
(2013) 07 MEG CK 0003
In the Meghalaya High Court
Case No : Writ Petition (C) SH No. 154 of 2012

Tikendra Singh and Others

APPELLANT

Vs

Managing Director, MECOFED and Others

RESPONDENT

Date of Decision : 10-07-2013

Acts Referred:

Citation : (2013) 07 MEG CK 0003

Hon'ble Judges : T. Nandakumar Singh, J

Bench : Single Bench

Advocate : N. Khan, S.J. Mondal, Ms. S. Acharjee, Ms. P. Roy and A. Baruah, for the Appellant; N.D. Chullai and Dr. O.D.V. Ladia, for the Respondent

Judgement

T. Nandakumar Singh, J.—Heard Mr. N. Khan, learned Counsel appearing for the petitioners and also Mr. N.D. Chullai, learned counsel assisted by Mr. R.B. Gurung, learned counsel appearing for respondent Nos. 3, 4, 5 and 6 and also Dr. O.D.V. Ladia, learned counsel appearing for respondent No. 1. The core question called for consideration in the present writ petition is as to whether "The Payment of Gratuity Act 1972" applies to the Society called "The Meghalaya State Co-operative Marketing & Consumer Federation Ltd., Shillong" or not? For deciding this core question in the present writ petition, it is not required to mention the facts in detail leading to the filing of the present writ petition. Only the fact sufficient for deciding the present writ petition is recapitulated.

2. The Aims and Objectives of the Meghalaya State Co-operative Marketing & Consumer Federation Ltd., Shillong (for short MECOFED) are clearly mentioned in the Bye-laws of the MECOFED. It would be profitable to reproduce the relevant portions of the Aims and Objectives which read as follows:--

Objects

4. The MECOFED shall be an Apex Body and its objects are to organize, promote and develop marketing, processing, storage and sale of Agricultural. Mineral produce and produces and industrial products of the State by way of exports

outside the State and Country and procure, distribute by sale of consumer goods, agricultural input Pharmaceuticals and to assist, aid, guide its affiliated member Societies in the State.

In the furtherance of these objects, the MECOFED activities:--

i. To facilitate, co-ordinate and promote the marketing and trading activities of the co-operative institutions in agricultural produce and products, agricultural input, minerals products and produce, pharmaceuticals, industrial, products and consumers goods and act as an Apex body for the purpose mentioned in these Bye-laws.

ii. To undertake or promote on its own or on behalf of its members Societies or the Government or Government Undertaking, Intrastate and international trade, and undertake marketing, purchase, sale and storage of agricultural produce and products. Industrial Products. Pharmaceuticals and consumers goods and to facilitate these activities to open branches, sub-branches, depots and appoint agents in any place within the country and abroad.

iii. To serve as an Apex Body for marketing, and consumers in the State, procure the raw materials, consumers goods. Pharmaceuticals: etc. required by them and to act as a Central Marketing Agency for marketing of produce and products procured by the Societies as its agent, supervise and control the activities of these affiliated Societies, organize consultancy works in various fields and establish Technical and Promotional Cells undertake marketing research and dissemination of market intelligence; arrange training of employee of MECOFED and affiliated Societies in marketing, processing etc, undertake grading, packing and standardization agricultural produce and products, mineral produce and; industrial products for the benefit of Co-operative Institutions in general and for its members in particular;

3. It is also stated in the writ petition that the Managing Director of the MECOFED is appointed directly by the Govt. of Meghalaya. The State Government has approximately 95% investment in the share capital of the MECOFED and also the MECOFED did not take any important decision without receiving prior approval of the Govt. of Meghalaya.

4. The petitioners, 95 in numbers were employees of the MECOFED. It is stated that because of the heavy financial losses incurred by the MECOFED and other PSUs/PSEs, the Govt. of Meghalaya prepared the scheme, "Voluntary Retirement Scheme/Golden Handshake Scheme" for the employees of the said PSUs. The relevant portion of the said scheme Golden Handshake Scheme is quoted hereunder:

GOVERNMENT OF MEGHALAYA PROGRAMME IMPLEMENTATION DEPARTMENT

CABINET MEMORANDUM

(To be circulated under Rule No. 17 of the Rules of Executive Business)

SUBJECT: VOLUNTARILY RETIREMENT SCHEME/GOLDEN HANDSHAKE SCHEME FOR EMPLOYEES OF STATE PUBLIC SECTOR ENTERPRISES.

