

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 9044 OF 2017

Shri Laxman Balu Deualkar

...Petitioner

Vs.

The Chief Executive Officer,
Kolhapur District Central Co-op.Bank Ltd.

...Respondent

Mr.Prashant Chavan i/b. Ravindra R. Chile for Petitioner.

Mr.T.S. Ingale with Nikhil Pawar for Respondent.

CORAM : S.C. GUPTE, J.

DATE : 14 JUNE 2018

ORAL JUDGMENT :

This petition challenges an order passed by the appellate authority under the Payment of Gratuity Act, 1972.

2 The Petitioner is an ex-employee of the Respondent bank. The Petitioner was charge-sheeted for misconduct alleging misappropriation of funds. It is the case of the Respondent that the Petitioner, whilst working as a manager in Sanjani Branch of the bank, fraudulently and by misuse of his office, opened a bogus saving account on 1 June 1995 in the name of a fictitious client and caused a sum of Rs.10,000/- to be deposited in the account. He, thereafter, on 8 June 1995, fraudulently withdrew that amount by executing a bogus withdrawal slip in his own handwriting and by forging the signature of the account-holder. He also caused to be deposited a sum of Rs.13,000/- in the same account on 21 June 1995 and withdrew the said sum on 27 June 1995 again by writing a bogus withdrawal slip and forging the signature of the account holder. On 21

June 1995, the Petitioner caused one more bogus saving account in the name of B.A. Patil and deposited a sum of Rs.10,000/- in that account on 21 June 1995 and once again, withdrew the said sum from the account by executing a bogus withdrawal slip in his own handwriting and forging the signature of the account holder thereon. It was the Respondent's case that accordingly, a total sum of Rs.33,000/- was fraudulently misappropriated by the Petitioner. After a duly conducted departmental enquiry, where the Petitioner was found guilty of the charge of misconduct, the services of the Petitioner were terminated on 6 July 1996 by giving one month pay in lieu of notice. Being aggrieved by the termination order, the Petitioner filed a complaint of unfair labour practice, being Complaint (ULP) No.5 of 1997, before the Labour Court at Kolhapur. The complaint was dismissed by the learned Judge of the Labour Court. On 24 June 2008, the Petitioner filed an application in Form-I for payment of gratuity. Since gratuity was not paid to him despite his application, on 2 July 2008 he preferred an application under Section 4 of the Payment of Gratuity Act before the controlling authority under the Act, being Application (PGA) No.63 of 2008. During the pendency of this application, a show cause notice was issued by the Respondent bank to the Petitioner for forfeiture of the amount of gratuity. After considering the Petitioner's reply to the show cause notice, by its notice dated 28 August 2008, the Respondent forfeited the gratuity payable to the Petitioner under Section 4(6)(b)(ii) of the Act. The controlling authority, by its order dated 15 July 2005, allowed the Petitioner's application and directed the Respondent bank to pay a sum of Rs.1,05,404/- to the Petitioner towards gratuity along with interest at the rate of 10% per annum from the date of his application and till realisation. This order was challenged by the Respondent bank before the appellate authority under the Act. The appellate authority, by its judgment dated 9

December 2015, allowed the appeal and set aside the order of the controlling authority. The order of the appellate authority is challenged in the present petition.

3 Mr.Chavan, learned Counsel for the Petitioner, makes three submissions. Firstly, it is submitted that the appellate authority could not have permitted forfeiture of gratuity by the Respondent, since the Petitioner was not convicted of any offence for the time being involving moral turpitude. Learned Counsel submits that in order to invoke Section 4(6)(b)(ii) of the Act for forfeiture of gratuity, conviction of the concerned employee for the time being in force of an offence involving moral turpitude, is a condition precedent. Learned Counsel, relies on a judgment of the Supreme Court in the case of **Jaswant Singh Gill vs. Bharat Coking Coal Ltd.**¹ and of Chhattisgarh High Court in the case of **The General Manger, UCO Bank, Kolkata vs. Jitendra Kumar Shrivastava**² in this behalf. Learned Counsel, secondly, submits that after termination of service in pursuance of a departmental enquiry, it is not open to the employer to hold a fresh inquiry for denying gratuity to the employee. Learned Counsel submits that no employee could be subjected to two inquiries for the same act of misconduct. Learned Counsel relies on a judgment of Calcutta High Court in the case of **UCO Bank vs. Nityananda Paul**³ in this behalf. Thirdly, it is submitted that the Petitioner's application for determination of his gratuity under Section 7 of the Act was within time, since non-payment of gratuity is a continuous cause of action. Learned Counsel relies on a judgment of our court in the case of **H. Jayarama Shetty vs. Sangli Bank**

1 (2007) 1 SCC 663

2 2016 DGLaw(Chh) 1

3 2016 DGLaw(Cal) 554

Ltd.⁴ in support of this proposition.

