

(2016) 08 GUJ CK 0055

In the Gujarat High Court

Case No : Special Civil Application Nos. 5250 of 2014 With Spl. C.A. Nos. 12932 and 18706 of 2014 With Spl. C.A. Nos. 9095, 9096, 9098, 12053 and 12054 all of 2015

Surendranagar District Cooperative Bank

APPELLANT

Vs

Jayvirsinh Surubha Parmar

RESPONDENT

Date of Decision : 02-08-2016

Acts Referred:

Payment of Gratuity Act, 1972 — Section 4, Section 4(2), Section 4(5), Section 7, Section 7(2), Section 7(3)

Citation : (2017) 2 GLR 1185

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

Bench : Single Bench

Advocate : Mr. P.S. Gogia, Advocate, for the Petitioner No. 1; Ms. Megha Chitaliya, AGP, for the Respondent No. 2; Mr. Bhatt, Ms. Acharya, Mr. Hemang M. Shah, Advocates, for the Respondent No. 1; Rule Served, for the Respondent Nos. 1 - 3

Final Decision : Disposed Off

Judgement

Mr. K.M. Thaker, J.(Oral) - In these petitions Surendranagar Co-operative Bank has challenged orders dated 16.5.2014, 30.6.2014, 16.5.2014, 28.1.2014, 23.8.2013, 30.9.2014, 30.9.2014, 23.8.2013 passed by the Controlling Authority appointed under the Provisions of Payment of Gratuity Act 1972 (Act for short). The petitioner bank has also challenged the order/s dated 17.1.2015, 17.1.2015, 17.1.2015, 19.9.2014, 5.2.2014, 22.4.2015, 22.4.2015, 27.6.2014 passed by the Appellate Authority appointed under the Act whereby the Appellate Authority confirmed the order passed by the Controlling Authority.

2. The respondents herein were employed by the petitioner bank and they retired from the service on attaining the age prescribed for superannuation.

2.1 After the respondents retired from service the petitioner bank paid gratuity to the respondents which they accepted.

2.2 Subsequently the employees raised dispute and claimed that the bank had short-paid gratuity inasmuch as the amount which would be payable in accordance with law was not paid and there was shortfall in the amount paid towards gratuity by the petitioner bank. The claimants based their case on the premise or allegation that the calculation of gratuity paid to the employees was not explained / provided or shown before or while making payment.

2.3 With such allegation and claim the employees invoked Section 7 of the Payment of Gratuity Act, 1972 and approached Controlling Authority by filing Gratuity Claim Applications. The Controlling Authority registered the applications of the respondents - employees and called upon the petitioner bank to file its reply.

2.4 The bank appeared before the authority and opposed the applications by filing its replies wherein the Bank claimed that it is governed by Bombay Industrial Relations Act 1946 and that in respect of various demands of the claimants including demand for gratuity, a settlement has been arrived at with representative union. The bank further claimed that since the settlement is arrived at with the representative union it is binding to the bank as well as all employees and the said settlement prescribes formula for payment of gratuity to its employees. The petitioner bank also claimed that when the respondents employees retired from service it calculated gratuity in accordance with relevant clause under the settlement and accordingly paid gratuity. The Bank also claimed that there is no shortfall in the amount paid towards gratuity to the respondents claimants and the demand raised by them is unjustified and is not sustainable.

2.5 The claimants on the other hand contended that in view of the provisions under Section 4(5) of the Gratuity Act, the employees are entitled to receive higher benefit and if amount payable under the Act is higher than the amount payable according to the settlement then the employees have right to claim and receive such higher amount towards gratuity and vice-versa. According to the claimants amount payable towards gratuity would be higher if calculated in accordance with the formula under the Act and that therefore the employees should be paid gratuity accordingly. However the employer did not grant such benefit therefore they had to file the claim applications.

2.6 The Controlling Authority considered rival submissions and reached to the conclusion that there is difference between the amount payable under settlement (as calculated by the Bank) and calculated in accordance with the provision under the Act (as calculated by the authority). Having found such difference the authority directed the petitioner bank to pay differential amount towards gratuity.

2.7 The petitioner bank felt aggrieved by the said order of the Controlling Authority and filed appeals before Appellate Authority.

2.8 The Appellate Authority heard the contesting parties and decided the appeals whereby the Appellate Authority confirmed the orders of Controlling Authority and rejected the appeals.

