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ALLAHABAD BANK & ANR.

v.

ALL INDIA ALLAHABAD BANK RETIRED EMPS. ASSN.
(Civil Appeal No. 1478 of 2004 etc.)

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DECEMBER 15, 2009 & JANUARY 29, 2010*

[B. SUDERSHAN REDDY AND R.M. LODHA, JJ.]

- Payment of Gratuity Act, 1972 – ss. 4, 4(5), 5 and 14 – Denial of gratuity – To the employees opting for pension in lieu of gratuity – Employer-Bank placing reliance on Awards and Bipartite Settlements – Held: Gratuity being a statutory right cannot be taken away except in accordance with provisions of the Act – Pension and gratuity are separate retiral benefits – Provisions of the Act prevail over other enactments, or instruments or contract so far as gratuity is concerned – Notwithstanding the Awards and Settlements, employees were entitled to gratuity – No exemption was granted to the employer-Bank from operation of the provisions of the Act – Waiver to the claim of gratuity on the part of employees also not established – The Controlling Authority neither had jurisdiction to decide nor was correct in deciding the question as regards comparative benefits between the pension scheme and the gratuity under the Act – Jurisdiction to decide such question is conferred on appropriate Government – An employee-establishment cannot decide this question for itself – For protection u/s. 4(5), the comparison is between gratuity under the Award/ Settlement/contract and the gratuity under the Act – Comparison cannot be between the pension scheme and gratuity under the Act – Service Law – Pension and Gratuity – Distinction between.*

Interpretation of Statute – Remedial / welfare / labour

*Ed: The Judgment dated 15.12.2009 is modified/clarified by order dated 29.1.2010.

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statutes – Interpretation of – Held: Such statutes should receive liberal construction having due regard to the directive principles of the State Policy, so as to secure the relief contemplated by the statute – Constitution of India, 1950 – Directive Principles.

The questions for consideration before this court were whether the retired employees of the appellant-Bank were entitled to payment of gratuity under the provisions of Payment of Gratuity Act, 1972, having opted for pensionary benefits in lieu of gratuity; and whether the Controlling Authority had jurisdiction to decide or rightly decided the question that the pension scheme offered by the Bank was more beneficial than the benefit of gratuity under Payment of Gratuity Act.

Dismissing the appeal preferred by the Bank and allowing the Writ Petitions preferred by the employees' Association, the Court

HELD: 1.1. Gratuity payable to an employee on the termination of his employment after rendering continuous service for not less than 5 years and on superannuation or retirement or resignation etc. being a statutory right cannot be taken away except in accordance with the provisions of Payment of Gratuity Act, 1972, whereunder an exemption from such payment may be granted only by the appropriate Government under Section 5 of the Act which itself is a conditional power. No exemption could be granted by any Government unless it is established that the employees are in receipt of gratuity or pension benefits which are more favourable than the benefits conferred under the Act. [Para 14] [174-G-H; 175-A-B]

1.2. Pensionary benefits or the retirement benefits as the case may be whether governed by a Scheme or Rules may be a package consisting of payment of pension as well as gratuity. Pensionary benefits may include

A payment of pension as well as gratuity. One does not
exclude the other. Only in cases where the gratuity
component in such pension schemes is in better terms
in comparison to that of what an employee may get under
the Payment of Gratuity Act, the Government may grant
B an exemption and relieve the employer from the statutory
obligation of payment of gratuity. Pension and gratuity
are separate retiral benefits and right to gratuity is a
statutory right. [Paras 16 and 17] [175-D-H]

C 1.3. It is not correct to say that under pension and/or
gratuity, in terms of Shastry/Desai Awards and/or
Bipartite Settlement on one hand and the gratuity payable
under the Act on the other, pensionary benefit was better
in terms and more favourable than the benefits conferred
under the Act. It is for the appropriate Government to form
D the requisite opinion that the employees were in receipt
of gratuity or pensionary benefits which were more
favourable than the benefits conferred under the Act and
therefore, the establishment must be exempted from the
operation of the provisions of the Act. The appellant-Bank
E having failed to obtain exemption from the operation of
the provisions of the Act cannot be permitted to raise this
plea. [Para 18] [178-F-H; 179-A-B]

