HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

****

CWP No.1298 of 2018

Date of Decision: 09.05.2019

****

Gayatri Prasad Singh ... Petitioner

VS.

FCI & Ors. ... Respondents

****

CORAM: HON'BLE MR.JUSTICE G.S. SANDHAWALIA

****

Present: Mr. Deepak Aggarwal, Advocate for the petitioner

Mr. JS Puri, Advocate for FCI

****

G.S. SANDHAWALIA, J. (Oral)

(1) By way of this writ petition under Articles 226/227 of the Constitution of India, the petitioner seeks setting aside of the order dated 30.07.2007 (P2) whereby the Gratuity of the petitioner has been forfeited. A consequential order dated 12.10.2017 (P8) whereby the claim of the petitioner for Gratuity and other retiral benefits is also subject matter of challenge which was passed in pursuance of the directions issued by this Court on 12.07.2017 (P7) in **CWP No.14692 of 2017 Gayatri Prasad Singh vs. Food Corporation of India & Ors.** to decide the representations of the petitioner and take appropriate steps. The order dated 29.09.2010 (P4) whereby the suspension period of the petitioner after his compulsory retirement has been treated as period not spent on duty is also under challenge.

(2) The factual matrix of the case would show that the petitioner was serving as Assistant Grade-I with the respondent-Corporation. The petitioner was criminally proceeded against on 29.03.2003 under Section 409 read with Section 34 IPC along with other employees by lodging FIR. Keeping in view the criminal proceedings, he was placed under suspension

on 02.04.2003 and thereafter was charge-sheeted on 24.09.2005 (P1) on the departmental side.

(3) The gamut of charges was as such shortage of foodgrains/ gunnies which was in custody/supervisory control of the petitioner. Keeping in view the findings of the Enquiry Officer, the order of compulsory retirement as such was passed on 30.07.2007 (P2). Vide impugned order dated 29.09.2010 (P4), the forfeiture of gratuity under Section 4(6) of the Payment of Gratuity Act, 1972 was also imposed. The petitioner's appeal dated 17.09.2007 (P3) was dismissed on 13.06.2008 (R1) by the Executive Director.

(4) The appellate order as such only talks about the shortages found during the physical verification checks and has not dealt with the order of forfeiture of the gratuity against which the petitioner has raised serious objection against the prescribed procedure, which according to the petitioner, is violative of the principles of natural justice.

(5) Admittedly, the issue before the Punishing Authority at that point of time was regarding the imputation of the contents of the charge-sheet and the shortage on the basis of which the order of compulsory retirement was passed. It is not borne out of the record or from the order passed that any such notice was issued to the petitioner at that point regarding the quantum of loss suffered by the employer. That apart the penalty was to be imposed on departmental side but no notice was issued regarding his gratuity which was going to be forfeited. Thus this Court is of the opinion that the order as such whereby the gratuity was forfeited without even putting the petitioner to notice suffers from patent illegality and is not

sustainable, in view of Rule 8(ii) of the Payment of Gratuity (Control) Rules 1972. Rules 8(i) & 8(ii) read as under:-

> ***8. Notice for payment of gratuity**.—*
>
> *(1) Within fifteen days of the receipt of an application under rule 7 for payment of gratuity, the employer shall—*
>
> > *(i) if the claim is found admissible on verification, issue a notice in Form 'L' to the applicant employee, nominee or legal heir, as the case may be, specifying the amount of gratuity payable and fixing a date, not being later than the thirtieth day after the date of receipt of the application, for payment thereof, or*
> >
> > *(ii) if the claim for gratuity is not found admissible, issue a notice in Form 'M' to the applicant employee, nominee or legal heir, as the case may be, specifying the reasons why the claim for gratuity is not considered admissible.*
>
> *In either case a copy of the notice shall be endorsed to the controlling authority.*

(6) It is another aspect that the criminal proceedings as such did not lead to conviction as the petitioner was acquitted by giving benefit of doubt by the criminal Court on 26.03.2012 (P5). On account of being under suspension till the order of compulsory retirement vide another order dated 29.09.2010 (P4), the suspension period from 02.04.2003 till the date when the petitioner was compulsorily retired was reckoned as period not spent on duty.

(7) The issue of compulsory retirement was held to be termination by way of punishment if it was on account of a misconduct committed by an employee in regular departmental enquiry by the Full Bench of this Court in **UCO Bank & Ors. vs. Anju Mathur, 2013(3) SCT 272**. It was also noticed that compulsory retirement can also be where an employee has become a dead wood and which is not to be treated as order of punishment.

In the present case, the petitioner falls apparently within the case of misconduct on account of which he was weeded out from service after holding the proper enquiry and therefore there is no dispute regarding this aspect as it amounts to a major punishment.

