

(1998) 11 BOM CK 0096
In the Bombay High Court
Case No : Writ Petition No. 1727 of 1995

Air India Ltd.

APPELLANT

Vs

Appellate Authority under the Payment of Gratuity Act, 1972
and Others

RESPONDENT

Date of Decision : 18-11-1998

Acts Referred:

Maharashtra Payment of Gratuity Rules, 1972 — Rule 7(1)
Payment of Gratuity Act, 1972 — Section 13, 14, 4, 7

Citation : (1999) 1 ALLMR 428 : (1999) 2 LLJ 93 : (1999) 1 MhLj 755

Hon'ble Judges : A.V. Savant, J

Bench : Single Bench

Advocate : E.P. Bharucha, Z. Kamdin and Pereira, i./b., Bhasin and Co, for the Appellant; M.M. Vashi and Vasudeo Shetty, for the Respondent

Final Decision : Dismissed

Judgement

A.V. Savant, J.—Heard both the learned counsel; Mr. Bharucha for the petitioner and Mr. Vashi for Respondent Nos. 9, 11, 17, 21 and 22.

2. This petition under Article 226 of the Constitution of India is by the employer Air India Limited challenging the two orders viz. (i) Order dated November 30, 1994 passed by the Controlling Authority-Respondent No. 2, and (ii) the order dated June 30, 1995 passed by the appellate authority Respondent No. 1 under the Payment of Gratuity Act, 1972 (for short, "Gratuity Act"). There were separate orders passed by respondent No. 2 Controlling Authority though the issues involved were identical. Under the said orders, the respondents Nos. 3 to 26 employees were held eligible to recover the amount of their gratuity payable in accordance with the provisions of the Gratuity Act, together with interest at the rate of 10% per annum on the said amount payable from different dates till the date of payment. The appellate authority has confirmed the findings recorded by the Controlling Authority. Against the different orders passed by the Controlling Authority in respect of individual workmen, only one appeal was

preferred by the petitioner, which has been dismissed by the appellate authority. Pending this petition, orders have been passed in respect of respondent Nos. 8, 13, 19 and 20 in terms of the minutes of the order handed in and the petition has been disposed of in terms of those Minutes in so far as respondent Nos. 8, 13, 19 and 20 are concerned.

3. A few facts necessary for appreciating the contentions raised now be stated. The respondents No. 3 to 26 were admittedly the employees of the petitioner Corporation - Air India Ltd. They were working in different departments of Air India, which has a Staff Housing Colony at Kalina, Mumbai. The said employees entered into a leave and licence agreement with the petitioner, under which the employee was allotted the Staff Quarter in the Air India Housing Colony. The allotment was done purely on account of the employment with Air India. The agreement provides that the employee has to vacate the quarters 30 days from the date of employee's death, retirement, resignation, dismissal, removal, termination or cessation of employment on any account whatsoever. The employees were to pay licence fee ranging from 7.5% to 10% of the monthly basic pay and D. A. and other allowances which are taken into consideration for the purpose of provident fund contribution. In the event of the employee failing to vacate the premises within 30 days of the termination/cessation of his services, the "employee was liable to pay at double the rate mentioned under the said agreement. However, this provision in Clause 16 of the agreement is independent of the right of the employer to recover damages from the employee for any breach or non-observance of the terms and conditions of the agreement of leave and licence, as stated in Clause 17 thereof. It is also provided therein that this right of the employer will be without prejudice and in addition to all other rights and remedies which the employer may have.

4. Under Clause 21 of the leave and licence agreement, the employer is entitled to deduct and reimburse and pay to itself every month and also as and when occasion may arise from the salary (i.e. basic pay and all allowances) of the employee- licensee, and from all other amounts which are or may be due and payable by the Corporation to the employee-licensee on any account whatsoever, the licence fees and all amounts which are or may be done and payable by the employee to the employer in respect of the said flat. It is further stated in Clause 21 that in the event of the employee licensee dying or retiring or resigning from the services of the Corporation or his service being terminated or his ceasing to be in the service of the Corporation for any reason whatsoever, then the Corporation will be entitled to call upon the Trustees of the Air India Employees' Provident Fund to pay to the Corporation out of the amount of the Corporation's contribution, inclusive of interest, made to the Provident Fund Account, of the employee-licensee and to recover from the said Trustees, and the Corporation will also be entitled to deduct and reimburse and pay to itself from the amount of the gratuity that might be payable to the employee-licensee and from any other amount whatsoever which might become payable to the employee-licensee, the licence fee and all other amounts which are or may be payable by him to the

Corporation or otherwise under the said terms and conditions or in respect of the said flat. By virtue of Clause 21 the employee irrevocably authorises the petitioner to make all such deductions, reimbursements of all such monies and amounts as are mentioned in Clause 21.

