

Form No.J(2)

**IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE**

Present :

The Hon'ble Justice Raja Basu Chowdhury

WPA 1857 of 2009

**Sk. Shajahan
Versus
Union of India & Ors.**

For the petitioner	:	Mr. Achin Majumder
For the respondents	:	Mr. Sukumar Bhattacharya Ms. Oindrila Chatterjee
Heard on	:	12.05.2023
Judgment on	:	12.05.2023

Raja Basu Chowdhury, J:

1. The present writ application has been filed, *inter alia*, challenging the order dated 22nd December, 2008, passed by the Senior Divisional Security Commissioner, R.P.F., South Eastern Railway, Kharagpur.
2. By the aforesaid order, the respondent no.3 has purported to direct recovery of a sum of Rs.1,31,268/- from the retiral dues payable to the petitioner. It is, however, an admitted position that the aforesaid amount has been recovered from the gratuity payable to the petitioner.
3. The petitioner claims to be an Assistant Sub-Inspector of Railway Protection Force of South-Eastern Railway (hereinafter referred to

as “RPF”). At the relevant point, he was posted at the RPF Post Nimpura under Kharagpur Division within the station of Kharagpur.

4. Subsequently, the petitioner was transferred to RPF Post, Ghatsila within the Kharagpur Division vide order dated 26th June, 1996. Since his transferred post was within the Kharagpur Division and the petitioner having not been provided with any accommodation thereat, the petitioner had made a representation seeking permission to continue with the possession of his quarter at Kharagpur. The authorities acceded to his request and permitted the petitioner to occupy the quarter at Kharagpur at normal rent.
5. Subsequently, however, by a notice dated 2nd April, 1997, which was received by the petitioner on 5th April, 1997, he was directed to vacate his railway quarter at Kharagpur. According to the petitioner, since the petitioner was not allotted any quarter at the place of posting at Ghatsila, he once again made a representation to the concerned authority for retention of his quarter, in the interest of the education of his children.
6. Petitioner says that challenging the aforesaid notice dated 2nd April, 1997, a writ application was filed before this Hon’ble Court which was registered as WP No.8924 (W) of 1997. By an order dated 11th November, 1997, this Hon’ble Court was, *inter alia*, pleased to stay the operation of the impugned notice dated 2nd April, 1997, and was

further pleased to permit the petitioner to go on paying normal rent for occupation of his quarter.

7. During pendency of the aforesaid writ application, the writ petitioner was again transferred back from RPF Post Ghatsila to Kharagpur vide an order dated 7th August, 2002. On rejoining his transferred post at Kharagpur, he continued to occupy and possess the railway quarter that had been allotted to him at Kharagpur.
8. On 28th February, 2007, the petitioner was superannuated upon attaining the age of 60 years. Till the date of his retirement the petitioner continued to occupy and possess his quarter at Kharagpur and continued to pay normal rent which was duly accepted by the respondents.
9. Subsequently, by an order dated 6th March, 2008, the aforesaid writ application being WP No.8924 (W) of 1997 was disposed of without any further orders in the matter. It was, however, made clear that disposal of the said application shall not prevent the petitioner from agitating his grievance before any forum of law for realization of his retiral benefits, if any, in accordance with law, if it is so advised.
10. Since his retiral dues had been held back, the petitioner had made a representation dated 11th November, 2008, addressed to the Senior Security Commissioner, RPF intimating that he had continued to occupy the quarter till 26th April, 2007, even after his retirement on 28th February, 2007. As such, by such letter the petitioner sought for regularisation of his occupation of the quarter

which had been allotted to him at Kharagpur and for disbursal of his retiral benefits.

11. Subsequently, by an order dated 22nd December, 2008, on consideration of the petitioner's representation the respondent no.3 regularised the occupation of the petitioner in his quarter from 18th August, 2002, when he was transferred back to Kharagpur till 26th April, 2007, when he vacated the quarter after his superannuation. However, the respondent no.3 determined that a sum of Rs. 1,31,268/- towards damages for the petitioner having occupied the quarter at Kharagpur beyond the permitted period from 1st May, 1997 to 17th August, 2002, with a further direction to effect recovery of the aforesaid sum from the settlement dues of the petitioner.
12. Challenging the aforesaid order the present writ application has been filed.
13. Mr. Majumder, learned advocate representing the writ petitioner, submits that the aforesaid amount of Rs. 1,31,268/- was recovered from the gratuity payable to the petitioner. He says that all along during the entire service career of the petitioner the respondents had permitted the petitioner to pay normal rent, for the period for which the petitioner had occupied the quarter. It was only after the superannuation of the petitioner that such a decision has been taken. The aforesaid decision taken by the respondent no.3 is contrary to the settled principles of law and natural justice. He says

that no opportunity of hearing was afforded to the petitioner prior to determining damages and effecting recovery thereof from the gratuity.