3. Aggrieved by the said orders the petitioner bank has taken out present petition.

4. Mr. Gogia, learned advocate for the petitioner submitted that the bank has entered into settlement with the representative union and that the settlement also contains provision with regard to payment of gratuity. Mr. Gogia, learned advocate for petitioner submitted that the relevant provision with regard to gratuity is found under clause 13 of the settlement dated 23.2.2000. He submitted that the concerned claimants are governed by the terms and conditions of the settlement. He also submitted that while concerned claimants were in service they had availed benefits flowing from the settlement (viz. benefit of revised salary as well as benefits like earned leave, special leave, medical reimbursement, HRA, washing allowance etc.). He submitted that the bank calculated and paid the amount payable towards gratuity to the claimants in accordance with the provisions under the settlement. The Learned advocate for the petitioner further submitted that (a) the applications were filed after delay of 2-3 years and therefore the controlling authority should not have entertained the applications (b) that except two applicants any other applicants had not filed application seeking condonation of delay and therefore other applications should not have been entertained though one of the applicants had filed affidavit offering explanation for delay however he had not filed application seeking condition of delay. In any case, only 3 employees out of 9 applicants had offered explanation with regard to delay. (c) the controlling authority could not have entertained any application and could not have passed directions without passing order condoning delay. (d) the claimants had accepted benefit flowing from the settlement and once the claimants accepted benefit under the settlement, they cannot shift to the provision under the Act and they cannot claim benefit as per provisions under the Act and they cannot deny to be bound by other terms and conditions of the settlement. To support the said submission reliance is placed on the decision in case of *Beed District Central Coop Bank Ltd. v. State of Maharashtra* (2006) 8 SCC 514.

5. Per contra learned advocate for the claimants submitted that the claimants do not demand benefit under both the schemes viz. the settlement and the Act. The demand by the claimants is for better benefit out of the two schemes. It is further claimed by the learned advocate for the claimants that the petitioner bank did not calculate the amount payable toward gratuity in accordance with law therefore the employees were constrained to raise demand to claim shortfall in the gratuity paid by the bank. Learned advocate for the claimants also submitted that if the employees are entitled to higher amount payable under the Act then the petitioner bank should have paid such higher amount. The bank is not justified in restricting payment of gratuity in accordance with the provisions under the settlement ignoring the amount which would be payable as per the formula prescribed under the Act. On such contention the claimants have opposed the petitions.

6. I have heard Mr. Gogia, learned advocate for the petitioner, Mr. Bhatt, learned advocate, Mr. Mangukiya, learned advocate, Ms. R.V. Acharya, learned advocate, Mr. Shah, learned advocate for the concerned respondents and I have also considered the order passed by the Controlling Authority and Appellate Authority and other material which is available on record of present petition.

6.1 It is not in dispute that the service of the claimants came to an end on account of superannuation / retirement. Thus, the claimants fulfil eligibility criteria (for payment of gratuity) prescribed under the Act and they also meet with and fulfil the criteria prescribed under the settlement and their eligibility and / or entitlement are not in dispute.

7. The issue which is involved in present petition is:- even if gratuity amount payable in accordance with the formula under the settlement is less than the amount payable under the Act whether the employees can claim benefit in accordance with the formula under the Act on the ground that it is beneficial or whether such right of the employees can be denied on the ground that they have accepted salary revision and such other "benefits" in accordance with the settlement.

8. So as to appreciate rival contentions it is necessary and appropriate to take into account relevant provision under the scheme as well as the relevant provision under the Act.

8.1 The provision with regard to gratuity under settlement is prescribed under clause 13 of the settlement dated 23.2.2000. The said clause No. 13 reads thus:-

"13. Gratuity Scheme:-

A Gratuity Scheme as under shall be applicable to all employee.

1. Every confirmed employee shall be eligible to the benefit of Gratuity Scheme on the following basis.

(a). on death and physical or mental disability after 1(one) completed year or service, as per existing practise.

(b). On retirement or on reaching the age of superannuation after 5(five) completed years of service at the rate of full months pay for each completed year of service.

(c). On voluntary retirement or resignation of service after 20(twenty) completed years of service, at the rate of full month"s pay for each completed years of service.

(d). On termination of service or resignation after 5(five) completed years of service, at the rate of half-months pay for each completed years of service.

Pay for each completed years of service.

Pay shall mean Basic Pay, Dearness Allowance and Special Allowance, if any.

2. Maximum Gratuity payable shall not exceed beyond 20 months pay.

3. There shall be no forfeiture of Gratuity for dismissal on account of misconduct except in cases, where such misconduct causes financial loss to the Bank and in that case to that extent only.

4. The amount of Gratuity will be paid within one month from the date of retirement, resignation or death.

Note:- Bank will pay 20 months full salary in case of death as mentioned in para 1(above).

8.2 So far as the provision under the Act is concerned the formula for calculation of gratuity is found under subsection (2) of Section 4 of Payment of Gratuity Act. The said subsection (2) of Section 4 of the Act reads thus:-

"(2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned:

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account: Provided further that in the case of [an employee who is employed in a seasonal establishment and who is not so employed throughout the year], the employer shall pay the gratuity at the rate of seven days' wages for each season. 15 [Explanation. -In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.]

8.3 Besides this, it is also relevant to take into account subsection (3) of Section 4 which reads thus:-

"(3) The amount of gratuity payable to an employee shall not exceed (ten lakh thousand)"

8.4 In view of the controversy which is raised on account of rival submissions it is also relevant and necessary to take into account the provision under subsection (5) of section 4 which reads thus:-

"(5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer."

8.5 So far as provision which prescribes eligibility criteria, is concerned, the said provision is found under subsection (1) of section 4 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"

9. On comparative analysis of the provision under the scheme and provision under the Act it is noticed that the requirement of completion of 5 years service for eligibility is common under clause 13 of the settlement and under Section 4 of the Act. However, there is difference in respect of rate of salary to be taken into account for calculation of gratuity. In this context it is relevant to take note of the fact that subsection (2) of section 4 provides, inter alia that gratuity shall be paid at the time of retirement / superannuation at the rate of 15 days wages for every completed years of service (or part thereof), whereas according to clause 13 of the settlement, in cases of retirement and superannuation, after completing 5 years of service full months salary (instead of 15 days wages as provided under the Act) would be paid for every completed year of service with maximum limit of 20 months" salary.