5. Admittedly, all the employees, who have retired from the services of the petitioner, except respondent Nos. 8, 13, 19 and 20 have not yet vacated the premises and are still occupying the premises which are needed for housing those in the services of the Corporation.

6. Some of the respondents had filed Writ Petition No. 2101 of 1984 in this Court praying that, on retirement, each one of them was entitled to the benefit of gratuity, provident fund, concessional passages and medical facilities, but the petitioner had declined to grant these facilities. Writ petition was, therefore, filed for a Writ of Mandamus directing the petitioner to pay the amount of gratuity and provident fund, along with interest and also to give to them concessional passages and medical facilities. By an order dated November 10/13, 1986, M.L. PENDSE, J. (as he then was) upheld the preliminary objection raised on behalf of the present petitioner regarding the maintainability of the petition filed by the employees on the ground that they had come to this Court with unclean hands and prayed for exercise of writ jurisdiction under Article 226 of the Constitution. It was held that the employees were not entitled to the discretionary relief having regard to their conduct in refusing to vacate the premises allotted to them even after they have ceased to be in employment. Having regard to the cantankerous attitude adopted by the employees, who were squatting on the premises without any title whatsoever, this Court refused to grant the relief to them. In the result, Rule in that writ petition was discharged with costs.

7. The concerned employees had filed Appeal No. 67 of 1986. It was heard by the Division Bench of S.P. BHARUCHA, J. (as Lordship then was) and T.D. SUGLA, J. on October 6, 1986. This Court upheld the present petitioner's contention that those who did not come to this Court with clean hands were not entitled to the grant of relief independently of the question as to whether they had a statutory right to claim gratuity. In the result, the appeal was dismissed on October 6, 1987. It is common ground before me that as against the dismissal of their appeal on October 6, 1997 the employees had approached the Apex Court, which had summarily rejected the S.L.P.

8. The present proceedings arise out of the applications filed by the employees claiming their gratuity in accordance with the provisions of Section 4 read with Section 7 of the Gratuity Act. The applications were filed belatedly, beyond the period prescribed under Rule 7(1) of the Payment of Gratuity (Maharashtra) Rules, 1972 (for short, "the 1972 Rules"). Under Rule 7(1) it is provided that an application should be made in writing ordinarily within 30 days from the date the gratuity became payable. There is, however, power to condone delay which is to be found in Sub-rule (5) of Rule 7. In the applications filed before the Controlling Authority, the petitioner, raised several contentions, including that of delay, as

also placed reliance on the clauses of the Agreement, under which the petitioner claimed that it was entitled to deduct from the gratuity payable to the employees his liability to pay charges/compensation/damages/penal rent in respect of the premises, service quarters, unlawfully occupied by him. Reliance was placed on the provisions of certain clauses of the agreement, to which I will make a brief reference and it was contended that the petitioner was entitled to adjust the amount of gratuity towards the charges/penal rent that was payable to the petitioner. Relying upon the clauses of the said agreement of leave and licence, a contention was raised that there was an assignment by the employees in favour of the employer, of his right to receive full (sic) gratuity and that such an assignment was permissible and was not prohibited by any provisions of the Gratuity Act. Reliance was also placed on the earlier orders passed by this Court in the petition filed by the employees claiming a Writ of Mandamus where this Court had refused to exercise the writ jurisdiction. The order passed by the Single Judge in Writ Petition No. 2101 of 1984 was confirmed by the Appeal Court as also by the Apex Court.

9. The Controlling Authority framed the requisite issues and by its Judgment and Order dated November 30, 1994 held that the delay in making the applications was liable to be condoned. On merits, it was held that the petitioner was not entitled to adjust the gratuity payable to the employees towards the dues and penal rent due to the petitioner from the employees. In this view of the matter, it was held that the employees are entitled to receive the amount of gratuity in accordance with the provisions of the Gratuity Act. It was held that Writ Petition No. 2101 of 1984 was dismissed on the ground that the Court ought not to entertain a Writ Petition in certain circumstances. It was further held that the relevant clauses of the agreement, as also Clause 5 of the Gratuity Scheme framed by the petitioner would not entitle the petitioner to set off its claim against the amount of gratuity payable to the employees. Relying on the provisions of Sections 13 and 14 of the Gratuity Act, it was held that if the petitioner had any other remedy under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 for getting vacant possession of the service quarters from the employees, the petitioner was free to pursue the said remedy in accordance with law. In the result, the claim of the employees for payment of gratuity was allowed with simple interest at the rate of 10% per annum from the date on which the gratuity had become payable till the date of payment.

