

(2016) 08 GUJ CK 0023

In the Gujarat High Court

Case No : Special Civil Application No.1833, 4261 of 2014 with Special Civil Application No.11179, 11229 of 2016 with Special Civil Application No.4667, 4700 of 2008

Baroda Rayon Corporation Ltd.

APPELLANT

Vs

Shantilal Prabhubhai Patel

RESPONDENT

Date of Decision : 08-08-2016

Acts Referred:

Payment of Gratuity Act, 1972 — Section 4(5)

Citation : (2016) 3 CLR 403 : (2016) LIC 3890

Hon'ble Judges : Mr. C.L. Soni, J.

Bench : Single Bench

Advocate : Mr. Mohir Joshi, Senior Advocate with Mr. K.B. Naik, Advocate for M/s Trivedi & Gupta, Advocate, for the Petitioners No.1 - 2; Government Pleader, for the Respondents No.3; Mr. Bhagyodaya Mishra, Advocate, for the Respondents No.2; Mr. Prabhakar Upadhyay,

Final Decision : Partly Allowed

Judgement

Mr. C.L. Soni, J.(Oral)—All these petitions are filed by one employer ? the Company questioning the orders made for payment of gratuity to its employees ? private respondent in each matter under the Payment of Gratuity Act, 1972 ("the Act").

2. For the sake of convenience, the petitions could be considered in three groups. Special Civil Application NO.1833/2014 and Special Civil Application No.4261 of 2014 will make first group. Special Civil Application No.11179 of 2016 to 11229 of 2016 will be referred to as second group and Special Civil Application No.4661 of 2008 to Special Civil Application No.4770 of 2008 will be referred as third group. The matters of the first group are at the notice stage. The matters in second group are fresh one page petitions. The matters of the third group were admitted long back and placed for final hearing. Final arguments were heard in all matters as they were listed on the same day.

3. In third group of the matters, the orders passed by the appellate authority under the Act for payment of gratuity are challenged. However, in first and second group of the matters, the orders of the controlling authority under the Act are straightway challenged without first availing the remedy of statutory appeal before the appellate authority under the Act. Therefore, in these groups of matters, the Court may require to consider whether the Company could be permitted to straightway challenge the orders of the controlling authority after long delay of 7 years and 9 years respectively.

4. Since it is pointed out that the foundation of the orders passed by the controlling authority which are impugned in the first and second group of the matters, is the decision of the appellate authority impugned in the third group of matters, the matters in the third group are first considered.

The Third Group of petitions - Special Civil Application No.4667 of 2008 to Special Civil Application No.4700 of 2008:

5. From amongst the matters of this group, learned Senior Advocate Mr. Mihir Joshi appearing with learned Advocate Mr. Naik for M/s. Trivedi & Gupta, Advocate for the petitioners states that since settlement is reached in Special Civil Application Nos.4668/08, 4670/08, 4672/08, 4673/08, 4674/08, 4676/08, 4677/08, 4678/08, 4682/08, 4689/08, 4695/08, 4698/08 and 4699/08, he does not press for these petitions. They are, therefore, required to be disposed of as not pressed.

6. In each petition of this group, the order passed by the appellate authority in appeal preferred by the respondent against the order of the Controlling Authority under the Act for payment of gratuity is challenged. Dealing with the individual application, the Controlling Authority passed separate orders for payment of the gratuity to the respondent by holding that the gratuity amount as per the settlement with the union is more beneficial for the respondent under section 4(5) of the Act. The appellate authority, however, did not agree with the controlling authority and held that the petitioner shall be required to pay gratuity to the respondent within the ceiling limit of Rs.3.5 lac instead of considering the ceiling of 20 months' wages as per clause 9.2(a) of the settlement of 1982. The appellate authority also held that for the services rendered prior to 31.12.2003, the gratuity shall be calculated by taking 100% wages and for the services rendered after 1.1.2004, 60% of the lastly paid wages shall be converted into 100% as per the settlement dated 27.10.2003.

7. Learned Senior Advocate Mr. Mihir Joshi submitted that the settlement for various demands including the demand for revising gratuity was arrived at between the union and the Baroda Rayon Corporation Ltd. (referred as "the employer-company") under section 18 of the Industrial Disputes Act, 1947 ("the Act") and as per the said settlement, the petitioner agreed to provide more benefits of gratuity to its employees and such settlement was accepted and acted upon and many employees got benefits of gratuity under the said settlement. Mr.

