

(2016) 02 GUJ CK 0173

In the Gujarat High Court

Case No : Special Civil Application No. 17251 of 2013

Gujarat State Co-Op. Marketing Federation Ltd.

APPELLANT

Vs

Controlling Authority Appointed Under The Payment of
Gratuity Act & 2 Others

RESPONDENT

Date of Decision : 22-02-2016

Acts Referred:

Payment of Gratuity Act, 1972 — Section 4(6)

Citation : (2016) 2 GLR 1767

Hon'ble Judges : K.M. Thaker, J.

Bench : Single Bench

Advocate : Mr. G.M. Joshi, Advocate, for the Appellant; Mr. Amit Barot, AGP and Mr. D.C. Chauhan, Advocate, for the Respondent

Final Decision : Disposed Off

Judgement

K.M. Thaker, J.(Oral) - Heard Mr. Joshi, learned advocate for the petitioner, Mr. Chauhan, learned advocate for the respondent No. 3, and Mr. Barot, learned AGP for the respondent Nos. 1 and 2.

2. In this petition, the petitioner has challenged order dated 30.9.2013 passed by the respondent No. 2 ? appellate authority appointed under the provisions of the Payment of Gratuity Act, 1972 [hereinafter referred to as "the Act"] in Gratuity Appeal No.36 of 2013. By the impugned order, the appellate authority has set aside the order passed by the controlling authority and directed the petitioner to pay Rs.5,01,993.60 towards gratuity to the respondent workman with interest at the rate of 10% to be calculated w.e.f. 9.6.2011.

The petitioner is aggrieved by the said direction hence, present petition.

3. Mr. Joshi, learned advocate for the petitioner, contends that the appellate authority has committed serious error of law and jurisdiction in setting aside the order dated 30.3.2013 passed by the controlling authority and has also committed serious error of law and jurisdiction in directing the petitioner to pay

Rs. 5,01,993.60 to the respondent towards gratuity with interest at the rate of 10%. According to the learned advocate for the petitioner, the appellate authority has exercised jurisdiction arbitrarily and without having regard to the facts of the case and also without having regard to the legal position and the provisions under the Act.

The petitioner claims that it has statutory right under Section 4 of the Act to forfeit the gratuity and it is in exercise of said right available under Section 4(6) (a) of the Act that the petitioner passed the order and forfeited gratuity, however, appellate authority failed to consider the said position and relevant facts and arbitrarily directed that the petitioner should pay gratuity to the respondent. The learned advocate for the petitioner would submit that the order of the appellate authority may be set aside and the order passed by the employer forfeiting the gratuity may be restored and confirmed.

4. Mr. Chauhan, learned advocate for the respondent workman, opposed the submissions as well as the petition. He submitted that the petitioner had tendered resignation and the resignation was accepted. However, about 2 months after the resignation was accepted, the petitioner passed an order dismissing the respondent workman with retrospective effect and on the ground that the respondent workman is dismissed from service, forfeited the gratuity. He further submitted that the petitioner did not grant opportunity of hearing to the respondent either before passing the order dismissing him from service and/or before forfeiting the gratuity. According to learned advocate for the respondent, the order forfeiting the gratuity is in violation of principles of natural justice and that therefore, the said order cannot be sustained. Learned advocate for the respondent would submit that the appellate authority has considered the said aspect and passed the order which does not warrant interference. According to learned advocate for the respondent workman, the action of the petitioner forfeiting the gratuity is illegal and arbitrary.

5. So as to consider and appreciate rival contentions, it is necessary to take into account the factual background.

5.1 It has emerged from the record and from the submissions by learned counsel for the contesting parties that the respondent workman was working with the petitioner federation as Chief Executive from 1.1.1980.

5.2 It appears that in April 2007, the respondent herein, after completing service of 27 years, submitted resignation dated 26.4.2007.

5.3 The respondent workman also claimed that his resignation dated 26.4.2007 was accepted w.e.f. 28.4.2007 vide office order dated 26.4.2007. The respondent workman claimed and alleged that at relevant time, his salary was Rs.33,071.75 and considering his salary and length of service, the employer should have paid Rs. 5,04,195/- towards gratuity, however, since the petitioner did not pay any amount towards gratuity even after accepting his resignation vide order dated 26.4.2007, he was compelled to initiate proceedings demanding payment

towards gratuity.

5.4 The petitioner, on the other hand, claimed that after the respondent workman tendered his resignation and after it was accepted w.e.f. 28.4.2007 vide order dated 26.4.2007, it came to the notice that during his tenure the respondent workman had not deposited certain cheques and without depositing the cheques and before the amount under the cheques were received, he had delivered material to the purchasers and thereby caused loss to the federation.

