

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

*Reserved On: 10<sup>th</sup> November, 2017*

*Pronounced on: 16<sup>th</sup> November, 2017*

+ WP (C) 15034/2004

UOI (THR.G.M.NORTHERN RAILWAY)

.... Petitioner

Through: Ms. Geetanjali Mohan,  
Advocate

Versus

MOHAMMAD AKHTAR & ANR. ....Respondents

Through: Mr.Kunal Gosain, Adv.

**CORAM:**

**HON'BLE MR. JUSTICE C.HARI SHANKAR**

**JUDGMENT**

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1. Having served in the Northern Railway, Govt of India, from 12<sup>th</sup> April 1958 to 31<sup>st</sup> of May 1995 as a driver, the respondent, consequent to his retirement, moved the learned Labour Court, sometime in July 1996, by way of an application under Section 33-C (2) of the Industrial Disputes Act, 1947 (hereinafter referred to as “the Act”), registered as LCA 137/1996, claiming that the petitioner had illegally deducted, from the retiral benefits due to him, an amount of Rs. 20,659/–, the breakup of which was provided as under:

- “a) Illegal deduction on account of alleged excess leave –  
Rs 9740.00

- b) Retention of quarter E/82 for 3 months from August, 95 to October, 1995 whereas there was due sanction due to wife's sickness. – Rs 6,637.00
- c) No reason of this deduction given. – Rs 3,282.00

Total – Rs 20,659.00”

It was pointed out that, despite notice dated 30<sup>th</sup> April 1996, submitted by him, the respondent had not received the aforementioned amounts. Accordingly, it was prayed that “the Hon’ble Court be pleased to determine the amount due to the applicant and order the opposite party to pay it to applicant with cost, and interest.”

2. It is clarified, at the outset, that Respondent No 1 is referred to, hereinabove and hereinbelow, as “the respondent”, and Respondent No 2 is the learned Industrial Tribunal, (hereinafter referred to as “the learned Tribunal”) which ought not to have been impleaded at all in the first place.

3. The respondent initially moved the learned Industrial Tribunal by way of LCA 118/96, which was dismissed, in default, by the learned Tribunal, *vide* order dated 23<sup>rd</sup> August 1996. The respondent, thereafter, moved a second, identical, application, which came to be numbered as LCA 137/1996 (in which the presently impugned award was passed) with the same prayers.

4. The petitioner filed a written statement, in response to the aforementioned application of the respondent, raising various

preliminary objections, including, but not limited, to the maintainability of the application. The said submissions have, however, not been ventilated before the learned Tribunal, and form no part of the present writ petition either. Neither were they argued by learned Counsel for the petitioner, before me; ergo, I abjure from returning any finding thereon.

5. On merits, the written statement of the petitioner contended that (i) the deduction of Rs. 9740/- was because the respondent had availed 54 days' excess leave, (ii) the deduction of Rs. 6637/- was because, consequent to his retirement on 31<sup>st</sup> March 1995, the respondent had been allowed to retain the quarter in his occupation for 4 months, i.e. till 31<sup>st</sup> July 1995, but had continued to retain the quarter up till 31<sup>st</sup> October 1995, thereby inviting penal rent, which worked out to Rs. 6637/-, and (iii) the deduction of Rs. 4282/- was towards "normal licence fee", "final electrical" and "assuming mileage". It was, therefore, contended that the deductions, which had been effected from the death-cum-retirement gratuity (hereinafter referred to as "gratuity", for convenience) payable to the respondent, were legitimate and in order. Consequently, it was prayed that the respondent's application be dismissed.

6. *Vide* Award dated 23<sup>rd</sup> April 2004, the learned Tribunal, however, allowed the respondent's application, holding the deduction of Rs. 20,659/-, from the respondent's gratuity, to be illegal, and directing the petitioner to pay the said amount to the respondent, while

retaining liberty, to the petitioner, to recover the amount from the respondent's properties. A reading of the Award reveals that the only pleas raised by the petitioner before the learned Tribunal related to the legitimacy of the deductions effected from the respondent's gratuity, which, it was submitted, were attributable to unauthorised retention of the Railway quarter and availing of excess leave by him. The learned Tribunal proceeded on the sole ground that, in law, no deduction could be effected from gratuity, and that, if any amounts were actually due by the respondent to the petitioner, the petitioner would have to recover the same otherwise, than by effecting deductions from the respondent's gratuity. As such, the learned Tribunal never entered into the issue of the merits of the deductions.

