(2016) 09 GUJ CK 0042

In the Gujarat High Court

Case No : Special Civil Application No. 8165 Of 2008

State Bank of India APPELLANT

Vs

Subhash S. Parkhe RESPONDENT

Date of Decision : 20-09-2016

Acts Referred:

Payment of Gratuity Act, 1972 — Section 14, Section 4(1)
S.B.S. Officers Service Regulations, 1979 — Regulation 1(11), Regulation 12, Regulation 50, Regulation 67
State Bank of India (Subsidiary Banks) Act, 1959 — Section 63

Citation : (2017) 2 CLR 152

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

Bench : Single Bench

Advocate : Mr. Pranav G. Desai, Advocate, for the Petitioner No. 1; Mr. Punit B. Juneja, Advocate, for the Respondent No. 1; Ms. Sejal K. Mandavia, Advocate and Rule Served, for the Respondents Nos. 2-3

Final Decision : Allowed

Judgement

Mr. K.M. Thaker, J. (Oral)—The petitioner State Bank of India has prayed, inter alia, that:

"8A) Your Lordships be pleased to issue a writ of or in the nature of Mandamus or a writ of or in the nature of Certiorari or any other appropriate writ, order or direction quashing and setting aside the orders passed by the Controlling Authority in Application No. ALC/ADPR/48(14)-2007 and the Appellate Authority in Case No. AH/RLC/48(3) of 2007 whereby the Appellate Authority confirmed the order passed by the Controlling Authority in directing payment of gratuity to the respondent along with interest @ 10%."

2. The petitioner is aggrieved by order dated 9.7.2007 passed by the Controlling Authority under the Payment of Gratuity Act, 1972 whereby the Controlling Authority held that the claimant, i.e. present respondent is entitled to receive Rs.3,50,000/- towards gratuity with simple interest @ 10% from 23.7.2004 till

the date of actual payment and directed the petitioner bank to pay the said amount to the claimant. The petitioner has also challenged the order dated 29.4.2008 passed by the Appellate Authority whereby the Appellate Authority rejected the appeal filed by present petitioner and confirmed the Controlling Authority''s order dated 23.7.2004.

3. The factual background involved in present petition can be summarized thus.

3.1 The respondent herein, i.e. claimant before the Controlling Authority was an officer employee of the petitioner bank.

3.2 With regard to certain reported acts of misconduct, the respondent was visited with a charge-sheet dated 15.9.2000.

3.3 Seven allegations / charge were levelled against the respondent vide said charge-sheet dated 15.9.2000.

3.4 In pursuance of the said charge-sheet dated 15.9.2000, domestic enquiry was conducted. On conclusion of the domestic enquiry, the Enquiry Officer submitted its report / finding, wherein the Enquiry Officer held that the charge Nos.1, 4, 5 and 6 are proved and charge Nos. 2, 3 and 7 are partly proved.

3.5 The Disciplinary Authority - Competent Authority considered the said report of the Enquiry Officer and the record of the domestic enquiry as well as the gravity of the allegations and passed order dated 14.7.2004 imposing penalty in form of compulsory retirement from bank''s service. Accordingly, vide penalty order dated 14.7.2004, the service of the respondent came to be terminated by way of compulsory retirement.

3.6 Since the bank, after having passed the said penalty order, did not pay gratuity to the respondent, the respondent approached the Controlling Authority under the Payment of Gratuity Act, 1972 and filed gratuity claim application which was registered as ALC/ADI/48(14) of 2007 and prayed that the bank may be directed to pay gratuity.

3.7 The bank opposed the said application and resisted the demand of the respondent on the ground that in view of the provisions under the Disciplinary and Appeal Rules read with Rules applicable in the matter of payment of gratuity, the claimant is not entitled for gratuity and therefore, the application should be rejected.

3.8 The Controlling Authority adjudicated the dispute and rejected the defence and proceeded on the ground that the bank had "forfeited gratuity" payable to the claimant which was unjustified and that in the facts of the case the said action of forfeiture was unsustainable. The authority held that the claimant was entitled to Rs.3,50,000/- towards gratuity with simple interest @ 10% from on 23.7.2004.

3.9 Feeling aggrieved by the said order dated 9.7.2007 passed by the Controlling Authority the bank filed appeal before the Appellate Authority. The appeal was registered as Case No.AH/RLC/48(3) of 2007. The Appellate Authority heard the parties and adjudicated the appeal and the Appellate Authority also reached to the same conclusion, i.e. the bank had forfeited the gratuity which was unjustified and that the bank had forfeited gratuity without issuing notice and without passing specific order for forfeiture of gratuity and thereby rejected the appeal.

