IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:16.08.2019

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

W.P.No.14522 of 2010

1.E.Dhanapal (deceased)

2.D.Saraswathi
3.S.Revathy
4.G.Kanchana
5.E.Bhavani
6.K.Vimala ... Petitioners

(Petitioners 2 to 6 are substituted as legal heirs of the deceased E.Dhanapal by RMDJ in W.M.P.No.35609 of 2018)

Vs.

1.Airports Authority of India
Rep. by its General Manager (Personnel)
Rajiv Gandhi Bhavan
New Delhi-110 003.

2.The Airport Director
Airports Authority of India
Chennai Airport
Meenambakkam, Chennai. ... Respondents

PRAYER: Writ Petition is filed under Article 226 of the Constitution of India, for issuance of a Writ of Certiorarified Mandamus, calling for the concerned records from the respondents, quash the order of the 2nd respondent bearing No.AAM/PERS/DISC/ED/06/509, dated 06.11.2006 and the order of the 1st respondent bearing No.PERS/DC/1102/284/ED/09/241, dated 22.05.2009 and consequently, direct the respondents to pay the arrears of wages, attendant benefits and other terminal benefits to the petitioner.

For Petitioners : Mr.Balan Haridas

For Respondents : Mr.R.Parthiban for R2

O R D E R

Writ Petition is filed for issuance of a Writ of Certiorarified Mandamus, calling for the records from the respondents, quash the order of the 2nd respondent bearing No.AAM/PERS/DISC/ED/06/509, dated 06.11.2006 and the order of the 1st respondent bearing No.PERS/DC/1102/284/ED/09/241, dated 22.05.2009 and consequently, direct the respondents to pay the arrears of wages, attendant benefits and other terminal benefits to the petitioners.

2(i).The learned counsel appearing for the petitioners contended that the 1st petitioner was working as contract labour and his services were regularised as per the order of the Hon'ble Apex Court dated 06.12.1996/11.04.1997 as Attendant (Chowkidar) in the 2nd respondent. Along with the 1st petitioner, 11 employees were absorbed by the 2nd respondent. In that 11 employees, one Guna, who was absorbed, was not a contract labour, but only a domestic servant in the house of one of the officials of the 2nd respondent. According to the petitioners, some contract employees, who were not regularised as per the order of the Hon'ble Apex Court, had given complaint in respect of the employees, who got regularised. In such circumstances, the 2nd respondent in order to camouflage its illegal act of absorbing a person, who had never worked as contract labour, initiated action against the 1st petitioner and issued a charge memo dated 30.09.2004 to make the 1st petitioner a scape goat.

2(ii).At the time of absorption, some form was given to the 1st petitioner and his signature was taken and the details were filled up later. The 1st petitioner being illiterate affixed his signature as directed by the 2nd respondent and contended that he has not filled up any details in the form. The 1st petitioner was not aware whether there was any column for filling about his previous employment. In any event, his previous employment in Indian Airlines was not relevant for the employment with the 2nd respondent. The 2nd respondent knowing fully well that employment of the 1st petitioner was purely based on absorption taking into account of long number of years as contract labour, issued a charge memo by framing reckless charges.

2(iii).The 2nd respondent in an arbitrary manner imposed punishment of withholding unpaid terminal benefits viz., gratuity on the whole and CPF in part (AAI's contribution) and consequently, his terminal benefits were withheld by the 2nd respondent.

2(iv).The 1st petitioner preferred an appeal with the 1st respondent on 20.11.2006 and the said appeal was rejected. The learned counsel appearing for the petitioners further contended that the reasons given by the 2nd respondent for imposing the above punishment are not valid and it is contrary to the statutory provision. There is no rule which empowers the 2nd respondent to impose such a punishment. Section 4(6) of Payment of Gratuity Act contemplates the circumstances under which the gratuity payable to an employee can be forfeited. None of the conditions mentioned in the said Section applies to the case of the 1st petitioner and the order of the 2nd respondent withholding the gratuity and employer contribution of provident fund is illegal. The 1st petitioner was not terminated from service and therefore, gratuity payable to the 1st petitioner cannot be withheld.

