

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

102+254

CWP-18716 of 2018 (O&M) and
other connected cases
Date of decision: 06.03.2020

M/s Hindustan Everest Tools Ltd.

.....Petitioner

versus

Inderjeet and another

....Respondents

CORAM: Hon'ble Mr. Justice Girish Agnihotri

Present: Mr. Ashwani Talwar, Advocate
for the petitioner(s).

Mr. Ramesh Goyat, Advocate
for the respondent No.1.

GIRISH AGNIHOTRI, J. (Oral)

1. This order shall dispose of 13 writ petitions i.e. CWP Nos.18716, 21412, 21413, 21415, 21416, 21417, 21418, 26071, 26072, 26073, 26074 to 26076 of 2018. For ready reference, facts have been taken from CWP-18716-2018.

2. The present writ petition has been filed by M/s Hindustan Everest Tools Ltd. *inter alia* praying for quashing of the order dated 30.04.2018 (Annexure P-1) passed by the Appellate Authority under the Payment of Gratuity Act, 1972, (for short 'the Act'). Vide which the appeals(s) filed by the workman has been allowed and the workman has been held entitled to gratuity.

3. The date of joining as per ESI record was taken to be the date w.e.f. which the gratuity is due till 20.07.2013. The gratuity amount has been calculated to the tune of Rs.82,673/- along with interest @ 10% p.a.

4. For the reasons recorded hereunder, this Court finds no merit in the submissions made by counsel for the petitioner and accepts the submissions made by counsel for the workman and writ petitions are therefore dismissed as devoid of merits.

5. The first contention of learned counsel for the petitioner is that from the detailed facts, it would be evident that the respondent-workman has been very unfair to the Management. The respondent was appointed in service on 20.02.1988. On 22.05.2013, the Union which consists of 203 workers resorted to illegal strike and started abstaining from the work. Learned counsel for the petitioner has referred to various notices dated 22.05.2013, 23.05.2013 and 18.06.2013, whereby, they were called upon to join the duties. Counsel then submits that on 19.06.2013, an Appropriate Government prohibited the strike by the Union. Accordingly, once again notices were issued to all workmen to join duties. Learned counsel then refers to notices dated 21.06.2013, 23.06.2013, 02.07.2013 and 04.07.2013. He then submits that on 10.07.2013, show cause notice was issued to the workman through registered post as to why gratuity be not forfeited under Sub-section (6) of Section 4 of the Act. It is also the case of the petitioner that loss from 22.05.2013 to 09.07.2013 was quantified as more than Rs.104.70 lacs. He further submits that on 12.07.2013, again a press publication was made. Still, the workmen did not join back. On 20.07.2013

a decision was taken to forfeit the gratuity of the workmen and the said order was sent to the workmen through post. By 20.07.2013, the losses to the petitioner had gone up to Rs.130 lacs. The case of the petitioner therefore is that the decision of the petitioner-Management to forfeit the gratuity under Section 4(6) of the Act, was in accordance with law.

6. At this stage, learned counsel for respondent No.1 submits that the pre-condition of Section 4(6) of the Act was that the services of the workmen had to be terminated but no order terminating the services of workmen was passed.

7. This Court finds merit in the submissions of counsel for the workman. For ready reference Section 4(6) of the Act is reproduced hereunder:-

xxxx xxxx xxxx xxxx

“(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.”

Section 4(1) of the Act is also reproduced hereunder:-

xxxx xxxx xxxx xxxx

“4. Payment of gratuity- *(i) Gratuity shall be payable to an employee on the termination of his employment after*

he has rendered continuous service for not less than five years-

- (a) on his superannuation, or*
- (b) on his retirement or resignation, or*
- (c) on his death or disablement due to*

accident or disease:

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement.

[Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institutions, as may be prescribed, until such minor attains majority.]

Explanation- For the purpose of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement."

8. From the above, it is evident that the pre-condition (where the gratuity of the employee could be said to be forfeited), was-whose services have been terminated for any act, willful omission or negligence. No specific order, terminating the services of the workmen was passed, which was a pre-condition for invoking the provisions under Section 4(6) of the Act.

9. Second submission of learned counsel for the petitioner is that as per the standing order, if the workmen remains absent for a continuous period of 10 days without taking permission, he shall lose lien and shall be deemed that he has left the service from the date of absence.

10. Learned counsel for the petitioner therefore submits that once the said Clause of standing order is invoked, the workmen would not be

entitled to claim that they were not terminated or that a specific order of termination was not passed.

11. Learned counsel for the respondent-workmen, however, submits that there is no other power under Sub Section (4) of Section 6 of the Act, under which the gratuity can be forfeited. He further submits that pre-condition for the same is the order of termination, which has not been passed.

