
(2002) 01 CAL CK 0010
In the Calcutta High Court
Case No : Writ Petition No. 2177 of 1992

S.T.P. Limited

APPELLANT

Vs

Second Labour Court and Others

RESPONDENT

Date of Decision : 24-01-2002

Acts Referred:

Industrial Disputes Act, 1947 — Section 18, 33C(2), 9A
Payment of Gratuity Act, 1972 — Section 7, 8

Citation : (2002) 2 LLJ 594

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : ;Arun Prakash Sarkar, for the Respondent

Final Decision : Dismissed

Judgement

D.K. Seth, J.

Facts:

1. A Scheme was floated for Voluntary Retirement (VRS for short), which is annexure "II" to this writ petition at page 21. This scheme was floated on November 4, 1981. In the scheme there were two categories. First category contained of those, who did not complete 25 years of service and the second category, who had completed more than 25 years of service. In respect of both the categories the gratuity was proposed to be paid in the same manner as quoted in Clause (4) of both the categories, one of which is quoted herein:

"4. Gratuity shall be paid in the following manner:

(i) For the period when the salary was lesser than Rs. 1,000/- @ 15 (Fifteen) days" salary (Basic plus DA) for each year of service as provided in the Payment of Gratuity Act, 1972

and

ii) For the period when the salary was above Rs. 1,000/- @ 15 (Fifteen) days" salary of the last drawn salary (Basic plus DA) for each year of service as a special case and for the purpose of this V.R. Scheme only."

2. The petitioners had accepted the said V.R. Scheme and were given benefits according to the said scheme. After four years in 1985, the petitioners moved an application u/s 33-C(2) of the Industrial Disputes Act, 1947 before the Labour Court seeking benefit of gratuity in terms of the existing agreement or settlement dated June 4, 1974, which is at page 32 of the writ petition, where a different kind of gratuity was made available to the petitioners, who were transferred from Turner Morison & Co. Ltd. to Shalimar Tar Products (1935) Ltd. A proposal to float a Voluntary Retirement Scheme was mooted by a letter dated March 5, 1981, which was Exhibit "20" before the Labour Court, contained in Annexure "D" to the Affidavit-in-Opposition at page 46. In the said proposal, it was pointed out that gratuity would be paid as per terms of the agreement so far as Lyons Range Office was concerned. Admittedly, staffs of Turner Morison & Co. were at 6, Lyons Range Office. It is contended on behalf of the petitioners that a notice u/s 9-A of the Industrial Disputes Act, 1947, was issued and a change was effected with regard to the service condition, as is apparent from Annexure "D" at page 74 of the writ petition. The said proposal, which was to take effect from September 10, 1981, contained a Clause with regard to gratuity at page 84 of the writ petition, which provided as per existing agreement. Thus, it relates to the 1974 agreement since affirmed by 1976 agreement. Nothing has been shown with regard to any other change relating to gratuity other than what is available to the petitioners by reason of the settlement of 1974 and 1976. It is not in dispute that those settlements are binding between the parties u/s 18 of the Industrial Disputes Act, 1947. The conditions contained in those settlements do form part of the conditions of service. It could, however, be changed u/s 9-A of the Industrial Disputes Act, 1947 and the proposal was so mooted through the letter dated August 17, 1981, which came into effect on September 10, 1981. But then the said proposal did not change the condition relating to gratuity.

3. Now a question is raised as to whether in the VRS the entitlement according to service condition could at all be changed.

4. However, the learned Labour Court had allowed the said application u/s 33-C(2) and granted the difference of the gratuity payable under the agreement. This has since been challenged in this writ petition.

Submission of the Petitioner:

5. The learned counsel for the petitioners had pointed out that Section 33-C(2) empowers the Labour Court to grant relief in respect of an existing right following from a settlement or an award, but it cannot enter into a disputed question of entitlement. According to him, the question of entitlement is being raised in this case, which was outside the purview of the jurisdiction conferred upon the Labour Court u/s 33-C(2). He then contends that the petitioners,

having accepted the VRS, they are estopped from challenging the scheme after their relationship had come to an end. The other point, that has been raised by the learned counsel for the petitioners, is that by reason of acceptance, the petitioners had waived their known right and as such they cannot claim the same, even if they are legally entitled to it. The last point, on which he assails the same, is that the petitioners had delayed in making the application u/s 33-C(2) almost for four years and, therefore, they cannot claim any relief with regard thereto. In support of his contention he relied upon the decisions in *State of Punjab Vs. Labour Court Jullunder and Others*, ; *Eastern Coal Fields Limited v. Regional Labour Commissioner* ; *Steel Authority of India v. Regional Labour Commissioner* 1994 Lab I.C. 2622; *Management, Binny Limited v. Deputy Commissioner of Labour*, 1997 1 LLJ 1172 (Mad) ; *Power Finance Corporation Ltd. Vs. Pramod Kumar Bhatia*, ; *Ashok Gangadhar Tayade and Ors. v. Maharashtra State Road Transport Corporation* 1998 Lab I.C. 1139; *V. Bahulayan v. State of Kerala* 2001 UI LLJ 653 (Ker).