9.1 The settlement also provides that in case of voluntary retirement or resignation full months salary would be paid only if an employee seeks voluntary retirement or tenders resignation after completing 20 years of service. In other cases of voluntary retirement or resignation (i.e. in those cases where the employee voluntarily retires or tenders resignation after completing service of 5 years but before completing service of 20 years) full month"s salary would not be payable and such employee would be paid gratuity at half month"s salary (similar to the formula under the Act) for every completed years of service, with maximum limit of 20 months pay. According to the settlement full month"s salary will be taken into account only in case of retirement / superannuation whereas in case of resignation and voluntary retirement before completing 20 years of service, half month"s salary would be taken into account.

9.2 Besides above-mentioned provisions another relevant and crucial provision is with regard to maximum gratuity which would be payable to the employees under the settlement vis-a-vis under the Act. Sub-clause (1) of Clause 13 of the settlement prescribes that maximum gratuity payable to employee shall not exceed 20 months pay. According to the amended provision under the Act (i.e. subsection (3) of Section 4) maximum amount of gratuity payable to employees shall not exceed Rs. 10 lakhs. The said upper limit has come into force w.e.f. 24.5.2010 (and prior to 24.5.2010 the said upper limited was Rs.3.5 lakhs).

9.3 A glance at above mentioned provisions bring out that in some cases payment in accordance with settlement may prove to be beneficial whereas in some case payment in accordance with the Act may turn out to be beneficial. In this view of the matter the answer to the issue: whether the scheme / formula under settlement or under the Act would be more beneficial would depend on the

mode / method by which the service comes to end and on total length of service of employee when the service of the employee comes to end and it may even differ from employee to employee.

10. Therefore, in the cases (gratuity claims) where the Act is applicable to the establishment but at the same time a settlement (which covers the subject of gratuity) is also in operation, comparative analysis and evaluation (for determining / identifying which of the two schemes / alternatives would be better or more beneficial to the employee) should be undertaken before payment of gratuity and such comparative calculation should be made available or should be shown to the employees at the time of payment and higher amount should be paid to the employee (Section 4(5) of the Act). This requirement is statutorily emphasized by section 4(2) read with section 7(2) and (3) of the Act.

10.1 According to the scheme of the Act, more particularly in light of Section 4(5) of the Act, the employees would be entitled to better / higher benefit.

10.2 The scheme of the Act - particularly Section 4(5) of the Act acknowledges simultaneous or parallel existence and operation of the formula prescribed under the Act and any other scheme / contract / settlement / award (dealing with subject of gratuity). The said provision also contemplates comparison of such two schemes and confers right on the employees to prefer better / higher benefit.

10.3 If amount payable towards gratuity is higher under service contract or wage settlement then the employee has statutory right to demand and receive such higher amount and if he is deprived of higher amount then he can invoke section 7 of the Act and seek direction for payment of such higher amount. At the same time if the amount payable under the Act (i.e. according to the formula under the Act) is higher than what would be available in accordance with the formula under settlement / contract then he can certainly claim gratuity in accordance with the formula under the Act and the employee has right in law, more particularly in view of provision contained under subsection (5) of section 4 to select either of the two benefits, and he can opt for better / higher benefit and his claim cannot be pinned - down to or cannot be restricted to the amount payable under the settlement without comparative analysis. Differently put, the employee cannot be compelled to accept gratuity in accordance with the settlement, though amount payable under the settlement (as compared to gratuity available under the Act) is less favourable and the employee's right of selection cannot be abridged.

10.4 Of course, the employee cannot opt for best of both the schemes i.e. best terms of the settlement and best terms under the statute at the same time. However an employee can compare two schemes / formulae and select better / higher benefit out of the said two schemes / formulae and can opt for one of the two schemes / formulae which, in given set of facts and circumstances and in light of mode of cessation of his service, length of service, and last drawn salary, is more beneficial in his case. The right of selection would be available to the employee and said right cannot be taken away and the employee cannot be

deprived of said right. At the same time once an employee expressly opts for one of the two formulae then he cannot claim benefit under other formula / scheme. Likewise, an employee cannot select part of the benefit under one scheme / formula (e.g. settlement) and other part of benefit from another scheme / formula. The employee must also keep in focus that when calculation is done in accordance with the formula under the Act then all conditions including the upper limit prescribed by Section 4(3) of the Act will apply and they must be considered while calculating gratuity under the Act.

10.5 Differently put an employee can differ the choice until he is able to take informed decision. Further, the opportunity to exercise the choice- option i.e. to select one of the two options, must be specifically offered to the employee because an employee can effectively exercise his right only if both the options are simultaneously put before him and he is asked to select one of the two options. Therefore such comparative calculation / analysis should be placed before him and effective opportunity should be given to the employee. After the selection is made, it would bind the employee. Another important condition is, as mentioned earlier, that while exercising his right to select one of the two options he cannot select some provision / condition from the scheme and some provisions / condition from the formula under the Act.