2(v). In support of his contentions, the learned counsel relied on the following judgments:

(i) 2014 SCC Online Madras 741 (C.Ashok Kumar vs. Canara Bank rep. by its Deputy General Manager/Disciplinary Authority, Disciplinary Action Cell Circle Office);

> "13.Therefore, if the punishment contemplated in the respondent's Service Code is only a reduction to bring down to lower stage of service by two stages, the respondent cannot subsequently insert the expression 'with cumulative effect for a period of two years'. Though the respondent Bank would seek to explain this issue by stating that the expression was inserted so as to specify the penalty, the same could not have been done without there being specific provision under the Service Code. That apart, even in the tentative show cause notice dated 28.10.2009, there is no such proposal to impose the punishment with cumulative effect for a period of two years. Therefore, to that extent, viz. the imposition of punishment for a period of two years with cumulative effect, is held to be without jurisdiction and to that extent the impugned order dated 24.11.2009 is quashed and the issue No.1 is decided in favour of the petitioner. "

(ii) (2018) 9 SCC 529 (Union Bank of India and others vs. C.G.Ajay Babu and another);

> "15. 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, Clause (a) and Clause (b) of sub-section (6) of Section 4 of the Act operate in different fields and in different circumstances. Under Clause (a), the forfeiture is to the extent of damage or loss caused on account of the misconduct of the employee whereas under Clause (b), forfeiture is permissible either wholly or partially in totally different circumstances. 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 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."

(iii) (2007) 1 SCC 663 (Jaswant Singh Gill vs. Bharat Coking Coal Limited and others);

"7. The short question which arises for consideration in this appeal is as to whether the provisions of the said Act shall prevail over the rules framed by Coal India Limited, holding company of Respondent No. 1, known as the Coal India Executives' Conduct, Discipline and Appeal Rules, 1978 (for short "the Rules"). Indisputably, the appellant was governed by the Rules. Rule 27 provides for the nature of penalties including ''recovering from pay or gratuity of the whole or part of any pecuniary loss caused to the company by negligence or breach of orders or trust''. Major penalties prescribed in Rule 27, however, include reduction to a lower grade, compulsory retirement, removal from service and dismissal. Rule 34 provides for special procedure in certain cases stating:

"34.2 Disciplinary proceedings, if instituted while the employee was in service whether before his retirement or during his re-employment shall, after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service.

34.3 During the pendency of the disciplinary proceedings, the disciplinary authority may withhold payment of gratuity, for ordering the recovery from gratuity of the whole or part of any pecuniary loss caused to the company, if have been guilty of offences/misconduct as mentioned in Sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972 or to have caused pecuniary loss to the company by misconduct or negligence, during his service including service rendered on deputation or on re-employment after retirement. However, the provisions of Section 7(3) and 7(3-A) of the Payment of Gratuity Act, 1972 should be kept in view in the event of delayed payment, in the case the employee is fully exonerated."

.. ..

.. ..

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

(iv) Order dated 19.07.2017 made in W.P.No.9568 of 2017 (P.Sangili v. The Chief Manager, Union Bank of India);

"16. In the light of the undertaking, and in the interest of justice, we are of the view that a person claiming himself to have maintained honesty and integrity while in service, till his retirement, should not have a black mark, by allowing the banker to encash his leave salary, which in the words of Hon'ble Justice V.R.Krishna Iyer, a short cut method.

For the foregoing reasons, writ petition is allowed. Order of the first respondent in Reference No.AGM:REC:101:2017 dated 28.02.2017 is set aside. In view of the undertaking, it is open to the first respondent to recover the petitioners property as per the order in DRC No.129 of 2012 in O.A.No.89 of 2011 on the file of the Debts Recovery Tribunal-II, Chennai. However, there shall be no order as to cost. Consequently, the connected writ miscellaneous petition is closed."

