

(2010) 03 GUJ CK 0037

In the Gujarat High Court

Case No : Special Civil Application No. 1161 of 2010

Gujarat Housing Board and Another

APPELLANT

Vs

Natwarlal Jagjivan Madia and Others

RESPONDENT

Date of Decision : 04-03-2010

Acts Referred:

Constitution of India, 1950 — Article 254
Gujarat Municipalities Act, 1963 — Section 271
Industrial Disputes Act, 1947 — Section 33C(2)
Payment of Gratuity Act, 1972 — Section 1(3), 14, 2, 2(4), 4

Citation : (2010) 126 FLR 201

Hon'ble Judges : H.K. Rathod, J

Bench : Single Bench

Advocate : H.S. Munshaw, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

H.K. Rathod, J.—Heard learned Advocate Mr. HS Munshaw for petitioners.

2. By filing this petition under Article 227 of the Constitution of India, petitioner Gujarat Housing Board has challenged order passed by Controlling Authority, Rajkot in Gratuity Case No. 73 of 2008 decided on 9th March, 2009 wherein Controlling Authority has granted Rs. 26,338.00 being interest on delayed payment of Rs. 1,58,565.00, for a period of about one year, seven months and 28 days at the rate of 10 per cent and remaining due amount of 10 % Gratuity which comes to Rs. 36,198/- with 10 per cent simple interest has been granted with effect from 1.8.2006. Aforesaid order passed by the controlling authority, Rajkot was challenged by petitioner before appellate authority, Rajkot in Appeal No. 42 of 2009 which came to be dismissed by appellate authority, Rajkot on 28.8.2009.

3. Learned Advocate Mr. Munshaw for petitioner has raised number of contentions before this Court. According to his submissions, respondent No. 1 herein who was born on 9.5.1955 was an employee of Gujarat Housing Board

and joined service as work charge clerk on 13.11.1973 and was made regular in service on 8.12.1983 and later on his application for voluntary retirement was accepted and accordingly, he retired on 30.6.2006. It was his submission that petitioner board was earlier having Contributory Provident Fund Scheme for its employees but after careful consideration of the request of the employees, it was thought fit to adopt the pension scheme of the State Government and a Circular dated 12.11.1991 was issued through which the Scheme was implemented. He submitted that accordingly, provisions of Gujarat Civil Service Rules/Bombay Civil Service Rules are made applicable for benefits to employees of petitioner board. He submitted that respondent No. 1 gave his option for pension scheme and accordingly his case was to be considered for calculation of pension as well as gratuity as provided under the Gujarat Civil Service Rules. He submitted that as per the provisions of the Gujarat Civil Service Rules, pension includes retirement cum death gratuity and, therefore, gratuity was also to be calculated accordingly. He submitted that an order dated 27.2.2008 was passed by Administrative Officer of petitioner board through which respondent No. 1 herein who retired as a junior clerk, was ordered to be paid pension on the basis of his last drawn salary. In all, 31 years service was counted for calculation of pension. Gratuity amounting to Rs. 1,58,565/- was calculated on the basis of 31 years service. Respondent No. 1 who joined service on 13.11.1973 and retired on 30.6.2006 was granted benefit of pension and gratuity on the basis of 31 years service as through orders dated 24.8.07, it was ordered that the period commencing from 13.3.76 to 8.5.78 was not to be counted for the purpose of pension. He also submitted that the impugned orders passed by respondent No. 3 and 2 respectively are illegal, unjust, arbitrary and contrary to facts and evidence on record as well as without jurisdiction. He further submitted that as such, petitioner board is a statutory body under total administrative control and supervision of Government of Gujarat and it has accepted and adopted provisions of Gujarat Civil Service Rules and policy of State. He submitted that services of present respondent No. 1 was counted for the purpose of pension and gratuity in accordance with Gujarat Civil Service Rules and retirement benefits like pension and gratuity to its employees accordingly, in other words, the calculations for payment of pension and gratuity are made as per provisions of Gujarat Civil Service Rules and policy of State. He submits that services of respondent No. 1 herein was counted for the purpose of pension and gratuity in accordance with the provisions of Gujarat Civil Service Rules and accordingly, payment of gratuity was made. It is submitted that the gratuity was not liable to be paid under the Payment of Gratuity Act, 1972 and, therefore, there is no question of jurisdiction of respondent No. 2 and 3 against the order of Gujarat Housing Board as said authorities have no authority to decide such calculation under the Payment of Gratuity Act, 1972. He further submitted that the calculation of gratuity is made as per the provisions of Gujarat Civil Service Rules and after considering total length of service of the respondent No. 1 herein. It is also submitted that through orders dated 24.8.07 passed by Housing Commissioner, 31 years service is to be counted for the purpose of pension and gratuity as two years service was