With the exception of the Mawmluh Cherra Cements Limited, the Meghalaya State Warehousing Corporation, the Meghalaya Co-operative Apex Bank Limited, the Meghalaya State Agricultural Marketing Board and the Meghalaya Industrial Development Corporation, all other Public Sector Enterprises and Departmental Undertakings/Boards in the State of Meghalaya are loss making and can be considered as sick PSUs/PSEs. They are in varying degrees of sickness. At the time when they were created; all of them were expected to be engines of growth in the State and to generate enough resources, which would at least help them to be self-sustaining in the long run. However, it is quite unfortunate that many of them have acted as a drain on the meager and precious resources of the State. Frankly and plainly speaking, most of the State PSUs can be said to have become white elephants, which the State Government call ill afford to keep. A number of factors are responsible for this sorry state of affairs.

2. In the Meghalaya Legislative Assembly debates on privatization/Disinvestment of sick Public Sector Enterprises/Undertakings during the last Budget Session (March-April 2001), while Members wanted to know the exact reasons for losses incurred by these PSUs/PSEs, the Hon'ble Minister, Programme Implementation Department, replied that one of the reasons was the uneconomic decisions taken by successive Chairmen and Vice-Chair-men of PSUs/PSEs especially in matters like employment without taking into consideration long-term repercussions of such decisions on the future economic health of the PSUs/PSEs they were heading. Most of the State PSUs/PSEs are overstaffed. Since this fact has been very clearly brought out in the proceedings of the Meghalaya Legislative Assembly, it is, therefore, high time that the employment profile of State PSUs/PSEs should be rationalized and that the surplus employees should be mopped out with a view to bringing about their much needed overall restructuring. A policy decision and action on these lines will go a long way towards partial if not full restoration of the financial health of the State PSUs/PSEs. In the present context of economic reforms, which is going on in the country, the process of downsizing or rightsizing of the State PSUs/PSEs can brook no further delay but the package of voluntary retirement benefits to be offered should appear to be fair and just if people are really to feel induced to accept the Government's offer to them. Initially, the possibility of retraining and redeployment needs also to be explored so that undue resistance to the Government's move, however economically rational the Government's viewpoint may be, is minimized if not totally eliminated.

3. Keeping in view the pace of reforms that has been taking place in the Country today, the State Government would only be further compounding its own financial problems in the long run if it continues to downsizing or rightsizing of State PSUs/PSEs is concerned. Even till today many State PSUs/PSEs are still heavily dependent on budgetary support from the State Government. This kind

of thing has to come to an end sooner than later. It is part of the much needed fiscal reforms that all States in the Country have to implement. A firm policy decision has, therefore, to be taken at the earliest and the process has also to be initiated forthwith. This is an inescapable requirement of the reforms process underway. It is hoped that the saving that can be effected through this measure will improve the financial picture of both the State Government and that of its PSUs/PSEs.

4. In our State, some of the State PSUs/PSEs have already been more or less regular defaulters in matters of salary payments and it is well known to the employees that these PSUs/PSEs are deeply in the red. It may be worthwhile for the State to examine the idea of voluntary retirement perhaps with the condition that all their dues would be paid in one lump sum amount within a few days of their relinquishing office, not piecemeal. If the State Government can ensure this there is high probability that the response to the scheme would be good. As far as other statutory, payments like Provident Fund gratuity, leave encashment etc. these also have to be paid within stipulated timeframe. Once the PSUs/PSEs have been downsized or right-sized, it is pretty certain that the average as well as the marginal productivity of the remaining employees will improve. The consequent reduction in the monthly salary bill will also improve to a certain extent the financial position of the PSUs/PSEs as already stated above.

5. In response to the said Golden Handshake Scheme framed by the Govt. of Meghalaya, the petitioners 95 in numbers had taken the Voluntarily Retirement. After Voluntarily Retirement, the petitioners also had submitted two representations dated 18-8-2004 and 16-8-2008 demanding payment of gratuity, leave salary and duty salary as well as arrear and pay on account of the pay revision in 1987 and 1996 in the State of Meghalaya.