(v) (2012) 5 SCC 242 (Vijay Singh v. State of Uttar Pradesh and others);

> "14. The issue involved herein is required to be examined from another angle also. Holding departmental proceedings and recording a finding of guilt against any delinquent and imposing the punishment for the same is a quasi-judicial function and not administrative one. (Vide: Bachhittar Singh v. State of Punjab & Anr., AIR 1963 SC 395; Union of India v. H.C. Goel, AIR 1964 SC 364; Mohd. Yunus Khan v. State of U.P. & Ors., (2010) 10 SCC 539; and Coal India Ltd. & Ors. v. Ananta Saha & Ors., (2011) 5 SCC 142).
>
> 15.Imposing the punishment for a proved delinquency is regulated and controlled by the statutory rules. Therefore, while performing the quasi-judicial functions, the authority is not permitted to ignore the statutory rules under which punishment is to be imposed. The disciplinary authority is bound to give strict adherence to the said rules. Thus, the order of punishment being outside the purview of the statutory rules is a nullity and cannot be enforced against the appellant."

3(i).The respondents filed counter affidavit and the learned counsel appearing for the respondents contended that the writ petition is not maintainable. The proper forum to the 1st petitioner is by way of raising industrial dispute. It is not correct to state that the 1st petitioner is illiterate. In the form, the 1st petitioner has stated that he can read and write Tamil and English. He suppressed the material fact that his services were terminated by his previous employer viz., Indian Airlines. The 1st petitioner was terminated on 07.08.1985. Further as per clause 7(b) of Airports Authority of India (General Conditions of Service and Remuneration of Employees) Regulations, 2003, "persons convicted of offences involving moral turpitude or persons who have been dismissed from service by the Central Government or State Government or Public Sector Enterprises should be deemed to be ineligible for appointment in the Authority".

3(ii).The charges levelled against the 1st petitioner were taken up by the Disciplinary Authority by initiating disciplinary proceedings as per the Rules of AAI Employees (CDA) Regulations, 2003. The Disciplinary Authority after considering the report of the Enquiry Officer found that the 1st petitioner had been given every opportunity to defend his case during enquiry. On such finding, the Disciplinary Authority agreed with the enquiry report submitted by the Enquiry Officer. At the time of regularisation, the 1st petitioner submitted various forms as required by AAI, filled up all the details including date of birth and stated that he can speak, read and write the languages viz., Tamil and English. It is clear that the 1st petitioner is not an illiterate.

3(iii).Though regularisation is as per the order of the Hon'ble Apex Court dated 06.12.1996/11.04.1997, it is mandatory on the part of the 1st petitioner to fill up the personnel inventory form. The date of birth mentioned by the 1st petitioner in the form was 01.07.1946 and 09.05.1955, whereas he has furnished his date of birth to his previous employer Indian Airlines was 08.10.1937. In column 14, the 1st petitioner did not fill up the previous experience details regarding his employment with Indian Airlines as loader. The fact of his previous experience with Indian Airlines had been suppressed along with false declaration of educational qualification, date of birth/age by the 1st petitioner. Hence, the charges have been framed by the Disciplinary Authority as per the Regulation 29 of AAI Employees (CDA) Regulation 2003.

3(iv).The 2nd respondent conducted domestic enquiry against the 1st petitioner. As per the Rules, the 1st petitioner was given every opportunity in the domestic enquiry and Enquiry Officer has given a finding that the charges levelled against the 1st petitioner were proved. The 2nd respondent considered all the materials including the report of the Enquiry Officer passed the impugned order. The orders of the respondents 1 and 2 had been issued as per the provisions contained in AAI Employees (CDA) Regulation, 2003. The 1st petitioner by suppressing his previous employment and dismissal, had furnished the false information, got regularisation and caused loss to the 2nd respondent.

