IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

## Writ Petition No. 6006 of 2016

**PETITIONER**: Western Coal Fields Limited, a Government Company registered under the provisions of Companies Act, having its head office at Seminari Hills Nagpur, through its Chief Managing Director, Civil Lines, Nagpur Tahsil & District Nagpur.

**Vs.**

**RESPONDENTS** : 1. The Presiding Officer, Appellate Authority under the Payment of Gratuity Act, 1972 & Dy. Chief Labour Commissioner (C), Nagpur, CGO Complex, Block -C, I'st Floor, Seminary Hills, Nagpur, Maharashtra.

2. Mr. Manohar S/o Govinda Fulzele, Aged 62 years, R/o Village Yenbodi, Post Office Kothari, Tahsil Ballarpur, District Chandrapur.



Mr. A.M. Ghare, Counsel for the petitioner.
Mr. B.B. Meshram, Counsel for the respondent No.2.

CORAM : MANISH PITALE, J.

RESERVED ON : 28.11.2019

PRONOUNCED ON : 29.01.2020

JUDGMENT

Rule. Rule is made returnable forthwith. Heard finally with the consent of learned counsel appearing for rival parties.

2. The petitioner – Western Coal Fields Limited is disputing the right of respondent No.2 towards gratuity under the

provisions of the Payment of Gratuity Act, 1972. The Controlling Authority (Assistant Labour Commissioner) and Appellate Authority (Deputy Chief Labour Commissioner) under the provisions of the said Act have concurrently repulsed the attempt on the part of the petitioner to deprive the respondent No.2 of the amount of gratuity payable under the provisions of the said Act. It has been held concurrently that the respondent No.2 is entitled to payment of gratuity on the basis of service of 22 years 6 months and 8 days put in by the respondent No.2 with the petitioner. The said authorities have concurrently rejected the contention of the petitioner that it was entitled to forfeit gratuity payable to the respondent No.2 under Section 4(6)(b)(ii) of the said Act.

3. The respondent No.2 joined service with the petitioner in the year 1990 and he was regularized in general Mazdoor category – I on 01/01/1992. On 21/4/2002, when the respondent No.2 was working on the post of Fitter (Auto) Category IV, a complaint was received at the headquarters of the petitioner, stating that while the actual date of birth of the respondent No.2 was 01/07/1953, he had entered service by falsely claiming his date of birth as 01/07/1960. On this basis, chargesheet was issued against the respondent No.2 on 07/09/2012, for giving false information on his date of birth by reducing his age for the purpose of employment. Pursuant to the said enquiry, report dated 05/02/2013 was submitted and on the basis of findings in the enquiry report, the respondent No.2 was dismissed from service on 28/3/2013.

4. The petitioner issued show cause notice on 25/04/2013, to the respondent to show cause as to why gratuity

payable to him ought not to be forfeited on the ground that he was dismissed for misconduct of giving false information regarding date of birth for the purpose of fraudulently seeking employment. The respondent No.2 had submitted a form prescribed under the provisions of the said Act for claiming gratuity on the basis of his continuous service. On 30/09/2015, the Controlling Authority passed an order holding that the respondent no.2 was entitled to receive gratuity for such continuous service and directed the petitioner to pay amount of Rs.4,25,557/- along with 10% simple interest w.e.f. 28/3/2013, till actual date of payment.

5. The petitioner deposited the said amount and filed an appeal under the provisions of the said Act before the Appellate Authority. The petitioner contended that it was entitled to forfeit gratuity amount payable to the respondent No.2 by exercising power under Section 4(6)(b)(ii) of the said Act, as service of the respondent No.2 had been terminated for providing false information regarding date of birth, which constituted an offence involving moral turpitude. The Appellate Authority considered the facts of the case, as also the judgment cited on behalf of the petitioner and it came to a conclusion that even if service of the respondent No.2 was terminated on misconduct defined under the standing order, “misconduct” was distinct from “offence”. It was held that since Section 4(6)(b)(ii) of the said Act pertains to an offence involving moral turpitude, merely because the service of the respondent No.2 was terminated for misconduct of having given false information regarding his date of birth, it could not be said that the provision applied for the petitioner to forfeit gratuity payable to respondent No.2. On this basis, the appeal was

dismissed and the order passed by the Controlling Authority was confirmed.

