

Jaswant Singh Gill vs M/S. Bharat Coking Coal Ltd. & Ors on 10 November, 2006

Equivalent citations: AIRONLINE 2006 SC 412, AIRONLINE 2006 SC 352

Author: S.B. Sinha

Bench: S.B. Sinha, Markandey Katju

CASE NO.:

Appeal (civil) 4770 of 2006

PETITIONER:

Jaswant Singh Gill

RESPONDENT:

M/s. Bharat Coking Coal Ltd. & Ors.

DATE OF JUDGMENT: 10/11/2006

BENCH:

S.B. Sinha & Markandey Katju

JUDGMENT:

J U D G M E N T (Arising out of SLP (C) No. 16827 of 2004) S.B. Sinha, J.

Leave granted.

Respondent Bharat Coking Coal Limited is a government company incorporated and registered under the Companies Act, 1956. Appellant herein joined as a Chief General Manager. He was working in a coking coal mine which vested in the Bharat Coking Coal Limited pursuant to an appropriate notification issued by the Central Government either under Section 7 of the Coking Coal Mines (Nationalisation) Act, 1972 or Section 5 of the Coal Mines (Nationalisation) Act, 1973.

A chargesheet was issued against him on the allegation of shortage of stock of coal in Lodna area of Respondent No. 1. During pendency of the departmental proceeding, the appellant was allowed to retire. He applied for payment of gratuity under the Payment of Gratuity Act, 1972 (for short "the Act") in the year 1998 which was denied. He, therefore, filed an application before the Additional Labour Commissioner, Dhanbad for payment of gratuity on 4.01.2000. Notices having been issued by the said authority, Respondent No. 1 filed reply thereto inter alia contending that the gratuity amount payable to the appellant had been withheld for the purpose of making of adjustment, in the event recovery from the said amount is directed to be made in the disciplinary proceedings. The controlling authority on the said premise allowed the disciplinary authority to proceed in the matter. Upon conclusion of the departmental enquiry, the disciplinary authority by an order dated

5.07.2000 opined:

"Whereas the undersigned has gone through the chargesheet dated 24.02.97 issued to Shri Gill, enquiry proceedings and report of Inquiring Authority dated 18.08.99 and other documents related to the case placed before him. After careful consideration of all the documents placed in the case file, the undersigned, is convinced that Shri Gill had a major role in causing the shortages in the coal stock and conniving with the measurement team in concealing the shortages at the time of annual measurement.

Now, therefore, the undersigned, Chairman- cum-Managing Director, Coal India Limited being the Disciplinary Authority in exercise of power conferred by the Conduct Discipline and Appeal Rules 1978 of CIL, considering the seriousness of the offence would have imposed the punishment of dismissal from the service of Shri J.S. Gill, the then Chief General Manager, BCCL, but for his superannuation. The undersigned also hereby orders forfeiture of his gratuity."

The Assistant Labour Commissioner (Central), Dhanbad in the application filed by the appellant under the Act, on the other hand, by an order dated 11.04.2001 held:

"It is clear that Shri J.S. Gill retired on superannuation as per notice for retirement w.e.f. 30.4.98, therefore, he is entitled for the payment of gratuity under the P.G. Act, 1972. As per section 4(6)(a) & 4(6)(b) of the P.G. Act, 1972, gratuity can be forfeited partially or wholly when the service of the employee is terminated for any act, which constitute an offence involving moral turpitude provided that such offence is committed by him in the course of employment. In the instant case, the services of Sri J.S. Gill has not been terminated for the offence mentioned under 4(6)(a) & 4(6)(b) of the P.G. Act, 1972. Therefore, the order of forfeiture of gratuity of Sri J. S. Gill issued by the C.M.D. and Disciplinary Authority of CIL is not tenable. The basic requirement of termination of service for any of the misconduct as enumerated under section 4(6)(a) & 4(6)(b) of the P.G. Act, 1972 has not been fulfilled before the issue of order of forfeiture of gratuity."

On an appeal preferred by Respondent No. 1, the appellate authority held:

"3. The appellant has appealed against the direction of the Controlling Authority directing to pay the gratuity to the respondent on the ground that it was beyond his jurisdiction for enter into merit of the forfeiture of the gratuity amount by the competent authority under Section 4(6) of the Act for the reasons mentioned therein. On the other hand the respondent had also filed an appeal about not allowing interest by the Controlling Authority for delayed payment of gratuity which is numbered as P.G. Appeal/(53)/2001. Since the matter of appeal filed by the Appellant and the respondent is against the same direction of the controlling authority hence both cases heard jointly and their oral argument were heard and hearing was concluded on that

date.