3.10 Feeling aggrieved by the said two orders, the bank has taken out present petition.

4. Mr. Desai, learned advocate for the petitioner bank submitted that the service of the respondent has been terminated by way of penalty and that, therefore, the respondent-claimant is not entitled and eligible for gratuity either under the applicable Rules or under the Act. The service of the respondent did not come to end in any of the manner / mode mentioned under Section 4(1) of the Act but his service came to an end for misconduct and by way of penal action and that, therefore, the claimant''s demand is unsustainable. He submitted that the bank has not forfeited gratuity in case of respondent - claimant but the claimant is not entitled and eligible for gratuity, however, the authority failed to appreciate the said submission and that the orders are erroneous and deserve to be set aside.

5. Per contra, Mr. Juneja, learned advocate for the respondent submitted that after the bank compulsorily retired, the respondent did not pay gratuity and therefore, the claimant had to approach the Controlling Authority. He submitted that the order passed by the Controlling Authority is just and legal and there is no infirmity in the order. Learned advocate for the respondent submitted that the case of the respondent does not come within the purview of section 4(6) and that, therefore, the bank could not have forfeited gratuity in case of respondent. He submitted that the service of the respondent came to end by way of compulsory retirement and not after domestic enquiry and that, therefore gratuity could not have been forfeited and section 4(6) would not be attracted or applicable to the case of the respondent.

Learned advocate for the respondent also submitted that compulsory retirement is a form of retirement and retirement is one of the mode for cessation of service which is covered under section 4(1) and therefore, the claimant is entitled for gratuity. Learned advocate for the respondent also submitted that the petitioner bank had neither issued notice to forfeit gratuity and/or the petitioner bank has not passed any order to forfeit gratuity and that, therefore, the action of not paying gratuity is unjustified and legally unsustainable and the Controlling Authority or the Appellate Authority have not committed any error.

6. I have considered the submissions by both the parties. I have also examined the material on record and two orders which are impugned in present petition.

7. The facts, by and large, are not in dispute. The petitioner bank served the charge-sheet dated 15.9.2000 against the respondent who was employed as officer employee (SMGS-IV).

7.1 The charge-sheet came to be issued against the respondent for certain acts of misconduct allegedly committed by him during his tenure as Branch Manager at Andheri Branch, Mumbai and at SSI Branch, Jamnagar.

7.2 The crux of the charge/allegations against the petitioner can be recapitulated in following terms:

"i) The CSO in collusion with outsiders and with malafide intention sanctioned an overdraft limit of Rs.11,20,000/- to M/s Jeevdani Trading & Consultancy Services (P) Ltd. against a third party NRE deposit to extend accommodative finance. He tampered with the deposit receipt and Branch record. He released the finance without obtaining prescribed security documents No.A-164. He permitted withdrawal of funds and part of the proceeds were allowed to be utilized for adjustment of other dues (Article of Charge No.1).

ii) He permitted unauthorized and accommodative transactions to extend undue favour to M/s Hexone Pharmaceuticals Ltd. and allowed several irregularities in opening an L.C. on behalf of the said borrowal unit. He allowed the transactions dated 04/05/1998 exceeding his discretionary powers. He failed to report these transactions to controller (Article of Charge No.2).

iii) The CSO allowed to discount six bills aggregating Rs.33.51 lacs. These bills were subsequently returned unpaid. Several irregular features were observed in connection with those transactions (Article of Charge No.3).

iv) With malafide intention to extend unauthorized facility to M/s.Hexone Pharmaceuticals Ltd. in handling various transactions at Bank''s S.S.I. Branch, Jamnagar, a T.D.R. Account in the name of the Company was opened without obtaining prescribed set of account opening forms. He released demand loan facility against the T.D.R. of Rs.15.00 lacs of the said Company without retaining any margin. The proceeds of the demand loan were remitted by telegraphic transfer without recovering exchange amount etc.

v) The CSO with malafide intention to extend accommodative assistance to M/s Hexone Pharmaceuticals Ltd. discounted an accommodation bill on 15/04/1999 for Rs.18,50,409.30. He failed to make proper scrutiny of the bill. The addresses of the drawer and the drawee of the bill were identical. He kept the controllers in dark by not reporting the said transaction. He sent the said bill for collection directly to the drawee''s Bank which was returned unpaid. The returned bill was once again sent to the drawee''s banker. Thereafter the bill was not traceable. The bill was received back directly from the drawer company. This points to connivance between the said Company and the CSO (Article of Charge No.5).

vi) Amount of M.T. Loan Rs.27,71,270.00 was disbursed by crediting the amount to the said Company M/s Hexone Pharmaceuticals Ltd. (Article of Charge No.7)."