treated as without pay. It is also submitted that respondent No. 2 and 3 have ignored issues like applicability of provisions of Gujarat Civil Service Rules, issue of jurisdiction and total length of service etc. raised before the authorities and allowed application for interest at the rate of 10 per cent on delayed payment. It is also submitted that respondent No. 2 and 3 have erred in not appreciating whether respondent No. 1 herein was treated as Government servant for the purpose of benefit of pension and gratuity and grievance, if any, is represented before appropriate authority. It is submitted that in case of delayed payment, interest at the rate of 6 per cent is required to be paid. It is also submitted that respondent No. 1 has not challenged orders passed by Gujarat Housing Board through which it is decided that in all 31 years service is to be calculated for purpose of pension and gratuity and has become final and conclusive. In view of this, respondent No. 2 and 3 have no authority to order to calculate pension and gratuity on the basis of 33 years. It is submitted that wrong calculation by any incompetent authority would not only result into heavy burden to the public exchequer but also set a bad precedent as the respondent No. 1 herein is not eligible and entitled for payment of gratuity under the provisions of the Payment of Gratuity Act, 1972. In light of aforesaid contentions raised by learned Advocate MR. Munshaw and considering draft amendment which has been placed on record and granted by this Court on 22nd February, 2010, it is submitted that pension scheme being package, it includes amount of gratuity which has been accepted by respondent No. 1 and thereafter, raising of dispute and disputing amount of gratuity paid by petitioner is amounting to committing breach of undertaking given by respondent No. 1 and same is contrary to package scheme of petitioner. Petitioner has placed on record by way of draft amendment, certain documents which would go to suggest that pension scheme has been accepted by petitioner board and accordingly, options were invited from concerned employees and such option was exercised by present respondent and on that basis, pension amount has been paid by respondent No. 1 as well as amount of gratuity which is part of pension scheme paid and yet, respondent No. 1 has disputed amount of gratuity and claimed amount of gratuity under the Payment of Gratuity Act, for that, according to him, respondent No. 1 is not entitled and respondent is entitled to amount of gratuity only under the pension scheme which has been accepted by respondent No. 1 and, therefore, this aspect has not been properly considered by controlling authority as well as appellate authority and, therefore, this petition has been filed by petitioner before this Court. Except these submissions, no other submission is made by learned Advocate Mr. HS Munshaw before this Court.

4. I have considered submissions made by learned Advocate Mr. Munshaw before this Court. I have also perused order passed by controlling authority as well as order passed by appellate authority wherein order passed by controlling authority has been confirmed by dismissing appeal preferred by petitioner.

5. It is necessary to consider relevant provisions of Payment of Gratuity Act, 1972. Provisions of said Act are applicable to petitioner establishment as per

Section 1(3)(b) and (c) and this fact has not been disputed by learned Advocate Mr. Munshaw before this Court. Not only that but this fact has also not been disputed by petitioner either before controlling authority or appellate authority under the Payment of Gratuity Act and, therefore, Act is made applicable to petitioner establishment. Section 4 Sub-section (5) of said Act provides that nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer. Section 5 of Act is giving power to appropriate Government by notification and subject to such conditions as may be specified in notification to exempt any establishment, factory, mine, oilfield, plantation, port, railway company or shop to which this Act applies from operation of provisions of this Act if, in the opinion of appropriate Government, the employees of such establishment as aforesaid are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act. Sub-section (3) of Section 5 of Act provides that a notification issued under Sub-section (1) or Sub-section (2) may be issued retrospectively a date not earlier than the date of commencement of the Act but no such notification shall be issued so as to prejudicially affect the interests of any person. It is not disputed by petitioner that petitioner establishment has not been exempted by appropriate Government u/s 5 and concerned employee is also not exempted under Sub-section (2) of Section 5 of the Act. As per Section 14 of this Act, provisions of this Act or any rule made there under 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 by this Act. Aforesaid provisions of the Payment of Gratuity Act, 1972 are mandatory in nature and same are relevant for deciding issue which has been raised by learned Advocate Mr. Munshaw for petitioner before this Court.

