

(2013) 09 CAL CK 0069

Calcutta High Court

Case No: Writ Petition No. 6538 (W) of 2011

Subhojit Dutta

APPELLANT

Vs

Union of India and Others

RESPONDENT

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Date of Decision: Sept. 11, 2013

Acts Referred:

- Payment of Gratuity Act, 1972 - Section 4(6), 4(6A)

Citation: (2013) 4 CALLT 451

Hon'ble Judges: Sambuddha Chakrabarti, J

Bench: Single Bench

Advocate: R.N. Majumder, Mr. Susanta Pal, Mr. Sourav Chakraborty and Mr. Supratim Bhattacharjee, for the Appellant; Sandipto Bose, Advocate for the respondent Nos. 1 and 2, Mr. Soumya Majumder, Dipayan Kundu, Promad Mishra and Mr. Anupam Das Adhikari, Advocates for the respondent No. 3, for the Respondent

Final Decision: Allowed

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### Judgement

Sambuddha Chakrabarti, J.

By the present writ petition the petitioner has inter alia prayed for a writ in the nature of Mandamus commanding the respondents to revoke and cancel two orders annexed to this writ petition as Annexure P-25 and P-26, a writ in the nature of Prohibition prohibiting the respondents from giving any effect to or taking any step in terms of the said two orders. The case of the petitioner inter alia is that he joined the service of the respondent No. 3 company in the year 1987 and was promoted to the post of the General Manager in 2004. The petitioner applied for the post of Director (Project Management) of the company. On June 17, 2005 the relevant department of the Government of India informed the Company Secretary of the concerned respondent company that the President of India had sanctioned appointment of the petitioner for the said post on the terms and conditions as mentioned therein. The Government of India further informed the Managing Director of the company about the approval of the competent authority to the

enhancement of the retiring age from 58 years to 60 years with immediate effect. The petitioner contends that his appointment would be till he attains the age of 60 years.

2. However, by a letter dated February 29, 2008 the relevant department of the Government of India informed the Managing Director of the respondent No. 3 company that since at the time of appointment of the petitioner to the new post the superannuation age in the respondent company was 58 years and taking into consideration that his age of superannuation was 58 years only the petitioner would cease to be the Director (Project Management) beyond February 29, 2008. Subsequently, by a circular dated March 4, 2008 the Company Secretary had informed all concerned that the petitioner had ceased to be a Director (Project Management) with effect from February 29, 2008. By a circular dated March 20, 2008 the General Manager (HRD) of the company informed all concerned that the petitioner had been posted in Grade E(7) with effect from 1st March, 2008 and he was designated as Technical Advisory to the MD of the respondent company.

3. The petitioner moved a writ petition in the year 2008 and after a contested hearing the said writ petition was disposed of by a judgement and order dated December 23, 2008 whereby the impugned order dated February 29, 2008 was set aside and quashed. An appeal therefrom was dismissed. A SLP taken from the order of the appeal bench was dismissed by the Supreme Court on July 17, 2009. The petitioner resumed his duties as Director (Project Management) of the respondent No. 3 company. This, however, did not continue for long. By an order dated August 28, 2009 issued by the respondent No. 2 herein the petitioner was placed under suspension with immediate effect in exercise of the powers conferred by the relevant rule in contemplation of a disciplinary proceeding for violation of Rule 26(iv) of the CRD Rules.

4. The petitioner moved a second writ petition and by order dated September 4, 2009 the learned single judge refused to pass any interim order. The petitioner filed an appeal from the said order and by order dated September 10, 2009 the appellate court disposed of the appeal and the connected application directing the respondents to allow the petitioner to attend his office regularly as Director (Project Management) and pay salary allowances etc. subject to the specific condition that he would only discharge those duties which would be assigned to him by his superior authorities. However, as the charge-sheet was already issued the authorities could proceed with the disciplinary proceeding.

5. By a third writ petition the petitioner challenged the disciplinary proceeding which was disposed of on December 14, 2010 by a learned single judge inter alia directing the Union of India to appoint an enquiry officer as early as possible which shall not be later than 30 days. The enquiry was also directed to be concluded expeditiously with a direction upon the enquiry officer to hear the matter on a day to day basis.

6. Pursuant to the said order an enquiry officer was appointed and he started the proceeding in February, 2010 but could not finish it before the date of the retirement on February 28, 2010. The enquiry was continued after the petitioner's retirement without prejudice to his rights and contentions.