Submission of the Respondent:

6. Mr. Sarkar, learned counsel for the respondents workmen, on the other hand, contends that the proposal, which was mooted through Annexure "D" being exhibit 20 at page 46 of the Affidavit-in-Opposition, provided for a gratuity to the petitioners in terms of the agreement and the agreement having been subsisting till the date of VRS and there having been no change of service condition till that date, the legal entitlement cannot be denied. According to him, the VRS cannot be treated to be a notice u/s 9-A, particularly, when a notice u/s 9-A was already issued without proposing to change the scheme for gratuity and when the VRS itself proposed gratuity as per existing terms. He further contends that final outcome of the scheme cannot deviate from the proposal, which is in terms of the settlement, so far as gratuity is concerned. He further points out that in the scheme specific mention has not been made, so far as petitioners are concerned. Though it sought to include the employees of the East India Divisions, but it has not made any specific mention about the petitioners, who were at 6, Lyons Range and were given different kind of gratuity. The same gratuity, which was payable to all the other workers, has since been mentioned. According to him omission to specify 6, Lyons Range would not change the situation and, in fact, according to him, it was an incomplete indication with regard to gratuity. He further contended that when there was no departure in respect of the persons other than those of 6, Lyons Range Office from the agreement itself, there cannot be a departure so far as the petitioners are concerned, who were entitled to a different kind of gratuity in terms of the same agreement. When an agreement or settlement is being implemented in respect of one group of the workers, it cannot exclude from the same agreement or settlement in respect of another group of workers. Thus, the question involved in Section 33-C(2) proceeding is not a disputed question of entitlement. It is an incidental determination of the right of the petitioners, which flows from the 1974 and 1976 settlements and as well as the change incorporated u/s 9-A on August 17, 1981, as well as the

proposal for VRS contained in letter dated March 5, 1981, being Exhibit "20" at page 46 of the Affidavit-in-Opposition. Thus, the question being a question incidental to the determination of the scheme, which flows from existing right, it was well within the jurisdiction and competence of the Labour Court to enter into the same and as such there was no infirmity so far as jurisdiction is concerned. He then contends that there cannot be any estoppel against statute or any existing right, statutory or contractual having statutory approval u/s 18 of the Industrial Disputes Act. A right, which existed on the date of VRS, even if, could not be insisted upon for some reason or other, could not be said to have been waived. Waiver, according to him, is a conscious action. It cannot be in oblivion or in ignorance or on compulsion.

7. According to him in a particular situation, it might not have been insisted upon. According to him, it can well be established if it is denied, through omission or otherwise, by the respondents, who could not have done so in view of the facts as disclosed in the present case. The facts indicate that non-mention of 6, Lyons Range and the different premises for them is simply an omission, which was not a deliberate or conscious one. He also contends that the delay cannot stand in the way after the I question has been gone into by the learned Labour Court, at this stage, without raising the said question by challenging the proceedings u/s 33-C(2) before this Court, after it was so initiated. For those reasons, this writ petition would fail.

8. I have heard the learned counsel for the respective parties at length.

The basic foundation for the claim:

9. From the facts disclosed, it appears that there were two agreements of settlement governed u/s 18 of the Industrial Disputes Act 1947. The 1974 agreement, which is at page 32 of the writ petition, provides for gratuity on the following terms:

"(b) Gratuity:

1. The Payment of Gratuity Act, 1972 has limited payment of gratuity to employees drawing more than Rs. 1,000/- per mensem as their emoluments. According to the Act such employees will be entitled to gratuity for the period they were in receipt of emoluments less than Rs. 1,000/- per mensem at the rates prescribed in the Act. The Union feels that this position has put undue hardship to a section of members and has in a way victimized them for no fault of theirs but only because their salary exceeds Rs. 1,000/- per mensem. To remove this anomalous position in respect of its members, it is now settled that gratuity should be paid to all clerical and technical staff in accordance with the Payment of Gratuity Act, 1972, excepting the limitation. imposed by the said Act on monthly wages exceeding Rs. 1,000/- and the period related therewith.

