

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

+ **W.P. (C) No.4510/2016**

% **16th December, 2016**

MS. NEERU ABROL

..... Petitioner

Through: Ms. Anju Bhattacharya, Advocate
with Mr. Elgin Matt John, Advocate.

versus

CHAIRMAN AND MANAGING DIRECTOR NATIONAL
FERTILIZERS LIMITED & ANR. Respondents

Through: Mr. Dipak Kumar Jena, Advocate
with Mr. Jalandhar Das, Advocate for
respondent No.1.
Mr. Vikram Jetley, Advocate for
respondent No.2.

CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **YES**

VALMIKI J. MEHTA, J (ORAL)

1. By this writ petition under Article 226 of the Constitution of India, the petitioner who retired as the Chairman and Managing Director of the respondent no.1/National Fertilizers Limited/employer essentially claims gratuity and leave encashment benefit by placing reliance upon Rules 35A and 35B of the NFL Employees' (Conduct, Discipline & Appeal) Rules

(hereinafter referred to as 'the NFL Rules'). Petitioner also additionally prays for the other reliefs of grant of Provident Fund and 'other retirement dues'.

2. Rules 35A and 35B of the NFL Rules read 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.

35(B) Withholding of leave encashment at the time of superannuation-

Company may withhold whole or part of cash equivalent of leave in the case of an employee who retires from service on attaining the age of retirement while under suspension or while disciplinary or criminal proceedings are contemplated or pending against him if in the view of Company there is a possibility of some money becoming recoverable from him on conclusion of the proceedings against him. On conclusion of the proceedings, he will become eligible to the amount so withheld after adjustment of his dues, if any.”

3. So far as the issue of payment of gratuity is concerned, payment thereof can be withheld under Rule 35A only if there is pendency of disciplinary proceedings; and no disciplinary proceedings are pending against the petitioner. However it is found that this Court does not have the jurisdiction to grant this relief as regards gratuity because a specific statutory authority called as the controlling authority is constituted under the

Payment of Gratuity Act, 1972 (hereinafter referred to as 'the Act') to determine and decide the disputes with respect to payment of gratuity. Against the order of the controlling authority, even filing of an appeal is provided. All these aspects are contained in Section 7 of the Act, especially in its sub-sections (4) to (7) and which Section 7 in its entirety reads as under:-

“Section 7 Determination of the amount of Gratuity.- (1) A person who is eligible for payment of gratuity under this Act or any person authorised, in writing to act on his behalf shall send a written application to the employer, within such time and in such form, as may be prescribed, for payment of such gratuity.

(2) As soon as gratuity becomes payable, the employer shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.

(3) The employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to the person to whom the gratuity is payable.

(3A) If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify:

Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground.

(4)(a) If there is any dispute as to the amount of gratuity payable to an employee under this Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the employer shall deposit with the controlling authority such amount as he admits to be payable by him as gratuity.

(b) Where there is a dispute with regard to any matter or matters specified in clause (a), the employer or employee or any other person raising the dispute may make an application to the controlling authority for deciding the dispute.

(c) The controlling authority shall, after due inquiry and after giving the parties to the dispute a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as a result of such inquiry any amount is found to be payable to the employee, the Controlling Authority shall direct the employer to pay such amount or, as the case may be, such amount as reduced by the amount already deposited by the employer.

(d) The controlling authority shall pay the amount deposited, including the excess amount, if any, deposited by the employer, to the person entitled thereto.

(e) As soon as may be after a deposit is made under clause (a), the controlling authority shall pay the amount of the deposit-

(i) to the applicant where he is the employee; or

(ii) where the applicant is not the employee, to the (nominee or, as the case may be, the guardian of such nominee or) heir of the employee if the controlling authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity.

(5) For the purpose of conducting an inquiry under sub-section (4), the controlling authority shall have the same powers as are vested in a Court, while trying a suit, under the Code of Civil Procedure, 1908 (5 of 1908), in respect of the following matters namely:-

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses.

(6) Any inquiry under this section shall be a judicial proceeding within the meaning of Sections 193 and 228, and for the purpose of section 196, of the Indian Penal Code, 1860 (45 of 1860).

