IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.1686 OF 2018

Kolhapur Zilla Sahakari
Dudh Utpadak Sangh Ltd.
b-1, MIDC, Gokul Shirgaon,
Taluka Karvir, Dist.Kolhapur .. Petitioner
Vs.
1.Shri Babu Shivappa Chougule
788,"A"Ward, Near Nathagole,
Talim Shivaji Peth
Kolhapur ..
2.Ld. Controlling Authority
Kolhapur .. Respondents

Mr.Prashant Chavan i/b Mr.Ravindra Chile for the petitioner.
Mr.Manoj Apagonda Patil for respondent No.1.

CORAM : A.K. MENON, J

RESERVED ON : 25TH APRIL, 2018
PRONOUNCED ON : 17TH JULY, 2018

JUDGMENT :

1. Heard.

2. Rule. Rule made returnable forthwith. By consent of the parties taken up for final hearing. Respondents waive service.

3. By this petition, the petitioner, a Co-operative society registered under

the provisions of Maharashtra Co-operative Societies Act, 1960 (Act) challenges an order dated 1st January, 2018 whereby the Controlling Authority, Kolhapur under the Payment of Gratuity Act, 1972 (Controlling Authority) rejected an application made under Rule 11(5) of the Payment of Gratuity (Maharashtra) Rules, 1972 for review and setting aside the final order dated 11th September, 2011 delivered in Misc. (PGA) No.2 of 20102

4. The facts in brief are as follows : The petitioner society is in the business of collecting milk from the suppliers who are its members and processing it into milk products and thereafter selling it to general public. The respondent no.1 was working in the petitioner-society as a Senior Clerk whose services came to be terminated by the petitioner on account of alleged theft, therefore, amounting to misconduct. A domestic enquiry was held and the respondent-employee was charge-sheeted and the charges were held to be proved. The respondent no.1 was dismissed from service vide order dated 6th August, 2007 with effect from 8th August, 2007. Upon dismissal, the respondent no.1 filed a Complaint (ULP) No.102 of 2007 before the Labour Court, Kolhapur and after hearing both the parties, the complaint came to be dismissed on 29th November, 2012. This order was not before the Controlling Authority which is believed to have passed an exparte order on 11th November, 2011.

5. Mr.Chavan, learned counsel appearing for the petitioner-society states that the order rejecting the complaint on 29th November, 2012 has not

been challenged before a higher forum. Thereafter, respondent no.1 approached the petitioner for payment of gratuity claiming Rs.1,90,500/-. This demand was denied since respondent no.1 was dismissed from services on account of serious misconduct which amounted to act of moral turpitude and therefore disqualifies respondent no.1 – employee any gratuity. Thereafter respondent no.1 filed an application before the Controlling Authority. The petitioner, petitioner's representative and their Advocates appeared and filed a written statement on 26th April, 2010 opposing the application. They are believed to have been informed, orally, that the next date of hearing will be communicated by post. Thereafter it is contended by Mr.Chavan no communication was received from the Controlling Authority.

6. On or about 6th December, 2011 the petitioner received a notice in Form-R dated 29th November/2nd December, 2011 by registered post directing them to pay gratuity to respondent no.1. Upon receipt of a notice dated 29th November/2nd December, 2011, the petitioner is believed to have sought legal opinion and thereafter applied for certified copy of the order by making an application dated 3rd January, 2012. It is case of the petitioner and as canvassed by Mr.Chavan that on the date the certified copy was received, an application was filed under Rule 11(5) of the Payment of Gratuity (Maharashtra) Rules, 1972 seeking review of the exparte order.

7. The respondent opposed the application by filing a reply. Thereafter it appears that the parties led evidence in the application and after hearing the

parties, the Controlling Authority rejected the application for payment of gratuity. Being aggrieved by the said rejection the petitioner is before this Court.

8. Mr.Chavan submitted that the petitioner learnt about the order only on or about 6th December, 2011 and applied for certified copy on 3rd January, 2012. The certified copy was received on 23rd January, 2012 and an application for setting aside the exparte order was filed on the same day. It is submitted that if the period for obtaining certified copy was excluded and the petitioner would be seen to have filed Miscellaneous (PGA) No.2 of 2012 within 30 days from the date of knowledge of the order.

9. Mr.Chavan further submitted that the written statement filed by the petitioner was not considered by the Controlling Authority and it had proceeded exparte. It is further submitted that the written statement had set up defence inter alia that the domestic enquiry had found against the respondent on the charge of misconduct resulting in his dismissal. He further submitted that the Controlling Authority had erroneously concluded that the order dated 11th November, 2011 was not an exparte order.