7. The enquiry officer thereafter submitted his report on May 3, 2010 wherein he found that the articles of charges were partly proved to the extent that the petitioner had given wrong information in his application for the post of Director (Project Management) counting his experience from the deemed date of promotion rather than the actual date of promotion. The specific finding was that it could not be proved that he had given the information deliberately. The petitioner submitted his comments on the findings of the enquiry officer but since the respondents had not communicated anything the petitioner by a letter dated January 5, 2011 had raised an issue about the validity of the continuance of the enquiry proceeding even after his retirement. This was followed by a fourth writ petition by the petitioner.

8. Thereafter the respondent No. 2 herein by an order dated February 28, 2011 imposed upon the petitioner the major penalty of removal from service with effect from February 28, 2011 and 50 per cent. of Gratuity due to him was withheld permanently. The respondent No. 3 thereafter by a letter dated March 1, 2011 inter alia informed the petitioner that the payment of final dues were being made to him after giving effect to the necessary recoveries. By the said letter the respondent No. 3 also forwarded three cheques to the petitioner. The petitioner, however, returned the same as he had already decided to challenge the impugned order dated February 28, 2011.

9. These two letters, dated February 28, 2011 and March 1, 2011 being Annexures P-25 and P-26 respectively, are the subject-matter of challenge in the writ petition. The crux of the petitioner's challenge is that the entire disciplinary proceeding was non-est and in support of his contention the petitioner has relied on the case of [Jaswant Singh Gill Vs. Bharat Coking Coal Ltd. and Others](#), . In that case the question that cropped up for consideration was whether the provisions of the Payment of Gratuity Act should prevail over the rules framed by the Coal India Limited. The appellant was governed by the rules framed by the company and Rule 27 provided for penalties including recovery from pay or Gratuity of the whole or part of any pecuniary loss caused to the company by negligent or breach of orders or trust. The Supreme Court held that the provisions of the Act must prevail over the rules as the rules were not statutory. Penalties must be imposed so long an employee remains in service. Even if a disciplinary proceeding is initiated when the petitioner is in service if he retires in the meantime the question of imposing a major penalty of removal or dismissal from service does not arise. Referring to the rules applicable to that case the Supreme Court further held that Article 34.2 no doubt provided for continuation of disciplinary proceedings despite retirement of an 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 could be imposed. The Supreme Court had further held that the power to withhold Gratuity must be subject to the provisions of the Act. Gratuity becomes payable as soon as an employee retires. The only condition therefor is rendition of five years" continuous service. The petitioner had strongly relied on the observation of the Supreme Court that a statutory right accrued cannot be impaired by reason of a rule which does not have the force of a statute.

10. Mr. R.N. Majumder, the learned counsel for the petitioner has submitted that following this judgement in Jaswant Singh Gill (Supra) this court in an unreported judgement dated May 11, 2012 passed in Bindeswari Prasad Singh v. The Eastern Coal Fields Limited and Others (W.P. No. 19427(W) of 2010) held that in view of the judgement delivered in the case of Jaswant Singh Gill (Supra) the penal consequences which would have been imposed by the employer upon a superannuated employee against whom a proceeding was continued under Article 34.2 stood whittled down. The employer can no longer do so until and unless this case falls within the ambit of Section 4(6A) and (6B) of the Payment of Gratuity Act, 1972.

11. The next case relied upon by Mr. Majumder is [Gour Chandra Sarkar Vs. State of West Bengal and Others](#), wherein a division bench of this court has held that with the retirement of an employee the employer-employee relationship snaps. Therefore, unless there is any allegation of the Government suffering any financial loss on account of the misconduct or negligence of a retired employee the departmental proceedings after his retirement cannot continue.

12. The specific case of the petitioner is that in Rule 27 of the Conduct, Discipline and Review Rules for Officers of Bridge and Roof Company (India) Limited (The Rules, for short), like the rules of Coal India and its subsidiaries, major penalties have been prescribed which includes various forms of punishment. In 38A(I) and 38A(ii) of the said Rules it has been inter alia provided that disciplinary proceedings, if instituted while the employee is in service whether before or after his retirement or during his reemployment, shall after the final retirement of the employee be deemed to be a proceeding and shall be continued and concluded in the same manner as if the employee had continued in service. The said Rules further permitted the disciplinary authority to withhold payment of Gratuity during the pendency of the disciplinary proceedings for ordering the recovery from Gratuity of the whole or part of any pecuniary loss caused to the company if the employee is found to have been guilty of offences or misconduct as mentioned in Section 4(6) of the Payment of Gratuity Act or to have caused pecuniary loss to the company by misconduct or negligence.