6. The respondent did not give any reply to the said representations and also the said representations had not been disposed of. Being aggrieved by the said inactions of the respondent, the petitioners approached this Court by filing W.P. (C)(SH) No. 251/2004. This Court vide an order dated 25-8-2006 passed in W.P. (C)(SH) No. 251/2004 directed the petitioners to make fresh representation to the respondents and further the respondents were directed to dispose of the representation in the form of speaking orders. In compliance to the said order of this Court dated 25-8-2006 passed in W.P.(C)(SH) No. 251/2004, the Deputy Labour Commissioner and the Controlling Officer under the Payment of Gratuity Act, 1972 passed a specific order dated 30-7-2010 that the employees of MECOFED are entitled to the gratuity and MECOFED to take further necessary action in compliance to the order. For easy reference, the said order of the Controlling Officers under the Payment of Gratuity Act, dated 30-7-2010 (Annexure VI of the writ petition) is quoted hereunder:

GOVERNMENT OF MEGHALAYA OFFICE OF THE LABOUR COMMISSIONER
MEGHALAYA::: ::SHILLONG

ORDER

No. MLG 16/73/____ Dated Shillong, the 30th July, 2010.

In compliance and pursuance to the order D/- 2.06.2010 of the Hon'ble Guwahati High Court (Shillong Bench) No. W.P.(C) No. 52 (SH) the application submitted by Shri Tikendra Singh & others has been perused and examined in the light of Payment of Gratuity Act, 1972 vis-?-vis the Constitution and Bye-Laws of MECOFED. After consideration it is found as follows:--

The Meghalaya State Co-operative Marketing & Consumer Federation is a Society registered with the Registrar of Co-operative Society and as such it is an establishment. Establishment connotes organized body of men and women employed where relationship of employer and employees comes into existence. Hence the Meghalaya State Co-operative Marketing & Consumer Federation is an Establishment within the meaning of Section 1(3)(b) of Payment Gratuity Act, 1972. The function of MECOFED also comes within the said Act. Therefore its employees are entitled to gratuity,

Now, therefore, as the Controlling Officer under Payment of Gratuity Act, 1972, I pass the Order that the employees of MECOFED are also entitle to gratuity. MECOFED to take further necessary action in pursuance of this order.

Sd/- (Smt. F.K. Marak) Deputy Labour Commissioner & Controlling Officer under the Payment of Gratuity Act.

7. It is stated that after the Controlling Officer under the Payment of Gratuity Act, 1972 had passed the said order dated 30-7-2010, the said respondents filed an application for review. Later on, the same Officers, i.e. the Controlling Authority under the Payment of Gratuity Act, 1972 passed the impugned order dated 30-5-2012, that the petitioners are not entitled to claim for gratuity. In the impugned order, there is no clear finding of the Controlling Authority under the Payment of Gratuity Act, 1972 that the Act, i.e. Payment of Gratuity Act, 1972 is not applicable to the MECOFED. Again for easy reference, the impugned order dated 30-5-2012 (Annexure A-11) to the writ petition is also quoted hereunder.

GOVERNMENT OF MEGHALAYA OFFICE OF THE LABOUR COMMISSIONER
MEGHALAYA ::: SHILLONG

Shri Tikendra Singh & others - Petitioner

v.

MECOFED - Respondent

In pursuance of the Hon'ble High Court in its order dated 30th March, 2012 passed in W.P.(C) No. (SH) of 2012, the application submitted by Shri Tikendra Singh & others is heard in the arguments presented by both the parties on the

2nd and 14th March, 2012. The case has been examined thoroughly in the light of the Payment of Gratuity Act, 1972 the Classification, Appointment, Control and Appeal Rules, 1980, Bye-Laws of MECOFED and the Golden Handshake Scheme.

As evident from the Classification, Appointment, Control and Appeal Rules, 1980, Bye-Laws and the Golden Handshake Scheme and the points raised by the Learned Counsel of the respondent, MECOFED, no fund provision was created by MECOFED to be reserved for the Payment of Gratuity since its inception. And the same was not incorporated in its Classification, Appointment, Control and Appeal Rules, 1980 and Bye-Laws. Payment of Gratuity was never paid to any of the employees who have retired on superannuation till the time of the introduction of the Golden Handshake Scheme. Again, as is evident, the employees had never raised the issue of the absence of the fund during all the time they were in service with the Corporation. Consequently, while framing the Golden Handshake Scheme, the Payment of Gratuity was never featured as a component of the Scheme.

In view of the above and the facts that the MECOFED is bound by the rules framed under the Classification, Appointment, Control and Appeal Rules 1980. and the Bye-Laws. this Authority hereby, declare that the employees who have retired under the Golden Handshake Scheme are not entitled to the claim of Gratuity.

Case disposed off and informed both parties.

