Union Bank Of India vs C.G. Ajay Babu on 14 August, 2018

Equivalent citations: AIR 2018 SUPREME COURT 3792, (2018) 3 PAT LJR 360, (2019) 1 WLC(SC)CVL 92, (2019) 1 CLR 264 (SC), AIR 2018 SC (CIV) 3001, (2018) 3 PUN LR 765, (2018) 5 MAD LW 927, (2018) 4 LAB LN 1, (2018) 4 SCT 25, (2018) 9 SCALE 622, (2018) 5 SERVLR 506, (2018) 5 SERVLR 1, (2018) 5 ANDHLD 195, (2018) 3 CURLR 325, (2018) 5 ALLMR 925 (SC), (2018) 5 ALL WC 4712, (2018) 3 ESC 454, (2018) 158 FACLR 948, (2018) 3 JLJR 336, (2018) 4 JCR 166 (SC), 2018 (9) SCC 529, AIRONLINE 2018 SC 112

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Bench: Sanjay Kishan Kaul, Kurian Joseph

REPORTABLE

SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8251 OF 2018
(Arising out of S.L.P.(Civil) No. 3852/2017)

UNION BANK OF INDIA AND OTHERS ... APPELLANT (S)

VERSUS

C.G. AJAY BABU AND ANOTHER ... RESPONDENT (S)

J U D G M E N T

KURIAN, J.:

Leave granted.

2. Whether forfeiture of gratuity, under The Payment of Gratuity Act, 1972 (hereinafter referred to as 'the Act'), is automatic on dismissal from service, is the issue for consideration in this case.

3. The respondent was an employee of the appellant-Bank. While serving as a Branch Manager, disciplinary proceedings were initiated against him on the following charges:

"a) Failure to take all steps to ensure and protect the interest of the Bank.

b) Failure to discharge his duties with utmost devotion, diligence, honesty and integrity.

c) Doing acts unbecoming of an Officer Employee."

4. On the charges being duly established, the respondent was dismissed from service on 03.06.2004. The order of dismissal has attained finality.

5. In the meanwhile, the respondent was issued a show-cause notice as to why the gratuity should not be forfeited on account of proved misconduct involving moral turpitude. His explanation was rejected and the gratuity was forfeited by order dated 20.04.2004. The order reads as follows:

> "We refer to the show cause notice no. CO:IRD:654 dated 30.01.2004, seeking your explanation as to why the gratuity payable to you should not be forfeited on account proved misconduct against you and the explanation dated 26.02.2004 submitted by you thereto.
>
> The misconduct proved against you amounts to acts involving moral turpitude. In this regards, the explanation submitted by you in terms of your above reference reply is not satisfactory and therefore not acceptable to the bank.
>
> Therefore, in accordance of the provisions of section 4, subsection 6(b)(ii) of the Gratuity Act, 1972 and clause 3 to Schedule "A" of the Banks Gratuity Rules, the Bank has decided to forfeit an amount of Rs. 1,77,900/- from the Gratuity amount payable to you." (Emphasis supplied)

6. The dismissal and forfeiture were the subject matters of challenge before the High Court leading to the impugned judgment dated 08.01.2016 of the learned Single Judge. The Court did not interfere with the dismissal; however, it was held that the respondent was entitled to gratuity as there was no financial loss caused to the Bank. It was also held that as per the bipartite settlement, forfeiture of gratuity is permissible only in case the misconduct leading to the dismissal has caused financial loss to the Bank and only to that extent.

7. While dismissing the intra-Court appeal, the Division Bench of the High Court took the view that Section 4(6)(a) and (b) have to be read together and only if there is any loss to the Bank on account of the misconduct, then alone, the forfeiture is permissible to the extent of loss. Thus, aggrieved, the appellant is before this Court.

8. Heard the learned Counsel appearing for the Bank and the respondent-employee.

9. Section 4 of the Act, to the extent relevant, reads as follows:

> "4 Payment of gratuity.—(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:

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.

xxx xxx xxx xxx (5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer.

