IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No.1932 of 2013 (O&M)
Date of Decision:- 19.08.2016.

Kuldeep Singh Mengi

......Appellant

Versus

Food Corporation of India and others

......Respondents

CORAM: HON'BLE MR. JUSTICE P.B. BAJANTHRI

****

Present: Mr. Harinder Sharma, Advocate for the appellant.

Ms. Jatinderjit Kaur, Advocate for the respondents.

****

<u>P.B. BAJANTHRI, J. (Oral)</u>

<u>CM No.9653-C of 2016</u>

CM for placing on record copy of the order dated 25.6.2003 as Annexure A-3 is allowed for the reasons stated in the application as well as affidavit.

<u>RSA No.1932 of 2013</u>

1.) In the instant appeal, the appellant has assailed the order dated 20.1.2011 and 3.1.2013 passed by the Trial Court and Appellate Court, respectively. Appellant filed a suit for declaration regarding entitlement of revision of pay and consequential benefits and further to get arrears of gratuity and other retiral benefits. Both the Trial Court and Appellate Court declined to grant any relief to the appellant. Hence, the present appeal.

2.) The appellant while working as Technical Assistant-I at Faridkot District was subjected to disciplinary proceedings which was concluded in imposing penalty of dismissal from service on 14.3.2002. Since the appellant was dismissed from service, whether he is entitled for gratuity or not is the question for consideration. The appellant is entitled to Gratuity under Clause 3 of the Food Corporation of India (Death-cum-Retirement Gratuity) Regulations, 1967, since the appellant had been dismissed from service. Sub-Section 6 of Section 4 of Payment of Gratuity Act, 1972 relates to under what circumstances a terminated employee is entitled for gratuity or not is required to be decided by the Competent Authority/employer. The extract of sub-Section 6 of Section 4 is reproduced herein:-

> *"(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 omitted by him in the course of his employment."*

3.) Learned counsel for the appellant submitted that while passing the order of dismissal from service insofar as entitlement of gratuity is concerned, it is silent, therefore, appellant is entitled for gratuity amount which is due to him. Further it was submitted that there was no determination whether the appellant is entitled for gratuity amount under sub-Section 6 of Section 4 of the Payment of Gratuity Act, 1972. In support of his claim, learned counsel for the appellant relied on decision of Allahabad High Court reported in ***2004 LAB. I.C. 2844 (M/s Hindalco Industries Ltd. Vs. Appellate Authority under Payment of Gratuity Act, Kanpur and others)***. The Allahabad High Court with reference to the decision of the Apex Court passed in ***Remington Rand of India Ltd. Vs. Workmen, 1970 Lab IC 1182 AIR 1970 SC 1421.*** In the said judgment Sub-Section 6 (a) and (b) of Section 4 of the Payment of Gratuity Act, 1972 has been interpreted. Para 7 of the judgement is reproduced herein.

> *"In the-present case there is no averment that any express order was passed by the employer forfeiting petitioner's right to receive gratuity. In Remington Rand of India Ltd. v. The Workmen AIR 1970 SC 1421 : 1969 (3) SCC 913, the Supreme Court considered the qualifying period for payment of gratuity, and the consequences of payment of gratuity on the termination of services for misconduct. It was held that gratuity is paid to ensure good conduct throughout the period that the workman serves his employer is an accepted proposition. The clause as to misconduct covers the act which may vary in degree of gravity, nature and its impact on the discipline and the working of the concern. All these acts may not result in loss capable to being calculated in terms of money. There may be an action which may forthwith disentitle the workman from retaining his employment and justifying his dismissal. It appears that after this pronouncement, the Act was amended and that a provision was made under Section 4(6)(b) for forfeiture*