(8) The only issue which thus remains is as to whether the provisions of Section 4(6) of Payment of Gratuity Act as such have been complied with or not? For this purpose, the operative part of the impugned order dated 30.07.2007 (P2) whereby the order of compulsory retirement was passed, reads as under:-

> *"In view of the above discussion the undersigned holds all the Cos guilty of charges leveled against them. The huge shortage in foodgrains and deed stock articles under the custody of S/Sh. Harbans Singh AG-I(D) and G.P.Singh AG-II(D) is clear indication of misappropriate of stocks by them whereas the bags found in excess were also kept unaccounted for with the intention to misappropriate the same as and when the situation so permitted. For such gross misconduct, the Cos do not deserve to be retained in the service of the Corporation. But the shortage in respect of Sh. Gurdip Singh AG-I(D) and Tirath Ram AG-II(D) being minor a lenient view is being taken in their case.*
>
> *Now therefore in totality of the circumstances the undersigned in XXX exercise of powers conferred under Regulation-56 of FCI Staff Regulation 1971 hereby imposes the penalty of compulsory retirement from the service along with forfeiture of gratuity under Section 4(6) of the Payment of Gratuity Act, 1972 upon S/Sh. Harbans Singh AG-I(D) & G.P. Singh AG4(D) and censures Gurdip Singh AG-1(D) and Tirath Ram AG-II(D)."*

(9) From the above order, it is clear that the quantum of loss which the respondent-Corporation suffered was not specified on the basis of which the amount of Gratuity has been withheld.

(10) Section 4(6) was subject matter of consideration in **UCO Bank** (supra) and accordingly, it was held as per sub-section 6(a) of the 1972 Act that the gratuity of an employee can be forfeited on account of damage or loss suffered because of the willful omission or negligence which led to the termination of the employee or on account of the misconduct by the employee which constituted the offence involving moral turpitude. This aspect has not been considered by the respondents while passing the impugned order. As noticed above, the petitioner has also been acquitted of the criminal charge as such at a later point of time. The relevant pat of the Full Bench judgment reads as under:-

> ***RE: FORFEITURE OF GRATUITY:***
>
> *12. Two aspects arise for consideration, namely, - (a) whether gratuity can be withheld/forfeited under Regulation 46(1)(e) if the termination of service is by way of punishment of compulsory retirement; and (b) if it can be forfeited, then under what circumstances and whether it would be necessary to give proper hearing to the delinquent employee before forfeiting the gratuity.*
>
> *13. Regulation 46 of the Officers' Regulations makes every officer eligible for gratuity in certain circumstances which include retirement, death, disablement, resignation and termination. However, Clause(e) states that if the termination of service is occasioned by way of punishment, then the officer will not be entitled to gratuity. The Division Bench in Ashwani Kumar Sharma (supra) held that this clause cannot apply to the case of compulsory retirement. That is the only reason given, but without any elaboration. We are afraid, we cannot accept*

this to be a justified reason, as it leads to wrong interpretation of Clause (e) of Regulation 46 of the Officers' Regulations.

14. We would like to emphasise that compulsory retirement is of two types. There can be an administrative order retiring an employee compulsorily from service when the employer finds that the employee has become deadwood. However, the compulsory retirement is also provided as one of the modes of punishment in the Disciplinary and Appeal Regulations, 1976 framed by the Bank. Whenever compulsory retirement is effected by way of penalty which is imposed after holding a regular enquiry, then the compulsory retirement leads to termination by way of punishment. Termination of service can result by various modes. It amounts to cessation of employment whereupon the employer-employee relation comes to an end. The purport of Regulation 46(1)(e) is very clear. Whenever it is a case of termination by any other mode than by way of punishment, gratuity is payable, but not when termination is occasioned by way of penalty on account of misconduct committed by an employee established in the regular departmental enquiry against such delinquent employee.

15. We are, therefore, of the opinion that Regulation 46(1) of the Officers' Regulations would not apply when termination is occasioned by way of compulsory retirement by way of punishment on account of misconduct proved against such an employee after regular departmental enquiry. To that extent, the judgment of Division Bench in Ashwani Kumar Sharma (supra) does not lay down correct law and is hereby overruled.

16. The next question is as to whether in all cases where the penalty of compulsory retirement is imposed, the gratuity is to be forfeited. Answer to this is to be found in Section 4(6) of the Payment of Gratuity Act, 1972. This sub-section reads as under:-

"(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,

(c) 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

(d) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provide that such offense is committed by him in the course of his employment."

This sub-section gives the instances when the gratuity can be forfeited and the forfeiture can be whole or partial. We are concerned herein with Clauses (a) and (d). The gratuity can be forfeited if there is damage or loss suffered by the employer because of wilful omission or negligence of the employee which act led to his termination. In that case, the forfeiture has to be to the extent of damage or loss caused. The gratuity can also be forfeited if the misconduct by the delinquent employee constitutes an offence involving moral turpitude and when such an offence is committed by him in the course of his employment.