7.3 In respect of the said allegation and charge sheet dated 15.9.2000, domestic enquiry was conducted against the respondent and on conclusion of the domestic enquiry, the Enquiry Officer found that the allegations in respect of Charge Nos.

1, 4, 5 and 6 are proved, whereas Charge Nos. 2, 5 and 7 are partly proved.

7.4 The Disciplinary Authority considered the material on record of the domestic enquiry, gravity of allegation and the finding by Enquiry Officer and concurred with the Enquiry Officer.

The Disciplinary Authority, thereupon, passed penalty order dated 14.7.2004.

7.5 In the said penalty order dated 14.7.2004, the Disciplinary Authority recorded that:

"11. I find that the charges established against the CSO at the enquiry are of serious nature. Apart from several procedural lapses, the CSO has committed grave misconduct by allowing accommodative finance to outsiders at the cost and risk of the Bank. His nexus with the outsiders has also been established at the enquiry. The serious implications of his acts of commission cannot be overlooked.

12. I am convinced that Shri Parkhe has wilfully violated Regulation No.50(1), (3) and (4) of S.B.S. (Officers'') Service Regulations, 1979.

13. The gravity of the charges to the extent to which they have been proved against Shri Parkhe, calls for imposition of appropriate stiff penalty.

14. I, therefore, decide to impose the undernoted penalty on Shri S.S. Parkhe which only in my opinion will meet the ends of justice "Compulsory Retirement from Bank''s Service".

15. The aforesaid penalty will be effective from the date of service of this order. General Manager (Operations) is authorised to convey this order to Shri Parkhe."

(emphasis supplied)

8. In view of the controversy involved in present petition, it is relevant to keep in focus the fact that the service of the respondent came to be terminated for misconduct and by way of penalty in form compulsory retirement.

8.1 Below mentioned facts, viz.

(a) the petitioner was served with the charge-sheet for misconduct;

(b) the charge-sheet contained allegations of serious irregularities (misconduct);

(c) domestic enquiry in respect of alleged misconduct was conducted; and

(d) the said order came to be passed by way of penalty; and

(e) the said fact is also clear from the observations in the said order dated 14.7.2004.

(f) in his said order, the Disciplinary Authority has observed and recorded that:

"I find that the charges established against the CSO at the enquiry are of serious nature. ... ... I am convinced that ... ... has wilfully violated Regulation No.50(1), (3) and (4) of S.B.S. (Officers'') Service Regulations, 1979. ... ... The gravity of the charges to the extent ... ... I, therefore, decide to impose the undernoted penalty on ... ... The aforesaid penalty will be effective from the date of ... ..."

and above observations from the order dated 14.7.2004, bring out and establish the fact that the respondent''s service was terminated by way of penalty.

9. Before proceeding further, it is also relevant to note that the petitioner bank has, in exercise of powers conferred by Section 63 of the State Bank of India (Subsidiary Banks) Act, 1959, framed rules in name and style of State Bank of Saurashtra (Payment of Gratuity to Employees) Regulations, 1975 [hereinafter referred to "Regulations of 1975"].

9.1 At this stage, it is relevant to take into account the provisions under which the disciplinary authority initiated the action/proceedings and passed the penalty order dated 14.7.2004, i.e. Regulation No.50(1), (3) and (4) of the SBS Officers Service Regulation, 1979. The said provisions/regulations are found in Chapter-X of above mentioned regulations which contain provisions and Rules with reference to conduct and discipline and prescribe, inter alia, the acts of omission or commission which shall amount to misconduct.

9.2 In furtherance of the said provision, it is also relevant to take into account provision under Regulation 67 which prescribes Major and Minor penalty, which reads thus:-

"Minor Penalties:-

(a) to (e) xxx xxx

Major Penalties:-

(f) and (g) xxxxxx

(h) Compulsory retirement."

