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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (S) No. 6024 of 2007

J.K. Bigharia, Aged about 64 years, S/o Late Raja Ram Bigharia, 166, Lok Seva Nagar, Nag Mandir Road, Bhamti Chowk, Nagpur -440022

---- Petitioner

Versus

1. South Eastern Coalfields Limited, Through its Chairman-cum-Managing Director, Seepat Road, Billaspur (C.G.)
2. Western Coalfields Limited, Through its Chairman-cum Managing Director, Civil Lines, Nagpur (Maharasthra)
3. Coal India Limited, through its Chairman-cum-Managing Director, 10, N.S. Road, Kolkata (WB)

---- Respondents

For Petitioner : Mr. Gary Mukhopadhyaya, Advocate.
For Respondents/SECL: Mr. Sudhir Bajpai, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

23/01/2018

(1) The petitioner stood retired from the South Eastern Coalfields Limited as Chief General Manager on 31.08.2003. The amount of gratuity along with interest was paid to him on 25.08.2004. Pursuant to the order of the Controlling Authority under The Payment of Gratuity Act, 1972 (for short "PG Act, 1972"), departmental enquiry pending against him continued by virtue of Rule 34.3 of Coal India Executives' Conduct, Discipline and Appeal Rules, 1978, which was concluded on 5.1.2005 and

the penalty of forfeiture of 30% (thirty percent) of gratuity as token penalty was imposed against the petitioner, against which he preferred appeal before the appellate authority and the appellate authority, by its order dated 14.07.2005, has also dismissed the appeal by affirming the order dated 5.1.2005, which has been questioned in the instant writ petition.

(2) Learned counsel appearing for the petitioner would submit that impugned order is without jurisdiction and without authority of law in view of provisions contained in Section 4(6)(a) of the PG Act, 1972 as there is no termination of the petitioner at any point of time, even after retirement there is no deemed termination. He relied upon judgment of the Supreme Court in the matter of **Jaswant Singh Gill Vs. Bharat Coling Coal Ltd. and others**[1] in support of his case.

(3) Per contra, learned counsel apparing for the SECL while supporting the impugned order would submit that after retirement, order of termination has not been passed against the petitioner. He submits that after the petitioner's retirement deduction of 30% of gratuity as token penalty has been directed to be deposited against the petitioner and it has already been deposited back by the petitioner with the SECL and, therefore, the writ petition deserves to be dismissed.

(4) I have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove and also

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gone through the record with utmost circumspection.

(5) Section 4(6)(a)(b) of the Payment of Gratuity Act, 1972 states as under:-

> "Section 4(6) Notwithstanding anything contained in sub-section (1),
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> (a) the gratuity of an employee, whose services have been teriminated for any act, wilful omission or negligence causing any damage or loss to, or destruction or, 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 in the cousre of his employment."

(6) A focused glance of the aforesaid provision would show that termination of service for any causes enumerated in section 4(6) of the PG Act, 1972 is imperative and unless there is order of termination from service of the delinquent officer or employee, the amount of gratuity payable to the employee cannot be fully or partially forfeited.

(7) In the matter of **Jaswant Singh Gill** (supra)**,** their Lordships of the Supreme Court have clearly held that in order to forfeit the gratuity, the conditions laid down in Section 4(6) of the Payment of

Gratuity Act must be fulfilled. It has further been held that provisions of the Act will prevail over non-statutory rules framed by the Company i.e. Coal India Limited.

(8) The Supreme Court in **Jaswant Singh Gill** (supra), posed following question for consideration :-

> "The short question which arises for consideration in this petition is as to whether the provisions of the said Act shall prevail over the rules framed by Coal India Limited, holding company of Respondent No. 1, known as Coal India Executives' Conduct Discipline and Appeal Rules, 1978 (for short "the Rules")." It was held as under :-

It was held as under:-

> "Indisputably, the petitioner was governed by the Rules. Rule 27 provides for the nature of penalties including 'recovering from pay or gratuity of the whole of or part of any pecuniary loss caused to the company by negligence or breach of orders or trust'. Major penalties prescribed in Rule 27, however, it include reduction to a lower grade, compulsory retirement, removal from service; and dismissal. Rule 34 provides for special procedure in certain cases stating:
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> > 34.2 Disciplinary proceeding, if instituted while the employee was in service whether before his retirement or during his re-employment shall, after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded by the authority by which it was commenced in the

same manner as if the employee had continued in service.