7. The petitioner challenges the said Award, by means of the present writ petition. The allegations, regarding availing excess leave, and retention of the quarter beyond 4 months, for which he was allowed to retain the same, have been reiterated. Reliance has, further, been placed, in the writ petition, on Rule 15 (2) of the Railway Services (Pension) Rules, 1993 (hereinafter referred to as "the Pension Rules"). Sub-Rules (1) to (4) of Rule 15 of the Pension Rules are, for ready reference, reproduced as under:

**"15. Recovery and adjustment of Government or Railway dues from pensionary benefits -**

- (1) It shall be the duty of the Head of Office to ascertain and assess Government or railway dues payable by a railway servant due for retirement.

(2) *The railway or Government dues as ascertained and assessed, which remain outstanding till the date of retirement or death of the railway servant, shall be adjusted against the amount of the retirement gratuity or death gratuity or terminal gratuity and recovery of the dues against the retiring railway servant shall be regulated in accordance with the provisions of sub-rule (4).*

(3) For the purposes of this rule, the expression “railway or Government dues” includes -

(a) dues pertaining to railway or Government accommodation including arrears of licence fee, if any;

(b) dues other than those pertaining to railway or Government accommodation, namely balance of house-building or conveyance or any other advance, overpayment of pay and allowances, leave salary or other dues such as Post Office or Life Insurance premia, losses (including short collection in freight charges shortage in stores) caused to the Government or the railway as a result of negligence or fraud on the part of the railway servant while he was in service.

(4)(i) A claim against the railway servant may be on account of all or any of the following:-

(a) losses (including short collection in freight charges, shortage in stores) caused to the Government or the railway as a result of negligence or fraud on the part of the railway servant while he was in service;

(b) other Government dues such as overpayment on account of pay and allowances or other dues such as house rent, Post Office or Life Insurance Premia, or outstanding advance,

(c) non-Government dues.

(ii) Recovery of losses specified in sub-clause(a) of clause (i) of this sub-rule shall be made subject to the conditions laid down in rule 8 being satisfied from recurring pensions and also commuted value thereof, which are governed by the Pensions Act, 1873 (23 of 1871). A recovery on account of item (a) of sub para (i) which cannot be made in terms of rule 8, and any recovery on account of sub-clauses items (b) and (c) of clause (i) that cannot be made from these even with the consent of the railway servant, the same shall be recovered from retirement, death, terminal or service gratuity which are not subject to the Pensions at 1871(23 of 1871). It is permissible to make recovery of government dues from the retirement, death, terminal or service gratuity even without obtaining his consent, or without obtaining the consent of the members of his family in the case of a deceased railway servant.”

8. The respondent has filed a counter-affidavit, in response to the writ petition. While denying, generally, the allegation that any amount was due from him, as would merit deduction thereof from the gratuity payable to him, the respondent has specifically contended, with respect to the allegation of overstay in the accommodation allotted to him, that he was constrained to do so owing to the fact that his wife was bedridden, and that he had, for the said purpose, sought permission, from the petitioner, to do so. When the said permission was refused, the respondent contends, he vacated the quarter on 31<sup>st</sup> October 1995. His liability, therefore, it is asserted, was only to pay nominal rent, i.e. Rs. 90/- per month.

9. During the pendency of the present writ petition, the respondent, unfortunately, expired – as is the scourge of many a labour matter, which has remained pending for years together. His legal heirs have been brought on record.

10. It is submitted, by learned counsel appearing for the petitioner, that the petitioner has a clear case on merits, in view of Rule 15(2) of the Pension Rules, which authorised and legitimised the deductions effected by the petitioner from the respondent's gratuity. Reliance was also placed, by learned counsel, on *Wazir Chand v U.O.I.*, (2001) 6 SCC 596 and para 20 of the report in *D. S. Nakara v U.O.I.*, (1983) 1 SCC 305. No other point was urged by her.

11. Learned counsel for the respondent desired to file written submissions, instead of advancing oral arguments. He was allowed to do so. Pursuant thereto, written submissions have been filed, by the respondent. Reliance has been placed, by the respondent, on Section 13 of the Payment of Gratuity Act, 1972 (hereinafter referred to as “the Payment of Gratuity Act”) which, it is contended, would override the Pension Rules, in view of Section 14 of the said Act. *Wazir Chand (supra)*, it is sought to be submitted, was distinguishable on facts, and did not, in any case, lay down any law; moreover, the respondent submits that his case is covered by the Payment of Gratuity Act, unlike *Wazir Chand (supra)*, which dealt with the retirement of a Railway officer. Reliance has also been placed, by the respondent, on

***R. Kapur v Director of Inspection, (1994) 6 SCC 589 and Gorakhpur University v Dr Shitla Prasad Nagendra, (2001) 6 SCC 591.***

12. I have heard learned counsel for the parties, and perused the material on record.

13. At the very outset, it is apparent that the reliance, by the respondent, on the Payment of Gratuity Act, is totally misplaced; it is probably for this reason that this argument has not figured before any of the authorities before. The preamble to the Payment of Gratuity Act itself states that it is “an Act to provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, *railway companies*, shops or other establishments and for matters connected therewith or incidental thereto.” Further, Section 1 (3) of the said Act, which deals with the application thereof, reads as under:

“(3) It shall apply to-

- (a) every factory, mine, oilfield, plantation, port and railway company;
- (b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months;
- (c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the

preceding twelve months, as the Central Government may, by notification, specify in this behalf.”