12. This Court accepts the submission made by counsel for the respondent-workman. Even if, it is assumed that as per the standing orders of the petitioner-Management in Clause 15, the absence on account of the workman beyond 10 days shall be deemed that he has left the service and it amounts to 'abandonment of service', yet the pre-condition for invoking Section 4(6) of the Act i.e. to pass an order of termination, had to be complied with. Therefore, on this account also, this Court accepts the submission of learned counsel for the respondent-workman. Clause 15 of the standing order is reproduced as under:-

xxxx xxxx xxxx xxxx

“15. Discontinuation of Service:

If a workman remains absent for a continuous period of ten days without taking permission of the management or giving intimation under standing orders 12 & 12(b) he shall lose lien on his appointment & it shall be deemed that he has left the services from the date of his absence unless he explains his absence satisfactorily to the management.”

13. Learned counsel for the petitioner relies on judgment reported as ***Vijay S. Sathaye Vs. Indian Airlines Ltd. And others*** reported as ***2013(10)SCC 253***. The facts in the said case were that the petitioner had

joined the services of erstwhile Indian Airlines Limited in the year 1972. The respondent-Airlines came out with Voluntary Retirement Scheme (for short 'VRS') for its employees in 1989 in order to reduce the surplus manpower. The condition prescribed in the scheme was to render twenty years of service. Under the scheme, three months notice was given for voluntary retirement, however acceptance of resignation would be subject to approval of the Competent Authority. It has also been noticed that the petitioner therein completed twenty years of service on 19.03.1992, however, petitioner did not attend the duty after 12.11.1994. He filed a writ petition No.19194 of 1994 seeking directions to the respondents to accept petitioner's application for voluntary retirement. During the pendency of the said petition he was informed that this application has been rejected. In this background the reliance placed by the counsel for the petitioner in Para 9, 11, 12 & 13 of the judgment in support of the contentions in the present writ petition is clearly misplaced. The petitioner in the aforementioned judgment was held to be under a duty to ensure compliance of Section 12(b) of the Services Regulations, which required a three months notice as a condition for applying for VRS, accordingly the same was rejected.

14. Learned counsel for the workman, on the other hand, relies on judgment of the Hon'ble Supreme Court of India in ***Civil Appeal No.8251 of 2018*** titled as ***Union of India and others vs. C.G. Ajay Babu and another*** decided on 14.08.2018. He also relies on judgment titled as ***Jaswant Singh Gill vs. M/s Bharat Coking Coal Ltd. and others*** reported as ***2007(1) SCC 663***. In the first judgment, learned counsel for the petitioner relies on Para 5

of the judgment, wherein reference has been made to Section 4 Sub Section 6 (b) (ii) of the Act. He relies on Para 16 of the judgment, wherein it has been observed that under Sub-Section 6(a) of Section 4 the Act, gratuity can be forfeited only to the extent of damage or loss caused to the Bank. In case, the termination of the employees is for any act or willful 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. In ***Jaswant Singh Gill (supra) case***, learned counsel relies on its Para 12 wherein reference has been made to sub section (6) of Section 4 of the Act and it has been observed that termination of services for any of the causes enumerated in sub section (6) of Section 4 of the Act, therefore is imperative. Para 12 of the judgment is reproduced hereunder:-

xxxx xxxx xxxx xxxx

“12. The Act provides for a closely neat 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 is 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 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.”

15. The next contention of the petitioner is that whatever was required under the law, has been done by the petitioner. To support this, learned counsel submits that in the order dated 20.07.2013 (Annexure P-7), it was clearly mentioned that on the basis of above facts, it is taken that you have forfeited your right to work in the organization.

16. The contention of the learned counsel therefore, to conclude is that the order dated 20.07.2013 (Annexure P-7) be treated as composite order which meets all the requirements of Section 4 (6) of the Act.

17. This Court with due respect is not able to accept this contention of the learned counsel for the petitioner. In fact, as is evident from Section 4(6) of the Act, the framers of the Act had intended that there has to be a specific/overt Act of the management whereby services of the workmen are specifically terminated. This Court is also not able to accept the contention of the petitioner because applying the golden principle that no words can be added to the statute. The words as emphasized by learned counsel for the petitioner i.e. 'it is taken that you have forfeited your right to work in the organization', are taken to be abandonment of service, then the said words i.e. 'abandonment of service' should be read into under Section 4(6) of the Act.

18. This Court is of the view that no words can be added to the

Statute and therefore, since Section 4 (6) clearly requires as a pre-condition that the employer is given a right to forfeit the gratuity where it has terminated the services of the workman, cannot include abandonment.

19. The next contention of learned counsel for the petitioner is that after the order dated 20.07.2013, a notice dated 31.07.2013 was published, copy of which has been appended as Annexure P-17 with CM No. 6360 of 2019. In the said notice, learned counsel for the petitioner has **laid** emphasis on the following lines, which reads as under:-

“On this basis, vide order dated 20.07.2013, it was presumed that you have lost your lien of employment by remaining absent from duty from 22.05.2013. The financial loss which you have caused to the organization, on the basis of Section 4(6) of the Payment of Gratuity Act, orders have been issued to forfeit your amount of gratuity.”