F 1.4. No establishment can decide for itself that
employees in such establishments were in receipt of
gratuity or pensionary benefits not less favourable than
the benefits conferred under the Act. Sub-section (5) of
Section 4 protects the rights of an employee to receive
better terms of gratuity from its employer under any
Award or agreement or contract as the case may be.
G Admittedly the Scheme under which the employees of
the Bank received the pension was in lieu of gratuity.
There is no question of comparing the said Scheme and
arrive at any conclusion that what they have received was
much better in terms than the benefits conferred under
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the Act. Reliance upon sub-section (5) of Section 4 is therefore unsustainable. [Para 18] [179-A-C] A

1.5. 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. [Para 21] [180-G-H; 181-A-B] B C

1.6. Notwithstanding the Desai and Shastry 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. [Para 22] [181-C-D] D E

1.7. There is no material placed before the Court that the employees while opting for the pension scheme at the time of their superannuation/retirement either expressly or impliedly waived their statutory right to claim payment of gratuity under the provisions of the Act. [Para 23] [181-E-F] F

Som Prakash Rekhi vs. Union of India (1981) 1 SCC 449; *Sudhir Chandra Sarkar vs. Tata Iron and Steel Co. Ltd.* (1984) 3 SCC 369; *Union of India vs. All India Services Pensioners' Association and Anr.* (1988) 2 SCC 580; *Hindustan Lever and Anr. vs. State of Maharashtra and Anr.* (2004) 9 SCC 438; *Purshottam H. Judye vs. V.B. Poddar* H G

A (1966) 2 SCR 353, relied on.

DTC Retired Employees' Association and Ors. vs Delhi Transport Corporation and Ors. (2001) 6 SCC 61; *Beed District Central Coop. Bank Ltd. vs. State of Maharashtra and Ors.* (2006) 8 SCC 514; *Municipal Corporation Delhi vs. Dharam Prakash Sharma and Ors.* (1998) 7 SCC 221; *Workman of Metro Theatre, Bombay vs. Metro theatre Ltd. Bombay* (1981) 3 SCC 596; *Bank of India and Ors. vs. P.O. Swarnakar and Ors.* (2003) 2 SCC 721 – distinguished.

C 2. Remedial statutes, in contra distinction to penal statutes, are known as welfare, beneficent or social justice oriented legislations. Such welfare statutes always receive a liberal construction. They are required to be so construed so as to secure the relief contemplated by the statute. Labour and welfare legislation have to be broadly and liberally construed having due regard to the Directive Principles of State Policy. The Payment of Gratuity Act is undoubtedly one such welfare oriented legislation meant to confer certain benefits upon the employees working in various establishments in the country. [Para 11] [173-E-G]

F 3.1. The Act, nowhere confers any jurisdiction upon the Controlling Authority to deal with any issue under sub-section (5) of Section 4 as to whether the terms of gratuity payable under any Award or agreement or contract is more beneficial to employees than the one provided for payment of gratuity under the Act. This Court's order could not have conferred any such jurisdiction upon the Controlling Authority to decide any matter under sub-section (5) of Section 4, since the Parliament in its wisdom had chosen to confer such jurisdiction only upon the appropriate Government and that too for the purposes of considering to grant exemption from the operation of the provisions of the Act. [Para 27] [183-G-H; 184-A]

