IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.08.2018

CORAM:

THE HON'BLE Dr. JUSTICE S.VIMALA
Writ Petition No.19034 of 2016
& WMP No.16581 of 2016

Villupuram District Central Cooperative Bank Ltd.,
Rep. by its Joint Registrar / Managing Director,
No.2 Hospital Road,
Villupuram 605 602 ... Petitioner

Vs.

1. The Authority under Payment of Gratuity Act / Assistant Commissioner of Labour, Vellore
2. Tmt. N.Jeyachandra ... Respondents

Prayer:- Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari to call for the records of the order passed by the first respondent in P.G.No.185 of 2013, dated 27.10.2015 and to quash the same.

For Petitioner : Mr. P.R.Shivakumar
For Respondents : Mrs. Hema Sampath, Sr. Counsel, for R-2

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O R D E R

When the right to receive gratuity is a valuable statutory and constitutional right available to an employee in the evening of his life and is assured by Article 41 of the Constitution of India, whether the employer can withhold the payment of gratuity on the ground that the employee is liable to pay a sum of Rs.2,77,98,427/- towards the loss already caused to the Bank, except the satisfaction of the condition under Section 4 (6) (a) of the Payment of Gratuity Act.

2. The second respondent herein was appointed as Manager of the Bank on 12.12.1974. She was relieved from the said post on 30.09.2010. During her tenure, surcharge proceedings have been initiated against her and surcharge order was passed by the Deputy Registrar of

Cooperative Societies, Villupuram, on 07.02.2013. ordering recovery of Rs.2,77,98,427/-.

2.1. Pending surcharge proceedings, the Assistant Commissioner of Labour, Vellore, in P.G.No.185 of 2013 passed an order directing the petitioner herein (employer) to make a payment of Rs.8,48,298/- to the second respondent herein (employee) as gratuity. The employer got aggrieved over the order passed, as the employee was under the liability to pay a sum of Rs.2,77,98,427/- towards the loss already caused to the Bank. Therefore, the Bank has chosen to challenge the award of gratuity, in this writ petition.

3. The main (first) contention raised by the learned counsel appearing for the petitioner (employer) is that, when the money is due from the second respondent, the Bank is entitled to withhold the payment of gratuity on account of the surcharge order for a sum of Rs.2,77,98,427/-.

4. The learned counsel appearing for the employee / second respondent (workman) would oppose the said contention raised by the writ petitioner stating that the writ petition itself is not maintainable on account of the availability of effective alternative remedy of appeal.

4.1. In support of the said contention, the learned counsel relied upon Section 7 (7) of the Payment of Gratuity Act, 1972 (39 of 1972) (hereinafter referred to as "the Act"), which reads as under:-

> "7. Determination of the amount of gratuity. - .... (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.]”

4.2. Pointing out the said provision, it is contended that on depositing the entire amount of gratuity only, the employer would be entitled to file the appeal, within a period of 60 days from the date of receipt of copy of the order. The grace period of 60 days is available, provided there are sufficient reasons for the delay in filing. Thereafter, there is no scope for the employer to file any appeal. Thus, the learned counsel appearing for the employee (second respondent) submitted that the employer has lost the right of filing the appeal by efflux of time and the employer did so not inadvertently, but with an evil design of avoiding deposit of the entire gratuity amount and therefore, rightly the employer has lost his right to challenge the award.

4.3. For this contention, there cannot be any answer on the side of the petitioner (employer), as the provision of the Appeal did not permit the filing of the appeal beyond 120 days (60 + 60). When there is an effective alternative remedy available, the employer should not have filed this writ petition. Admittedly, the writ petition is not maintainable.

5. The learned counsel appearing for the second respondent (employee) further submitted that the employer has no right to withhold the payment of gratuity on account of any pending claims as against the employee, as per Sections 13 and 14 of the said Act.

5.1. So far as this contention is concerned, under the backdrop of directive principles of state policy, with the conscience of social justice, the Hon'ble Apex Court has explained the policy behind the introduction of Sections 13 and 14 of the Act and has upheld the said contention. The relevant decision with critical observations are extracted for better appreciation:-

5.2. In the case of Som Prakash Rekhi vs Union Of India & Anr, reported in 1981 AIR 212, 1981 SCR (2) 111 the Hon'ble Apex Court has held as follows:-

"The public policy behind the provisions of ss.10, 12 and 14 of the respective statutes is clear. We live in a welfare State, in a `socialist' republic, under a Constitution with profound concern for the weaker classes including workers (Part IV) welfare benefits such as pensions, payment of provident fund and gratuity are in fulfillment of the Directive Principles. The payment of gratuity or provident fund should not occasion any deduction from the pension as a "set off". Otherwise, the solemn statutory provisions ensuring provident fund and gratuity become illusory. Pensions are paid out of regard for past meritorious services. The root of gratuity and the foundation of provident fund are different. Each one is a salutary benefaction statutorily guaranteed independently of the other. Even assuming that by private treaty parties had otherwise agreed to deductions before the coming into force of these beneficial enactments they cannot now be deprivatory. It is precisely to guard against such mischief that the non-obstante and overriding provisions are engrafted on these statutes.