14. By referring to section 4(6)(a) of the Payment of Gratuity Act, 1972 (hereinafter referred to as the "said Act"), it is submitted that gratuity payable to an employee can be forfeited under Sub-section 6 of Section 4 of the said Act, provided the service of such an employee had been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer and that the gratuity shall be forfeited to the extent of the damage or loss so caused. Insofar as Section 4(6)(b) of the said Act is concerned, the same cannot apply in respect of the petitioner.
15. It is contended on behalf of the petitioner that no proceedings under section 4(6) of the said Act, had been initiated by the respondents prior to effecting such recovery. By placing reliance on a judgement delivered by the Hon'ble Supreme Court in the case of **Shri D.V. Kapoor v. Union of India & Ors.**, reported in **1990 (3) SLR 5**, he says employees' right to receive gratuity is a statutory right. The measure of deprivation, therefore, must be correlated to or commensurate with the gravity of the grave misconduct or irregularity as it offends the right to assistance at the evening of his life as assured under Article 41 of the Constitution.

16. It is submitted that the respondents having permitted the petitioner to occupy the quarter upon payment of normal rent during his entire service tenure, could not have charged extraordinary rate subsequent to his retirement and could not have recovered the same from the gratuity payable to the petitioner. By further placing reliance on sections 13 and 14 of the said Act, it is submitted that no gratuity payable under the said Act is liable to attachment and the said Act has an overriding effect.
17. He says that under no circumstances the respondents could have attached or realised their demand from the gratuity payable to the petitioner. In support of his aforesaid contention, he has placed reliance on a Division Bench judgement of this Hon'ble Court delivered in the case of ***Union of India v. Gurtiboina Appaia V.G. Shankar***, reported in **2022 (1) CHN (Cal) 508**. He has also placed reliance on a judgement delivered by the Hon'ble Supreme Court in the case of ***Union of India & Ors. v. Madan Mohan Prasad***, reported in **(2010) 15 SCC 785**. In the facts stated hereinabove, he says that recovery made by the respondents vide order dated 22nd December, 2008, cannot be sustained. The same should be set aside, with a further direction upon the respondents to refund the gratuity along with interest at statutory rate.
18. *Per contra*, Mr. Bhattacharya, learned advocate representing the respondents, at the outset has placed before this Court a list of dates. By referring to the same he says that the petitioner had not

only unauthorisedly retained his quarter on and from 2nd April, 1997, but had also moved a writ application before this Hon'ble Court and obtained an order of stay. He says that the respondents had, however, regularised a part of the illegal occupation of the quarter occupied by the petitioner for the period from 18th August, 2002 to 26th April, 2007, and for the aforesaid period the petitioner was permitted to pay rent at normal rate. However, insofar as the period between 1st May, 1997 and 17th August, 2002 is concerned, the respondents have determined damages payable by the petitioner for his unauthorised occupation of the quarter. Such decision had been taken on the basis and in terms of Rule 16 of the Railway Services (Pension) Rules, 1993 (hereinafter referred to as the "said Rules").

19. By further placing reliance on Rule 16 of the said Rules he says that the aforesaid Rule authorises the respondents to recover damages or rent from the ex-railway employee. In this case since no dispute had been raised by the petitioner the matter was not referred to the Estate Officer under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. He says that there is no irregularity on behalf of the authorities in determining and in realising the damages from the retiral benefits payable to the petitioner.
20. By referring to a judgement delivered by the Hon'ble Supreme Court in the case of **Secretary, ONGC Ltd. & Another v. V.U. Warriar**,

reported in **(2005) 5 SCC 245**, it is submitted that the Hon'ble Supreme Court has long recognised the power of the authorities to recover damages for unauthorised occupation of a quarter from the gratuity. The right to recover damages from the gratuity on the basis and in terms of Death-cum-Retirement Rules has also been recognised by the Hon'ble Supreme Court.

