IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19.02.2024

Coram:

THE HONOURABLE MRS.JUSTICE N.MALA

WP.No. 28844 of 2023
and
WMP.No.28447 of 2023

The General Manager,
Krishnagiri District Co-operative Milk Producer's Union,
Kanagamutlu Village,
Salem Main Road,
Krishnagiri-635 002.

... Petitioner

Vs.

1. The Appellate Authority / Additional Commissioner of labour,
(Appellate Authority under the Payment of Gratuity Act, 1972),
Coimbatore-18.

2.The Assistant Commissioner of Labour,
(Controlling Authority under the Payment of Gratuity Act, 1972),
Office of the Deputy Commissioner of Labour,
Salem.

3.M.Vivekanathasamy

.. Respondents

Writ Petition is filed under Article 226 of the Constitution of India for issuance of Writ of Certiorari calling for the records relating to impugned orders dated 21.01.2021 passed in A.G.A.No.27 of 2020 on the file of 1st respondent and quash the same as being illegal, arbitrary and unconstitutional.

For Petitioner : Mr.R.Arvind
for Mr.I.John Arockiadas

For Respondents : Mr.P.Sanjaygandhi, Government Advocate
for RR1 & 2
Mr.M.L.Manekam
for Mrs.N.E.Raniselvam
for R3

ORDER

Writ petition is filed challenging the order dated 21.01.2021 passed in A.G.A.No.27 of 2020.

2. The petitioner is a Society registered under the Tamil Nadu Co-operative Societies Act, 1983 (Herein after called as Act). The petitioner union is a Co-operative Milk Producers Union handling various milk products for the needs of general public. The 3rd respondent was in the petitioner union from the year 1987. When the 3rd respondent was holding the post of Manager (Diary), he committed certain irregularities between 01.10.1987 to 31.12.2017 causing loss to the union to the tune of Rs.4,66,084.18/-. The surcharge proceedings were commenced and penalty was imposed for the aforesaid amount on the petitioner union. The surcharge award passed for various periods was not challenged under

Section 152 of the Act.

3. According to the petitioner, the 3rd respondent was liable towards total surcharge amount of Rs.55,78,748/- to the petitioner union. While so, on 14.06.2013, the recovery order for Rs.20,000/- every month from the 3rd respondent's monthly salary was passed. The 3rd respondent attained superannuation and retired from service on 31.12.2017. At the time of the 3rd respondent's retirement, an amount of Rs.55,78,748/- was due to the union from him towards the surcharge award amount. The petitioner withheld all the retirement benefits of the 3rd respondent. Meanwhile, the 3rd respondent filed an application under Section 7(4)(b) of the Payment of Gratuity Act, 1972 read with Rule 10(1) of the Tamil Nadu Payment of Gratuity Rules before the Assistant Commissioner of Labour, Salem in P.G.No.124 of 2019 seeking relief from the controlling authority to determine the amount of Gratuity payable to him and further to direct the petitioner to pay the same to the 3rd respondent. The 2nd respondent dismissed the P.G application vide order dated 09.12.2019. Aggrieved by the order dated 09.12.2019 passed in P.G.No.124 of 2019, the 3rd respondent

preferred an appeal before the Joint Commissioner of the Labour, Coimbatore under Section 7(7) of the Payment of Gratuity Act, 1972 in A.G.A.No.27 of 2020. An ex-parte award dated 21.01.2021 was passed directing the petitioner union to pay the gratuity amount of Rs.10,00,000/- along with 10% interest till the date of realisation of the payment by the 3rd respondent. Aggrieved by the order passed by the Appellate Authority in A.G.A.No.27 of 2020 dated 21.01.2021, the petitioner has filed the above writ petition.

4. The 3rd respondent filed a counter denying that any loss to the Society was caused due to any negligence or malpractice by the 3rd respondent. The 3rd respondent further denied the contention of the petitioner that the surcharge order dated 12.10.2004 was not challenged. The 3rd respondent in his counter narrated the various proceedings initiated by him against the surcharge orders. The 3rd respondent further stated that he had put in continuous service for more than 35 years and he was lawfully entitled to gratuity. The 3rd respondent further submitted that the order of the Appellate Authority did not deserve any interference. The 3rd

respondent also filed additional counter affidavit giving the details of the surcharge orders and the status of the cases pending against the surcharge orders.

