed with the finding of the IO on all other charges. In respect of Charge No.2, he proposed to disagree and issued show cause notice to the appellant. The appellant filed reply to the show cause notice. Disciplinary Authority after considering the report and the reply of the appellant, came to the conclusion that the appellant was directly responsible for loss of over ₹49.92 lacs to the NSIC by acting in the manner as mentioned in the charges viz. he had sanctioned the credit facilities without observing the procedure and guidelines laid down and had shown favour to the said firm and further that he proceeded to destroy the evidence and had allowed the guilty officers to go scot free.

2. Since the appellant had already retired from service, the Disciplinary Authority, viz., the President passed the orders dated 05.2.2004 imposing punishment of forfeiture of 50% of gratuity due and 50% of leave encashment. It was this order which is challenged by the appellant by filing writ petition in this Court. That writ petition was taken up by the learned Single Judge of this Court. The impugned order of penalty was challenged on various grounds which included the grounds relating to the validity of the inquiry as well as alleged perversity of the findings as according to the appellant, there was no evidence to come to the conclusion that the charges were proved. All these grounds have been found to be without any merit.
3. Apart from challenging the punishment order on merits, the appellant had also argued that the penalty of forfeiture of 50% gratuity and 50% of leave encashment could not be imposed,

as there was no such provision in the National Small Industries Corporation Limited (Control and Appeal) Rules, 1968 (hereinafter referred to as 'NSIC Rules'). To put it precisely, the argument was that no such penalty has been prescribed in the aforesaid NSIC Rules. This argument has been brushed aside holding that there are adequate provisions. Reference was made to Rule 5(x) of the NSIC Rules which reads as under:

"Rule 5 (x)

During the pendency of the disciplinary proceedings, the disciplinary authority, may withhold payment of gratuity, for ordering the recovery from gratuity of the whole or part of any pecuniary loss caused to the Company if the employee is found in a disciplinary proceedings or judicial proceeding to have been guilty of offences/misconduct as mentioned in sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972 or to have caused pecuniary loss to the Company by misconduct or negligence, during his service including service rendered on deputation or on re-employment after retirement. However, the provisions of section 7(3) and 7(3A) of the Payment of Gratuity Act, 1972 should be kept in view in the event of delayed payment, in case the employee is fully exonerated."

4. According to the learned Single Judge, under the aforesaid provisions, gratuity could be forfeited if the misconduct of the employee had caused damage or loss to the employer. The appellant had also argued that sub-section (4) has no application as that could apply only in those cases where services had been "terminated". Present case was not a case of termination of service, but the appellant had been made to retire from the services. The learned Single Judge did not find favour with this argument also and repelled the same in the following manner:

"16. However, quoting the provision of the Act, it is submitted that gratuities can be forfeited only when an employee is terminated from service on account of his misconduct either covered by clause (a) or clause (b) of Sub-section 6 of Section 4 of the Act.

17. In the present case, the petitioner had already superannuated on 31st August, 2002. He did not suffer an order of termination of his service on account of the misconduct now proved against him. It is, thus, submitted that this order of forfeiture of gratuity is bad. The petitioner had already retired when the punishment order was made and, therefore, it was not necessary to pass further order terminating his service. It is true that an order technically/formally terminating petitioner's service with effect from the date of his retirement could be passed. But such an order would not have benefitted the petitioner in any way and might have deprived him of other benefits of the long service rendered by him with the respondent No.3. It has to be remembered that in view of the financial loss of crores of rupees suffered by the respondent No.3 on account of the 'misplaced generosity' of the petitioner, the respondent No.3 might as well have terminated the services of the petitioner. It cannot be said that the order of withholding of gratuity in the present case is bad because the petitioner had already by then and this order did not come along with an order terminating his service from the respondent No.3."

5. The present intra-Court appeal is preferred by the appellant against the aforesaid judgment of the learned Single Judge.
6. We may state the outset that though attempt was made to question the findings of the IO as well as Disciplinary Authority on merits on the plea that the findings were perverse as there was no material on record to hold the appellant guilty of charged and that inquiry was conducted on the contravention of *principles of natural justice*, we find no merit in these submissions. It is trite that the Courts while dealing with the new inquiry report or the order of the Disciplinary Authority are not supposed to sit as appellate authority and to analyze and

weigh the evidence all over again. Once it is found that that inquiry is held following the prescribed procedure and *principles of natural justice* and there are some evidence on the basis on which charges are held to proved, it is not the function of the Court to discuss the same evidence as if sitting in appeal and interfere with the findings only because the Court could have come to the different conclusion than arrived by the Disciplinary Authority.