2. Staff transferred from Turner Morrison & Co. Ltd. to Shalimar Tar Products (1935) Ltd. on and with effect from September 1, 1962 shall be entitled to

gratuity for the total period of their service in accordance with paragraph 1 above, in addition to their personal benefit as per existing agreement with the company".

From the above terms, it appears that workers, other than the petitioners, who were staffs transferred from Turner Morrison & Company to Shalimar Tar Products, were entitled to a kind of gratuity, as was reflected in Clause 4 of the VR Scheme; whereas in Clause 2 of the settlement, the petitioners, who were staffs transferred from Turner Morrison & Company, were given a different kind of gratuity. This agreement was not changed by the 1976 settlement. The change that was proposed u/s 9-A, as is apparent from Annexure D, at page 74 of the writ petition, on August 17, 1981, which came into effect on September 10, 1981, did not propose any change in respect of gratuity, which was maintained as per the existing agreement, as is apparent from page 84 of the writ petition. Thus, till September 10, 1981, or till the VR Scheme was floated, the petitioners were entitled to gratuity in terms of these settlements. Even in the proposal for VR Scheme, as is apparent from Exhibit 20, which is dated March 5, 1981, at page 46 of the Affidavit-in-Opposition, the gratuity was proposed to the petitioners as per the terms of agreement, so far as 6, Lyons Range Office is concerned. All these indicate that in the VR Scheme, only that part of the gratuity as contained in Clause 1 of the settlement was quoted omitting Clause 2 of the settlement. If there is no departure in respect of the other workers from the agreement, there cannot be any justified ground to make a departure, so far as the petitioners are concerned, particularly, when it was so indicated in the proposal for the VR Scheme at page 46 of the Affidavit-in-Opposition. Thus, it appears that it was not a deliberate and conscious action on the part of the petitioners, but an omission.

How can condition of service be changed: Section 9-A:

10. When the petitioners are entitled to a particular kind of gratuity, the same can be altered only by means of a notice u/s 9-A of the Industrial Disputes Act, 1947. The same having not been altered, despite having issued a notice u/s 9-A, the same cannot be altered through a VR Scheme. A VR Scheme cannot be treated to be a notice u/s 9-A. Section 9-A puts a specific bar in changing conditions of service. VRS is an offer to give certain benefits in order to prepone the retirement. It cannot take away the existing rights except proposing the retirement.

11. Section 9-A has been engrafted in the Industrial Disputes Act to protect the interest of the workman with regard to the conditions of service. It prohibits unilateral changing of conditions of service to the prejudice of the workman without giving opportunity to the workman. The mandate provided in Section 9-A requires a fulfilment of certain conditions in order to bring about change in the service conditions. The tests are that there must be:

(a) a proposal by the employer to effect change in the condition of service; and

(b) a notice issued in the prescribed manner to the workman likely to be affected; and

(c) such changes take effect only after expiry of 21 days of such notice.

12. These conditions are pre-requisites for effecting any change. In case any unilateral change is allowed, in that event, it would frustrate the object of enactment of Section 9-A. In *Tata Iron and Steel Co. Ltd. Vs. The Workmen and Others*, , the Apex Court had held that the object of Section 9-A seems to be, to afford an opportunity to the workman to consider the effect of the proposed change and, if necessary, to present their point of view on the proposal. Such consultation further serves to subserve the feeling of common joint interest of the Management and workmen in the industrial progress and increased productivity. This approach, on the part of the industrial employer, would reflect his harmonious and sympathetic co-operation in meeting status and dignity of the industrial employees, in accordance with the egalitarian and progressive trend of our industrial jurisprudence, which strives to treat the capital and labour as co-sharer and to break away from the tradition of labourers sub-surveillance to capital. Reference may also be made to *Assam Match Company Limited Vs. Bijoy Lal Sen and Others*, . Any change in the condition of service that affects workman prejudicially, is hit by the mischief of Section 9-A unless it is so followed. Since Section 9-A imposes a prohibition on the employer's right to unilaterally change the condition of service to the prejudice of the workman, any such change brought about, without complying with Section 9-A, would be ineffective and void. Any change brought about without following the procedure laid down, however, justifiable on merits, is illegal. Any such change brought about without compliance Section 9-A cannot be enforced by the employer, neither can he compel the workman to accept such change. My above view finds support in *Edward Mills Limited v. Jokuram Panday* 1954 II LLJ 49 (LAT) ; *Workmen of Rohtas Industries Ltd. Vs. H.K. Choudhuri and Others*, ; *Tata Iron and Tata Iron and Steel Company, Ltd. Vs. Its workmen and Others*,

Scope of Section 33-C(2):

