



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED:08.02.2018

CORAM:

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

W.P. (MD) No. 21589 of 2017

and

W.M.P. (MD). No. 17872 of 2017

The Management,
R.K.10, Virudhunagar District,
Central Co-operative Bank Limited,
Represented by the Managing Director,
Madurai Road, Virudhunagar.

.. Petitioner

Vs.

1. The Appellate Authority under the Payment of
Gratuity Act, [Joint Commissioner of Labour],
Tamil Nadu Housing Board Office Complex,
Ellis Nagar Main Road, Madurai.

2. The Authority under the Payment of Gratuity Act,
[Assistant Commissioner of Labour],
Office of the Deputy Commissioner of Labour,
Bharathi Ula Salai, Race Course Colony,
Madurai - 625 002.

3. P.Narayanasamy

.. Respondents

PRAYER: Petition filed under Article 226 of the
Constitution of India to issue a Writ of Certiorari, to call for
records of the first respondent in P.G.A [I.A] No.9/17, quash the
order passed therein on 10.08.2017, consequently the order of the
second respondent passed in P.G.No:1/16; dated 03.03.2016, grant
such other reliefs as expedient of the facts and circumstances of
the matter.

For petitioner

: Mr. S.Seenivasagam

For R-1 & R-2

: Mr.M.Jeyakumar

Additional Government Pleader

For R-3

: Mr.P.Narayanasamy

Party-in-person

O R D E R

Heard the learned Counsel on either side.

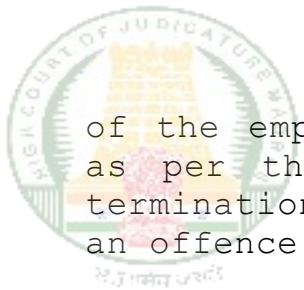
2. The third respondent herein was employed in the writ
<https://hservices.ecourt.gov.in/hservices/> He was dismissed from service by order dated
07.09.2008. Instead of raising an Industrial Dispute, the third



respondent filed W.P.(MD).No. 26497 of 2003, questioning the same. The said writ petition came to be dismissed on 13.03.2008. The order of dismissal has now become final. Thereafter, the third respondent filed P.G [I.A] No.87 of 2012, seeking condonation of delay in lodging his claim for payment of gratuity before the Controlling Authority. The management received the notice in the condone delay Petition. The management also filed its counter affidavit opposing P.G[I.A] No.87 of 2012. In paragraph 4 of the counter affidavit, it was specifically stated that in view of his dismissal, the petitioner's right to claim gratuity was taken away. Even though P.G [I.A] No.87 of 2012 was only an application for condonation of delay, in the Counter opposing the said prayer, it was also contended that there was no cause of action to make an application for gratuity. Probably in view of this, the Controlling Authority while condoning the delay, also allowed the main petition and directed the management to pay a sum of Rs.1,88,225/-. This order was passed on 03.03.2016.

3. Aggrieved by the aforesaid order passed by the Controlling Authority, the petitioner filed an appeal before the Appellate Authority. Unfortunately the appeal was filed after a gap of more than 120 days. The Appellate Authority also noted that the appeal has been filed after 165 days without making the mandatory statutory deposit. Therefore, the appeal was dismissed as not maintainable. Questioning the same this writ petition has been filed.

4. The learned Counsel appearing for the petitioner management submitted that since the third respondent was dismissed on grounds of moral turpitude, the disqualification set out under Section 4(6) b (ii) of the Payment of Gratuity Act would be automatically attracted. He also placed reliance on the decision of the Hon'ble Supreme Court reported in **JT 2013 (14) SC 332 - Ch.cu.Man.Director Mahanadi Coalfield Ltd. Vs Rabindranath Choubey** and the one rendered in Civil Appeal No.11807 of 2016. He also drew the attention of this Court to the order dated 04.06.2014 made in W.P(MD).No.12098 of 2012 batch etc. The Hon'ble Supreme Court in **JT 2013 (14) SC 332** observed that if the charge involving dishonesty and moral turpitude is proved and the punishment of dismissal is imposed, the provision of 4(6) b (ii) of the Payment of Gratuity Act would naturally get attracted and it will be within the discretion of the employer to forfeit the gratuity payable to the employee. It was also held that the employer has right to withhold the payment of gratuity due to departmental enquiry. However the Hon'ble Bench took a view that matter deserves to be referred to a larger Bench for rendering an authoritative opinion. It is not known as to whether the Larger Bench has been constituted. The other two decision relied on by the learned Counsel are to the same effect. The Hon'ble Supreme Court in Civil Appeal No.11807 of 2016 held that in order to deny gratuity to the employee, it is not enough that alleged misconduct



