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

% **Date of order: 21st August, 2023**

\+ W.P.(C) 11996/2018

SHANTI SWAROOP ..... Petitioner
Through: Mr. Saqib, Advocate

versus

DELHI URBAN SHELTER IMPROVEMENT BOARD THROUGH ITS CHIEF EXECUTIVE OFFICER ..... Respondent
Through: Mr. Parvinder Chauhan and Ms. Aakriti Garg, Advocates

CORAM:

HON'BLE MR. JUSTICE CHANDRA DHARI SINGH

ORDER

CHANDRA DHARI SINGH, J (Oral)

1. The instant petition under Article 226 of the Constitution of India has been filed on behalf of the petitioner seeking the following reliefs:

> *"(a) Call for records of the case; and*
> *(b) issue writ, order or direction in the nature of certiorari thereby quashing the impugned Office Order No. F/I0970/SE(COORDN.)/PF/(28)/2018/D-I79 dated 04.04.2018 passed by the respondent-DUSIB; and*
> *(c) issue writ, order or direction in the nature of mandamus thereby further directing the respondent to immediately release his terminal benefits including retirement gratuity along with interest for the delay as applicable under CCS Pension Rules;*
> *(d) award costs of the litigation in favour of the petitioner; and Pass any or further order(s) that this Hon'ble Court may deem fit and proper in view of the facts and circumstances of the case, in the interest of justice."*

2. The Brief Factual Matrix has been recapitulated hereinbelow-

a) In 1978, the petitioner joined the Slum Wing of Municipal Corporation of Delhi (MCD) as Junior Engineer (JE).The petitioner vide Establishment Order No. GA/1150/2/95/Vol.-II/D-140 dated 22nd March, 2001, was entrusted with the current duty charge of the post of Executive Engineer (Civil) in the Slum & JJ Department.

b) On 15th September 2009, vide another the petitioner was entrusted with the duty charge of the post of Superintendent Engineer on current duty charge basis with immediate effect was transferred to one Sh. Mahajan and the petitioner was working at post of Executive Engineer (Civil).

c) On 2nd May, 2014, upon recommendations of the Departmental Promotion Committee (DPC) and approval of the CEO, DUSIB, vide office order, the petitioner who was working as Executive Engineer (Civil) on an ad-hoc basis was given regular promotion to the post of Executive Engineer (Civil). On the same date, vide another office order, the petitioner who was working as Executive Engineer (Civil) was given a regular promotion to the post of Superintending Engineer (Civil).

d) On 2nd March 2016, the Department of Personnel & Training, Ministry of Personnel, Government of India issued O.M. No. 18/03/2015 regarding the recovery of wrongful/excess payments made to government servants.

e) On 7th June 2016, vide office order,, services of petitioner were regularised upon promotion from the post of Assistant Engineer. Vide an Addendum No. GA/4505/Admin/2012/D-132, it was also clarified that the effective date of promotion is only for seniority purposes and that no financial benefit will be given to the officers from the said effective date. On 4th November, 2016, another Office Order No. GA/505/Admin/2012/D-332 was issued by the DUSIB, without superseding, withdrawing and/or modifying the earlier office order(s).

f) On 30th January, 2018, the petitioner superannuated and vide Impugned Office Order No. F/10970/SE/PF/28/2018/D-179 dated 04th April 2018, the recovery was directed to be made against petitioner for a sum of Rs. 5,36,053/- from his gratuity.

g) The petitioner made representations to withdraw the said order and release Petitioner's terminal benefits including retirement gratuity along with interest for delay as under CCS Pension Rules were made by the petitioner. However, no action has been taken by the respondent to restrain from recovering such amount. Hence, the present Petition.

3. Learned Counsel for the petitioner submits that under sub-clause (6) of Section 4 of the Payment of Gratuity Act, 1972 (hereinafter referred to as "the Act") no recovery can be made against the petitioner, as his services were neither terminated by the respondent for causing loss nor the petitioner was convicted.

4. It is also submitted that Clause (a) of Sub-section (6) of Section 4 of Act enunciates regarding the termination of service of an employee for wilful omission or negligence causing any damage. However, the amount

liable to be forfeited can be only to the extent of damage or loss caused. Herein, no such damages or loss was caused to respondent by the petitioner.

5. It is also submitted that pensionary/retiral benefits are paid to a superannuated employee as a measure to ensure social welfare to enable him/her to live a life of dignity, which is recognized as a fundamental right of a citizen of India. Any right of the employer to recover from the pensionary/retiral benefits of an employee, any excess payment received by the employee despite no fault, fraud or misrepresentation on his part is to be strictly construed. Further, in light of instructions issued by the Government vide O.M. No. 18/03/2015 dated 2nd March 2016 qua recovery of wrongful/excess payments, the impugned order becomes non-est and illegal, being impressible in law.