9.3 From above mentioned provisions also, it becomes clear that (a) the action against the petitioner is punishment and that (b) under the applicable regulations of the bank, "compulsory retirement" is mode of "major penalty". The Rules which contain above mentioned provision are framed in exercise of power under Section 67 of State Bank of India (Subsidiary Banks) Act, 1959.

10. In the petitioner Bank matters related to payment of gratuity are governed by said Regulations of 1975. The said Rules came into force w.e.f. 1.1.1975.

10.1 Rule/clause - 11 thereof deals with Conditions of Grant (for gratuity), which reads thus:-

"Conditions of Grant

11. The gratuity will be granted to an employee subject to the terms, conditions and other provisions contained in the succeeding Regulations but nothing in these Regulations shall be construed as conferring any right or benefit on any employee whose service in the Bank is governed by a contract expressly stipulating his service to be for a specified period, unless otherwise provided in such contract."

The said provision confers benefit of gratuity to the employees. The said provision prescribes, inter alia, that gratuity will be granted "subject to the terms, conditions and other provisions" in succeeding Rules. Thus, the right to gratuity is not absolute, wholesome and complete right but it is subject to other conditions.

10.2 Rule/clause - 12 of said Rules makes provision as to the events when gratuity would be admissible/payable. The said provision enumerates the events and circumstance, wherein gratuity shall be payable/admissible. The said clause - 12 reads thus:-

"When Admissible:

12. (1) Gratuity will be granted to or in the case of an employee if:-

(i) he dies while in service of the Bank; or

(ii) he becomes physically or mentally incapable of further service; or

(iii) he retires from the service after attaining the age of superannuation; or

(iv) he retires from the service with the permission of the Bank before attaining the age of superannuation; or

(v) he voluntarily resigns from the service of the bank after 10 years of completed service; or

(vi) his service in the bank is terminated by the Bank.

(2) Notwithstanding anything contained herein above:-

(a) No gratuity will be granted to or in the case of an employee if he is or has been dismissed from service in the Bank for any misconduct committed by him prior to 1st January, 1966;

(b) In case of termination of the service of an employee by dismissal for any misconduct committed by him after 1 s t January , 1966 involving financial loss to the Bank, there shall be forfeiture to the extent of such loss from the gratuity admissible to him otherwise under these Regulations."

(emphasis supplied)

11. On plain reading of the said Rule - 12, it emerges that the gratuity will be payable to an employee if he dies while in service of the Bank; or he becomes physically or mentally incapable of further service; or he retires from the service

after attaining age of superannuation; or he retires from the service with the permission of the Bank before attaining the age of superannuation; or he voluntarily resigns from the service of the bank after completing 10 years of service; or his service in the bank is terminated by the Bank, except in case of misconduct.

12. The bank subsequently introduced amendment in the said Regulation. The (amended) clause (e) of Rule 12 of said Regulation reads thus:-

"Amendment to Regulation No.12:

"Provided however that notwithstanding anything contained herein above gratuity will be granted to or in respect of an employee governed by the State Bank of Saurashtra (Officers'') Service Regulations 1979, on

(a) retirement

(b) death

(c) disablement rendering him unfit for further service as certified by a medical officer approved by the bank

(d) resignation after completion of ten years of continuous service

(e) termination of service in any other way except by way of punishment after completion of ten years of service."

(emphasis supplied)

The said amended regulation provides, inter alia, that gratuity would not be payable in case of termination of service effected by way of punishment.

12.1 Thus, in light of said provision an employee whose service is terminated by way of punishment will not be eligible or entitled for gratuity.

12.2 Differently put, the said provision prescribes the circumstances when an employee would be "eligible" for gratuity and sub-clause (e) thereof carves out an event which would render employee "ineligible" for gratuity and he would not be even entitled for gratuity in case of termination by way of punishment which is in contradistinction to the provision under which gratuity of an employee who is "entitled" for gratuity can be "forfeited" by the employer.

13. So as to wriggle out of said provision, learned advocate for the respondent would rely on Section 14 of the Payment of Gratuity Act. He would submit that in light of said provision Gratuity Act would prevail over the Rules of the Bank and therefore, he is entitled for gratuity.

14. Therefore, it is necessary to consider the position which emerge from Section 14 of the Act, which reads thus:-

"14. Act to override other enactments, etc. - The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue 3 of any enactment other than this Act."