Joshi submitted that as per the revised scheme of gratuity under the settlement, the petitioner agreed to calculate the gratuity amount by taking 21 days wages as against 15 days? wages provided under the Act, however, maximum amount of gratuity under the settlement was not to exceed 20 months? wages. Mr. Joshi submitted that by amendment in the Act, though ceiling limit was fixed of Rs.50,000.00, still the petitioner extended more benefits of gratuity by considering the ceiling limit of 20 months? wages. Mr. Joshi submitted that the respondent is not entitled to receive the gratuity by opting better terms from the settlement as well as under the Act. Mr. Joshi submitted that the settlement for the revised gratuity scheme has offered better rate of gratuity to the employees and better ceiling limit for payment of maximum gratuity at the relevant time but if any term of settlement for gratuity is not acceptable to the employee, the employee cannot opt for beneficial term from the Act on change in the law. Mr. Joshi submitted that the employees are either to accept the settlement as a whole or to claim gratuity under the Act. Mr. Joshi submitted that the appellate authority has, on misinterpretation of section 4(5) of the Act, committed serious error in holding that the demand of the respondent for asking gratuity amount beyond the limit of 600 days (20 months? wages) is reasonable as per clause 9.2(e) of the settlement. Mr. Joshi submitted that clause 9.2(e) of the settlement of 1982 does not provide for payment of gratuity beyond the ceiling limit of 20 months? wages on account of the amendment in this regard in the law but what is contemplated is to follow the procedure for payment of gratuity to the employee as per the provisions of the Act. Mr. Joshi submitted that if the respondent or any employee was intended to be paid maximum amount as per the provisions of the Act, there was no need to fix ceiling limit of 20 months? wages in the settlement. Mr. Joshi submitted that it cannot be that for calculation of gratuity, respondent would opt for beneficial term of 21 days? wages which is otherwise at the rate of 15 days? wages under the Act and for ceiling limit, he could go under the Act. Mr. Joshi submitted that the appellate authority not only could not have accepted demand of the respondent for considering ceiling limit of 3.5 lac but even the demand for the benefits in later settlement dated 27.10.2003 also could not have been accepted by the appellate authority. In support of his argument, Mr. Joshi has relied on the decision of the Hon?ble Supreme Court in the case of Beed District Central Coop. Bank Ltd. v. State of Maharashtra and others, reported in (2006) 8 SCC 514.

8. Learned Advocate Mr. Upadhyaya appearing for the respondent in all matters, on the other hand, submitted that there is no question of opting only beneficial term from the settlement for gratuity scheme but the demand for payment of gratuity by the respondent was in the context of terms of settlement between the union and the employer-company. Mr. Upadhyaya submitted that when the gratuity scheme was revised, the company consciously agreed for taking 21 days wages for calculation of gratuity and since the ceiling limit of 20 months? wages was fixed as per the provision then existed in the Act, it was subject to change brought in the Act as specifically provided in condition (e) of clause 9.2 of the

settlement. Mr. Upadhyaya submitted that the ceiling of maximum amount of gratuity of 20 months' wages is one of the conditions provided in the settlement for payment of gratuity and in furtherance of such condition, clause 9(2)(e) is to be read which unequivocally provides for payment of gratuity as per the provisions of the Act and on the basis of the decisions of the Hon'ble Supreme Court from time to time which would mean that the condition of ceiling limit of 20 months' wages was subject to amendment in the Act and the decisions of the Hon'ble Supreme Court rendered from time to time. Mr. Upadhyaya submitted that clause 9(2)(e) is, therefore, not just for procedure to be followed under the Act for payment of gratuity but it provides that as and when there is amendment in the Act for change in the ceiling limit for the amount of gratuity payable to the employees, the employee of the company shall be entitled to the payment of gratuity according to such change in the ceiling limit of gratuity. Mr. Upadhyaya submitted that such being part of the terms of settlement, it cannot be said that the respondent is asking for one beneficial term from the settlement and other from the Act. Mr. Upadhyaya submitted that what is being asked is the amount of gratuity under the settlement and, therefore, the appellate authority committed no error in accepting the demand of the respondent for payment of gratuity by considering the ceiling limit of 3.5 lacs and also by considering the subsequent settlement entered in the year 2003 for quantification of gratuity amount. Mr. Upadhyaya submitted that the Gratuity Act is beneficial legislation and the benefits thereunder should be immediately released, however, the respondent has not received any amount of gratuity and, therefore, this Court may not interfere with the impugned orders. Mr. Upadhyaya submitted that in the first and second group of the petitions, since no appeals were filed under the Act and the petitions are filed against the original orders after long time, this Court may not entertain the petitions.

9. Having heard the learned advocates for the parties and having perused the orders of the controlling authority as well as the appellate authority passed under the Act for payment of gratuity to the respondent and also having perused the settlement of the year 1982, it appears that in connection with the application made by each Respondent for payment of gratuity before the controlling authority, the company represented that the respondent shall be entitled to the amount of gratuity within the ceiling limit of 600 days (20 months) wages as per the settlement. However, the respondent claimed that he was entitled to gratuity by calculating 21 days' wages per year as per the settlement and by considering the amendment in the Act for ceiling limit of gratuity ignoring the ceiling limit of 600 days provided in the Settlement. The controlling authority came to the conclusion that the amount of gratuity payable under the settlement was more than the amount payable under the Act and in such circumstances, the gratuity as per the settlement was more beneficial to the respondent. The controlling authority thus ordered to pay the gratuity amount to the respondent as per the settlement and with interest at the rate of 10% from the date of the application.

10. As such, it was beyond the competence of the controlling authority to decide

that the gratuity payable under the settlement was more beneficial for the respondent. Section 4(5) of the Act protects the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer. It is, therefore, for the employee concerned to decide whether the terms of gratuity under any award or agreement or contract with the employer are better or not. In the case of Allahabad Bank and another v. All India Allahabad Bank Retired Employees Association, reported in (2010) 2 SCC 44, the Hon'ble Supreme Court has held and observed in para 44 as under:

"44. Sub-section (7) of Section 7 provides for an appeal against the order of the Controlling Authority. The Act, nowhere confers any jurisdiction upon the Controlling Authority to deal with any issue under sub-section (5) of Section 4 as to whether the terms of gratuity payable under any Award or agreement or contract is more beneficial to employees than the one provided for payment of gratuity under the Act. This Court's order could not have conferred any such jurisdiction upon the Controlling Authority to decide any matter under sub-section, (5) of Section 4, since the Parliament in its wisdom had chosen to; confer such jurisdiction only upon the appropriate Government and that too for the purposes of considering to grant exemption from the operation of the provisions of the Act."