6. Aggrieved by the said order, the petitioner filed the present writ petition, wherein notice was issued for final disposal and interim relief was granted in favour of the petitioner.

7. Mr. A. M. Ghare, learned counsel appearing for the petitioner contended that both the authorities erred in holding in favour of respondent No.2, because the fact that the respondent No.2 had submitted false information regarding his date of birth had been proved in the departmental enquiry. It was found that the actual date of birth of the respondent No.2 was 01/07/1953, while he had falsely got his date of birth recorded while obtaining employment with the petitioner as 01/07/1960. If his actual date of birth is taken into consideration, he would not have been even eligible for employment with the petitioner. It was submitted that such falsehood polluted the inception of the respondent No.2 into the employment of the petitioner and, therefore, it was clearly an act of moral turpitude, thereby showing that the petitioner was entitled to forfeit the gratuity payable to the respondent No.2, under Section 4(6)(b)(ii) of the said Act. It was submitted that the authorities below wrongly held that unless criminal proceedings were initiated and offence was registered against respondent No.2 for the said conduct on his part and then conviction was rendered against him, that gratuity could be forfeited. The learned counsel appearing for the petitioner relied upon judgment of the Hon'ble Supreme Court in the case of **Devendra Kumar Vs. State of Uttaranchal and others (2013) 9 SCC 363**, to contend that in the said case, suppression of

information while seeking employment had been held to be an act of moral turpitude. It was submitted that if the law as laid down in the said judgment was applied to the facts of the present case, it was clear that the petitioner was entitled to forfeit the gratuity payable to respondent No.2.

8. It was further submitted that even though the Hon'ble Supreme Court in the case of **Union Bank of India and Others Vs. C.G. Ajay Babu and another, (2018) 9 SCC 529,** had held that the registration of criminal offence and conviction for an offence involving moral turpitude by the Competent Court of jurisdiction was necessary for invoking Section 4(6)(b)(ii) of the said Act, the said opinion of the Hon'ble Supreme Court relying upon an earlier judgment in the case of **Jaswant Singh Gill Vs. Bharat Coking Coal Ltd. (2007) 1 SCC 663,** was *obiter dicta*, which was not binding on this Court. It was submitted that the said view taken in both the judgments of the Hon'ble Supreme Court could not be said to *ratio decidendi*, as the question did not squarely arise for determination in these cases before the Hon'ble Supreme Court. In order to support this argument, the learned counsel relied upon judgment of the Hon'ble Supreme Court in the case of **State of Gujarat and Others Vs. Utility User's Welfare Association and Others (2018) 6 SCC 21**, wherein "inversion test" was approved and applied by the Hon'ble Supreme Court to determine the *ratio decidendi* of a particular judgment. It was further submitted that this Court in its judgments in the cases of **Mohandas Issardas and others Vs. A. N. Sattanathan and others AIR 1955 BOMBAY 113** and **Shankar Amrita Deshmukh Vs. M/s Paper and Pulp Conversions Ltd. and another 1996(1) Mh.L.J. 765,** had held that the opinion of the Hon'ble Supreme Court would be binding on

the High Courts in India if the opinion was on a question that arose for determination before the Hon'ble Supreme Court. On this basis, it was contended that the impugned orders passed by the two authorities below were required to be set aside.

9. On the other hand, Mr. B.B. Meshram, learned counsel appearing for respondent No.2 supported the orders passed by the authorities below. It was contended that the petitioner had not instituted any criminal proceedings against respondent No.2 in the present case and, therefore, there was no question of the respondent No.2 having been accused of an offence involving moral turpitude and there was no question of the respondent No.2 having been convicted for any such offence. By placing reliance on the judgment of the Hon'ble supreme Court in the case of **Union Bank of India and Others Vs. C.G. Ajay Babu and another** (supra), it was submitted that the writ petition deserved to be dismissed.