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3.2. Even on merits, the conclusions drawn by the Controlling Authority that the Pension Scheme (old) offered by the Bank is more beneficial since the amount of money, the pensioners got under the Pension Scheme is more than the amount that could have been received in the form of gratuity under the provisions of the Act, is unsustainable. The Controlling Authority failed to appreciate that sub-section (5) of Section 4 of the Act, protects the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer than the benefits conferred under the Act. The comparison, if any, could be only between the terms of gratuity under any award or agreement or contract and payment of gratuity payable to an employee under Section 4 of the Act. There can be no comparison between a Pension Scheme which does not provide for payment of any gratuity and right of an employee to receive payment of gratuity under the provisions of the Act. Viewed from any angle the order of the Controlling Authority is unsustainable. [Para 27] [184-B-E]

4. It is applicable to all the members of the Petitioner's Association/Pensioners in the respondent-Bank governed by the Pension Regulations (old) 1890 of the Bank as well as those pensioners who retired during the period 1.1.1986 to 31.10.1993. However, it is clarified that such of those officers of the Bank working prior to 1.7.1979 and have retired after coming into force of the said Act on 31st October, 1993, shall alone be entitled for the benefits. [Para 28 (as modified/clarified by order dated 29.1.2010)] [185-C-D]

Case Law Reference:

(1981) 1 SCC 449	Relied on.	Para 12
(1984) 3 SCC 369	Relied on.	Para 13

A	(1988) 2 SCC 580	Relied on.	Para 15
	(2001) 6 SCC 61	Distinguished.	Para 17
	(2006) 8 SCC 514	Distinguished.	Para 18
B	(1998) 7 SCC 221	Distinguished.	Para 19
	(1981) 3 SCC 596	Distinguished.	Para 20
	(2003) 2 SCC 721	Distinguished.	Para 21
C	(2004) 9 SCC 438	Relied on.	Para 22
	(1966) 2 SCR 353	Relied on.	Para 22

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- D From the Judgment & Order dated 13.11.2003 of the High Court of Allahabad, Lucknow Bench in Civil Misc. Writ Petition No. 1002 of 1989.

WITH

- E W.P. (C) Nos. 150 & 237 of 2007.

- P.P. Rao, Jitendra Sharma, Dhruv Mehta, Yashraj Singh Deora, Tanushree Mukherjee, Rama Arora, Sr. Manager (Law) (for K.L. Mehta & Co.), Shail Kumar Dwivedi, Vandana Mishra, Ashutosh Kr. Sharma, Manoj Kr. Dwivedi, B.K. Pal, P.N. Jha, D.S. Mahra for the appearing parties.

The Judgment of the Court was delivered by

- B. SUDERSHAN REDDY, J.** 1. All India Allahabad Bank Retired Employees Association (for short 'Association') filed a writ petition invoking the original jurisdiction of the Allahabad High Court under Article 226 of the Constitution of India with a prayer to issue a writ of mandamus directing the appellant bank herein to pay gratuity to the members of its Association under the Payment of Gratuity Act, 1972 (for short 'the said Act'). The

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High Court on due consideration of the matter declared that the retired employees of the appellant bank were entitled to the benefit of gratuity under the said Act and accordingly directed the payment of gratuity within the time specified in the judgment. The said judgment of the Allahabad High Court is impugned in this appeal.

2. A short question that arises for our consideration in this appeal is as to whether the retired employees of appellant bank are entitled to payment of gratuity under the provisions of the said Act?

3. The retired employees of the appellant bank having formed an association which includes officers and subordinate staff sent a legal notice to the appellant bank on 27.11.1988 requiring it to release the amount of gratuity to its members in accordance with the provisions of the said Act. The case set up by the Association was that its members were being illegally deprived of their statutory right to receive gratuity under the provisions of the Act on the pretext that they had opted for pensionary benefits in lieu of gratuity. It appears that on behalf of the Association applications were sent to the competent authority in the prescribed proforma for payment of gratuity in response to which the appellant bank made its stand explicitly clear that it was not possible to make payment of gratuity in addition to pension. Since the whole cause of action is based on the response of the appellant bank dated 10.01.1989, it would be appropriate to notice the same in its entirety.

