

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

Decided on February 13, 2014

+ **W.P.(C) 5474/2013**

M/S CEMENT CORPORATION OF INDIA LTD.

..... Petitioner

Represented by: Mr.Jainendra Maldahiyar,
Advocate with Ms.Nanda Devi,
Advocate

versus

V K ARORA & ORS.

..... Respondents

Represented by: Ms.Jyoti Singh, Sr. Advocate with
Mr.Sameer Sharma, Advocate

CORAM:

HON'BLE MR. JUSTICE V.KAMESWAR RAO

V.KAMESWAR RAO, J. (Oral)

1. The challenge in this writ petition is to the order dated May 24, 2013 passed by the Appellate Authority under the Payment of Gratuity Act, 1972 (Act, in short).

2. The issue which arises for consideration of this Court in this writ petition is whether the petitioner could withhold the gratuity amount of the respondent No. 1 (Respondent, in short) on the date when the respondent had superannuated, on the ground that disciplinary proceedings were pending against the respondent.

3. The brief facts are, the respondent at the relevant time, was working as GM (M.M./Marketing) with the petitioner company. During the period 1996-1998, the respondent, with regard to a tender did not place on record the approved estimates which led to placement of

contract at higher rates. The recommendation was made by a Committee which consisted of the respondent and three other officers.

4. A charge sheet was issued to the respondent on September 18, 2007. The respondent attained the age of superannuation on September 30, 2007 and was relieved without any pre-qualification and conditions. The petitioner withheld the gratuity payable to the respondent. This was done by the petitioner in terms of a circular dated March 29, 2000 issued by it, which was an amendment effected in Rule 30-A of the CCI (Conduct, Disciplinary and Appeal) Rules. The Rule 30-A reads as under:

“Rule 30-A

- (i) Disciplinary proceedings, if instituted while the employee was in service whether before his retirement or during his re-employment, shall, after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service.*
- (ii) During the pendency of the disciplinary proceeding, 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 proceeding or judicial proceeding to have been guilty of offence/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 low in the event of delayed payment, in case the employee is fully exonerated.”

This resulted in the respondent filing a claim before the Controlling Authority appointed under the Act.

5. The charge sheet culminated in an order dated November 16, 2011 of major penalty of dismissal of the respondent from the services of the petitioner, who adjusted the alleged financial loss suffered by the petitioner against the withheld gratuity.

6. In the meantime, vide order dated March 25, 2011, the Controlling Authority allowed the claim of the respondent No. 1 and thereby held that he is entitled to receive a sum of Rs. 10 lakhs towards gratuity with interest @ 10% p.a. Against the order dated March 25, 2011, the petitioner preferred a Writ Petition No. 8286 of 2011 before this Court. Since an appeal lies with the Appellate Authority under Section 7 of the Act, the petitioner withdrew the writ petition and filed an appeal before the Appellate Authority, which culminated in the impugned order.

7. The Appellate Authority was of the view that in view of the Judgment of the Supreme Court in the case of Jaswant Singh Gill Vs. Bharat Coking Coal Ltd. & Ors., Civil Appeal No. 4770 of 2006, decided on November 10, 2006, the order of the Controlling Authority dated March 25, 2011 does not call for any interference.

8. Mr. Jainendra Maldahiyyar, learned counsel appearing for the petitioner would submit that in terms of circular dated March 29, 2000 whereby an amendment was effected to Rule 30-A, the petitioner was within its right to withhold the gratuity and adjust the same against the

loss caused to the petitioner. He would submit that Rule 30-A has the effect of law and rightly been invoked. He would also rely upon the Judgment of the Supreme Court reported as (2007) 9 SCC 15, Ramesh Chandra Sharma Vs. Punjab National Bank and Anr. to contend that the Supreme Court has upheld the continuance of departmental proceedings even on attaining the age of a superannuation by delinquent officer and also upheld the power to withhold/withdrawal of pension to recover pecuniary loss caused to an organization. He would also rely upon the Judgment of the Supreme Court reported as AIR 2008 SC 1235, U.P. State Sugar Corporation Ltd. Vs. Kamal Swaroop Tondon to contend that departmental proceedings for recovery of losses sustained by an organization due to negligence of delinquent employee could be continued after retirement of the said employee.