14.1 By invoking Section 14, the respondent placed reliance on Section 4(1) of the Act. Learned advocate for the respondent-claimant would contend that sub-section (1) of Section 4 takes in its fold termination of service on account of "retirement". According to learned advocate for the respondent, "compulsory retirement" is form of or part of the genus i.e. "retirement". Thus, even the case of compulsory retirement would be covered under sub-section (1) of Section 4 of the Act and that therefore, his case should be considered under Section 4(1) of the Act - which would prevail over Bank''s rules - and gratuity should be paid to him in light of said provision.

14.2 In this view of the matter, before proceeding further, it would be appropriate to deal with said contention raised in light of said provision.

15. The said provision would be attracted in the event of inconsistency and/or conflict between two provisions. In present case, foregoing discussion and the discussion which follows hereafter brings out that there is no conflict or inconsistency between Section 4(1) and Rule 12 of Bank''s Rules and that therefore, question of one provision prevailing over other does not arise in present case.

15.1 Actually, to an extent there is similarity between said two provisions. Both the schemes/provisions do not provide for gratuity and do not impose obligation on employer to pay gratuity in the event of termination of service by way of penalty. Therefore, in present case, any question of supremacy of one provision over other or one prevailing over other does not arise. Consequently, the said Section 14 neither comes in picture nor does it take the petitioner''s case further. Therefore, the said submission is of no assistance to the petitioner in taking the case further. Besides this, in view of the facts and circumstances of present case, it is not necessary to enter into further and detailed deliberation of the issue as to whether the provisions under the Act would prevail over the said Rules framed by the bank or not.

16. In view of the said contention, it is also necessary to take into account Section 4(1) of the Act as well, which reads 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"

16.1 On reading the said provision under the Act, it becomes clear that the said section prescribes the events and circumstances in which gratuity would be payable. Differently put, the said section enumerates the circumstances which determine the eligibility and entitlement of an employee (for gratuity).

16.2 The section brings out that gratuity would not be payable in all cases of termination of services but gratuity would be payable and obligation to pay gratuity would arise if service of employee comes to end on account of specified events viz. when the service of an employee comes to end on superannuation or on retirement or resignation or on death or disablement due to accident or disease.

16.3 The section as well as the events (on occurrence of which gratuity would be payable) are exhaustive and do not leave room for further inclusion or addiction by interpretative process.

16.4 It is pertinent that even under the Act, more particularly under Section 4(1), "termination of service" by way of "penalty" is not included (amongst the events mentioned under clause (a) to (c) of sub-section (1) of Section 4) as one of the events on occurrence of which gratuity would be payable. The said provision does not provide or contemplate that gratuity would be payable even in case where the service of an employee comes to end on account of termination of service on account of or by way of "dismissal" or in case where the service of employee is terminated/employee is removed from service by way of penalty. The said provision does not prescribe that gratuity would be payable in any and every and all cases of termination - cessation of service. On the contrary, the said provision prescribes that gratuity would be payable and obligation to pay gratuity would arise if any one event or instance out of the events specified in sub-section (1) of Section 4 of the Act, occur. It is pertinent that the said three events (i.e. clause (a) to (c) of subsection (1) of Section 4) do not include "termination of service by way of penalty" or by way of "dismissal from service" or "removal from service by way of punishment/penalty".

17. Likewise, Rule 12 of Bank''s Rules also does not include - rather said Rule 12 expressly and specifically excludes - termination of service "by way of

punishment". Thus, in view of the provisions under Regulations of 1975, an employee whose service is terminated by way of penalty/disciplinary action would not be entitled for gratuity and that therefore, question of forfeiture of gratuity in such case would not arise. Even under the Act, the position is similar, inasmuch as sub-section (1) of Section 4 does not contemplate or postulate payment of gratuity in case of termination of service by way of penalty or in case of dismissal from service. Therefore, there is no inconsistency or conflict between Section 4(1) and Rule 12. Therefore, the contention does not help the respondent.

17.1 The contention of the respondent that compulsory retirement is also a form of retirement is misconceived and cannot be accepted. The said contention is far fetched and conveniently overlooks the fact that by virtue of specific provision under the Regulations of 1975 "compulsory retirement" is categorized as "major penalty". When "compulsory retirement" is specifically prescribed and included as one of the modes of major penalty, it cannot be considered or treated as or can not be construed as "ordinary retirement" or "retirement on superannuation" or "voluntary retirement". Further, the said submission is contrary to the scheme of Section 4 of the Act, particularly subsection (1) thereof and that therefore, it can not be entertained and cannot be sustained.