3(v). The learned counsel appearing for the 2nd respondent contended that as per Regulation, the 2nd respondent has initiated disciplinary proceedings. The disciplinary proceedings were initiated before the 1st petitioner attained age of superannuation. As per Regulation, even after retirement of an employee, the departmental proceedings can be proceeded with. Regulation 27 contemplates minor and major penalties that can be imposed. Regulation 27(d) empowers the 2nd respondent to recover from the part of the whole or part of any pecuniary loss caused to the 2nd respondent by the negligence or breach of order and other amounts as may be due from the employee. Apart from the conditions contemplated in Payment of Gratuity Act, the 2nd respondent is entitled to recover any loss caused by the 1st petitioner and also if the conduct of the 1st petitioner as such affects the conduct and morale of co-worker and other worker. The 1st petitioner by furnishing false particulars has caused loss to the 2nd respondent by receiving wages to which he is not entitled to. The order of 2nd respondent withholding the amounts and order of 1st respondent rejecting the appeal of the 1st petitioner is valid and legal.

3(vi). The learned counsel appearing for the 2nd respondent further contended that as per Regulation 33(2)(1) and 33(2)(2), the 2nd respondent has power to withhold gratuity, when the employee found in a disciplinary proceedings or judicial proceedings to have been guilty of offences and misconduct or to have caused pecuniary loss to the 2nd respondent by misconduct or negligence during the service. In the present case, the 1st petitioner by furnishing false information obtained regularisation and caused loss to the 2nd respondent by way of wages paid to him. The judgment of the Hon'ble Apex Court relied on by the learned counsel appearing for the petitioners reported in (2018) 9 SCC 529 (Union Bank of India and others vs. C.G.Ajay Babu and another) is delivered by two Judges Bench and the same was delivered before Payment of Gratuity Act came into force and the conditions mentioned therein are not incorporated in Section 4(6) of Payment of Gratuity Act. The gratuity can be withheld. The punishment imposed by the 2nd respondent is valid and legal and prayed for dismissal of the writ petition. In support of his contentions, the learned counsel relied on the following judgments:

(i) AIR 1970 SC 919 (Delhi cloth and General Mills Co.Ltd. Etc. vs. Workmen and others etc.);

> "37. .. .. The Court therefore modified the condition and directed that while paying gratuity to a workman who was dismissed for misconduct only such amount should be deducted from the gratuity due to him in respect of which the employer may have suffered loss by the misconduct of the employee.
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> 38. A similar view was expressed in Remington Rand of India Ltd.'s case. In Calcutta Insurance Company Ltd. 's case however protest was raised against acceptance of this rule without qualification. Mitter, J., observed at p. 9 that it was difficult to concur in principle with the opinion expressed in the Garment Cleaning Works

case. Mitter, J., observed:

> "We are inclined to think that it (gratuity) is paid to a workman to ensure good conduct throughout the period he serves the employer. Long and meritorious service, must mean long and unbroken, period of service meritorious to the end. As the period of service must be unbroken, so must the continuity of meritorious service be a condition for entitling the workman to gratuity. If a workman commits such misconduct as causes financial loss to his employer, the employer would, under the general law, have a right of action against the employee for the loss caused, and making a provision for withholding payment of gratuity where such loss was caused to the employer does not seem to aid to the harmonious employment of labourers or workmen. Further, the misconduct may be such as to undermine the discipline in the workers---a case in which it would be extremely difficult to assess the financial loss to the employer."

.. .. It was broadly stated in the cases which have come before this Court that notwithstanding dismissal for misconduct a workman will be entitled to gratuity after deducting the loss occasioned to the employer. If the cases cited do not enunciate any broad principle we think that in the application of those cases as precedents a distinction should be made between technical misconduct which leaves no trail of indiscipline, misconduct resulting in damage to the employer's property, which may be compensated by forfeiture of gratuity or part thereof, and serious misconduct which though not directly causing damage such as acts of violence against the management or other employees or riotous or disorderly behaviour, in or near the place of employment is conducive to grave indiscipline. The first should involve no forfeiture: the second may involve forfeiture of an amount equal to the loss directly suffered by the employer in consequence of the misconduct and the third may entail forfeiture of gratuity due to the workmen. The precedents of this Court e.g. Wenger & Co. v. Workmen, Remington Rand of India Ltd. case and Motipur Zamindari (P) Ltd.'s case do not compel us to hold that no misconduct however grave may be visited with forfeiture of gratuity. In our judgment, the rule set out by this Court in Wenger & Co.'s case and Motipur Zamindari (P) Ltd.'s case applies only to those cases where there has been by actions wilful or negligent any loss occasioned to the property of the employer and the misconduct does not involve acts of violence against the management or other employees, or riotous or disorderly behaviour in or near the place of employment. In these exceptional cases--the third class of cases the employer may exercise the right to forfeit gratuity: to hold otherwise would be to put a premium upon conduct destructive of maintenance of discipline."