Sd/- (Smti. M. Thabab) Deputy Labour Commissioner & Controlling Authority under the Payment of Gratuity Act, 1972.

8. The respondent Nos. 3 and 4 filed a joint affidavit-in-opposition stating that the petitioners are barred by the principles of estoppel, acquiescence as well as waiver for claiming the benefits under the Payment of Gratuity Act, 1972 inasmuch as they had already taken the voluntarily retirement and enjoyed the benefits under the Golden Handshake Scheme of Meghalaya and also that the MECOFED is not dependant on the government finance for its functioning. As a matter of fact, the Federation had been managing its salary from the profit of its business every year. On perusal 2013 Lab IC/261 XI of the affidavit-in-opposition filed by the State respondent, it appears that the MECOFED is running the business and the profit had been used for paying the salaries of the employees of the MECOFED.

9. Mr. N.D. Chullai, learned Sr. counsel appearing for the respondents to whom this Court had put the question; "is MECOFED a Government Financed Society or not?" could not give a satisfactory answer but admitted that the State Government has approximately 95% investment in the share capital of MECOFED.

10. In the above factual backdrop, this Court is to decide the core question called for decision in the present writ petition. Section 1(3) of the payment of Gratuity Act, 1972 clearly mentions the types of establishment or factories to which the

Act applies. Section 1(3) of Payment of Gratuity Act, 1972 read as follows:

1. Short title, extent, application and commencement.-

(1) This Act may be called the Payment of Gratuity Act, 1972

(3) it shall apply to--

(a) every factory, mine, oilfield, plantation, port and railway company;

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

(c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf.

2. Definitions.--In this Act, unless the context otherwise requires.--

(e) "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity.

(f) "employer" means, in relation to any establishment, factory, mine, oilfield, plantation, port, railway company or shop -

(i) belonging to or under the control of the Central Government or a State Government a person or authority appointed by the appropriate Government for the supervision and control of employees or where no person or authority has been so appointed, the head of the Ministry or Department concerned.

(ii) belonging to, or under the control of, any local authority the person appointed by such authority for the supervision and control of employees or where no person has been so appointed the chief executive officer of the local authority.

(iii) in any other case the person who or the authority which, has the ultimate control over the affairs of the establishment, factory mine, oilfield, plantation, port, railway company or shop, and where the said affairs are entrusted to any other person, whether called a manager, managing director or by any other name such person;

11. It is the case of the petitioners that the MECOFED is an establishment within the meaning of an establishment mentioned in Section 1(3) of the Payment of Gratuity Act, 1972. The Payment of Gratuity Act, 1972 is applicable to an establishment within the meaning of any law for the time being in force in

relation to shops and establishments in a State.

12. Mr. N.D. Chullai, learned Sr. counsel appearing for the respondents submits that the State Government of Meghalaya had enacted an Act called "The Meghalaya Shop and Establishment Act 2004". Therefore the establishment mentioned in Section 1(3) of the Payment of Gratuity Act, 1972 is to be understood in the light of the said Act, i.e. "The Meghalaya Shop and Establishment Act 2004." Section 2(g) of the said Act 2004 defines the meaning of the word "establishment".

13. On perusal of Section 2(g) of the said the Meghalaya Shop and Establishment Act 2004 Act, it appears that "Establishment" is defined by examples. u/s 2(g), "Establishment" means a shop or a commercial establishment. The commercial establishment is again defined u/s 2(c) of the said Act, i.e. "The Meghalaya Shop and Establishment Act 2003 which reads as follows:

2. In this Act, unless there is everything repugnant to the subject or context,

(c) "commercial establishment" means an establishment in which there is conducted the business of advertising, commission, forwarding or commercial agency, a department of a factory in which persons are employed in a clerical capacity in any room or place where no manufacturing process is being carried on, a clerical, department of any industrial or commercial undertaking including public transport, an insurance company, joint stock company, brokers office or exchange or such other establishment or class.

(g) "establishment" means a shop or a commercial establishment or an establishment for public entertainment or amusement.

14. On perusal of Section 2(c) of the said Act 2004, it is clear that the commercial establishment means an establishment in which there is conducted the business of advertising, commission, forwarding or commercial agency, public transport, joint stock company, brokers office or exchange. The functions of the MECOFED are mentioned in the objectives of the MECOFED which had been quoted above. For the sake of repetition, it is reiterated that the MECOFED had been conducting business of marketing, processing, storage and sale of agricultural, mineral produce and products and industrial products of the State. The MECOFED is an Apex body for marketing and consumer in the State of Meghalaya.