5.5 When the said details came to the notice of the petitioner, the petitioner formed an opinion that the respondent workman had tendered the resignation by suppressing the said fact and/or with a view to taking disadvantage of the position that the facts had not come to the notice of the authority he tried to walk out of the federation (by tendering resignation).

5.6 Upon taking into account said fact, the petitioner passed the order dated 26.6.2007 wherein the petitioner mentioned the details of the irregularities. The petitioner mentioned the details of the cheques which were not deposited by the respondent workman and the details of the payments made by it to the purchasers and the details of the material supplied to the purchasers and the loss caused to the federation.

5.7 After mentioning the details, the petitioner also stated in the order dated 26.6.2007 that the respondent had mislead and misdirected the organisation by tendering resignation and he had surreptitiously tried to get himself relieved before the facts came to the notice of the authority.

5.8 On such premise, the petitioner cancelled the resolution accepting the respondent's resignation and dismissed the petitioner from service with effect from the date on which his resignation was accepted and simultaneously, the petitioner forfeited the gratuity in exercise of power under Section 4(6) of the Act.

5.9 It further appears from the record that after the petitioner passed the order dated 26.6.2007, the respondent workman instituted suit proceedings in the City Civil Court, Ahmedabad. He filed the suit on or around 10.5.2010 which was registered as Civil Suit No. 1076 of 2010. In the said suit, the petitioner claimed, inter alia, that:-

"14. The plaintiff is a senior citizen and not keeping good health. Non payment of gratuity ad other dues which he has earned for him long 27 years services with defendant corporation has put him in financial lurch. Therefore, the plaintiff has approached this Hon"ble Court for quashing and setting aside the impugned order of dismissal from service and for getting his gratuity and other dues. That as stated in the reply of the notice by the plaintiff the following amount is due and payable by the defendant to the plaintiff.

(1)

Gratuity

Rs. 5,04,195-00

(2)

P.L.

Rs. 2,64,000-00

(3)

Sick Leave

Rs. 1,08,000-00

(4)

Insurance

Rs. 52,776-00

(5)

Bonus

Rs. 50,000-00

(6)

Salary Increased

Rs. 20,000-00

Total

Rs. 9,98,971-00"

5.10 Besides the said claim, the respondent herein prayed in the suit below quoted relief:-

"17A. This Hon''ble Court may be pleased to quash and set aside the impugned order of dismissal of the plaintiff from the service dated 26-06-2007 by declaring the said impugned order of defendant is arbitrary, illegal, unjust, bad in law and in violation of Gujarat State Co-operative Marketing Federation Limited Staff Regulations.

B. This Hon''ble Court may be pleased to direct defendant to release the amount of Rs.9,98,971-00 of gratuity and other retiral dues with interest at the rate of 18% per annum payable to the petitioner.

C. This Hon''ble Court may be pleased to pass other and further reliefs as may be deemed just and proper in the interest of justice."

5.11 During the hearing of present petition, it is clarified by learned advocate for the respondent workman that subsequently, the respondent had amended the suit after 5.12.2012 and deleted the relief which was prayed for in paragraph No.

17A i.e. for declaration and decree against order of dismissal from the service (and also deleted part of the relief which was initially prayed for in paragraph No. 17B) and restricted the claim to other claims.

5.12 Sometime after the said suit was filed, the respondent workman approached the controlling authority appointed under the Act by filing application in prescribed formate. He filed the application claiming Rs. 5,04,195/- towards gratuity on or around 25.6.2012 but before the date on which above referred amendment was permitted. The said application was registered as Gratuity Application No. 220 of 2012 in the office of the controlling authority at Ahmedabad.

5.13 At the time of hearing of the said application, the petitioner employer informed the controlling authority about the suit filed by the respondent workman.

5.14 Before the controlling authority the petitioner employer contended that the respondent workman had demanded gratuity before the learned City Civil Court and had also challenged the dismissal order and that since the order dismissing him from service was under challenge before the learned City Civil Court, the application claiming gratuity is premature and cannot be entertained. The petitioner employer also claimed that in view of the respondent's acts of irregularities and misconduct in service with the petitioner, the gratuity is forfeited in view of the provisions contained under Section 4(6) of the Act.

5.15 The controlling authority considered the said contentions of the petitioner employer as well as the submissions by learned advocate for the respondent and vide order dated 30.3.2013 disposed of the Gratuity Application No.220 of 2012 on the ground that the application was premature since the suit wherein the dismissal order was challenged, is pending.