9. On the other hand, Ms. Jyoti Singh, learned Senior Counsel appearing for the respondent would contend that the Rule under which the petitioner has decided to withhold the gratuity of the respondent, is contrary to the scheme of the Act. According to her, the provisions of the Act would prevail over the Rules framed by the petitioner-Corporation, which are not Statutory Rules. According to her, the issue is no more res-integra in view of the Judgment of the Supreme Court in the case of *Jaswant Singh Gills's case (supra)* wherein the Supreme Court has held that “even if a disciplinary proceeding was initiated prior to attaining the age of superannuation, in the event the employee retires from service, the question of imposing a major penalty by removal or dismissal from service would not arise” and further the power to withhold gratuity must be subject to the provisions of the Act and the Statutory right accrued thus, cannot be impaired by reason of a Rule

which does not have a force of Statute. She would further draw my attention to the latest opinion of the Supreme Court in the case of State of Jharkhand Vs. Jitender Kumar Srivastava, Civil Appeal No. 611/2013 decided on August 14, 2013, wherein the Supreme Court held that “a person cannot be deprived of his pension without the authority of law which is the Constitutional mandate enshrined in Article 300-A of the Constitution. It follows that pension or gratuity or even leave encashment cannot be taken away without any statutory instructions and under the umbrage of administrative instructions.”

10. Having considered the rival submissions made on behalf of the parties, I agree with the submission made by the learned Senior Counsel for the respondent that since the payment of gratuity to the respondent is governed by the Act, which occupies the field relating to the payment of gratuity must prevail. The Supreme Court in *Jaswant Singh's case* (*supra*) has elaborately considered an identical issue as to whether the provisions of the Act shall prevail over the Rules framed by Coal India Ltd., known as Coal India Executives' Conduct, Disciplinary and Appeal Rules, 1978 (Rules, in short). Rule 27 of the Rules provides for penalty including recovery from pay or gratuity of the whole of or part of any pecuniary loss caused to the company by negligence or breach of orders or trust. Rule 34.2 and 34.3 inter-alia deals with, if disciplinary proceeding instituted while the employee was in service, whether before his retirement or during his re-employment shall after the final retirement of the employee be deemed to be proceeding and shall be continued and concluded by the Authority by which it was commenced in the same manner as if the employee has continued in service. Rule 34.3 empowers the disciplinary authority to withhold the payment of

gratuity for ordering the recovery from gratuity, of the whole or part of any pecuniary loss caused to the company. The Supreme Court, after referring to Sub-Section (6) of Section 4 has held as under:

“9. The Act was enacted with a view to provide for a scheme for payment of gratuity to employees engaged inter alia in mines. Section 3 of the Act provides for appointment of an officer to be the controlling authority. Controlling authority is to be responsible for administration of the act. Different authorities, however, may be appointed for different areas. Section 4 of the Act entitles an employee to gratuity after he has rendered continuous service for not less than five years inter alia on his superannuation. Sub-section (6) of Section 4 contains a non-obstante clause stating:

"(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 or 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."

10. The Rules framed by the Coal India Limited are not statutory rules. They have been made by the holding company of Respondent No. 1.

11. The provisions of the Act, therefore, must prevail over the Rules. Rule 27 of the Rules provides for recovery from gratuity only to the extent of loss caused

to the company by negligence or breach of orders or trust. Penalties, however, must be imposed so long an employee remains in service. Even if a disciplinary proceeding was initiated prior to the attaining of the age of superannuation, in the event, the employee retires from service, the question of imposing a major penalty by removal or dismissal from service would not arise. Rule 34.2 no doubt provides for continuation of a disciplinary proceeding despite retirement of employee if the same was initiated before his retirement but the same would not mean that although he was permitted to retire and his services had not been extended for the said purpose, a major penalty in terms of Rule 27 can be imposed.