(ii) (1973) 2 SCC 502 (The Management of Tournamulla Estate vs. Workmen);

"3. .. .. In other words, according to this decision, if a workman is guilty of a serious misconduct of the third category, then, his gratuity can be forfeited in its entirety."

"4. .. .. "The gratuity payable to an employee shall be wholly 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,........" .. .."

(iii) (2019) 6 SCC 175 (Reliance Life Insurance Company Limited and another vs. Rekhaben Nareshbhai Rathod);

"34. We are not impressed with the submission that the proposer was unaware of the contents of the form that he was required to fill up or that in assigning such a response to a third party, he was absolved of the consequence of appending his signatures to the proposal. The proposer duly appended his signature to the proposal form and the grant of the insurance cover was on the basis of the statements contained in the proposal form. Barely two months before the contract of insurance was entered into with the appellant, the insured had obtained another insurance cover for his life in the sum of Rs 11 lakhs. We are of the view that the failure of the insured to disclose the policy of insurance obtained earlier in the proposal form entitled the insurer to repudiate the claim under the policy.

35. .. ..

36. Finally, the argument of the respondent that the signatures of the assured on the form were taken without explaining the details cannot be accepted. A similar argument was correctly rejected in a decision of a Division Bench of the Mysore High Court in VK Srinivasa Setty v Messers Premier Life and General Insurance Co Ltd (1957 SCC Online Kar 27), where it was held:

"80.Now it is clear that a person who affixes his signature to a proposal which contains a statement which is not true, cannot ordinarily escape from the consequence arising therefrom by pleading that he chose to sign the proposal containing such statement without either reading or understanding it. That is because, in filling up the proposal form, the agent normally, ceases to act as agent of the insurer but becomes the agent of the insured and no agent can be assumed to have authority from the insurer to write the answers in the proposal form.

81.If an agent nevertheless does that, he becomes merely the amanuensis of the insured, and his knowledge of the untruth or inaccuracy of any statement contained in the form of proposal does not become the knowledge of the insurer. Further, apart from any question of imputed knowledge, the insured by signing that proposal adopts those answers and makes them his own and that would clearly be so, whether the insured signed the proposal without reading or understanding it, it being irrelevant to consider how the inaccuracy arose if he has contracted, as the plaintiff has done in this case that his written answers shall be accurate." "

4.In reply, the learned counsel appearing for the petitioners contended that the 2nd respondent is relying on Regulation 22 and 33(2) to justify withholding gratuity and employees contribution payable to the 1st petitioner. The said contention is contrary to para-7 of the judgment of the Hon'ble Apex Court reported in (2007) 1 SCC 663 referred to above. In the said judgment, the similar provision was considered by the Hon'ble Apex Court and it has been held in the said judgment that the provision of the Act will prevail over the Regulation. The gratuity is payable, when the employee retires. The employer has to pay the gratuity within 30 days whether the employee makes an application for payment of gratuity or not. The only power granted to the employer to forfeit the gratuity payable to the employee is if there is a condition mentioned in Section 4

(6) of Payment of Gratuity Act. The judgments relied on by the learned counsel appearing for the 2nd respondent reported in (2018) 9 SCC 529 (Union Bank of India and others vs. C.G.Ajay Babu and another) and (1973) 2 SCC 502 (The Management of Tournamulla Estate vs. Workmen) are not applicable to the facts and circumstances of the present case and prayed for allowing the writ petition.

5.Heard the learned counsel appearing for the petitioners as well as the learned counsel appearing for the respondents and perused the materials available on record.