5.16 The respondent workman felt aggrieved by the said order and filed appeal before the appellate authority. The appeal filed by the respondent was registered as Gratuity Appeal No. 36 of 2013. Before the appellate authority, the respondent workman claimed that his resignation was accepted and about 2 months after having accepted the resignation, the dismissal order came to be passed and that therefore, the dismissal order is illegal and arbitrary. The respondent also contended before the appellate authority that the dismissal order is passed in violation of principles of natural justice. The respondent workman contended before the appellate authority that in the suit, the workman has not claimed relief of reinstatement but has claimed a sum of Rs. 9,98,971/- towards retiral dues after setting aside the dismissal order. He claimed that since the relief of reinstatement is not prayed for, he is entitled to claim gratuity.

5.17 The appellate authority considered the rival submissions and vide order dated 3.10.2013 the appellate authority held that the petitioner should pay a sum of Rs. 5,01,993.60 towards gratuity to the claimant.

6. In this factual background, the said order dated 3.10.2013 passed by the appellate authority is under challenge before this Court.

7. Mr. Joshi, learned advocate for the petitioner submitted that Section 4(6) of the Act authorizes the employer to forfeit the gratuity in case where the service of the employer is terminated for act of wilful omission or negligence causing any damage or loss to the employer or destruction of property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused. The said provision also confers power on the employer to forfeit the gratuity either partially or wholly, in case where the service of the employee is terminated for any disorderly conduct or any other act constituting offence or involving moral turpitude and that therefore, having regard to the fact that due to respondent's acts and omission and commission, the federation was put to suffer heavy financial loss, the petitioner forfeited the gratuity and that therefore, the action of the petitioner is legal and justified and the appellate authority failed to appreciate the scope and effect of the provision under Section 4(6) of the Act and that therefore, the impugned order is unsustainable and deserves to be set aside. Learned advocate for the petitioner submitted that when the respondent workman tendered resignation, the fact about the irregularities allegedly committed by him were not within knowledge of the authority and that therefore, his resignation was accepted, however, when the irregularities were brought to the notice of the competent authority, the resolution accepting the respondent's resignation was withdrawn/cancelled and instead, the respondent is treated dismissed from service with effect from the date when his resignation was accepted. He submitted that since the service is put to an end by way of dismissal and also for the reasons that during his tenure, the respondent caused loss and damages to the petitioner, the order forfeiting gratuity is passed and that therefore, the said order dated 26.6.2007 comes within purview of Section 4(6) of the Act and consequently, the order passed by the appellate authority, who failed to appreciate the said aspects, deserves to be set aside.

8. Per contra, Mr. Chauhan, learned advocate for the respondent workman, submitted that the petitioner could not have forfeited the gratuity after having accepted the resignation. According to learned advocate for the respondent, the order dismissing the respondent from service could not have been passed 2 months after the resignation was accepted. According to learned advocate for the respondent, his service could not have been terminated with retrospective effect and such order is not only illegal, but void and consequently, the order forfeiting the gratuity is also not sustainable. He submitted that the respondent's resignation was accepted and he was relieved. Thus, his service came to an end by way of, and on acceptance of, resignation which fact makes him entitled for gratuity.

9. I have heard learned counsel for the contesting parties and considered the material on record.

10. In order to decide the controversy, it is necessary to take into account

Sections 4(1) and 4(6) of the Act, which read thus:-

"4. Payment of Gratuity ? (1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,-

- (a) on his superannuation, or
- (b) on his retirement or resignation, or
- (c) on his death or disablement due to accident or disease;

Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement:

[Provided further that in the case of death of the employee, gratuity payable to him shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.]

Explanation.-For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.

(2) to (5) xxx xxx

(6) Notwithstanding anything contained in subsection (1),-

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee [may be wholly or partially forfeited]-

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

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

11. Sub-section (1) of Section 4 prescribes, inter alia, that the gratuity shall be payable to an employee (1) after he has rendered continuous service for not less than 5 years; and (2) when the service comes to an end either on superannuation or on retirement or resignation or on death or his disablement due to accident or disease.

11.1 For claiming gratuity, cessation of service on account of any of the events

mentioned in subsection (1) of Section 4 is sine-quo-non. Until service of "employee" comes to an end on account of occurrence of any of the events or any of the grounds mentioned under sub-section (1) of Section 4, right to receive gratuity does not fructify and cause for claiming gratuity or entitlement does not arise.

If a dispute against termination of service and claim for reinstatement in service is pending before the competent Court, then, the authority under the Act may differ the adjudication of the claim for gratuity until final decision in such dispute.

