

ISM

IN THE HIGH COURT OF JUDICATURE AT BOMBAY**CIVIL APPELLATE JURISDICTION****WRIT PETITION NO. 9349 OF 2012**

Shri. Shankar Dadoba Naik

.....Petitioner

V/s.

Maharashtra State Road Transport
Corporation, Palghar Division and others

.....Respondents

Mr. Vaibhav R. Gaikwad for the Petitioner
Mr. G. S. Hegade i/b Mr. G. S. Hegade & Associates for respondent
no. 1**CORAM : NITIN W. SAMBRE, J.****DATE : JULY 25, 2019.****P.C.**

Heard.

2 The petitioner is an employee of the respondent State Road Transport Corporation questioning the order dated 16/12/2011 passed in exercise of powers under Section 4(6)(b) of The Payment of Gratuity Act, 1972 (Hereinafter referred to as 'the Act' for sake of brevity) thereby forfeiting gratuity of the petitioner. The facts necessary for deciding the petition are as under:

(i) It is the case of the petitioner that he was appointed as conductor and in 2003 when his bus was checked, certain serious defaults were noticed. The petitioner was accordingly charge-sheeted and after receipt of inquiry report, a show cause notice dated 07/07/2003 proposing punishment of dismissal was served. The petitioner questioned the said show cause notice dated 07/07/2003 in complaint (ULP) No. 157 of 2003. Said complaint came to be dismissed on 29/08/2005 which order was confirmed in Revision Application No. 68 of 2008 by the learned Industrial Court vide order dated 18/11/2010.

(ii) Feeling aggrieved, petitioner preferred Writ Petition No. 9903 of 2010 which petition was admitted on 20/12/2010 and status-quo was directed to be maintained with regard to the employment of the petitioner during pendency of the petition.

(iii) According to petitioner, services of the petitioner were never terminated and he continued in service by virtue of above order

passed in Writ Petition. According to petitioner, his date of superannuation is 31/12/2011, however, on 02/12/2011, petitioner was served with show cause notice as to why under Sub-Section (6) (b)(ii) of Section 4 of the Act, his gratuity be not forfeited. The said notice though was replied by the petitioner, by the order impugned dated 12/12/2011, gratuity of the petitioner was ordered to be forfeited. As such, this petition.

3 The submissions of the learned counsel for the petitioner are, though the petitioner was served with a final show cause notice proposing his dismissal dated 07/07/2003, the said show cause notice was not taken to its logical end in view of status-quo order passed by this Court in Writ Petition No. 9903 of 2010 thereby terminating his services. According to him, petitioner since has superannuated on 31/12/2011 and his services were not terminated, he was entitled for gratuity pursuant to the Act.

4 The learned counsel then would invite attention of this Court to provisions of Section 4 (6)(b)(ii) of the Act so as to claim that as the

services of the petitioner were never terminated. Alleged act as reflected in the charge-sheet has never resulted into his prosecution for offence involving moral turpitude as he was never charge-sheeted or convicted for the same. According to him, Apex Court in the matter of **Union Bank of India and others Vs. C. G. Ajay Babu and others**¹ has held that forfeiture of the gratuity is permissible only in case of alleged termination for misconduct of constituting offence involving moral turpitude and after the conviction for such offence which alleged to have been committed during the course of employment. As such, the forfeiture of gratuity is not justified.

5 The learned counsel then would urge that if any act of the petitioner in the capacity of employee in the nature of wilful omission or negligence has caused any damage or loss to the respondent-employer Corporation thereby destructing the property of the respondent-employer, such loss can be ordered to be recovered by way of forfeiture. According to him, sub-clause 1 of clause (b) of Sub-Section (6) of Section 4 of the Act are not attracted as it is not the

¹ (2018) 9 SCC 529

allegation against the petitioner of causing any damage or loss because of wilful omission or negligence.