17.2 As mentioned above, Section 4(1) does not take in its fold "penalty" i.e. termination or cessation of service or removal from service by way of or on account of "penalty". The said provision does not contemplate obligation to pay gratuity in case where the concerned employee is visited with order of penalty.

17.3 The legislative intent emerges clearly from plain reading of the Section and also from the Scheme of the Act. The legislature has mentioned specific cases or instance or type or form and nature i.e. species of "termination of service" of an employee on occurrence of which he would be eligible for gratuity. After employing more general and wide cannotation i.e. the term "termination" the legislature has restricted the width and depth of the said term and its cannotation by expressly mentioning the species - specific form or type of termination, by clarifying that gratuity would be payable in case "termination of service" is occasioned by and is result of, either (i) superannuation or (ii) resignation or (iii) retirement or (iv) disablement due to accident or disease or (v) on account of death. The section is exhaustive and there is no scope for further addition of any other category or type or form of "termination" by process of interpretation and construction.

17.4 On reading the section, it also comes out clearly that the legislature has consciously kept the disciplinary actions and penal orders i.e. "dismissal" from service and termination of service "on account of and by way of penalty" out of the purview and scope of the general and wide term "termination" and also from the purview of Section 4(1) of the Act. The mode of penalty depends on the provision under "Conduct & Discipline" Rules or conditions of service of every organization. The measures which are prescribed as "penalty" under the

Discipline Rules or conditions of service would be relevant in the matter of payment of gratuity because if service of employee is terminated by way of any mode of "penalty" or "punishment" prescribed under the Rules, then, the employee would not be eligible/entitled for gratuity. Therefore, though the word "termination" is of wide amplitude its scope is curtailed for the purpose of Section 4(1) of the Act and consequently, it is required to be read and construed to include only those termination which are specified under clause (a) to (c) of Section 4(1) of the Act.

17.5 Ordinarily, the expression "termination of service" would admit diverse modes of "termination" e.g. termination by way of superannuation or by way of resignation or by way of voluntary retirement and also by way of penalty and disciplinary action in form of dismissal or discharge. The said term would ordinarily include and envelope within its fold non-punitive as well as punitive termination. However, under Section 4(1) and for the purpose of said section, the legislature has consciously kept out the "punitive termination" and included only "non-punitive" type or form and mode of termination of service. In this view of the matter, the word "retirement" would not include punitive action i.e. retirement by way of penalty. Thus, when applicable Rules or service conditions specifically prescribe "compulsory retirement" as form/mode of penalty and punishment, then, it cannot be granted entry within the boundary of Section 4(1) of the Act.

18. According to the scheme of Section 4(1) of the Act, the said section does not contemplate and does not impose obligation to pay gratuity to an employee in case of cessation - termination of his service by way of penalty - on account of disciplinary action. The scheme of Section 4(1) makes provision for payment of gratuity when service of employee comes to end in non-punitive manner and for non-punitive reason i.e. in manner other than by way of penalty.

18.1 An employee becomes eligible/entitled for gratuity if his service comes to end - on completion of 5 years - by way of one mode out of the modes prescribed under sub-section (1) which does not include any punitive measure e.g. dismissal or discharge or removal from service by way of penalty.

18.2 In the establishment where the Rules or service condition prescribe "compulsory retirement" as one of the penalties then "compulsory retirement by way of penalty" would not form part of "retirement" contemplated under Section 4(1) of the Act.

18.3 The term "retirement" shall take its colour and meaning from the company it keeps i.e. from the words which precede and/or succede the term "retirement" and the scope. Therefore, the meaning of the said term "retirement" under Section 4(1) of the Act must be determined in light of the preceeding term "superannuation" and the succeeding or following term "resignation". Both the terms viz. "superannuation" and "resignation" do not include rather they exclude "termination of service by way of punishment".

18.4 Thus, where the Conduct & Discipline Rules or Payment of Gratuity Rules or service conditions applicable to the claimant - employee, prescribe different modes of termination of services as form of penalty e.g. dismissal, discharge, removal by way of compulsory retirement, then, all such forms or modes of termination of service by way of penalty would not come within the purview of the clause (a) to (c) of sub-section (1) of Section 4 and the employee who is subjected to such measure will not be eligible and entitled for gratuity and his case would not come within the purview of clause (a) to (c) of sub-section (1) of Section 4.