13. That the petitioner has given wrong information in the application form has been found by the enquiry officer. But he has simultaneously held that this to be not done deliberately. Mr. Majumder therefrom wants to make out a case that there was

no mens rea in giving a merely wrong information from which it can be alleged that the petitioner committed misconduct. The disciplinary authority accepted findings of the enquiry without addressing itself to this part of the report and that too without assigning any reason. In this context the petitioner has relied on the case of [A.L. Kalra Vs. Project and Equipment Corporation of India Ltd.](#), wherein the Supreme Court had observed that the disciplinary authority which was none other than the committee of management of the corporation while accepting the report of the enquiry officer did not assign any reason for accepting the report of the enquiry officer. It is difficult to make out how the committee of management agreed with the observations of the enquiry officer because at one stage while recapitulating the evidence the enquiry officer unmistakably observed that the appellant was subjected to double punishment and at another place it was observed that granting extension of time and acceptance of documents would amount to extending the time which would make the affair look wholly innocuous. Mr. Majumder submitted that in view of the principles laid down in different judgments of the Supreme Court particularly in the decision of Jaswant Singh Gill (Supra) the entire disciplinary proceeding and the final order passed thereon should be quashed and since no charges of pecuniary loss have been alleged against the petitioner the Gratuity of the petitioner could not be forfeited by the respondents authorities.

14. On behalf of the respondents Nos. 1 and 2 an affidavit has been filed. According to the answering respondents while applying for the post of Director (Project Management) of the concerned company the petitioner had furnished false information that he was working as the General Manager of the company with effect from 1st April, 2004. Since the post he applied for required one year's experience as a General Manager he misleadingly gave the false information without possessing the same as he was promoted to the post of General Manager only with effect from October 30, 2004.

15. These respondents say that in the disciplinary proceeding that followed it was established that the charges against the petitioner were proved to the extent that he had given false information regarding his experience by showing his experience from the deemed date of promotion instead of the actual date of promotion.

16. The competent authority after going through the findings of the enquiry officer as well as the representation of the petitioner concluded that as a result of the incorrect information submitted by the petitioner he projected himself as an eligible candidate for the said post and was selected as a result of the same.

17. The respondents have further said that there is no provision in the Conduct, Discipline and Review Rules for Officers (the Rules, for short) to issue a notice under Rule 38 A(i) of the Rules. The answering respondents have also denied that continuance of the disciplinary proceeding after the retirement of the petitioner without applying for extension of time, is clear violation of the order passed by this court on December 14, 2006. The respondents have also tried to justify their acts by

quoting the provisions of Section 4(6) of the Payment of Gratuity Act, 1972 which says that Gratuity amounts can be withheld. According to them in the case of removal a permanent withholding of 50 per cent. of the Gratuity amount of the writ petitioner is entirely justifiable.

18. The respondents Nos. 1 and 2 have further argued that the case does not involve superannuation of the writ petitioner. On the other hand in the instant case the Public Enterprises Selection Board had advertised for the concerned post. The eligibility criteria clearly mentioned that at the time of applying the candidate should possess at least a year's experience in the grade of General Manager of the concerned company receiving an equivalent scale of pay. The firm stand of the respondents is this that the petitioner had furnished false information while filling up the application form that he had one year's experience in the grade of General Manager of the company and was receiving the equivalent scale of pay. The Union of India's stand is that even if one accepts the stand of the petitioner that he was promoted with effect from April 4, 2004 on the date of the filling up of the application form on November 1, 2004 he could never have written that he had one year's experience as a General Manager. The petitioner's disclosure that one year as on 01.04.2005 was to mislead the verifying officials. From this they concluded that the petitioner had deliberately furnished the false information and thereby he had committed a misconduct under Rule 26 of the relevant Rules which inter alia included furnishing false information regarding name, age, father's name, qualification, ability or previous service or any other matter germane to the employment at the time of employment or during the course of employment. He had also committed misconduct under Rule 26 by knowingly furnishing false information to the company.

19. They have further referred to the decision referred in [Govinda Menon Vs. Union of India \(UOI\)](#), wherein the Supreme Court had approvingly quoted an observation made by the Queen's Bench Division in the case of Pears v. Foster, reported in 1886 (17) QB 536 that "if a servant conduct himself in a way inconsistent with the faithful discharge of his duty in the service it is misconduct which justifies immediate dismissal.... It is sufficient if its conduct which is prejudicial or is likely to be prejudicial to the interests or to the reputation of the master and the master will be justified not only if he discovers it at the time but what if he discovers it afterwards for dismissing that servant."