(7) Any person aggrieved by an order under sub-section (4), may, within sixty days from the date of the receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf:

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days:

Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the controlling authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under subsection (4), or deposits with the appellate authority such amount.

(8) The appropriate Government or the appellate authority, as the case may be, may, after giving the parties to the appeal a reasonable opportunity of being heard, confirm, modify, or reverse the decision of the controlling authority.”

4. The issue therefore is of whether this Court can consider entitlement of the petitioner on merits to the payment of gratuity as per Rule 35A of NFL Rules because this Court is not the competent authority, inasmuch as, once a specific statutory authority is created to decide the disputes and which disputes are decided in terms of the provision of the Act, then this Court ought not to exercise its extraordinary jurisdiction. Once there is an alternative efficacious remedy to enforce the claim before a duly constituted authority then the payment of gratuity will have to be decided by the statutory authority being the controlling authority including by deciding the defences of the employer under Section 4 of the Act including sub-section (6) thereof pertaining to entitlement of the employer to adjust the gratuity amount from the loss caused to the employer on account of misconduct/illegality etc of the employee. Therefore, so far as relief claimed of grant of gratuity is concerned, this Court refuses to exercise its extraordinary jurisdiction in view of the fact that there is a duly constituted authority and against whose decision even a statutory appeal can be filed.

5. So far as the claim of leave encashment is concerned, it is seen that Rule 35B of the NFL Rules specifically talks of withholding of leave

encashment amounts when the criminal proceedings are contemplated. Respondent no.1/employer in its counter affidavit has referred to the contemplation of criminal proceedings in sub-paras 4(ii) and 4(iii) and which para 4 in its entirety reads as under:-

“4. It is submitted that as per the vigilance profile of the petitioner sent by CVO, NFL vide letter dated 17.02.2015, there were three issues pending against the petitioner.

(i) First issue was supply of urea to mixing units in Maharashtra during her tenure as Director (F), NFL.

Inquiry in the matter was being conducted simultaneously by CBI, Delhi and CBI, Nagpur. The CBI, Delhi vide letter dated 27.02.2015 had stated that complaint no.CO AC1 2014 A0001 against the petitioner, Ex-Dir. (NFL) & others has been closed on 05.01.2015.

Further, the CBI, Nagpur vide letter dated 04.04.2016 has stated that preliminary enquiry has been closed without recommending any action against the officials of NFL.

(ii) The second pending issue pertained to acceptance of sub-standard HDPE bags by NFL during 2013-14 during the tenure of the petitioner as Director (F), NFL. CVO, NFL has submitted its detailed report in the matter wherein it had fixed responsibility on the petitioner besides other officers.

In another similar matter related to issue of procurement of HDPE bags by NFL, CVC vide its office Memorandum dated 03.12.2015 had recommended for CBI inquiry into it. This department in pursuance of CVC's advice dated 03.12.2015 accepted by Competent Authority had referred the matter to CBI for inquiry and report. The Report from CBI is still awaited.

(iii) The third pending issue was complaint from Sh. R S Virk against the petitioner as CMD, NFL wherein several issues were raised regarding misuse of office for transfer of officials of NFL and corruption in NFL. The complaint of Sh. R.S. Virk was forwarded by CVC vide office memorandum dated 26.08.2014 to this department. The issues raised by the complainant involved issues pertaining to supply of urea to mixing units in Maharashtra, procurement of HDPE bags, misuse of the official position by the petitioner in transferring of officials and exorbitant expenditure during AGMs 2012 in NFL besides other issues. The issues are under consideration of this Department at various stages of examination as procurement of HDPE bags has been referred to CBI, issue of exorbitant expenditure in AGMs besides other issues have been examined and a report to the CVC is to be submitted shortly. As matters are pending against the petitioner in this Department, considering these, in

accordance of vigilance clearance may not be feasible at this stage. It has also been communicated to NFL vide this Department's letter dated 30.05.2016. The decision pertaining to the release of retirement benefits in favour of the petitioner has to be taken by NFL in terms of relevant provisions of NFL.

