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

% *Date of Decision : July 28, 2015*

+ **LPA 597/2014**

NATIONAL FERTILIZERS LIMITED Appellant
Represented by: Mr.Dipak Kumar Jena, Advocate with
Mr.P.P.Nayar, Advocate

versus

SHRI ASHOK KUMAR AHLUWALIA Respondent
Represented by: Ms.Anju Bhattacharya, Advocate

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J. (Oral)

1. Having joined service under the appellant on May 30, 1975, the respondent superannuated from service on November 29, 2013.
2. While in service the respondent was served with a charge sheet in June, 2004 but proceedings thereto were dropped by the Competent Authority on May 04, 2006. It appears that the reason was that the respondent was facing a criminal prosecution concerning the same acts of omission and commission alleged against him in respect of which departmental proceedings were initiated.
3. As on the date of his superannuation the criminal proceedings were pending against the respondent.

4. Leave encashment and gratuity payable by the appellant to the respondent became a bone of contention resulting in the respondent filing W.P.(C) No.337/2014 which has been allowed by the learned Single Judge vide impugned judgment dated April 24, 2014.

5. As regards leave encashment, the view taken by the learned Single Judge is that unless a rule exists to withhold leave encashment pending trial of an employee of the appellant before a criminal court, the leave encashment cannot be denied. No rule being shown, direction issued is that the appellant should encash the leave lying to the credit of the respondent on the date of superannuation and pay the money equivalent.

6. The appellant does not challenge said part of the impugned order.

7. On the issue of gratuity, the learned Single Judge has noted that Rule 35A of the Discipline and Conduct Rules framed by the appellant deals with withholding of gratuity. The rule reads as under:-

“35A Withholding of Gratuity during the pendency of disciplinary proceedings: *During the pendency of 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 proceeding 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(3-A) of the Payment of Gratuity Act, 1972 should be kept in view in the event of the delayed payment, in case the employee is exonerated.”*

8. The view taken by the learned Single Judge is that the rule in question permits withholding of gratuity if disciplinary proceedings are pending when the employee superannuates from service and as regards judicial

proceedings pending, the learned Single Judge has held that the rule must take its colour from the main statute.

9. The main statute is the Payment of Gratuity Act, 1972. The learned Single Judge has held that a perusal of sub-Section 6 of Section 4 of the Act would require it to be held that as per the rule gratuity can be withheld if it a case of termination of service.

10. The reasoning of the learned Single Judge is in paragraph 7.2 to 7.4 of the impugned decision. It reads as under:-

“7.2 A reading of the Rule clearly brings to fore the fact that there is no power vested in NFL to firstly, withhold dues payable towards leave encashment. Secondly, the power to withhold gratuity, to recover wholly or partly pecuniary loss caused to NFL, is confined to a finding returned either in the disciplinary proceeding or in a judicial proceeding in relation to offences/misconduct referred to in Section 4(6) of the Payment of Gratuity Act, 1972 (in short PGA). Gratuity, can also be withheld to recover pecuniary loss caused to NFL due to misconduct or negligence of the delinquent employee. The question then is : what is the meaning to be ascribed to the expression ‘judicial proceeding’ in the context of Rule 35A. The setting of an expression is important, as the meaning is contextual. The expression ‘judicial proceeding’, by itself, bereft of setting, would clearly include even a criminal proceeding but, when read in the context of the fact that it is preceded by the expression ‘disciplinary proceeding’ and, followed by, the words, ‘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 misconduct or negligence’, it would bring within its ambit a proceeding other than criminal proceedings.

7.3 It may be useful to bear in mind the provisions of Section 4(6) of the PGA. The said provisions get triggered only in a case which results in termination of an employee. In this case, the petitioner, retired from service on 29.11.2013, after he was fully exonerated on 04.05.2006. Therefore, having regard to the fact that criminal proceedings do not fall within the purview

of Rule 35A, the argument advanced on behalf of the respondent to withhold gratuity, cannot be accepted.

7.4 As regards reliance on instruction dated 10.09.2006 is concerned, it clearly indicates that it is applicable during the pendency of disciplinary proceedings to provision for a possible loss/damage caused, as may be determined, in such proceedings. As indicated above, the disciplinary proceedings have already come to an end; in which, the petitioner has been fully exonerated.”

11. As per sub-Section 1 of Section 4 of the Payment of Gratuity Act, 1972, gratuity is payable to an employee on termination of his employment if continuous service for not less than 5 years is rendered on superannuation, retirement or resignation or death or disablement due to accident or disease. Sub-Section 6 of Section 4 reads as under:-

“4(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 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 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 the course of his employment.”

12. The learned Single Judge is therefore right in adopting the reasoning that unless sub-Section 6 of Section 4 comes into play, gratuity has to be

paid.

13. A perusal of sub-Section 6 of Section 4 would evince that termination of the service is a sine qua non to withhold gratuity. Further, the termination has to be for any act, wilful omission or negligence causing damage or loss or destruction of property belonging to the appellant or on account of riotous, disorderly conduct, violence or an act of moral turpitude.

14. Thus, the act does not permit withholding of gratuity if an employee superannuates, and it is irrelevant whether on said date criminal proceedings are pending. We leave the question open as to what would be the legal position if an employee superannuates from service but prior thereto has been held guilty by a criminal court and the guilt relates to an act of omission or commission causing loss to the employer.

15. We note that the appellant has paid the gratuity to the respondent.

16. The appeal is dismissed.

17. No costs.

CM No.15100/2014

Dismissed as infructuous.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

JULY 28, 2015

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