11.2 In present case, there is no dispute with regard to the factum of termination. When concerned employee dropped the challenge against the order of termination from service (by amending the plaint in the pending suit and deleting the prayer for setting aside the order of dismissal from service) and dropped/withdrew the prayer for reinstatement and thereby he accepted, as final the factum of termination of his service, his right to claim and receive gratuity, of course subject to Section 4(6) of the Act and/or subject to the service rules or the standing orders (which may contain provision with regard to the gratuity in case of dismissal from service), accrued.

12. Since the employee had raised a contention before the Controlling Authority that after having accepted his resignation dismissal order could not have been passed and since the petitioner had opposed the application on the ground that it was not maintainable and should not be entertained because it was premature, it is, at this stage, appropriate to note that the Controlling Authority appointed under the Act cannot dwell on and decide the issue whether the employer could have passed the order of dismissal from service after the respondent employee had tendered resignation and after an order accepting the resignation was passed, or not. The Controlling Authority appointed under the Act has no jurisdiction to adjudicate such dispute and since issue can be decided only by the competent Court.

The respondent employee was aware and conscious of this position and that therefore, he dropped the challenge against the order of dismissal from service and he amended the plaint in the pending suit and thereby he also dropped the prayer for reinstatement. Therefore, the objection raised by the employer on the ground that the application was filed prematurely did not survive.

Under the circumstances, in present case, the pre-condition for claiming gratuity is complied. Let me hasten to add that if the employee keeps open and alive his challenge against action ? order by the employer, then the employer's objection would also spring-up and revive.

13. Sub-section (6) of Section 4, inter alia, provides the circumstances in which the gratuity can be forfeited by the employer.

13.1 Sub-clause (a) of sub-section (6) of Section 4 provides, inter alia, that gratuity can be forfeited (1) if service of an employee is terminated for an act of

wilful omission or negligence; and (2) if such wilful omission or negligence caused any damage or loss to the employer or it caused destruction of employer's property and according to clause (b) of subsection (6), gratuity can be forfeited in the event service of an employee is terminated for any riotous or disorderly conduct or any other act of violence or if his service is terminated for any act which constitute an offence involving moral turpitude.

14. From the said provisions, it emerges that the Act confers right in favour of the employee to receive gratuity when his service comes to an end on account of superannuation or on account of retirement or on account of resignation provided he completed 5 years' service with the employer before such cessation of service or on account of death or disablement.

14.1 On the other hand, the Act confers right to the employer and permits the employer to forfeit the benefit of gratuity in certain circumstances.

14.2 It also emerges that before forfeiting the gratuity, the employer is obliged to establish that the service of the employee has been terminated on account of one or more circumstance or event mentioned under clause (a) or (b) of sub-section (6) of Section 4.

14.3 Further, the said provision implies that before forfeiting the gratuity by invoking clause (a) of Section 4(6), the employer must establish that any damage or loss to the property is caused or destruction of property is caused and such loss or damage has occurred on account of wilful act of omission or negligence by the employee i.e. the employee acted in a manner which caused loss or damage and his act was wilful act of omission or negligence.

14.4 According to sub-section(b) of Section 4, the employer is obliged to establish that the termination of the service of the employee was occasioned on account of riotous or disorderly conduct or act of violence on the part of the employee or on account of his act constituting offence involving moral turpitude.

15. The action of forfeiting gratuity in exercise of power under sub-section (6) of Section 4 tantamounts to and culminates into civil as well as adverse consequences.

15.1 Consequently, the obligation to follow and comply the principles of natural justice is implied and inherent in the said provision.

15.2 Therefore, the order of forfeiture of gratuity cannot be passed without specific and formal order to that effect i.e. gratuity cannot be forfeited automatically and mechanically merely because order of termination/dismissal from service is passed.

15.3 The employer must take specific decision to forfeit gratuity and must pass an order to that effect. In view of the provision under Section 4(6) of the Act, those actions of termination/dismissal from service entail consequences of forfeiture of gratuity which fall within the purview of clause (a) and/or (b) of

Section 4(6) of the Act and that therefore, there is nothing like automatic forfeiture of gratuity when order of termination/dismissal from service is passed.

15.4 Further, such order cannot be passed without complying the principles of natural justice.

15.5 Before passing order of forfeiture principles of natural justice must be followed.

15.6 The said requirement ? condition is implied and inherent in the section and must be read into the provision which permits or authorizes forfeiture of gratuity because the provision entails civil and adverse as well as monetary consequences. It is too late in time to reiterate the oft repeated dicta that compliance of Audi Altrem Partem must precede any order ? even an order which is administrative in nature ? which entails civil and adverse consequences.

