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

Reserved on: 5th September, 2018
Pronounced on: 4th October, 2018

\+ W.P.(C) 6301/2010

VIJAY KRISHAN ..... Petitioner
Through: Mr. V.P. Singh, Adv.

versus

THE STATE TRADING CORPORATION & ORS
.. Respondents
Through: Mr. Tarkeshwar Nath, Adv.

CORAM:
HON'BLE MR. JUSTICE C.HARI SHANKAR

% JUDGMENT

1. The petitioner, who had put in 36 years of service in the Government and public sector, was appointed, in the State Trading Corporation of India Ltd (Respondent No. 1 herein and referred to, hereinafter, as "STC"), as Director (Finance), *vide* Department of Commerce Office Memorandum, dated 23rd July, 2002, for a period of 5 years from the date of taking charge of the post or till superannuation, or further orders, which was earlier. The petitioner assumed charge of the post of Director (Finance) on 1st August, 2002, and retired, on 31st July, 2006, on attaining the age of superannuation, vide Office Order dated 12th May, 2006.

2. On 28th July, 2006, a charge-sheet was issued, to the petitioner, proposing holding of an enquiry, against him, under Rule 27 of the Employees' (Conduct, Discipline & Appeal) Rules, 1975 (hereinafter referred to as "the Rules"). Though learned counsel for the petitioner has not made any submissions regarding the merits of the charges against his client, the Articles of Charge may, for the sake of completion of the recital, be reproduced thus:

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> Article-I
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> That the said Shri Vijay Krishan while working as Director (Finance) of State Trading Corporation of India Limited, New Delhi failed to ensure proper examination of the business proposal from finance angle of the STC Metal Scrap Division for grant of financial assistance of Rs.150 crore to M/s Metro Machinery Traders for purchase of old plant & Machinery from M/s Neyveli Lignite Corporation submitted on 28.04.2005 for consideration of the STC Committee of management.
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> Article-II
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> That the said Shri Vijay Krishan failed to critically evaluate the financial viability of the NLC Project before submitting Viability Report dated 29.04.2005 by Fax from Mumbai.
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> Article-III
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> That the said Shri Vijay Krishan failed to exercise due diligence by neither questioning the wide variations in the estimated values of individual items of plant & machinery of two valuation reports arranged by applicant party while approving the proposal dated 28.04.2005 initiated by Metal Scrap Division for seeking reliable estimation of worth of the plant & machinery in question through independent third party evaluation before considering the proposal.

Article-IV

That the said Shri Vijay Krishan failed to ensure compliance with the provisions of STC's Circular No.CMD/STC/03/990 dated 19th August, 1999 issued by CMD and Circular No. 173 dated 27th July, 2000 issued by Company Secretary while approving the proposal dated 28.05.2005 of Metal Scrap Division for financial assistance to the tune of Rs.15.38 crore to M/s A.G. Agro Pvt. Ltd. for purchase of old process steam plant of M/s Neyveli Lignite Corporation Ltd.

The above acts of omission and commission as detailed in Articles I to IV above on the part of Shri Vijay Krishan constitute misconduct as per rules 4(1) (i) & (ii) and Rule 5 (5) & (9) of the STC Employees (Conduct, Discipline, Appeal) Rules, 1975."

3. A disciplinary inquiry was held, culminating in Inquiry Report dated 14th November, 2008. The disciplinary authority, finally, passed the impugned order, dated 20th May, 2009, imposing, on the petitioner, the penalty of deduction of 100% of the gratuity payable to him.

Rival Submissions

4. Mr. V. K. Singh, learned counsel for the petitioner, chose not to address any submissions regarding the merits of the charges against his client, or the findings of the IO and the DA thereon. He restricts his submissions to the following:

(i) Deduction of 100% gratuity was contrary to Section 4(6) of the Payment of Gratuity Act, 1972 (hereinafter referred to as "the Act") under which termination of employment was the *sine qua non* for passing an order for forfeiture of gratuity. Sub-

section (6) of Section 4 of the Act may, for ready reference, be reproduced thus:

> "(6) Notwithstanding anything contained in sub-section (1),-
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> > (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.
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> > (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)

Termination of service is, therefore, Mr. Singh would contend, the *sine qua non* for forfeiture of gratuity, whether in whole or in part, as per Section 4(6) of the Act. No such termination, of the petitioner's service, had taken place, as he had been relieved, on completion of his tenure as Director (Finance) of the STC, on 31st July, 2006. For this proposition Mr. Singh relies on para 14 of ***Jaswant Singh Gill v. Bharat Coking Coal Ltd, (2007) 1 SCC 663*** and para 17 of ***Jorsingh Govind Vanjari***

v. Divisional Controller, Maharashtra State Road Transport Corporation, Jalgaon Division, Jalgaon, AIR 2017 SC 57.

(ii) Punishment had been awarded, to the petitioner under Rule 30-A(ii) of the Rules, which could not supersede the Act, as they were not statutory. Reliance was placed, for this purpose, on paras 18 to 21 of ***Chairman-cum-managing Director, Mahanadi Coal Field Ltd v. Rabindranath Choubey, (2013) 16 SCC 411***. Rule 30-A of the Rules read thus:

> "**30-A Continuation of disciplinary proceedings after retirement**
>
> (i) Disciplinary proceedings, 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.
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> (ii) During the pendency of the disciplinary proceedings, the disciplinary authority may withhold payment of gratuity, for ordering the recovery of gratuity of the whole or part of any pecuniary loss caused to the Company if the employee is found in a disciplinary proceeding or judicial proceeding to 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(3-A) of the Payment of Gratuity Act, 1972 should be kept in view in the event of delayed payment, in case the employee is fully exonerated."