15. The State respondent in their affidavit-in-opposition has stated very clearly that the MECOFED has been managing the salaries from the profit of the business undertaken every year. Therefore, it is clear that the MECOFED is conducting a commercial business and it is a commercial establishment under "The Meghalaya Shop and Establishment Act, 2004."

16. Therefore, relying on the provisions of the Payment of Gratuity Act, 1972, more particularly, Section 1(3), Section 2(e) and (f) and Section 2(c) and 2(g) of "The Meghalaya Shop and Establishment Act 2004", this Court is of the

considered view that Payment of Gratuity Act, 1972 applies to the MECOFED. u/s 4 of the Payment of Gratuity Act, 1972, gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than 5(five) years; It is admitted by the parties that the MECOFED had more than 100 (one hundred) employees and the petitioner had rendered continuous service for more than 5 (five) years before taking voluntary retirement. The State has the power to exempt any establishment from operation of the provisions of the Payment of Gratuity Act, 1972 if in the opinion of the appropriate Government, the employees in such establishment, factory, mine, oilfield, plantation, port, railway company or shop are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under the Act. In the present case in hand, admittedly the respondent has not issued any order u/s 5 of the Payment of Gratuity Act, 1972 for exemption of the MECOFED from operation of the provisions of the Payment of Gratuity Act, 1972.

17. It is the case of the State respondents that the petitioners are barred by the principles of estoppel, waiver and acquiescence from claiming the benefit under the Payment of Gratuity Act, 1972 inasmuch as they had already enjoyed the benefit under the said Golden Handshake Scheme of Meghalaya with their eyes open. When they enjoyed the benefit under the said scheme by undergoing voluntary retirement, they did not claim for gratuity under the Payment of Gratuity Act, 1972. But it is the case of the petitioners that there cannot be estoppel against the statutes. In other words, there cannot be waiver of statutory right under the Payment of Gratuity Act, 1972 to claim the gratuity, the Apex Court in

Allahabad Bank and another v. All India Allahabad Bank Retired Employees Association, (2010) 2 SCC 4 (2009 AIR SCW 7667)

held that there cannot be a waiver of statutory rights and also that the principles of estoppel cannot be raised to defeat the provisions of statute. The fact of the case in Allahabad Bank's case (supra) is similar with that of the present case. In that case also, the employees had exercised their options voluntarily for availing of pension in lieu of gratuity for retirement from bank service. Therefore, it was the case of the authority that since the employees had already exercised their options voluntarily for availing the pension in lieu of the gratuity, they cannot claim payment of gratuity under the Payment of Gratuity Act, 1972. In that context, the Apex Court held that the statutory right of the employee under the Payment of Gratuity Act, 1972 cannot be denied to the employees who had already given their options for voluntarily retirement for availing of pension in lieu of gratuity.

18. The facts of the case are mentioned in paras 6 and 7 (para 4 of AIR SCW) and the findings are mentioned in para Nos. 10, 11, 12, 13, 14, 15, 32, 33, 34, 35, 36, and 37 (paras 6, 7, 8, 9, 10, 19, 20, 21, 22 of AIR SCW) of the SCC in the Allahabad Bank's Case (2009 AIR SCW 766) (supra) which read as follows:--

6. The Association thereafter filed a writ petition asserting its right that its members were entitled to receive gratuity in accordance with the provisions of the Act. The contention was that the consent or option given by the members of the Association opting for pension scheme would not deprive them of their statutory right to receive gratuity under the provisions of the Act. The appellant-Bank resisted the writ petition filed by the Association mainly relying upon the awards known as Shastry Award and Desai Award and subsequent settlements under which the employees were entitled either to the benefit of pension or benefit of gratuity at one's own option but not both.

7. The Bank took a specific stand that the members of the Association had voluntarily opted for the Pension Scheme, as a result thereof, they were not entitled to receive gratuity as well since they have already exercised their option claiming benefit of pension. The submission was that at the time of their retirement all the employees were paid contributory provident fund and pension in terms of option exercised by them, under the relevant Pension Scheme of the Bank and therefore, they were not entitled to payment of any gratuity. The Bank further asserted that the employees opted for the pensionary benefits which, admittedly, are better in terms as found by various Awards that the pensionary scheme was really more advantageous to the employees than that of the gratuity.