13. On the other hand, Section 33-C(2) empowers the Labour Court to compute the benefit the workman is entitled to receive. Such benefit, admittedly, can be both monitory and non-monitory *The Central Bank of India Ltd. Vs. P.S. Rajagopalan etc.*, . The use of the word "entitle" in Section 33-C(2) does not indicate that the sub-section relates to the stage when the title of the workman to receive the money has already been established by some competent authority. The expression "entitled to receive" means no more than what it primarily connotes i. e., an existing debt or liability. The expression entitle to receive any benefit used in Sub-section (2) does not justify the extended connotation of recoverability at *Ramkrishan Ramnath Bidi Manufacturing, Kamptee Vs. Labour Court, Nagpur*, . In *Central Bank of India Limited v. Rajagopalan* (supra), the Apex Court had held that on a fair and reasonable construction of Sub-section (2), it is clear that if a workman's right to receive the benefit, is disputed, that

may have to be determined by the Labour Court. Before proceeding to compute the benefit in terms of money, the Labour Court, inevitably, has to deal with the question as to whether the workman has a right to receive the benefit. It does not mean that only in respect of admitted claim, Section 33-C(2) can be invoked. Such a construction can be possible only if some words are added in the provision. In *The Sawatram Ramprasad Mills Co. Ltd. Vs. Baliram Ukandaji and Another*, , it was held that in order to determine the benefit or monetary value receivable by a workman, when disputed, can be computed, only after the dispute is first determined. The enquiry of the Labour Court u/s 33-C(2) is not restricted or confined only to quantification of a benefit capable of being computed in terms of money. It can determine as to whether the claimant has a right to the benefit or whether or not the facts and circumstances exists, which gives rise to that right. In *South Indian Bank Ltd. Vs. A.R. Chacko*, , it was held that Section 33-C(2), in some cases, postulates the determination of the question about computing the benefit to be preceded by an enquiry into the existence of that right and such an enquiry must be held to be incidental to the main determination. MAXWELL, in MAXWELL'S INTERPRETATION OF STATUTES 11th edition page 350, has observed "where an act confers a jurisdiction, it impliedly also grants the power of doing of such acts or employing such means as are essentially, necessary to its execution." Section 33-C(2) envisages claim of a workman even though disputed by the employer. In *Bombay Gas Co. Ltd. Vs. Gopal Bhiva and Others*, , it was held that the proceedings contemplated u/s 33-C(2) is analogous to executing proceedings. The Labour Court under the said Section is competent to interpret the award or the settlement, on which it is claimed or based. The Labour Court has jurisdiction to decide the question as to whether the workman is entitled to the claim. It has to decide such incidental questions.

14. Section 33-C(2) can be assumed where there is a settlement, a workman is entitled to receive from the employer any money under the settlement and to determine the rate or quantum of the amount and whether such amount claimed is due or not. In *Chief Mining Engineer East India Coal Co. Ltd. Vs. Rameswar and Others*, , it was held that the right to the benefit sought to be computed, must be an existing one. In *State Bank of Bikaner and Jaipur Vs. R.L. Khandelwal*, , it was held that a workman cannot put forward a claim in an application u/s 33-C(2), in respect of a matter, which is not based on an existing right, and which can appropriately be a subject matter of a dispute requiring adjudication u/s 10. In *Central Inland Water Transport Corporation Limited Vs. The Workmen and Another*, , it was held that the Labour Court has to be circumspect before it undertakes an investigation u/s 33-C(2), reminding itself that any investigation undertaken, is, in a real sense, incidental to the computation of a benefit under an existing right, which is its principle concern. The above proposition is now a settled proposition of Law, which was followed in the case of *Municipal Corporation of Delhi Vs. Ganesh Razak and Another*, .

