

**HIGH COURT OF ORISSA: CUTTACK****W.P.(C) No.6890 of 2012**

In the matter of an application under Articles 226 and 227 of the Constitution of India.

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Indian Red Cross Society,  
Orissa State, Red Cross Bhawan,  
Bhubaneswar, represented through its  
Honorary Secretary

... Petitioner

-Versus-

Bankanidhi Mishra,  
aged about 63 years,  
S/o. Late Banchhanidhi Mishra,  
Village/PO- Bali, Dist: Cuttack

... Opp. Party

For Petitioner : M/s. Santanu K. Sarangi,  
B.K. Behera & A.K. Nayak

For Opp. Party : Manoj Kumar Mishra,  
Sr. Advocate  
M/s.P.K. Das, D.K. Pattnaik,  
M.K. Rajguru, B.K. Mishra,  
J.K. Mohapatra, D. Tripathy,  
T. Mishra & D.P. Das

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*P R E S E N T:*

**THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA**

Date of Judgment: 15.03.2013

**B.N. Mahapatra, J.** This writ petition has been filed with a prayer for quashing the order dated 29.11.2010 (Annexure-2) passed by the Controlling Authority under Payment of Gratuity Act-cum-Asst. Labour Commissioner, Cuttack in P.G. Case No.23 of 2009 allowing the claim of opposite party in part and directing the Honorary Secretary, Indian Red Cross Society, Orissa State Branch, Bhubaneswar to deposit Rs.3,00,000/- before the said Court along with 10% interest per annum

within 30 days from receipt of the order for onward disbursement to the applicant as per Section 7(3) of the Payment of Gratuity Act, 1972 (for short, "Act, 1972") and also the execution proceeding initiated under Annexure-3 dated 30.12.2011.

2. Petitioner's case in a nut-shell is that the petitioner-society was constituted by an Act of Parliament, 1920 and it is neither a registered society under the Societies Registration Act, 1860 nor a Co-operative Society. Opposite party is a doctor employed in Blood Bank. On 31.10.1977, the opposite party entered into service as Medical Officer. He was appointed as Director, Central Red Cross, Blood Bank, Cuttack on 31.05.2006. He retired from service on attaining the age of superannuation on 31.05.2007. He was paid Rs.50,000/- towards retiral benefit, gratuity etc. as per Clause 28 (a) of the Service Rules, 2001. Petitioner's claim is that his last drawn salary was Rs.21,545/- per month and considering his length of service of 28 years he is entitled to get a sum of Rs.3,48,034/- against payment of Rs.50,000/- towards gratuity. Since his representation with regard to higher gratuity was not considered by the authorities, he moved the Controlling Authority-cum-Asst. Labour Commissioner, Cuttack in P.G. Case No.23 of 2009 under the Act, 1972 and the Controlling Authority passed the impugned order allowing the claim of the petitioner by granting Rs.3,50,000/- towards gratuity. Hence, the writ petition.

3. Mr. S.K. Sarangi, learned counsel appearing for the petitioner submitted that the petitioner does not come under the Act, 1972 since it is not a factory, mine, oil field, plantation, port and railway company as provided under Section 1(3)(a) of the Act, 1972. It is not a shop or establishment as defined under Section 1(3)(b) of the Act, 1972. It is also not an establishment/establishments as notified by the Central Government under Section 1(3)(c) of the Act, 1972. Referring to Sections 2(8) and 2(19) of the Orissa Shops and Commercial Establishments Act, 1956, it was submitted that “establishment” means a shop or a commercial establishment and “shop” means any premises where any trade or business is carried on or where services are rendered to customers respectively. The petitioner-society has already paid a sum of Rs.50,000/- towards full and final settlement of gratuity as per Rule 28(a) of the Indian Red Cross Society, Orissa State Branch (Recruitment & Conditions of Service) Rules, 2001 (for short, “Rules, 2001”) framed by the petitioner-society which came into effect from 05.11.2001. The term ‘employee’ has been defined under Section 2(e) of the Act, 1972. The term ‘employer’ has also been defined under Section 2(f) of the Act, 1972. It is further submitted that the applicant was a Director (Chief Executive under Class-I Officer) of Central Red Cross Society, Blood Bank and does not come within the ambit of “employee” under the Act. He retired on 31.05.2007. His services were governed by the Rules, 2001 framed by the petitioner-Indian Red Cross Society. The provisions of the Act, 1972 are not attracted. The Controlling Authority is not justified to bring the