"Ref. No. Admn./5/0280

Date: January 10,1989

The General Secretary
All India Allahabad Bank Retired
Employees Association,
Central Office, Ram Bhawan,
C-1254B, Sector-A,

A Mahanagar, Lucknow.

Dear Sir,

Payment of Gratuity

B This has reference to your letter Bank/14/8 dated 14.11.1988 and enclosures.

C In this connection, we have to advise that Allahabad Bank has accepted contributory Provident Fund Scheme, which is not available to Government employees. Besides this, the Bank has a Pension Scheme in which an employee/officer may exercise option letter for Pension or Gratuity; but the dual benefits are not available under the scheme. Since the respective pensioners have exercised their option voluntarily for availing of pension in lieu of D Gratuity on their retirement from the bank's service, they are not eligible for gratuity at all. They are receiving pension since their retirement and as such we are not in a position to accede to your request for payment of gratuity in addition to pension to the persons named in your letter E under reference.

Yours faithfully,

Sd/-

(R.K. Nath)

Chief Manager (P.A.)"

F 4. 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 G 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 Shastri Award and Deasai Award and subsequent settlements under which employees were entitled either to the benefit of H

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pension or benefit of gratuity at one's own option but not both. A
The Bank took a specific stand that the members of the
Association had voluntarily opted for 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 B
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 C
which, admittedly, are better in terms as found by various
Awards that pensionary scheme was really more advantageous
to the employees than that of the gratuity.

5. We may at this stage notice that appellant bank did not
succeed in its attempt to get the bank exempted from the D
operations of provisions of the Act.

6. Before advertng to the question as to whether the
retired employees of the bank are entitled to payment of any
gratuity, it may be just and necessary to notice the objects and E
reasons and the scheme of the Act. It was realised that there
was no Central Act to regulate the payment of gratuity to
industrial workers, except the Working Journalists (Conditions
of Service) and Miscellaneous Provisions Act, 1955. The
Government of Kerala enacted legislation for payment of F
gratuity to workers employed in factories, plantations, shops
and establishments. The West Bengal enacted an Ordinance
on 3.6.1971 prescribing a similar scheme of gratuity. Gratuity
was also being paid by some employers to their workers under
Awards and agreements. Since the enactment of the Kerala G
and the West Bengal Acts, some other State Governments
have also voiced their intention of enacting similar measures
in their respective States. It is under those circumstances the
Union Government realised that it has become necessary, to
have a Central law on the subject so as to ensure a uniform H

- A pattern of payment of gratuity to the employees through out 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' Conference, where
- B Central legislation on payment of gratuity was felt a necessity.

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

- C “(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

- D (c) on his death or disablement due to accident or disease.”

- E 8. The expression “employee” is defined in Section 2 (e) of the Act as any person (other than 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
- F bank is an establishment and an employer within the meaning of the provisions of the Act. 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,
- G 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
- H affected by the decision to be taken and the exemption itself

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is subject to the conditions mentioned in the provisions of the Act namely that employee or 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.

9. A plain reading of the provisions referred to herein above 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.

10. Notwithstanding the subsequent improvements and embellishments the stand taken by the 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.

11. We shall proceed to examine the point urged by the learned counsel for the appellant. Remedial statutes, in contra distinction to penal statutes, are known as welfare, beneficent or social justice oriented legislations. Such welfare statutes always receive a liberal construction. They are required to be so construed so as to secure the relief contemplated by the statute. It is well settled and needs no restatement at our hands that labour and welfare legislations have to be broadly and liberally construed having due regard to the Directive Principles of State Policy. The Act with which we are concerned for the present is undoubtedly one such welfare oriented legislation meant to confer certain benefits upon the employees working in various establishments in the country.