(6) Notwithstanding anything contained in sub-section (1),—

(a) the gratuity of an employee, whose services have been 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;

(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." (Emphasis supplied)

10. The subtle distinction between sub-Section (5) and sub- Section (6) is that the former is a non-obstante clause of the entire Section whereas the latter is only in respect of sub-Section (1). In other words, sub-Section (5) has an overriding effect on all other sub-Sections under Section 4 of the Act. Thus, notwithstanding anything contained under Section 4 of the Act, an employee is entitled to receive better terms of gratuity under any award or agreement or contract with the employer.

11. In the case of the appellant-Bank, as noted by the learned Single Judge, there is a bipartite settlement dated 19.08.1966 prevailing in the Bank and the clause dealing with the forfeiture of gratuity reads as follows:

> "12.2 There will be no forfeiture of gratuity for dismissal on account of misconduct except in cases where such misconduct causes financial loss to the bank and in that case to that extent only." (Emphasis supplied)

12. Learned Counsel for the appellant-Bank submits that sub- Section (5) of Section 4, "while providing for better terms of gratuity under any award or agreement or contract", deals only with the quantum of the gratuity and not with the entitlement under any award or agreement or contract as such. We are afraid, this submission cannot be appreciated. The statute provides for better terms of gratuity under any award or agreement or contract which means all terms of the contract. The choice is between the award or agreement or contract and the statute, but not partially of either.

13. In Beed District Central Coop. Bank Ltd. v. State of Maharashtra and others1, it has been held that the expression 'terms' as appearing under sub-Section (5) of Section 4 of the Act must ordinarily mean all terms to the contract and that the employee is not entitled to best terms of both the statute and the contract. Paragraph-14 reads as follows:

> "14. Applying the "golden rule of interpretation of statute", to us it appears that the question should be considered from the point of view of the nature of the scheme as also the fact that the parties agreed to the terms thereof. When better terms are offered, a workman takes it as a part of the package. He may volunteer therefor, he may not. Sub-section (5) of Section 4 of the 1972 Act provides for a right in favour of the workman. Such a right may be exercised by the workman concerned. He need not necessarily do it. It is the right of individual workman and not all the workmen. When the expression "terms" has been used, ordinarily it must mean "all the terms of the contract". While interpreting even a beneficent statute, like, the Payment of Gratuity Act, we are of the opinion that either contract has to be given effect to or the statute. The provisions of the Act envisage for one scheme. It could not be segregated. Sub-section (5) of Section 4 of the 1972 Act does not contemplate that the workman would be at liberty to opt for better terms of the contract, while keeping the option open in respect of a (2006) 8 SCC 514 part of the statute. While reserving his right to opt for the beneficent provisions of the statute or the agreement, he has to opt for either of them and not the best of the terms of the statute as well as those of the contract. He cannot have both. If such an interpretation is given, the spirit of the Act shall be lost....."

14. In Y.K. Singla v. Punjab National Bank and others2, the position has been reiterated holding that the employee has to make a choice between the two for drawing the benefit of gratuity and the choice has a statutory protection under sub-Section (5) of Section 4 of the Act. To quote paragraph-23:

> "23. Based on the conclusions drawn hereinabove, we shall endeavour to determine the present controversy. First and foremost, we have concluded on the basis of Section 4 of the Gratuity Act that an employee has the right to make a choice of being governed by some alternative provision/instrument other than the Gratuity Act, for drawing the benefit of gratuity. If an employee makes such a choice, he is provided with a statutory protection, namely, that the employee concerned would be entitled to receive better terms of gratuity under the said provision/instrument, in comparison to his entitlement under the Gratuity Act. This protection has been provided through Section 4(5) of the Gratuity Act."

15. That there is a bipartite settlement in the appellant-Bank is not in dispute. That the settlement provides for forfeiture only if there is a loss caused on account of misconduct leading to dismissal, is also not in dispute. There is no case for the Bank that the misconduct of the respondent-employee has caused any financial (2013) 3 SCC 472 loss to the Bank, and therefore, forfeiture, taking recourse to sub- Section (6) of Section 4 of the Act, cannot be resorted to. Thus, we are in respectful agreement with the view taken by the High Court that the respondent-employee is entitled to the protection of the bipartite settlement.