14. It is only, therefore, an employee of a “railway company”, to whom the Payment of Gratuity Act would apply. The said Act, on its terms, would not apply to a driver employed directly with the Northern Railway.

15. That apart, Section 13 of the said Act, on which the respondent places extensive reliance, reads as under:

**“13. Protection of gratuity.-**

No gratuity payable under this Act shall be liable to attachment *in execution of any decree or order of any civil, revenue or criminal court.*”

The present case, not being one in which the gratuity of the respondent is being sought to be attached in execution of any decree or order of a court, there is no question of Section 13 of the Payment of Gratuity Act calling for application at all.

16. Adverting, now, to Rule 15 of the Pension Rules, it is immediately apparent that the said Rule permits attachment of gratuity which is “ascertained and assessed” by the Head of the Department, under sub-rule (1) thereof. *A priori* ascertainment, and assessment, of the amounts allegedly due from the concerned Railway servant, by the Head of the Department, is, therefore, the statutory *sine qua non* for attachment, thereof, to be permissible.

17. On “ascertainment”, Crompton, J., speaking for the Queens’ Bench, ruled thus, in *Braunstein v Accidental Insurance*, 31 LJQB 24:

“Where money to be paid, or service to be rendered, has to be ascertained’ in a certain way, the words ‘to be ascertained’ are very strong words, and they look very like a condition precedent.”

18. The following words, from the judgement of the Supreme Court in *Badri Prasad v State of Madhya Pradesh*, (1971) 3 SCC 23, though rendered in the context of Section 19 of the Sale of Goods Act, 1930, are also instructive:

“It is true that trees which are agreed to be severed before sale or under the contract of sale are ‘goods’ for the purposes of the Sale of Goods Act. But before they cease to be ‘proprietary’ right or interest in proprietary right within the meaning of Sections 3 and 4 (a) of the Act, they must be held under the contract. *It had to be ascertained which trees fell within that description. Till this was ascertained, they were not ‘ascertained goods’, within Section 19 of the Sale of Goods Act.*”

19. Similarly, in the context of Section 58 of the Sale of Goods Act, 1930, P. Ramanathan Aiyar defines “ascertained goods” as “goods, the identity of which have by some means or another *been determined*”. Reference, to the statutory, and precedential law, under the Sale of Goods Act, 1930, is not being made so as to draw some kind of analogy between the Pension Rule, and the said Act. What is being sought to be emphasised is that, jurisprudentially, the concept of

“ascertainment” requires a prior exercise of *determination* to have taken place.

20. Reference may, usefully, also be made to two other judicial authorities, which underscore this position. In ***Thanjavur P. Bank v Dharmasamvardhani***, AIR 1964 Mad 108, it was held that the expression “ascertained sum” clearly meant an amount “which has been *determined and quantified*”. Similarly, the Allahabad High Court also held, in ***Har v Ram***, AIR 1924 All 872, that the expression “ascertained sum” “excludes such items as unliquidated damages, damage to goods, *mesne* profits and amounts of which are not ascertainable *until determined by Court*.”

21. Sans any prior determination, therefore, there is no “ascertainment”.

22. “Assessment” is an expression which is normally encountered in taxing statutes; reference to decisions rendered in the context of such statutes, in order to appreciate the contours of the said expression is, therefore, inescapable. P. Ramanatha Aiyar, in his authoritative “Advanced Law Lexicon”, defines “assess” as “to rate or ascertain, to apportion or fix the amount of tax to be paid or contributed; to make a valuation or official estimate of property for the purpose of taxation; to adjust or apportion; to fix or settle a sum to be levied paid (as) assessed taxes; or revenue assessed on land.” The Gujarat High Court, in ***Mandal Ginning & Pressing Co. Ltd v C.I.T.***, (1973) 90 ITR 332 (Guj), defined the term “assessed”, occurring in Section 30 (1) of the

erstwhile Indian Income Tax Act, 1922, as having been “used in a comprehensive sense and it means subjected to the whole procedure for ascertaining and imposing liability on the taxpayer.” Essentially, therefore, it is obvious that the exercise of “ascertainment” is also inbuilt in the concept of “assessment”.