12. Krishna Iyer, J in *Som Prakash Rekhi vs. Union of India*¹ stated the principle in his inimitable style that benignant provision must receive a benignant construction and, even if two interpretations are permissible, that which furthers the

- A beneficial object should be preferred. It has been further observed: "We live in a welfare State, in a "socialist" republic, under a Constitution with profound concern for the weaker classes including workers (Part IV). *Welfare benefits such as pensions, payment of provident fund and gratuity are in fulfilment 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.
- C 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."

13. Interpreting the provisions of the said Act this Court in *Sudhir Chandra Sarkar vs. Tata Iron and Steel Co. Ltd.*²
- E observed that pension and gratuity coupled with contributory provident fund are well recognised retiral benefits governed by various statutes. These statutes are legislative responses to the developing notions of the fair and humane conditions of work, being the promise of Part IV of the Constitution. It was
- F observed: "the fundamental principle underlying gratuity is that it is a retirement benefit for long service as a provision for old age. Demands of social security and social justice made it necessary to provide for payment of gratuity. On the enactment of Payment of Gratuity Act, 1972 a statutory liability was cast
- G on the employer to pay gratuity."

14. Gratuity payable to an employee on the termination of his employment after rendering continuous service for not less than 5 years and on superannuation or retirement or resignation etc. being a statutory right cannot be taken away except in
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accordance with the provisions of the Act whereunder an exemption from such payment may be granted only by the appropriate Government under Section 5 of the Act which itself is a conditional power. No exemption could be granted by any Government unless it is established that the employees are in receipt of gratuity or pension benefits which are more favourable than the benefits conferred under the Act.

15. In *Union of India Vs All India Services Pensioners' Association And Another*,³ this Court explained that there is always a distinction between the pension payable on retirement and the gratuity payable on retirement. "While pension is payable periodically as long as the pensioner is alive, gratuity is ordinarily paid only once on retirement." No decision of this Court which has taken a view contrary to the decisions referred to herein above has been brought to our notice.

16. In our considered opinion pensionary benefits or the retirement benefits as the case may be whether governed by a Scheme or Rules may be a package consisting of payment of pension and as well as gratuity. Pensionary benefits may include payment of pension as well as gratuity. One does not exclude the other. Only in cases where the gratuity component in such pension schemes is in better terms in comparison to that of what an employee may get under the Payment of Gratuity Act the government may grant an exemption and relieve the employer from the statutory obligation of payment of gratuity.

17. In the result, we find merit in the submissions made by the learned senior counsel, Shri P.P. Rao appearing for the Association that pension and gratuity are separate retiral benefits and right to gratuity is a statutory right. However, Shri Dhruv Mehta, learned counsel for the bank placed strong reliance on the decision rendered by this Court in *DTC Retired Employees' Association & Ors. Vs Delhi Transport Corporation & Ors.*,⁴ in support of his contention that the employees of the bank are not entitled to the twin benefits of

A payment of pension and as well as gratuity. In that case, Delhi Transport Corporation introduced the Pension Scheme for the first time on 27.11.1992, for its retired employees, as per which all employees of DTC retiring on or after 3.8.1981, were to be covered for the purpose of pensionary benefits. The existing employees at the relevant time and those who retired on or after 3.8.1981, were required to exercise their option for the Pension Scheme. The retired employees opting for the pension scheme were required to refund the employer's share of provident fund received by them with interest thereon. Those employees, who joined the service on 27.11.1992, and thereafter, had no option but to be compulsorily covered under the Pension Scheme. This Court found that the employees therein received gratuity at the time of their exit from the service and subsequently opted for pension which had never been a part of their service conditions. It is under those circumstances, this Court took the view that it was a condition precedent that in order to get the benefit of the Pension Scheme, they were required to refund the gratuity received by them at the time of retirement. It was clear that at the time of receipt of gratuity they were not entitled to get pension. The employees have opted for payment of pension only after the introduction of the Scheme for the first time. *DTC* (*supra*), in our considered opinion, is not an authority for the proposition that an employee who receives the pension is not entitled to the payment of any gratuity. This decision is of no assistance to the appellant.