6. Pension scheme which has been accepted by respondent No. 1 includes benefit of gratuity but amount of gratuity is less favourable than the claim made under the Payment of Gratuity Act, therefore, respondent workman is entitled to claim such benefit as per the provisions of Payment of Gratuity Act, 1972. This being statutory right available to respondent workman, it has been rightly examined by controlling authority after considering last drawn salary of employee and respondent is also covered by definition of Section 2(e) of Payment of Gratuity Act, 1972. Continuity of service as defined u/s 2(c) of Payment of Gratuity Act, 1972 has also been rightly considered by Controlling Authority and Appellate Authority under the Payment of Gratuity Act and provisions of said Act are applicable to petitioner establishment and last drawn salary Rs. 10230.00 divided by 26 and then to find out one day salary and on that basis amount of gratuity has been calculated by controlling authority considering total 33 years service, for that, employee is entitled for wages of days as claim of gratuity and accordingly order has been passed by controlling authority and same aspects were rightly considered by appellate authority and appellate authority has rightly come to conclusion that controlling authority has rightly passed order and it

requires no interference. Appellate authority has rightly come to conclusion that u/s 2(4), petitioner being commercial establishment, provisions of Payment of Gratuity Act, 1972 would apply. Appellate authority has relied upon decision of this Court reported in case of Jayaben Suryakant Modi and Ors. v. Gujarat Labour Welfare Board and Ors. 1997 Lab IC 2581 wherein it has been held that provisions of Gratuity Act are applicable to Labour Welfare Board considering it a commercial establishment as per Section 2(4) of the Act. Considering activity of petitioner establishment of construction of house and sale thereof on hire purchase basis, petitioner establishment has been held to be commercial establishment.

7. This Court had an occasion to consider same question in group of petitions being Special Civil Application No. 2138 of 2002 and other allied matters decided by this Court on 27.2.2002. Relevant discussion made by this Court in para 14 to 21 of said decision of this Court dated 27.2.2002 is quoted as under:

14. However, other contention raised by learned advocate Ms. Jhaveri is in respect to Rules framed by the Nagarpalika, which has been sanctioned by the Government of Gujarat, while exercising power u/s 271(a) of the Gujarat Municipalities Act, 1963. Accordingly, she relied upon Rule-5 which for the purpose of calculation of gratuity only basic pay as defined under BCSR Rules will be taken into account exclusive of dearness allowance. The gratuity will be paid on the basis of the average of last 12 months pay preceding the date of the relieve from service. The contention is that because the concerned employee is governed by BCSR Rules and Gratuity Rules as referred above, provisions of the Act are not applicable. The Himachal Pradesh High Court has considered this aspect in the case of State of H.P. Vs. Lashkari Ram, wherein after considering the definition of "employee" u/s 2(e) of the Act and after considering the Central Civil Services Rules (Pension), 1972 and employee having worked in different capacity, was held to be entitled to get benefits of Gratuity Act as well as Civil Service Rule (Pension) Rules. Whether Rules prevailed or the Act, that question was also examined by the Apex Court in case of Jashwant Singh Gill (supra). The Apex Court has considered the Rules framed by the Bharat Coking Coal Ltd. are not statutory rules and they have been made by the holding company of respondent No. 1. The Payment of Gratuity Act was enacted with a view to provide for a scheme for payment of gratuity to the employees engaged inter alia in mines. The Act provides for close - knit scheme providing for payment of gratuity. It is a complete code containing detailed provisions covering the essential provisions of a scheme for a gratuity. It not only creates a right to payment of gratuity but also lays down the principles for quantification thereof as also the conditions on which he may be denied there from. A statutory right accrued, thus, cannot be impaired by reason of a rule which does not have the force of a statute. The provisions of the Act, therefore, must prevail over the Rules.