11. However, in the present case, the question is whether the respondent demanded payment of gratuity as provided in the settlement or opted for some terms from settlement finding it to be better and other beneficial terms from the Act for getting higher amount of gratuity. Claim of the respondent to get the gratuity amount is on account of retirement from service and on completion of 20 years or more service. As per clause 9.1 of the settlement, the company has agreed to take 21 days wages per year for the purpose of calculation of the amount of gratuity as part of revised gratuity scheme with effect from 1.1.1983. Under the Act, 15 days' wages per year is to be taken for calculation of the amount of gratuity. Therefore, for employees, 21 days' wages is beneficial for calculation of the gratuity. However, under the settlement, the payment of gratuity calculated on the basis of number of days mentioned in the table of clause 9.1, is made subject to the conditions mentioned in clause 9.2 including condition (a) and (e). Condition (a) and (e) of clause 9.2 read as under:

"(a) The maximum amount of Gratuity payable to the workman shall not exceed 20 months' wages.

(e) The Payment of Gratuity shall be made to the workmen as per the provisions of the Payment of Gratuity Act and on the basis of decisions of Hon'ble Supreme Court from time to time."

12. Condition (a) of clause 9.2 of the Scheme would limit the payment of gratuity upto 20 months' wages. Therefore, on calculation by taking 21 days' wages per year, if it is found that the gratuity payable shall be more than the maximum limit i.e. 20 months' wages, the entitlement of the employee shall be restricted

to receive gratuity maximum upto 20 months' wages. Such is the ceiling limit provided in the settlement. The claim made before the appellate authority by the respondent was that the limit for payment of gratuity maximum up to 20 months' wages was done away with long before by amendment in the Act and as provided in condition (e) of clause 9.2 the gratuity amount to be paid was within the maximum limit of Rs.3.5 lacs as per the amended provision. The appellate authority came to the conclusion that on account of amendment in the Act, for enhancement in the ceiling limit of the gratuity, condition (a) would lose its efficacy and shall not survive and better terms for gratuity as per section 4(5) of the Act are required to be made available to the respondent.

13. The question is whether condition (e) would efface condition (a) of clause 9.2 on account of amendment in the Act fixing higher maximum limit for payment of gratuity.

14. Under the settlement, payment of gratuity by giving benefits of more days' wages is circumscribed to maximum of 20 months' wages by condition (a) in clause 9.2. Whereas condition (e) provides that the payment of gratuity shall be made to the workman as per the provisions of the Act and on the basis of the decisions of the Hon'ble Supreme Court from time to time. The payment of gratuity as per the provisions of the Act is on calculation of gratuity by taking 15 days' wages per year. Therefore, if the payment of gratuity is based on calculation by taking 15 days' wages, it would take away the heart of the settlement for revised gratuity scheme. Therefore, what appears to have been provided by condition (e) is that the payment of gratuity as per the settlement shall be in accordance with the substantive procedure made in the Act and as decided by the Hon'ble Supreme Court from time to time. It does not appear that by condition (e), it was ever intended that on amendment for maximum limit in the Act, the ceiling limit provided in condition (a) would stand modified to match with maximum limit of gratuity as per the amendment in the Act. If such was the intention, it would have been so provided in clear terms in the settlement. The entitlement of an employee to get the gratuity is on fulfilment of the requirement as mentioned in section 4 of the Act which also provides for divesting the employee of his right to get the gratuity on happening of the contingencies as mentioned therein. The Government is vested with the powers to exempt any establishment etc. from the operation of the provisions of the Act. Provisions are also made for nomination and mode of deduction of the amount of gratuity and liability to pay interest on delayed payment of gratuity. Therefore, condition (e) could be read in the context of the mechanism provided in the Act for the payment of gratuity. Once, on behalf of the employee, ceiling limit of 20 months' wages was accepted, the employee would either accept the settlement as a whole for payment of gratuity under the existing scheme or claim gratuity under the Act but it is not open to him to accept better terms for calculation of gratuity from the settlement and to go for better terms for maximum limit of gratuity under the Act. In the case of Beed District Central Cooperative Bank (supra), the Hon'ble Supreme Court while dealing with the similar situation, has

held and observed in para 5, 8 to 16 as under:

"5. The short question which arises for our consideration is as to whether, keeping in view the provisions contained in Sub-Section (5) of Section 4 of 1972 Act, Respondents herein although would be entitled to the benefit of ceiling limit of 3.5 lakhs, the rate of gratuity should be calculated at the rate of 26 days? instead and in place of 15 days salary for every completed year of service in terms of the 1972 Act.

8. It is not in dispute that Appellant-Bank had its own gratuity scheme. The said scheme constituted one of the terms of contract of employment between the parties. Under the scheme, employees were entitled to gratuity on the following terms :

(i) eligibility to receive gratuity Minimum 5 years of service (ii) rate of gratuity 26 days? wages for every completed year of service

(iii) the maximum amount of Rs.2,50,000/- gratuity

9. Whereas Respondents intended to have benefit of rate of gratuity under the aforesaid terms (i) and (ii); according to them, in the above table; term (iii) contained in the contract of employment being repugnant to Section 4(3) of the 1972 Act and void under Section 23 of the Contract Act, must be replaced by Section 4(3) of the 1972 Act.