20. The respondents have further referred to the case of [A.P. Public Service Commission Vs. Koneti Venkateswarulu and Others](#), where the Supreme Court had held that for the purpose for which a certain information is called the employer is the ultimate judge. Plea of inadvertence is untenable as at no point of time the respondent candidate informed the Public Service Commission that there was a bona fide mistake by him in filling up the application form or that there was inadvertence on his part in doing so.

21. In the case of [Kendriya Vidyalaya Sangathan and Others Vs. Ram Ratan Yadav](#), the Supreme Court held that the object of requiring information in attestation form was to ascertain and verify the character and antecedents to judge the suitability to continue in service. A candidate having suppressed material information and/or giving false information cannot claim right to continue in service. Again in the case of [Jammu and Kashmir Public Service Commission Vs. Farhat Rasool and Others](#), the Supreme Court compared the supply of wrong information about the eligibility to committing fraud to reap the benefit.

22. On the entitlement of the petitioner to Gratuity the said respondents have further relied on the case of [Y.P. Sarabhai Vs. Union Bank of India and Another](#), for a proposition that a person who is dismissed from service is entitled to get only the Provident Fund but not Gratuity. Again in the case of [U.P. State Sugar Corporation Ltd. and Others Vs. Kamal Swaroop Tondon](#), the Supreme Court held that retirement benefits are earned by an employee for long and meritorious service rendered by him or her. They are not paid to an employee gratuitously or merely as a matter of boon. It is paid to him or her for his or her dedicated and devoted work. The respondents drew a distinction with the case of Jaswant Singh Gill (Supra) and submitted that while Jaswant Singh Gill (Supra) was allowed to retire the petitioner was retained in service and the disciplinary proceedings were continued.

23. The respondent No. 3 has also used an affidavit inter alia alleging that the petitioner did not acquire the essential qualification for being appointed to the post he applied for. A regular disciplinary proceeding was, therefore, initiated against him. During the pendency of the same he had attained the age of superannuation. The relevant service rules permit continuance of enquiry even after the attainment of the age of superannuation if the proceeding had been instituted before his retirement. As a result of it the High Court also in the past had directed continuance of the enquiry proceedings against the petitioner. According to the said respondent the petitioner cannot raise this issue which is now barred either by res judicata or by principles analogous thereto. The respondent No. 3 has supported the enquiry report and the actions taken by the respondents and by the disciplinary authority. They have prayed for dismissal of the writ petition.

24. The chief point of submission on behalf of the respondent No. 3 was that the petitioner had submitted to the jurisdiction of the disciplinary proceeding by participating therein. The qualification for applying to the said post was laid down in the advertisement. The petitioner was an internal candidate. He was the Deputy General Manager in E 6 Grade till he was promoted to the post of General Manager in E 7 on October 1, 2004 with retrospective effect from April 1, 2004. The pay was notionally fixed with effect from October 1, 2004 and the petitioner did not have the experience of working in the desired grade for one year on the date of the advertisement.

25. Mr. Soumya Majumder, the learned Advocate for the respondent No. 3, had submitted that the mistaken appointment of the petitioner to the concerned post did not confer upon him any right to hold the post and he having been found on enquiry that he was mistakenly granted some benefits the same are to be refunded by the petitioner on application of the principle of unjust enrichment. Mr. Majumder has also adopted the submission of the respondents Nos. 1 and 2 in support of the contention that experience means an actual experience or working at a certain post and not the notional experience which has been conferred on him retrospectively.

26. Mr. Soumya Majumder has also relied on the case of [State of Punjab and Others Vs. Gurdeep Kumar Uppal and Others](#), . With reference to the facts of that case the Supreme Court held that undisputedly the respondents were governed by a certain rules where it was provided that the seniority of the members in each branch shall be determined by the dates of their confirmation in service. Based on this he pointed out that the writ petitioner was not in regular service as a General Manager in E 7 Grade and as such he could not have counted any irregular or ad hoc service period for reckoning his experience.

27. Mr. Majumder has also relied on the case of [M. Subba Reddy and Another Vs. A.P. State Road Transport Corporation and Others](#), for the same principle. He further relied on the case of Ashok Kumar Das v. National Institute of Homeopathy and Others, reported in 2010 (1) CHN 327 wherein the charges were of submitting false and fabricated certificate of teaching experience and a division bench of this court held it was well within the power of the enquiry officer to enquire into the genuineness of the teaching experience of the appellant in that case on the basis of the above charges.

28. In reply to the strenuous submission made by the petitioner that what he did was not to furnish false but wrong information Mr. Soumya Majumder has relied on the lexical meaning of the two words and submits that the judgments relied on by the petitioner can be distinguished from the facts of the present case. In fact the respondents submitted that there is not much of difference between the words, wrong and false, in the present context.