6. It is submitted the Hon'ble Supreme Court in judgment of ***Sudhir Chandra Sarkar vs. Tata Iron & Steel Co. Ltd. and Ors.,*****1984 (3) SCC 369,** held that upon enactment of Payment of Gratuity Act, 1972, a statutory liability has been casted upon the employer to pay gratuity to his employees. Further reliance has been placed upon the dictum in ***State of Kerala vs. M. Padmanabhan Nair*** **(1985) 1 SCC 429 and** ***State of Punjab vs. Rafiq Masih*** **(2015) 4 SCC 334.**

7. Therefore, in view of the foregoing submissions, the petitioner seeks this Court the present petition may be allowed and the reliefs as prayed by the petitioner may be granted by this Court.

8. *Per Contra*, the learned counsel appearing on behalf of the respondent School vehemently opposed the present writ petition submitting to the effect

that the same has no merit since the sum of Rs. 5,36,053/- was to be recovered from the gratuity of the petitioner and the aforesaid recovery is entirely legal. Moreover, the said amount has been calculated on the basis of the due and drawn statement with effect from 1st January 1999 to 23rd November 2017 furnished by the respondent.

9. It is submitted that there is no illegality or irregularity in the impugned order passed by the respondent which invites interference of this Court since the impugned order has been passed after considering all relevant facts and circumstances reason for initiating recovery may be gathered from the impugned orders or other contents.

10. Heard learned counsel for the parties and perused the material on record including the pleadings, and judicial precedents cited.

11. Keeping in view the arguments advanced by the parties, the following issue has been framed for adjudication by this Court:

> *'Whether the Impugned Office Order No. F/10970/SE(COORD.)/PF/28/2018/D-179 dated 04th April 2018 passed by Respondent-DUSIB deserves to be set aside?'*

12. To consider this issue, it is imperative to set out the relevant facts as also elaborated hereinunder.

13. Teresly, that it is the case of the petitioner that he superannuated from service as Chief Engineer (Civil) on 30th January, 2018 and on the same day, an Office Order No. F/10970/SE/PF/28/2017/D-41 was issued regarding the regulation of pay of the petitioner. On 2nd March 2016, O.M. No. 18/03/2015 was issued regarding the recovery of wrongful/excess payments made to the

Government servants vide Endorsement bearing CD No. 012433322 F. No. 31/Fin./2017 dated 28th February 2018.

14. Furthermore, in contravention to the aforesaid Order, the respondent-DUSIB issued the Impugned Office Order directing recovery of sum of Rs. 5,36,053/- from the gratuity of petitioner, who retired from service on 31st January, 2018.

15. For proper adjudication of the matter at hand, it is apposite to consider the Impugned Order dated 4th April, 2018 and the relevant paragraph of the same is annexed herewith-

> *'In compliance of Office Order No. F/10970/SE/PF(28)/2017/D-93 dated 27.02.2018, a sum of Rs. 5,36,053/- is to be recovered from the gratuity of Sh. Shanti Swaroop, CE (Retd.). The amount has been calculated on the basis of due and drawn statement with effect from 01.01.1999 to 23.11.2017 furnished by the DDOC-3.'*

16. At this stage, it is also pertinent to highlight the relevant provisions of Payment of Gratuity Act, 1972 which casts a liability on the employer to pay gratuity. Section 4 (1) of the Act states as follow:

> *(1) 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:*
> *1[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 institution, as may be prescribed, until such minor attains majority.]

Explanation.-- For the purposes 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."

17. Further, Section 4 Sub-clause 6 extrapolates as under-

"Section 4. Payment of Gratuity

(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 [17][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."

18. Section 7(3A) of Act enumerates the following:

"*Section 7. Determination of the amount of gratuity*

(3A) If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer shall pay, from the date on which the gratuity

> *becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify*
>
> *Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has obtained permission in writing from the controlling authority for the delayed payment on this ground.]"*

19. In light of the aforementioned legal provisions, it is a settled position that the Act provides for payment of gratuity to every employee by their employer.

20. The provisions under the Act, which have also been interpreted by the Courts of the country time and again specifically state that recovery can be made from an employee only when the employer is able to show that there has been fraud or misrepresentation on the part of the employee for drawing benefits in excess to what is otherwise due to him. In the matter at hand, the respondent has failed to show that the petitioner had defrauded or misrepresented to get the excess payment of retiral or pensionary benefits. In the absence of such allegations, there arises no entitlement in favour of the respondent to recover a substantial sum of amount from the petitioner considering the law which already stands settled.