(iii) Reliance was also placed, by Mr. Singh, on para 10 of ***Jaswant Singh Gill (supra)***, which holds that Rule 27 of the Rules, which applied in that case, provided only for recovery from gratuity to the extent of loss caused to the Company, and ordained that, in any event, penalties had to be imposed so long as the employee remained in service. It was held, in the said paragraph, that, even if disciplinary proceedings were initiated prior to attaining of the age of superannuation, once the employee was allowed to retire from service, the question of imposing the penalty of removal or dismissal from service would not arise. Even though the applicable Rules allowed for continuation of a disciplinary proceeding despite retirement of the employee, the said allowance, it was held, would not mean that, though the employee was permitted to retire, and his services had not been extended for the said purpose, major penalty could be imposed on him.

(iv) Mr. Singh pointed out that ***Jaswant Singh Gill (supra)*** has been referred, by ***Rabindranath Choubey (supra),*** to a Larger Bench, but submitted that the said reference would not affect his case, as his was not the case of dismissal of removal, and the point referred to the Larger Bench was, expressly, whether the punishment of removal, or dismissal, could be awarded to an employee after he had retired from service.

(v) It was further submitted that Rule 30-A permitted for withholding/forfeiture of gratuity, only to the extent of loss caused. There was no allegation, in the present case, in any

Article of Charge, of the acts of the petitioner having caused loss to the respondent. In fact, no loss had occurred, to the respondent, till date. Neither had any such loss been quantified.

5. Arguing in opposition, Mr. Tarkeshwar Nath initially contested the maintainability of the present writ petition, on the ground that Section 7(6) of the Act provided an efficacious alternative remedy, by way of appeal, to the appellate authority specified thereunder. He relied, for the said purpose, on the judgements of this Court in ***Neeru Abrol v. Chairman and Managing Director, National Fertilisers Ltd, 2017 (152) FLR 565***, ***P. S. Gupta v. U.O.I., 2011 (3) LLJ 839*** and ***S. P. S. Rana v. National Seeds Corporation, 2007 (99) DRJ 227***. He also highlighted the fact that the proceedings, which had culminated before the Supreme Court in ***Jaswant Singh Gill (supra)***, too, reached the Supreme Court via the Controlling Authority under the Act. Alternatively, Mr. Nath submits, a remedy of appeal was also available under Rule 35 of the Rules. As such, he would exhort this Court to reject this writ petition on the ground of maintainability.

6. Addressing the reliance, by Mr. Singh, on ***Jaswant Singh Gill (supra)***, Mr. Nath would submit that the said decision does not deal with the situation where the charge-sheet had been issued prior to retirement of the employee. He, instead, places reliance on para 23 of the judgement in ***Rabindranath Choubey (supra),*** also submitting that, as the said judgement referred ***Jaswant Singh Gill (supra)*** to a Larger Bench, the reliance, on the latter decision, by Mr. Singh, was inappropriate.

7. Mr. Nath further submitted that Section 4(6) of the Act had been interpreted by a coordinate single bench of this Court in ***Marmar Mukhopadhyay v. U.O.I., MANU/DE/2466/2013.*** He placed specific reliance on paragraphs 23 and 24 of the report, which read thus:

> "23. In view of the aforesaid discussion with respect to bindingness of the ratios in the judgments of ***M.H. Mazumdar (supra)*** and ***Brahm Datt Sharma (supra)*** we will have to read the provisions of Section 4(6) of the Payment of Gratuity Act. Once the ratio of the judgment of the Supreme Court is that departmental proceedings can continue even after retirement if the rules of the organization or statutory rules so permit, then, I am of the opinion that the provision of Section 4(6) of the Payment of Gratuity Act must be read by putting more stress not on the aspect of the fact that dismissal order or termination of services order against an employee cannot be passed after retirement but the substance and heart of Section 4(6) is that the action of the employee is such that loss or damage caused to the employer during the period of service of the employee and which can result in an order of termination of services i.e. what is important is not passing of an actual order of termination of services before retirement but the loss or damage caused to the employer-organization which can entail order of termination of services of an employee if the employer had continued to be in service. The fact that order of termination of services cannot be passed because of retirement of the employee in the meanwhile cannot mean that the loss or damage has not been caused to the employer which otherwise could have resulted in dismissal/termination of services of an employee. That being so, the provisions of Section 4(6) will have to be read in the same manner as was done by the Supreme Court with reference to Bombay Civil Services Rules 188 and 189 in the case of ***M.H. Mazumdar (supra)*** i.e. entitling an employer to continue with the departmental proceedings even after retirement of the employee.
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> 24. I do not find anything in the applicable provision of Section 4(6) of the Payment of Gratuity Act, 1973 which brings to an end automatically the continuation of an enquiry against a charged employee merely on account of

> superannuation/retirement. If the provisions of Rules 188 and 189 have been held in the case of ***M.H. Mazumdar (supra)*** to enable continuation of the departmental proceedings after retirement of an employee, I find that the provision of Section 4(6) also does provide entitlement of forfeiture on account of loss or damages caused by an employee and which entitlement does not bear any co-relation to the incidence of retirement of an employee because nothing in Section 4(6) of the Payment of Gratuity Act at all provides that on retirement there is disentitlement to continue the enquiry/departmental proceedings against a superannuated employee. All that the provision of Section 4(6) provides is that once the services have been terminated i.e. in effect can be terminated if employee was in service or the employee being found guilty of act or willful omission or negligence causing any damage or loss or destruction of property belonging to the employer, then, forfeiture can be made of the gratuity, and if that be so, this provision does not in any manner prohibit continuing of the departmental enquiry after superannuation of the charged official/retiring employee."
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> (Emphasis supplied)

In this connection, Mr. Nath also sought to invoke para 18 of the judgement in ***S. P. S. Rana (supra)***.

