

THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

WRIT PETITION No.276 OF 2003

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ORDER:

This Writ Petition is filed under Article 226 of the Constitution of India to issue an order, direction or a writ more particularly one in the nature of a Writ of Certiorari calling for the records and quash the impugned order dated 03.12.2002 passed by the first respondent and pass appropriate orders.

2. The facts leading to filing of the present writ petition are, in brief, as follows:

The petitioner is a Charitable Eye Hospital rendering free service to the patients with the help of Lions Club, Hyderabad. The building where the hospital is located is donated by

Mrs. Kalavathi Sadhuram Ali Chand. The Lions Club had donated the equipment and other instruments. The third respondent, who worked as Accountant, was charge sheeted on 08.08.2000 for the following charge:

“For your gross negligence in not checking and verifying all the cash transactions and entries in the books for the financial year 1999-2000 resulting in the misappropriation of a huge sum of Rs.85,104/- therefore causing loss to the management of hospital.”

Thereafter, an enquiry was initiated against the third respondent and the Enquiry Officer submitted a report dated 10.11.2000 holding the third respondent misappropriated the funds. Basing on the report of the Enquiry Officer, the third respondent was dismissed from service by order dated 16.12.2000. The third respondent filed an application before the second respondent claiming gratuity for the service he rendered for 9 years and 7 months. The said application was numbered as P.G.No.160 of 2001. The petitioner contested the case and the second respondent, by order dated 16.03.2002, allowed the claim of the third respondent to an extent of Rs.20,815/-. Challenging the order of the second respondent, the petitioner filed an appeal under Section 7(7) of the Payment of Gratuity Act, 1972 (for

short, 'the Act') before the first respondent who confirmed the order of the second respondent. The first and the second appellate authorities failed to consider that the petitioner is a charitable institution, therefore, the provisions of the Act are not applicable to the petitioner - Hospital. Hence, the writ petition.

3. Heard Sri S.Ravindranath, the learned counsel for the petitioner, the learned Government Pleader for Labour for respondent Nos.1 and 2 and Sri D.Sunil Kumar, Advocate, representing Smt. K.Udayasri, the learned counsel for respondent No.3.

4. It is admitted that the third respondent worked as an Accountant in the petitioner – Hospital for a period of 9 years and 7 months. It is also an admitted fact that the third respondent was removed from service on 16.12.2000 on the ground that he misappropriated the money. As per Section 4 of the Act, an employee is entitled for gratuity on his termination provided he worked continuously for a period of not less than five years. A perusal of the record reveals that an enquiry was initiated against one Smt. Susamma Luka and the third respondent. After completion of the enquiry, the Enquiry Officer submitted a report. The third respondent filed an application for sanction of the gratuity vide P.G.No.160 of 2001 before the second respondent. After hearing both sides, the second respondent allowed the petition directing the petitioner to pay gratuity amount of Rs.20,815/- to the third respondent within 15 days from the date of receipt of that order. Feeling aggrieved by the order of the second respondent, the petitioner filed an appeal vide P.G.A.No.3 of 2002 under Section 7(7) of the Act before the first respondent. The first respondent dismissed the said appeal on 03.12.2002. Feeling aggrieved by the order of the first respondent, the present writ petition is filed.

5. Initially the petitioner – Hospital has taken a plea that it is a charitable institution. At the time of arguments, the learned counsel for the petitioner, in all fairness, submitted that he is not pressing on the point that the provisions of the Act are not applicable to the petitioner – Hospital. He strenuously submitted that the Enquiry Officer arrived at a conclusion that the third respondent along with one Smt. Susamma Luka committed misappropriation to the tune of Rs.85,104/-. Therefore, the petitioner is entitled to withhold the gratuity of the third respondent in view of Sub-Section 6 of Section 4 of the Act. I am in full agreement with the submission made by the learned counsel for the petitioner that Sub-Section 6 of Section 4 of the Act enjoins the employer to forfeit the gratuity of the employee to the extent of the damage or loss caused to the employer by the employee.

6. The crucial question that falls for consideration is “Whether the third respondent has misappropriated the money of the petitioner so as to forfeit the gratuity amount of the third respondent or not?”

7. Learned counsel for the third respondent submitted that the third respondent has not committed misappropriation. To substantiate the argument, he has drawn my attention to the order passed by the second respondent. For better appreciation of the rival contentions, it is not out of place to extract the relevant portion of the order, dated 16.03.2002, which is as follows:

“On perusal of the evidence, it is clear that the applicant has not been dismissed from service for the misconduct of misappropriation and there is no charge against the applicant that the loss was caused to the respondent on account of misappropriation. The charge against the applicant is only dereliction of duty, which resulted to loss. In fact, it is another employee who misappropriated the amount and paid part of the amount admitting the misappropriation. It is clearly proved that the applicant has got no role in misappropriation, but only out of trust and belief he might have signed the necessary documents and there is no intention of committing such misconduct as alleged by the respondent.”

