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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: 05th April, 2023*

+ W.P.(C) 2753/2019

HIMANSHU SRIVASTAVA AND ORS. Petitioners

Through: Mr. Kabir S. Ghosh, Advocate.

versus

UNION OF INDIA AND ORS. Respondents

Through: Ms. Anjana Gosain, Advocate
for R-1 to R-4.

Mr. Puneet Taneja and Ms. Laxmi Kumari,
Advocates for R-5.

CORAM:

HON'BLE MS. JUSTICE JYOTI SINGH

JUDGEMENT

JYOTI SINGH, J. (ORAL)

C.M. APPL. 2467/2023

1. Present application has been preferred on behalf of the Petitioners seeking condonation of delay of 135 days in filing the rejoinder.

2. Issue notice.

3. Ms. Anjana Gosain, learned counsel accepts notice on behalf of Respondents No. 1 to 4.

4. Mr. Puneet Taneja, learned counsel accepts notice on behalf of Respondent No. 5.

5. For the reasons stated in the application, the same is allowed.

6. Delay of 135 days in filing the rejoinder is condoned.

7. Rejoinder is taken on record.

8. Another copy of the rejoinder has been handed over to learned counsel for Respondent No. 5 during the course of hearing.

9. Application stands disposed of.

Signature Not Verified

Digitally Signed by: KAMAL
KUMAR
Location:
Signing Date: 29/04/2023
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W.P.(C) 2753/2019

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10. Present writ petition has been filed on behalf of the Petitioners seeking the following reliefs:-

“I. Issue a writ of mandamus thereby directing the Respondents herein to extend the benefit of enhanced gratuity amount to the Petitioners who have retired on or after 01.01.2017 as per O.M. No. W-02/0028/2017- DPE(WC)-GL-XIII/17 dated 03.08.2017 issued by the Min. of Heavy Industries & Public Enterprises (Dept. Of Public Enterprises) and quash the Office Order No. 477/2018 dated 22.05.2018 issued by the Respondent No. 5; and

II. Issue a Writ of mandamus directing the Respondents to release the remaining gratuity amount lying with the Respondents as per the increased gratuity amount of Rs. 20 lakhs to the Petitioners herein;”

11. Factual score emerging from the narrative in the writ petition is that Petitioners joined the services of Respondent No. 5/Pawan Hans Limited between the years 1986 to 1989 and after serving for several decades, without a blemish in service, retired on various dates between 01.01.2017 to 28.02.2018. Payment of Gratuity Act, 1972 (hereinafter referred to as the ‘1972 Act’) was enacted on 16.09.1972 as a welfare legislation and envisages payment of lump sum amount to an employee at the time of retirement in view of the years of service rendered by the employee with the concerned employer/establishment. Under Section 4(3) of 1972 Act, the amount of Gratuity is to be paid as per the ceiling limit notified from time to time by the Central Government.

12. Respondent No. 5 is a Mini Ratna-I category Central Public Sector Undertaking under the administrative control of Ministry of Civil Aviation/Respondent No. 1. It was incorporated on 15.10.1985 as the Helicopter Corporation of India with the objective of providing helicopter support services to oil sectors for offshore exploration operations, services in remote areas and charter services for tourism promotion. The 1972 Act admittedly applies to employees of Respondent No. 5. On 24.05.2010, the 1972 Act was amended by the

Payment of Gratuity (Amendment) Act, 2010 and the limit of Gratuity payable was enhanced from Rs.3.5 lakhs to Rs.10 lakhs w.e.f. 24.05.2010.

13. On 19.11.2015, Report of the 7th CPC was submitted to the Central Government wherein number of recommendations were made with regard to the pay structures, retiral benefits etc. of the Central Government employees. In line with the recommendations, the Central Government decided to review and revise the existing structure of salary and emoluments of employees working as Executives in various Central Public Sector Enterprises ('CPSEs') and in this view, appointed 3rd Pay Revision Committee (PRC) on 09.06.2016 headed by Justice Satish Chandra (Retd.) to consider the 7th CPC recommendations.