8. Mr. Nath lastly submits that, if the arguments of Mr. Singh were accepted, an employee of the respondent could easily commit embezzlement prior to his retirement, and, after he retires, claim that he should be let off scot-free. Such, Mr. Nath would submit, could never be the intention of the law.

9. For these reasons, Mr. Nath would exhort this Court to reject the present writ petition.

10. Countering the reliance, by Mr. Nath, on ***Marmar Mukhopadhyay (supra)***, Mr. Singh submits that, in view of the later decision of the Supreme Court in ***Jorsingh Govind Vanjari (supra)***, ***Marmar Mukhopadhyay (supra)*** could not come to the aid of the respondent.

11. Mr. Nath would, in surrejoinder thereto, contend that the controversy, in ***Jorsingh Govind Vanjari (supra)***, was totally different, and that the said decision does not refer, anywhere, to Section 4(6) of the Act.

Analysis

12. Inasmuch as the controversy in issue is primarily legal, involving interpretation of different pronouncements of the Supreme Court and of this Court, and the issue was addressed, at length, by both learned counsel, over various dates of hearing, I deem it appropriate to decide it on merits, instead of relegating the petitioner to the remedy of appeal available at the administrative level. Besides, in ***Rabindranath Choubey (supra)***, a similar objection, as upheld by the learned Single Judge, was rejected, in appeal, by the Division Bench of the High Court, which ruled on merits, and the matter was also decided, on merits, by the Supreme Court.

13. It is obvious, even from a reading of Rule 30-A of the sub-rules, that the respondent cannot wish away Section 4(6) of the Act. Sub-Rule (ii) of Rule 30-A specifically permits withholding of payment of

gratuity by reference to Section 4(6) of the Act. In my view, therefore, it is not possible to countenance an argument that Rule 30-A of the Rules can operate on its own steam, as a self-contained code, oblivious of the dictates of Section 4(6) of the Act.

14. Adverting, now, to Section 4(6) of the Act, a plain reading of the said provision reveals that it contemplates termination as a necessary pre-requisite to withholding of gratuity, whether in whole or in part. Termination of the employee is specifically contemplated in clause (a) as well as in both of the sub-clauses (i) and (ii) of clause (b), of Section 4(6). Withholding of gratuity, in the absence of an order of termination of the employee would, therefore, clearly amount to doing violence to Section 4(6) of the Act which, being in the nature of plenary parliamentary legislation, has to be accorded due respect and reverence. It is not permissible, therefore, for the respondent to rely on Rule 30-A of the Rules, to act in a manner contrary to Section 4(6) of the Act.

15. I may note, in this regard, that it is nobody's case that the Act does not apply to the respondent, or to the present proceedings. That being so, even assuming there were a conflict between Rule 30-A of the Rules and Section 4(6) of the Act – which, frankly, does not seem to exist – it is obvious that Section 4(6) of the Act would prevail. The submission of Mr. Singh, to this effect, is well taken and merits acceptance.

16. I now proceed to the inevitable task of maneuvering betwixt the authorities which, chiefly, were cited before me, i.e. ***Jaswant Singh Gill (supra), Rabindranath Choubey (supra), Jorsingh Govind Vanjari (supra)*** and ***Marmar Mukhopadhyay (supra)***.

17. <u>Jaswant Singh Gill</u>

17.1 The appellant Jaswant Singh Gill (hereinafter referred to as "Gill"), was an employee of Respondent No.1- Bharat Coking Coal Ltd. (hereinafter referred to as "BCCL"). He was visited with a charge-sheet, alleging shortage of stock of coal in one of the areas under his supervision. During the pendency of the ensuing departmental proceedings, he was allowed to retire.

17.2 Consequent to retirement, Gill applied, in 1998, for payment of gratuity, under the Act. The application was denied. Gill approached the Additional Labour Commissioner (hereinafter referred to as "ALC"). In response to the notice issued by the ALC, BCCL filed a response, contending that the gratuity payable to Gill had been withheld for the purposes of making of adjustment, in the event recovery was directed to be made in the disciplinary proceedings.

17.3 Upon conclusion of the departmental inquiry, the disciplinary authority, *vide* order dated 5th July, 2000, found Gill guilty of the charge against him and, "considering the seriousness of the offence, would have imposed the punishment of dismissal from service of Shri

J.S. Gill……. but for his superannuation". Forfeiture of the gratuity of Gill was, therefore, ordered.

17.4 The ALC, however, in his order dated 11th April, 2001, held that, as Gill had retired on superannuation, he was entitled to payment of gratuity under the Act. It was observed, by the ALC, that forfeiture of gratuity, under Section 4(6) of the Act, was permissible only where the service of the employee was terminated, for one or other of the reasons contemplated by the different clauses of the said sub-section. The services of Gill not having been so terminated, the ALC held that forfeiture of his gratuity was impermissible. He specifically observed, in this regard, that "the basic requirement of termination of service for any of the misconduct as enumerated under Sections 4(6)(a) and 4(6)(b) of the Payment of Gratuity Act, 1972 has not been fulfilled before the issue of order of forfeiture of gratuity."

17.5 BCCL appealed. The appellate authority concurred with the finding, of the controlling authority under the ALC that termination, for one of the reasons contemplated in the different clauses of Section 4(6) of the Act was a *sine qua non* for forfeiture or withholding of gratuity. He, therefore, dismissed the appeal of BCCL.

17.6 BCCL proceeded to the High Court of Jharkhand by way of a writ petition, which, too, was dismissed by a learned Single Judge, *vide* judgment dated 13th December, 2001.

17.7 The matter was carried further, by BCCL, *via* an intra-court appeal. The Division Bench of the High Court of Jharkhand set aside the judgment of the learned Single Judge, on the ground that the controlling authority under the Act was not competent to entertain the appeal against the order passed by the disciplinary authority, imposing, on Gill, the punishment of forfeiture of gratuity.