20. In view of above, learned counsel for the petitioner submits that two things can be seen from this notice. Firstly, that the order dated 20.07.2013, clearly recorded the intention that the management had presumed that the workman had lost lien of employment by remaining absent from duty from 22.05.2013. Secondly, he submits that to 203 employees offer was made through this notice to accept fresh recruitment w.e.f. 01.08.2013. In pursuance thereof, 139 workers out of 203 had accepted fresh recruitment. He further submits that out of these 139 workers, 2 workmen are in the present bunch of writ petitions. He further submits that after the said notice, some of these workers had raised a dispute under Section 10 (1) of the Industrial Disputes Act, that the break in service as ordered in respect of workers be ended and there consequential benefits

be given after maintaining continuity in service with regard to their previous service.

21. This Court is not able to accept the contention of learned counsel for the petitioner. Section 4(6) of the Act only gives power to the employer in a situation as mentioned therein. A perusal of Section 4(6) of the Act, makes it clear that all the situations in which the power has been given to the employer have been explained. For example it has been mentioned in Section 4 (6) of the Act that 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: Section 4(6) (b) further explains situations where the gratuity payable to an employee may be forfeited. However, in the present case mere intention or abandonment as alleged by the petitioner cannot be said to be a situation whereby employer has the power under Section 4(6) of the Act to forfeit the gratuity of employees.

22. Learned counsel for the petitioner has placed reliance on clause 11.k and 15 of the Standing Orders. Clause 11(k) provides for over stay and further provides that if a workman remains absent beyond the period of leave originally granted or subsequently extended, he shall lose his lien on employment and his name shall be removed from the Muster Roll of the company unless for the situations mentioned therein. Clause 15 also provides that if a workman remains absent for a continuous period of ten days without taking permission, as provided therein, he shall lose lien on his

appointment and it shall be deemed that he has left the services from the date of his absence.

23. Therefore, from the reading of the aforementioned standing orders, it is evident from the standing order 11.k, that in the case of absence/over stay by the workman, the name of the workman has to be ordered to be removed by the Management.

24. Secondly, in standing order No.15, it has been provided that in the case of continuous absence, the workman shall be deemed to have left the services. Therefore, both the standing orders, firstly lead to the conclusion that in such situations as mentioned herein, the workman shall be treated to have abandoned the services. Secondly, as noticed above, this Court is of the view that such a situation of abandonment of service is not envisaged in Section 4 (6) of the Act which is the only Section which provides for power of the employer to forfeit the gratuity. Since abandonment has not been mentioned in Section 4 (6) of the Act, this Court is not able to accept the plea of the petitioner as submitted above.

25. The next contention of the counsel for the petitioner is that the order dated 20.07.2013 (Annexure P-7) has not been challenged by the workmen. He, therefore, submits that since the said order has not been challenged, the order passed by the Appellate Authority dated 30.04.2018, whereby the workmen were held entitled to gratuity has fallen to error.

26. Learned counsel for the respondent-workmen has drawn attention of this Court to the following observation by the Controlling Authority in its order dated 26.11.2014 (Annexure P-2):-

“It is settled law that gratuity payable to an employee may be wholly or partially forfeited if the service of such employee terminated of any act, willful omission or negligence causing any damage or loss to, or destruction of property under Section 4 (6) (a) and the gratuity may be wholly or partially forfeited of the service of such employee terminated for his riotous or disorderly conduct or any other act of violence on his part of if the services have been terminated for any act which constitute an offence involving moral turpitude under Section 4 (6) (a) . From the bare reading of the aforesaid provision of law it can be inferred that termination of the service of an employee is very much necessary prior to forfeiture of gratuity of such employee.

Once after passing the order of termination from service by way of lost of right to join duty, there was no occasion with the respondents to call the workmen including applicant further to join duty. In this way the respondents themselves set aside their own order dated 20.07.2013 by calling the workmen including applicant on duty. In this way they have also set aside the order qua the forfeiture of gratuity of the applicant. Order of forfeiture of gratuity will be followed only by the order of termination from service. After displaying the order dated 30.08.2013 Ex. MW-1/8 there is no any other order on record qua the termination of employment of applicant qua the forfeiture of amount of gratuity of the applicant. Therefore, there is no order on record qua the termination of services of the applicant.”

27. This Court is not able to accept the contention of the petitioner. The findings recorded in the forgoing paras of this judgment clearly answers this contention of the petitioner. In the foregoing paras, this Court has already taken the view that the pre-condition to exercise of powers under Section 4 (6) was that the petitioner management has to pass a specific order terminating the services of the employees. Since the pre condition i.e. order of termination has not been passed as observed in the forgoing paras, the objection that the order dated 20.07.2013 has not been challenged is,

therefore, misconceived.

28. For the reasons mentioned above, writ petitions are devoid of merit and the same are dismissed.

(GIRISH AGNIHOTRI)
JUDGE

06.03.2020

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Whether speaking/ reasoned:	Yes/No
Whether Reportable:	Yes/No