In view of the above pending issues and in consonance of the Rules 35(A) and 35(B) of the NFL Employees (CDA), NFL has not released the retirement benefit of the petitioner for the want of vigilance clearance from the Ministry of Chemicals and Fertilizers, Department of Fertilizers. The Hon'ble Supreme Court of India has held in the matters of **Ch. Cum Man. Mahanadi Coal field Ltd. VS. Rabindranath Choubey as under:**

“That the respondent was working as Chief General Manager (Production) since 17.2.2006 at Rajmahal area under **Mahanadi Coalfields Ltd.**, the appellant herein. A memo containing articles of charge was issued to him on 1.10.2007 alleging that there was shortage of stock of coal in Rajmahal Group of mines which was under his management and enquiry was proposed to be conducted under Rule 29 of the Conduct, Discipline & Appeal Rules (hereinafter to be referred as 'CDA Rules).

That the Rule 29 enlists the procedure for imposing major penalties for misconduct and misbehavior. The CDA Rules are not statutory in nature however; they govern the employees of the appellant.

That the appellant (**Mahanadi Coalfields Ltd**) that in the charge sheet served upon the respondent herein, there are very serious allegations of misconduct alleging dishonestly causing coal stock shortage amounting to Rs.31.65 crores, and thereby causing substantial loss to the employer. If such a charge is proved and punishment of dismissal is given thereupon, the provisions of Section 4(6) of the Payment of Gratuity would naturally get attracted and it would be within the discretion of the appellant to forfeit the gratuity payable to the respondent. As a corollary one can safely say that the employer has right to withhold the gratuity pending departmental inquiry. Having regard to our discussion above of Jaswant Singh Gill (supra) and Ram Lal Bhaskar (supra), this issue needs to be considered authoritatively by a larger Bench. We, therefore, are of the opinion that present appeal be decided by a Bench of three Judges.”

In view of the above submissions the writ petition of the petitioner is not maintainable and liable to be dismissed by this Hon'ble Court.”

6. The aforesaid paras also make reference to the loss upon the employer under Section 4(6) of the Act, and which aspect as already stated above, will be decided by the appropriate statutory authority being the controlling authority under the Act.

7. In view of aforesaid paras 4(ii) and (iii), it is clear that since criminal proceedings are contemplated against the petitioner, hence Rule 35B of the NFL Rules by its very language cannot help the petitioner, and therefore, relief claimed so far as this aspect is concerned, is accordingly dismissed at this stage being not maintainable in view of the defences of the employer under Rule 35B of the NFL Rules of contemplation of criminal proceedings against the petitioner.

8. So far as the relief of grant of Provident Fund is concerned, learned counsel for the respondent no.1/employer states that all the Provident Fund dues of the petitioner have been duly paid to the petitioner, and therefore, no further orders are required to be passed in this regard except that the respondent no.1/employer will give the details and a calculation chart to the petitioner within four weeks as to what were the Provident Fund dues payable to the petitioner and how they duly stand paid to the petitioner.

9. That takes us to the relief claimed of 'all other retirement benefits'. What are these other retirement benefits have not been pleaded and specifically stated in the writ petition, and therefore, unless there is a properly pleaded legal cause of action as to what are these so called other retirement benefits, under which heads, how are they due for being paid to

the petitioner, under what rules such amounts are payable etc etc, this writ petition cannot be entertained as it is lacking in the relevant averments of the legal cause of action qua the relief of ‘other retirement dues’.

10. In view of the above, this writ petition is dismissed so far as the relief of payment of gratuity is concerned as being barred by existence of an alternative efficacious remedy under the Payment of Gratuity Act, for non-grant of leave encashment on account of criminal proceedings being contemplated against the petitioner as per the language provided for under Rule 35B of the NFL Rules, and that the Provident Fund dues of the petitioner being already paid, and finally on account of lack of details pleaded with regard to legal cause of action for ‘other retirement benefits’.

11. Writ petition is accordingly disposed of.

DECEMBER 16, 2016
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VALMIKI J. MEHTA, J