10. It is under those circumstances that the Union Government realized that it has become necessary to have a Central law on the subject so as to ensure a (sic) uniform pattern of payment of gratuity to the employees throughout the country, The Act was intended to avoid different treatment to the employees of establishments having branches in more than one State. The proposal for Central legislation on gratuity was discussed in various Labour Ministers Conferences, where Central legislation on payment of gratuity was felt a necessity.

11. Section 4(1) of the Act provides:

4. Payment of gratuity--(1) Gratuity shall be payable to an employee on the termination of his employment after he 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.

(Emphasis supplied)

12. The expression "employee" is defined in Section 2(e) of the Act as "any person" (other than an apprentice) employed on wages, in any establishment, factory, mine, oilfield, plantation, port, railway company or shop to do any skilled, semi-skilled, or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied".

There is no dispute before us that the appellant Bank is an establishment and an

employer within the meaning of the provisions of the Act.

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

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

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

32. This Court in

MCD v. Dharam Prakash Sharma (1998) 7 SCC 221 : 1998 SCC (L&S) 1800 (AIR 1999 SC 293)

observed (SCC pp. 222-23, para 2)

2. The mere fact that the gratuity is provided for under the Pension Rules will not disentitle him to get the payment of gratuity under the Payment of Gratuity Act. In view of the overriding provisions contained in Section 14 of the Payment of Gratuity Act, the provision for gratuity under the Pension Rules will have no effect. Possibly for this reason, Section 5 of the Payment of Gratuity Act has conferred authority on the appropriate Government to exempt any establishment from the operation of the provisions of the Act, if in its opinion the employees of such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under this Act. Admittedly MCD has not taken any steps to invoke the power of the Central Government u/s 5 of the Payment of Gratuity Act. In the aforesaid premises, we are of the considered opinion that the employees of the MCD would be entitled to the payment of gratuity under the Payment of Gratuity Act notwithstanding the fact that the provisions of the Pension Rules have been made applicable to them for the purpose of determining the pension. Needless to mention that the employees

cannot claim gratuity available under the Pension Rules.

(Emphasis supplied)

In the present case it is not the case of the Bank that its employees had claimed and received gratuity under the Pension Scheme.

33. The decision in

Workmen v. Metro Theatre Ltd. (1981) 3 SCC 596 : 1981 SCC (L&S) 546 (AIR 1981 SC 1685)

in which this Court took the view that on true construction the expression "award" occurring in subsection (5) of Section 4 does not mean and cannot be confined to "existing award", but includes any award that would be made by an adjudicator wherein better terms of gratuity could be granted to the employees if the facts and circumstances warrant such grant. This decision cited by the learned counsel for the appellant is of no relevance and in no manner supports the appellant's case.

34. Learned counsel for the appellant relying upon the decision of this Court in

Bank of India v. O.P. Swarnakar; (2003) 2 SCC 721 : 2003 SCC (L&S) 200 (AIR 2003 SC 858)

contended that once the employees have exercised their option to avail pension made available to them under the old Pension Scheme, and having drawn the benefits thereunder cannot be permitted to resile from their stand. In that case a group of employees of State Bank of India accepted the amount of ex gratia under; the scheme known as "The Employees Voluntary Retirement Scheme" and thereafter made an attempt to resile from the very Scheme itself. It is under those circumstances that this Court observed that: (SCC p.764 para 114) (p. 883, para 114 of AIR).

114. ...Those who accepted the ex gratia payment or any other benefit under the Scheme, in our considered opinion, could not have resiled therefrom.

35. In the present case the real question that arises for our consideration is whether the employees having exercised their option to avail the benefits under the Pension Scheme are estopped from claiming the benefit under the provisions of the Act?

36. The appellant being an establishment is under the statutory obligation to pay gratuity as provided for u/s 4 of the Act which is required to be read along with Section 14 of the Act which says that the provisions of the Act shall have effect notwithstanding anything inconsistent therein contained in any enactment or in any instrument or contract having effect by virtue of any enactment other than this Act. The provisions of the Act prevail over all other enactments or instruments or contracts so far as the payment of gratuity is concerned. The right to receive gratuity under the provisions of the Act cannot be defeated by

any instrument or contract.