21. The principle that gratuity is a social benefit granted to the employee has been enunciated in the dictum of ***Balbir Kaur vs. Steel Authority of India*** **(2000) 6 SCC 493**, wherein the Hon'ble Supreme Court opined as under-

> *'As* regards *the provisions of the Payment of Gratuity Act, 1972 (as*

amended from time to time) it is no longer in the realm of charity but a statutory right provided in favour of the employee'

22. In the case of ***Syed Abdul Qadir vs. State of Bihar* 2009 3 SCC 475 ,** the Hon'ble Court stated as under-

'That recovery of excess payments, made from employees who have retired from service, or are close to their retirement, would entail extremely harsh consequences outweighing the monetary gains by the employer. It cannot be forgotten, that a retired employee or an employee about to retire, is a class apart from those who have sufficient service to their credit, before their retirement. Needless to mention, that at retirement, an employee is past his youth, his needs are far in excess of what they were when he was younger. Despite that, his earnings have substantially dwindled (or would substantially be reduced on his retirement). Keeping the aforesaid circumstances in mind, we are satisfied that recovery would be iniquitous and arbitrary, if it is sought to be made after the date of retirement, or soon before retirement. A period within one year from the date of superannuation, in our considered view, should be accepted as the period during which the recovery should be treated as iniquitous. Therefore, it would be justified to treat an order of recovery, on account of wrongful payment made to an employee, as arbitrary, if the recovery is sought to be made after the employee's retirement, or within one year of the date of his retirement on superannuation.'

23. In light of the aforesaid judgements, it is manifest that the fundamental principle forming the bedrock of gratuity is that a retirement benefit for long service is an imperative provision for old age and pension along with gratuity are well-reckoned measures of social security. Moreover, if any accrued or vested right of gratuity is sought to be taken away, it must be covered by the conditions laid down in Section 4(6) of the Act, 1972.

24. Under Article 226, the Court has to exercise its power by balancing the equity between parties and take into consideration the rights of the parties. Unlike a Civil Court in which, if the party proves that it is entitled to recovery of certain amount, the Civil Court may award such amount to the party. Under writ jurisdiction, the employer though entitled to the amount paid in excess to its employee, the Court while balancing equity may disallow such recovery to be made by the employer from the employee. The test in these cases is whether such recovery would result in a great amount of difficulty to the employee which will outweigh the equitable balance of the employer's right to recover. Hence, the Court has to balance equities in case there is a recovery to be made by employee from the employer.

25. The Hon'ble Supreme Court in ***State of Punjab v. Rafiq Masih*** **(Supra),** has enunciated the above-discussed position of law with regard to recovery of excess amount paid to an employee. The relevant portion is reproduced below:

> "*7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to the employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would*

establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.
8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the Preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the employee concerned. If the effect of the recovery from the employee concerned would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover."

26. The principle laid down in the aforesaid judgment has been reiterated by the Hon'ble Supreme Court in the judgment of ***Sasikala Devi P. v. State of Kerala*** **2023 SCC OnLine SC 513, whereby the Hon'ble court held as under:**

"*12. At the time of the hearing, it was submitted that all the appellants who were given the benefits have retired from service and recoveries were sought to be made from them though they were not at fault in grant of those benefits at the time of promotion. Considering the aforesaid fact and keeping in view the judgment of this Court in State of Punjab v. Rafiq Masih (White Washter)1 , we direct that no recovery of the amount already paid to them be effected. However, their pension can be refixed considering the emoluments to which the appellants were entitled at the time of their retirement in accordance with the rules."*

27. In the instant case, the respondent has failed to show the alleged excess payment by means of fraud, misrepresentation, riotous or disorderly conduct (as stipulated under Section 4(6) of Act, 1972), and his services were also not terminated. Henceforth, any wrongful determination of Petitioner's inflated emoluments and its subsequent recovery by the employer is impermissible in law.

28. This Court is of the view that the impugned order dated 4th April, 2018 is *prima facie* erroneous, cryptic and sans any reasoning. The irregularity in such a non-speaking Order goes to the root of the matter and invites the intervention of this Court while exercising its extraordinary powers under Section 226 of Constitution of India.

29. This Court also discerns substantial material to establish the propositions put forth by the petitioner. There are robust reasons to characterize that the Impugned Office Order was arbitrary and contrary to provisions as envisaged in the Payment of Gratuity Act, 1972 for grant of gratuity/retiral benefits. Further, in view of instructions issued by Government of India vide O.M. dated 2nd March 2016 regarding recovery of wrongful/excessive payments and its endorsement, the impugned Order is manifestly infructuous.

30. This Court is of the view that the present petition has merit and therefore, stands allowed. The Impugned Order dated 4th April, 2018 passed by respondent-DUSIB is set aside and the respondent is directed to immediately release the petitioner's terminal benefits including retirement gratuity along with interest for the delay as applicable under CCS Pension

Rules. The Court directs respondent to not initiate any recovery proceedings, if already initiated should be stopped forthwith

31. Accordingly, the issue framed has been decided and the instant petition stands allowed.

32.The order be uploaded on the website forthwith.

CHANDRA DHARI SINGH, J

AUGUST 21, 2023

gs/db

Click here to check corrigendum, if any