18.5 In present case, the order passed by Disciplinary Authority expressly states that claimant''s service was "terminated" and that termination of service was by way of penalty i.e. he was "removed" from service by way of punishment.

18.6 It is pertinent that it is not the case even of the claimant that when his service was "terminated" vide order dated 14.7.2004 he had, at that stage, attained age of superannuation. It is not even his case that he had sought voluntary retirement. Thus, even according to his own case, his service did not come to end on "superannuation" and/or "voluntary retirement" or "resignation". His service came to end by way of "disciplinary action" and "penalty" in form of compulsory retirement. In case of Bank "compulsory retirement" is one of the modes/forms of penalty and that therefore, even if it is assumed that there is some substance in the respondent''s claim that "compulsory retirement" would tantamount to "retirement simpliciter" then also, so far as petitioner Bank is concerned, "compulsory retirement" is expressly specified as one of the forms/ modes of "major penalty".

18.7 To be eligible and entitled for gratuity, the case of an employee i.e. termination of employee must fall within the purview of clause (a) to (c) of Section 4(1) of the Act. Termination or cessation of service by way of penalty does not fall and does not fit into the modes prescribed under Section 4(1) of the Act.

18.8 In present case, it is not in dispute that the petitioner bank had served a charge sheet to the respondent for reported acts of misconduct and in pursuance of the said charge sheet, domestic inquiry was conducted and the service of the petitioner came to be terminated by way of disciplinary action and upon imposition of penalty (i.e. by way of penalty).

18.9 Thus, the cases where Rules prescribe "compulsory retirement" as one of the modes/forms or measures of penalty termination or cessation of service, then, in such cases "compulsory retirement" would tantamount termination by way of penalty and consequently, it would not stand on par with "retirement on superannuation" or "voluntary retirement".

18.10 In this view of the matter, when compulsory retirement is categorized as penalty under the rules, the contention by the respondent that in view of inclusion of term "retirement" in Section 4(1) of the Act, "compulsory retirement" would be covered under Section 4(1) of the Act, is not sustainable. Therefore, the said contention is hereby rejected.

19. Now, with reference to impugned order by the controlling authority,it is relevant to note that the controlling authority as well as the appellate authority failed to appreciate the distinction between the "entitlement" and "eligibility" on one hand and "forfeiture" on the other hand.

19.1 Unfortunately, both the authorities proceeded to decide the case on the ground that the bank forfeited gratuity in case of the respondent. Whereas, the bank categorically claimed before the authorities that it had not forfeited gratuity in case of the respondent, but the respondent was not entitled/eligible for gratuity under the rules.

19.2 According to the Rules applicable to the Bank and its employees, an employee whose service is terminated on account of or by way of "penalty" is not eligible/entitled for gratuity and gratuity would not be "payable" to such employee. This aspect is required to be considered in light of the fact that when an employee, in light of applicable Rules, is not eligible or entitled for gratuity and when there is absence of "eligibility" or "entitlement" for gratuity, question or occasion for forfeiture of gratuity does not and would not arise. There would be nothing to "forfeit" when right or eligibility or entitlement has not even accrued or ripened in favour of employee and when he does not have gratuity "in his hands" and/or even "in his account" and/or "to his credit" then, any occasion to forfeit gratuity would never arise. Only that amount which is "in hands" of employee can be forfeited and not, what is not his.

20. In case of petitioner Bank matters related to gratuity are governed by Regulations of 1975. Like Section 4(1) of the Act, the Rule 12 of Regulations of 1975 prescribe the events or circumstances which determine "eligibility" or "entitlement" of employee for gratuity or the events when gratuity would become payable. According to Rule 12 gratuity would be payable when service of employees come to end by way of the modes prescribed under said Rule 12 (amended provision). The said Rule 12 (amended provision) prescribes, inter alia, that gratuity will be paid to employee if an employee dies while in service or he becomes physically or mentally incapable of further service or when he retires from the service after attaining the age of superannuation or before attaining superannuation but with bank''s permission or he voluntarily resigns from the service of the bank after 10 years of completed service; or his service in the bank is terminated by the Bank. The sub-clause (e) of said Rule 12 provides, inter alia, that:-

"(e) termination of service in any other way except by way of punishment after completion of ten years of service."

(emphasis supplied)

20.1 Above quoted provision in present case make it clear that present claimant was not eligible or entitled for gratuity when his service came to end (on removal from service by way of penalty) and that therefore, question or occasion for forfeiture did not arise.