23. It is for this reason that it was incumbent upon the appellant-Bank to mention specifically about the actual loss having been suffered, if it suffered, in the show cause notice itself with particulars of that loss in order to enable the respondent to meet the same. That has not been done even in the final order. Though the figure of ₹4 crores is given, in the final order, even that is not substantiated by giving particulars thereof. We are, therefore, of the opinion that the show cause notice or the final orders passed, forfeiting the gratuity, do not meet the legal requirements and have to be set aside.

24. The upshot of the aforesaid discussion would that though we disagree with the reasons given by the learned single Judge allowing the writ petition and also that Ashwani Kumar Sharma (supra) does not lay down correct law, insofar as present case is concerned, still the impugned order forfeiting the gratuity has to be set aside for the reasons given above. At the same time, since it is a procedural defect, liberty is given to the Bank to serve proper show cause notice indicating actual loss, if any, with particulars of the said loss and pass final orders after giving due opportunity of being heard to the respondent."

(11) In **UCO Bank** (supra), an opportunity has also been given to the employer as such to pass separate order on account of the procedural defect as the Bank had failed to serve proper show cause notice indicating the actual loss after giving due opportunity of being heard respondents. The petitioner is also entitled for the same benefit.

(12) The Apex Court in **Union of India & Ors. vs. CG Ajay Babu & Anr. (2018) 9 *SCC* 529** while noticing the provisions of the 1972 Act, came to conclusion that forfeiture of gratuity could only be on account of misconduct which had caused financial loss to the Bank in view of the bipartite settlement of the Bank. It was further held that there was no criminal proceedings as such filed against the employee and therefore it was held that there was no justification for the forfeiture of Gratuity as the misconduct of acts which involved moral turpitude had to be duly established in the Court of law. As notice in the present case, the petitioner has also been acquitted of the criminal charge at a later point of time.

(13) Accordingly, the impugned order dated 30.07.2007 (P2) which had been upheld in appeal 13.06.2008 (R1) and thereafter reiterated on 12.10.2017 (P8) cannot sustain and is partly set aside to the extent of forfeiture of gratuity. The Corporation is given liberty to issue show cause

notice to the petitioner specifying the loss of its property which it may have suffered on account of the alleged negligence and it will be open to the petitioner to reply to the said show cause notice. After giving the petitioner an opportunity of hearing, the competent authority shall then pass the order whether the gratuity is liable to be forfeited or not.

(14) Coming to the second issue *re*. suspension period which has been treated as period not spent on duty vide order dated 29.09.2010 (P4). Mr. Puri has rightly relied upon Regulations 66(8) of the FCI (Staff) Regulation, 1971 which reads as under:-

> *(8) When the suspension of an employee is held to be unjustified or not wholly justified; or when an employee has been dismissed or suspended is reinstated, the disciplinary, appellate or reviewing authority, as the case may be, whose decision shall be final, may grant to him for the period of his absence from duty:*
>
> > *(a) if he is honourably acquitted, the full pay and allowances other than conveyance allowance to which he would have been entitled, if he had not been dismissed or suspended, less the subsistence grant;*
> >
> > *(b) if otherwise, such proportion of pay and allowances other than conveyance allowances as the disciplinary, appellate or reviewing authority may prescribe. In a case falling under clause (a), the period of absence from duty will be treated as a period spent on duty. In a case falling under clause (b) it will not be treated as a period spent on duty unless the disciplinary, appellate or reviewing authority, as the case may be, whose decision shall be final, so directs.*
>
> *No order passed under this regulation shall have the effect of compelling any employee to refund any part of the subsistence grant paid to him."*

(15) A perusal of the above would show that under sub-clause (b) it has been provided that the discretion as such of the authorities is to treat the period of absence from duty as period spent on duty if the person is honourably acquitted under sub-clause (a). It has been further provided that if the case falls under Clause (b) which is otherwise then it is not to be treated as period spent on duty.

(16) In the present case, the petitioner was acquitted giving the benefit of doubt as such. The respondents were justified by regularizing the suspension period as not spent on duty. Even otherwise the suspension was justified since he was facing criminal proceedings at that point of time and it was not that the suspension was without any basis. Needless to say that though he was acquitted at subsequent point of time but the justification for treating the period not spent on duty is validated in the above facts and circumstances.

(17) Resultantly, the order dated 29.09.2010 (P4) is liable to stand and not interfered with. Accordingly, the writ petition is partly allowed regarding the issue of forfeiture of Gratuity as mentioned in para 11 above.

(18) Let necessary exercise be done within three months from the date of receipt of certified copy of this order.

09.05.2019 **(G.S. Sandhawalia)**
vvishal **Judge**

1. Whether speaking/reasoned? ***Yes/No***
2. Whether reportable? *Yes/No*