21. By further placing reliance in the case of ***M/s Steel Authority of India Limited v. Raghendra Singh and others***, reported in **(2020) 3 Apex Court Judgements (SC) 805**, he says that if an employee occupies a quarter beyond his specified period, penal rent would be a natural consequence and such penal rent can be adjusted against the dues payable, including gratuity.
22. While distinguishing the judgement delivered by the Division Bench of this Court in the case of ***Union of India v. Gurtiboina Appaia V.G. Shankar*** (supra), he says that the judgement delivered in the case of ***Secretary, ONGC Limited*** (supra) was not cited before the Hon'ble Division Bench and as such the aforesaid judgement cannot be considered a good law.
23. He says there is no irregularity on behalf of the respondents in determining and in recovering the aforesaid amount from the gratuity payable to the petitioner.
24. Mr. Majumder, in reply by referring to Rule 16, Sub-Rule 8(e) of the said Rules, submits that the aforesaid Rule also does not permit the respondents to become a judge of their own cause. He says that in

the event there is any dispute regarding recovery of damages or rent from the ex-railway employee, the same is subject to adjudication by the concerned Estate Officer appointed under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. Admittedly, in this case there was dispute as regards payment of rent in excess of normal rate. The respondents ought not to have decided upon the quantum of damages payable by the petitioner. In any event, he says, that the aforesaid amount could not have been recovered by the respondents from the gratuity payable to the petitioner.

25. Heard learned advocates appearing for the respective parties and considered the materials on record. In this case I find that the petitioner while posted at Kharagpur was allotted a quarter. Subsequently, when the petitioner was transferred to Ghatsila by an order dated 26th June, 1996, the petitioner had made a representation before the authorities, *inter alia*, praying for permission so as to continue occupation of his quarter at Kharagpur since no accommodation was available at Ghatsila. Records reveal that the petitioner was permitted to occupy the quarter at Kharagpur until the time herein mentioned. On 2nd April, 2007, a notice was issued by the respondents calling upon the petitioner to vacate the said quarter. The petitioner, however, challenged the same by filing a writ application which was registered as WP No.8924 (W) of 1997. Records reveal that by an

order dated 11th November, 1997, the order passed by the authorities dated 2nd April, 1997, was stayed and the petitioner was permitted to occupy the quarter upon payment of normal rent.

26. Subsequently, however, the petitioner was transferred back to Kharagpur and was permitted to occupy his quarter at Kharagpur. The petitioner was superannuated from service on 28th February, 2007, and on 26th April, 2007, the petitioner had vacated the said quarter.

27. Still later the writ application being WP 8924 (W) of 1997 was disposed of without further order. A Co-ordinate Bench of this Hon'ble Court, however, by the said order made it clear that disposal of the writ application will not prevent the petitioner from agitating his grievance before any forum of law for realisation of his retiral benefits, if any, in accordance with law.

28. Consequent upon the same, the petitioner had applied before the respondent no.2 for *post facto* regularisation of the quarter which he was occupying till the date of vacating the same at Kharagpur, and for the disbursal of his retiral benefits.

29. Records reveal that the respondent no.3 while regularisation the occupation of the petitioner from 8th August, 2002 to 26th April, 2007, by permitting the petitioner to make payment of rent at normal rate, determined the damages payable by the petitioner for the period of his occupation between 1st May, 1997 to 17th August, 2002, and further quantified a sum of Rs. 1,31,268/- towards

damages with a further direction to realise the same from the admissible dues payable to the petitioner. The aforesaid amount has already been realised by the respondents.

30. The aforesaid notice including the recovery has been challenged.

31. I find that Mr. Bhattacharya, learned advocate representing the respondents, by placing reliance on the Railway Services (Pension) Rules, 1993, and in particular Rule 16 thereof, has strenuously argued that it is within the authority and jurisdiction of the respondents to realise the damages suffered by them, for the failure on the part of the petitioner to vacate his quarter. He says that the right to recover damages from gratuity has long been recognised by the Hon'ble Supreme Court and in support thereof he has relied on judgement delivered by the Hon'ble Supreme Court in the case of **Secretary, ONGC Limited** (supra). He says that this judgement was not considered by the Division Bench of this Hon'ble Court and as such the judgement delivered by the Division Bench of this Hon'ble Court in the case of **Union of India v. Gurtiboina Appaia V.G. Shankar** (supra) cannot be considered a good law.