7. Realizing the aforesaid limitation and that the instant appeal is not a case of "no evidence", the main thrust of the learned counsel for the appellant was on the interpretation given in sub-Clause (6) of Section 4 of Payment of Gratuity Act. He reiterated that gratuity could be only in the provision of termination from service and not otherwise. He argued that the reasons given by the learned Single Judge, in teeth of specific contingency contained in the aforesaid provision which had not occurred in the present case, it was not permissible for the Disciplinary Authority to pass the order forfeiting 50% of gratuity.
8. We do not find force in the aforesaid argument of the argument of the learned Senior Counsel for the appellant. Reasons given by the learned Single Judge may not be appropriate. After the retirement of the appellant from service, no order even technically/formally terminating his services could be passed from the date of his retirement. To this extent, observations contained in the impugned order are not legally correct. All the major penalties stipulated in Paras 5 to 9, viz., reduction to the lower time scale in grade pay, compulsory retirement, removal

from service or dismissal from service can be passed only if the concerned employee is still in service. Such a penalty cannot be imposed after the employee has retired from service. In case, the employer wants any of these major penalties, it should ensure that disciplinary proceedings are concluded and the penalty orders passed while the delinquent official is still in service, specific provision is made for conducting the inquiry. It is for this reason that in the case of public servant, after the retirement under the Pension Rules since no such penalty can be inflicted on an employee who has retired from service. Rule 9 of the Civil Services (Pension) Rules prescribes for imposition of penalty of forfeiture of pension, partly or wholly and forfeiture of gratuity partly or fully. Thus, after retirement only such kind of penalty stated in Rule 9 only is given, and not the penalties stated in CCS (CCA) Rules.

9. In the present case, we find that Rule 5(x) of Rules provides for withholding of gratuity or for an order of recovery from gratuity the whole or part of any pecuniary losses caused to NISC. The moot question here is as to whether such an order can be passed only in the event of services of such an employee are terminated under sub-Section (6) of Section 4 of the Payment of Gratuity Act, 1972.
10. From the reading of Clause (x) of Rule 5, we do not find it to be so. This rule has already been reproduced above. The careful reading of this Rule would demonstrate that the Disciplinary Authority may:

- (a) withhold payment of gratuity;

- (b) order the recovery from gratuity of the whole or part of any pecuniary loss caused to the company,
 - (i) if the employee is found in a disciplinary proceedings;
 - (ii) judicial proceedings to have been guilty of offence/misconduct as mentioned in sub-Clause (6) of Section 4 of the Act, during his service including service or reemployment after retirement.

11. When we dissect the provision in the aforesaid manner, it becomes manifest that reference to sub-Section (6) of Section 4 of the Act is entailed in a situation where the employee is found to be guilty of an offence/misconduct mentioned in that provision. Thus, sub-Section (6) of Section 4 of Rules is brought into picture only for the purpose of referring to the offence/misconduct and if it is of the nature mentioned in the said provision of which employee is found guilty, order of recovery of gratuity can be passed. This provision, viz., sub-Section (6) of Section 4 is not referred to in the context of punishment provided therein. That apart, as pointed out above, the order of recovery of gratuity can also be made when there is a pecuniary loss caused to the company by misconduct or negligence of the employee. The word 'or' is disjunctive and while considering the pecuniary losses, it is not necessary to refer to sub-Section (6) of Section 4 of the Payment of Gratuity Act, 1972. Therefore, we are of the opinion that once it is found that the offence/misconduct is such which is stipulated in sub-Section (6) of Section 4 of the said Act or because of such misconduct or negligence, loss is suffered by NSIC, recovery of

gratuity of can be ordered whether such misconduct/guilt has resulted in termination of services of an employee or not.

12. We, thus, agree with the conclusion of the learned Single Judge though not for the reason stated in the impugned judgment, but because of the aforesaid analysis of the provisions by us. Finding no merit, these appeals are dismissed.

No costs.

ACTING CHIEF JUSTICE

**(RAJIV SAHAI ENDLAW)
JUDGE**

APRIL 20, 2012

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