

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.11529 of 2019

Food Corporation of India through General Manager(Region), Regional
Office, Arunachal Building, Exhibition Road, Patna-1. Petitioner/s
Versus

1. Union of India through the secretary, Ministry of Labour and Employment,
New delhi.
2. The Assistant Labour Commissioner (Central), Patna, 2nd, Floor, Maurya
Complex, P.S. Kotwali, District-Patna
3. The Deputy Chief Labour Commissioner (Central), Patna,
4. Agendra Nath Dubey, Son of Late-Nand Kishore Dubey, Resident of
Gannipur, South of Law College, P.O. Muxaffarpur, Dist. Muzaffarpur.
5. Directorate general of Mines Satety, Ministry of Labour and Employment,
Sardar Patel Nagar, Dhanbad, Jharkhand-826001

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. Saket Tiwary, Advocate.
For the Respondent No.4: Mr. Uday Prakash Sharma, Advocate.
For the Respondent/s : Mrs. Kanak Verma, CGC.

CORAM: HONOURABLE MR. JUSTICE HARISH KUMAR
ORAL JUDGMENT

Date : 06-12-2022

Heard Mr. Saket Tiwary, learned counsel for the
petitioner, Mr. Uday Prakash Sharma, learned counsel for the
respondent no.4 and Mrs. Kanak Verma, learned central
government counsel for the Union of India.

2. By filling the present writ application, the petitioner
Food Corporation of India seeks quashing of the order dated
30/31.01.2019 passed by the Deputy Chief Labour Commissioner
(Central) Patna -cum- Appellate Authority under payment of
Gratuity Act, 1972, by which the Appellate Authority has upheld
the order of the Controlling Authority dated 31.01.2018 directing
payment of gratuity to the respondent no.4 as also for quashing of



the order of the Controlling Authority dated 31.01.2018, by which the Controlling Authority has directed the petitioner to pay gratuity to the respondent no.4 amounting to Rs.8,66,411/- along with 10 per cent interest with effect from 31.09.2012 till the date of payment. The petitioner further seeks a direction to restrain the Labour Authorities to release the deposited amount of Rs.8,66,411/-.

3. The short facts, which led to the filing of present writ application is that in the year 2011, while the respondent no.4 was posted as AG-I (Depot) at FSD NRPA, under Food Corporation of India, D.O. Muzaffarpur holding the charge of stock and store as In-charge of shed no.1, shortage of 7,318 bags of Rice and 7940 bags of wheat of total amounting to Rs.1,41,08,020/- was detected during special physical verification.

4. A departmental enquiry was conducted under Regulation 58 and 60A of the Food Corporation of India (Staff) Regulation, 1971 and finally on being found the charges proved, the respondent no.4 inflicted with the penalty of compulsory retirement from service with token recovery of Rs.10,00,000/- in lump-sum, which was to be recovered from the terminal dues including gratuity vide order dated 30.08.2012 (Annexure-5 to the writ petition).



5. The said order of Disciplinary Authority was challenged by the respondent no.4 before the Appellate Authority, however, after considering the amount of loss suffered by the Corporation the Appellate Authority modified the order of punishment to the extent of compulsory retirement from the service of the Corporation with forfeiture of entire amount of gratuity of the respondent no.4. The respondent no.4 being aggrieved, assailed the order of punishment as well as the Appellate Authority before the Central Government Industrial Tribunal (CGIT), Dhanbad, by filing Complaint Case No. 01 of 2013. The learned Central Government Industrial Tribunal, Dhanbad, vide award dated 12.08.2013 held that dismissal of respondent no.4 by the petitioner is illegal.

6. The aforesaid award was challenged by the management of Food Corporation of India by filing W.P. (L) No.2041 of 2014 before the Hon'ble Jharkhand High Court and the Hon'ble Court vide order dated 06/05.02.2016 having heard the parties has been pleased to quash the award dated 12.08.2013 passed by the Central Government Industrial Tribunal (CGIT), Dhanbad and remitted the matter back to the Tribunal in respect of respondent no.4, which is still pending. During the pendency of the matter before the Hon'ble Jharkhand High Court, the



respondent no.4 moved before the Controlling Authority under the Payment of Gratuity Act, 1972 and the Assistant Labour Commissioner (Central), Pakur, vide order dated 31.01.2018 directed the petitioner for making payment of gratuity of Rs.8,66,411/- along with interest at the rate of 10 per cent with effect from 31.09.2012 to the date of payment, the aforesaid order of the Controlling Authority as well as the Appellate Authority are subject matter of this writ application.