6 The learned counsel then would urge, entitlement of gratuity is based on continuous service for a particular period and the fact remains that petitioner was in continuous service of respondent-employer pursuant to provisions of Section 2A of the Act and that being so, he is entitled for payment of gratuity on his superannuation.

7 *Per contra*, Shri. Hegade, learned counsel for respondent-employer would urge that case of the petitioner cannot be termed to be covered pursuant to the Judgment of **Union Bank of India** [cited supra]. He would invite attention of this Court to the fact that petitioner has committed 15 similar incidents of misconduct during his service tenure as a conductor as has been admitted before the Labour Court. According to him, petitioner is served with final show cause notice proposing termination of his services in view of the fact that in an inquiry, he was found to be guilty. He would urge that

since the nature of misconduct is serious as per Discipline and Appeal procedure, the only punishment contemplated under Clause 7 is that of dismissal or discharge from the services which amounts to termination. According to him, because of pendency of petition at the behest of the petitioner which was later on withdrawn by him in which the interim order of status-quo as regards employment was operating, respondent-employer was unable to serve order of termination against him. He would then urge that once it is proved in an inquiry that petitioner has committed serious misconduct and such report is accepted by Disciplinary Authority by proposing punishment of termination of services, the inevitable result will be effecting termination of petitioner. Relying upon the Judgment of the Apex Court in the matter of **Divisional Personnel Officer, Southern Railway and another vs. T. R. Chellappan**² particularly paragraph 9, he would urge that what remained was only a formality of issuing termination order and that being so, this Court should consider issuance of termination order as symbolic event. According to him, in Extraordinary Jurisdiction, this Court should consider the degree of

2 AIR 1975 SC 2216

the misconduct of the petitioner and his stigmatic past services and as such, may order dismissal of the petition.

8 Considered rival submissions.

9 Some of the important admitted facts which are required to be appreciated are, petitioner was served final show cause notice proposing dismissal of services on 07/07/2003. Against such show cause notice, in a petition before this Court on 20/12/2010, an interim relief as regards maintaining status-quo as regards services of the petitioner came to be passed. As a consequence of above, petitioner continued in the employment of the respondent-Corporation and stood superannuated. Even if said petition was withdrawn, however, same was in the backdrop of his superannuation. The respondent-employer has never objected for the withdrawal of the petition nor insisted for permission to serve the order of termination during pendency of the petition.

10 In view of aforesaid position, the petitioner was never served

with termination order, though a final show cause notice was issued to him on 07/07/2003.

11 The order impugned is based on fact that in the matter of disciplinary proceedings against the petitioner, the only rituals which remained to be followed is that of assessing the reply of the petitioner to final show cause notice dated 07/07/2003 and pass order in accordance with Discipline and Appeal procedure of that of termination from service.

12 Though Mr. Hegade has submitted that a ritual of issuance of termination order was remained to be completed because of interim order passed by this Court in Writ Petition No. 9903 of 2010, which petition was withdrawn by the petitioner after his superannuation. However, fact remains that order of termination was never served on the petitioner. As such, his termination was never effected from the service of respondent-employer. As such, the very requirement of Section 4(6)(b) of the Act was not satisfied.

13 The Apex Court in the matter of **Jaswant Singh Gill Vs. Bharat Cooking Coal Ltd. and others**³ had an occasion to consider the issue of forfeiture of gratuity under the provisions of the Act. The Apex Court has observed that once workman stood superannuated and he was not served with an order of termination, requirement under Sub-Section (6) of Section 4 of the Act is not satisfied. The Apex Court then held that for invoking provisions of Section 4 Sub-Section (6) of the Act for ordering forfeiture of the gratuity, it is imperative that termination order must be served on the workman. Appropriate support to that effect can be drawn from paragraph nos. 13 & 14 in the matter of **Jaswant Singh Gill** [cited supra] which reads thus:

“13. The Act provides for a close-knit 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

³ (2007) 1 Supreme Court Cases 663

contains a non- obstante clause vis-a-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.