17.8 It was thus that Gill reached the Supreme Court.

17.9 The Supreme Court crystallized the issue arising for consideration before it as " whether the provisions of the said Act shall prevail over the rules framed by the Coal India Limited, the holding company of Respondent No.1, known as the Coal India Executives' Conduct, Discipline and Appeal Rules, 1978 (for short "the Rules")".

17.10 It was recognized, at the very outset, by the Supreme Court, that the Rule by which Gill was governed, provided for imposition of the penalty of "recovery from pay or gratuity of the whole or part of any pecuniary loss caused to the company by negligence or breach of orders or trust". Further, Rule 34.2 and 34.3 of the said Rules read thus:

> "34.2. Disciplinary proceedings, 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.
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> 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 Sections 7(3) and 7(3-A) 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."

17.11 The Supreme Court held, categorically, in paras 9 and 10 of the report, thus:

"9. *The Rules framed by the Coal India Limited are not statutory rules. They have been made by the holding company of Respondent 1.*

10. *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.*

(Emphasis supplied)

17.12 A reading of the above paras from the judgment of the Supreme Court discloses that, while the Supreme Court acknowledged the entitlement, of BCCL, to continue the disciplinary proceedings,

initiated against Gill, while he was in service, even after his retirement, it was of the clear view that the said continuance would not, as a sequitur, empower BCCL to, having allowed Gill to retire and not having extended his service, impose, on him, a major penalty in terms of Rule 27.

17.13 Again, in paras 11 and 12 of the judgment, the Supreme Court held thus:

> "11. *Power to withhold penalty (sic gratuity) 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.
>
> 12. *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 1 or its holding company are not statutory in nature.* The Rules in any event do not provide for withholding of retiral benefits or gratuity"
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> (Emphasis supplied)

17.14 The Supreme Court went on to observe further, in para 13 of the judgment that the provision of sub-section (6) of Section 4 of the Act "must…..be scrupulously observed". This, it was held, would not only require termination of services of the employee, to have been directed before any forfeiture of his gratuity took place, but also limited such forfeiture to the actual loss of or damages, quantified by the disciplinary authority.

17.15 The only circumstance in which the whole of gratuity payable to the employee could be forfeited, was where the termination of the

employee was for riotous or disciplinary conduct, or an act of violence, or where an employee was convicted for an offence involving moral turpitude.

17.16 Para 14 of the report reiterates the legal position, in no uncertain terms, thus:

> "14. *Termination of services for any of the causes enumerated in sub-section (6) of Section 4 of the Act, therefore, is imperative."*
>
> (Emphasis supplied)

17.17 Relying on the above reasoning, the Supreme Court set aside the judgment of the Division Bench of the High Court of Jharkhand, and allowed the appeal of Gill, with costs.

17.18 ***Jaswant Singh Gill (supra)*** therefore, is categorical in postulating that

(i) the Rules framed, by the company, would have to cede place to the provisions of the Act, especially Section 4(6) of the Act,

(ii) even if the Rules permitted continuation of the disciplinary proceedings, initiated by the employee, while in service, beyond his superannuation, that would not permit imposition of a major penalty of dismissal or removal, after the employee had superannuated, *unless he was not allowed to retire and his services were continued for the said purpose,*

(iii) termination of service, for one of the reasons contemplated in Section 4(6) of the Act, was a *sine qua non* for withholding of gratuity, whether in whole or in part, and

(iv) the gratuity could be withheld, if at all, only to the extent of the loss suffered by the organisation, which was required to be quantified by the disciplinary authority.

18. Rabindranath Choubey

18.1 The respondent in this case (Rabindranath Choubey, hereinafter referred to as "Choubey") was issued a charge-sheet on 1st October, 2007, proposing to hold a disciplinary inquiry. During the pendency of the said proceedings, he was allowed to retire, on 31st July, 2010, on attaining the age of superannuation. Choubey applied, on 21st September, 2010, for release of his gratuity. He also moved an application before the Controlling Authority under the Act for the same purpose.

18.2 On being informed, by the appellant-company Mahanadi Coalfield Limited (hereinafter referred to as "MCL"), that the gratuity of Choubey had been withheld owing to the pendency of the disciplinary case against him, the Controlling Authority, under the Act, held the claim of Choubey to be premature.

18.3 Choubey moved to the High Court of Orissa by way of a writ petition, which was dismissed by the learned Single Judge, on the ground that an alternate remedy of appeal was available to him.

18.4 Choubey filed an intra-court appeal. The Division Bench held that the writ petition was maintainable and further ruled, on merits, following ***Jaswant Singh Gill (supra)*** that, as the disciplinary proceedings against Choubey had been initiated prior to his attaining the age of superannuation, and he had been permitted to retire on superannuation, there could be no question of imposing, on him, the major penalty of dismissal from service thereafter. Withholding of his gratuity, it was further held, had necessarily to abide by the provisions of the Act. It was also held that the right, of Choubey, to gratuity, under the Act, could not be impaired by resorting to the rules framed by MCL, which did not have the force of statute. A direction, was therefore, issued to MCL, to release the gratuity payable to Choubey.

18.5 The Supreme Court, which was further moved by MCL, crystallized the issue arising for its consideration as "whether it is permissible in law for the appellant to withhold the payment of gratuity to the respondent, even after his superannuation from service, because of the pendency of disciplinary proceedings against him."

18.6 Before the Supreme Court, learned counsel for MCL relied on the judgment in ***SBI v. Ram Lal Bhaskar, (2011) 10 SCC 249***, and

urged that the Act did not mandate release of gratuity when departmental proceedings were pending against an employee.