10. Heard learned counsel for rival parties and perused the material on record. Considering the nature of submissions made before this Court, a reference to Section 4(6)(b)(ii) of the aforesaid Act is necessary, which reads as follows :

"4. **Payment of gratuity -**
1 ....
2 ....
3 ....
4 ....
5 ....
6. Notwithstanding anything contained in sub-section (1) -
(b) the gratuity payable to an employee [may be wholly or partially forfeited] -
(i) ....

(ii) if the services of such employee have been terminated for any act which constitute an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

11. In the present case, there is no dispute about the fact that the misconduct of having given false information regarding his date of birth was proved against respondent No.2 in the departmental enquiry and on the basis of such findings his service was terminated. The question is whether such an act, which was proved in a departmental enquiry by the petitioner would constitute an offence involving moral turpitude, justifying forfeiture of his gratuity under Section 4(6)(b)(ii) of the said Act. There is no doubt about the fact that, but for furnishing of such false information about his date of birth, the respondent No.2 would not have been able to secure employment with the petitioner. Thus, the very inception of the respondent No.2 into employment with the petitioner was based on a false information. There is substance in the contention raised on behalf of the petitioner that by such falsity the very process of securing employment was polluted by the respondent No.2 and if such an act went unpunished and the respondent No.2 was held entitled for gratuity, it would clearly send a wrong message to the society. It is on this basis that it has been strongly contended on behalf of the petitioner that the impugned orders passed by the two authorities below deserve to be set aside. It is claimed that if an employee like the respondent No.2,who at the initial stage of entering in public employment indulged in such falsity, it clearly involves an act of moral turpitude and such an employee ought not to be granted the gratuity amount. It is submitted that any other interpretation of the aforesaid provision would militate

against the very object of the provision and it would encourage persons like the respondent No.2 to blatantly make false claims regarding their date of birth and other such vital information for securing employment.

12. Both the authorities below have held against the petitioner on the basis of the words used in the aforesaid provisions. It has been held that although the act of the respondent No.2 was certainly a "misconduct" under the aforesaid standing orders, gratuity could be forfeited under the aforesaid provision only if it was an "offence" involving moral turpitude. The Appellate Authority has discussed in detail about distinction between "misconduct" and "offence" and has reached findings in favour of respondent No.2.



13. Since Section 4(6)(b)(ii) of the said Act empowers an employer to forfeit gratuity wholly or partially, it is in the form of an exception to the general Rule under the said Act regarding payment of gratuity to an employee, who otherwise satisfies the requirements specified in Section 4 of the said Act. Gratuity is an amount paid to an employee in consideration for continuous service that is put in by such an employee for years together (minimum service required being five years of continuous service). It is, therefore, directly relatable to every completed year of service and it is based on the rate of wages last drawn by the employee. The requirements under Section 4 of the said Act are clearly spelt out and the quantum of gratuity can be ascertained based upon the facts pertaining to each employee. There is no doubt about the fact that in the present case the respondent No.2 had completed 22 years 6 months and 8 days

continuous service with the petitioner. Therefore, on the basis of number of years of service put in by respondent No.2, he was clearly eligible for payment of gratuity under the provisions of the said Act, particularly Section 4 thereof.

14. Since Section 4(6)(b)(ii) of the said Act is an exception to the whole object and purpose of the said Act to pay gratuity to an employee for the continuous service put in, it has to be interpreted strictly. The fact that it was proved that the respondent No.2 had furnished false information regarding his date of birth, demonstrates that he had indulged in misconduct as specifically defined in service standing orders. It is on the basis of such proven misconduct that the respondent No.2 stood dismissed from the service and thereby he was deprived of the balance years of service that he could have otherwise claimed. In a sense, he stood penalized for his misconduct.