16. In this context, profitable reference can be had to the observations by Hon''ble Apex Court in the decision in the case of Swadeshi Cotton Mills etc. v. Union of India etc. [AIR 1981 SC 818] where Hon''ble Apex Court observed that:-

"26. During the last two decades, the concept of natural justice has made great strides in the realm of administrative law. Before the epoch-making decision of the House of Lords in Ridge v. Baldwin, [1964] AC 40, it was 555 generally thought that the rules of natural justice apply only to judicial or quasi-judicial proceedings; and for that purpose, whenever a breach of the rule of natural justice was alleged, Courts in England used to ascertain whether the impugned action was taken by the statutory authority or tribunal in the exercise of its administrative or quasi-judicial power. In India also, this was the position before the decision, dated February 7, 1967, of this Court in Dr. Bina Pani Dei's case (ibid); wherein it was held that even an administrative order or decision in matters involving civil consequences, has to be made consistently with the rules of natural justice. This supposed distinction between quasi judicial and administrative decisions, which was perceptibly mitigated in Bina Pani Dei's case, was further rubbed out to a vanishing point in A.K. Kraipak v. Union of India (ibid), (AIR 1970 SC 150) thus:

"If the purpose of these rules of natural justice is to prevent miscarriage of justice one fails to see why those rules should be made inapplicable to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries Arriving at a just decision is the aim of both quasi judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far-reaching effect than a decision in a quasi judicial enquiry."

89. In concluding the discussion in regard to this aspect of the matter, we can do no better than reiterate what was said by one of us (Chinnappa Reddy, J.) in S.L. Kapoor v. Jagmohan (AIR 1981 SC 136) (ibid) :

"In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced."

16.1 Hon"ble Apex Court emphasised the need to follow and comply principles of natural justice even in matter of administrative order with following observations in the decision in the case of *State of Orissa v. Dr. (Miss) Binapani Dei & Ors.* [AIR 1967 SC 1269] where Hon"ble Apex Court observed that:-

"9. ...An order by the State to the prejudice of a person in derogation of his vested rights may be made only in accordance with the basic rules of justice and fair play. The deciding authority, it is true, is not in the position of a Judge called upon to decide an action between contesting parties, and strict compliance with the forms of judicial procedure may not be insisted upon. He is however under a duty to give the person against whom an enquiry is held an opportunity to set up his version or defence and an opportunity of correct or to controvert any evidence in the possession of the authority which is sought to be relied upon to his prejudice. For that purpose the person against whom an enquiry is held must be informed of the case he is called upon to meet, and the evidence in support thereof. The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitution "setup that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would therefore arise from the very nature of the function intended to be perform; it need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the tails of justice be ignored and an order to the prejudice of "a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case.

12. We think that such an enquiry and decision were contrary to the basic concept of justice and cannot have any value. It is true that the order is administrative in character, but even an administrative order which involves civil consequences as already stated must be made consistently with the rules of natural justice after informing the first respondent of the case of the State, the evidence in support thereof and after giving an opportunity to the first respondent of being heard and meeting or explaining the evidence. No such steps were admittedly taken; the High Court was, in our judgment, right in setting aside the order of the State."

16.2 On this count, reference may be made to the observations by Hon"ble Apex Court in case of *Mrs. Maneka Gandhi v. Union of India & Anr.* [(1978) 1 SCC

248], wherein it is held that:-

"8.Now, it is true that there is no express provision in the Passports Act, 1967 which requires that the audi alteram partem rule should be followed before impounding a passport, but that is not conclusive of the question. If the statute makes itself clear on this point, then no more question arises. But even when the statute is silent, the law may in a given case make an implication and apply the principle stated by Byles, J., in *Cooper v. Wandsworth Board of Works*, (1863) 143 ER 414. "A long course of decision---, beginning with *Dr. Bentley's* case and ending with some very recent cases, establish that, although there are no positive words in the statute requiring that the party shall be heard, yet-the justice of the common law will supply the omission of the legislature". The principle of audi alteram partem, which mandates that no one shall be condemned unheard, part of the rules of natural justice. In fact, there are two main principles in which the rules of natural justice are manifested, namely, *Nemo Judex in Sua Causa* and audi alteram partem. We are not concerned here with the former, since there is no case of bias urged here. The question is only in regard to the right of hearing which involves the audi alteram partem rule. Can it be imported in the procedure for impounding a passport ?