10. The "doctrine of blue pencil? was evolved by the English and American Courts. In Halsbury?s Laws of England (4th Edn. Vol.9), p.297, para 430, it is stated:

"430. Severance of illegal and void provisions - A contract will rarely be totally illegal or void and certain parts of it may be entirely lawful in themselves. The question therefore arises whether the illegal or void parts may be separated or "severed?? from the contract and the rest of the contract enforced without them. Nearly all the cases arise in the context of restraint of trade, but the following principles are applicable to contracts in general"

11. In P. Ramanatha Aiyar?s Advanced Law Lexicon, 3rd Edn. 2005, Vol. ,p.553-554, it is stated:

"Blue pencil doctrine (test). A judicial standard for deciding whether to invalidate the whole contract or only the offending words. Under this standard, only the offending words are invalidated if it would be possible to delete them simply by running a blue pencil through them, as opposed to changing, adding, or rearranging words. (Black, 7th Edn., 1999).

This doctrine holds that if Courts can render an unreasonable restraint reasonable by scratching out the offensive portions of the covenant, they should do so and then enforce the remainder. Traditionally, the doctrine is applicable only if the covenant in question is applicable, so that the unreasonable portions may be separated. E.P.I, of Cleveland, Inc. v. Basler, 12 Ohio App2d 16:230

NE2d 552, 556. Blue pencil rule/test. - Legal theory that permits a judge to limit unreasonable aspects of a covenant not to compete.

Severance of contract. -

"severance can be effected when the part severed can be removed by running a blue pencil through it without affording the remaining part. *Attwood v. Lamont*, (1920) 3 KB 571 (Banking)

A rule in contracts a Court may strike parts of a covenant not to compete in order to make the covenant reasonable. (Merriam Webster).

Phrase referring to severance (q.v.) of contract. "Severance can be effected when the part severed can be removed by running a blue pencil through it" without affording the remaining part. *Attwood v. Lamont*, (1920) 3 KB 571. (Banking)"

12. The matter has recently been considered by a learned Judge of this Court while exercising his jurisdiction under Sub-Section (6) of Section 11 of the Arbitration and Conciliation Act, 1996 in the case of *Shin Satellite Public Co, Ltd. v. Jain Studios Ltd.*, [2006] 2 SCC 628.

13. We, however, are of the opinion that the said doctrine cannot be said to have any application whatsoever in the instant case. Undoubtedly, the Payment of Gratuity Act is a beneficial statute. When two views are possible, having regard to the purpose, the Act seeks to achieve being a social welfare legislation, it may be construed in favour of the workman. However, it is also trite that only because a statute is beneficent in nature, the same would not mean that it should be construed in favour of the workmen only although they are not entitled to benefits thereof. See *Regional Director, Employees' State Insurance Corporation, Trichur v. Ramanuja Match Industries*, AIR (1985) SC 278.

14. Applying the "Golden Rule of Interpretation of Statute?", to us it appears that the question should be considered from the point of view of the nature of the scheme as also the fact that the parties agreed to the terms thereof. When better terms are offered, a workman takes it as a part of the package. He may volunteer therefor, he may not. Sub-Section (5) of Section 4 of the 1972 Act provides for a right in favour of the workman. Such a right may be exercised by the workman concerned. He need not necessarily do it. It is the right of individual workman and not all the workmen. When the expression "terms" has been used, ordinarily it must mean "all the terms of the contract". While interpreting even a beneficent statute, like, Payment of Gratuity Act, we are of the opinion that either contract has to be given effect to or the statute. The provisions of the Act envisage for one scheme. It could not be segregated. Sub-Section (5) of Section 4 of the 1972 Act does not contemplate that the workman would be at liberty to opt for better terms of the contract, while keeping the option open in respect of a part of the statute. While-reserving his right to opt for the beneficent provisions of the statute or the agreement, he has to opt for either of them and not the best of the terms of the statute as well as those of the

contract. He cannot have both. If such an interpretation is given, the spirit of the Act shall be lost. Even in *Shin Satellite* (supra), this Court stated :

"27. The proper test for deciding validity or otherwise of an agreement or order is "substantial severability" and not "textual divisibility". It is the duty of the court to sever and separate trivial or technical parts by retaining the main or substantial part and by giving effect to the latter if it is legal, lawful and otherwise enforceable. In such cases, the court must consider the question whether the parties could have agreed on the valid terms of the agreement had they known that the other terms were invalid or unlawful. If the answer to the said question is in the affirmative, the doctrine of severability would apply and the valid terms of the agreement could be enforced, ignoring invalid terms. To hold otherwise would be "to expose the covenantor to the almost inevitable risk of litigation which in nine cases out of ten he is very ill-able to afford, should he venture to act upon his own opinion as to how far the restraint upon him would be held by the court to be reasonable, while it may give the covenantee the full benefit of unreasonable provisions if the covenantor is unable to face litigation."

15. It is significant that in the event the amount of gratuity is calculated at the rate of 26 days' salary for every completed year of service, vis-a-vis, 15. days' salary therefor, the tenure of an employee similarly situated will vary. Whereas in the former case an employee may receive the entire amount of gratuity while working for a lesser period, in the latter case an employee drawing the same salary will have to work for a longer period.

16. We are, therefore, of the opinion that the workman cannot opt for both the terms. Such a construction would defeat the purpose for which Sub-Section (5) of Section 4 has been enacted. For the reasons aforementioned, the impugned judgment cannot be sustained, which is set aside accordingly. The appeal is allowed. No costs."

15. In light of the above, the view taken by the appellate authority that as per condition (e) of clause 9.2 of the settlement, gratuity shall be payable within the ceiling limit of 3.5 lac instead of maximum limit of 20 months' wages on account of amendment in the Act cannot be sustained. The respondent, will therefore, be now required to declare as to whether he wants payment of gratuity under the settlement or wants gratuity as per the provisions of the Act.