14. Government of India issued an O.M. dated 04.08.2016 vide which various modifications were made qua Central Government employees governed by CCS (Pension) Rules, 1972, whereby *inter alia* Gratuity limit was enhanced from Rs.10 lakhs to Rs.20 lakhs retrospectively w.e.f. 01.01.2016. On 21.11.2016, the 3rd PRC submitted its report to the Central Government i.e. Department of Public Enterprises, Ministry of Heavy Industries and Public Enterprises and in view of the report, Government issued O.M. dated 03.08.2017 whereby, in addition to revised pay scales, the ceiling of Gratuity of Executives and non-unionised Supervisors of CPSEs was to be raised to Rs.20 lakhs w.e.f. 01.01.2017. Clause 12.1 of the O.M. is as follows:-

"12.1 The ceiling of gratuity of the executives and non-unionised supervisors of the CPSEs would be raised from Rs. 10 lakhs to Rs. 20 lakhs with effect from 01.01.2017 and the funding for the entire amount of gratuity would be met from within the ceiling of 30% of BP plus DA. Besides, the ceiling of gratuity shall increase by 25% whenever IDA rises by 50%."

15. As per Clause 3, the revised pay scales were to be implemented

subject to ‘affordability’ of the concerned PSU and Clause 3 is as follows:-

*“3. **Affordability:** The revised pay scales would be implemented subject to the condition that the additional financial impact in the year of implementing the revised pay-package for Board level executives, Below Board level executives and Non-Unionized Supervisors should not be more than 20% of the average Profit Before Tax (PBT) of the last three financial years preceding the year of implementation.”*

16. Pursuant to the said O.M., revised pay scales were made applicable to CPSEs and being a profit making concern, the Petitioners were also granted the benefits of the revised pay scales and the only grievance that remained was enhanced Gratuity w.e.f. 01.01.2017.

17. In the meantime, considering the inflation and wage increase in case of employees in the private sectors, Central Government decided that entitlement to Gratuity should be revised even in respect of employees covered under the 1972 Act and initiated the process for amending the 1972 Act to increase the maximum limit of Gratuity to such an amount as may be notified by the Central Government from time to time and accordingly, Payment of Gratuity (Amendment) Bill, 2018 was passed followed by Notification dated 29.03.2018, enhancing the limit of Gratuity to Rs. 20 lakhs. This led to a confusion amongst various employees as to the effective date of applicability of the enhanced Gratuity and numerous representations were made by various stakeholders in this regard. In order to clarify this issue, Government of India issued a Clarificatory O.M. dated 10.07.2018, whereby it was clarified that payment of Gratuity under the DPE Guidelines dated 03.08.2017 is subject to affordability of CPSEs concerned, effective for the period 01.01.2017 to 28.03.2018, in respect of Executives and non-unionised Supervisors of CPSEs or IDA pay patterns, where pay was revised w.e.f. 01.01.2017. It was

further clarified that on or after 29.03.2018, payment of Rs. 20 lakhs is mandatory for all CPSEs, irrespective of affordability.

18. Not receiving the enhanced Gratuity, Petitioners made representations, however, there was neither any response nor any action by Respondent No. 5, compelling the Petitioners to file the present writ petition.

19. Contentions raised on behalf of the Petitioners are that by virtue of Clause 12 of O.M. dated 03.08.2017, issued by the Central Government, Respondent No. 5 is bound to enhance the Gratuity upto the ceiling limit of Rs.20 lakhs w.e.f. 01.01.2017. Petitioners cannot be deprived of the enhanced Gratuity in the garb of 'affordability' stipulated in the Clarificatory O.M. dated 10.07.2018 in view of the fact that Respondent No. 5 has no financial crunch and in fact, implemented the revised pay scales under the same O.M. Respondent No. 5 has been a profit making concern which is indicated from the Financial statements for the years 2013-17. All similarly placed Public Sector Undertakings such as Indian Oil Corporation, National Hydroelectric Power Corporation Limited, Bharat Petroleum Corporation Limited, National Seeds Corporation Limited and even Reserve Bank of India have paid enhanced Gratuity to their employees w.e.f. 01.01.2017. It is a settled law that Gratuity is not the bounty of the State and Courts have repeatedly held that retiral and terminal benefits of an employee must be released without any delay.

20. *Per contra*, contention of Respondent No. 5 is that Petitioners have failed to demonstrate how they have a legal right to seek enhanced Gratuity of Rs.20 lakhs under the Notification dated 29.03.2018, when they have admittedly superannuated in 2017 i.e. prior to the Notification. All Petitioners have attained superannuation on various dates between 01.01.2017 to 28.02.2018 and have been

duly paid the admissible amount of Gratuity as per the ceiling limit of Rs.10 lakhs applicable at that point in time.