18.7 The Supreme Court, at the outset, acknowledged the fact that Rule 34 of the Rules applicable in that case permitted the management to withhold gratuity during the pendency of disciplinary proceedings. It, thereafter, distilled the issue before it thus (in paras 14 and 15 of the report):

> "14. The bone of contention is as to whether this rule is contrary to the provisions of the Payment of Gratuity Act and, therefore, this rule being no-statutory is to be ignored and the provisions of the Gratuity Act are to be preferred. In this behalf we will have to examine the scheme of the Gratuity Act to find whether as per the Gratuity Act, such a person like the respondent, would become entitled to receive the gratuity under this Act.
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> 15. It is because of the reason that a statutory right accrued, thus, cannot be impaired by reason of a rule which does not have the force of statute. It will bear repetition to state that the Rules framed by Respondent or its holding company are not statutory in nature."

18.8 ***Jaswant Singh Gill (supra),*** it was noted, examined the interplay of the very same rules, *vis-a-vis* the Act. The principles flowing from ***Jaswant Singh Gill (supra)*** were set out thus, by the Supreme Court (in paras 17.1 and 17.2 of the report):

> "17.1 No doubt, Rule 34.2 of the CDA Rules provides for continuation of disciplinary proceedings despite retirement of an employee if the same was initiated before his retirement. However, after his retirement, major penalty in terms of Rule 27 cannot be imposed. We may state here that Rule 27 of the CDA Rules provides for the nature of penalties including 'recovery from pay or gratuity of the whole party of any back loss caused to the company by negligence or breach of orders

for trust'. Major penalties which are prescribed under Rule 27 are reduction to a lower grade, compulsory retirement, removal from service and dismissal. The Court thus held that these major penalties cannot be imposed upon a retired employee.

17.2 The Gratuity Act gives right to an employee to receive gratuity on rendition of 5 years' continuous service. Gratuity becomes payable as soon as the employee retires. This statutory right which accrues to an employee cannot be impaired by reason of a rule which does not have the force of a statute. Therefore, Rule 34.3 of the CDA Rules, which is non-statutory in nature, is contrary to the provisions of the Gratuity Act. As such, gratuity cannot be withheld on the retirement of an employee even if departmental proceedings were initiated against him before his retirement and pending at the time of retirement."

18.9 It was noticed that, while ***Jaswant Singh Gill (supra)*** was rendered by a Bench of two learned Judges, ***Ram Lal Bhaskar (supra)*** was a judgment of three learned Judges of the Supreme Court, and later in point of time. Regarding ***Ram Lal Bhaskar (supra),*** the Supreme Court held thus (in paras 18 to 21 of the report):

"18. ***Jaswant Sigh Gill v. Bharat Coking Coal Ltd. (2007) 1 SCC 663: (2007) 1 SCC (L& S) 584*** was a judgment delivered by a two-Judge Bench. Mr. Mahavir Singh, learned Senior Counsel has placed strong reliance on a three-Bench judgment of this Court which is later in point of time. This case is known as ***SBI v. Ram Lal Bhaskar, (2011) 10 SCC 249: (2012) 1 SCC (L&S) 402***. In that case, rule 19(3) of the State Bank of India Officers Service Rules, 1992 came up for interpretation which is in pari material with Rule 13.42 of the CDA Rules. Said Rule 19(3) of the SBI Officers, Service Rules also permits disciplinary proceedings to continue even after the retirement of an employee if those were instituted when the delinquent employee was in service. Then for the purpose of such proceedings the otherwise retired employee is deemed to be in service and those proceedings shall be

continued and concluded as if the employee had continued in service. Thus, such an employee is deemed to be in service for limited and specified purpose only viz. for the purposes of continuance and conclusion of the proceedings. In that case, charge-sheet was served upon the respondent before his retirement. The proceedings continued after his retirement and were conducted in accordance with relevant rules wherein charges were proved. On the departmental remedies, the respondent filed the writ petition in the High Court which was allowed and order of dismissal was quashed.

19. This Court in ***SBI v. Ram Lal Bhaskar, (2011) 10 SCC 249: (2012) 1 SCC (L&S) 402*** reversed the said decision of the High Court. However, we find that there is no direct discussion, in the said judgment, on the issue as to whether it is permissible for the disciplinary authority to impose the penalty of dismissal of service after the retirement of the employee. In fact the Court had dealt with two aspects. One question which was deliberated was as to whether inquiry could continue after the retirement of the respondent from service. This question was answered in the affirmative having regard to Rule 19 (3) of the SBI Officers Service Rules. The court distinguished another judgment in ***UCO Bank v. Rajinder Lal Capoor [(2007) 6 SCC 694: (2007) 2 SCC (L& S) 550]*** on the ground that in the said case the delinquent officer had already been superannuated and the charge-sheet was served after his retirement. In these circumstances the Court had taken the view in ***Rajinder Lal Capoor case [(2007) 6 SCC 694: (2007) 2 SCC (L& S) 550]*** that when an employee is allowed to superannuate, no inquiry can be initiated against him thereafter. However, if charge-sheet is served before the retirement, enquiry can continue even after the retirement as per Rule 19(3). This proposition thus stands settled viz. if the Rule permit, enquiry can continue even after the retirement of the employee.

20. The other aspect which was dealt with in ***SBI v. Ram Lal Bhaskar, (2011) 10 SCC 249: (2012) 1 SCC (L&S) 402*** was as to whether the High Court could interdict the findings of disciplinary authority and arrive at its conclusion that the findings recorded by the inquiry officer were not substantiated by any officer on record on the basis of evidence produced. This Court held that so long the findings of the disciplinary

authority are supported by some evidence, the High Court is not empowered to reappreciate the evidence as an appellate authority and came to a different and independent findings on the basis of that evidence. This is not the issue before us in the instant case.