10. Mr.Chavan, relied upon a decision of the Single Judge of this Court in *Chanda Khand Sahakari Shetkari Kharedi Vikri Sanstha, Vs. Shri Dattatraya Ramchandra Gaund & Anr.*[1] wherein the respondent no.1 was dismissed from services on the ground of grave misconduct of misappropriation of funds. That order was challenged before the Labour Court and the said

1 (2016) 148 FLR 102

complaint was dismissed for default. The order of dismissal has thus attained finality. Meanwhile the respondent was acquitted on 30th May, 1998 in the criminal case. The Controlling Authority directed payment of gratuity along with interest and that is how the employer had filed the writ petition. In that case, this Court held that while considering the entitlement of the respondent-employee for payment of gratuity, it was not necessary for this Court to go into correctness and legality of the order of dismissal passed by the employer and as a matter of fact in that case the order of dismissal had attained the finality. The Court also observed that the dismissal having attained finality could not be reason for non-payment of gratuity. The Court enumerated various sub-sections of Section 4 of Payment of Gratuity Act under which the gratuity payable to an employee can be wholly or partially forfeited. That Payment of Gratuity of which Section 4(6)b)ii) provides as follows :

> *"4. Payment of gratuity …*
>
> *(6) ....*
>
> *(a) ....*
>
> *(b) the gratuity payable to an employer (may be wholly or partially forfeited)*
>
> *(i) ....*
>
> *(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."

The test set out in the said judgment is to find out a ground mentioned in the order of the termination and if the order shows that services have been terminated for any act which constitutes an offence involving moral turpitude, the gratuity payable to an employee can partially or wholly forfeited on account of termination of services on the ground of misappropriation of the amount. It is not necessary to issue any show cause notice for forfeiting the gratuity, wholly or partially. Hence the employer was justified in taking action under the said section.

11. In the present case also the employer has contended that the respondent is not entitled to gratuity on account of dismissal and the domestic enquiry finding against him and he was charged with misappropriation of funds which amounted to misconduct and charges were proved that being the case the question is whether or not the gratuity should be wholly or partially forfeited. It is in the domain of the employer considering the nature of misconduct.

12. On behalf of the respondent Mr.Patil, learned counsel opposed the admission of the petition on the ground that the order is passed after consideration of all aspects including the contentions taken up in the written

statement. He therefore submitted that there is no occasion to interfere with the order. He submitted that admittedly there has been delay in filing the application and although the petitioner had come to learn of the order on 6th December, 2011 he has not even applied for certified copy till 3rd January, 2012. The conduct of the petitioner is therefore such that it does not deserve equitable consideration. He therefore submitted that the petition is liable to be dismissed.

13. The petitioner had filed its written statement and engaged an Advocate and it was also the petitioner's duty to pursue the application. The petitioner could not take shelter under the guise of not filing the application for remand if notice was not received within reasonable time, it was for the petitioner to make enquiries in that respect.

14. In the facts of this case, it is evident that the written statement of the petitioner was on record. The impugned order takes into consideration the fact that the charges levelled against respondent no.1 had been proved and services were terminated. The impugned order rejects the review application on the ground that it is not tenable in view of conduct of the petitioner being found to be wanting. The application was held to be not maintainable, however, the fact remains that the contention in the written statement had not been considered at the relevant time. There is no submission that has

been made contrary on behalf of the respondent. In the circumstances in the facts of the present case I am of the view that challenge to the order of dismissal by filing the Complaint (ULP) No.102 of 2007 and rejection of the complaint vide order dated 29th November, 2012 was also material fact which was to be considered by the Controlling Authority. This has not been considered by the Controlling Authority since the order was passed on 11th November, 2011 whereas the order on Complaint (ULP) No.102 of 2007 was passed on 29th November, 2012 i.e. more than a year later. Considering these facts it is appropriate in my view that the matter be remanded for consideration to the Controlling Authority so that the petitioner's contention be considered on merits. However since the respondent had succeeded before the authority it is in the fitness of things that the petitioner be saddled with an order for payment of costs.

15. In the circumstances I pass the following order :

(i) The impugned order dated 1st January, 2018 passed by the Controlling Authority Exhibit-H to the petition and the order dated 11th November, 2011 are hereby set aside and the matter is remanded back to the Controlling Officer and to be heard afresh.

(ii) Considering the time already consumed it is in the fitness of things that the Controlling Authority hears and disposes of the matter within six months from today and without being influenced by any of the observations herein.

(iii) The parties are directed to appear before the Controlling Authority on 30th July, 2018 at 11 am to enable the dates for hearing to be fixed.

(iv) The petitioner shall however pay a sum of Rs. 10,000/- as costs to the respondent within a period of four weeks. Payment of costs shall be condition precedent to hearing upon remand.

(v) Rule is made absolute in the above terms.

(A.K. MENON,J.)

Hemant Chandersen Shiv

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