10. Against the several orders that were passed by the Controlling Authority in separate applications filed by the employees, the petitioner filed one appeal before the Appellate Authority. The Appellate Authority by its Judgment and order dated June 30, 1995 dismissed the appeal and confirmed the findings of the Controlling Authority. It is these concurrent findings that are challenged before me by the petitioner Air India.

11. Having heard both the learned Counsel at some length, the following points arise for my consideration:

(i) Whether having regard to the provisions of Sections 13 and 14 of the Payment of Gratuity Act, 1972 the petitioner can claim the right of set-off in respect of its claim of dues against the amount of gratuity payable to the respondent employees relying upon the provisions of leave and licence agreement?

(ii) Whether the petitioner can withhold the payment of amount of gratuity due to the respondent employees on the ground that they have continued to authorisedly occupy the service quarters allotted to them even after the termination/cessation of their employment with the petitioner?

In order to answer the above questions, I will briefly refer to the provisions of a few more welfare legislations which are on par with the Payment of Gratuity Act and to some decided cases.

12. In the Workmen's Compensation Act, 1923 Section 9 of the Act specifically provides that the compensation payable to the workmen cannot be assigned, attached or charged or passed on to any person other than the workman by operation of law, nor shall any claim be set off against the same. Section 60 of the Employees' State Insurance Act, 1948 provides that the right to receive any payment of any benefit under the said Act shall not be transferable or assigned. Sub-section (2) of Section 60 provides that no cash benefit payable under the said Act shall be liable to attachment or sale in execution of any decree or order of any Court. The Employees' Provident Funds and Miscellaneous Provisions Act, 1952 contains similar provisions. Section 10 of the said 1952 Act protects the provident fund from being assigned, charged or attached under any decree or order of the Court in respect of any debt or liability incurred by the member of the Fund. Sub-section (2) of Section 10 of the 1952 Act provides that in the event of the death of the employee, the account standing to the credit of a member in the Fund would be payable to his nominee under the Scheme or Rules of the Provident Fund free from any debt or other liability incurred by the deceased. Section 12 of the said 1952 Act prohibits the employer from directly or indirectly reducing his liability for payment of contribution to the fund or the total quantum of benefits in the nature of old age pension, gratuity to which the employee is entitled. In the light of these provisions, it is relevant to note the protection afforded by Sections 13 and 14 of the Payment of Gratuity Act, 1972 which read as under:

"13. Protection of gratuity. No gratuity payable to an employee employed in any establishment, factory, mine, oil field, plantation, port, railway company or shop exempted u/s 5 shall be liable to attachment in execution of any decree or order of any civil, revenue or criminal Court".

"14. Act to override other enactments etc. The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act".

It would be evident from the above provisions that Section 13 of the Gratuity Act protects gratuity from being attached in execution of any decree or order of any civil, revenue or criminal Court. Section 14 makes it clear that the provisions of the Gratuity Act or any rule made thereunder shall have overriding effect notwithstanding anything inconsistent therewith contained in any other enactment or any instrument or contract.

13. Relying on the absence of the specific provision in the Gratuity Act similar to the provisions of Sections 10 and 12 in the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, Mr. Bharucha tried to contend that there is no prohibition in the Gratuity Act against assignment of charging the claim for the right to receive gratuity. Counsel contended that Clauses 16, 17 and 21 of the agreement of leave and licence would specifically entitle the petitioner to set off its claim of compensation, damages, penal rent if any, against the claim of gratuity payable to the employees. Clauses 16, 17 and 21 of the agreement of leave and licence entered into by each employee read as under:

"16. If under any of the provisions hereof the licence is or stands determined or comes to an end, but the employee licensee does not remove himself together with the persons staying with him and his and their belongings from the flat, then, without prejudice to the rights and remedies of the Corporation to remove the employee licensee and such persons and his and their belongings from the flat and also without prejudice to any other rights and remedies of the Corporation, the Corporation shall be entitled to charge the employee licensee, and the employee- licensee shall be bound to pay to the Corporation, licence fee at double the rate mentioned in these terms and conditions till such time as the employee-licensee and the persons staying with him and his and their belongings are removed from the flat.

17. Any breach or non-observance of these terms and conditions shall make the employee-licensee liable to pay such damages as may be determined by the Corporation. This will be without prejudice and in addition to all other rights and remedies of the Corporation."