7. Aggrieved by the aforesaid order the petitioner filed appeal before the Deputy Chief Labour Commissioner (Central), Patna, under the Payment of Gratuity Act, 1972, however, the Appellate Authority vide order 30/31.01.2019 dismissed the appeal of the petitioner upholding the order passed by the Controlling Authority.

8. Mr. Saket Tiwary, learned counsel for the petitioner vehemently submitted that from reading of Section 4 (6)(a) of the Payment of Gratuity Act, it will be apparent that if service of an employee is terminated for any act, willful 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 whereas Section 4(6)(b) says that the service of an employee is terminated for any act which constitutes



an offence involving moral turpitude, his gratuity may be forfeited either in whole or partially. He submits that the order of termination i.e. compulsory retirement from service of the respondent no.4 is as per Section 2(q) of the Payment of Gratuity Act as the respondent no.4 has been punished by way of compulsory retirement because of moral turpitude which has caused a loss to the Corporation to the tune of Rs.1.6 crore and odd.

9. He next submits that the impugned orders have been passed in teeth of the law laid down by the **Hon'ble Apex Court in a judgment of State Bank of India Vs. Ramlal Bhaskar and others** reported in **2011(10) SCC 249** and as such the claim of the respondent no.4 beyond the order of penalty and forfeited of gratuity was not maintainable and so fit to be rejected.

10. He further submitted that now the issue involve in the present writ application has already been set at rest by a three Judges Bench of the Hon'ble Supreme Court in the case of **Chairman-cum-Managing Director, Mahanadi Coalfields Limited Vs. Sri Rabindranath Choubey** reported in **2020 (3) PLJR (SC) 438**.

11. On the other hand, learned counsel for the respondent no.4 by referring to the statements made in his counter



affidavit vehemently contended that the Payment of Gratuity Act, 1972 is an independent act, which seeks to protect the interest of an employee in so far as the payment of gratuity is concerned. Under gratuity act, gratuity can be withheld only on the ground which has been enumerated under Section 4 (6) of the said Act and not otherwise. He submits that the respondent no.4 has not been terminated from service rather he has been made to retire compulsorily on 30.08.2012, while his actual date of retirement was 31.01.2015, hence, the provision contained under Section 4 (6) of the Act does not debar him from being entitled to gratuity in any manner. He next submits that the impugned order passed by the Controlling Authority as well as Appellate Authority is in consonance with the provisions of the Gratuity Act and do not require any interference.

12. The moot question for consideration before this court is as to whether the payment of gratuity will be subject to the outcome of the Departmental Proceeding or the authority under Gratuity Act has rightly passed the order for payment of gratuity. The identical issue involved in the present writ application was pending consideration before the Hon'ble Supreme Court in Civil Appeal No. 9693 of 2013 (**Chairman-cum-Managing Director, Mahanadi Coalfields Limited Vs. Sri Rabindranath Choubey**)



and the three Judges Bench of the Hon'ble Supreme Court having considered the various aspect of the matter including the relevant provisions of the Payment and Gratuity Act, 1972 has been pleased to held that:

“The provisions of [Section 4\(6\)](#) of the Act of 1972 prevail over [Section 4\(1\)](#) as provisions of [Section 4\(6\)](#) contain non-obstante clause as to [Section 4\(1\)](#). It would prevail over the provisions made in [Section 4\(1\)](#) and gratuity would not become payable mandatorily as provided in [Section 4\(1\)](#). The provisions of [Section 4\(6\)](#) provide recovery or forfeiture where services of employee have been terminated for the reasons prescribed in [Section 4\(6\)\(a\)](#) and [4\(6\)\(b\)](#). [Section 4\(6\)\(a\)](#) and (b) both provide for recovery of loss caused or forfeiture wholly or partially in the case of termination of services. In case after superannuation of employee there cannot be any dismissal i.e., termination of services as contemplated in [Section 4\(6\)](#), then there can be no recovery of pecuniary loss caused by employee or forfeiture of gratuity wholly or partially as that can only be done in the event of termination of services on charges found established. Such an interpretation would render continuance of enquiry otiose and would defeat the public policy and the provisions of Act of 1972. The recovery of loss or forfeiture is one of the punishments which depends on exigency of termination by way of dismissal as mandated by [Section 4\(6\)](#). To give effect to the provisions of the Act, the punishment of dismissal can be imposed in view of Rule 34.2, otherwise it would defeat the intendment of provisions contained in [Section 4\(6\)\(a\)](#) and [4\(6\)\(b\)](#) of the Act of 1972. ”