11. In this context it is appropriate to mention that on inquiry with learned advocates it has emerged that comparative calculation was not shown to the employees when the bank paid gratuity and that the employees were not informed about the comparative advantage or disadvantage under the said two formulae and it was subsequently (i.e. on comparative analysis) that the employees noticed that calculation according to other formula would yield higher rate of gratuity than what was paid by the bank. In this background the dispute and controversy between the petitioner and the claimant arose.

11.1 The petitioner claims that it calculated and paid gratuity to each claimant in accordance with clause 13(A) (1)(b) of the gratuity scheme under the settlement read with clause 13(2) of the settlement which prescribe upper limit of 20 months salary.

11.2 After being informed that the Bank had calculated and paid gratuity in accordance with the settlement, the controlling authority considered the claim of the claimants and calculated gratuity in accordance with the formula under the Act and on comparison of calculation / quantification of gratuity in accordance with the Act and the quantification by the bank in accordance with the settlement, the authority found that (a) the calculation (of gratuity payable to the claimants) by the authority reveals that there is difference between the amount calculated / quantified by the bank (under the settlement) and the amount calculated / quantified by the authority (in accordance with the Act); and (b) the amount calculated by the petitioner and paid to the claimants was less than the amount calculated / quantified (in accordance with the formula under the Act); and (c) that if the calculation / quantification in accordance with the

formula under the Act is followed then higher amount would be payable to the applicants and the applicants / claimants would stand to receive more amount than what is paid to the claimants (under the settlement). Having reached such conclusion the controlling authority passed the orders directing the petitioner to pay differential amount. The appellate authority has confirmed said order/s.

12. In this view of the matter the order granting higher / better benefit to the claimants cannot be faulted. The said order is just legal, and proper and it upholds the object of subsection (5) of section 4 of the Act.

13. Before proceeding further it is relevant and pertinent to note that the calculation / quantification of gratuity and / or the mode and method followed by the authority is not disputed by the petitioner on any ground. The petitioner does not claim or contend that such calculation is erroneous or the method followed by the authority for calculation is erroneous or contrary to law. What the petitioner contends and claims is that the claim for payment in accordance with the formula under the Act is untenable since the claimants are bound by wage-settlement and since they have accepted the benefits under the settlement their claim on the basis of formula under the Act is untenable. What is challenged by the petitioner is the claim for gratuity except under the settlement i.e. on any basis other than the formula under the settlement.

13.1 The foregoing discussion has brought out and following discussion will also establish that the said contention is not sustainable and the orders are not erroneous.

14. On this count it is relevant to note at the outset that the purport of the Bank's claim is that once the applicants accepted benefits under the settlement they are bound by all terms and conditions of the settlement including the terms and conditions related to payment of gratuity and they must accept gratuity in accordance with the scheme under the settlement and cannot claim gratuity in accordance with any other provision and that once they accepted gratuity paid by the bank they cannot raise any dispute and / or any other claim with regard to gratuity and they cannot shift to the formula under the Act.

14.1 However, it is pertinent that the said contention overlooks the provision under subsection (5) of section 4 of the Act and in light of said provision such contention is not sustainable and cannot be entertained.

14.2 The said provision obliges the employer (in cases where opportunity of choice is available to employee) to calculate gratuity payable to an employee in accordance with both the schemes (i.e. under the settlement and the Act) and after comparative analysis, to pay higher benefit. The said obligation is implied in sub-section (5) of Section 4 of the Act. If said procedure and obligation are not read into the said section 4(5) then the object of said subsection would be frustrated and the right of selection or to demand and receive better benefit may be negated and unreasonable employers may conveniently and easily avoid payment of better benefit higher / more amount towards gratuity. Even the

procedural provision viz. Section 7 of the Act emphasizes the obligation to pay better / higher benefit and employee's right to claim such benefit.

14.3 The payment of gratuity Act is a Special Act and it is a social and labour welfare legislation which is enacted with object to make provision for social and financial security for workmen on their retirement. The sub-section (5) of Section 4 makes special provision for better benefit and creates special right in favour of the employees. The said provision, should be construed in a manner which would support and advance the object of the provision and would not frustrate the spirit of the Act and object of Section 4(5). In this view of the matter the bank's objection is unjustified and it is not sustainable.

15. In present case the scheme under the settlement prescribes a formula for payment of gratuity which, to some extent or in some respect, is different from the scheme / provisions prescribed under the Act. The said formula may turn out to be more beneficial in some cases whereas it could prove to be less beneficial in some other cases. The said aspect is established from the orders of the authority inasmuch as it has emerged therefrom that in present case the amount calculated in accordance with the formula under the Act is better / higher than the amount calculated by the Bank under settlement.

15.1 The said aspect demonstrates that the bank ought to have simultaneously done the calculation in accordance with settlement and in accordance with the formula under the Act and then determined the amount payable to the claimants and then it should have followed the mandate under subsection (5) of section 4 of the Act. The petitioner failed to act in accordance with section 4(5) read with section 7(2)(3) of the Act and the petitioner failed to follow and comply the mandate under said Sections.