9..... Thus, the soul of natural justice is fair play in action" and that is why it has received the widest recognition throughout the democratic world..... It is the quintessence of the process of justice inspired and guided by fair play in action". If we look at the speeches of the various law Lords in *Wise man's* case, it will be seen that each one of them asked the question "whether in the particular circumstances of the case, the Tribunal acted unfairly so that it could be said that their procedure did not match with what justice demanded", or, was the procedure adopted by the Tribunal "in all the circumstances unfair"? The test adopted by every law Lord was whether the procedure followed was "fair in all the circumstances" and "fair play in action" required that an opportunity should be given to the tax payer "to see and reply to the counter-statement of the Commissioners" before reaching the conclusion that "there is a prima facie case against him." The inquiry must, therefore, always be : does fairness in action demand that an opportunity to be heard should be given to the person affected ? Now, if this be the test of applicability of the doctrine of natural justice, there can be no distinction between a quasi judicial function and an administrative function for this purpose. The aim of both administrative inquiry as well as quasi-judicial inquiry is to arrive at a just decision and if a rule of natural justice is calculated to secure justice, or to put it negatively, to prevent miscarriage of justice, it is difficult to see why it should be applicable to quasi-judicial inquiry and not to administrative inquiry. It must logically apply to both. On what principle can distinction be made between one and the other ? Can it be said that the requirement of "fair play in action" is any the less in an administrative inquiry than in a quasi-judicial one? Sometimes an unjust decision in an administrative inquiry may have far more serious consequences than a decision in a quasi judicial inquiry and hence the rules of natural justice must apply equally in an

administrative inquiry which entails-civil consequences. There was, however, a time in the early stages of the development of the doctrine of natural justice when the view prevailed that the rules of natural justice have application only to a quasi-judicial proceeding as distinguished from an administrative proceeding and the distinguishing feature of a quasi-judicial proceeding is that the authority concerned is required by the, law under which it is functioning to act judicially. This requirement of a duty to act judicially in order to invest the function with a quasi, judicial character was spelt out from the following observation of Atkin, L.J. in *Rex v. Electricity Commissioners*, [1924] 1 KB 171, "wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King Bench Division..... This decision, broadened the area of application of the rules of natural justice and to borrow the words of Prof. Clear in his article on "Natural Justice, Substance and Shadow" in *Public Law Journal*, 1975, restored light to an area "benighted by the narrow conceptualism of the previous decade". This development in the law had its parallel in India in the *Associated Cement Companies Ltd. v. P.N. Sharma & Anr.* where this Court approvingly referred to the decision in *Ridge v. Baldwin* (supra) and, later in *State of Orissa v. Dr. Binapani* observed that : "If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power". This Court also, pointed out in *A.K. Kraipak & Ors. v. Union of India & Ors.* another historic decision in this branch of the law, that in recent years the concept of quasi-judicial power has been undergoing radical change and said: "The dividing line between an administrative power and a quasi judicial power is quite thin and is being gradually obliterated, for determining whether a power is an administrative, power or a quasi-judicial power one has to look to the nature of the power conferred, the person or persons on whom it is conferred, the framework of the law conferring that power, the consequences ensuing from the exercise of that power and the manner in which that power is expected to be exercised". The net effect of these and other decisions was that the duty to act judicially need not be super-added, but it may be spelt out from the nature of the power conferred, the manner of exercising it and its impact on the rights of the person effected and where it is found to exist, the rules of, natural justice would be attracted.

12. This Court, speaking through Hegde, J., in *I.K. Kraipak's* case quoted with approval the above passage from the judgment of Lord Parker, C.J., and proceeded to add :

"The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it-Till very recently it was the opinion of the courts that unless the authority concerned was required by the law under which it functioned to act judicially there was no room for the, application of the rules of natural

justice. The validity of that limitation is now questioned. If the purpose of the rules of natural justice is to prevent miscarriage of justice One fails to see why those rules should be made inapplicable, to administrative enquiries. Often times it is not easy to draw the line that demarcates administrative enquiries from quasi-judicial enquiries. Enquiries which were considered administrative at one time are now being considered as quasi-judicial in character. Arriving at a just decision is the aim of both quasi-judicial enquiries as well as administrative enquiries. An unjust decision in an administrative enquiry may have more far reaching effect than a decision in a quasi-judicial enquiry. As observed by this Court in *Suresh Koshy George v. The University of Kerala and Ors.* (1969) 1 S.C.R. 317 the rules of natural justice are not embodied rules. What particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case the framework of the law under which the enquiry is held and the constitution of the Tribunal or body of persons appointed for that purpose. Whenever a complaint is made before a court that some principles of natural justice had been contravened the court has to decide whether the observance of that rule was necessary for a just decision on the facts of the case."