15. In aforesaid decision, there were no statutory rules but, in facts of this case,

there may be statutory rules. The Apex Court has considered similar aspect in case of E.I.D. Parry (I) Ltd. Vs. G. Omkar Murthy and Others, Relevant observations made in Para.2, 3 and 4 are quoted as under:

2. Four contentions are put forth before us, namely, that

(i) The Central Act prevails over the State Act by virtue of Article 254 of the Constitution and Section 40(3) is invalid and the claims are unsustainable;

(ii) Section 40(3) of the State Act stood repealed on the coming into force of the Andhra Pradesh Shops and Establishments Act, 1988 and gratuity became payable u/s 47(5) of the State Act where payment of gratuity is not payable under the Central Act;

(iii) Section 14 of the Central Act overrides other enactments in relation to gratuity, and

(iv) The respondents have been paid gratuity under the Central Act for the period covered and for the balance period of service gratuity is paid under the prevailing trust scheme.

At the relevant time when the respondents voluntarily retired from service the definition of "employee" u/s 2(e) of the Central Act read as not to include employee whose wages exceeded Rs. 1,000/- per mensem while the respondents-employees were all getting wages more than Rs. 1,600/- per mensem and, therefore, the Central Act could not be applied. If that is so, it is certainly permissible for the respondents to have made an application for payment of gratuity u/s 40(3) of the State Act. Further the scheme of the Central Act would indicate that it would not be applicable in cases where the State Act is more beneficial than the Central Act. In this case, the finding is that the State Act is more beneficial than the Central Act. Therefore, the contentions sought to be advanced on behalf of the appellant as to repugnancy or otherwise of the State Act would not arise at all. If both the enactments can co-exist and can operate where one Act or the other is not available then we find no difficulty in making the State Act applicable on the fact situation available as has been done in the present case. Therefore, we find that the contentions raised on behalf of the appellant are unsustainable.

3. Shri Narayan B. Shetye, the learned Senior Advocate appearing for the appellant, submitted that the Central Act is a complete Code containing detailed provisions and creates right of payment of gratuity and, therefore, the Central Act should prevail over the State Act. Reliance has been placed on the decision of this Court in State of Punjab Vs. Labour Court Jullunder and Others, In that case the issue before the Court was whether for payment of gratuity an application could be made u/s 33C(2) of the Industrial Disputes Act, 1947, and it was held that such an application could not be filed under the said Act. Therefore, this decision cannot be of any assistance to the appellant inasmuch as the question before us is whether the Central Act or the State Act would apply for payment of

gratuity.

4. The decision in *M.S.R. Murthy v. Arya Somayajula Yagneswara Chenulu*, 1985 Lab IC 189 (AP) also is of no use to the appellant inasmuch as the State Act is held not to operate to the extent the Central Act prevails. In the present case, on facts, it is found that the Central Act is not applicable.

15.1 In aforesaid two decisions, the Apex Court has considered the fact that even when statutory rules are available, the provisions of the Act prevail. Therefore, in this case though services rules may be statutory, considering Section 14 of the Act, provisions of the Act should prevail.

16. The contention raised by learned advocate Ms. Jhaveri that Gratuity Act is not applicable to the Nagarpalika being the local authority, cannot be accepted as the Nagarpalika is covered by definition of "establishment" and the provisions of the Gratuity Act are applicable. Section 1(3)(b) of the Act wherein definition "establishment" is provided, which reads, thus,

every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishment in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months.