20.2 It is pertinent that there is difference between Section 4(1) and Section 4(6) of the Act and the field of operation for both the provisions are different. The former prescribes and determines "eligibility" or "entitlement" whereas the latter provision specifies the circumstances and events when gratuity can be forfeited.

20.3 The action of forfeiture of gratuity would arise only if an employee is entitled for gratuity under the Act or under the Rules and despite the entitlement, the employer, by specific and overt action, "forfeits" gratuity. Thus, when an employee is, in first instance, eligible and entitled for gratuity but his case, unfortunately, falls in any of the events or circumstances mentioned and contemplated under sub-section (6) of Section 4 of the Act, then, his "entitlement" and "eligibility" for gratuity can be taken-away or cancelled or retrieved or re-claimed by the employer by way of "forfeiture" in accordance with law. However, if an employee is, in first instance, not eligible and entitled for gratuity then there would be nothing to be taken away or retrieved or re-claimed from him. In present case, the respondent - claimant was not "eligible" or "entitled" for gratuity, therefore, any question or occasion for forfeiture did not arise. The authorities ignored or failed to appreciate the distinction.

20.4 As mentioned earlier, the controlling authority and the appellate authority failed to appreciate above mentioned distinction between "eligibility" or "entitlement" and "forfeiture". Both the authorities proceeded on the premise that the petitioner bank had "forfeited" gratuity in case of the claimant.

20.5 However, the authorities failed to take into account the fact that the bank had categorically claimed in its reply and in its submission that it had not forfeited gratuity, but in view of applicable rules, the claimant was not entitled for gratuity.

20.6 The authority did not examine the respondent''s claim and/or bank''s explanation from the said perspective. The authorities also ignored or failed to appreciate the Regulations of 1975.

20.7 It is relevant to note that the controlling authority has not come to and has not recorded the conclusion that the respondent''s service was not terminated by way of penalty and that therefore, the claimant was entitled for gratuity even under the rules and therefore, the claimant should have been paid gratuity.

20.8 The authorities, without addressing the issue as to whether the claimant, in first instance, was eligible and entitled for gratuity or not and without reaching to and without recording conclusion to the effect that the claimant was eligible for gratuity, proceeded on the presumption that the bank had resorted to "forfeiture of gratuity" and that the respondent''s case did not fall within the purview of sub-section (6) of Section 4 and therefore, the forfeiture is bad.

20.9 The said reasoning of the controlling authority and the appellate authority is not only misconceived and incorrect but it is contrary to evidence and it also overlooks and ignores the facts of the case and the nature of the action taken by the petitioner bank against the respondent and the cause and circumstances for which the service of the respondent came to be terminated.

20.10 Therefore, the reasons and conclusions recorded by the controlling authority and appellate authority are not sustainable and they deserve to be set aside. Consequently, the reasons and final conclusion and final directions are hereby set-aside.

21. Before concluding, it is necessary to mention that the learned advocate for the respondent cited certain instances and submitted that in about 7 to 9 cases of compulsory retirement,the petitioner bank had paid gratuity. Learned advocate for the petitioner bank could not, factually, dispute the said submission. However, from the details mentioned by learned advocate for the petitioner, it has emerged that the instances in which the bank seems to have paid gratuity even in case of compulsory retirement are cases prior to 2004 and mostly the instances are for the period 1987, 1988, 1992, 1997 and 1998.

21.1 Further, on the ground that in past the Bank had paid gratuity in certain cases of compulsory retirement, the Court cannot pass any direction to the bank to pay gratuity when rules framed by the bank do not permit such payment and when there is no provision which would justify such direction by the Court.

21.2 At this stage, learned advocate for the respondent would rely on the decision in case of one of the employees of the bank i.e. in case of Mr. J.T. Dasani rendered in Letters Patent Appeal No.1180 of 2012 on 25.2.2014. The said instance does not help the case of present respondent because in the cited decision, the Court proceeded on the premise that the gratuity was forfeited. Whereas in present case, the said fundamental aspect is distinguishable inasmuch as the bank has categorically taken stand that gratuity is not forfeited but the employee is not eligible and entitled for gratuity as per the relevant rules.

For the foregoing reasons, the impugned orders cannot be sustained. The orders deserve to be set aside and are accordingly hereby set aside. Learned advocate for the respondent despite his best efforts could not make out a case to support and justify the claim of the respondent.

Consequently, the petition deserves to be accepted. Rule is made absolute to the said extent.