petitioner under the fold of Section 1(3)(c) of the Act, 1972. Blood is a necessary ingredient of the medical treatment upon which the life and death of a patient depends. The tests conducted in the Blood Bank are in the nature of excluding some diseases which are carried by blood and unless such tests are conducted, donors' blood can neither be accepted nor the contaminated blood can be issued. Therefore, the activities of blood test can neither be termed as test in order to earn profit nor the same is commercial in nature. Apart from the voluntary donors, blood is collected from willing donors on payment of certain amount. The same is generated through sale of Blood to different patients. In addition to this, donors are also given food after donating blood and those expenses are met out of the sale of Blood. Thus, the finding of learned Controlling Authority is erroneous and not sustainable in law. Getting exemption under Section 5 of the Act, 1972 from the Central Government is not at all necessary in view of self contained Rules of the petitioner which prescribes the limit of gratuity. The entire finding of the Controlling Authority is based on surmises and relied on extraneous matter. Therefore, the same is not sustainable in law. The certificate proceeding initiated pursuant to the order of the learned Controlling Authority vide Certificate Case No.551 of 2011, which is pending in the Court of Special Certificate Officer, Bhubaneswar to enforce the said order is also not equally sustainable in law. Concluding his argument, Mr. Sarangi prays to allow the writ petition in the interest of justice and equity.

4. Per contra, Mr. M.K. Mishra, learned Senior Advocate appearing for opposite party submitted that the present writ petition is not maintainable as there is statutory alternative remedy available to the petitioner. The impugned order has been passed on 29.11.2010. The period of limitation for appeal under Section 7(7) of the Act, 1972 is 60 days. The order having not been challenged before the appropriate forum within the period of limitation it has attained finality. The petitioner has also participated in the certificate proceedings bearing Certificate Case No.551 of 2011 filed by opposite party which is pending in the Court of Special Certificate Officer, Bhubaneswar. The petitioner cannot challenge the certificate proceedings having accepted the order and not preferred any appeal against the same. The petitioner's action in challenging the order by way of the present writ petition after one and a half years suffers from the well established principles of waivers, acquiescence and estoppels. Applicability of the Rules for exempting the petitioner from the Act is dependent upon two essential conditions as envisaged under Section 5 of the Act, 1972. The first requirement under Section 5 of the Act, 1972 is that the establishment must obtain exemption from the appropriate government and there must be a notification to that effect. The second requirement is that the gratuity payable under the Rules should not be less favourable than the benefit conferred under the statute. The Rules, 2001 framed by the petitioner are deficient on both counts. It is also not the case of the petitioner that the establishment is exempted under Section 5 of the said Act. Since the

society is not exempted under Section 5 of the Act, 1972 the Act has full application to the petitioner-society. Section 4 of the Act, 1972 enumerates that an employee is entitled to get his gratuity subject to maximum of Rs.3,50,000/-. The said benefit cannot be taken away by limiting the entitlement to Rs.50,000/- only. No rule can be framed and made applicable to the employees which is less favourable in comparison to what one is entitled under the statute. Statutory entitlement cannot be curtailed by any rules framed by the employer.

In support of his contention, Mr. Mishra places strong reliance upon the decisions of the Hon'ble Supreme Court in the cases of *Municipal Corporation of Delhi vs. Dharam Prakash Sharma and another*, (1998) 7 SCC 221, *Allahabad Bank vs. All India Allahabad Bank Retired Employees Association*, AIR 2009 SCW 7667 and judgment of this Court in the case of *Paradeep Port Trust vs. A. Controlling Authority & Others*, 110 (2010) CLT 338.