21. Without in any way affecting the employee-licensee's obligation to pay the licence fee on the due dates and all other amounts due and payable by him under these terms and conditions or in respect of the said flat and without prejudice to any rights or remedies which the Corporation may have, the Corporation shall be entitled to deduction and reimburse and pay to itself every month and also as and when occasion may arise from the salary (i.e. basic pay and all allowances) of the employee-licensee and from all other amounts which are or may be due and payable by the Corporation to the employee-licensee on any account whatsoever, the licence fee and all amounts which are or may be due and payable by the employee licensee to the Corporation or otherwise under these terms and conditions or in respect of the said flat. If no salary is payable to the employee-licensee in any month due to his being on leave without pay or for any other reasons whatsoever, the employee-licensee shall promptly pay on the

due dates the monthly licence fee and all other amounts due and payable by him under these terms and conditions or in respect of the said flat. In case the employee-licensee is under suspension, the Corporation shall be entitled to deduct and reimburse and pay to itself from the subsistence allowance payable to him the monthly licence fee and all other amounts due and payable by him under the said terms and conditions of leave and licence or in respect of the said flat. In case the subsistence allowance is not adequate to cover the licensee fee and the other amounts payable by the employee-licensee or in case the employee-licensee is on leave and the leave salary payable to him is not adequate to cover the licence fee and the said other amounts the employee-licensee shall promptly pay on the due dates such amounts by which the subsistence allowance or leave salary falls short of the licence fee and other amounts payable by him. In the event of the employee-licensee dying or retiring or resigning from the services of the Corporation or his service being terminated or his ceasing to be in the service of the Corporation for any reasons whatsoever then the Corporation will be entitled to call upon the Trustees of the Air India Employees' Provident Fund to pay to the Corporation out of the amount of the Corporation's contribution, inclusive of interest, made to the Provident Fund Account, of the employee-licensee and to recover from the said trustees, and the Corporation will also be entitled to deduct and reimburse and pay to itself from the amount of the gratuity that might be payable to the employee-licensee, the licence fee and all other amounts which are or may be payable by him to the Corporation or otherwise under these terms and conditions or in respect of the said flat. The employee-licensee hereby expressly and irrevocably authorises the Corporation to make such deductions and recoveries and to reimburse and pay to itself all such moneys and amounts as are mentioned above in this clause."

14. Mr. Bharucha placed strong reliance on the rights available to the petitioner under Clause 17, which is independent of the right to charge double the licence fees as provided in Clause 16. Counsel further contended that from the portion underlined above in Clause 21, it is abundantly clear that there can be an assignment by the employee in favour of the petitioner of his right to receive gratuity. In the peculiar facts of the case when the employees are squatting on the property belonging to the petitioner and have continued to illegally occupy the service quarters even after termination or cessation of the employment, such a right in favour of the petitioner must be upheld. Counsel contended that unlike the provisions contained in Section 9 of the Workmen's Compensation Act, 1923 Section 60 of the Employees State Insurance Act, 1948 and Sections 10 and 12 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, there is no specific provision against transfer and assignment of one's right to receive gratuity under the provisions of the Payment of Gratuity Act. All that Section 13 protects is the payment of gratuity against attachment in execution of any decree or order of any civil, revenue or criminal Court. In this case, I am not concerned with any attachment in execution of any decree or order of the civil, revenue or criminal Court. I am concerned with the right claimed by the

petitioner in pursuance of the agreement and in particular, Clauses, 16, 17 and 21 reproduced above, which counsel contends are not hit by any of the provisions of the Gratuity Act. Let me now consider some of the decisions, which have a bearing on the points that arise for my consideration.

15. In *Ramjilal Chimanlal Shartna v. Elphinstone Spinning and Weaving Mill Co. Ltd. and Anr.* 1984 LIC 1703, this Court was called upon to consider the question as to whether the right to receive the amount of gratuity under the Payment of Gratuity Act, 1972 can be circumscribed or made dependent upon the conduct of the employee subsequent to the date of his retirement, as is the case before me. In that case, the petitioner Ramjilal had retired from the employment of the respondent Mill. He was claiming his gratuity. However, there was a dispute in relation to the room in his occupation and the employer was declining to pay the amount of gratuity unless the room was vacated. In para 5 of the judgment, at page 1705, this Court considered the question and held that the right to receive the amount of gratuity could not be circumscribed or made dependent upon the conduct of the employee subsequent to the date of his retirement. The right to receive gratuity cannot be defeated or cannot be used as a lever by the employer for securing back possession of the premises from the employee. It is true that in Ramjilal's case the petitioner gave an undertaking to the Court that he will vacate the premises and hand over the possession of the premises to the employer within three months from the date of receipt of the gratuity. The fact, however, remains that this Court -PENDSE, J. (as he then was) held that the right cannot be defeated.