15. However, this jurisdiction relating to incidental enquiry is confined to existing

benefit or right, Central Bank of India Limited v. Rajagopalan (supra), if the claim flows from a pre-existing right, then the Labour Court has jurisdiction to determine all questions relating thereto. In other words, if there is the framework of an existing right and the workman claims enforcement of that right within that particular framework and the only question that is to be determined, is whether the right claimed can be computed. But, such computation can only be made if the workman is able to establish that the benefit flows from a pre-existing right vested in him. In East India Coal Company Limited v. Rameshwar 1968 I LLJ 6, the Apex Court had held the right to the benefit that is sought to be computed, must be an existing right and must arise in the course of and in relation to the Relationship between an industrial workman and his employer. A worker cannot put forth a claim in respect of a matter, which is not based on existing right. State Bank of Bikaner and Jaipur v. R.L. Khandarwal (supra), and Punjab National Bank Limited v. K.L.Kharbandah AIR 1963 SC 489 : Punjab National Bank Limited Vs. K. L. Kharbanda, .. In Shanker Swarup Saxena Vs. Allahabad Dist. Co-operative Bank Ltd. and Another, , it was held that where payment of gratuity becomes a part of the service conditions by reason of an agreement between the parties, a claim for the computation of gratuity can be founded thereupon, even though, the agreement is not registered, but is only acted upon. The claim must be based on an existing right either under a settlement or an award or under the provision of any statute. A mere denial of such right will not ouster the jurisdiction of the Labour Court Andhra Pradesh State Electricity Board v. Ikram Ahmed 1979 Lab I.C. 915 at 935 (AP-FB); N. Suleman v. New Shorrock Spinning and Manufacturing Mills Company Limited 1980 Lab I.C. 397 at 404 (Guj-FB)). In the process of such enquiry, the Labour Court can interpret an award or settlement for the purpose of finding out the existence of the Delhi Cloth and General Mills Co. Ltd. Vs. The Workmen and Others, ; The Andhra Prabha Ltd. and Others Vs. Secretary, Madras Union of Journalists and Others, ; Jewell Filter Company Limited Vs. The State of West Bengal and Others, ; Central Bank of India Ltd. Vs. Sisir Kumar Shaw, .

Can delay deny relief u/s 33-C(2) :

16. No period of limitation has been prescribed for an application u/s 33-C(2). In Ramkrishan Ramnath Bidi Manufacturing v. Labour Court (supra), it was held that the legislature in its wisdom, have not thought it necessary to prescribe a period of limitation for such an application, therefore, it must be held that there was a deliberate omission to prescribe limitation. It is open to a workman to go before the Labour Court with his application at any time suitable to him. But that does not mean that over stale and delayed claims, can be entertained by the Labour Court u/s 33-C(2), though, no law of limitation applied to. This has now been a settled proposition. It would be depending on the discretion of the Labour Court, whether there has been a reasonable delay or not Inder Singh and Sons v. Their Workmen, 1961 II LLJ89 (SC)). Subsequently, in Central Bank of India (supra), it was held that only on the ground of delay, such application cannot be thrown out.

17. Once the Labour Court had jurisdiction to determine it, if it so determines, the same cannot be questioned on the ground of delay at this stage, when the very initiation of the proceedings before the learned Labour Court was not challenged through any proceedings before this Court and the petitioners had participated in the proceedings and had allowed the same to be continued on merit. Therefore, the ground of delay cannot be gone into at this stage.

Existing Right?

18. In the present case, as observed earlier, the right of the workman is an existing right and does not require determination of entitlement. The decision in *The Jhagrakhan Collieries (P) Ltd. Vs. Shri G.C. Agrawal*, Presiding Officer, Central Government Industrial Tribunal-Cum-Labour Court, Jabalpur and Others, cited by the learned counsel for the respondents, does not help the counsel for the STP in the facts and circumstances of the present case. In the said case, the alleged agreement did not satisfy the characteristics of a settlement, defined in Section 2(p) of the said Act. As such, it was held to have no binding force u/s 18 Sub-section (1) or (3). Unlike the present case, in the said case the agreement was alleged to be an implied one by acquiescence or conduct. The agreement was alleged to be oral and not in writing and signed. A workman can avoid an agreement or settlement. It may not be binding on him, in certain circumstances. But in the present case, the employer and the workmen both were parties to the written and signed agreement dated August 31, 1962. Therefore, neither the workmen nor the employer could avoid the same, in terms of Section 18. In the present case, all the workmen were parties to the said agreement. Thus, the said agreement was a contract binding between the parties. That apart, the terms and conditions of service have been accepted by the parties and it continued for a long time between them, it would be effective and binding under the terms of the transfer.

19. As already observed that statutory right can also be enforced through such a proceeding. Right to gratuity is statutory right provided under the Payment of Gratuity Act, 1972. Sub-section (5) of Section 4 prescribes that nothing in Section 4 shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer. Therefore, if in a case where an employee though not entitled or eligible to gratuity by reason of the 1972 Act, yet, if by reason of a contract or agreement or conditions of service is entitled to a gratuity, which is definitely a better term, the same is enforceable and it can be so recoverable. Therefore, right to gratuity in the present case, is not only a statutory right but also a contractual one and is part of the condition of service.

20. Therefore, the right that is being claimed by the petitioners flows from the existing settlement and is an existing right, which required a determination. Such determination is an incidental determination with regard to a question covered u/s 33-C(2) of the Industrial Disputes Act, 1947. It is not an entitlement disputed that requires the determination outside the scope and ambit of Section 33-C(2).