5. Mr. Mishra, further submitted that definitions under Section 1(3)(b) and (c) are wide enough to include all establishments in which more than 10 employees are employed. Undisputedly, more than 40 employees are employed in the petitioner's establishment. Section 1(3)(b) of the Act, 1972 includes all shops and establishments. Section 2(8) of the Orissa Shops and Commercial Establishments Act, 1956 defines "establishment" as shop or a commercial establishment. Section 2(19) of the Act defines "shop" as any premises where any trade or business is carried on or where service are rendered to

customers. The definition provided under Sections 2(8) and 2(19) of the Orissa Shops and Commercial Establishments Act, 1956 are wide enough to include all premises where any transaction is carried on. Opposite party comes within the definition of “employee” under Section 2(e) of the Act, 1972. Rule 3(b) of the Rules, 2001 defines “employee” as all persons employed by the society. The petitioner is involved in commercial activities. It sells blood, conducts different types of medical/pathological tests/ examinations where testing fees and service charges are collected from the customers. When the opposite party retired in the year 2007, over Rs.3 crores of fixed deposit was available with the petitioner establishment.

Placing reliance upon the judgment of Gujarat High Court in the case of *Indian Red Cross Society vs. Vidyaben H. Vyas*, (2004) ILLJ 802 Guj, it is submitted that the Indian Red Cross Society is a shop or establishment under the Act, 1972 and is liable to pay gratuity.

6. It is further submitted that some of the petitioner’s employees preferred appeal under Section 4 of the Act, 1972 claiming gratuity. Order was passed for payment of gratuity. The petitioner in those cases had complied with the orders and paid gratuity under the Act, 1972. The opposite party is now old and physically disabled. After retirement, he is suffering by running from pillar to post and is being denied of his statutory post-retiral dues. No pension is provided by the petitioner to opposite party. The opposite party is solely dependent on the gratuity amount for his living. Concluding his argument, Mr. Mishra,

learned counsel for the opposite party prayed for dismissal of the present writ petition.

7. On the rival legal and factual contentions advanced by the parties, the following questions fall for consideration by this Court:

- (i) Whether the Indian Red Cross Society is an establishment as per definition in any law operating in the State?
- (ii) Whether the provision of Payment of Gratuity Act, 1972 is applicable to the employees of Indian Red Cross Society?
- (iii) Whether the entitlement of an employee under the Payment of Gratuity Act, 1972 can be curtailed by Rules, 2001 framed by the petitioner-Indian Red Cross Society?
- (iv) What order ?

8. Since question Nos.(i) and (ii) are interlinked, they are dealt with together.

9. In the present writ petition, the petitioner is Indian Red Cross Society. On 31.10.1977, opposite party entered into service as Medical Officer. He was appointed as Director, Central Red Cross Society, Blood Bank, Cuttack on 31.05.2006. He retired from service on attaining the age of superannuation w.e.f. 31.05.2007. He has served more than 28 years of continuous service. His last drawn salary was Rs.21,545/- per month. As per the Rules, 2001 framed by the petitioner-society, opposite party was paid gratuity amount of Rs.50,000/- as against the claim of Rs.3,48,034/-. In the impugned order at paragraph 14, the Controlling Authority taking into



consideration the evidence available on record has stated that the organization is also involved in some commercial activities. It sells blood, conducts different types of Medical/Pathological tests/examination where testing fees and service charges are collected from the customers. Accordingly, it is held that petitioner establishment is coming within the meaning of Section 1(3)(b) of the Act, 1972.

Case of petitioner is that it is a Society which is purely a non profit making voluntary organization, as such, it is not a factory mine etc. as defined under Section 1(3)(a) of the Act, 1972. Further contention of the petitioner is that it is not an establishment as defined under Section 1(3)(b) of the said Act nor it is an establishment as provided under Section 1(3)(c) of the said Act. It is further submitted that the petitioner-Society has its own set up rules namely, Rules, 2001. In terms of Rule 28(a) of the said Rules, 2001, all the employees are entitled to get maximum amount of Rs.50,000.00 towards retiral benefits.