4 Section 4 of the Act provides for payment of gratuity. Gratuity is payable to an employee on the termination of his employment after he has rendered a continuous service for not less than five years. Clause (a) of Sub-section (6) of Section 4 provides that notwithstanding anything contained in sub-section (1), 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, is liable to be forfeited to the extent of the damage or loss caused. Clause (b) of Sub-section (6) provides for forfeiture of whole or partial gratuity (i) if the services of the employee are terminated for riotous or disorderly conduct or any other act of violence, or (ii) if the services of the employee have been terminated for any act which constitutes an offence involving moral turpitude, provided it is committed by him in the course of his employment. On its plain terms, clause (b) refers to termination for any “act which constitutes an offence involving moral turpitude”. The clause does not contemplate actual conviction of the employee concerned for an offence involving moral turpitude. Any act, which if proved, would constitute an offence, would be covered by the first part of the clause. Anything done contrary to justice, honesty, modesty or good morals involves moral turpitude. If the act constituting an offence is, thus, contrary to justice, honesty, modesty or good morals, it enables the employer to forfeit, wholly or partially, the gratuity payable to the concerned employee. There is nothing in the clause to suggest that actual conviction for an offence involving moral turpitude is a pre-condition for forfeiture of gratuity under it.

4 2005(3) Mh.L.J. 609

5 Sub-section (6) of Section 4, read as a whole, also does not lend itself to any such construction. Clause (a) of it provides for forfeiture of gratuity in case of termination *inter alia* for “any act, wilful omission or negligence causing any damage or loss” to the employer; whereas as Clause (b)(i) provides for forfeiture in case of termination for “riotous or disorderly conduct or any other act of violence”. If these acts or omissions or conducts need not be proved in any court of law as a condition of forfeiture and can only be a matter of domestic inquiry, there is no basis for claiming that the act referred to in clause (b)(ii), namely, “act which constitutes an offence involving moral turpitude”, must be proved in a criminal court of competent jurisdiction. The termination may well be based on proof of such act in a domestic inquiry. Besides, considerations of purposive interpretation also negate any such construction of clause (b). As noted by the Supreme Court in the case of **Management of Tournamulla Estate vs. Workmen**⁵, the object of a gratuity scheme is to provide retirement benefits to workmen who have rendered long and unblemished service to the employer and thereby contributed to the prosperity of the employer and therefore, it may not be correct to say that no misconduct, however grave, can be visited with forfeiture of gratuity or part thereof. Even in a recent case, **U.P. State Sugar Corporation Ltd. vs. Kamal Swaroop Tondon**⁶, the Supreme Court has held that retiral benefits “are not paid to the employee gratuitously or merely as a matter of boon”, but they are paid to the employee “for his/her dedicated and devoted work”. In cases involving termination of an employee for misconduct, the law of gratuity, i.e. Section 4(6), makes a distinction between various acts of misconduct. There are acts or wilful omissions (i) which cause damage or

5 (1973) 2 SCC 502

6 AIR 2008 SC 1235

loss to, or destruction of, property belonging to, the employer, (ii) which amount to riotous or disorderly conduct or any other act of violence, and (iii) which constitute an offence involving moral turpitude, each of which are visited with different consequences in the matter of forfeiture. In case of (i) the forfeiture is to the extent of damage or loss caused, whilst in case of (ii) and (iii) the forfeiture may be whole (or partial). These acts, in the first place, lead to termination of the employee and thereafter forfeiture of gratuity in the manner stated by law. If the termination on the ground of any of these acts is justifiable, the forfeiture may follow. If termination is justifiable by reason of the act proven in a domestic inquiry, there is no reason why a further proof of any of these acts in a court of competent jurisdiction may be necessary for applying the provisions of forfeiture of gratuity. No such proof is insisted upon in case of acts listed in (i) and (ii) above; and there is no legislative purpose in requiring such proof in case of acts mentioned in (iii) above.

6 A learned single Judge of our court in the case of **Bank of India vs. R.V. Deshmukh**⁷ has considered the contention of the employee suffering forfeiture of gratuity. The learned Judge has held that there is no merit in the contention that the provisions of Section 4(6)(b)(ii) authorize forfeiture of gratuity only where an employee is convicted of an offence involving moral turpitude. “Neither the express wordings of the sub-section nor does the legislative intent”, held the learned Judge, “support any such strained construction”.

7 Our court in the case of **Bank of India vs. Kamlakar Vishwambhar Joshi**⁸ considered a case where a departmental enquiry was

7 **2015(1) Bom.C.R.561**

8 **2001(4) L.L.N.1286**

conducted against the delinquent employee specifically on the charge of misconduct involving misappropriation of funds of the bank and an order of dismissal was passed upon such charge being proved in a departmental enquiry. After the matter was carried before the Industrial Tribunal in a reference under the Industrial Disputes Act, the Tribunal affirmed the finding that the charge was proved. The court struck down, on these facts, the orders of the controlling authority and the appellate authority impugned before it on the ground that the justification of dismissal from service on account of damage or loss caused to the Petitioner being proved before a domestic inquiry and the findings being confirmed by the industrial tribunal in a reference, the guilt of the delinquent employee of misappropriation and the amount of such misappropriation were established and the order of forfeiture could not be found fault with.