37. This Court in

Hindustan Lever v. State of Maharashtra, (2004) 9 SCC 438 (AIR 2004 SC 326)

relying upon the decision of this Court in

Purshottam H. Judge v. V.B. Potdar, : AIR 1966 SC 856 (1966) 2 SCR 353

held that the word "instrument" would include award made by the Industrial Tribunal. It is thus clear that notwithstanding the Desai and Shastri Awards and the subsequent settlements the members of the Employees Association are entitled to avail the benefit conferred upon them for payment of gratuity under the provisions of the Act. The employees cannot be deprived of their valuable statutory right conferred upon them to receive payment of gratuity.

19. It is nobody's dispute that the Payment of Gratuity Act, 1972 is a beneficial legislation. Therefore the Act should be liberally construed and even if two interpretations are permissible, that which furthers the beneficial object should be preferred. Reference maybe made to the decisions of the Apex Court in Allahabad Bank's Case (2009 AIR SCW 7667) (supra) para 17 which read as follows:

17. Krishna Iyer J., in

Som Prakash Rekhi v. Union of India; 1 (1981)1 SCC 449 : 1981 SCC (L&S) 200 (AIR 1981 SC 212)

stated that principle in his inimitable style that a benignant provision must receive a benignant construction and, even if two interpretations are permissible, that which furthers the beneficial object should be preferred. It has been further observed: (SCC pp. 483-84, para 66) (p. 233, para 67 of AIR).

66. We live in a welfare State in a "socialist" republic, under a Constitution with profound concern for the weaker classes including worker (Part IV). Welfare benefits such as pensions, payment of provident fund and gratuity are in fulfillment of the directive principles. The payment of gratuity or provident fund should not occasion any deduction from the pension as a "set-off. Otherwise, the solemn statutory provisions ensuring provident fund and gratuity become illusory. Pensions are paid out of regard for past meritorious services. The root of gratuity and the foundation of provident fund are different. Each one is a salutary benefaction statutorily guaranteed independently of the other. Even assuming that by private treaty parties had otherwise agreed to deductions before the coming into force of these beneficial enactments they cannot now be depravatory. It is precisely to guard against such mischief that the non-obstante and overriding provisions are engrafted on these statutes.

20. The Apex Court in

Dr. Ashok Kumar Maheshwari v. State of U.P. and another, : AIR 1998 SC 966

held that:--

20. The basic principle is that the plea of estoppel cannot be raised to defeat the provisions of a statute. (See

G.H.C. Ariff v. Jadunath Majumdar Bahaduri) (: AIR 1931 PC 79)

Mathra Parshad & Sons v. State of Punjab; (: AIR 1962 SC 745)

Rishabh Kumar & Sons v. State of U.P. (: AIR 1987 SC 1576)

21. This principle was reiterated in Union of India v. R.C. D' Souza where a retired army officer was recruited as Assistant Commandant on temporary basis and was called upon to exercise his option for regularisation contrary to the statutory rules. It was held that it would not amount to estoppel against the Department.

The Apex Court again in

M/s. Mathra Parshad & Sons v. State of Punjab & Ors., : AIR 1962 SC 745

held that:

4. Two contentions were raised in the forefront before the High Court, by the appellants. The first was that the Punjab Tobacco Vend Fees Act had pro tanto repealed the East Punjab General Sales Tax Act, and that Sales tax on manufactured tobacco could not be levied after April 1, 1954. The second was that the State Government by its assurance in the Press Note of August, 1954, had estopped itself from reversing its policy and claiming the sales tax up to the date of the notification. These points were not seriously pressed upon us, because there can be two taxes on the same commodity or goods without the one law repealing the other. No repeal can be implied, unless there is an express repeal of an earlier Act by the later Act or unless the two Acts cannot stand together. The first argument was, therefore, rightly rejected in the High Court. The second argument is also without force. There can be no estoppel against a statute, if the law requires that a certain tax be collected it cannot be given up, and any assurance that it would not be collected, would not bind the State Government, whenever it chose to collect it.

21. Dr. O.D.V. Ladia, learned counsel appearing for respondent No. 1 also referred to the decision of the Apex Court in State of Punjab and others v. The Labour Court, Jullundur and others, AIR 1879 SC 1981 (para 3) which read as follows:

3. In this appeal, the learned Additional Solicitor-General contends on behalf of the appellant that the Payment of Gratuity Act, 1972 cannot be invoked by the respondents because the Project does not fall within the scope of Section 1(3) of that Act. Section 1(3) provides that the Act will apply to;

(a) every factory, mine, oilfield, plantation, port and railway company;

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

(c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf.