6.The 1st petitioner filed writ petition for Writ of Certiorarified Mandamus to quash the orders of the 2nd and 1st respondents and consequently, direct the 2nd respondent to pay the arrears of wages, attendant benefits and other terminal benefits to the 1st petitioner. The 1st petitioner while working as contract labour in 2nd respondent, he was regularised as per the orders of the Hon'ble Apex Court. The complaints were received by the 2nd respondent that the employees were irregularly regularised. The 2nd respondent after verifying the records, initiated disciplinary proceedings against the 1st petitioner. The charge levelled against the 1st petitioner is that he suppressed his previous employment in Indian Airlines and his dismissal by the said organisation. In addition to the same, the 2nd respondent alleges that the 1st petitioner has furnished false information in the form filled up by him at the time of his regularisation. The 2nd respondent conducted domestic enquiry and by producing the documents in Indian Airlines and the forms filled up and furnished by the 1st petitioner at the time of regularisation, proved the charges levelled against the 1st petitioner. The 1st petitioner is not challenging the findings in the domestic enquiry, but he is challenging only the punishment imposed by the 2nd respondent. Pending domestic enquiry, the 1st petitioner attained the age of superannuation and the 2nd respondent continued the domestic enquiry even after the 1st petitioner attaining the age of superannuation. As per the Regulation of the 2nd respondent, the 2nd respondent has power to continue the domestic enquiry even after the employee attaining the age of superannuation.

7.The first contention of the learned counsel appearing for the 2nd respondent that the writ petition is not maintainable and the proper remedy available to the 1st petitioner is under the provisions of the Industrial Disputes Act, is without merits. The 1st petitioner is challenging the order of the 2nd respondent as confirmed by the 1st respondent alleging that the said punishment is in gross violation of the provisions of the Payment of Gratuity Act and the 2nd respondent has no power to withhold the gratuity by relying Regulation. In view of the above fact, the writ petition filed by the 1st petitioner is maintainable.

8.The 2nd respondent based on the enquiry report, imposed punishment of withholding entire gratuity payable and employer's contribution payable to the 1st petitioner. Whether the 2nd respondent has power to withhold the said amount based on Regulation is the issue to be decided in the writ petition.

9. According to the learned counsel appearing for the petitioners, pending enquiry, the 1st petitioner was permitted to retire. On the other hand, according to the learned counsel appearing for the 2nd respondent, the 1st petitioner was not permitted to retire, but deemed to be in service. Whether the 1st petitioner was permitted to retire or deemed to be in service is not relevant to decide the issue in the writ petition as the 2nd respondent has not imposed punishment of dismissal from service. Now it is well settled that the payment of gratuity is not a charity to an employee. The employee had earned the same by his service rendered to the employer atleast for a minimum period of five years. As per the provision of the Payment of Gratuity Act, on retirement, the employee can make application to the concerned authority for payment of gratuity. Section 7(2) and 7 (3-A) of the Payment of Gratuity Act reads as follows:

> "Payment of Gratuity Act
>
> 7(2) As soon as gratuity becomes payable, the employer shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.
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> 7(3-A) If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify:
>
> Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground. "

As per Section 7(2) of the Payment of Gratuity Act, as soon as the gratuity becomes payable by the employer, whether employee makes an application for payment of gratuity or not, the employer must calculate the gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority. As per sub-section (3), the employer must pay the gratuity within 30 days from the date that it becomes payable. As per Section 7(3-A), if the employer fails to pay the gratuity within 30 days, he has to pay gratuity together with simple interest at the rate not exceeding the rate fixed by the Central Government for repayment of long deposit.

10.The 2nd respondent has not produced any materials to show that the 1st petitioner was continued in service even after attaining superannuation. Admittedly, after the 1st petitioner attained the age of superannuation, the 2nd respondent continued the enquiry and passed orders on 06.11.2006 withholding entire gratuity payable to the 1st petitioner and employer's contribution of provident fund. The only provision under which the employer is entitled to forfeit the gratuity payable is Section 4(6) of the Payment of Gratuity Act. The said section reads as follows:

> "Payment of Gratuity Act
>
> 4(6) 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 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.