16. In present case if the calculation in accordance with the formula under the settlement and in accordance with the formula under the Act were simultaneously shown to the claimants, they could have selected one of the two formulae i.e. one which appeared more beneficial because only after comparison of such calculation the claimants could have decided as to which one is beneficial for them and thereby they could have taken proper and informed decision viz. to either accept gratuity in accordance with the calculation under the settlement or according to the calculation under the Act.

16.1 This procedure was not followed by the petitioner when it paid gratuity to the claimants. The petitioner did not calculate gratuity under the settlement and the Act and did not undertake the process of comparison and also did not show the calculations to the claimant and also did not allow the claimants to exercise their right of selection and paid them gratuity without following the said process. The claimants were not granted opportunity to exercise their right of selection of better option. Thus, neither the payment to the claimants nor the acceptance of gratuity by the claimants will operate as estoppel and that will not deprive the claimant's of their right to demand better / higher benefit.

16.2 It is necessary to note that merely because the claimants accepted the amount paid by employer without undertaking the process of comparative calculation and showing both calculations to the employees before making the payment under the settlement, it would not bar claim from the claimants for higher / better benefit of gratuity (in accordance with the Act) if, on comparative analysis, it emerges that amount paid under the scheme is less than what would be payable in accordance with law.

17. At this stage it is relevant to take into account Subsection (2) and (3) of Section 7 of gratuity act. The said provisions reads thus:-

"7. Determination of the amount of gratuity:-

(2) As soon as gratuity becomes payable, the employer shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.

(3) The employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to the person to whom the gratuity is payable."

17.1 On plain reading of said provision it becomes clear that Section 7 of the Act imposes obligation on the employer to determine the amount of gratuity payable to employee (whose service comes to end by any mode prescribed by section 4 (1) of the Act). The said Section imposes further obligation on the employer viz. to "give notice in writing to the person to whom gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined"

17.2 Thus, the employer would be under obligation not only to calculate and determine the amount which would be payable towards gratuity to employee but to also inform him in writing the amount determined by him. The employer should perform this obligation even if any claim application (Form-I) is not filed by the employee. In present case the petitioner failed in respect of this obligation.

17.3 From the said provision it also comes out that in those cases where any scheme for payment of gratuity is in operation, the employer would be obliged to calculate gratuity in accordance with the formula under the scheme and also in accordance with the formula under the Act (by keeping in focus Subsection (3) of Section 4 of the Act) and thereafter determine the amount which would be payable to the employee and then inform him in writing the amount determined by him.

17.4 Subsection (3) of section 7 prescribes that after completing the procedure prescribed by subsection (2) of section 7 the employer must arrange to pay gratuity within 30 days and subsection (3)(a) prescribes that if gratuity is not paid by the employer then he shall be obliged to pay interest.

17.5 Subsection (4)(a) of Section 7, which is another important provision,

prescribes that if there is any dispute to the amount of gratuity then undisputed amount must be deposited with the controlling authority. The clause (e) of Subsection (4) of Section 7 prescribes that the undisputed amount deposited by the employer should be paid to the employee by the authority while the authority adjudicated the dispute.

17.6 It is pertinent that Clause (c) of Sub-section (4) of Section 7 provides that when any application is submitted by the employee with the allegation that employer has not paid gratuity or that there is shortfall in gratuity paid to him as against gratuity payable in accordance with law then the authority shall determine the "matter in dispute" and direct the employer to pay such amount as is found to be "payable" to the employee.

17.7 It is relevant to take into account the fact that the said clause (c) of Sub-section (4) of Section 7 employs expression "amount found to be payable". The said expression imposes obligation on the authority to determine the amount which would be "payable" to an employee in accordance with law which will take in its fold employer's obligation to pay gratuity in accordance with Sub-section (5) of Section 4 and the right of an employee to receive better terms of gratuity in light of said Subsection (5) of Section 4.

17.8 By virtue of Sub-section (5) of Section 4 statutory right to receive better terms of gratuity is conferred on the employee. Consequently the amount to be paid to employee by way of "better terms of gratuity" contemplated under Sub-section (5) of Section 4 would fall within purview of expression "amount found to be payable to the employee" in clause (c) of Sub-section (4) of Section 7.

17.9 Thus, it would be authority's obligation to determine such amount as well and if, on adjudication it is determined that any amount is "payable" to the employee in light of Sub-section (5) of Section 4 then competent authority would be obliged to pass such order and such order would be within his power and jurisdiction.

17.10 When the said clause (c) is read with clause (a) and clause (e) of Sub-section (4) of section 7 it becomes clear that merely because undisputed amount is paid to / received by the employee, such payment shall not bar the claim for "amount payable in accordance with law". The contention of the petitioner that since employees accepted gratuity paid by it their claim should not have been considered by the controlling authority, therefore, must fail.