F 18. Learned counsel for the appellant has strenuously contended that under the Old Pension Scheme of the Bank, only two terminal benefits namely, Contributory Provident Fund and either gratuity or pension were required to be paid to the employees of the bank and not both. The bank in view of the Awards, circulars and statutory regulations is not under any legal obligation to pay gratuity as a third retiral benefit. The submission was that ever since the Payment of Gratuity Act came into force in 1972, no employee was paid both pension and gratuity till 1995, when the Pension Regulations came into

force. It is the case of the bank that the optional scheme of A
pension prevalent at the relevant time was a better mode of
payment and therefore was a better form of retiral benefit within
the meaning of Section 4 (5) of the Act. In this regard, he relied
on the decision of this Court in *Beed District Central Coop.*
*Bank Ltd. vs. State of Maharashtra & Ors.*⁵ In that case a policy B
decision was taken by the bank to extend the benefit of better
rate of gratuity to a large number of its employees and a
scheme was accordingly formulated to the effect that such of
those employees who were on its roll on and from 1.12.1975,
the rate of gratuity was to be calculated on one month's salary C
for every completed year of service with ceiling limit of 20
months salary. It was operative from 1975 to 19.7.1996. The
employees of the bank accepted the scheme and availed the
benefit thereof. Thereafter the scheme was amended providing
for payment of gratuity at the rate of 26 days' salary for every D
completed year of service with a ceiling limit of Rs. 1.7 lakhs
which was operative from May, 1994 to September, 1997. Yet
again, a scheme was floated raising the ceiling limit of Rs. 1.7
lakhs to Rs. 2.50 lakhs. The employees retired during the
currency of the scheme formulated by the bank were offered E
gratuity in terms whereof the ceiling limit was fixed at Rs. 1.7
lakhs and Rs. 2.50 lakhs between the period 20.7.1996 and
30.11.1999 and the period 1.12.1999 to 17.1.2005,
respectively and the amount of gratuity so offered to them in
terms of the scheme was accepted. However, they raised a F
claim that they were entitled to the benefit of both the schemes
as also the ceiling limit fixed under the Amendment Act, 1998,
raising the ceiling limit to Rs. 3.50 lakhs. On the facts, this Court
framed a question for its consideration as to whether keeping
in view the provisions contained in sub-section (5) of Section G
4 of 1972 Act, the employees 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. We fail to appreciate as to how the said judgment
is of any relevance to resolve the question that arises for our H

A consideration in the present case. It is not the case of the bank that at the time of superannuation of the employees there was a scheme for payment of gratuity under which the employees were entitled to payment of gratuity and the said scheme in comparison to that of the provisions of the Act was more
B beneficial to the workmen. On the other hand, the scheme that was prevalent at the relevant time in clear and categorical terms provided that "the gratuity will not be payable in case where a pension is granted by the Bank. But if a pensioned officer should die before receiving any pension payments an
C aggregate sum at least equal to the gratuity which he would otherwise have received then the Bank will pay the difference between such aggregate sum and gratuity to the officer's widow; if any, otherwise to his legal representative." Be it noted that in the counter affidavit filed in the High Court the Bank
D placed reliance on Shastri and Desai Awards which have taken the view that Allahabad Bank which had pension scheme of its own was more advantageous than the provisions of the gratuity to its employees. It is asserted that under the said Awards and the subsequent settlements an employee entitled to receive
E either the benefit of pension or gratuity at his own option but not both. The contention was that such of those Employees who had voluntarily opted for pension scheme were not entitled to receive the gratuity as well. The respective comparative figures under pension and/or gratuity, in terms of Shastri/Desai Awards and/or Bipartite Settlement on one hand and the gratuity
F payable under the Act on the other were made available for the perusal of the Court to buttress the Bank's submission that what has been paid to the employees was better in terms and more favourable than the benefits conferred under the Act. The submission is totally devoid of any merit for more than one
G reason namely, that it is for the appropriate Government to form the requisite opinion that the employees were in receipt of gratuity or pensionary benefits which were more favourable than the benefits conferred under the Act and therefore, the establishment must be exempted from the operation of the
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provisions of the Act. The Bank having failed to obtain A
exemption from the operation of the provisions of the Act cannot
be permitted to raise this plea. No establishment can decide
for itself that employees in such establishments were in receipt
of gratuity or pensionary benefits not less favourable than the
benefits conferred under the Act. Sub-section (5) of Section 4 B
protects the rights of an employee to receive better terms of
gratuity from its employer under any Award or agreement or
contract as the case may be. Admittedly the Scheme under
which the employees of the Bank received the pension was in
lieu of gratuity. There is no question of comparing the said C
Scheme and arrive at any conclusion that what they have
received was much better in terms than the benefits conferred
under the Act. Reliance upon sub-section (5) of Section 4 is
therefore unsustainable.