10. At this juncture, it is necessary to know what is the meaning of “gratuity”.

The term “Gratuity” as observed by the Hon’ble Supreme Court in its etymological sense, means a gift, especially for services rendered or return for favours received. (See *Delhi Cloth and General Mills Co. Ltd. vs. Its Workmen and others*, AIR 1970 SC 919). The

general principle underlying the gratuity scheme is that by their length of service, workmen are entitled to claim a certain amount as a retiral benefit. (See *Indian Hume Pipes Co. Ltd. vs. Its Workmen and another*, AIR 1960 SC 251). Gratuity has to be considered to be an amount paid connected with any consideration and not resting upon it, and has to be considered something given freely or without recompense. It does not have foundation on any legal liability, but upon a bounty steaming from appreciation and graciousness. Long service carries with its expectation of an appreciation from the employer and a gracious financial assistance to tide over post retrieval difficulties. (See *Administrator, Shree Jagannath Temple, Puri vs. Jagannath Padhi and others*, 1991 (II) OLR-251).

11. To deal with the issue involved in the present case, it is necessary to extract Sub-sections (3) (a), (b) and (c) of Section 1, Sub-sections (1) and (2) of Section 4 and Sub-sections (7) and (8) of Section 7 of the Act, 1972.

“Section 1 xx xx xx

(3) It shall apply to-

(a) every factory, mine, oil field, 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 in this behalf;

(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.”

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“Section 4   xx                   xx                   xx

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

(a) on his superannuation, or

(b) on his retirement or resignation, or (c) on his death or disablement due to accident or disease:

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

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

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

4(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.

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”.

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“7(7) Any person aggrieved by an order under sub-Section (4) may, within sixty days from the date of receipt of the order, prefer an appeal to the appropriate Government or such other authority as may be specified by the appropriate Government in this behalf :

Provided that the appropriate Government or the appellate authority, as the case may be, may, if it is satisfied that the appellant was prevented by sufficient cause from preferring the appeal within the said period of sixty days, extend the said period by a further period of sixty days:

Provided further that no appeal by an employer shall be admitted unless at the time of preferring the appeal, the appellant either produces a certificate of the Controlling Authority to the effect that the appellant has deposited with him an amount equal to the amount of gratuity required to be deposited under sub-section (4) or deposits with the appellate authority such amount.

7(8) The appropriate Government or the appellate authority, as the case may be, may, after giving the parties to the appeal a reasonable opportunity of being heard, confirm, modify or reverse the decision of the Controlling Authority.”

12. The term “establishment” has not been defined under the Act, 1972. Section 1(3)(b) of the said Act makes it clear that it applies to every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishment in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months.

13. In the case of ***State of Punjab vs. The Labour Court, Jullundur***, AIR 1979 SC 1981, the Hon'ble Supreme Court while interpreting Section 1(3) of the Act, 1972 has observed that Section 1(3)(b) of the said Act applies to 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.

Thus, the Hon'ble Supreme Court held that the establishment having a wide meaning which includes commercial establishment as well non commercial establishments and no limited meaning can be given to the word 'establishment' which has been referred to in Section 1(3)(b) of the Act, 1972.

14. This Court in the case of *Administrator, Shree Jagannath Temple, Puri (supra)* has held as under:

"4. According to the Compact Edition of the Oxford English Dictionary, Volume I, Page 897 (Reprinted 1972), "establishment" means a public institution; a school; factory; a house of business etc. In 1851, D. Wilson in Preh Ann (1863) II. Iv. i. 192 referred to "the religious establishment founded at loan". "Establishment" also has been defined to be the ecclesiastical system established by law. As observed by the Allahabad High Court in 1986 (53) FLR 227 : Municipal Board v. Appellate Authority and Addl. L.C. to which reference was made by this Court in Executive Officer, Puri Municipality's case (supra), the definition of establishment is very wide, and keeping in view the objective of the Act, it was held that the same is applicable to the retired persons of municipalities. Keeping in view the laudatory objects of the Act, and the same being a part of the social justice, this Court observed that the legislation was to be applied liberally and a wider meaning was to be given."

15. In the case of ***The Executive Officer, Puri Municipality (in all) vs. Rama Naik and others***, 1991 (1) OLR 175, this Court has held that the Act, 1972 is not restricted to only commercial establishments, but to establishments within the meaning of any law for the time being in force in relation to establishments in a State.