34.3 During the pendency of the 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 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(3A) of the Payment of Gratuity Act, 1972 should be kept in view in the event of delayed payment, in the case the employee is fully exonerated."

8. The Act was enacted with a view to provide for a scheme for payment of gratuity to employees engaged inter alia in mines. Section 3 of the Act provides for appointment of an officer to be the controlling authority. Controlling authority is to be responsible for administration of the act. Different authorities, however, may be appointed for different areas. Section 4 of the Act entitles an employee to gratuity after he has rendered continuous service for not less than five years inter alia on his superannuation. Sub- section (6) of Section 4 contains a non-obstante clause stating:

"(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 or 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 in the course of his employment."

9. The Rules framed by the Coal India Limited are not statutory rules. They have been made by the holding company of Respondent No. 1.

10. The provisions of the Act, therefore, must prevail over the Rules. Rule 27 of the Rules provides for recovery from gratuity only to the extent of loss caused to the company by negligence or breach of orders or trust. Penalties, however, must be imposed so long an employee remains in service. Even if a disciplinary proceeding was initiated prior to the attaining of the age of superannuation, in the event, the employee retires from service, the question of imposing a major penalty by removal or dismissal from service would not arise. Rule 34.2 no doubt provides for continuation of a disciplinary proceeding despite retirement of employee if the same was initiated before his retirement but the same would not mean that although he was permitted to retire and his services had not been extended for the said purpose, a major penalty in terms of Rule 27 can be imposed.

11. Power to withhold penalty contained in Rule 34.3 of the Rules must be subject to the provisions of the Act. Gratuity becomes payable as soon as the employee retires. The only condition therefor is rendition of five years continuous service.

12. A statutory right accrued, thus, cannot be impaired by reason of a rule which does not have the force of a statute. It will bear repetition to state that the Rules framed by Respondent No. 1 or its holding company are not statutory in nature. The Rules in any event do not provide for withholding of retrial benefits or gratuity.

13. The Act provides for a closely neat scheme providing for payment of gratuity. It is a complete code containing detailed provisions covering the essential provisions of a scheme for a gratuity. It not only creates a right to payment of gratuity but also lays down the principles for quantification thereof as also the conditions on which he may be denied therefrom. As noticed hereinbefore, sub-section (6) of Section 4 of the Act contains a non- obstante clause vis-`-vis sub-section (1) thereof. As by reason thereof, an accrued or vested right is sought to be taken away, the conditions laid down thereunder must be fulfilled. The provisions contained therein must, therefore, be scrupulously observed. Clause (a) of Sub-section (6) of Section 4 of the Act speaks of termination of service of an employee for any act, willful omission or negligence causing any damage. However, the amount liable to be forfeited would be only to the extent of damage or loss caused. The disciplinary authority has not quantified the loss or damage. It was not found that the damages or loss caused to

> Respondent No. 1 was more than the amount of gratuity payable to the appellant. Clause (b) of Sub-section (6) of Section 4 of the Act also provides for forfeiture of the whole amount of gratuity or part in the event his services had been terminated for his riotous or disorderly conduct or any other act of violence on his part or if he has been convicted for an offence involving moral turpitude. Conditions laid down therein are also not satisfied.
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> **14.** Termination of services for any of the causes enumerated in Sub- section (6) of Section 4 of the Act, therefore, is imperative."

(9) Now, reverting to the facts of the case, it is quite apparent that though enquiry was initiated against the petitioner under the Rules, 1978, which was concluded on the date of impunged order but the petitioner was not inflicted with the penalty of termination, therefore, no amount of gratuity could have been directed to be deducted or forfeited as power under Section 4(6)(a) of the PG Act, 1972 cannot be exercised in absence of order of termination.

(10) As a fallout and consequence of the aforesaid discussion, the writ petition is allowed and the impugned order to the extent of directing deduction of 30% of the amount of gratuity is set aside. The respondent No. 2 is directed to refund the amount of gratuity along with 8% interest from the date of deposit by the petitioner till the date of its actual payment. No costs.

Sd/-

(Sanjay K. Agrawal)
Judge