19. This Court in *Municipal Corporation Delhi vs. Dharam D*
Prakash Sharma & Ors.,⁶ observed: "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 E
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 F
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 G
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 H

A *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.

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20. The decision in the case of *Workman of Metro Theatre, Bombay vs. Metro theatre Ltd., Bombay*⁷ in which this Court took the view that on true construction the expression 'Award' occurring in sub-section (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.

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21. Learned counsel for the appellant relying upon the decision of this Court in *Bank of India & Ors. vs. P.O. Swamakar & Ors.*⁸ 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

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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.

22. This Court in *Hindustan Lever and Anr. vs. State of Maharashtra & Anr.*⁹ relying upon the decision of this Court in *Purshottam H. Judye vs. V.B. Poddar*¹⁰ 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.

23. There is no material placed before us that the employees while opting for the pension scheme at the time of their superannuation/retirement either expressly or impliedly waived their statutory right to claim payment of gratuity under the provisions of the Act. In the circumstances we find no merit in the submission made by the learned counsel for the appellant in this regard. For the aforesaid reasons we find no merit in the appeal.

24. During the pendency of the appeal this Court by its order dated 22.3.2006 directed the parties to appear before the Controlling Authority and the Controlling Authority was required to decide as to whether the benefits under the Allahabad Bank Employees Pension Scheme (Old) are more beneficial in comparison to that of the payment of Gratuity under the provisions of the Act. Following is the order passed by this Court:

A “Though the order of the High Court speaks about the benefit of gratuity under the Payment of Gratuity Act, 1972 and a better Scheme, it does not indicate as to who is the Authority to decide which one of the schemes is better. According to the Bank, the employees concerned had

B accepted the particular Scheme which had the option of either the pension or the gratuity. It is pointed out that there was no challenge to the legality of the arrangement made or the Scheme itself. On the other hand, Mr. Trivedi, learned counsel for respondent no. 1 submits that whether

C the Scheme is better is relatable to the benefits available under the Act and nothing beyond it. The High Court has come to an abrupt conclusion that a Statute overrides an agreement. There was no plea in this regard in the writ petition. Be that as it may, we permit the parties to appear

D before the controlling authority who shall take a decision within three months. The parties are given liberty to produce copy of the order before the controlling authority so that it can fix a date for hearing.

E The parties are permitted to take all stands which are being raised in the present appeal. The matter shall be listed after four months.”

25. The Controlling Authority held that the amount received by the employees under the said Scheme is much more than what they could have received under the Act. The benefits according to the Controlling Authority available under the Scheme are more beneficial than the gratuity payable under the Act.

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26. Being aggrieved by the order of the Controlling Authority two writ petitions were filed, one by All India Allahabad Bank Retired Employees Association and the other by the Allahabad Bank Retirees' Association challenging the validity of the order of the Controlling Authority dated 25.9.2006.