17.11 Thus, section 7 contemplates, inter alia, that upon receiving intimation from the employer about the amount payable towards gratuity, if there is any dispute, the employee may approach the controlling authority for claiming amount which, according to him, would be payable. The said section 7 of the Act also clarifies that an employee is not barred from demanding alleged short- fall in gratuity amount paid to him and / or from demanding better / higher benefit, after receiving the amount paid by employer, which according to the employee, is inadequate or short of the amount payable in accordance with law. The said

section 7 also clarifies and emphasizes that an employee is not supposed to be deprived of undisputed amount (i.e. the amount calculated / determined by the employers) payable towards gratuity, during the pendency of the proceedings before controlling authority. This aspect becomes clear from the provision which obliges the employer to deposit undisputed amount with the controlling authority and permits the employee to raise claim / demand and provides that the dispute may survive and may be adjudicated only in respect of disputed amount. In addition to this clause (e) of Subsection (4) of Section 7 provides that the authority should pay to the employee the undisputed amount deposited by the employer. The said provision therefore brings out dual obligation on the employer viz. (i) to determine amount payable towards gratuity and inform the employee about the amount calculated and (ii) in case of dispute, to deposit the amount with controlling authority. Further, sub-section (c) of Section 7(4) of the Act provides that the authority shall decide the matter in dispute. Thus, the employee's claim should be adjudicated and the section itself prescribes that the authority should pay the employee the amount deposited by the employer. On the other hand clause (c) of subsection 4 of section 7 of the Act mandates that the authority should adjudicate the claim / dispute / demand by the employee and to pass appropriate order / direction.

17.12 When the Act provides such obligation and prescribes such procedure, the petitioner's contention or objection that since the claimants accepted the benefits under settlement or the amount paid by him towards gratuity, the applications before the authority would not be maintainable and the subject applications could not have been entertained, militates against the scheme of the act, more particularly Section 7 read with section 4 of the Act.

17.13 Besides this, conjoint reading of Section 7(2) and (3) and (4) with Section 4(2) and 4(5) clarifies that merely because some amount is paid by employer purportedly towards gratuity, such payment will not operate as estoppel and the employee is not barred from raising dispute / claim if gratuity is not paid in accordance with law.

17.14 Moreover such payment does not prohibit the authority from adjudicating claim of the authority. On the contrary the Act-Section 7(4)(c) and (d) prescribes - rather obliges the authority - that the authority shall determine the dispute and direct the employer to such amount as may be found payable to the employee.

17.15 Thus, the contention that sine the claimants accepted the amount paid by the employer in accordance with the settlement, they cannot claim other / additional amount towards gratuity, is not sustainable.

18. At this stage it would be appropriate to take into account the observation by Hon"ble Apex Court in the case of Beed District (supra) which is relied on by the petitioner, while considering the said decision by Apex Court it would also be relevant and appropriate to take into account that in the cited decision the claimants contended that they would be entitled to better / favourable part of the

provision / benefit under both the schemes and that therefore a question arose before Hon"ble Apex Court which is framed in paragraph No. 5 of the said judgment which reads thus:-

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

18.1 In the said decision Hon"ble Apex Court also observed that:-

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

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

emphasis supplied

18.2 Whereas, in present cases, the claim of the claimants, simply put, is that gratuity calculated in accordance with the formula under the Act is beneficial to them as against gratuity in accordance with the formula under the settlement and that therefore the employer should have paid gratuity in accordance with the formula under the Act. The claimants, in present case, do not demand better part of the provisions under both the schemes.

19. In this background and with a view to examining the submissions based on the difference which emerge from calculations under the said two formulae, the Court requested the parties to submit statement of comparative calculation i.e. calculation in accordance with Act and in accordance with the settlement. In response to the said request learned advocate for the employees submitted statement which gives out comparative review and analysis of the calculation under both formulae. It would be appropriate, at this stage to take into account the details from the said statement. The said details read thus:-

1. Special Civil Application No. 5250 of 2014

Jayveersinh S. Parmar

...Petitioner

Amount Calculated as per Bank and paid

As per the Gratuity Act Outstanding

Length of service 39 years 1 months

$38505/26 = \text{Rs.}1480.96$ One day

Basic + DA =Rs. 38,505/- $1.38505 \times 20 = \text{Rs. } 770100$

$15 \times 1480.96 = \text{Rs.}22214$ $22214 \times 39 = 866361$

2. As per calculation of one day $38505/30 = \text{Rs.}1283.5015$ $\times 1283.50 = \text{Rs. } 19252.50$ one year $19252.50 \times 40 = \text{Rs. } 770100$

$15 \times \text{salary} \times \text{years} / 26$ $15 \times 38505 \times 39 / 26 = \text{Rs. } 866362$

Difference: Rs. 96,263/-

2. Special Civil Application No. 18706 of 2014

Dinesh H. Rathod

...Petitioner

Amount Calculated as per Bank and paid

As per the Gratuity Act Outstanding

Length of service 40 years 5 months 30 days

$40504/26 = \text{Rs. } 1557.84$ one day

1. Basic + DA = Rs. 40,504 Rs. $40504 \times 20 = \text{Rs.}810080$

$15 \times 1557.84 = \text{Rs. } 23367.69$ one year $23367.69 \times 40 = \text{Rs. } 934707$

2. As per calculation of one day $40504 / 30 = \text{Rs. } 1350.13$ $15 \times 1350.13 = \text{Rs. } 20251.99$ one year $20251.99 \times 40 = \text{Rs. } 810080$