Thus, the Labour Court was competent and had jurisdiction to determine the same.

Waiver:

21. So far as the question of waiver is concerned, the learned counsel for the petitioners had relied on the decision in *Basheshar Nath Vs. The Commissioner of Income Tax, Delhi and Rajasthan and Another*, . He particularly refers to page 172, left hand column and contends that waiver must be an intentional relinquishment of a known right or the voluntary relinquishment and abandonment of a known existing legal right or conduct such as to warrant an inference of a relinquishment of a known right or privilege.

22. The principle of waiver does not arise in respect of a relation between an employer and a workman. Inasmuch as, the employer stands in an advantageous position to dictate terms. Whereas, a workman stands in a disadvantageous position and is at the receiving end. He belongs to a weaker section. Therefore acceptance of VRS would not be a factor to construe waiver of the existing right, other than the benefit of the remaining service, which he could continue till superannuation. When a workman accepts VRS, he does not waive his right to receive the terminal benefits to which he is, otherwise, entitled under the conditions of service. Unless it is proved that the workman had waived his right, it cannot be presumed by reason of his conduct in accepting VRS. In any event, when the right flows from the conditions of service or from the statute related to terminal benefits, there cannot be any waiver of such a j right.

23. In the present case, admittedly, the petitioners have accepted the offer, but as discussed above, it was simply an omission to include the clause governing the petitioners. Therefore, acceptance thereof would not operate as waiver so far as the workmen are concerned. The petitioners, however, all along maintained that the workmen would be getting the benefit of the existing agreement even in the proposal for VRS.

24. That apart, the respondents could not have changed the conditions of service through floating a VR Scheme. As such, acceptance of such VRS would not be a waiver. The VRS may be accepted as an offer, but that will not preclude the workmen from claiming their right relating to terminal benefit, which they are otherwise entitled to, in law. In the present case, by reason of Section 18, the workmen could enforce their right to get gratuity according to the agreement, which in law they are entitled to. The petitioners, in law, could not have changed the same without following Section 9-A. As such any such change, if sought to be made through VRS, would be hit by the mischief of Section 9-A and thus void. Therefore, there cannot be any waiver in respect of an action taken by the petitioner, which is void and a nullity and as such the said principle cannot be attracted in the present case.

25. The decision in *Management, Binny Limited v. Deputy Commissioner of Labour (supra)*, it was held that employees, who accepted payment without

protest, must be deemed to have waived the claim. The principle of estoppel would be applicable: in such case when a settled claim was sought to be reopened. This decision does not help us in the present case where it was not a conscious giving up of the right. The VR Scheme itself referred to the gratuity according to the agreement, which includes the agreement, on which the present claim is based. The principle, on which waiver was construed in Binny Limited (supra), does not help us.

26. The decision in Ashok Gangadhar Tayade v. Maharashtra State Road Transport Corporation (supra), dealt with a question whether one or few of the clauses of a settlement, which is otherwise binding u/s 18, could be challenged on the ground that those clauses are illegal. This decision also does not apply in the present case. Inasmuch as, here the VR Scheme proceeded on the basis of a term for gratuity according to, and with reference to the agreement, which is binding u/s 18, and under which better benefit of gratuity is being claimed. As such the claim having been based on a settlement binding u/s 18, the said ratio does not help the counsel for the petitioner, who sought to contend, relying on the same that one part of the VRS cannot be held to be illegal. In V. Bahulayan v. State of Kerala, (supra), it was held that workmen, if agreed to give up their statutory claim while accepting Voluntary Retirement Scheme, they cannot turn round and seek to recover such statutory claim, once they have accepted VRS in final settlement of their claim. This decision also does not help us in view of the same analogy on which the decision in Ashok Gangadhar Tayade (supra) is distinguishable.

27. The decision in Power Finance Corporation Ltd. Vs. Pramod Kumar Bhatia, has no manner of application in the present case having regard to the facts and circumstances of the case and the question involved in the decision in Power Finance Corporation.

28. Thus, all these decisions cited by the learned counsel for the petitioner, particularly, dealt with the question that the workmen cannot come back after having accepted the VRS do not help us having regard to the facts and circumstances of the case in view of the peculiar facts and distinguishing features, which were not involved in any of the above decisions that dealt with matters, which are completely different and distinct from the question, with which we have dealt with in this case.