16. As regards the view of the appellate authority on the settlement dated 27.10.2003 to convert 60% wages as 100% wages for the purpose of calculation of wages after 1.1.2004 and as regards consideration of 100% wages for the services rendered prior to 31.12.2003, such being the part of the settlement, the Court finds that the appellate authority has not committed any error.

17. For the reasons stated above, the impugned order of the appellate authority is required to be quashed and set aside in so far as it is held that the respondent shall be entitled to payment of gratuity within the maximum limit of 3.5 lacs. The matter shall be required to be remitted to the appellate authority to decide on

the question of payment of gratuity to the respondent after giving an opportunity to the respondent to claim the gratuity either under the settlement or under the Act.

The First and Second Group of petitions - Special Civil Application NO.1833/2014 with Special Civil Application No.4261 of 2014 and Special - Civil Application No.11179 of 2016 to 11229 of 2016

18. In these petitions, the petitioners have challenged the orders passed by the Controlling Authority bypassing the statutory remedy of appeal under section 7(7) of the Act. The limitation provided for filing the appeal under the Act is of 60 days and condonation of delay permitted is also of 60 days. It is now no longer a matter of debate that the statutory authority has no power to condone the delay beyond the period prescribed. As provided in section 7(7) of the Act, no appeal should be admitted unless at the time of preferring appeal, the appellant has produced certificate of controlling authority to the effect that the appellant has deposited before him an amount equal to the amount of gratuity required to be deposited under section 4 of the Act or deposits with the appellate authority such amount. These group of petitions are filed after a period of 7 and 9 years respectively. The second group of petitions are branded as one page petitions without placing therewith the copies of the impugned orders. In these two groups of petitions, it is first required to be decided as to whether the petitioners could be permitted to challenge the orders of original authority ? the Controlling Authority by considering the aspect of delay and the conduct of the petitioner.

19. Learned Senior Advocate Mr. Joshi submitted that the powers of this Court under Article 226 of the Constitution of India are not circumscribed by the provisions of any Statute and, therefore, in extra-ordinary circumstances, this Court can straightaway entertain the challenge against the original order though the remedy of appeal provided under the Statute is not availed. He relied on the decision of the Hon?ble Full Bench of this Court in the case of Panoli Intermediate (India) Pvt. Ltd. Jhagadia v. Union of India, reported in 2015(2) GLR page 1395.

20. Mr. Joshi submitted that in para 4.5 and 4.6 of the petition, the extraordinary circumstances are stated for invoking the jurisdiction of this Court under Article 226 of the Constitution of India against the original order of the Controlling Authority. Mr. Joshi submitted that all the petitions are against the employees of one Company and the order of the appellate authority impugned in the third group of petitions is the foundation for passing the orders by the Controlling Authority impugned in these group of matters and thus outcome of the petitions (third group of petitions) will have direct bearing on the present group of petitions, Mr. Joshi submitted that since in connection with the order of the controlling authority impugned in this group of petitions, litigation for recovery of the amount of gratuity remained pending before this Court upto the proceedings of the Letters Patent Appeals, the challenge to the orders of the Controlling Authority was not made under bona fide impression that the result in third group of petitions shall govern these group of petitions, however, in the Letters Patent

Appeals, after the Hon?ble Bench permitted the company to challenge the impugned orders passed by the controlling authority, the Company immediately filed the present petitions. He, therefore, submitted that in view of the extraordinary circumstances pointed out, the Court may entertain the petitions under Article 226 of Constitution to challenge the original order passed by the Controlling Authority.

21. Learned Advocate Mr. Upadhyaya on the other hand submitted that not only the statutory remedy of appeal available under the Act is bypassed but the petitions are also not filed within the period available for condonation of delay before the Statutory Authority. Mr. Upadhyaya submitted that the very same petitioner could file the petitions of the third group immediately after the passing of the orders by the Controlling Authority, however, before filing the present group of petitions, the petitioner took chance of getting the recovery proceedings decided and when it realised during hearing of Letters Patent Appeals that there was no escape left, the present petitions were then filed. Mr. Upadhyaya submitted that the petitioner's selective action of not availing of the statutory remedy and of not filing any petition when third group of petitions were first filed would amount to waiver of its right to challenge the impugned order passed by the Controlling Authority. Mr. Upadhyaya submitted that there are no extraordinary circumstances pointed out to invoke the jurisdiction of this Court under Article 226 of the Constitution of India. Mr. Upadhyaya submitted that considering the conduct of the petitioner of not only bypassing the statutory remedy of appeal and avoiding compliance of the prerequisite deposit for filing the appeal but also for filing the present group of petitions after inordinate delay, this Court may not permit the petitioners to challenge the impugned orders of the controlling authority under Article 226 of the Constitution of India.

22. The Court having heard the learned advocates for the parties, finds that in the third group of petitions which were filed in the year 2008, the Company challenged the orders passed by the appellate authority in individual appeal of its employee. Such orders were made by the appellate authority in the month of June, 2007. Following the orders of the appellate authority, the orders impugned in the present group of petitions were then made by the controlling authority. However, these group of petitions came to be filed after long delay of 7 years and 9 years respectively. Therefore, the conduct of the Company of not availing of the statutory remedy of appeal and not challenging the orders of the controlling authority for a long time cannot be ignored to decide whether the Company could be permitted to invoke the powers of this Court under Article 226 of the Constitution. The company, by not availing of the statutory remedy of appeal within the time limit prescribed under the Act, had already lost its remedy before the appellate authority as there is no provision for condonation of delay beyond period of 60 days in the Act. However, if the company had any case to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution, it could have immediately approached this Court but it chose to face the recovery proceedings up to Letters Patent Appeals before this Court. It appears that the