21. *It is thus clear that the question as to whether penalty of dismissal could be imposed after retirement was not categorically raised or dealt with in* ***Ram Lal*** *case.* No doubt, penalty of dismissal was inflicted upon the employee in that case. But *it was not specifically or in clear terms contended that such a penalty could not be imposed on an employee who is already permitted to retire. At the same time, innuendo, the judgment gives a semblance of indication that such a penalty is permissible because of the reason that as per the rules, for the purposes of enquiry, the employee shall be deemed to be in service. As a sequitur, one can deduce the principle that when the Rules, by creating fiction, treat the officer still in service, albeit for the limited purpose of the continuance and conclusion of such proceedings, then any of the prescribed penalties, including dismissal, can be imposed. However, as we have pointed out above, the issue of permissibility of penalty of dismissal on such a retired official was neither raise nor any direct discussion followed thereupon. At the same time, the fact remains that penalty of dismissal even after the retirement, was upheld. This goes contrary to the dicta laid down in* ***Jaswant Singh Gill*** *which took the view that no major penalty is permissible after retirement and was not even referred to."*

(Emphasis supplied)

18.10 Having thus examined the decisions in ***Jaswant Singh Gill (supra)*** and ***Ram Lal Bhaskar (supra)***, the Supreme Court held, in para 22 of the report, that the issue of whether, in view of the provisions of the Act, gratuity had necessarily to be released to the employee concerned, on his retirement, even if departmental proceedings were pending against him, stood directly answered by ***Jaswant Singh Gill (supra).*** However, it was also noticed that

Jaswant Singh Gill (supra) proceeded on the premise that, after the retirement of an employee, he could not be visited with the penalty of dismissal. Resultantly, if the penalty of dismissal *could* be visited on the retired employee, the right to forfeit gratuity would still enure, in favour of the employer, in the eventualities provided in sub-section (1) to (6) of Section 4 of the Act.

18.11 *The Supreme Court also held, categorically, that "for invoking clause (a) or (b) of sub-section (6) of Section 4, the necessary precondition is the termination of service on the basis of departmental enquiry or conviction in a criminal case" and that "this provision would not get triggered if there is no termination of service."*

18.12 On the premise that ***Jaswant Singh Gill (supra)*** proceeded on the assumption that it was permissible to impose, on the employee, the punishment of dismissal from service, even after his superannuation, and noticing that ***Ram Lal Bhaskar (supra)*** took a contrary view, the Supreme Court felt that the matter needed resolution by a Larger Bench. Accordingly, the decision in ***Ram Lal Bhaskar (supra)*** directed that the matter be placed before the Chief Justice for constituting a Larger Bench to hear the appeal.

18.13 The said Larger Bench remains to be constituted.

19. <u>Jorsingh Govind Vanjari</u>

19.1 This case, clearly, did not actually deal with the issue of whether, in the absence of an order terminating the services of an

employee, his gratuity could be withheld. The appellant before the Supreme Court had been dismissed from service, and had raised an industrial dispute, resulting in the termination being set aside, vide order dated 26th August, 2002. However, as, in the interregnum, the appellant had crossed the age of superannuation on 31st May, 2005, the Labour Court ordered that, from the date of termination to the date of superannuation, the appellant would be entitled to all service benefits except back wages which were limited to 50%.

19.2 The management challenged the award before the Bombay High Court, which, *vide* judgment dated 8th July, 2015, modified the award by granting one time compensation equivalent to 50% back wages.

19.3 The appellant moved the Supreme Court thereagainst.

19.4 The Labour Court noted that the termination of the appellant, from service, was consequent to a domestic inquiry, and that the Labour Court had found the inquiry to have proceeded in violation of the principles of natural justice. Once such a finding had been returned by it, the Labour Court observed that it was for the management to prove the factum of misconduct, by leading evidence before it. This, the Labour Court noted, was not done, resulting in the allegation of misconduct having been committed by the appellant (before the Supreme Court) remained unestablished. In this scenario, the Labour Court held that it could "safely be inferred that the charges leveled

against the parties are false and that charge-sheet was issued with an intention to victimize him".

19.5 As noted hereinabove, ultimately, the High Court limited the relief granted to the appellant-workman, a lump sum compensation of 50% back wages, from the date of termination till the date of superannuation.

19.6 The appellant was also held, by the High Court, not to be entitled to gratuity.

19.7 In so modifying the order of the Labour Court, the High Court proceeded on the premise that the procedure followed by the Labour Court was faulty, as it had decided the preliminary issue regarding fairness of inquiry as well as the issue of misconduct at one stroke. The Supreme Court found that this presumption, by the High Court, was erroneous on facts, as it was the respondent-management which, despite having been granted an opportunity, had failed to lead evidence, to prove the misconduct, before the Labour Court.

19.8 Thereafter, the Supreme Court proceeded, in para 17 of the report, to hold thus:

> "17. In order to deny gratuity to an employee, it is not enough that the alleged misconduct of the employee constitutes an offence involving moral turpitude as per the report of the domestic inquiry. *There must be termination on account of the alleged misconduct, which constitutes an offence involving moral turpitude*."
>
> (Emphasis supplied)

19.9 Mr. Singh presses into service the above extracted para 17 of the Supreme Court in ***Jorsingh Govind Vanjari* (*supra*)**.

19.10 Be it regarded as *ratio decidendi* or *obiter dictum*, it is clear that in para 17, the Supreme Court has held termination of service to be the *sine qua non* for withholding gratuity. A reading of the judgment of the High Court of Bombay, from which the matter proceeded to the Supreme Court, as reported in ***MANU/MH/3974/2015***, reveals that the High Court directed withholding of gratuity on the ground that the charge against the appellant involved moral turpitude. The Supreme Court, in para 17 of its judgment, clearly disapproved of this view, holding that termination of the employee had necessarily to precede withholding of gratuity.