$15 \times \text{salary} \times \text{years} / 26$ $15 \times 40504 \times 40 / 26 = \text{Rs. } 934707$

Difference: Rs. 1,24,627

3.Special Civil Application No. 12053 of 2014

Dipak Vishnuprasad Thaker

...Petitioner

Amount calculated as per Bank and paid

As per the Gratuity Act Outstanding

Length of service 40 years 1 months 18 days

$43536/26 = \text{Rs. } 1674.46$ one day

Basic + DA = Rs. 43,536/- $43536 \times 20 = \text{Rs. } 870720$

$15 \times 1674.46 = \text{Rs. } 25116.90$ $25116.90 \times 40 = \text{Rs. } 1004676$

2. As per calculation of one day $43536/30 = \text{Rs. } 1451.20$ $15 \times 1451.20 = \text{Rs. } 21768$ one year $21768 \times 40 = \text{Rs. } 870720$

$15 \times \text{salary} \times \text{years} / 26$ $15 \times 43536 \times 40 / 26 = \text{Rs. } 1004676$

Difference: Rs. 129280/-

4. Special Civil Application No. 12054 of 2014

Arvind K. Chotaliya

...Petitioner

Amount calculated as per Bank and paid

As per the Gratuity Act Outstanding

Length of service 37 years 2 month 28 days

$34250/26 = \text{Rs. } 1317.30$ One day

Basic + DA = Rs. 34,250

$1.34250 \times 20 = \text{Rs. } 685000$

$15 \times 1317.30 = \text{Rs. } 19759.61$ $19759.61 \times 37 = \text{Rs. } 731105$

2. As per calculation of one day $34250/30 = \text{Rs. } 1141.66$ $15 \times 1141.66 = \text{Rs. } 17124$ one year $17124.99 \times 40 = \text{Rs. } 685000$

$15 \times \text{salary} \times \text{years} / 26$ $15 \times 34250 \times 37 / 26 = \text{Rs. } 731105$

Difference: Rs. 46,095/-

5. Special Civil Application No. 12054 of 2014

Arvind K. Dave

...Petitioner

Amount calculated as per Bank and paid

As per the Gratuity Act Outstanding

Length of service 39 years 2 month 28 days

$23530/26 = \text{Rs. } 905$ One day

Basic + DA = Rs. 23530/- $23530 \times 20 = \text{Rs. } 470600$

$15 \times 905 = \text{Rs. } 13575$ one year $13575 \times 39 = \text{Rs. } 529425$

2. As per calculation of one day $23530/30 = \text{Rs. } 784.33$ $15 \times 784.33 = \text{Rs. } 11764.99$ one year $11764.99 \times 39 = \text{Rs. } 470599$ $15 \times$

$15 \times 23530 \times 39 / 26 = \text{Rs. } 529425$

Difference: Rs. 56,215/-

6. Special Civil Application No. 12054 of 2014

Bipin P. Dave

...Petitioner

Amount calculated as per Bank and paid

As per the Gratuity Act Outstanding

Length of service 38 years 8 month 7 days

$31280/26 = \text{Rs. } 1203.07$ One day

Basic + DA = Rs. 31280/- $31280 \times 20 = \text{Rs. } 625600$

$15 \times 1203.07 = \text{Rs. } 18046.05$ one year $18046.05 \times 39 = \text{Rs. } 703798.95$

2. As per calculation of one day $31280/30 = \text{Rs. } 1042.66$ $15 \times 1042.66 = \text{Rs. } 15639.99$ one year $15639.99 \times 40 = \text{Rs. } 625599$

$15 \times \text{salary} \times \text{years} / 26$ $15 \times 31280 \times 39 / 26 = \text{Rs. } 703800$

Difference: Rs. 78,200/-

19.1 On examining the said statement, it is apparent that there are substantial difference between the amount paid by the employer as per the settlement and the amount payable under the Act.

20. At this stage it is not out of place to mention that the concept and method of calculating gratuity is explained by Hon"ble Court in case of Digvijay Woollen Mills Ltd v. Mahendra Prataprai Buch (AIR 1980 SC 194) and in the case of Jeevanlal Ltd v. Appellate Authority (1984 4 SCC 356). The applicability of the procedure and method of calculating gratuity explained by Apex Court and the principles emphasized by Apex Court are binding in the matter of calculation and payment of gratuity under the Act (i.e. in accordance with formula under the Act).

20.1 In present case the authority has calculated gratuity in accordance with the formula prescribed under the Act and the said calculation is made in consonance with (i.e. by applying) the principles explained by Hon"ble Apex Court in above-mentioned two decisions.

20.2 The calculation by the authority brought out the fact that so far as the claimants are concerned, the amount payable in accordance with formula under the Act is better / higher than the amount calculated / quantified in accordance with the scheme / formula under the settlement. Having regard to this fact the controlling authority passed the order and awarded better benefit. The said orders are in consonance with Sections 4(1), (2), 7(2), 7(3), 7(4) and 4(5) of the Act and there is no error or illegality in the order.

20.3 In this background the direction by the controlling authority that the claimant should be paid higher / more amount cannot be faulted. The controlling authority has merely given effect to and enforced the scheme of the Act and object of sub-section (5) of Section 4 of the Act which confers right to the employees to claim and receive better / higher benefit.