16. The Gujarat High Court in the case of ***Vidyaben H. Vyas (supra)***, has held as under:

“11. Similar question has been raised before the Punjab and Haryana High Court to effect that whether Indian Red Cross Society is an ‘Industry’ or nor within the meaning of Section 2(j) of the Industrial Disputes Act, 1947. Punjab and Haryana High Court has taken the decision in case of INDIAN RED CROSS V. ADDITIONAL LABOUR COURT, CHANDIGARH & OTHERS 1994 (3) LLJ (SUPPL.) 919. The relevant discussion made in paragraph 6 is quoted as under:

“As already observed, the said case dealt with the State Activities and not with the activities of the institutions which are statutory or companies. In the present case, the society is a corporate body like a registered company. In Bangalore Water Supply’s case 1978 (52) F.J.R. 197, it has been held by the Supreme Court that the term ‘industry’ as defined in Section 2(j) of the Act has a wide import. According to the Supreme Court in the said case, whether there is : (i) systematic activity, (ii) organized by co-operation between employer and employee (the direct and substantial element is chimerical), (iii) for the production and/or distribution of goods and services calculated to satisfy human wants and wishes (not spiritual or religious but inclusive of material things or services geared to celestial bliss, e.g., making, on a large scale, Prasad or food) prima facie, there is an ‘industry’ in that enterprise. If the organization is a trade or business it does not cease to be one because of philanthropy animating the undertaking. Applying the said tests, it was held that (i) professions, (ii) clubs, (iii) educational institutions, co-operatives, (iv) research institutes,

(v) charitable projects, and (vi) other kindred adventures, if they fulfil the triple test listed above, cannot be exempted from the scope of Section 2(j). In view of this authoritative pronouncement, it could not be successfully argued that the society is not an industry within the meaning of Section 2(j) of the Act.

12. While considering Section 1(3)(b) of the Payment of Gratuity Act, whether the word 'commercial' which has been used in the said provision; it only covered the 'commercial' establishments' or 'non-commercial establishment' or 'charitable institutions' or not, the said question has been examined by the Madras High Court in the case of MANAGEMENT OF GOOD SAMARITAN RURAL DEVELOPMENT PROJECT V. T.A. RAMAIAH & OTHERS, 2003(I) CLR 3, wherein, the Madras High Court has held the Hospital to be an 'establishment' to which Payment of Gratuity Act applies. The relevant discussion made in paragraph 9 is quoted as under:

"A careful perusal of the order passed by the appellate authority would reveal that it had not only traced the facts and circumstances encircling the whole case, but also would go through each and every ground of appeal and based on such facts and the position of law, would analyze the controlling authority's order and decision and the manner in which it has been arrived at and would take up two points for its consideration, viz., (i) whether the Payment of Gratuity Act will not apply to the appellant hospital ? and (ii) whether, in any event, the reasonable amount of gratuity would be Rs.6,473 on the basis of basic pay of Rs.1850 and dearness allowance of Rs.279 per month ? Taking up the issue one by one and applying the facts with the position of law as it is prescribed under section 1(3)(b) of the Payment of Gratuity Act and remarking that the establishment is covered by the Minimum Wages Act, 1948, and since the hospital is an 'establishment' within the meaning of section 1(3)(b) of the Payment of Gratuity Act, 1972, and remarking that there is no distinction made between both these Acts, pertaining to the meaning of 'establishment' and further there is no classification made under the law between an institution which is run on commercial basis and a

majority institution which is run on the charitable basis so far as the applicability of the Act is concerned. Therefore, for the first point framed, the appellate authority would arrive at the conclusion holding that the eye hospital run by the management falls within the meaning of section 1(3)(b) of the Payment of Gratuity Act, 1972.”

17. The object of the Act, 1972 is to achieve social justice. Therefore, a liberal interpretation and wider meaning has to be given while interpreting the word ‘establishment’.

18. In view of the above, the petitioner-Indian Red Cross Society, Orissa Branch comes within the meaning of ‘establishment’ and the provisions of the Act, 1972 is applicable to it. Accordingly, questions Nos.(i) and (ii) are answered.


19. Question No.(iii) is as to whether the entitlement of an employee under the Act, 1972 can be curtailed by Rules, 2001 framed by the petitioner-Indian Red Cross Society.