It is a wholesome rule designed to secure the rule of law and the court should not be too ready to eschew it in its application to a given case. True rue it is that in questions of this kind a fanatical or doctrinaire approach should be avoided, but that does not mean that merely because the traditional methodology of a formalised hearing may have the effect of stultifying the exercise of the statutory power, the audi alteram partem should be wholly excluded. The court must make every effort to salvage this cardinal rule to the maximum extent permissible in a given case. It must not be forgotten that "natural justice is pragmatically flexible and is amenable to capsulation under the compulsive pressure of circumstances". The audi alteram partem rule is not cast in a rigid mould and judicial decisions establish that it may suffer situational modifications. The core of it must, however, remain, namely, that the per%on affected must have a reasonable opportunity of being heard and the hearing must be a genuine hearing and not an empty public relations exercise..... It would not, therefore, be right to conclude that the audi alteram partem rule is excluded merely because the power to impound a passport might be frustrated, if prior notice and hearing were to be given to the person concerned before impounding his passport."

(emphasis supplied)

16.3 A profitable reference may also be made to the decision in case of *Olga Tellis & Ors. v. Bombay Municipal Corporation & Ors.* [(1985) 3 SCC 545], wherein it is held that:-

"40. Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right, in this case the right to life, must confirm to the norms of justice and fair play.

Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards: The action must be within the scope of the authority conferred by law and secondly, it must be reasonable. If any action, within the scope of the authority conferred by law, is found to be unreasonable it must mean that the procedure established by law under which that action is taken is itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it, Sir Raymond Evers says that, from the point of view of the ordinary citizen, it is the procedure that will most strongly weigh with him. He will tend to form his judgment of the excellence or otherwise of the legal system from his personal knowledge and experience in seeing the legal machine at work", ["The influence of Remedies on Rights" (Current Legal Problems 1953, Volume 6.)]. Therefore, He that takes the procedural sword shall perish with the sword.

42. Having given our anxious and solicitous consideration to this question, we are of the opinion that the procedure prescribed by Section 314 of the Bombay Municipal Corporation Act for removal of encroachments on the footpaths or pavements over which the public has the right of passage or access, cannot be regarded as unreasonable, unfair or unjust.

45.There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.

47. The proposition that notice need not be given of a proposed action because, there can possibly be no answer to it, is contrary to the well-recognised understanding of the real import of the rule of hearing. That proposition overlooks that justice must not only be done but must manifestly be seen to be done and confuses one for the other. The appearance of injustice is the denial of justice. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done. Procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary action on the part of public authorities. (Kadish, "Methodology and Criteria in Due Process Adjudication - A Survey and Criticism," 66 Yale L.J. 319,

340 [1957]. The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decision taken by public authorities operate, to participate in the processes by which those decisions are made.....

48. Any discussion of this topic would be incomplete without reference to an important decision of this Court in *S.L. Kapoor v. Jagmohan*, [1981] 1 S.C.R. 746, 766..... the Court, speaking through one of us, Chinnappa Reddy, J. Said:

"In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The nonobservance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It will come from a person who has denied justice that the person who has been denied justice is not prejudiced."

These observations sum up the true legal position regarding the purport and implications of the right of hearing."

(emphasis supplied)

16.4 Thus, it follows that like in the matter of quasi judicial proceedings even in administrative matters the requirement to grant opportunity of hearing must be adhered to and there is no justification to exclude the opportunity of hearing.

17. Decades have passed from the time when payment of gratuity used to be matter of employer's discretion and would be granted in appreciation of long and loyal service to the master. No more. Now, gratuity is a statutory right of an employee. Therefore, it can be denied or restricted only in accordance with the provision under the Act. It cannot be withheld or curtailed except in accordance with the Act.

18. The right to forfeit the gratuity is a right conferred by the Act and it flows from Section 4(6) of the Act. Thus, it can be exercised only in accordance with the provision which permits forfeiture. Since on account of such action civil and adverse as well as monetary consequence visits the employee is concerned, the requirement of opportunity of hearing and adherence to the principles of natural justice, as explained by various judicial pronouncements, though not expressly provided in the Section, is deemed to be inherent in the provision and must be read into the provision.

18.1 The employer who intends to forfeit gratuity, shall be obliged to grant opportunity of hearing to the concerned employee asking him to show cause as to why the gratuity should not be forfeited and the reason for which he proposes such action must be informed to the employee. The employee's explanation ? response must be called for and the employee should be given an opportunity to put-up his case and explain as to why proposed action should not be taken.