21. At this stage it is relevant to take into account Section 5 of the Act. The said provision confers power to the appropriate government to grant exemption from operation of the provision of the Act. The said provision provides better to employers who introduce scheme for payment of gratuity which, on overall evaluation, may be beneficial / better than the formula under the Act, to seek exemption from operation of the Act.

21.1 The petitioner bank could have sought such exemption, for which it would have been called upon to establish, and satisfy appropriate government, that its scheme is not less favourable than the formula under the Act.

21.2 Upon its satisfaction the appropriate government would have granted exemption. However, such exemption is not granted to the bank to its scheme under the settlement.

21.3 It is not in dispute that the petitioner is not "exempted establishment" i.e. it is not exempted from operation of the provisions under the Act. Consequently, in absence of exemption from operation of the provisions of the Act, all provisions including Section 4(5) of the Act would be applicable to the establishment / employer and that therefore also an employee would be justified in raising claim in light of section 4(5) of the Act and the controlling authority would be justified in passing order for payment of better benefit / higher amount towards gratuity, if available under the provisions of the Act or vice versa. When impugned order are examined in light of findings of fact and above-mentioned provisions under the Act then it becomes clear that the impugned orders cannot be faulted.

22. Now is the time and stage to turn to the petitioner's objection on the ground of delay. It is claimed by the petitioner that in most of the applications any application seeking condonation of delay was not filed but the authority entertained and decided the claim / applications on merits i.e. the authority suo motu condoned delay in absence of any request - application.

22.1 True it is that the Act confers power to the authority to condone delay, however it is apparent and abundantly clear from the relevant provision that the authority cannot exercise the said power suo motu. There must be request / application by the claimant to condone delay and the said request / application should offer sufficient and satisfactory explanation with regard to the reasons which caused delay and the authority should be satisfied that the applicant was prevented from filing application or he was unable to file application within prescribed time due to unavoidable circumstances and upon being satisfied with such explanation the authority may condone delay. The language of the provision clearly gives out that the power of the authority does not have to act suo motu

and condone delay in absence of request / application by the claimant (either by separate application or by incorporating the request in main / parent claim application)

22.2 In present case it is not disputed that except in one case the other applicants had not submitted any application with request to condone delay. The applicant did not offer any explanation as regards cause of action on account of which delay occurred. Despite absence of such application / request the authority proceeded with the cases and entertained the claim applications despite the fact that the claim applications were submitted after expiry of prescribed period of limitation. Therefore said decision and action of the controlling authority cannot be sustained. The impugned orders, to that extent, are erroneous and defective.

22.3 However, a question would arise as to whether the claims of the applicants should be allowed to be frustrated in entirety only because the applicants failed to submit application / offer explanation with regard to delay caused in submitting claim application. In view of this Court such course of action would be unjustified. If strong reason for refusing such opportunity is not made out, said opportunity should be, ordinarily, not denied and process of deciding cases on merits of the case should be preferred over the option of dismissing the case merely on ground of delay i.e. in absence of anything more.

23. In view of this Court equitable and just course of action would be to grant opportunity to the claimants to submit appropriate application seeking condonation of delay (instead of rejecting claim on the ground that they failed to file application) and an opportunity to the petitioners to file their objection and an opportunity to the authority to consider and decide such application in accordance with law.

23.1 In this view of the matter it would appropriate to remand the cases for the said limited purpose to the authority so that the claimants can file appropriate applications and the authority can independently decide as to whether the claimants are able to offer satisfactory explanation and are able to make out sufficient cause to support and justify the request for condonation of delay.

24. In light of foregoing discussion and for above-mentioned reasons following order is passed:-

(a) The impugned decision of the authority of suo motu condoning delay are for the foregoing reasons, set aside and the matters are remitted to the controlling authority for the said limited purpose viz. to consider the request - application to condone delay.

(b) The decision of awarding higher benefit and more amount is not disturbed.

(c) It is clarified that while deciding cases, the controlling authority will take into account the petitioner's objection on ground of delay.

(d) The authority will grant opportunity to the claimants who did not file

applications seeking condonation of delay, to file appropriate application and after considering petitioner's objection and the explanation offered by the claimants, controlling authority will independently pass appropriate orders in accordance with law with regard to the request to condone delay. It is clarified that this Court has not expressed any view or opinion with regard to merits of such request, Hence the authority will decide the applications independently and on their merits.

(e) It is further clarified that the claimants who had earlier filed delay condonation application / affidavit and in whose cases authority condoned delay after considering affidavit / application, need not file another / fresh application. In their cases present decision (whereby the authority condoned delay) will hold good. Only those applicants are required to file delay condonation applications who had earlier not filed such application / affidavit.

(f) in all such cases where the request to condone delay may be granted by the authority, the decision / order awarding higher/more amount shall automatically apply and operate and such applicants shall be entitled for said benefit and to implement - execute said order - decision. With the aforesaid clarifications and direction the petitions are partly (i.e. with regard to objection against condonation of delay in absence of application - request to condone delay) allowed and the cases are remanded to the authority for said limited purpose i.e. to receive and decide application for condonation of delay. Accordingly the petitions are disposed of.