20. No rule can be framed by the employer and made applicable to the employees which is less favourable in comparison to what an employee gets under the Act, 1972.

21. The Hon’ble Supreme Court in the case of ***Municipal Corpn. of Delhi v. Dharam Prakash Sharma***, (1998) 7 SCC 221 has held as under:-

“2. The short question that arises for consideration is whether an employee of the MCD would be entitled to payment of gratuity under the Payment of Gratuity Act when the MCD itself has adopted the provisions of the CCS (Pension) Rules, 1972 (hereinafter referred to as “the Pension Rules”), whereunder there is a provision both for payment of pension as well as of gratuity. The contention of the



learned counsel appearing for the appellant in this Court is that the payment of pension and gratuity under the Pension Rules is a package by itself and once that package is made applicable to the employees of the MCD, the provisions of payment of gratuity under the Payment of Gratuity Act cannot be held applicable. We have examined carefully the provisions of the Pension Rules as well as the provisions of the Payment of Gratuity Act. The Payment of Gratuity Act being a special provision for payment of gratuity, unless there is any provision therein which excludes its applicability to an employee who is otherwise governed by the provisions of the Pension Rules, it is not possible for us to hold that the respondent is not entitled to the gratuity under the Payment of Gratuity Act. The only provision which was pointed out is the definition of "employee" in Section 2(e) which excludes the employees of the Central Government and State Governments receiving pension and gratuity under the Pension Rules but not an employee of the MCD. The MCD employee, therefore, would be entitled to the payment of gratuity under the Payment of Gratuity Act. 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 <sup>223</sup> 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 under Section 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.”

22. The Hon’ble Supreme Court in the case of *All India Allahabad Bank Retired Employees Association (supra)*, has held as under:

“21. Learned counsel for the appellant relying upon the decision of this Court in *Bank of India & Ors. V. P.O. Swarnakar & Ors.* 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 the 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 this Court observed that “those who accepted the ex-gratia payment or any other benefit under the Scheme, in our considered opinion, could not have resiled therefrom.” 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 ? The appellant being an establishment is under the statutory obligation to pay gratuity as provided for under Section 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 enactment or instrument or contract 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.”

23. The Hon'ble Supreme Court in the case of **Bakshish Singh vs. M/s. Darshan Engineering Works and others**, (1994) 1 SCC 9, has held as under:-

“27. It would thus be apparent both from its object as well as its provisions that the Act was placed on the statute book as a welfare measure to improve the service conditions of the employees. The provisions of the statute were applied uniformly throughout the country to all establishments covered by it. They applied to all employees drawing a monthly salary up to a particular limit in factories, shops and establishments etc. whether the employees were engaged to do any skilled, semi-skilled, unskilled, manual, supervisory, technical or clerical work. The provisions of the Act were thus meant for laying down gratuity as one of the minimal service conditions available to all employees covered by the Act. There is no provision in the Act for exempting any factory, shop etc. from the purview of the Act covered by it except those where, as pointed out above, the employees are in receipt of gratuity or pensionary benefits which are no less favourable than the benefit conferred under the Act. The payment of gratuity under the Act is thus obligatory being one of the minimum conditions of service. The non-compliance of the provisions of the Act is made an offence punishable with imprisonment or fine. It is settled law that the establishments which have no capacity to give to their workmen the minimum conditions of service prescribed by the Statute have no right to exist [vide *Bijay Cotton Mills Ltd. v. State of Ajmer*, *Crown Aluminium Works v. Workmen* and *U. Unichoyi v. State of Kerala*].”

24. For the reasons stated above, this Court is of the view that the statutory entitlement available to an employee cannot be curtailed by the petitioner by framing any Rules of its own. Hence, there is no infirmity and illegality in the impugned order passed under Annexure-2 warranting interference of this Court. Consequently, there

is also no illegality in the consequential order passed under Annexure-3.

25. In the result, the writ petition is dismissed.

No order as to costs.

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***B.N. Mahapatra, J.***

*Orissa High Court, Cuttack  
The 15<sup>th</sup> March, 2013/skj.*