21. The entire case of the Petitioners is based on DPE O.M. dated 03.08.2017, which provides for enhancement of Gratuity to executives and non-unionised Supervisors of CPSEs. In fact, the said O.M. having been issued by DPE in relation to CPSEs did not take note of the fact that Gratuity in respect of CPSEs employees is governed by 1972 Act and until amendment takes place in the said Act, directions issued by DPE will be only recommendatory and not mandatory. In fact, realising this position, DPE issued the Clarificatory O.M. dated 10.07.2018 making payment of Gratuity subject to affordability of the CPSEs concerned for the period 01.01.2017 to 28.03.2018, since on or after 29.03.2018 payment of enhanced Gratuity is mandatory in light of the amendment to 1972 Act.

22. It is further contended that prior to the present amendment, a similar situation had arisen whereby DPE, in view of the implementation of Pay Commission Recommendations had enhanced the ceiling from Rs.3.5 lakhs to Rs.10 lakhs w.e.f. 01.01.2007 vide O.M. dated 26.11.2008. However, since the 1972 Act was amended only vide Notification dated 18.05.2010 enhancing the Gratuity, DPE informed vide letter dated 02.06.2010 that the enhanced Gratuity shall come into force w.e.f. 24.05.2010.

23. Additionally, in the present writ petition, out of 14 Petitioners, only 5 can even otherwise rely on the DPE Guidelines which are for executives and non-unionised Supervisors and the rest of the Petitioners fall in the workmen category to which the O.M. does not apply.

24. I have heard the learned counsels for the parties and examined their contentions.

25. In the wake of recommendations of 7th CPC, Central Government reviewed and revised the existing structure of salary and emoluments of employees working in CPSEs and on 09.06.2016 the 3rd PRC was appointed. On 21.11.2016, 3rd PRC headed by Justice Satish Chandra submitted a report to the Central Government, in wake of which, an O.M. dated 03.08.2017 was issued enhancing the ceiling of Gratuity to Rs.20 lakhs w.e.f. 01.01.2017 and the funding was to be met from within the ceiling of 30% of Basic Pay + DA. Clause 3 provided for implementation subject to 'affordability' of the concerned PSUs. It is admitted that revised pay scales were implemented by Respondent No. 5 and therefore, the limited grievance in the present writ petition is with respect to enhancement of Gratuity from 01.01.2017. It is equally undisputed that on 29.03.2018 the Central Government has notified the enhancement of Gratuity to Rs.20 lakhs by S.O.1420(E) and in view of the confusion that arose with respect to the effective date of applicability of enhanced Gratuity, the Central Government issued a clarificatory O.M. dated 10.07.2018 clarifying that payment of gratuity under DPE Guidelines dated 03.08.2017 is subject to affordability of CPSEs concerned for the period 01.01.2017 till 28.03.2018 in respect of executives and non-unionized supervisors of CPSEs on IDA pay patterns whereas on or after 29.03.2018, payment of enhanced gratuity was a mandate.

26. The short question, therefore, raised by the Petitioners is with respect to the 'affordability' of Respondent No. 5 to pay the enhanced gratuity from 01.01.2017. In the rejoinder affidavit filed by the Petitioners, it is stated that "affordability" only means that implementation of the benefits should not have an additional financial impact of more than 20% of the average Profit Before Tax ('PBT') of the last three financial years. It is further brought out that for the

relevant years i.e. 2014-15, 2015-16 and 2016-17, the net profits/loss after tax earned by Respondent No. 5 is as follows:-

Financial Year	Profit after Tax
2012-13	Rs. 11.70 Crores
2013-14	Rs. 38.57 Crores
2014-15	Rs. 38.81 Crores
2015-16	Rs. 58.10 Crores
2016-17	Rs. 254.10 Crores

27. This, according to the Petitioners, is a summarised account extracted from annual report of Respondent No. 5 and as per this, the average PBT for the relevant three years comes to Rs.117 Crores $[(38.81+58.10+254.10)/3]$. Referring to these figures, it is the contention of the Petitioners that the financial effect of the payment of enhanced gratuity has not been considered by Respondent No. 5 taking into account the profits as well as the fact that the additional impact will not go beyond the permissible limit of 20% of average PBT.

28. Perusal of the impugned order dated 22.05.2018 shows that Respondent No. 5 has rejected the claims of the Petitioners only on the ground that the enhanced gratuity limit of Rs.20 lakhs is effective from 29.03.2018 as per the Payment of Gratuity (Amendment) Act, 2018. None of the factors urged by the Petitioners, as captured above, have been considered by Respondent No. 5, more particularly, the financial statements which, according to the Petitioners, shed light on the fact that the payment of enhanced gratuity is in the 'affordable' limit.