of the employee constitutes an offence involving moral turpitude as per the report of the domestic enquiry. There must be a termination on account of the alleged misconduct which constitute an offence involving moral turpitude.

5. This Court is unable to accept the submissions advanced by the learned Counsel appearing for the petitioner. This writ petition is liable to be rejected for more reasons than one. As held by the Hon'ble Supreme Court, the discretion is conferred on the employer to forfeit the gratuity payable to the employee if his services are terminated for any act which constituted the offence involving moral turpitude. Of course the said offence should be committed by him in the course of his employment. Section 4(6) of the Payment of Gratuity Act reads as under:

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

(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 of violence on his part, or

(ii) if the service 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."

6. The expression used is "may be wholly or partially forfeited". This expression has already been considered by this Court in the decision reported **2011 4 LLJ 59 (Manager, Park Side Estate Nonsuch Post, Coonoor vs. Appellate Authority)**. This Court held that separate order must be passed by the employer forfeiting the gratuity of the employee. Such a forfeiture orders shall be passed after giving opportunity of hearing to the employee. In fact this has to be contemporaneous. This right to forfeit the employee's gratuity cannot be invoked during the hearing of the application filed by the employee under the Payment of Gratuity Act, 1972. It must be passed contemporaneously while handing punishment of dismissal. It cannot be passed later in point of time. Secondly in this case the order of the Controlling Authority was passed on 03.03.2016. The employer had the statutory right of appeal to go before the Appellate Authority. In this case, the appeal cannot be filed at any time as the employer should have been filed within a period of 60 days. Of course Section 7(7) of the said Act gives an outermost limit of



60 more days to enable the Appellate authority to condone the delay. In this case, admittedly such an appeal was not filed either within time or within the extended time of 60 days. Therefore the appellate authority rightly held that the appeal itself was not maintainable. When the employer had missed the bus by not filing the appeal within time it is not open to the employer to invoke the writ jurisdiction of this Court. The writ petition is therefore not maintainable. It is not as if the controlling Authority passed the order impugned behind the back of the employer. The employer was very much given notice and only after hearing the employer, the Controlling Authority passed the order. Of course the learned Counsel for the management had strongly urged that the notice was given only in condone delay petition and while allowing the condone delay petition the main order also came to be passed. This is after all a matter of procedure because even in the counter affidavit opposing condone delay petition the employer has consciously chosen to go into the merits of the matter. Therefore, this Court finds no merit in this writ petition and the same.

6. The third respondent who appeared as party-in-person submitted that he shall not press his claim for payment of interest if the amount of Rs.1,88,225/- is paid by the management within a period of two months from the date of receipt of a copy of this order. No costs.

Sd/-

Assistant Registrar(W)

/True Copy/

Sub Assistant Registrar

To:

1. The Appellate Authority under the Payment of Gratuity Act, [Joint Commissioner of Labour], Tamil Nadu Housing Board Office Complex, Ellis Nagar Main Road, Madurai.
2. The Authority under the Payment of Gratuity Act, [Assistant Commissioner of Labour], Office of the Deputy Commissioner of Labour, Bharathi Ula Salai, Race Course Colony, Madurai - 625 002.

+1cc to Mr. S.Seenivasagam, Advocate Sr.No.47708

+1cc to Mr.P.Narayanasamy, Advocate Sr.No.47119

KMI

VB/SV/SAR4/03/05/2018/4P/5C

<https://hcservices.ecourts.gov.in/hcservices/>

ORDER MADE IN
W.P (MD) .No.21589 of 2017
08.02.2018