5. The learned counsel for the petitioner submitted that the petitioner union was registered under the Tamil Nadu Co-operative Societies Act and it is not covered by the Payment of Gratuity Act. According to the petitioners counsel, the employees of the Co-operative Society were entitled to claim gratuity only under the provisions of By-laws of the society, which was approved by the Registrar of Cooperative Societies under the provisions of the Tamil Nadu Co-operatives Societies Act and not under the Payment of Gratuity Act.

6. The learned counsel for the 3rd respondent submitted that the impugned order was infallible in as much as the appellate Authority had properly appreciated the facts and law involved in the case and therefore it did not call for any interference.

7. I have heard both the learned counsels and I have perused the materials placed on record.

8. The petitioners case is that the 3rd respondent is liable to pay the petitioner union Rs.55,78,748/- towards surcharge awards and therefore the Appellate Authority erred in directing the petitioner to pay the 3rd respondent an amount of Rs.10,00,000/- as Gratuity. The petitioner raised objection to the applicability of the Gratuity Act, stating that the petitioner union has special bylaws governing the conditions of the service of the employees and therefore the special bylaws governing the service conditions of the employees District Co-operative Milk Producers Union alone will apply. The petitioner further contends that the gratuity amount of the 3rd respondent was withheld as a measure of punishment and that the Appellate Authority failed to note that the 3rd respondent was guilty of moral turpitude and therefore the Appellate Authority should have forfeited the gratuity of the 3rd respondent. The petitioner further relied on Section 153 of the Co-operative Societies Act to non-suit the 3rd respondent.

On the above grounds, the petitioner prayed for setting aside the impugned order.

9. It is pertinent to note here that the petitioner did not raise any objection as to the applicability of the Gratuity Act before the authorities below. Even otherwise, the special bylaws has been produced by the 3rd respondent and the same is considered. It is seen that Gratuity rules form part of the special bylaw governing the service conditions of the employees in the petitioner union. Under the special bylaw governing the service conditions of the employees of District Co-operative Milk Producers Union, a special schemes is framed for payment of gratuity. Under the scheme the employees who put in continuous service of 5 years in the Union were eligible for payment of Gratuity under the Payment of Gratuity Act and rules thereon in force from time to time subject to a maximum ceiling of Rs.10 lakhs. Clause 7 of the special bylaws deals with procedure for payment, recovery or protection of gratuity from attachment by the Court. It is stated that the procedure for mode of payment, application and appeal shall be in accordance with the Payment of Gratuity Act and the

Tamil Nadu Payment of Gratuity rules. Therefore the applicability of the Payment of Gratuity Act is not totally barred or shut by the special bylaws. The 3rd respondent's application under the Payment of Gratuity Act was therefore in accordance with the scheme and procedure provided under the special bylaws.

10. It is contended by the learned counsel for the petitioner that the 3rd respondent was involved in a misconduct of moral turpitude and therefore the Appellate Authority should have forfeited the gratuity. As far as forfeiture of gratuity is concerned, Section 4(6) of the Payment of Gratuity Act provides as follows:

> *"(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."

The sub clause 'a' admittedly would not apply to the facts of the case, because admittedly the services of the 3rd respondent were not terminated. Sub clause 6- b(ii) speaks of termination of an employee for any act which constitutes an offence involving moral turpitude. Sub clause 6(b) came up for consideration before the Hon'ble Supreme Court in the case of *Union bank of India and others vs C.G.Ajay Babu and another* reported in 2018 (9) SCC 529, the Hon'ble Supreme Court following the earlier Judgment in the case of *Jaswanth Singh Gill Vs. Bharat Coking Coal Ltd. and other.* reported in *2007 (1) SCC 663* held in para 17 of the Judgment held as follows:

"17. Though the learned counsel for the appellant Bank has contended that the conduct of the respondent employee, which leads to the framing of charges in the departmental proceedings involves moral turpitude, we are afraid the contention cannot be appreciated. It is not the conduct of a person involving moral turpitude that is

required for forfeiture of gratuity but the conduct or the act should constitute an offence involving moral turpitude. To be an offence, the act should be made punishable under law. That is absolutely in the realm of criminal law. It is not for the Bank to decide whether an offence has been committed. It is for the court. Apart from the disciplinary proceedings initiated by the appellant Bank, the Bank has not set the criminal law in motion either by registering an FIR or by filing a criminal complaint so as to establish that the misconduct leading to dismissal is an offence involving moral turpitude. Under sub-section (6)(b)(ii) of the Act, forfeiture of gratuity is permissible only if the termination of an employee is for any misconduct which constitutes an offence involving moral turpitude, and convicted accordingly by a court of competent jurisdiction."