16. In *Bombay Gas Public Ltd. Co. Vs. Papa Akbar and another, Smt. SUJATA V MANOMAR* (as she then was) considered the provisions of the Payment of Gratuity Act, 1972 and the 1972 Rules framed thereunder and held that the provisions of Section 4(6) of the Gratuity Act dealing with the employer's right to forfeit the amount of gratuity can come into play only when there is termination of the services or any act, wilful omission or negligence causing any damage or loss to or destruction of the property belonging to the employer. It was held that the provisions dealing with forfeiture of the right to receive the gratuity had to be construed strictly. In the absence of the conditions stipulated in Section 4(6) being satisfied, the termination of an employee simpliciter, does not result in forfeiture of his right to receive gratuity.

17. In *Dr. Shailendranath Kartikchandra Ghosh v. Siemens India Ltd.* 1990 II CLR 790. AGARWAL, J. had occasion to consider the question as to whether it is open to a company to confuse the issue of its claim to receive back the possession of the Company's flat from an ex-employee with the claim of the employee to receive retirement benefits. Under Article 10 of the Retirement Benefit Scheme, framed by the Company, the company claimed the right to withdraw the pensionary benefits payable to the employee on account of his failure to vacate the flat of the Company which was in his possession. Criminal, proceedings filed by the Company against the ex-employee for unlawfully withholding the

possession of the company's flat were pending. It was held that it would not be open to the Company to withhold the retirement benefits from its employee. Since pension was an incident of service which the employee earns after a life long service, it was held that such a right cannot be lightly frittered away on the ground that the employee was withholding the possession of the Company's flat.

18. In *Life Insurance Corporation of India Vs. John Anton D'souza and Others*, , a Division Bench of this Court was called upon to consider the validity of the circulars dated June 20, 1985 and September 4, 1985 issued by the Life Insurance Corporation providing for withholding of provident fund and gratuity in the event of the employee refusing to vacate the staff quarter on superannuation. The argument of the employee was that such circulars were mere administrative instructions and could not affect the right of the employee under the statute to receive retirement benefit. The Division Bench, however, was not called upon to specifically consider the question of the effect of the provisions of Sections 13 and 14 of the Payment of Gratuity Act and the question as to whether the said two circulars dated June 20, 1985 and September 4, 1985 were contrary to the provisions of the Section 14 of the Payment of Gratuity Act. On facts, it appears in the said case in *John D "Souza*, the gratuity was paid in the trial Court itself, as is evident from the statement appearing at page 1176 of the report. Regarding the powers of the Corporation to frame regulations regulating the recruitment of employees and their service conditions, it was held that the circulars were issued validly and the petitioner L.I.C was entitled to withhold the employees' contribution to the provident fund till such time as the employee surrendered vacant possession of the staff quarters under the Circular dated-June 20, 1985. The petition of the Life Insurance Corporation was allowed. As stated earlier with respect, the question of constructions of the provisions of Section 13 and more particularly, Section 14 of the Gratuity Act did not arise for the consideration of the learned Judges of the Division Bench in arriving at its conclusion, the Division Bench in *John D" Souza* case (supra) placed reliance on the observations of the Apex Court in *V.T. Khanzode and Others Vs. Reserve Bank of India and Another*, . Reliance on this decision was to a limited extent on the question as to whether the L.I.C. could issue the circulars regularising the service conditions of the staff in exercise of its powers under the L.I.C. Act. In my view, the ratio of the decision of the Division Bench in *John D "Souza's* case is not of much assistance to Mr. Bharucha.

19. The Kerala High Court had occasion to consider this question directly under the relevant provisions of the Payment of Gratuity Act, 1972 in *Travancore Plywood Industries Ltd. v. The Regional Joint Labour Commissioner and Ors.* 1996 I CLR 770. In that case also the employees had refused to surrender possession to the extent of 30 cents of land, which according to the petitioner Company belonged to it and had been given to the employee under a leave and licence agreement and he was bound to surrender the same as and when directed by the Company. The employee's contention was that the land did not belong to the Company. Apart from the approach that dispute as to title and

possession to immovable property could not be agitated under Article 226, the learned Judge took the view that the eligibility of the employee's claim for gratuity had to be decided on the basis of the provisions contained in the Payment of Gratuity Act. The amount of gratuity cannot be withheld, except in accordance with the provisions laid down in Section 4(6) of the Act. Under the Act, the employer was entitled to withhold the gratuity only if the termination was in the manner stipulated in Section 4(6). Having regard to the scheme of the provisions of Sections 13 and 14 of the Act, it was held that the Act did not authorise the withholding of the amount of gratuity payable to the employee merely because there was a dispute regarding the surrender of the land in possession of the employee. That could not form a basis for withholding the disbursement of the amount of gratuity.