4. *** **

5. From perusal of the case record of the Controlling Authority it is observed that the respondent submitted an application in form N on 5.1.2001 after his superannuation from 30.4.1998 when the appellant did not pay the gratuity amount. It is observed from the decision/ direction of the Controlling Authority that he has rightly determined the amount of gratuity as well as correctly interpreted Section 4(6) of the Payment of Gratuity Act, 1972. For Application of Section 4(6) it is pre-condition that the service should have been terminated for any act. For the purpose of section 4(6)(a) such act should be about 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 and for the purpose of sub-section 4(6)(b) the gratuity can be forfeited wholly or partially only if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence etc. on his part. It is observed from the punishment order that the services have not been terminated and rather could not have been terminated and also does not indicate the extent of damage or loss. Since neither the service terminated nor there is anything about extent/ quantification of damage or loss in punishment order, question of forfeiture of gratuity does not arise as per Section 4(6)."

Aggrieved by and dissatisfied with the orders of the authority under the Act as also the appellate authority, a writ petition was filed by Respondent No. 1 in the High Court of Jharkhand at Ranchi which was marked as W.P.(C) No. 5957 of 2001. By a judgment and order 13.12.2001, a learned Single Judge of the said refused to interfere therewith and dismissed the writ petition. In an intra-court appeal preferred by Respondent No. 1, a Division Bench of the said Court, however, set aside the judgment and order of the learned Single Judge opining:

"In our opinion, the Controlling Authority under the Act being not the appellate or the Competent Authority against the order dated 5.7.2000 passed by the CMD-cum-Disciplinary Authority inflicting punishment of forfeiture of gratuity against the respondent no. 3 the comments on the said order as well as interference therewith either by him or the Appellate Authority under section 7(7) of the Act is unwarranted and without jurisdiction."

The appellant is, thus, before us.

The short question which arises for consideration in this appeal is as to whether the provisions of the said Act shall prevail over the rules framed by Coal India Limited, holding company of Respondent No. 1, known as Coal India Executives' Conduct Discipline and Appeal Rules, 1978 (for short "the Rules"). Indisputably, the appellant was governed by the Rules. Rule 27 provides for the nature of penalties including 'recovering from pay or gratuity of the whole of or part of any

pecuniary loss caused to the company by negligence or breach of orders or trust'. Major penalties prescribed in Rule 27, however, include reduction to a lower grade, compulsory retirement, removal from service; and dismissal. Rule 34 provides for special procedure in certain cases stating:

"34.2 Disciplinary proceeding, if instituted while the employee was in service whether before his retirement or during his re-employment shall, after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service.

34.3 During the pendency of the disciplinary proceedings, the Disciplinary Authority may withhold payment of gratuity, for ordering the recovery from gratuity of the whole or part of any pecuniary loss caused to the company if have been guilty of offences/ misconduct as mentioned in Sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972 or to have caused pecuniary loss to the company by misconduct or negligence, during his service including service rendered on deputation or on re-employment after retirement. However, the provisions of Section 7(3) and 7(3A) of the Payment of Gratuity Act, 1972 should be kept in view in the event of delayed payment, in the case the employee is fully exonerated."

The Act was enacted with a view to provide for a scheme for payment of gratuity to employees engaged inter alia in mines. Section 3 of the Act provides for appointment of an officer to be the controlling authority. Controlling authority is to be responsible for administration of the act. Different authorities, however, may be appointed for different areas. Section 4 of the Act entitles an employee to gratuity after he has rendered continuous service for not less than five years inter alia on his superannuation. Sub- section (6) of Section 4 contains a non-obstante clause stating:

"(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 or 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 Rules framed by the Coal India Limited are not statutory rules. They have been made by the holding company of Respondent No. 1.

The provisions of the Act, therefore, must prevail over the Rules. Rule 27 of the Rules provides for recovery from gratuity only to the extent of loss caused to the company by negligence or breach of orders or trust. Penalties, however, must be imposed so long an employee remains in service. Even if a disciplinary proceeding was initiated prior to the attaining of the age of superannuation, in the event, the employee retires from service, the question of imposing a major penalty by removal or dismissal from service would not arise. Rule 34.2 no doubt provides for continuation of a disciplinary proceeding despite retirement of employee if the same was initiated before his retirement but the same would not mean that although he was permitted to retire and his services had not been extended for the said purpose, a major penalty in terms of Rule 27 can be imposed.

Power to withhold penalty contained in Rule 34.3 of the Rules must be subject to the provisions of the Act. Gratuity becomes payable as soon as the employee retires. The only condition therefor is rendition of five years continuous service.

A statutory right accrued, thus, cannot be impaired by reason of a rule which does not have the force of a statute. It will bear repetition to state that the Rules framed by Respondent No. 1 or its holding company are not statutory in nature. The Rules in any event do not provide for withholding of retrieval benefits or gratuity.