According to the parties, it is Clause (b) alone which needs to be considered for deciding whether the Act applies to the Project. The Labour Court has held that the Project is an establishment within the meaning of the Payment of Wages Act, Section 2(ii)(g) of which defines an "industrial establishment" to mean an "establishment" in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or the supply of water, or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on," it is urged for the appellant that the Payment of Wages Act is not an enactment contemplated by Section 1(3)(b) of the Payment of Gratuity Act. The Payment of Wages Act, it is pointed out, is a central enactment and Section 1(3)(b) . it is said, refers to a law enacted by the State Legislature. We are unable to accept the contention. Section 1(3)(b) speaks of "any law for the time being in force in relation to shops and establishments in a State." There can be no dispute that the Payment of Wages Act is in force in the State of Punjab, Then it is submitted the Payment of Wages Act is not a law in relation to "shop and establishments". As to that, the Payment of Wages Act is a statute which, while it may not relate to shops, relates to a class of establishments, that is to; say; industrial establishments. But it is contended, the law referred to u/s 1(3) (b) must be a law which relates to both shops and establishments, such as the Punjab Shops & Commercial Establishments Act, 1958, it is difficult to accept that contention because there is no warrant for so limiting the meaning of the expression law" in Section 1(3)(b) . The expression is comprehensive in its scope, and can mean, a law in relation to shops as well, as, separately, a law in relation to establishments, or a law in relation to shops and commercial establishments and a law in relation to non-commercial establishments. Had Section (3)(b) intended to refer to a single enactment, surely the appellant would have been able to point to such a statute, that is to say, a statute relating to shops and establishments, both commercial and non-commercial. The Punjab Shops & Commercial Establishments Act does not relate to all kinds of establishments. Besides shops, it relates to commercial establishments alone. Had the intention of Parliament been, when enacting Section 1(3)(b) - to refer to a law relating to commercial establishments, it would not have left the expression: "establishments" unqualified. We have carefully examined the various provisions of the Payment of Gratuity Act. and we are unable to discern any reason for giving the limited meaning to Section 1(3)(b) urged before us on behalf of the appellant. Section 1(3)(b) applies to every establishment within

the meaning of any law for the time being in force in relation to establishments in a State. Such an establishment would include an industrial establishment within the meaning of Section 2(ii)(g) of the Payment of Wages Act.

22. Mr. N.D Chullai, learned Sr. counsel appearing for the respondent strenuously contended that if the Court held that the provisions of Payment of Gratuity Act, 1972 are applicable to the (MECOFED) it would open floodgates of cases. It is trite that only because there is possibility floodgate of litigations, the doors of the Courts of Justice cannot be closed. It would be suffice to refer to 3(three) decisions of the Apex Court:

(i)

Guruvayoor Devaswom Managing Committee and another v. C.K. Rajan and others, (2003) 7 SCC 546 (AIR 2004 SC 561). (para 69)

69. It is trite that only because floodgates of cases will be opened, by itself may not be (sic a) ground to close the doors of Courts of justice. The doors of the Courts must be kept open but the. Court cannot shut its eyes to the ground realities while entertaining a public interest litigation,

(ii)

Coal India Ltd. and others v. Saroj Kumar Mishra (2007) 9 SCC 625 (AIR 2007 SC 1706) (para 19) (para 23 of AIR)

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19. The floodgate argument also does not appeal to us. The same appears to be an argument of desperation. Only because there is a possibility of floodgate litigation, a valuable right of a citizen cannot be permitted to be taken away. This Court is bound to determine the respective rights of the parties.

(iii)

N. Kannadasan v. Ajoy Khose and others (2009) 7 SCC 1

127. Mr. Venugopal would submit that such an interpretation would open a floodgate. We do not think so. We even wish no occasion like the present one arises in future before the superior Courts for their consideration. Even otherwise, the floodgate argument does not appeal to us. In

Coal India Ltd. v. Saroj Kumar Mishra (: AIR 2007 SC 1706) 37

this Court held (SCC P. 632, para 19) (para 23 of AIR).

23. For the following reasons, this Court has no alternative except: to quash the impugned order dated 30-5-2012 and held that the Payment of Gratuity Act, 1972 applies to MECOFED and accordingly the impugned order dated 30-5-2012 is hereby quashed. In the result the respondents are directed to pay the gratuity to the petitioners by determining the amount of gratuity in the manner provided

u/s 7 of the Payment of Gratuity Act, 1972 within a period of 4(four) months from the date of receipt of the applications for gratuity to be filed by the petitioners. With the above observations and directions, this writ petition is allowed.