13. This Court also thinks it apt and proper to quote paragraph nos. 38 and 39 of the aforesaid judgment in order to crystallize the matter in issue, which reads as follows:

“38. Taking note of the exposition of law which has been noticed and of the scheme of Rules, 1978, which indubitably has a binding force and are not a subject matter under challenge and are neither in derogation nor in contravention to the scheme of [Payment of Gratuity Act, 1972](#). I have no hesitation in holding that the substantive penalties provided under the schedule of penalties referred to under Rule 27 could be inflicted on a delinquent employee while he is in service but in case where the delinquent employee stood retired or superannuated from service pending disciplinary inquiry, at least either of the substantive penalties provided under Rule 27 are not available to the disciplinary authority to be inflicted with retrospective effect but at the same time punishment of forfeiture of gratuity if held guilty for misconduct or negligence to the extent damage or pecuniary loss has been caused to the employer can be inflicted upon the delinquent in terms of Rule 34.3 of Rules 1978 read with sub section (6) of [Section 4](#) of the Act, 1972 and in case the delinquent employee stands exonerated he became entitled for gratuity for the delay in payment in terms of [Sections 7\(3\)](#) and [7\(3A\)](#) of Act, 1972 and as a matter of caution, it should not be presupposed that where the disciplinary inquiry remain pending and could not be concluded while the delinquent employee was in service in due course of time, he shall be held guilty and punished under the scheme of Rules, 1978.

39. To sum up, my conclusion to the question is as under:



Que. 1 Whether it is permissible in law for the employer to withhold the payment of gratuity even after the employee has attained his superannuation from service because of the pendency of disciplinary proceedings against him?

Ans. I am in agreement with the view expressed by brother Justice Shah that in view of Rule 34.3 of the Rules, 1978, the employer has a right to withhold gratuity during pendency of the disciplinary proceedings.

Que. 2 Whether the penalty of dismissal could be imposed after the employee stood retired from service?

Ans. In my considered view, after conclusion of the disciplinary inquiry, if held guilty, indeed a penalty can be inflicted upon an employee/delinquent who stood retired from service and what should be the nature of penalty is always depend on the relevant scheme of Rules and on the facts and circumstances of each case, but either of the substantive penalties specified under Rule 27 of the Rules, 1978 including dismissal from service are not open to be inflicted on conclusion of the disciplinary proceedings and the punishment of forfeiture of gratuity commensurate with the nature of guilt may be inflicted upon a delinquent employee provided under Rule 34.3 of Rules, 1978 read with sub-section (6) of [Section 4](#) of the Act, 1972.”

14. Considering the aforesaid ratio laid down by the Hon’ble Apex Court in the case of **Chairman-cum-Managing Director, Mahanadi Coalfields Limited Vs. Sri Rabindranath Choubey (supra)** this court is of the opinion that before superannuation of an employee, who was departmentally proceeded with and in terms of the regulation, inflicted with the



punishment of compulsory retirement from the service of the Corporation with forfeiture of entire amount of gratuity the employee would only be entitled for payment of gratuity on the basis of outcome of the departmental proceeding which at present admittedly against the respondent no.4 and the matter between the parties is still pending before the Central Government Industrial Tribunal (CGIT), Dhanbad. Hence, the impugned order of the controlling authority dated 31.01.2018 as contained in Annexure-2 directing the petitioner to pay gratuity to the respondent no.4 as also the appellate order dated 30/31.01.2019 as contained in Annexure 1 to the writ petition upholding the order of the Controlling Authority are hereby set aside.

15. It is needless to say that the payment of gratuity shall be subject to the final outcome of Complaint Case No.1 of 2013. This court hopes and trust that the Tribunal will make all possible endeavour to dispose of this case expeditiously.

16. In view of the aforesaid settled legal position, the writ application is hereby allowed. There shall be no order as to cost.

(Harish Kumar, J)

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AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	08.12.2022.
Transmission Date	NA