11. Therefore it is clear that it is not mere misconduct of moral turpitude that entails forfeiture of gratuity, but the conduct or act should constitute an offence punishable under law. The Hon'ble Supreme Court has categorically held that forfeiture of gratuity is permissible only when the misconduct constitutes an offence of moral turpitude and there is conviction by a Criminal Court of competent jurisdiction. In the present

case, it is not the petitioners case that the respondent has been convicted for the offence of moral turpitude and therefore the contention that gratuity of the 3rd respondent should be forfeited, as huge amount is due towards the surcharge awards cannot be countenanced. Even Rule 4(b) of the special bylaw relating to forefeiture of gratuity reads as follows:

> *"4(b). Gratuity shall not be paid to any employee who is dismissed for dishonesty or misconduct, irrespective of the length of his service."*

Relying on the said Rule, it is contended that the 3rd respondent is not entitled to gratuity, as he is guilty of dishonesty. In my view, the said rule will not aid the petitioner, because the rule is very clear in stating that gratuity can be forfeited only if the employee is dismissed for dishonesty or for misconduct. In the present case, it is an admitted fact that no disciplinary proceedings were initiated against the 3rd respondent for acts of dishonesty or any act of misconduct. Therefore in the absence of dismissal order, there cannot be forfeiture of gratuity. The Appellate Authority has relied on the Judgment of the Hon'ble Supreme Court reported in *2007(1) SCC 663* in the case of *Jaswanth Singh Gill Vs. Bharat Coking Coal Ltd. and other,* wherein the Hon'ble Supreme Court clearly held in para '14' that *termination of services for any of the causes enumerated in sub-section (6) of Section 4 of the Act, is imperative.* As the bylaw also provides for an order of dismissal for misconduct of dishonesty, the petitioner cannot invoke the bylaw to deprive the 3rd respondent of gratuity.

12. According to the counsel, the special By-laws which have been framed under the Tamil Nadu Co-operative Societies Act, being special act should prevail over general act. In my view there is no conflict between the Special bylaws and the Payment of Gratuity Act because, even as per the said bylaws, the mode of payment, recovery etc. shall be as per provisions of the Payment of Gratuity Act, 1972 and the Tamilnadu Payment of Gratuity Rules, 1973. Even otherwise this Court in W.P.(MD).No.10875 of 2010 dated 23.10.2019 held as follows:

> *"11. The Payment of Gratuity Act is a Central Enactment and it is enacted with an object to provide a scheme for payment of gratuity to employees, who are engaged in factories, mines, shops and other establishments. The applicability of the Act can not be excluded by any other provisions under the Tamil Nadu Co-operative Societies Act, 1983. The Tamil Nadu Cooperative Societies*

Act, though received assent of the President, it is not brought to the notice of this Court that the assent was obtained with specific reference to Payment of Gratuity Act. No other provisions under the Tamil Nadu Cooperative Societies Act is brought to the notice of this Court, as regards, the applicability of Payment of Gratuity Act, 1972.....”

Therefore the contention of the respondent's that Special Act will prevail over general Act is rejected. I therefore find no illegality or infirmity in the impugned order.

13. The objection that the 3rd respondent ought to have approached the competent authority under Section 153 of the Act is also untenable for the reasons stated supra.

14. The learned counsel for the petitioner contended that the gratuity was withheld as a measure of punishment. In my view neither the special bylaws or the provisions of Payment of Gratuity Act, provide for withholding of gratuity as a measure of punishment. Therefore the contention of the learned counsel for the petitioner is rejected.

In view of the aforesaid discusion, the writ petition is dismissed. No costs. Consequently, connected WMP is closed.

19.02.2024

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Index:Yes/No
Speaking Order:Yes/No
Neutral Citation:Yes/No

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