of gratuity either wholly or partially. The discretion given to the employer must be based upon the material and the reasons recorded, after serving principle of natural justice and these conditions postulate an order to be passed by the employer. The termination of services of an employee on the grounds contemplated under Section 4(6)(a) and (b), by itself does not entitle the employer to forfeit gratuity payable to an employee. The right of an employer to terminate the services of an employee under the Certified Standing Orders, or Service Conditions on any such act given in Section 4 (6)(a) and (b), of the Act of 1972, is circumscribed and restricted to holding a just and fair domestic enquiry serving principles of natural justice, which may be examined and justified in industrial adjudication, in which the proportionality of punishment may be examined under Section 11A of the Industrial Disputes Act, 1947. The Industrial adjudicature may find the domestic enquiry and punishment to be just, fair and proper, but these findings by themselves do not serve the requirements of Section 4(6)(a) and (b) of the Payment of Gratuity Act, 1972. The right to receive gratuity is a statutory right. It is not sub-servient to the common law rights of the employer to terminate the services of an employee. In order to forfeit the statutory right of gratuity, qualified by expression 'to the extent of damage or loss so caused' in Sub-section (6)(b), the quantum of forfeiture has to be determined, and thus it requires an order, which can only be passed after giving opportunity to the employee. When the forfeiture, even if by an express and reasoned order is challenged before the Controlling Authority under the Act, the employer must satisfy the authority in proceedings under Section 7(4) of the Act, with the justification of forfeiture."

4.) In view of the principle laid down by the Supreme Court Remington Rand of India Limited's case (supra) in the absence of determination whether the petitioner is entitled to gratuity or not, the appellant is entitled to gratuity amount. On the other hand, learned counsel for the respondents resisted the contention of the appellant and relied on decision of this Court reported in ***2008 2 SCT 434 Devinder Singh Vs. Food Corporation of India and others.*** This Court interpreted the penalty order passed in Devinder Singh's case (supra) that the petitioner had caused loss to the Corporation to that extent punishment has been awarded, namely, recovery of loss has been determined and sought to be recovered. Therefore, exercising power under sub-Section 6 of Section 4 (a) & (b) of the Payment of Gratuity Act, 1972 do not arise.

5.) Heard learned counsel for the parties.

6.) Perusal of the dismissal order in the present case, it is evident that there is no determination whether appellant is entitled for gratuity amount or not. There is no specific determination as to loss caused to the Corporation and even recovery has not been ordered. In other words, if the appellant has caused loss to the Corporation, the Corporation is entitled to recover the amount. What has been ordered is only a dismissal. On the other hand, respondents-Corporation in the case of R.S. Bhullar vide Annexure A-3 specifically, an order has been passed, namely, *"Dismissal from the services of the Corporation and withholding of his gratuity benefits under Section 4, Sub-Section 6 (a) of the Payment of Gratuity Act, 1972 upon Shri R.S. Bhullar, AM (QC) now TA-I with immediate effect"* In the case cited by learned counsel for the respondents, i.e. Devinder Singh Vs. Food Corporation of India and others, punishment itself is recovery of a particular determined amount, therefore, facts of Devinder Singh's case (supra) as well as R.S. Bhullar's case (Annexure A-3) are distinguishable for the reasons that in the appellant's case what has been ordered is only a dismissal from service. In other words, there is no decision taken by the respondents-Corporation insofar as entitlement of gratuity. The gratuity issue is governed by two sets of statutory provisions. One is Food Corporation of India (Death-cum-Retirement Gratuity) Regulations, 1967 and Payment of Gratuity Act, 1972. The Payment of Gratuity Act, 1972 would prevail over the Food Corporation of India (Death-cum-Retirement Gratuity) Regulations, 1967. Therefore, the respondents-Corporation are bound by the Payment of Gratuity Act, 1972. Further the respondents-Corporation cannot say that appellant is already dismissed from service and he is not entitled for gratuity amount. The respondents-Corporation have to determine whether the appellant is entitled for gratuity or not under sub-Section 6 of Section 4 of the Payment of Gratuity Act, 1972.

7.) In view of the facts and circumstances, the respondents-Corporation are directed to determine whether the appellant is entitled for gratuity amount or not under sub-Section 6 of Section 4 of the Payment of Gratuity Act, 1972. The appeal stands disposed of. The respondents are directed to examine whether appellant is entitled for gratuity or not under Sub-Section 6 of Section 4 of the Payment of Gratuity Act, 1972 within a period of three months from today.

(P.B. BAJANTHRI)
JUDGE

August 19, 2016.
sandeep sethi

Whether speaking/reasoned:- Yes / No

Whether Reportable:- Yes / No.