Principle of estoppel:

29. When a person has entered into an agreement in writing with another party, such party shall not be allowed to set up the contrary of his assertion in the deed Bowman v. Taylor, 2 A&E 228; Bateman v. Hunt 1904 (2) KB 530 . LORD MANSFIELD said "no man shall be allowed to dispute his own solemn deed" Good Title v. Bailey, 2 Cowp 579. By reason of such estoppel, the workmen had altered their position on the basis of a representation or promise made by STP. As such the said agreement would operate as estoppel, in view of the decision in Banshi

Dhar Lachhman Prasad and Another Vs. Union of India (UOI) and Others, ; Mahindra and Mahindra Ltd. Vs. Union of India (UOI) and Another, . The employer had never sought to avoid the said agreement at any point of time. By reason of its acting in terms of the agreement, the employer had acquiesced. Thus, the principle of estoppel by acquiescence or doctrine of standing by, is attracted. LORD CAMPBELL IN *Cairn Cross v. Lorrimer*, 3 LT 130, had held that "generally speaking if a party having an interest to prevent an act being done has full notice of its being done, and acquiesce in it, so as to induce a reasonable belief that he consents to it and the position of others is altered by their giving credit to its sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous license." COTTENHAN LC in *Duke of Leeds v. Amherst*, 1846: 78 RR 47 : 2 Phillips 177, had held "if party having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while act is in progress, he cannot afterwards complain. This is the proper sense of the word acquiescence".

Admittedly, STP had ratified the agreement by acting upon the same. Therefore, STP is estopped, on the principle of estoppel, by ratification or on the principle of estoppel by silence, *Rangasami v. Nachiappa* AIR 1918 PC 196 and *Chadwick v. Manning* 1896 AC 231. The doctrine of part performance is an extension of the Rule of estoppel, termed as equitable estoppel.

30. Now, therefore, the employer cannot claim contrary to the agreement on the alleged ground that it was not sent to the Officer authorized for the purpose, for denying that the agreement was a settlement within the meaning of Section 2(p). By reason of the above principle of estoppel as discussed, the employer is estopped from contending that the agreement was not sent or denying the agreement which has since been acted upon for this long period.

31. On the other hand, by reason of acceptance of VRS the workmen cannot be said to have been estopped on account of the principle of estoppel in the facts and circumstances of the case. Inasmuch as, there can be no estoppel against statute. The agreement, on which the claim is based, is binding u/s 18 of the ID Act. Thus, the right flows from a settlement or agreement having statutory approval.

32. The contention that the petitioners are estopped from raising this question after having accepted the VRS, also cannot be sustained, in view of the fact that such estoppel would be operative against the workmen in respect of their right following from the settlement, which is otherwise protected u/s of the ID Act. As such the liability of the petitioners flowing from the settlement has the characteristic of a statutory approval. As such there cannot be any estoppel against a right: flowing from a settlement, which has the characteristic of statutory approval.

Continuing Condition of Service:

33. There is another distinguishing feature. It is not alleged that any new service condition was introduced under the agreement. It was the same terms and conditions of service governing the workmen's employment with TM. These conditions were formally acknowledged and ratified by STP. In case of transfer of an industrial undertaking, along with the workmen, the workmen, if opt to continue, continues under the transferee on the same terms and conditions, until altered by or through acknowledged process, permissible under the industrial legislation. Therefore, the said agreement is more a ratification of the condition of service than a settlement. The conditions of service cannot be altered except through the process of Section 9-A of the ID Act.

Section 33-C(2) : Gratuity

34. In *State of Punjab Vs. Labour Court Jullunder and Others*, cited by the counsel for the petitioner, it was held that Section 33-C(2) of ID Act cannot be utilised for recovery of dues under the Payment of Gratuity Act, 1972. Such procedure is to be taken under the provisions of the 1972 Act. The said decision cannot be applied to the present case in view of the distinguishing feature. In the present case, the dues, which are payable, are not in dispute. The only dispute that has been raised by the petitioner is that the workmen are not entitled to anything more than what is provided in the VRS. It is not, therefore, a claim flowing from anything else other than the scheme. It is the question as to what amount of gratuity would be payable in terms of the VRS, which itself provides for gratuity as a term or condition of to VRS. In the present case, the claim flows from a contract relating to Payment of Gratuity. That apart, the Law is developing. Section 33-C(2) of ID Act has been held to be applicable even in case of computation of an existing right arising out of award, settlement, contract or statutory dues. In such a situation, if the entitlement is not in dispute, if the right can incidentally be determined, such claim can also be brought within the purview of Section 33-C(2) of ID Act. In *Eastern Coal Fields Limited v. Regional Labour Commissioner*, the decision in *State of Punjab (supra)* was considered. In the said case, the claim of gratuity was based on Section 4(5) of the Payment of Gratuity Act, as in this case for higher benefit. Taking into consideration the ratio decided in *State of Punjab (supra)*, it was held that benefit of more favourable term of gratuity can be had through a proceeding under the Gratuity Act.