32. Before proceeding further, it would be relevant to refer to the provisions of Payment of Gratuity Act, 1972 insofar as the same concerns forfeiture of gratuity.

33. In this context Section 4(6) of the Payment of Gratuity Act is extracted hereinbelow:

“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.”

34. It would appear from the above that gratuity can only be forfeited provided there has been omission or negligence causing damage or loss to, or destruction to property belonging to the employer and where the service of the employee is terminated for riotous, disorderly or violent conduct or for an offence involving moral turpitude committed in course of employment.

35. Section 13 of the said Act affords protection of gratuity while section 14 of the said Act gives an overriding effect. The same are extracted herein below:

“13. Protection of gratuity. – No gratuity payable under this Act ¹[and no gratuity payable to an employee employed in any establishment, factory, mine, oilfield, plantation, port, railway company or shop exempted under section 5] shall be liable to attachment in execution of any decree or order of any civil, revenue or criminal court.

“14. Act to override other enactments, etc. – The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act.”

36. I find in the judgement delivered by the Hon’ble Supreme Court in the case of **Secretary, ONGC** (supra), the Hon’ble Supreme Court while considering the provisions of the said Act, noted in paragraph 10 of the said judgment that the statutory regulations framed by ONGC (Corporation) which are more liberal and beneficial than a provision of Payment of Gratuity Act are applicable to the employees of the Corporation.

37. It is seen that section 4(5) of the said Act, provides for an exception where the right of an employee to receive better terms of gratuity has been recognised.

38. It is noticed that in the light of the aforesaid, the Hon’ble Supreme Court in paragraph 17 of the said judgement was, *inter alia*, pleased to observe as follows:

“17. *Having heard the learned counsel for the parties, in our opinion, the appeals deserve to be allowed. It is no doubt true that pensionary benefits, such as gratuity, cannot be said to be “bounty”. Ordinarily, therefore, payment of benefit of gratuity cannot be withheld by an employer. In the instant case, however, it is the specific case of the Commission that the Commission is having a statutory status. In exercise of statutory powers under Section 32(1) of the Act, regulations known as the Oil and Natural Gas Commission (Death, Retirement and Terminal Gratuity) Regulations, 1969 have been framed by the Commission. In Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi [(1975) 1 SCC 421 : 1975 SCC (L&S) 101] the Constitution Bench of this Court held that regulations framed by the Commission under Section 32 of the Oil and Natural Gas Commission Act, 1959 are statutory in nature and they are enforceable in a court of law. They provide for eligibility of grant of gratuity, extent of gratuity, etc. Regulation 5 deals with recovery of dues of the Commission and reads thus:*

“5. Recovery of dues.—The appointing authority, or any other authority empowered by the Commission in this behalf shall have the right to make recovery of the Commission's dues before the payment of the death-cum-retirement gratuity due in respect of an officer even without obtaining his consent or without obtaining the consent of the members of his family in the case of a deceased officer, as the case may be.”

The above regulation leaves no room for doubt that the Commission has right to effect recovery of its dues from any officer without his consent from gratuity. In the present case admittedly the respondent retired after office hours of 28-2-1990. According to the Commission, he could be allowed four months' time to occupy the quarters which was granted to him. His prayer for extension was considered and rejected stating that it would not be possible for the Commission to accept the prayer in view of several officers waiting for quarters. He was also informed that if he would not vacate the quarters, penal rent as per the policy of the Commission would be recovered from him. But the respondent did not vacate the quarters. It was only after eviction proceedings were initiated that he vacated the quarters on 16-5-1991. In the circumstances, in our opinion, it cannot be said that the action of the Commission was arbitrary, unlawful or unreasonable. It also cannot be said that the Commission had no right to withhold gratuity by deducting the amount which is found "due" to the Commission and payable by the respondent towards penal charges for unauthorised occupation of the quarters for the period between 1-7-1990 and 15-5-1991."