19.11 It is true that the judgment of the Supreme Court does not refer to Section 4(6) of the Act. Even so, it is obvious that the Supreme Court was seized of a provision which contemplated withholding of gratuity only in the case of termination of the employee, and the Supreme Court had treated the said clause as mandatory.

20. Marmar Mukhopadhyay

20.1 This judgment, by a learned Single Judge of this Court, admittedly addresses, squarely, the issue of whether Section 4(6) of

the Act permitted withholding of gratuity in the absence of an order terminating the services of the concerned employee.

20.2 In the said case, the petitioner-Marmar Mukhopadhyay (hereinafter referred to as "Mukhopadhyay"), challenged a charge-sheet, dated 28th November, 2006, issued to him, as well as the consequential letter dated 30th November, 2006, whereby his employer withheld his gratuity. The applicability of Section 4(6) of the Act was admitted by all parties. Arguments were addressed, at length, on the issue of whether inquiry proceedings could, or could not, continue beyond the retirement/superannuation of Mukhopadhyay, in view of Section 4(6) of the Act.

20.3 Mukhopadhyay, relied on Section 4(6) of the Act to contend that departmental inquiry, against him, had necessarily to cease with his retirement. He placed reliance, *inter alia*, on the judgment in ***Jaswant Singh Gill (supra)*****.**

20.4 Para 7 of the judgment of this Court, which deals with ***Jaswant Singh Gill (supra),*** reads thus:

> "7. When we refer to para-10 of the judgment in the case of ***Jaswant Singh Gill (supra)*** the same quite clearly holds that penalties can only be imposed so long as the employee remains in service and if an employee attains the age of superannuation prior to closing of the disciplinary proceedings question of major penalty by removal or dismissal from services would not arise. It has further been observed that entitlement to continue the departmental proceedings is only if the services of the employee are extended for the purpose of the enquiry proceedings. Supreme Court thereafter observed in para 7 in the case of ***Bhagirathi***

Jena (supra) that departmental proceedings cannot continue unless there was a provision for continuing the departmental enquiry after superannuation in the relevant rules of the employer-organization.

In my opinion, para-13 of the judgment in ***Jaswant Singh Gill (supra)*** would also be relevant because the Supreme Court in the case of ***Jaswant Singh Gill (supra)*** arrived at a finding that there is no entitlement to withhold the gratuity because the conditions which were required for applicability of Section 4(6) had not arisen inasmuch as in the facts of that case the Disciplinary Authority had not passed an order quantifying the loss or damage because the Disciplinary Authority observed that punishment cannot be imposed after retirement. In the case of ***Jaswant Singh Gill (supra)*** the Disciplinary Authority had passed an order dated 5.7.2000 (which is reproduced in para-3 of the judgment) that since the charged official in that case had superannuated from service, no punishment of dismissal could be imposed. However, the Disciplinary Authority, still directed forfeiture of the gratuity of the charged official, and therefore the issue was that if there exists no order of punishment as imposed by the Disciplinary Authority whereby the existence of the conditions of Section 4(6) of the Payment of Gratuity Act are made out, then, how can there be an entitlement of the employer to withhold gratuity. The ratios as given in paras 10 and 13 of the judgment in the case of ***Jaswant Singh Gill (supra)*** are independent of each other i.e. Supreme Court has independently observed of disentitlement to continue the enquiry proceedings after superannuation and has also separately found that in the facts of that case since there was no order of the Disciplinary Authority quantifying the loss or damage or existence of other conditions of Section 4(6) of the Payment of Gratuity Act, 1972, hence there could not be forfeiture of the gratuity as ordered by the Disciplinary Authority."

(Emphasis supplied)

20.5 In para 21 of the judgment, the learned Single Judge held that "the ratio of the Supreme Court in the case of ***Jaswant Singh Gill***

(supra) that although the roles of employer-workman, permitted continuation of the departmental proceedings, yet departmental proceedings cannot continue after retirement." was in direct conflict with an earlier decision of two-Judge Bench of the Supreme Court as well as the decision of a Bench of three learned judge of the Supreme Court in ***State of Maharashtra v. H.M. Mazumdar 1988 (2) SCC 52***. Thereafter, in paras 23 and 24 of the judgment, the learned Single Judge proceeded to hold thus:

> "23. In view of the aforesaid discussion with respect to bindingness of the ratios in the judgments of ***M.H. Mazumdar (supra)*** and ***Brahm Datt Sharma (supra)*** we will have to read the provisions of Section 4(6) of the Payment of Gratuity Act. Once the ratio of the judgment of the Supreme Court is that departmental proceedings can continue even after retirement if the rules of the organization or statutory rules so permit, then, I am of the opinion that the provision of Section 4(6) of the Payment of Gratuity Act must be read by putting more stress not on the aspect of the fact that dismissal order or termination of services order against an employee cannot be passed after retirement but *the substance and heart of Section 4(6) is that the action of the employee is such that loss or damage caused to the employer during the period of service of the employee and which can result in an order of termination of services i.e. what is important is not passing of an actual order of termination of services before retirement but the loss or damage caused to the employer-organization which can entail order of termination of services of an employee if the employer had continued to be in service. The fact that order of termination of services cannot be passed because of retirement of the employee in the meanwhile cannot mean that the loss or damage has not been caused to the employer which otherwise could have resulted in dismissal/termination of services of an employee. That being so, the provisions of Section 4(6) will have to be read in the same manner as was done by the Supreme Court with reference to Bombay Civil Services Rules 188 and 189 in the case of* ***M.H. Mazumdar (supra)*** *i.e. entitling an employer to continue with the departmental proceedings even after retirement of the employee*.