35. The Payment of Gratuity Act, 1972 provides for settlement of disputes relating to and recovery of gratuity. Therefore, a claim for gratuity can be processed through the provisions of the 1972 Act. There having been a specific provision provided in the 1972 Act, Section 33-C(2) of ID Act cannot be invoked. It may also include the cases governed u/s 4(5) of the 1972 Act. Inasmuch as better terms are also recognized under the 1972 Act. Relying on the implication of Section 4(5) of the 1972 Act, the only construction that is possible is that Section 4(5) qualifies Section 4(1). In *State of Punjab v. Labour Court, Jullundur (supra)*, the Apex Court had held that when the claim is made under the

Payment of Gratuity Act, it has to be processed before the authority under the 1972 Act. However, it has not dealt with a case falling u/s 4(5) of the 1972 Act. Section 4 Sub-section (5) of the 1972 Act recognizes terms better than those available under the 1972 Act. 1972 Act restricts the benefit to the employees defined u/s 2(e), namely whose wages do not exceed the maximum limit provided therein and for the period during which such employee was employed at such wages for a period not less than five years till his wages exceed the maximum level. He cannot claim anything more than that and that too according to the rates and mode prescribed in Section 4 Sub-sections (2), (3) and (4) respectively. Therefore, a claim of gratuity to the 1972 Act is restricted to the extent provided in Section 4 Sub-section (2), (3) and (4) read with Section 2(e) thereof.

36. While providing for determination of the amount of gratuity in Section 7, the 1972 Act entitles a person, eligible for payment of gratuity under the 1972 Act, to make an application to the employer in the prescribed form for payment of gratuity. Employer, also, is liable to pay the same in terms of Sub-sections (2) and (3) of Section 7. In case of dispute with regard to the amount payable to an employee under the 1972 Act, the employer has to deposit the amount admitted by it with the controlling authority. In such a case, the controlling authority shall make an enquiry giving opportunity to the parties and determine the amount and pay the same to the employee and refund the excess, if any, to the employer. Section 8 provides for recovery of the gratuity payable under the 1972 Act.

37. Thus, Sections 7 and 8 relate to cases within the scope and ambit of 1972 Act. It can be contended that the more favourable claim falling u/s 4(5) of the 1972 Act, though recognized by the said Act, may not be a claim within the 1972 Act, or that, such employee will not be an employee within the meaning of Section 2(e) or that the same may not be a claim falling within Section 4(2), (3) and (4) of the said Act and as such may not be covered u/s 7 and Section 8 respectively. But, there may be cases where such employee, who may be entitled u/s 4 Sub-section (5) to more favourable terms in terms of agreement or contract or otherwise than the Act, may be eligible for a part of his employment or service under the Act. In such a case, his claim may consist of two parts. One part may fall within the 1972 Act and the other part may not, though, recognized u/s 4(5) of the 1972 Act. In such a case, an employee should not be driven, for recovering these two parts, to two different forums. It can be proceeded through, even, before the controlling authority, as was held in *Steel Authority of India Vs. Regional Labour Commissioner (Central) and Others*, If, in such a case, if the controlling authority is competent in respect of one part, then he can assume jurisdiction in respect of the other part on account of such competence, though, the other part may not come within his competence. This is on the principle that a person cannot be driven to two different forums for such recovery.

38. Cases falling u/s 4(5) may sometimes require determination of existing right having regard to the implication of various provisions relating to the industrial

disputes, in respect of which forums have been created under the ID Act. Admittedly, such forums have the expertise, by reason of it being presided over by judicial officers. Such questions can be better dealt with before the forums under the ID Act, than the forum constituted under the 1972 Act. In such cases, it would be the option of the employee, who approaches either of the forums. One forum cannot preclude the other. But, it will depend on cases, where the disputes are related to matters, which are predominantly subject matter of an industrial dispute. But, in such cases, before entering into these questions, the concerned authority should examine the question and then decide whether it would go into the question or not, But after the question is decided on merit by either of the authority, the same is not open to challenge on the ground of jurisdiction or competence, unless the very decision to proceed at the initial stage is challenged and an order is obtained from the higher forum.

39. However, in the present case, it was open to the employees to approach either of the forums. As such, approach to one forum, at this stage, cannot be held to be incompetent or without jurisdiction.

ORDER

40. For all these reasons. I am not inclined to interfere with the Award. The writ petition, therefore, fails and is accordingly dismissed.

41. No order as to costs.

42. Xerox certified copy of this dietetics order may be supplied to the parties expeditiously if applied for.