8 Calcutta High Court in the case of **Indian Iron and Steel Co.Ltd. vs. Himangshu Bikash Sarkar**⁹ has also held that conviction by a criminal court of competent jurisdiction is not required for the purpose of forfeiting gratuity under sub-clause (ii) of clause (b) of sub-section (6) of Section 4 of the Act. Even the Allahabad High Court in the case of **UCO Bank vs. Regional Labour Commissioner**¹⁰ has held the observation of the Controlling Authority that unless the employee concerned was prosecuted by a criminal court of law and was punished for an offence involving moral turpitude his gratuity under Section 4(6) cannot be forfeited, was not legally justified and was based on misreading of the section. To the same effect are the observations of Madras High Court in the case of **Padmanabhan A. vs. Joint Commissioner of Labour,**

9 (2006)2CALLT89(HC)

10 2008-III-LLJ-54(AII)

Chennai¹¹. The court held that clause (ii) of Section 4(6)(b) was silent on 'conviction' and to insist upon a conviction would be a stress upon the intent of the legislature.

9 Learned Counsel for the Petitioner relies on the judgment of the Supreme Court in the case of **Jaswant Singh Gill** (supra) and submits that forfeiture in case of clause (b)(ii) of sub-section (6) of Section 4 can only be ordered “if the employee has been convicted for an offence involving moral turpitude”. No doubt, whilst discussing Section 4(6)(a) and (b) in this case, the Supreme Court does make a reference to conviction for an offence involving moral turpitude, but that is merely a stray sentence. It cannot be picked out of the context and made the basis for interpretation of a provision of law, which is clear in its plain meaning. The Supreme Court in the case of **Jaswant Singh Gill** was considering an order of forfeiture issued by the disciplinary authority of the employer. The forfeiture was ordered under disciplinary rules framed by the employer (called “Coal India Executives' Conduct, Discipline and Appeal Rules, 1978”). Rule 27 of those Rules provided for penalties including “recovery from pay or gratuity of the whole or part of any pecuniary loss caused to the company by negligence or breach of order or trust”. The short question before the Supreme Court was, whether the provisions of Payment of Gratuity Act shall prevail over the rules framed by the company. The court held that the rules framed by Coal India Limited were not statutory rules and the provisions of the Act would prevail over these rules; the power to withhold gratuity contained in the rules was subject to the provisions of the Act. Whilst explaining how gratuity was a statutory right, the court set out a gist of the close-knit scheme of the Act providing for payment of gratuity

11 2009-III-LLJ-414(Mad)

and in doing so, made a reference to Clause (b) of Sub-section (6) of Section 4 of the Act, stating that it “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.” The court was clearly not considering the interpretation of Section 4(6)(b)(ii) of the Act to test whether or not conviction by a criminal court of competent jurisdiction was a condition precedent for forfeiture of gratuity under that provision.

10 Relying on this judgment, High Court of Chhattisgarh in the case of **Jitendra Kumar Shrivastava** (supra) has held that in order to invoke Section 4(6)(b)(ii) of the Act to forfeit the amount of gratuity payable to an employee, the condition precedent is that the terminated employee should have been convicted for an offence for the time being in force and that offence must be an offence involving moral turpitude. The High Court has observed that unless the aforesaid conditions are fully established, mere termination or dismissal of an employee concerned would not *epso facto* constitute an offence, that too an offence involving moral turpitude, so as to attract the provisions of Section 4(6)(b)(ii) of the Act. I am afraid I am unable to concur with the observations of the High Court of Chhattisgarh. The observations run counter to the plain terms of Clause b(ii) of sub-section (6) of Section 4 and, as I have observed above, the Supreme Court in **Jaswant Singh Gill's** case lays down no such proposition of law.

11 There is no substance in the submission that the employee cannot be made to face a second show cause notice or inquiry for

forfeiture. It is no double jeopardy. The first show cause notice as also domestic inquiry was for termination of service; the second is to show cause why, in addition, gratuity should not be forfeited. The reason for forfeiture is nothing but termination on account of proven misconduct in pursuance of the first show cause notice and inquiry. The cause to be shown is whether or not this termination falls within the provisions of Section 4(6) of the Act. That is perfectly legitimate. The case of **UCO Bank** (supra) cited by learned Counsel is on an altogether different point. That was a case where the employee was terminated upon being found guilty of misconduct without quantifying the actual loss suffered by the employer as a result of such misconduct. The charges against the employee were (a) failure to protect the interest of the bank, (b) acts contrary to the instructions of the superiors and (c) failure to discharge duties with integrity. These charges were proved, but none mentioned actual loss caused to the bank. Thereafter, a separate inquiry was ordered in the same misconduct for proving and quantifying the loss with a view to forfeit gratuity. That was held impermissible by the court, holding that employee could not be subjected to two inquiries for the same misconduct.

12 In view of my conclusions as above, there is no need to consider the submission on limitation. Gratuity is being denied to the employee under Section 4(6) and not for having applied for it belatedly.

13 In the premises, there is no merit in the writ petition. The writ petition is dismissed. No order as to costs.

(S.C. GUPTE, J.)