29. The academic distinction between a false and a wrong information may not be a very crucial factor here. The submission of the petitioner that the respondents had no authority to proceed with the disciplinary proceedings after his retirement does not seem to be a substantial one. Rule 38A(i) of the concerned Rules says that disciplinary proceedings if instituted while an employee is in service whether before his retirement or during his reemployment shall after the final retirement of the employee be deemed to be proceeded and shall be continued and concluded by the authority by which it was commenced in the same manner save the employee had continued in service. As such the respondent had no difficulty in continuing with the enquiry initiated against him before his retirement. The objection raised by the petitioner about the legality of the enquiry proceeding after the retirement must be

held to be without any substance.

30. But Mr. R.N. Majumdar has a more substantial submission to make. According to him the provisions of the Payment of Gratuity Act must prevail over the rules and in terms of the relevant provisions of the service rules the disciplinary authority may withhold payment of Gratuity if the employee is found in a disciplinary proceeding or in a judicial proceeding to have been guilty of offences or misconduct as mentioned in Section 4(6) 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 the retirement.

31. Thus one thing is clear that in order to withhold the Gratuity the employer must have to come to a conclusion that the charged employee had not only committed an act of misconduct but had also caused financial loss to the company to compensate which the employer shall be entitled to withhold a part of the Gratuity from that which he is otherwise entitled to. There is no specific allegation that because of the petitioner the company had suffered any financial loss. It was imperative on the part of the employer to indicate why they want to invoke the concerned rule and how that was applicable to the facts of the case.

32. That apart, I find sufficient substance in the submission of the petitioner that the information dished out by him in his application form was perhaps not a deliberate one. Even if it was a wrong information the question is whether it was false information or not. Because Rule 26(iv) of the Service Rules makes furnishing false information regarding certain things an act of misconduct. It must be mentioned that in the Articles of Charge it was specifically alleged against the petitioner that he had furnished false information in his application form about his experience of working as the General Manager of the company. The enquiry officer had held that the charge was proved to the extent that he had given wrong information in his application for the concerned post. He had further found that it could not be proved that he had furnished these information "deliberately". Thus the charge of furnishing false information was found at the enquiry to be one of furnishing a wrong information. While communicating the decision of the disciplinary authority it was mentioned that the disciplinary authority on careful consideration of the enquiry report and other materials agreed with the conclusion of submitting wrong information by the charged officer. Thus the disciplinary authority had also accepted that the petitioner had given wrong and not false information.

33. The submissions of the respondent that experience means the actual working experience may not provide the whole answer in view of the eligibility criteria laid down in the advertisement. The minimum experience required was that of one year for the internal candidates in the grade pay as mentioned in the advertisement itself which means that what was wanted in fact was an experience in the eligible scale of pay and the petitioner was notionally given that scale of pay.

34. There is yet another aspect of the case which cannot be ignored. The petitioner had applied as an internal candidate. It is not to suggest that an internal candidate does not furnish false information or a false information furnished by an internal candidate is an absolving factor. Far from it. But regard being had to the common course of human conduct an internal candidate is not likely to deliberately furnish false information for the chance of detection is much more than that in the case of an external candidate. All the records were before the respondents. As such the petitioner is entitled to the benefit of doubt when the authorities themselves also could not detect at the stage of the processing the application which passed through various stages.

35. Such being the position I am not of the view that the petitioner had deliberately sought to defraud the employer in whose employment he was seeking a higher post. The service career of the petitioner has also no blemish and it has not been alleged against him that he ever did practice fraud or misconduct against the company.

36. In such view of it I think the decision to withhold 50 per cent. of the Gratuity of the petitioner is both unjust and a little too harsh. The authorities ought to have held that the requirement of Rule 26(iv) of the conduct Rules of the company was not satisfied inasmuch as an act of misconduct ought to have consisted of furnishing false information and not a merely wrong information. That apart in terms of Rule 38A(ii) of the said Rules Gratuity can be withheld only when the charged person by committing an act of misconduct had caused pecuniary loss to the company. The authority should have indicated in its decision that there is no such charge that the petitioner had caused financial loss to the company and there is no finding to that effect. This imposition of penalty is unwarranted and without any just cause.

37. I find sufficient merit in the writ petition and the same is allowed. The order dated February 28, 2011 is hereby set aside and quashed. The authorities are directed to release all retiral benefits to the petitioner within a period of six weeks from the date of the communication of the order.

38. There shall, however, be no order as to costs. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all requisite formalities.