18.2 Forfeiture of gratuity in breach of principles of natural justice and without

following such procedure would be unsustainable.

19. At this stage, one clarification would be in order, rather it is necessary. In many cases it may so happen that proposed action viz. forfeiting gratuity is preceded by a full-fledged domestic inquiry pursuant to a charge sheet with regard to the same misconduct which is the base or reason or ground for the decision to forfeit the gratuity. In such cases either a separate and specific show cause notice (about proposed action) calling for employee's explanation as to why gratuity should not be forfeited in light of the domestic inquiry/inquiry officer's report, must be given to the employee or at least in the second show cause notice specific and express and separate mention about such proposed action (viz. to also forfeit gratuity) also must be made and explanation/response on that count must be invited and thereby opportunity must be given to the employee to put-up his case as to why such action also (i.e. besides the disciplinary action/penalty order for the misconduct) may not be taken. Although duplication of process of domestic inquiry is neither necessary nor expected (where the ground and reason for order of penalty and for forfeiture of gratuity is the same) but the employee must be put to separate and specific notice about proposed action of forfeiture of gratuity, besides the proposed order of penalty.

20. Further, if the charge/misconduct in respect of which a domestic inquiry is conducted pursuant to/in connection with any charge sheet, is not such which would come within the purview of the instances specified in clause (a) or clause (b) of Section 4(6) then a specific notice with regard to the alleged conduct must be served and regular procedure to establish that the concerned employee is guilty of the conduct mentioned in Section 4(6)(a) or (b) must be conducted and opportunity to offer reply and to make-out a case for not taking such measure, must be granted.

20.1 Without establishing (in accordance with law and after following principles of natural justice) that the concerned employee is guilty of the conduct mentioned in Section 4(6)(a) and/or (b) without considering employee's reply such action cannot be taken, and if any employer takes such action without granting opportunity of hearing and defence and without complying principles of natural justice then it cannot be sustained.

21. In view of the fact that the section contemplates that the amount of gratuity can be forfeited if any loss or damage is occasioned, the employer would be obliged to also establish that (i) loss or damage is caused; and that (ii) such loss or damage is caused on account of wilful conduct of the employee and (iii) he shall be also obliged to quantify the extent of loss or damage since only so much amount can be forfeited which is equal to the loss or damage caused on account of wilful conduct of the employee. These aspects and ingredients can be established only after following the aforesaid procedure and during the proceedings initiated by the employer wherein the employee is granted opportunity of hearing.

22. In present case, it is undisputed fact that before passing the order dated 26.6.2017 (whereby the petitioner employer forfeited the respondent's gratuity), the respondent workman was not granted any opportunity of hearing and any opportunity to show cause as to why gratuity should not be forfeited.

22.1 Since, in present case, the petitioner employer forfeited the respondent's gratuity without complying principles of natural justice, the order passed by the employer forfeiting the gratuity payable to the respondent was not sustainable and deserved to be set aside on the ground that the order suffer from vice of violation of principles of natural justice. In this view of the matter, the appellant authority's order cannot be faulted or disturbed, though for different reasons which are discussed above. For the foregoing reasons, the appellate authority's order is not disturbed and this petition, which is directed against appellate authority's order dated 30.9.2013 is dismissed.

23. At this stage, it is necessary to mention and clarify that this Court has not expressed any view or opinion so far as the allegations against the respondent workman (mentioned in the order dated 26.6.2007) are concerned and the order forfeiting gratuity is held to be unsustainable on the said limited ground viz. violation of principles of natural justice.

23.1 In aforesaid view of the matter and also having regard to the position that when an order is set aside on such limited ground, then, the decision affects and unsettles only the order of forfeiture of gratuity and not the proceedings and the proceedings do not stand terminated, hence it is also necessary and appropriate to clarify that present order will not stand in way of the petitioner employer to pass fresh order as may be considered necessary in the facts and circumstances of the case, after following requisite procedure in accordance with law and after granting opportunity of hearing to the employee. It is also clarified that in such proceedings, if initiated by the employer, it will be permissible to the employee to raise all contentions and objections as may be available in law.

24. So far as the order passed by the appellate authority is concerned, it is necessary to mention that though the petition against the appellate authority's order setting aside the controlling authority's order is dismissed, it is clarified that nothing in the order passed by the appellate authority nor in present order will stand in way of the petitioner employer to pass appropriate fresh order in accordance with law, and after granting opportunity of hearing to the respondent workman, with regard to the forfeiture of the gratuity. With aforesaid clarification and direction, present petition stands disposed of. Rule is discharged.