We must realise that the pension scheme came into existence prior to the two beneficial statutes and Parliament when enacting these legislations must have clearly intended extra benefits being conferred on employees. Such a consequence will follow only if over and above the normal pension, the benefits of provident fund and gratuity are enjoyed. On the other hand, if consequent on the receipt of these benefits there is a proportionate reduction in the pension, there is no real benefit to the employee because the Management takes away by the left hand what it seems to confer by the right, making the legislation itself left- handed. To hold that on receipt of gratuity and provident fund the pension of the employee may be reduced pro tanto is to frustrate the supplementary character of the benefits. Indeed, that is why by ss. 12 and 14 overriding effect is imparted and reduction in the retiral benefits on account of provident fund and gratuity derived by the employee is frowned upon. We, accordingly, hold that it is not open to the second respondent to deduct from the full pension any sum based upon which now has acquired statutory flavour, having been adapted and continued by statutory rules, operates contrary to the provisions of the P.F. Act and the Gratuity Act, it must fail as invalid. We uphold the contention of the petitioner."

5.3. Further, it is trite law that social justice is the conscience of our Constitution, the State is the promoter of economic justice, the founding faith which sustains the Constitution and the country is Indian humanity. The public sector is a model employer with a social conscience not an artificial person without soul to be damned or body to be burnt. The stance that, by deductions and discretionary withholding of payment, a public sector company may reduce an old man's pension to Rs. 40/-from Rs. 250/- is unjust, even if it be assumed to be legal. Law and justice must be on talking terms and what matters under our constitutional scheme is not merciless law but humane legality. The true strength and stability of our polity is society's credibility in social justice, not perfect legalise; and this case does disclose indifference to this fundamental value. We are aware that, Shri G.B. Pai, for the Management, did urge that `principle' was involved and that settlements had been reached between Labour and Management on many issues. We do appreciate the successful exercises of the Management in reaching just settlements with its employees but wonder whether the highest principle of our constitutional culture is not empathy with every little individual.

5.4. In view of the above provision, the second contention that the amount payable on account of surcharge proceedings cannot be deducted, is acceptable, except where the case of the employee is governed under Section 4 (6) (a) of the Act.

6. At this juncture, it is appropriate to consider the decision reported in 2014 (3) Mh.L.J. 625 (Western Coalfield Ltd., v. Regional Labour Commissioner (Central). In the said decision, it has been held that the termination of services of employee is a condition precedent under clause 6 (a) to recover the loss caused

to the property belonging to the employer. Mere assessment of the loss and the entitlement of the employer to recover such a loss from the employee concerned, would not attract the said provision, unless the services of the employee concerned are terminated in the circumstances mentioned in clause (a) of sub-section (6).

6.1. The sum and substance of the said decision is that mere assessment of loss and entitlement of employer to recover such a loss from the employee would not attract the said provision, unless the services of the employee are terminated in the circumstances mentioned in clause (a) of sub-section 6. So far as this case is concerned, it is not a case of termination for the circumstances mentioned in Section 4 (6) (a) of the Act. It is the case of discharge of the employee from the Bank and it is not a case of termination. Therefore, provisions of Section 4 (6) (a) of the Act will not be attracted in this case.

7. The learned counsel appearing for the employee (second respondent) further contended that though the amount due on account of surcharge proceedings is liable for forfeiture under Section 4 (6) of the Act, there is no enforceable order directing payment of Rs.2,77,98,427/-.

7.1. It is pointed out that the employee has successfully challenged the order directing payment of Rs.2,77,98,427/- and the learned District Judge, Villupuram, has set-aside the order and has directed fresh enquiry and therefore, there is no subsisting order for effecting recovery.

8. It is also appropriate to consider the provisions of Section 4 (6) of the Act, which provides for the grounds under which withholding of the gratuity is permissible:-

"4. Payment of gratuity.

...... (6) Notwithstanding anything contained in sub-section (1), -

(a) the gratuity of an employee, whose services have been terminated for any act, willful 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 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 course of his employment.

8.2. In this case, there is no enforceable order and therefore, there is no ground to withhold the gratuity. However, it is made clear that if, on fresh enquiry, if there is an order against the employee, then it is open to the petitioner herein (employer) to deduct that amount from any other retirement benefits payable to the second respondent (employee).

9. In view of the foregoing discussion, the writ petition stands dismissed with observations. No costs.
Consequently, the connected WMP is closed.

Sd/-
Assistant Registrar(CS vi)

//True Copy//

Sub Assistant Registrar

srk

To
1. The Authority under Payment of Gratuity Act /
Assistant Commissioner of Labour, Vellore

+1cc to M/s.R.MEENAL. , Advocate SR.No. 58193
+1cc to Mr.M.S.PALANISAMY , Advocate SR.No. 58054

W.P.No.19034 of 2016 & WMP No.16581 of 2016

ASK(16/11/2018)