16.1 The aforesaid contention is not accepted because the local authority being an establishment covered under the Gratuity Act, the Gratuity Act is applicable as has been held by the Madras High Court in case of *The Commissioner, Sathyamangalam Municipality, Sathyamangalam Vs. The Deputy Commissioner of Labour (Appellate Authority under Payment of Gratuity Act)*, Salem, *The Assistant Commissioner of Labour (Controlling Authority under Payment of Gratuity Act)*, Salem and *T. Mahali*, wherein it has been observed by the Madras High Court that, "Payment of Gratuity Act, 1972 - Sectis 2(e), 5 and 7(3-A)- Local authority also established liable under Act to pay gratuity - Award of interest to employee for period after expiry of 30 days from retirement, held proper. Even the Panchayat is also considered to be an establishment under the provisions of the Gratuity Act and the Act is applicable as decided by Madhya Pradesh High Court in the case of *S.N. Verma Vs. State of Madhya Pradesh and Others*, Relevant observations in the aforesaid decision is in Para.6 which is quoted as under:

6. Thus the Panchayat is indisputedly a "local body" and if it is employing more than ten persons it would be an "establishment" within the meaning of the notification given above. An employee of an Panchayat is entitled to the payment of gratuity as per provisions of Payment of Gratuity Act, 1972 unless under any other rule of the Panchayat or the State Government he has a right to receive "better terms of gratuity" as per Section 4(5) of the Act. Though there is an observation in the judgment dated June 27, 1997 in W.P. No. 1743 of 1997 that the gratuity is payable to the Panchayat employees as per Madhya Pradesh Janpad Panchayat Employees (Qualifications, Recruitment and Conditions of

Service) Rules, 1976, on a perusal of these rules it is conceded that there is no provision in these rules for payment of gratuity. In such a situation an employee of the Panchayat would be entitled to gratuity as per Payment of Gratuity Act, 1972. The Supreme Court has held in *Bakshish Singh Vs. M/s. Darshan Engineering Works and others*, that the provisions for payment of gratuity contained in Section 4(1)(b) of the Act are one of the minimal service conditions, which must be made available to the employees notwithstanding the financial capacity of the employer to bear its burden. It is settled law that the establishments which have no capacity to give to their workmen the minimum conditions of service prescribed by the statute have no right to exist. The respondent Janpad Panchayat is admittedly employing more than ten persons and therefore the petitioner who was its employee is entitled to gratuity under the Payment of Gratuity Act, 1972.

16.2 The Delhi High Court in case of *Municipal Corporation of Delhi Vs. Smt. V.T. Naresh and another*, relying upon the decision of Apex Court in case of *State of Punjab Vs. Labour Court Jullunder and Others*, it is held that a Corporation and/or local authority like Municipal Commissioner of Delhi is an establishment governed by Payment of Gratuity Act, 1972. The word "establishment" in the Gratuity Act is not controlled by any type of establishment and it will include commercial, public sector establishment." Relevant observations in the aforesaid decisions are in Para.6 and 7 which are quoted as under:

6. It will be noticed that the word "establishment" used in the aforesaid clause of Payment of Gratuity Act, 1972 is not controlled by any type of establishment. It will include commercial, public sector establishment, private sector establishment as also the non-commercial establishment. Therefore, it is merely because Municipal Corporation of Delhi which is created by Delhi Municipal Corporation Act, 1957 is also a local body or local authority, it does not mean that the Corporation will not be an "establishment" so long as it is so in relation to any law relating to "establishment". It need not multiply the instances. Only one is sufficient to make the Act applicable. I have, thus, no doubt that the Municipal Corporation of Delhi is an "establishment" within the meaning of S.1, Sub-section (3) Clause (b) of the Act.

7. Coming to the second point, even if Municipal Corporation of Delhi has certain schemes, it is no bar to the applicability of the employees of the petitioner - Corporation. It is only common which can be said that an employee cannot have benefit of both under Payment of Gratuity Act as well as scheme of regulations/pension framed by the Corporation but if he has availed of the benefit under Payment of Gratuity Act, to that extent benefit will be denied to him under the regulations/pension scheme framed by the Corporation. If the scheme framed by the Corporation gives higher benefit to the extent the employee obtains benefit under the "Payment of Gratuity Act, to that extent those benefits will be adjusted while claiming benefit under the Scheme of Regulations/pensions framed by the Corporation. The employee cannot have complete benefit under both the

Payment of Gratuity Act as well as under the Scheme of regulations/pensions. To the extent the benefit has been granted to him under the Payment of Gratuity Act, only to that extent the benefit will be adjusted while enforcing the scheme of regulations/pension framed by the Corporation. Similarly, if under a Scheme framed by the Corporation the benefit is less than that which is available in the Payment of Gratuity Act, the employee will be entitled to claim difference under the Payment of Gratuity Act. No other point was argued. The petition, therefore, fails and is dismissed. Since nobody has put in appearance on behalf of the respondent, parties are left to bear their own costs.