employees including the respondent had filed petitions being Special Civil Application No.9045 of 2009 and allied matters making grievance about non-execution of the recovery certificate. Such petitions were disposed of by the learned Single Judge on 3.11.2012 by directing the Collector to take appropriate steps under the provisions of the Land Revenue Code. Such orders of the learned Single Judge was challenged by the Company by preferring Letters Patent Appeal No.1064 of 2013 and allied matters. The Hon'ble Division Bench found that since the order of the controlling authority was not challenged by the Company, the employees were justified in approaching the learned Single Judge for enforcement of the order of the controlling authority. However, while disposing of the appeals, the Hon'ble Division Bench ordered to stay the operation of the direction issued in appeal for a period of fortnight at the request of the learned advocate appearing for the appellant ? the Company to enable the Company to move appropriate authority for challenging the order of the controlling authority. Learned Senior Advocate Mr. Joshi submitted that pursuant to the liberty given by the Hon'ble Division Bench of this Court, present group of petitions came to be filed and, therefore, this Court may examine the challenge against the order of the controlling authority on merits. The Court finds that the Hon'ble Division Bench of this Court has neither given any liberty to challenge the order of the controlling authority after long period of 7 and 9 years nor even it could be construed to be an extraordinary circumstance to entertain the challenge on merits. What appears to this Court is that the Company just selected to oppose the proceedings for recovery of the amount of gratuity ordered by the controlling authority with no intention to challenge the order of the controlling authority. Such conduct on the part of the Company would go against the Company so as not to permit it to challenge the orders of the controlling authority after long time.

23. In the case of Panoli Intermediate (India) Pvt. Ltd. (supra), the questions considered by the Hon'ble Full Bench were whether the delay could be condoned beyond 30 days of the limitation provided in section 35 of the Central Excise Act for filing the appeal, whether the petition under Article 226 of the Constitution would lie for the purpose of condonation of delay in filing the appeal and whether, in what circumstances petition under Article 226 of the Constitution could be preferred for challenging order passed by the original authority. The first two questions were answered in the negative. The Hon'ble Full Bench answered the third question in the affirmative while clarifying as under:

"A. The petition under Article 226 of the Constitution can be preferred for challenging the order passed by the original adjudicating authority in following circumstances that -

(A.1) The authority has passed the order without jurisdiction and by assuming jurisdiction which there exist none, or

(A.2) Has exercised the power in excess of the jurisdiction and by overstepping or crossing the limits of jurisdiction, or

(A.3) Has acted in flagrant disregard to law or rules or procedure or acted in violation of principles of natural justice where no procedure is specified.

B. Resultantly, there is failure of justice or it has resulted into gross injustice." The Hon^{ble} Full Bench then said further as under:

"We may also sum up by saying that the power is there even in aforesaid circumstances, but the exercise is discretionary which will be governed solely by the dictates of the judicial conscience enriched by judicial experience and practical wisdom of the judge."

24. The circumstances pointed out in the decision of the Hon^{ble} Full Bench are not straightway available irrespective of facts of the case to invoke the jurisdiction under Article 226 of the Constitution of India against the order passed by the Original Adjudicating Authority where the statutory remedy of appeal is available. A party could be permitted to invoke the jurisdiction under Article 226 of the Constitution of India against the Original Order without filing statutory appeal on the circumstances pointed out by the Hon^{ble} Full Bench only when such party is found to be vigilant for his right and his conduct deserves exercise of the discretion by the Court for the purpose of entertaining the petition directly under Article 226 of the Constitution of India against the Original Order of the Adjudicating Authority.

25. The Company could not be said to be unaware for its right. It could well oppose the individual applications of the employees before the Controlling Authority and even before the appellate authority in appeals filed by some employees. It could challenge the orders of the appellate authority immediately by filing third group of petitions in the year 2008 and at that stage, chose not to challenge the orders passed by the controlling authority, impugned in these first and second groups of petitions. It needs to be mentioned that every employee has right to make separate application under the Act for payment of gratuity and in connection with such application, when the order is passed by the controlling authority, it is the choice of the employer either to accept the order of the controlling authority or to avail the statutory remedy of appeal against the order of the controlling authority. Therefore, even when for similar reason the controlling authority passes various orders on different applications of the employees, there may not be any challenge for some of the orders of the controlling authority made on the applications of the employees and the orders of the controlling authority in such cases shall become final and the employer shall be under obligation to comply with such order. It is no ground to say that since the orders passed by the appellate authority in appeals of some employees were under challenge in the third group of petitions, the Company remained under bona fide impression that whatever decision rendered in such third group of petitions could be applied to the other employees even without filing the appeals/petitions against them especially when the Company could get equipped with legal advise. After filing the third group of petitions, it chose to oppose only recovery proceedings till the stage of Letters Patent Appeal. It remained

consciously indolent for a long time of 7 years and 9 years to call in question the orders of the controlling authority. Considering such conduct of the Company, it cannot be permitted to invoke the powers of this Court under Article 226 of the Constitution against the Order of the Original Authority even though the foundation for the orders impugned in the first and second group of petitions is the order passed by the appellate authority which is the subject matter of challenge in the third group of petitions. For filing the petition under Article 226 of the Constitution of India straightway against the order of the Original Authority, the circumstances pointed out in para 4.5 and 4.6 of Special Civil Application No.1833 of 2014 are as under:

"4.5 The petitioners humbly state and submits that thereafter respondent employee had filed its written arguments on 26.9.2007. It would be vital to note at this juncture that not only the respondent employee but some other employees of the petitioner company had also filed gratuity applications before the controlling authority claiming benefits both under the Act as well as under the settlement which came to be rejected by the controlling authority, against such orders, other employees had filed appeals being Gratuity Appeal Nos.4 to 37/2006. The appellate authority reversed the orders of the controlling authority which have been challenged by the petitioner company by filing writ petitions before this Hon^{ble} Court which are pending for final adjudication and this Hon^{ble} Court has been pleased to stay the order of the appellate authority. The petitioners humbly state and submit that the controlling authority while passing the impugned order has solely relied upon the order of the appellate authority dated 30.6.2007 in the case of Prahlad Pundlik Sirsagar and others which has been stayed by this Hon^{ble} Court vide order dated 16.10.2008 in SCA No.4667 to 4700/2008. Copies of the written arguments, order dated 30.6.2007 and order dated 16.10.2008 are annexed hereto and marked as Annexure-G, Annexure-H & Annexure-I respectively.

4.6 The petitioners humbly state and submit that in the meanwhile on 27.8.2008 the petitioner company had to suspend its operations because of labour unrest and adverse market conditions and, therefore, in view of prevailing insurgent atmosphere the order passed by the controlling authority remained unchallenged. The petitioners humbly state and submit that thereafter also since the petitioner company and the union were negotiating for amicable resolution of the dispute and payment of the dues to the employees, the impugned order remained unchallenged. In fact, the respondent employee had filed a petition being SCA No.9298/2009 for implementation and execution of the impugned order and the recovery certificate, which was pending along with the petitions filed by the petitioner company being SCA No.4667 to 4700/2008 and the petitioner company was trying to settle the whole dispute with all the employees including the respondent employee. The petitioners humbly state and submit that in the meanwhile the petitioner company had received notice dated 8.1.2008 from the Assistant Labour Commissioner of labour, Surat for payment of gratuity to respondent No.1. Copies of notice dated 3.12.2007 and letter dated 28.5.2008

are annexed hereto and marked as Annexure-J and Annexure-K respectively."

26. The above circumstances would not justify the conduct of the petitioner for not immediately invoking the jurisdiction of this Court under Article 226 of the Constitution of India against the order passed by the Controlling Authority. As stated earlier, in connection with the individual applications of the employees, the controlling authority passed orders for gratuity. It is always for the party aggrieved by the orders of the controlling authority to decide to take further remedy to challenge some orders and to leave the challenge for the other orders. In the present group of matters, after long delay of 7 and 9 years respectively, the orders of the controlling authority are challenged. In the second group of matters of one page petitions, the orders of the controlling authority are also not placed with the petitions. This reflects on the conduct of the Company in the matter of challenge to the orders of the controlling authority. A party who is not vigilant to his right cannot be permitted to invoke the jurisdiction of this Court under Article 226 of the Constitution. The Act is beneficial legislation and the delay in payment of gratuity to the employees would defeat the very object and purpose of the Act. Learned Advocate Mr. Upadhyaya pointed out that the company had not deposited any amount towards the gratuity of the employees. Learned Senior Advocate Mr. Joshi however stated that pending the petitions, the company has deposited more than Rs.93,00,000.00 with the authority below. Mr. Joshi stated that such is the undisputed amount payable to the employees.

27. In the case of *A.P. Steeling Re-Rolling Mill Ltd. v. State of Kerala and others*, reported in (2007) 2 SCC page 725, Hon^{ble} the Supreme Court has held and observed in para 35 to 40 as under:

"35. Evidently, except in a situation as might have been existing in Hitech Electrothermics that any application filed by the entrepreneur had not been processed within a reasonable time, in which case benefit might not be denied on equitable ground; in cases where there has been a substantial failure on the part of the industrial unit to obtain such benefit owing to acts of omission and commission on its part, in our opinion, no such benefit can be given.

36. The High Court has arrived at a finding of fact that the appellant herein had failed and/or neglected to comply with the terms and conditions of the scheme or contributed to a large extent in not being able to obtain such sanction within a reasonable time.

37. The appellant applied for grant of electrical connection on 9.11.1994. It, however, on its own showing did not receive any sanction till 17.11.1995. But even on that date the project was not complete. It was only at an advanced stage.

38. From the appellant's letter dated 24th June, 1996, as noticed supra, it would appear that it merely had been complaining of about non-grant of sanction, but then, evidently, it was not ready for commencing commercial production. Machineries were obtained by it only on 4.6.1996. How much time was taken for

installation of machinery and completion of the project, is not known.

39. Sanction, evidently, had been allocated on 24.2.1997. It accepted the same without any demur. It had been making payments in terms of the new tariff. It filed the writ petition only in the year 2003, i.e., only after this Court rendered its decision in Hitech Electrothermics on 17th December, 2002.

40. The benefit of a judgment is not extended to a case automatically. While granting relief in a writ petition, the High Court is entitled to consider the fact-situation obtaining in each case including the conduct of the petitioner. In doing so, the Court is entitled to take into consideration the fact as to whether the writ petitioner had chosen to sit over the matter and then wake up after the decision of this Court. If it is found that the appellant approached the Court after a long delay, the same may disentitle him to obtain a discretionary relief. See Chairman, U.P. Jal Nigam and Anr. v. Jaswant Singh"

28. In the case of I. Chuba Jamir and others v. State of Nagaland and others, reported in (2009) 15 SCC 169, Hon?ble the Supreme Court has held and observed in para 21 and 25 as under:

"21. The decision in R.S. Deodhar certainly does not lay down an inviolable rule that once a writ petition is entertained on merits the appellate court is powerless in going into the questions of delay and laches, the conduct of the writ petitioner(s) and the consequences of granting the reliefs sought for at the highly belated stage.