> 24. *I do not find anything in the applicable provision of Section 4(6) of the Payment of Gratuity Act, 1973 which brings to an end automatically the continuation of an enquiry against a charged employee merely on account of superannuation/retirement*. If the provisions of Rules 188 and 189 have been held in the case of ***M.H. Mazumdar (supra)*** to enable continuation of the departmental proceedings after retirement of an employee, *I find that the provision of Section 4(6) also does provide entitlement of forfeiture on account of loss or damages caused by an employee and which entitlement does not bear any co-relation to the incidence of retirement of an employee because nothing in Section 4(6) of the Payment of Gratuity Act at all provides that on retirement there is disentitlement to continue the enquiry/departmental proceedings against a superannuated employee. All that the provision of Section 4(6) provides is that once the services have been terminated i.e. in effect can be terminated if employee was in service or the employee being found guilty of act or willful omission or negligence causing any damage or loss or destruction of property belonging to the employer, then, forfeiture can be made of the gratuity*, and if that be so, this provision does not in any manner prohibit continuing of the departmental enquiry after superannuation of the charged official/retiring employee."
>
> (Emphasis supplied)

20.6 Paras 23 and 24 of the judgment of the learned Single Judge in ***Marmar Mukhopadhyay (supra),*** as reproduced hereinabove, elucidate two principles, i.e. (i) that Section 4(6) of the Act did not bring to an end, automatically, the continuation of an inquiry against a charged employee, merely on account of superannuation/retirement and (ii) the reference to "termination" under Section 4(6) of the Act did not necessarily refer to actual termination, but to a situation in which the services of the employee *could have been terminated*, had he continued in service. By this reasoning, the learned Single Judge,

has held that the superannuation/retirement, of the employee, in the interregnum, would not debar the establishment-department from withholding his gratuity, provided that the services of employee *could have been terminated* had he continued in service and not retired.

21. <u>The above dicta, juxtaposed</u>

21.1 Section 4(6) of the Act, plainly read, uses the word "if the services of such employee had been terminated". There is no reference, in the said provision, to any "deemed termination" or "possible termination". On a plain reading, the said sub-section requires actual termination of the employee and nothing else, for it to apply.

21.2 The learned Single Judge, in ***Marmar Mukhopadhyay*** has read into Section 4(6), a situation in which actual termination of the employee cannot take place but, had the employee not superannuated in the interregnum, from service, it might have been possible to terminate him.

21.3 The necessity of entering further into this controversy is, however, obviated by the judgment in ***Rabindranath Choubey (supra),*** which was delivered three months after ***Marmar Mukhopadhyay (supra)***, on 29th October, 2013. In the said case, the Supreme Court has categorically held that ***Jaswant Singh Gill (supra)*** clearly ruled that gratuity of an employee could not be withheld after he had superannuated. No doubt, the Supreme Court noticed that the

rationale of the decision in ***Jaswant Singh Gill (supra)*** was the premise that, after superannuation, disciplinary proceedings, resulting in the dismissal or removal of the employee from service, could not take place, which view the Supreme Court felt appropriate to refer to a Larger Bench. On the issue of impermissibility of recovery or withholding of recovery of gratuity from an employee who had superannuated from service, the law in ***Jaswant Singh Gill (supra)*** continues to hold till date, in view of the pronouncement in ***Rabindranath Choubey (supra).***

21.4 Para 22 of the report in ***Rabindranath Choubey (supra)*** categorically observes thus "Thus for invoking clause (a) or (b) of sub-section 6 of Section 4, the necessary precondition is the termination of service on the basis of departmental enquiry or conviction in a criminal case. This provision would not get triggered if there is no termination of services."

21.5 The views expressed in para 17 of ***Jaswant Singh Gill (supra)*** and para 22 of ***Rabindranath Choubey (supra)***, therefore, support the proposition that an order of termination of the employee is a necessary precursor to withhold his gratuity. At the cost of repetition, it may be mentioned that this view is completely in accordance with the actual wording of Section 4(6) of the Act and, therefore, in my opinion, commends immediate acceptance.

22. Mr. Tarkeshwar Nath, appearing for the respondents, had also sought to question the wisdom of such a view, by suggesting that, if such a view were to be accepted, an employee and officer who was guilty of serious financial defalcation could, merely by superannuating

or retiring, escape the consequences of his act. The argument is too facile to be countenanced seriously.

23. In the first place, the issue in controversy relates only to the power to withhold gratuity and not to any other action which could be taken against the officer. Secondly, all that would be required to be done, in order to ensure that the officer receives his just desserts for his actions, would be not to permit him to retire during the continuancy of the disciplinary proceedings.

24. Once the officer has been permitted to superannuate, however, Section 4(6) of the Act would, in my view, unquestionably, kick in, with all is appurtenances and embellishments, as noticed hereinabove.

Conclusion

25. For the above reasons, I am of the view that there is merit, in the contention of the petitioner, that the petitioner having been allowed to superannuate in normal course, and no order, terminating his service, ever having been passed, the decision to withhold/forfeit his gratuity was clearly in the teeth of Section 4(6) of the Act, and cannot, therefore, sustain. Consequently, the impugned order, dated 20th May, 2009, is quashed and set aside.

26. The petitioner shall be entitled to reliefs consequent thereupon, which shall be computed and disbursed to him within four weeks of receipt, by the respondent, of a certified copy of this judgment.

27. I refrain from issuing any directions regarding continuation of the disciplinary inquiry, or imposition of any alternative penalty by the respondent, as the very permissibility of continuation of the disciplinary inquiry, and imposition of a major penalty on the petitioner, after he had superannuated from service, is still at large, following the reference to the larger Bench, made by the Supreme Court in ***Rabindranath Choubey (supra)***.

28. There shall be no order as to costs.

C.HARI SHANKAR, J

OCTOBER 04, 2018
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