20. I will now make a reference to some of the decisions of the Apex Court which have a bearing on the points framed for my consideration. In *Som Prakash Rekhi v. Union of India and Ors.* the Apex Court was considering the scheme of the provisions of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952, as also the Payment of Gratuity Act, 1972. In particular the provisions of Section 12 of the 1952 Act and Section 14 of the 1972 Act were considered by the Apex Court, and it has been observed as under:

"The public policy behind the provisions of Sections 10, 12 and 14 of the respective statutes is clear. We live in a welfare State, in a "socialist" republic under a Constitution with profound concern for the weaker class including workers (Part IV). Welfare benefits such as pension, payment of provident fund and gratuity are in fulfilment of the directive principles. The payment of gratuity or provident fund should not occasion any deduction from the pension as a "set-off". Otherwise, the solemn statutory provisions ensuring provident fund and gratuity become illusory. Pensions are paid out of regard for past meritorious services. The root of gratuity and the foundation of provident fund are different. Each one has salutary benefaction statutorily guaranteed independently of the other. Even assuming that by private treaty parties had otherwise agreed to deductions before the coming into force of these beneficial enactments they cannot now be depravatory. It is precisely to guard against such mischief that the non-obstinate and overriding provisions are engrafted on these statutes. We must realise that the pension scheme came into existence prior to the two beneficial statutes and Parliament when enacting these legislations must have clearly intended extra benefits being conferred on employees. Such a consequence will follow only if over and above the normal pension, the benefits of provident fund and gratuity are enjoyed on the other hand, if consequent on the receipt of these benefits there is a proportionate reduction in the pension, there is no real benefit to the employee because the Management takes away by the left hand what it seems to confer by the right making the legislation itself left-handed. To hold that on receipt of gratuity and provident fund the pension of the employee may be reduced pro tanto is to frustrate the supplementary character of the benefits. Indeed, that is why by Sections 13 and 14 overriding a effect is

imparted and reduction in the retrial benefits on account of provident fund and gratuity derived by the employee is frowned upon. We, accordingly, hold that it is not open to the second respondent to deduct from the full pension any sum based upon Regulation 16 read with Regulation 13. If Regulation 16 which now has acquired statutory flavour, having been adapted and continued by statutory rules, operates contrary to the provisions of the Provident Fund Act and the Gratuity Act, it must fail as invalid. We uphold the contention of the petitioner".

Thereafter, it has been observed by the Apex Court as under:-

"Social justice is the conscience of our Constitution, the State is the promoter of economic justice, the founding faith which sustains the Constitution and the country is Indian humanity. The public sector is a model employer with a social conscience not an artificial person without soul to be damned or body to be burnt. The stance that, by deduction and discretionary withholding of payment, a public sector company, may reduce an old man's pension to Rs. 40 from Rs. 250 is unjust even if it be assumed to be legal. Law and justice must be on taking terms and what matters under our constitutional scheme is not merciless law but humane legality. The true strength and stability of our polity is society's credibility in social justice, not perfect legalism, and this case does disclose indifference to this fundamental value".

21. In *D. V. Kapoor v. Union of India and Ors.* 1990 II CLR 283 S.C., the Apex Court was considering the right of the employer to withhold the payment of gratuity on account of misconduct of the public servant. The President of India has exercised his powers under Rule 9(1) of the Civil Services Pension Rules, 1972 under which the President had a right to withhold or withdraw pension permanently or for a specified period in whole or in part or to order recovery of pecuniary loss caused to the State in whole or in part subject to a minimum. It was held that the employee's right to pension was a statutory right. The measure of deprivation therefore, must be correlative to or commensurate with the gravity of the misconduct or irregularity as it offends the right to assistance at the evening of his life as assured under Art. 41 of the Constitution. The impugned order disclosed that the President had withheld on permanent basis the payment of gratuity in addition to pension. The right of gratuity was also a statutory right and the appellant before the Apex Court was not charged with nor was given an opportunity that his gratuity would be withheld as a measure of punishment. Therefore, the order of withholding gratuity as a measure of penalty was held to be illegal for want of jurisdiction. In the circumstances, the appeal of the employee was allowed. The relevant observations are to be found in paras 6, 7 and 8 of the Judgment.