16. Under sub-Section (6)(a), also the gratuity can be forfeited to only to the extent of damage or loss caused to the Bank. In case, the termination of the employee is for any act or wilful omission or negligence causing any damage or loss to the employer or destruction of property belonging to the employer, the loss can be recovered from the gratuity by way of forfeiture. Whereas under

> sub-Clause (b) of sub-Section (6), the forfeiture of gratuity, either wholly or partially, is permissible under two situations– (i) in case the termination of an employee is on account of riotous or disorderly conduct or any other act of violence on his part, (ii) if the termination is for any act which constitutes an offence involving moral turpitude and the offence is committed by the employee in the course of his employment. Thus, sub-Clause (a) and sub-Clause
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> (b) of sub-Section (6) of Section 4 of the Act operate in different fields and in different circumstances. Under sub-Clause (a), the forfeiture is to the extent of damage or loss caused on account of the misconduct of the employee whereas under sub-Clause (b), forfeiture is permissible either wholly or partially in totally different circumstances. Sub-Clause (b) operates either when the termination is on account of- (i) riotous or (ii) disorderly or (iii) any other act of violence on the part of the employee, and under Sub-Clause (ii) of sub-Section (6)(b) when the termination is on account any act which constitutes an offence involving moral turpitude committed during the course of employment.

17. 'Offence' is defined, under The General Clause Act, 1897, to mean "any act or omission made punishable by any law for the time being in force".

18. 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.

19. In Jaswant Singh Gill v. Bharat Coking Coal Limited and others3, it has been held by this Court that forfeiture of gratuity either wholly or partially is permissible under sub-Section (6)(b)(ii) only in the event that the termination is on account of riotous or disorderly conduct or any other act of violence or on account of an act constituting an offence involving moral turpitude when he is convicted. To quote paragraph-13:

> "13. The Act provides for a close-knit scheme providing for payment of gratuity. It is a complete code containing detailed provisions covering the essential provisions of a scheme for a gratuity. It not only creates a right to payment of gratuity but also lays down the principles for quantification thereof as also the conditions on which he may be denied therefrom. As noticed hereinbefore, sub-section (6) of Section 4 of the (2007) 1 SCC 663 Act contains a non obstante clause vis-à-vis sub-section (1) thereof. As by reason thereof, an accrued or vested right is sought to be taken away, the conditions laid down thereunder must be fulfilled. The provisions contained therein must, therefore, be scrupulously observed. Clause (a) of sub-section (6) of Section 4 of the Act speaks of termination of service of an employee for any act, wilful omission or negligence causing any damage. However, the amount liable to be forfeited would be only to the extent of damage or loss caused.

The disciplinary authority has not quantified the loss or damage. It was not found that the damages or loss caused to Respondent 1 was more than the amount of gratuity payable to the appellant. Clause (b) of sub- section (6) of Section 4 of the Act also provides for forfeiture of the whole amount of gratuity or part in the event his services had been terminated for his riotous or disorderly conduct or any other act of violence on his part or if he has been convicted for an offence involving moral turpitude. Conditions laid down therein are also not satisfied."

20. In the present case, there is no conviction of the respondent for the misconduct which according to the Bank is an offence involving moral turpitude. Hence, there is no justification for the forfeiture of gratuity on the ground stated in the order dated 20.04.2004 that the "misconduct proved against you amounts to acts involving moral turpitude". At the risk of redundancy, we may state that the

requirement of the statute is not the proof of misconduct of acts involving moral turpitude but the acts should constitute an offence involving moral turpitude and such offence should be duly established in a court of law.

21. That the Act must prevail over the Rules on Payment of Gratuity framed by the employer is also a settled position as per Jaswant Singh Gill (supra). Therefore, the appellant cannot take recourse to its own Rules, ignoring the Act, for denying gratuity.

22. To sum-up, forfeiture of gratuity is not automatic on dismissal from service; it is subject to sub-Sections (5) and (6) of Section 4 of The Payment of Gratuity Act, 1972.

23. Thus, though for different reasons as well, we find no merit in the appeal and it is accordingly dismissed. No costs.

.....J. (KURIAN JOSEPH) .....J. (SANJAY KISHAN KAUL) NEW DELHI;

AUGUST 14, 2018.