23. The above decisions also indicate that “ascertainment”, or, for that matter, “assessment”, cannot be, per definition, unilateral. If amounts due are to be “ascertained” or “assessed”, the exercise of ascertainment, or assessment, must necessarily involve the person being so assessed, or subjected to ascertainment of liability. At the very least, this would involve the issuance of notice, or a communication, to the said person – i.e. the employee concerned – intimating that, as per the Railway authorities, certain sums were due to be paid by him, so that he could, if he so chose, demonstrate that no such liability existed. Without undertaking any such exercise, it would not be open to the petitioner to, at the stage of disbursal, to deprive the employee, of his retiral benefits/gratuity, unilaterally deducting certain amounts which, in its estimation, were due from the employee, and, when questioned in this regard, seek to piggyback on Rule 15 of the Pension Rules.

24. The deductions from the respondent’s gratuity having been effected by the petitioner, the onus lay on the petitioner to justify the same. It is for the first time, before this Court, that the Pension Rules have been pressed into service by the petitioner, as justification for

such deduction. While doing so, however, no attempt has been made to demonstrate that the necessary prior exercise of “assessment” or “ascertainment” of the amounts allegedly due from the respondent, were ever undertaken by the petitioner.

25. For this very reason, the reliance, by learned counsel appearing for the petitioner, on *Wazir Chand (supra)*, has to be characterised as misplaced. Apart from the fact that *Wazir Chand (supra)* does not, *stricto sensu*, declare any law, so as to render it a binding precedent within the meaning of Article 141 of the Constitution of India, but has been passed, expressly, “in the facts and circumstances of” that case. A reading of the order indicates that, there, the Government had, “*in accordance with rules ...* charged penal rent from the retired government servant”. The said decision cannot, in my opinion, be cited as an authority for the proposition that, without even the elementary courtesy of prior notice, it was open to the petitioner to unilaterally deduct, from the gratuity payable to the respondent, amounts which, in its estimation, were due and payable by the respondent to it. That apart, there has been no adjudication, in the present case, whether, in fact, the amounts allegedly due from the respondent to the petitioner were, in fact, so due. No submissions, either, were advanced, on this aspect of the matter, and the learned Tribunal, too, has not ventured into that terrain. At this distance of time, when the respondent-workman has expired, and the present litigation is being prosecuted only against his legal heirs, it does not seem appropriate, to me, to enter into this controversy, which would

necessarily involve disputed questions of fact. In any case, learned counsel for the petitioner has not been able to show any provision which would entitle her client to effect deductions from the respondent's gratuity, in the manner in which it has chosen to so deduct.

26. *D.S. Nakara (supra)*, on which too, learned counsel for the petitioner places reliance, does not, for its part, even begin to address the issue at hand in the present case.

27. In the light of the view that I have taken hereinabove, it is not necessary to examine the authorities cited by the respondent. Clearly, the unilateral deduction, by the petitioner, of Rs. 20,659/-, from the gratuity payable to the respondent, was not sustainable in law. *Per sequitur*, no fault can be found in the ultimate decision, of the learned Tribunal, directing payment, of the said amount, to the respondent.

28. This, in my view, was an entirely unnecessary litigative exercise, at least at this distance of time. I had queried, of learned counsel for the petitioner, whether the petitioner was, in fact, interested in pursuing the present litigation against the respondent, the amount involved being merely Rs. 20,659/—, payable to the legal heirs of a driver who had, undisputedly, rendered nearly 4 decades of unblemished service to the petitioner. Unfortunately, for want of instructions, learned counsel submitted that she had no authority not to contest the matter. The predicament of learned counsel is perfectly

understandable and, to be fair to her, she has been eminently reasonable in her submissions. At the same time, valuable judicial time has been expended, in the present matter, both during arguments as well as during the drafting of the present judgment. In order that such cases are not unnecessarily contested, I am of the view that the petitioner has, necessarily, to be saddled with costs, albeit token in nature, despite the fact that the operation of the impugned Award had been stayed by this Court.

29. Resultantly, the present writ petition is dismissed. The award, dated 23<sup>rd</sup> April 2004, of the learned Tribunal is upheld, albeit for different reasons. The petitioner is also held liable to pay costs of Rs. 25,000/-, to the legal representatives of the respondent-workman. Payments, in accordance herewith, are directed to be made within a period of 4 weeks from the date of pronouncement of this judgement.

**C. HARI SHANKAR, J.**

**NOVEMBER 16, 2017**

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