39. Admittedly, in this case there is no such statutory rule which has been framed by the railways dealing with payment of gratuity. As such the provisions of Payment of Gratuity Act, will have an overriding effect in so far as the Railway Services (Pension) Rules, 1993, framed by the railways are concerned.

40. This apart, in this case, no determination of the damages by the authorities could have been made, especially when there was a dispute with regard to the same. As such no recovery, therefore could not have been made from the petitioner's gratuity. The judgement delivered by the Division Bench of this Hon'ble Court in the case of **Union of India v. Gurtiboina Appaia V.G. Shankar** (supra) had the occasion to consider the aforesaid issue. It would appear that the Division Bench of this Hon'ble Court in paragraphs 25 to 29 has been, *inter alia*, pleased to observe as follows:

“25. *Read in such context, in order to be intra vires, the Clause (a) of Rule 16(8) of the 1993 Rules has to be read down to the extent that, if the Railway accommodation is not vacated after termination of the Railway servant, as envisaged in Section 4(6) of the Gratuity Act, the gratuity may be withheld. Apart from such interpretation, Clause (a) of sub-rule (8) of Rule 16 has to be declared ultra vires.*

26. *That apart, Clauses (b), (c) and (d) also have to be read down to the extent that withholding or adjustment from the Death-Cum-Retirement Gratuity in lieu of dues can only be done from the Death-Cum-Retirement Gratuity in the event there is a termination as contemplated in Section 4(6) of the Gratuity Act.*

27. *Any other interpretation of Rule 16(8) of the 1993 Rules will render the same open to be overridden by the Gratuity Act, in view of Section 14 of the said Act.*

28. *In the present case, whatever might have been the explanation for not regularizing the accommodation-in-*

question in favour of the respondent, as advanced on behalf of the appellants-Authorities, the same could not be a justification of deducting/withholding any amount of gratuity even if the Railway employees did not vacate his/her accommodation after superannuation or after the permissible period of retention after the superannuation.

29. *Even looking into Clause (e) of Rule 16(8) of the 1993 Rules, the dispute regarding recovery of damages or rent from the ex-Railway employee shall be subject to adjudication by the concerned Estate Officer appointed under the PP Act. Section 7 of the PP Act specifically empowers the Estate Officer to require payment of rent or damages in respect of public premises where any person is in arrears of rent payable in respect of the public premises. Without due compliance with the detailed procedure as laid down chronologically in the various sub-sections of Section 7 of the PP Act, no other recourse is open to the Railway Authorities to recover the dues.”*

41. In view thereof, and having regard to the facts of this case, I am of the view that no recovery from the petitioner's gratuity was permissible. In any event, no recovery of damages could have been made by the respondents, without first having the same adjudicated by an Estate Officer appointed under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971.

42. I am also not impressed by the argument advanced by Mr. Bhattacharya that there was no dispute with regard to

quantification of the damages or that the petitioner had accepted the same.

43. Admittedly, in this case the petitioner had made a representation dated 11th November, 2008, and had sought for regularisation of his occupation. During the entire service tenure of the petitioner the respondents had realised rent at normal rate. At no point of time the respondents had charged damages or extraordinary rate of rent. It is not the case of the respondents that petitioner was overstaying the quarter beyond the date of his superannuation for prolonged period. In any event, without going into the question whether the respondents can at all realise damages from the petitioner and quantification thereof, I am of the view that such a dispute, if any, ought to have been adjudicated by the Estate Officer in the mode and manner provided for in the said Rules. The same, however, could not have under any circumstances, authorised the respondents to recover any amount from the gratuity payable to the petitioner.

44. In view thereof, the order passed by the respondent no.3 dated 22nd December, 2008 cannot be sustained. The same is accordingly set aside and quashed.

45. The respondents are directed to disburse the gratuity payable to the petitioner along with interest at statutory rate as provided in the

said Act, within a period of eight weeks from the date of communication of this order.

46. This order shall, however, not prevent the respondents from realising the damages, if any, in accordance with law in the manner as provided for in the Railway Services (Pension) Rules, 1993.

47. With the aforesaid observation and direction, the writ application being WPA 1857 of 2009 stands disposed of.

48. There shall be no order as to costs.

49. Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis upon compliance of requisite formalities.

(Raja Basu Chowdhury, J.)

S.S.
Assistant Registrar (Court)