29. A similar situation arose before a Co-ordinate Bench of this Court in *States Farms Corporation of India Ltd. v. P.S. Gupta, 2014 SCC OnLine Del 3419*, where the challenge was to an order passed by the Controlling Authority under the 1972 Act, allowing the claim of

the employee therein for enhanced gratuity under the earlier ceiling of Rs. 10 lakhs. The primordial ground of challenge by the Petitioner was that if the CPSE cannot afford to pay full package, it was within its power to so reject, as this was dependant on the affordability of the concerned PSU as under the applicable O.M., it was only if the additional outgo by such revision does not exceed 20% of the average PBT that a PSU could be compelled to enhance the gratuity. Significantly, the Court was dealing with the similar clause in the O.M. which is as follows:-

“3. Affordability for implementation of pay revision : -

The revised pay scales would be adopted, subject to the condition that the additional outgo by such revision for a period of 12 months should not result in more than 20% dip in profit before tax (PBT) for the year 2007-08 of a CPSE in respect of executives as well as non-unionised supervisory staff taken together in a CPSE. CPSE that cannot afford to pay full package, can implement with either part PRP or no PRP. These CPSEs may pay the full package subsequently, provided the dip in the profit (PBT) is fully recouped to the original level.”

30. Having examined the issue, the Court held as under:-

“16. From the above, it is clear that the available balance of profit before tax was within the permissible limit of 20% which is sufficient and the additional dip of approximately 2.98% in the year 2007-08 may be recouped, and the enhanced gratuity could be paid in terms of the OM dated November 26, 2008. I am conscious of the fact that the aforesaid report of the Controlling Authority is conclusive in favour of the respondent, but the same need to be considered by the petitioner. The decision on grant of any benefit need to be taken by the concerned CPSE, more particularly, when affordability need to be seen. Further, this Court would restrain itself from forming an opinion on the report. In the fitness of things, it would be appropriate for the Board of the petitioner organization to consider the report submitted by the Controlling Authority and take a view on the payment of enhanced gratuity to the respondent herein. This I say so, more particularly, in view of my conclusion above that the affordability of grant of enhanced gratuity was not at all considered by the Board before sending the case for approval of the Ministry of Agriculture. If the Board is of the view that the enhanced gratuity is affordable, then the same shall be paid to the respondent in terms of the directions of the Controlling Authority, including interest as granted by him, after seeking the release of the amount as stood transferred to this Court pursuant to the order of

this Court dated October 11, 2013. The aforesaid directions shall be implemented by the petitioner within a period of three months from today. In the eventuality, the decision of the Board is against the payment of enhanced gratuity to the respondent, the respondent shall be at liberty to revive this petition by filing appropriate application.”

31. In my view, the judgment squarely covers the present case. As held by the Court, the decision on grant of the benefit of the enhanced ceiling in the Gratuity has to be taken in the first instance by the concerned CPSE since it relates to affordability and at this stage, the Court must refrain from forming any final opinion. The impugned order shows that there has been no consideration of the financials of Respondent No. 5 and therefore, it would be appropriate for the Board of Directors of Respondent No. 5 to consider the issue of payment of enhanced gratuity keeping in mind the financials for the relevant period i.e. 2014-15, 2015-16 and 2016-17 and also assess if the payment of enhanced gratuity would lead to an additional outgo to exceed 20% of the average PBT. If the Board is of the view that the enhanced gratuity is affordable, then necessary payments shall be made to the Petitioners. However, if the decision of the Board is against the enhancement, a reasoned and speaking order shall be passed in respect thereto and communicated to the Petitioners who shall be at liberty to take recourse to legal remedies available to them, if so advised to challenge the said decision. The entire exercise of taking a decision shall be completed within three months from today.

32. Respondent No.5 has also taken an objection that five of the Petitioners fall in the workmen category and therefore, the O.Ms. relied upon are not applicable. It is open to the competent authority to examine this issue in the light of the provisions of the O.M. and take a considered decision. Insofar as the argument that some of the Petitioners have superannuated in 2017 prior to the issue of the Notification dated 29.03.2018 is concerned, the argument cannot be

accepted for the simple reason that Clause 12.1 of the O.M. dated 03.08.2017 clearly provides that an enhanced ceiling of Rs.20 lakhs will come into force from 01.01.2017 and therefore, if the Petitioners succeed and the effect is given from 01.01.2017, they will be clearly covered under the Notification.

33. With these observations and for the aforesaid reasons, writ petition is disposed of.

APRIL 05, 2023/shivam

JYOTI SINGH, J