12. Power to withhold penalty contained in Rule 34.3 of the Rules must be subject to the provisions of the Act. Gratuity becomes payable as soon as the employee retires. The only condition therefore is rendition of five years continuous service.

13. A statutory right accrued, thus, cannot be impaired by reason of a rule which does not have the force of a statute. It will bear repetition to state that the Rules framed by Respondent No. 1 or its holding company are not statutory in nature. The Rules in any event do not provide for withholding of retrial benefits or gratuity.

14. The Act provides for a closely neat scheme providing for payment of gratuity. It is a complete code containing detailed provisions covering the essential provisions of a scheme for a gratuity. It not only creates a right to payment of gratuity but also lays down the principles for quantification thereof as also the conditions on which he may be denied therefrom. As noticed hereinbefore, sub-section (6) of Section 4 of the Act contains a non- obstante clause vis-a-vis sub-section (1) thereof. As by reason thereof, an accrued or vested right is sought to be taken away, the conditions laid down thereunder must be fulfilled. The provisions contained therein must, therefore, be scrupulously

observed. Clause (a) of Sub-section (6) of Section 4 of the Act speaks of termination of service of an employee for any act, wilful omission or negligence causing any damage. However, the amount liable to be forfeited would be only to the extent of damage or loss caused. The disciplinary authority has not quantified the loss or damage. It was not found that the damages or loss caused to Respondent No. 1 was more than the amount of gratuity payable to the appellant. Clause (b) of Sub-section (6) of Section 4 of the Act also provides for forfeiture of the whole amount of gratuity or part in the event his services had been terminated for his riotous or disorderly conduct or any other act of violence on his part or if he has been convicted for an offence involving moral turpitude. Conditions laid down therein are also not satisfied.

15. Termination of services for any of the causes enumerated in Sub-section (6) of Section 4 of the Act, therefore, is imperative”.

11. In the present case, the respondent superannuated on September 30, 2007. The gratuity becomes payable to him on the said date. On the said date, there is no decision of the Disciplinary Authority either to terminate the respondent for any Act or any conclusion of his wilful omission or negligence causing any damage or loss or destruction of property belonging to employer so as to forfeit to the extent of the damage or loss so caused. The conclusion arrived at by the Disciplinary Authority was not on the date of superannuation like in this case on November 16, 2011 would not empower the petitioner to forfeit the gratuity of the respondent contrary to the scheme of the Act as interpreted by the Supreme Court in *Jaswant Singh Gills's case (supra)*. I note for benefit, the conclusion arrived at by the Appellate Authority in the impugned order wherein he concludes as under:

“In the instant case, appellant has himself recorded that the respondent was superannuated on 30.09.2007. On perusal of the relieving order dated 28.09.2007, it is noted that the respondent was superannuated without any qualification remarks & his superannuation was absolute & unconditional. Further, appellant has stated that the services of the respondent were dismissed on 16.11.2011 where as he was already superannuated on 30.09.2007 without any prequalification.

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In this case also the service of the respondent was not terminated & he was superannuated on 30.09.2007 without any precondition. Further as on 30.09.2007, there was no Rule of the appellant company to withhold the retiral benefits. The rules were amended by the appellant's company only on 09.02.2012 as per page 49 of the appeal of the appellant”.

12. I note only that the respondent has challenged the order dated November 16, 2011 in a separate W.P.(C) No.2566/2012, in this Court which is pending adjudication. The pendency of the writ petition has no bearing on this writ petition.

13. In view of the above, I do not find any infirmity in the impugned order dated May 24, 2013 of the Appellate Authority. The writ petition is dismissed.

C.M. No.12217/2013 (stay)

14. Dismissed as infructuous.

**(V.KAMESWAR RAO)
JUDGE**

FEBRUARY 13, 2014

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