The Act provides for a closely neat 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 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, willful 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 No. 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.

Termination of services for any of the causes enumerated in Sub-section (6) of Section 4 of the Act, therefore, is imperative.

In *Balbir Kaur and Another v. Steel Authority of India Ltd. and Another* [(2000) 6 SCC 493], this Court opined:

"...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..."

Interpreting Section 4(1) of the Act, it was held:

"...We shall come back to the deposit of the provident fund but as regards the gratuity amount, be it noted that there is a mandate of the statute that gratuity is to be paid to the employee on his retirement or to his dependants in the event of his early death the introduction of the Family Pension Scheme by which the employee is compelled to deposit the gratuity amount, as a matter of fact runs counter to this beneficial piece of legislation (Act of 1972). The statutory mandate is unequivocal and unambiguous in nature and runs to the effect that the gratuity is payable to the heirs of the nominees of the employees concerned but by the introduction of the Family Pension Scheme, this mandate stands violated and as such the same cannot but be termed to be illegal in nature. We do find some substance in the contention as raised, a mandatory statutory obligation cannot be trifled with by adaptation of a method which runs counter to the statute. It does not take long to appreciate the purpose for which this particular Family Pension Scheme has been introduced by deposit of the provident fund and the gratuity amount and we are not expressing any opinion in regard thereto but the fact remains that statutory obligation cannot be left high and dry on the whims of the employer irrespective of the factum of the employer being an authority within the meaning of Article 12 or not."

We may notice that this Court in Bhagirathi Jena v. Board of Directors, O.S.F.C. & Ors. [(1999) 3 SCC 666] was concerned with interpretation of Regulation 17 of the Orissa State Financial Corporation Employees' Provident Fund Regulations, 1959. This Court noticed the relevant Regulations and opined that therein no specific provision existed for deducting any amount from the provident fund consequent to any misconduct determined in departmental enquiry, nor was there any provision for continuance of departmental enquiry after superannuation. It was in the aforementioned situation opined :

"In view of the absence of such a provision in the abovesaid regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30-6-1995, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement."

These aspects of the matter although have been considered by the authority under the Act as also the appellate authority wherewith the learned Single Judge agreed, the Division Bench posed unto itself a wrong question and, thus, misdirected itself while passing the impugned judgment. The

controlling authority was exercising a power under a statute and, therefore, it having been authorised to administer the provisions of the Act was entitled to determine as to whether any case has been made out to deny the right of the appellant to obtain the amount of gratuity in accordance with the provisions thereof. He, thus, did not exceed his jurisdiction.

Reliance has been placed by Mr. Rana Mukherjee, learned counsel appearing on behalf of Respondent No. 1 on *Management of Tournamulla Estate v. Workmen* [1973 (3) SCR 762]. In that case, this Court was concerned with a scheme of gratuity. The scheme contained a provision which was in *pari materia* with Section 4(6)(b) of the Act. The said scheme was upheld stating:

"Although the provisions of this statute would not govern the decision of the present case, the importance of the enactment lies in the fact that the principle which was laid down in the *Delhi Cloth Mills case* with regard to forfeiture of gratuity in the event of commission of gross misconduct of the nature mentioned above, has been incorporated in the statute itself. Even otherwise, such a rule is conducive to industrial harmony and is in consonance with public policy."

Reliance has also been placed upon a decision of Karnataka High Court in *M/s. Bharath Gold Mines Ltd. v. The Regional Labour Commissioner (Central), Bangalore and others* [1986 Lab. I.C. 1976]. In that case it was held that before the amount of gratuity can be directed to be forfeited, an opportunity of hearing must be given. The said decision may not have any application to the fact of the present case as opportunity of hearing was given both to the employer as also the employee by the authority.

Reliance placed by Mr. Mukherjee on a decision of this Court in *D.V. Kapoor v. Union of India and Others* [(1990) 4 SCC 314] is misplaced. Therein having regard to the provisions of the Civil Services and Conduct Rules, it was held that a departmental proceeding can be continued even after allowing the delinquent employee to voluntarily retire. However, therein the rules provided for withholding or withdrawing pension permanently. In that case itself, it was opined:

"...The right to gratuity is also a statutory right. The appellant was not charged with nor was given an opportunity that his gratuity would be withheld as a measure of punishment. No provision of law has been brought to our notice under which, the President is empowered to withhold gratuity as well, after his retirement as a measure of punishment. Therefore, the order to withhold the gratuity as a measure of penalty is obviously illegal and is devoid of jurisdiction."

The said decision, thus, was rendered having regard to the rule which was in operation.

For the reasons aforementioned, the impugned judgment cannot be sustained which is set aside accordingly. The appeal is allowed. The appellant shall also be entitled to costs. The counsel's fee assessed at Rs. 25,000/-.