14. *Termination of services for any of the causes enumerated in Sub-section (6) of Section 4 of the Act, therefore, is imperative.”.*

14 Apart from above, the Apex Court in the matter of **Union Bank of India** [cited supra] had an occasion to consider both sub-clauses i.e. clause (a) & (b) of Sub-Section (6) of Section 4 of the Act. While dealing with requirement as contemplated under aforesaid provisions, in paragraph nos. 16 to 18, the Apex Court had made following observations.

“16. Under Sub-section (6)(a), also the gratuity can be forfeited to only to the extent of damage or loss caused to the Bank. In case, the termination of the employee is for any act or wilful omission or negligence causing any damage or loss to the employer or destruction of property belonging to the employer, the loss can be recovered from the gratuity by way of forfeiture. Whereas under Sub-clause (b) of Sub-section (6), the forfeiture of gratuity, either wholly or partially, is permissible under two situations- (i) in case the termination of an employee is on account of riotous or disorderly conduct or any other act of violence on his part, (ii) if the termination is for any act which constitutes an offence involving moral turpitude and the offence is committed by the employee in the course of his employment. Thus, Sub-clause (a) and Sub-clause (b) of Sub-section (6) of Section 4 of the Act operate in different fields and in different circumstances. Under Sub-clause (a), the forfeiture is to the extent of damage or loss caused on account of the misconduct

of the employee whereas under Sub-clause (b), forfeiture is permissible either wholly or partially in totally different circumstances. Sub-clause (b) operates either when the termination is on account of- (i) riotous or (ii) disorderly or (iii) any other act of violence on the part of the employee, and under Sub-clause (ii) of Sub-section (6)(b) when the termination is on account any act which constitutes an offence involving moral turpitude committed during the course of employment.

17. *'Offence' is defined, under The General Clause Act, 1897, to mean "any act or omission made punishable by any law for the time being in force".*

18. *Though the learned Counsel for the Appellant-Bank has contended that the conduct of the Respondent-employee, which leads to the framing of charges in the departmental proceedings involves moral turpitude, we are afraid the contention cannot be appreciated. It is not the conduct of a person involving moral turpitude that is required for forfeiture of gratuity but the conduct or the act should constitute an offence involving moral turpitude. To be an offence, the act should be made punishable under law. That is absolutely in the realm of criminal law. It is not for the Bank to decide whether an offence has been committed. It is for the court. Apart from the disciplinary proceedings initiated by the Appellant-Bank, the Bank has not set the criminal law in motion either by*

registering an FIR or by filing a criminal complaint so as to establish that the misconduct leading to dismissal is an offence involving moral turpitude. Under Sub-section (6)(b)(ii) of the Act, forfeiture of gratuity is permissible only if the termination of an employee is for any misconduct which constitutes an offence involving moral turpitude, and convicted accordingly by a court of competent jurisdiction”.

15 In case of forfeiture of gratuity under The Payment of Gratuity Act, 1972, issuance of order of termination is held to be imperative for the purpose of invoking provisions of Section 4 Sub-Section (6) of the Act as is held in the matter of **Jaswant Singh Gill** [cited supra]

16 As such, submissions of Shri. Hegade that, consequence of the petitioner being served with final show cause notice dated 07/07/2003 proposing punishment of dismissal/termination from services, is required to be considered to mean that services of the petitioner were to be terminated, as there is no other punishment prescribed under the Discipline and Appeal Rules is liable to be rejected.

17 Apart from above, the fact remains that petitioner was never charge-sheeted nor convicted for an offence involving moral turpitude as is prescribed under the provisions of clause (b) of Sub-Section (6) of Section 4 of the Act.

18 In the aforesaid background, in my opinion, the Writ Petition deserves to be allowed and is accordingly allowed in terms of prayer clause (b).

19 Respondent no. 1 is directed to release gratuity of the petitioner with Statutory interest thereof within period of 3 months from today.

[NITIN W. SAMBRE, J.]