25. On a careful consideration of the materials on record and the submissions made by Mr. Goswami we are unable to accept the claims of the appellants-writ petitioners. In our view the inordinate delay of 7 or 8 years by the appellants-writ petitioners in approaching the High Court was a very valid and important consideration. This aspect of the matter was also brought to the notice of the single Judge but he proceeded with the matter without saying anything on that issue, one way or the other. It was, therefore, perfectly open to the Division Bench to take into consideration the conduct of the appellants-writ petitioners and the consequences, apart from the legality and validity, of the reliefs granted to them by the learned single Judge."

29. In the case of U.P. Jal Nigam and another v. Jaswant Singh and another reported in (2006) 11 SCC 464, Hon?ble the Supreme Court has held and observed in para 6,11 and 13 as under:

"6. The question of delay and laches has been examined by this Court in a series of decisions and laches and delay has been considered to be an important factor in exercise of the discretionary relief under Article 226 of the Constitution. When a person who is not vigilant of his rights and acquiesces with the situation, can his writ petition be heard after a couple of years on the ground that the same relief should be granted to him as was granted to person similarly situated who was vigilant about his rights and challenged his retirement which was said to be

made on attaining the age of 58 years. A chart has been supplied to us in which it has been pointed out that about 9 writ petitions were filed by the employees of the Nigam before their retirement wherein their retirement was somewhere between 30.6.2005 and 31.7.2005. Two writ petitions were filed wherein no relief of interim order was passed. They were granted interim order. Thereafter a spate of writ petitions followed in which employees who retired in the years 2001, 2002, 2003, 2004 and 2005, woke up to file writ petitions in 2005 and 2006 much after their retirement. Whether such persons should be granted the same relief or not?

11. In Govt. of W.B. v. Tarun K. Roy their Lordships considered delay as serious factor and have not granted relief. Therein it was observed as follows:

(SCC pp.359-60, para 34)

"34. The respondents furthermore are not even entitled to any relief on the ground of gross delay and laches on their part in filing the writ petition. The first two writ petitions were filed in the year 1976 wherein the respondents herein approached the High Court in 1992. In between 1976 and 1992 not only two writ petitions had been decided, but one way or the other, even the matter had been considered by this Court in Debdas Kumar. The plea of delay, which Mr. Krishnamani states, should be a ground for denying the relief to the other persons similarly situated would operate against the respondents. Furthermore, the other employees not being before this Court although they are ventilating their grievances before appropriate courts of law, no order should be passed which would prejudice their cause. In such a situation, we are not prepared to make any observation only for the purpose of grant of some relief to the respondents to which they are not legally entitled to so as to deprive others therefrom who may be found entitled thereto by a court of law."

13. In view of the statement of law as summarised above, the respondents are guilty, since the respondents have acquiesced in accepting the retirement and did not challenge the same in time. If they would have been vigilant enough, they could have filed writ petitions as others did in the matter. Therefore, whenever it appears that the claimants lost time or whiled it away and did not rise to the occasion in time for filing the writ petitions, then, in such cases, the court should be very slow in granting relief to the incumbent. Secondly, it has also to be taken into consideration the question of acquiescence or waiver on the part of the incumbent whether other parties are going to be prejudiced if the relief is granted. In the present case, if the respondents would have challenged their retirement being violative of the provisions of the Act, perhaps, the Nigam could have taken appropriate steps to raise funds so as to meet the liability but by not asserting their rights the respondents have allowed time to pass and after a lapse of couple of years they have filed writ petitions claiming the benefit for two years. That will definitely require the Nigam to raise funds which is going to have serious financial repercussions on the financial management of the Nigam. Why should the court come to the rescue of such persons when they themselves are

guilty of waiver and acquiescence?"

30. In light of the above and in the facts of the case, the Court finds that the petitioner-Company in this groups of petitions is not entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution of India directly against the orders of the controlling authority. Therefore, the petitions of these two groups are required to be rejected without examining the challenge to the impugned orders passed by the controlling authority on merits.

31. In the result, Special Civil Application Nos.4668/08, 4670/08, 4672/08, 4673/08, 4674/08, 4676/08, 4677/08, 4678/08, 4682/08, 4689/08, 4695/08, 4698/08 and 4699/08 are disposed of as not pressed. Rule in such petitions stands discharged.

32. Remaining petitions of the third group being Special Civil Application Nos.4667/2008, 4669/2008, 4671/2008, 4675/2008, 4679/2008 to 4681/2008, 4683/2008 to 4688/2008, 4690/2008 to 4694/2008, 4696/2008, 4697/2008, 4700/2008 are partly allowed. Impugned orders passed by the appellate authority are quashed in so far as it is held by the appellate authority that the respondent is entitled to receive gratuity within ceiling limit of Rs.3.5 lac and the matters are remitted to the appellate authority to decide a fresh in light of the observations made in the present judgment after giving opportunity to the respondent to declare as to whether they would accept the gratuity as per the provisions made in the settlement or they would like to claim the gratuity under the Act. After such opportunity is given to the respondent, the appellate authority shall decide the appeals accordingly. Rule is made absolute to the above said extent.

33. Special Civil Application No.1833/2014 with Special Civil Application No.4261 of 2014 and Special - Civil Application No.11179 of 2016 to 11229 of 2016 - the first and second group of the petitions are rejected.

34. The undisputed amount deposited by the company shall be now disbursed to the concerned employees as per their entitlement within one month from the date of receipt of this order by the authority below.

35. Remaining Petitions of 3rd group, partly allowed.