17. The Allahabad High Court in case of Nagar Palika, Moradabad v. Appellate Authority and Additional Labour Commissioner, U.P. Kanpur and Ors. reported in : 1990-II-LLJ-156, it has been held that municipal board is an "establishment" governed by the Payment of Gratuity Act, 1972. Relevant observations of the said decision are in Para. 8, 9 and 10 which are quoted as under:

8. Sub-Section (3) of Section 1 lays down that the provisions of the Act are to apply to every establishment in which 10 or more persons are employed.

9. The argument sought to be advanced by the learned Counsel for the petitioner is that the Municipal Board cannot be described as an "establishment" because the word "establishment" connotes some business institution or atleast it may include a public institution. Such a definition of a word "establishment" is to be found in Black's Legal Dictionary.

10. I am afraid the argument is not sustainable. The activities which are carried on by the Municipal Board do go to make it a public institution undoubtedly. In fact, Municipal Board, or for that matter, such local bodies do exist to cater to the needs of the general public and, therefore, many statutory duties have been conferred upon such bodies. To say that in spite of those functions which have to be carried out by those institutions in accordance with the mandate of law, those do not become public institutions is too bald an argument to be accepted.

18. This Court has, in case of Dabhoi Nagarpalika and Anr. v. S.J. Khedia and Anr. 1996 II CLR 910, held that Payment of Gratuity Act is applicable to the Nagarpalika.

19. The Karnataka High Court in case of Management of Sir Venkataramana Temple and Sri Hale Mariyamma Temple, Kapu, Udupi District v. Deputy Labour Commissioner and the Appellate Authority under the Payment of Gratuity Act, 1972, The Management of Sri. Venkataramana Temple and Sri. Hale Mariyamma Temple Vs. The Deputy Labour Commissioner and The Appellate Authority under the Payment of Gratuity Act, 1972, Hassan Region, The Assistant Labour Commissioner and Controlling Authority under the Payment of Gratuity Act, 1972 and K. Vishwanatha Shenoy, has observed in Para. 12 and 14 as under:

12. On these rival contentions and on a further examination of the case-law, it is clear that the word "establishment" in Section 1(3)(b) of the Payment of Gratuity

Act, 1972 is not to be restricted as referring to "commercial establishments" alone. The Act has been held to apply even to institutions which were exempted under the Shops and Establishments Act (see : Principal, Bhartiya Mahavidyalaya and Another Vs. Ramakrishna Wasudeo Lahudkar, There is no doubt that a liberal construction has to be given to the expression and any institution or organization where systematic activity is carried on, by employing ten or more persons, would fall within the ambit of the provision.

14. The further contention that the employee ought to have had recourse to remedies prescribed under the provisions of KHRI and CE Act is also not tenable. The employee is certainly entitled to elect his remedy, in the absence of a bar.

20. The Karnataka High Court has, in case of U. Ratnakar Rao Vs. Union of India (UOI) and Others, observed that, "Payment of Gratuity Act, 1972 - Section 2(e) - New Mangalore Port Trust (Adaptation of Rules) Regulations, 1980 - Regulation 4 - Central Civil Services (Pension) Rules, 1972 - Rule 50 - Gratuity Act not applicable to person governed by Act or Rule providing for payment of gratuity - Regulation 4 of Port Trust Regulations made Central Pension Rules applicable to its employees - Denial of gratuity as per Central Pension Rules therefore held not proper and payment of balance with interest at 12% ordered."