15. The crucial question that arises for consideration is, as to whether such misconduct proved in a departmental enquiry, which had attained finality could be equated with “an offence involving moral turpitude”. In this context, the appellate authority is justified in examining as to what could be defined as an offence. The standing orders obviously cannot be referred to find the definition of the expression “offence”. In the Code of Criminal Procedure, 1973, “offence” means any act or omission punishable by any law for the time being in force. The question is whether the findings rendered in departmental enquiry conducted by the petitioner (employer) would be enough to conclude that the act of the respondent No.2, which stood proved and led to the termination of his service, constitutes an “offence” involving moral

turpitude. The answer has to be in the negative, because whether an act constitutes an offence can be decided only by a Competent Court. This is because, whether the material on record and acts attributed to a person indicate the ingredients of an offence would have to be judged on the basis of proceedings under criminal jurisprudence. The further question as to whether such an offence involves moral turpitude could perhaps be in the domain of a proceeding other than that under criminal jurisprudence, but what would constitute an offence, could certainly not be within the purview of departmental enquiry or any such enquiry by an employer.

16. Therefore, for an employer to deprive an employee of gratuity under Section 4(6)(b)(ii) of the said Act, would necessarily require initiation of criminal proceedings that would culminate in conviction for an "offence". The employer could then come to a conclusion that such an offence does involve moral turpitude and then forfeit the gratuity of an employee. This is because the said provision has to be interpreted strictly as it has the consequence of depriving an employee of gratuity for which he would otherwise be eligible, based on long years of continuous service.

17. In this context, the Hon'ble Supreme Court in the case of **Union Bank of India and Others Vs. C.G. Ajay Babu and another** (supra), has categorically held as follows :

> "15. Under sub-section 6(a), also the gratuity can be forfeited only to the extent of damage or loss caused to the Bank. In case, the termination of the employee is for any act or wilful omission or negligence causing any damage or loss to the employer or destruction of property belonging to the employer, the loss can be recovered from

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

16. "Offence" is defined, under the General Clauses Act, 1897, to mean "any act or omission made punishable by any law for the time being in force" [Section 3(38)].

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

18. Therefore, the contentions raised on behalf of the petitioner cannot be accepted and the concurrent orders passed by the authorities cannot be said to be erroneous. In so far as the binding nature of the aforesaid judgment of the Hon'ble Supreme Court, the opinion of the Hon'ble Supreme Court is the *ratio decidendi* by application of the 'inversion test' and it is not *obiter dicta* not binding on this Court.

19. The judgments of this Court relied upon by the learned counsel appearing for the petitioner in the cases of **Mohandas Issardas and others Vs. A. N. Sattanathan and others** (supra) and **Shankar Amrita Deshmukh Vs. M/s Paper and Pulp Conversions Ltd. and another** (supra) on the question of precedents, *ratio decidendi* and *obiter dicta,* would also not come to the assistance of the petitioner. This is because, it has been categorically held therein that opinion of the Hon'ble Supreme Court on a question that arises for determination, is binding on the High Courts.

20. A perusal of the judgment of the Hon'ble Supreme Court in the case of **Union Bank of India and Others Vs. C.G. Ajay Babu and another** (supra), shows that in the opening paragraph the question framed for consideration was, whether forfeiture of gratuity under the Payment of Gratuity Act, 1972, is automatic on dismissal from service. In the process of deciding this specific question and upon hearing the counsel, the Hon'ble Supreme Court examined whether Section 4(6)(b)(ii) of the said Act would apply in the case before it and then laid down the law as quoted above. In fact, the Hon'ble Supreme Court after referring to the

facts of the said case and in the context of the question framed, held in paragraph 19 as follows :

> "In the present case, there is no conviction of the respondent for the misconduct which according to the Bank is an offence involving moral turpitude. Hence, there is no jurisdiction for the forfeiture of gratuity on the ground stated in the order dated 20-4-2004 that the "misconduct proved against you amounts to acts involving moral turpitude". At the risk of redundancy, we may state that the requirement of the statute is not the proof of misconduct of acts involving moral turpitude but the acts should constitute an offence involving moral turpitude and such offence should be duly established in a court of law".

21. Hence, it becomes very clear that the Hon'ble Supreme Court did lay down its opinion regarding Section 4(6)(b)(ii) of the said Act, while deciding the specific question framed in the facts and circumstances of that case. Therefore, the said opinion of the Hon'ble Supreme Court is binding on this Court.



22. In view of the above, it is found that there is no substance in the present writ petition and accordingly, it is dismissed. Rule is discharged.

JUDGE

*MP Deshpande*