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27. Section 2 (d) of the Act defines Controlling Authority as an authority appointed by the appropriate Government under Section 3 of the Act. Under Section 3 the Controlling Authority is made responsible for the administration of the Act and it further provides for appointment of different authorities for different areas. Section 7 deals with for determination of the amount of gratuity. Every person who is eligible for payment of gratuity under the Act is required to send a written application to the employer in the prescribed form for payment of such gratuity. Sub-section (2) of Section 7 provides once the gratuity becomes payable, the employer shall, whether an application 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 and arrange to pay the amount of gratuity to the person to whom the gratuity is payable. The Scheme envisaged under Section 7 of the Act, is that in case of any dispute to the amount of gratuity payable to an employee under the Act or as to the admissibility of any claim of, or in relation to, an employee payable to gratuity etc. the employer is required to deposit with the Controlling Authority the admitted amount payable as gratuity. In case of any dispute parties may make an application to the Controlling Authority for deciding the dispute who after due inquiry and after giving the parties to the dispute, a reasonable opportunity of being heard, determine the matter or matters in dispute and if, as result of such inquiry any amount is found to be payable to the employee, the Controlling Authority shall direct the employer to pay such amount to the employee. Sub-section (7) of Section 7, provides for an appeal against the order of the Controlling Authority. The Act, nowhere confers any jurisdiction upon the Controlling Authority to deal with any issue under sub-section (5) of Section 4 as to whether the terms of gratuity payable under any Award or agreement or contract is more beneficial to employees than the one provided for payment of gratuity under the Act. This Court's order could not have conferred any such jurisdiction

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- A upon the Controlling Authority to decide any matter under sub-section (5) of Section 4, since the Parliament in its wisdom had chosen to confer such jurisdiction only upon the appropriate Government and that too for the purposes of considering to grant exemption from the operation of the provisions of the Act.
- B Even on merits the conclusions drawn by the Controlling Authority that the Pension Scheme (old) offered by the Bank is more beneficial since the amount of money the pensioners got under the Pension Scheme is more than the amount that could have been received in the form of gratuity under the provisions of the Act is unsustainable. The Controlling Authority failed to appreciate that sub-section (5) of Section 4 of the Act, protects the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer than the benefits conferred under the Act. The comparison, if any, could be only between the terms of gratuity under any award or agreement or contract and payment of gratuity payable to an employee under Section 4 of the Act. There can be no comparison between a Pension Scheme which does not provide for payment of any gratuity and right of an employee to receive payment of gratuity under the provisions of the Act.
- D Viewed from any angle the order of the Controlling Authority is unsustainable. The order is liable to be set aside and the same is accordingly set aside.

28. However, the judgment of ours is applicable to only such of those employees/workmen who retired from the service between 1.1.1986 and 31.10.1992.

29. In the result, the appeal preferred by the bank is dismissed with costs quantified at Rs. 25,000/- and the writ petitions are allowed without any order as to costs.

K.K.T. Appeal dismissed and writ petitions allowed.

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ORDER

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(Dated 29.1.1.2010)

In

I.A. No. 6

In

Civil Appeal No. 1478 of 2004.

B

We have heard learned counsel for the petitioner as well as learned counsel appearing for the Bank.

Paragraph 28 of the Judgment shall now read as under:

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“Judgment is, however, applicable to all the members of the Petitioner’s Association/Pensioners in the respondent-Bank governed by the Pension Regulations (old) 1890 of the Bank as well as those pensioners who retired during the period 1.1.1986 to 31.10.1993.

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It is made clear that such of the those officers of the Bank working prior to 1.7.1979 and have retired after coming into force of the said Act on 31st October, 1993, shall alone be entitled for the benefits.

I.A. Is disposed of accordingly.

K.K.T.

I.A. disposed of.