21. The Andhra Pradesh High Court has, in case of Life Insurance Corporation of India, Hyd. Vs. Regional Labour Commissioner (Central), Hyderabad and others, in Para. 10, observed as under:

10. A reference to the provisions of Sections 2(e), 4, 5 and 14 leads to an irresistible conclusion that either Section 48(2B) of the LIC Act or the LIC Rules for Class-I Officers do not take away the right of an employee to claim the benefit under the provisions of the Act. Indeed, Sub-section (5) of Section 4 provides that an employee is entitled to better terms of gratuity other than the gratuity payable under Sub-section (2) of Section 4 and Section 5 enables the appropriate Government to exempt any establishment from the operation of the Act only if the gratuity payable by the LIC is more favourable to the employees than the benefits under the Act.

8. Aforesaid decision was challenged before Division Bench of this Court by Bilimora Nagarpalika by filing Letters Patent Appeal No. 379 of 2008 which is reported in 2008(2) GLH 448. Division Bench of this Court decided group of appeals and observed as under in para 5,6 and 7:

5. We are unable to accept the contention raised by Ms. Jhaveri. Section 2(f) of the Act of 1972 defines employer." Sub-clause (ii) of the said Clause (f) expressly includes the "local authority" within the meaning of the word employer. Section 4(1) of the Act of 1972 enjoins the employer to pay gratuity to its employee on termination of employment after he renders continuous service for not less than five years, inter alia, on his superannuation or on his retirement. Thus, the Municipality is under obligation to pay gratuity to its retired employees in accordance with the Act of 1972.

6. Section 5 of the Act of 1972 empowers the appropriate Government to exempt any establishment, etc. to which the Act applies, from the operation of the provision of the Act of 1972. In other words, unless an establishment is expressly exempted by the appropriate Government by notification issued u/s 5 of the Act of 1972, such establishment would be liable to pay gratuity to its retired employees in accordance with the Act of 1972. It was not the case of the Municipality before the controlling authority or before the learned Single Judge or before us that the Municipality is exempted from the operation of the provisions of the Act of 1972 as envisaged by Section 5 of that Act. In absence of the exemption specifically granted u/s 5, the Municipality is duty bound to pay its employees gratuity in accordance with the Act of 1972.

7. In above view of the matter, the order of the learned Single Judge does not warrant interference. The Appeals are dismissed in limine. Civil Applications stand disposed of.

9. Learned Advocate Mr. Munshaw has relied upon decision of apex court in case of Beed District Central Co-operative Bank Ltd. Vs. State of Maharashtra and Others, Relevant para 14 which is relied upon by learned Advocate Mr. Munshaw is reproduced as under:

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:

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 covenanter 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 covenanter is unable to face litigation.

10. Recently, this aspect has been examined by apex court in case of Allahabad Bank and Anr. v. All India Allahabad Bank Retired Employees Association (2010) 2 SCC 44. Identical question has been examined and it has been held that pension and gratuity are two separate elements of retirement benefits. Apex court considered same aspect of interpretation of statutes, liberal construction to be given having regard to directive principles of State Policy and Payment of Gratuity Act, 1972 held to be welfare legislation deserving liberal interpretation as discussed in para 13 to 22. Therefore, para 13 to 22 are quoted as under:

13. Section 5 confers power upon the appropriate Government to exempt any establishment, factory, mine, oilfield, plantation etc. from the operation of the provisions of the Act, if, in its opinion, the employees in such establishment, factory etc. are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under the Act. The power to exempt conferred upon the appropriate Government is not an unconditional power. The appropriate Government is required to hear all the persons concerned who are likely to be affected by the decision to be taken and the exemption itself is subject to the conditions mentioned in the provisions of the Act namely that employee or class of employees in the opinion of the government are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under the Act.

14. A plain reading of the provisions referred to herein above makes it abundantly clear that there is no escape from payment of gratuity under the provisions of the Act unless the establishment is granted exemption from the operation of the provisions of the Act by the appropriate Government.

15. Notwithstanding the subsequent improvements and embellishments the stand taken by the bank was and is before us that the members of the Association had accepted the Contributory Provident Fund Scheme and they opted for pension in lieu of gratuity which was being paid and therefore are not entitled to payment of gratuity under the provisions of the Act.