22. In view of the above legal position it is difficult to accept Mr. Bharucha's contention that there is a valid assignment of the right to receive gratuity by virtue of the working of Clause 21 of the agreement reproduced in para 13 above. Having regard to the Scheme of the provisions of the Gratuity Act and the nature of the right to receive a terminal benefit, as emphasised by the Apex

Court in Som Prakash Rekhi "s case (supra) and in D. V. Kapur "s case (supra) it is not possible to accept Mr. Bharucha"s contention that there is nothing in the provisions of Section 14 of the Gratuity Act which can over-ride the terms of Clause 21 of the Contract. In my view, the Apex Court has clearly indicated in Som Prakash Rekhi"s case that the right to receive gratuity is a salutary benefaction statutorily guaranteed to the employee and even if there was an agreement or settlement between the employer and the employee affecting such a right, it would be hit by the provisions of Section 14 of the Payment of Gratuity Act. I have already reproduced in Para 20 above, the relevant observations in Som Prakash Rekhi"s case. Similarly the Apex Court had clearly indicated in D. V. Kapoor"s case (supra) that the right to receive gratuity is a statutory right. It is a valuable right available to an employee in the evening of his life and is assured by Article 41 of the Constitution of India which deals with the right to work, to education and to public assistance in certain cases.

23. This Court in the three decisions referred to above viz (i) Ramjilal Chimanlal Sharma "s case (supra); (ii) Bombay Gas Public Ltd. Co. v. Papa Akbar and Anr. (supra); and (iii) Dr. Shailendranath Kartikchandra Ghosh"s case (supra), has clearly upheld the right to receive the retirement benefits as a statutory right which cannot be frittered away. Such a right cannot be confused with the right of the employer to get back possession of the service quarter for which the employer has adequate remedy under the ordinary law, including the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. Ramjilal Sharma"s case specifically deals with the right of the employee to receive gratuity under the Payment of Gratuity Act, though the employee therein had given an undertaking to vacate the premises within three months of his receiving his dues of gratuity. In Bombay Gas Public Ltd. Company"s case, this Court made it clear that the provisions of forfeiture of gratuity must be construed very strictly and it is only in the circumstances mentioned in Section 4(6) of the Act that the employer can exercise the power of forfeiture. Similarly, in the case of Dr. Shailendranath Ghosh, this Court did not permit the employer to withhold the payment of terminal benefit on the ground that the employee had not vacated the possession of the company flat, in respect of which criminal case was pending u/s 630 of the Companies Act.

24. Having regard to the above decisions, it is not possible for me to accept Mr. Bharucha"s contention that Clause 21 of the Agreement of Leave and Licence contains a specific assignment in favour of the employer. Even assuming that there was any such assignment in favour of the employer, in my view, having regard to the scheme of the provisions of Sections 13 and 14 of the Gratuity Act, such clause will be hit by the provisions of Section 14 of the Gratuity Act which would clearly override such an agreement.

25. Mr. Bharucha placed reliance on the dictionary meaning of the word "assignment" in the NEW LEXICON WEBSTER"S DICTIONARY of the English Language - 1989 Edition, Lexicon Publications, Inc. New York. At page 56, the

word "assign" has been defined in the following terms:

""assign" to give as a share, allot, to assign positions to people, to nominate, appoint, to assign to a position to give or make over (property or a right) to fix or determine (a day, time etc.) to ascribe to a given time, authorship, origin, class, to give as a task".

Similarly, the word "assignment" has been defined in the following terms:

""assignment", the act of assigning the thing (task) assigned, attribution, assignation (law) transference of property or a right (law) the document by which this is done."

26. Even assuming that there was a valid assignment by virtue of the provisions of Clause 21 of the agreement of leave and licence, in my view, the provisions of Section 14 will over-ride such an assignment. In the result, the respondents employees would be entitled to receive the amount of gratuity independently of their liability to pay the licence fee, rent, compensation, damages or penal rent, as the case may be, in respect of their continued occupation of the service quarters belonging to the petitioner. I am not expressing any opinion on the merits of the rival contentions which may be available in the proceedings under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 or any other law for the time being in force. For examining the legality and validity of the impugned orders, it is not necessary for me to express any opinion on the same.

27. Mr. Vashi tried to contend that there can be no forfeiture, except in accordance with the procedure laid down in Section 4(6) nor can there be any nomination, except in accordance with the provisions of Section 6 of the Gratuity Act read with Rule 6 of the 1972 Rules. It is not necessary to deal with this contention, since Mr. Bharucha fairly stated that he was not basing his right under the leave and licence agreement either as a right of forfeiture which is admittedly subject to the conditions laid down u/s 4(6) of the Gratuity Act or as a nomination in favour of the employer, which must comply with the provisions of Section 6 read with Rule 6. I am, therefore, not examining this contention of Mr. Vashi. Suffice it to say that Mr. Bharucha's contention that there was a valid assignment in favour of the petitioner must be rejected.