As per this section, only when the conditions mentioned in the said section exists, the employee can forfeit the gratuity payable to the employee. The first condition mentioned in Section 4(6) of the Payment of Gratuity Act is the employees must have been terminated. The second condition is the employee must have committed any of the misconduct mentioned therein. In the present case, the 2nd respondent has not alleged and proved that the 1st petitioner was terminated from service and that he has committed any one of the misconduct mentioned in Section 4 (6) of the Payment of Gratuity Act. In the present case, the reason for withholding the gratuity payable to the 1st petitioner is that by misrepresentation and suppression of facts, the 1st petitioner obtained regularisation, received wages to which he is not entitled and thereby caused loss to the 2nd respondent. The reason given by the 2nd respondent for withholding the gratuity is erroneous. The 1st petitioner after regularisation, worked with the 2nd respondent and the 2nd respondent paid the wages only for the work done by the 1st petitioner. In such circumstances, by no stretch of imagination it can be stated that by receiving wages for the work done by him, caused loss to the 2nd respondent.

11.The learned counsel appearing for the 2nd respondent referred to Regulation 27(d), 33(2)(i) and 33(2)(ii) and the said provisions read as follows:

> "Regulation 27(d). Recovery from pay of the whole or part of any pecuniary loss caused to the Authority by the negligence or breach of orders or such other amount as may be due to him;
>
> Regulation 33(2)(i). Disciplinary proceedings, if initiated while the employee was in service whether before his retirement or during his re-employment, shall after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service.
>
> Regulation 33(2)(ii). During the pendency of Disciplinary Proceedings, the Disciplinary Authority may withhold payment of gratuity, for ordering the recovery from gratuity of the whole or part of any pecuniary loss caused to the Authority if the employee is found in a disciplinary proceedings or judicial proceedings to have been guilty of offences and misconduct as mentioned in sub-section (6) of Section (4) of the Payment of Gratuity Act, 1972 or to have caused pecuniary loss to Authority by misconduct or negligence during his service, including service rendered on deputation or on re-employment after retirement. However, the provisions of Section 7 (3) and 7(3A) of the Payment of Gratuity Act, 1972 should be kept in view in the event of delayed payment, in case the employee is fully exonerated."

As per Regulation 27(d), the 2nd respondent has power to recover from the pay of his employee the pecuniary loss caused to the authority by negligence or breach of orders or such other amount as may be due to the 2nd respondent. In the present case, the 2nd respondent has not proved that the 1st petitioner has caused loss to the 2nd respondent by his negligence or breach of order, except stating by receiving wages for the work done by the 1st petitioner caused loss to the 2nd respondent. The Regulation 27 (d) in the facts and circumstances of the present case is not applicable and the 2nd respondent cannot withhold the gratuity and the Employees Provident Fund payable to the 1st petitioner.

12. The 2nd respondent as per the power conferred under Regulation 33(2)(i) continued the enquiry as if the employee continued in service. The Regulation 33(2)(ii) contemplates the situation, where the 2nd respondent can withhold the payment of gratuity pending disciplinary proceedings or recovery from the gratuity the whole or part of any pecuniary loss. The 2nd respondent had not proved that the gratuity payable is withheld for any of the conditions mentioned in Section 4(6) of Payment of Gratuity Act. In the judgment reported in (2007) 1 SCC 663 (Jaswant Singh Gill vs. Bharat Coking Coal Limited and others), the Hon'ble Apex Court held that statutory provision prevail over Regulations.

13.For the above reason, order of the 2nd respondent confirmed by the 1st respondent is not valid and legal, the same is liable to be set aside and it is hereby set aside. In the result, the writ petition stands allowed. No costs.

Sd/-
Asst.Registrar (CS VI)

/true copy/

Sub Asst. Registrar

Kj

To

1.Airports Authority of India
Rep. by its General Manager (Personnel)
Rajiv Gandhi Bhavan
New Delhi-110 003.

2.The Airport Director
Airports Authority of India
Chennai Airport
Meenambakkam, Chennai.

+1cc to Mr.Balan Haridas, Advocate, SR.69558
+1cc to Mr.R.Parthiban, Advocate, SR.69621

RV(CO)
CB(01/10/2019)