16. We shall proceed to examine the point urged by the learned Counsel for the appellant. Remedial statutes, in contra distinction to penal statutes, are known as welfare, beneficent or social justice oriented legislations. Such welfare statutes always receive a liberal construction. They are required to be so construed so as to secure the relief contemplated by the statute. It is well settled

and needs no restatement at our hands that labour and welfare legislation have to be broadly and liberally construed having due regard to the Directive Principles of State Policy. The Act with which we are concerned for the present is undoubtedly one such welfare oriented legislation meant to confer certain benefits upon the employees working in various establishments in the country.

17. Krishna Iyer, J in *Som Prakash Rekhi v. Union of India* stated the principle in his inimitable style that benignant provision must receive a benignant construction and, even if two interpretations are permissible, that which furthers the beneficial object should be preferred. It has been further observed: (SCC pp.483-84, para 66)

We live in a welfare State, in a "socialist" republic, under a Constitution with profound concern for the weaker classes including workers (Part IV). Welfare benefits such as pensions, 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 is a 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 obstante and overriding provisions are engrafted on these statutes.

18. Interpreting the provisions of the said Act this Court in *Sudhir Chandra Sarkar v. Tata Iron and Steel Co. Ltd.* observed that pension and gratuity coupled with contributory provident fund are well recognised retiral benefits governed by various statutes. These statutes are legislative responses to the developing notions of the fair and humane conditions of work, being the promise of Part IV of the Constitution. It was observed: (SCC p.380, para 15)

15. ...the fundamental principle underlying gratuity is that it is a retirement benefit for long service as a provision for old age. Demands of social security and social justice made it necessary to provide for payment of gratuity. On the enactment of Payment of Gratuity Act, 1972 a statutory liability was cast on the employer to pay gratuity.

19. Gratuity payable to an employee on the termination of his employment after rendering continuous service for not less than 5 years and on superannuation or retirement or resignation etc. being a statutory right cannot be taken away except in accordance with the provisions of the Act whereunder an exemption from such payment may be granted only by the appropriate Government u/s 5 of the Act which itself is a conditional power. No exemption could be granted by any Government unless it is established that the employees are in receipt of gratuity or pension benefits which are more favourable than the benefits conferred under

the Act.

20. In *Union of India v. All India Services Pensioners' Association And Anr.*, this Court explained that there is always a distinction between the pension payable on retirement and the gratuity payable on retirement.

8. While pension is payable periodically as long as the pensioner is alive, gratuity is ordinarily paid only once on retirement.

21. No decision of this Court which has taken a view contrary to the decisions referred to herein above has been brought to our notice.

22. In our considered opinion pensionary benefits or the retirement benefits as the case may be whether governed by a Scheme or Rules may be a package consisting of payment of pension and as well as gratuity. Pensionary benefits may include payment of pension as well as gratuity. One does not exclude the other. Only in cases where the gratuity component in such pension schemes is in better terms in comparison to that of what an employee may get under the Payment of Gratuity Act the government may grant an exemption and relieve the employer from the statutory obligation of payment of gratuity.

10. In view of aforesaid decision of apex court and considering contentions raised by learned Advocate Mr. Munshaw, according to my opinion, such contentions cannot be accepted by this Court because there is no exemption given to petitioner establishment by appropriate Government from operation of Payment of Gratuity Act, 1972 and respondent No. 1 is an employee as defined u/s 2(e) of said Act. There is no dispute raised by petitioner before controlling authority or appellate authority or before this Court about applicability of said Act and pension and gratuity both are separate and independent scheme for retirement benefits and it cannot be considered to be one package policy as contended by learned Advocate Mr. Munshaw and, therefore, in view of that, contentions raised by learned Advocate Mr. Munshaw are rejected. View taken by controlling authority and appellate authority is perfectly justified and therefore, this petition does not call for any interference in exercising power under Article 227 of Constitution of India by this Court. Therefore, according to my opinion, there is no substance in this petition and same is therefore dismissed.

11. It is directed to controlling authority concerned to pay amount deposited by petitioner at the time of filing of an appeal before Appellate Authority by way of account payee cheque in name of Natvarlal Jagjivan Madia after proper verification, immediately and without any delay.