28. I am also of the view that the refusal on the part of this Court to entertain Writ Petition No. 2101 of 1984 filed by the employees on the ground that they were not entitled to invoke the writ jurisdiction having regard to their cantankerous conduct cannot be a ground for rejecting their applications made to the Controlling Authority u/s 4 read with Section 7 of the Gratuity Act, 1972. Similar was the view expressed by the Appeal Court while dismissing Appeal No.67 of 1986 on October 6, 1986. The order passed by the Apex Court has not been produced before me, but it is common ground that the SLP filed by the respondent employees was dismissed summarily. In my view, refusal on the part of this Court to entertain the Writ Petition of the employees for issuing a Writ of Mandamus against the petitioner for payment of gratuity, provident fund,

concessional passages and medical facilities cannot be confused with the substantive applications made by the employees under the Gratuity Act, 1972, which have been entertained by the Authorities and have been allowed on merits. There is, thus, no illegality or perversity in the impugned orders.

28. Mr. Bharucha also relied upon the right of the petitioner under Clause (V) of the Gratuity Scheme framed by the petitioner to set off gratuity towards

a) any amount due under liability incurred by a workman to the Corporation and remaining outstanding against him on the date on which he/she ceases to be in service; and

b) any loss caused to the Corporation by any misconduct of a workman for which he/she is removed/dismissed from service.

Clause (V) of the Gratuity Scheme framed by the petitioner for its workmen reads as under:

"V. Set off of the Gratuity:

The Gratuity payable under this Scheme is liable to be set off wholly or in parts towards:

(a) Any amount due under liability incurred by a workman to the Corporation and remaining outstanding against him/her as on the date on which he/she ceases to be in service; and

b) Any loss caused to the Corporation by any misconduct of a workman for which he/she is removed/dismissed from the service".

A bare perusal of Sub-clause (a) would show that the amount payable to the workman towards gratuity can be set off only towards any amount due under the liability incurred by the workman to the Corporation and remaining outstanding against him on the date on which the workman ceases to be in service. What the petitioner is seeking to set off is the liability of the workman to pay damages or compensation or penal rent which becomes payable after the expiry of 30 days from the date of termination/cessation of the employment. As per Clause 8 of the agreement, the employee is entitled to remain in possession of the service quarter till the expiry of the period of 30 days from the date of termination of his service or cessation thereof. Thus, there is nothing in Clause V(a) of the Gratuity Scheme which would entitle the petitioner to set off its claim which had not yet arisen against the employee on the date of his ceasing to be in service. Clause V(a) of the Gratuity Scheme only permits the employer to set off the liability which has been incurred by the workman to the Corporation or any outstanding dues from the date on which the workman ceases to be in service. There is no such liability incurred or having accrued on the date of the workmen ceasing to be in service. The liability would arise after the expiry of 30 days after the termination/cessation of employment. Sub-clause (a) of Clause V of the Scheme, therefore has no application whatsoever. Similarly, Sub-clause (b) of Clause V

has no application whatsoever inasmuch as it is not a case of any loss caused to the Corporation by the respondents for which they are removed/dismissed from service. It must be stated, in fairness to Mr. Bharucha, that he did not pray his claim under either of the two sub-clauses of Clause V.

29. In view of the above, my answer to the two points mentioned in Para 11 above, are as under :-

(I) Having regard to the provisions of Sections 13 and 14 of the Payment of Gratuity Act, 1972 the petitioner employer cannot claim the right of set off in respect of its dues against the amount of gratuity payable to the respondents-employees relying upon the provisions of the leave and licence agreement dated October 5, 1981.

(II) The petitioner employer cannot withhold the payment of the amount of gratuity due to the respondents employees on the ground that they have continued to unauthorisedly occupy the service quarters allotted to them even after the termination/cessation of their employment with the petitioner.

30. In the circumstances, there is no substance in the writ petition. The petition is, therefore, liable to be dismissed.

31. Under Clause (a) of the interim order dated November 5, 1998 passed by this Court, the operation of the impugned orders was stayed. That stay would stand vacated.

32. At this juncture, Mr. Kamdin for the petitioner prays for stay of the operation of the final order for a period of eight weeks. Mr. Vashi opposes the prayer. However, having regard to the facts and circumstances mentioned above, I am inclined to grant stay for a period of six weeks.

33. Rule is accordingly discharged. However, the operation of this order is stayed for a period of six weeks. There will be no order as to costs.