8. The second respondent has given a specific finding that the third respondent has not committed misappropriation of the money as alleged by the petitioner. The second respondent further directed the petitioner to pay the gratuity amount to the third respondent. It is apposite to extract the relevant portion of the impugned order, which is as follows:

“.....Further Smt.Susamma Luka in her statement before the Enquiry Officer absolved Smt. Bharathi, Thaigarajan and Sri Ramakrishna (Respondent-employee) and involved only Smt. A.Janaki in the misappropriation. Though there is a admission of misappropriation by Smt. Susamma Luka and absolving the respondent employee from involvement of misappropriation, the management conducted enquiry against the respondent employee and issued charge sheet and terminated from service. But this does not deprive the respondent-employee to get gratuity since the termination does not fall under the ambit of Sec. 4(6) of the Act and it only for dereliction of his duties. I find that there is no consistency in the contention of the appellant.”

A perusal of the above paragraph clearly indicates that both the authorities have come to a conclusion that the third respondent has not misappropriated the money of the petitioner. The alleged act committed by the third respondent utmost amounts to dereliction of the duties.

9. Learned counsel for the third respondent has drawn my attention to **Jaswant Singh Gill v. Bharat Coking Coal Ltd. and others**, wherein it is held at para No.4 as under:

“The Assistant Labour Commissioner (Central), Dhanbad in the application filed by the appellant under the Act, on the other hand, by an order dated 11-4-2001 held:

“It is clear that Shri J.S. Gill retired on superannuation as per notice for retirement w.e.f. 30.4.1998, therefore, he is entitled to the payment of gratuity under the PG Act, 1972. As per Sections 4(6)(a) and 4(6)(b) of the PG Act, 1972, gratuity can be forfeited partially or wholly when the service of the employee is terminated for any act, which constitute an offence involving moral turpitude provided that such offence is committed by him in the course of employment. In the instant case, the services of Shri J.S. Gill have not been terminated for the offence mentioned under Sections 4(6)(a) and 4(6)(b) of the PG Act, 1972. Therefore, the order of forfeiture of gratuity of Shri J.S. Gill issued by the CMD-cum-disciplinary authority of CIL is not tenable. The basic requirement of termination of service for any of the misconduct as enumerated under Sections 4(6)(a) and 4(6)(b) of the PG Act, 1972 has not been fulfilled before the issue of order of forfeiture of gratuity.””

10. As per the principle enunciated in the case cited supra, the employer is not entitled to forfeit the gratuity of the employee unless the employee caused damage or loss to the employer. The principle enunciated in the case cited supra is fairly applicable to the facts of the case on hand. The second respondent or the first respondent has not committed any irregularity or illegality while passing the orders. The finding recorded by the second respondent and the first respondent is supported by oral and documentary evidence. Absolutely, there is no material on record to establish that the third respondent has committed misappropriation of the funds thereby, to forfeit his gratuity amount by the petitioner.

11. Learned counsel for the third respondent has also placed reliance on **Jaswant Singh Gill**'s case (1 cited supra), wherein it is held at para Nos.19 and 20 as under:

“19. Reliance has been placed by Mr Rana Mukherjee, learned counsel appearing on behalf of Respondent 1 on *Tournamulla Estate v. Workmen* ((1973) 2 SCC 502). In that case, this Court was concerned with a scheme of gratuity. The scheme contained a provision which was in pari material with Section 4(6)(b) of the Act. The said scheme was upheld stating: (SCC p.504, para 4)

“Although the provisions of this statute would not govern the decision of the present case, the importance of the enactment lies in the fact that the principle which was laid down in the *Delhi Cloth Mills case (Delhi Cloth & General Mills Co. Ltd. V. Workmen, AIR 1970 SC 919)* with regard to forfeiture of gratuity in the event of commission of gross misconduct of the nature mentioned above, has been incorporated in the statute itself. Even otherwise, such a rule is conducive to industrial harmony and is in consonance with public policy.”

20. Reliance has also been placed upon a decision of the Karnataka High Court in *Bharath Gold Mines Ltd. V. Regional Labour Commr. (Central)* (1986 Lab IC 1976). In that case it was held that before the amount of gratuity can be directed to be forfeited, an opportunity of hearing must be given. The said decision may not have any application to the fact of the present case as opportunity of hearing was given both to the employer as also the employee by the authority.”

12. Admittedly, the petitioner has not given any notice prior to forfeiting of the gratuity of the third respondent. As rightly pointed out by the learned counsel for the petitioner, Section 4 of the Act is silent with regard to the issuance of the notice. However, the principles of natural justice mandate that employer has to give notice to the employee before forfeiting of gratuity, which is a statutory right of an employee. Viewed from this angle also the acts of petitioner is not sustainable. Hence, there are no merits in the writ petition.

13. Accordingly, the Writ Petition is dismissed. No costs.

14. Consequently, Miscellaneous Petitions, if any, pending in this Writ Petition shall stand closed.

T.SUNIL CHOWDARY, J

Date: 13.04.2015

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