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IN THE HIGH COURT OF ORISSA, CUTTACK

W.P.(C) No.20160 of 2019

The Sr. Branch Manager, the
National Small Industries
Corporation Ltd., Bhubaneswar
and another ..... Petitioners

-Versus-

The Deputy Chief Labour
Commissioner (Central),
Bhubaneswar-cum-the
Appellate Authority and
others ..... Opp. Parties

For Petitioners : Mr. P.K. Jena, Advocate

For Opp. Party No.3 : Mr. R.D. Sarkar, Advocate

CORAM: JUSTICE SANJAY KUMAR MISHRA

Date of Hearing: 20.12.2023 Date of Judgment: 15.03.2024

S.K. Mishra, J. The Writ Petition has been preferred by the Employer-Corporation challenging the Order dated 12.11.2018 passed by the Controlling Authority-cum-Assistant Labour Commissioner (C), Bhubaneswar under Payment of Gratuity Act, 1972 (shortly, "P.G. Act" 1972) in Application Case No.36(03)/2018-B.III

(Annexure-2). Vide the said order a direction was given to the Petitioners-Employer to pay the Opposite Party No.3 an amount of Rs.10,00,000/- along with simple interest @ 10% per annum for the period from 01.12.2016 till the date of payment. The said order being confirmed by the Order dated 26.09.2019 (Annexure-1) passed by the Appellate Authority under the P.G. Act, 1972 & Deputy Chief Labour Commissioner (Central), Bhubaneswar, is also under challenge.

2. The background facts, as detailed in the Writ Petition, are that the Opposite Party No.3 joined on 10.03.1981 as Lower Division Clerk (LDC) in the National Small Industries Corporation Ltd. at the Sub-Office, Patna, in the State of Bihar under the control of Regional Office, Kolkata of the Corporation. Thereafter, he was promoted from time to time. At the time of retirement, he was working as Manager, Sub-Branch, Balasore. On attaining the age of superannuation, the Opposite Party No.3 was superannuated from service w.e.f. 30.11.2016.

3. While working as Manager in the Sub-Branch of the Corporation at Bhubaneswar, just before his retirement, a disciplinary proceeding was contemplated against the Opposite Party No.3 by the Zonal General Manager (East) vide Order dated

24.08.2016. The Opposite Party No.3 was placed under suspension with immediate effect in terms of rule 4 of National Small Industries Corporation Limited (Control and Appeal Rules, 1968), shortly, "NSIC Ltd (C & A Rules, 1968)". On 24.11.2016, by order of the Disciplinary Authority i.e. the ZGM-SG (East), it was proposed to hold an enquiry against the Opposite Party No.3 under rule 8 of the NSIC Ltd (C & A Rules, 1968). The Opposite Party No.3 was directed to submit his written statement of defence so also to state as to whether he desires to be heard in person.

4. In response to the said charge-sheet, the Opposite Party No.3, by submitting his statement of defence dated 03.04.2017, denied the charges. Thereafter, the Disciplinary Authority, vide Order dated 12.09.2017, in exercise of power conferred under sub-rule (2) of rule 9 of the NSIC Ltd (C & A Rules, 1968), appointed an Enquiry Officer to enquire into the charges framed against the Opposite Party No.3.

5. In spite of several intimation and service of notices, the Opposite Party No.3 did not cooperate in the said enquiry. Rather, he sent letters dated 13.12.2017 and 23.07.2017 to the Inquiry Officer indicating therein that he being a retired

employee of the Corporation cannot be proceeded against and the place of inquiry at New Delhi is against his wishes. In response to the said communication made by the Opposite Party No.3, the Inquiry Officer, vide Order dated 29.12.2017, recorded that rule 3 (3) of the NSIC Ltd (C & A Rules, 1968) is very clear on the subject as well as the rules and Policy of NSIC with regard to travel, lodging and boarding expenses and the charged employee intentionally and deliberately, showing ignorance of the same, writing so with the sole intention to delay the inquiry proceeding for indefinite period. In absence of the Opposite Party No.3, for his deliberate non-cooperation, the inquiry was proceeded ex-parte and finally, the same was concluded.

6. The Inquiry Officer submitted his report dated 20.02.2018 to the Disciplinary Authority with the finding that the charges laid down in Article of Charges I to VII are well proved against the Opposite Party No.3. The copy of the Inquiry Report was sent to the Opposite Party No.3 vide letter dated 20.02.2018 by the Disciplinary Authority providing him with an opportunity to submit his response to the said findings of the Inquiry Officer's Report, if any, within a period of fifteen days from the date of receipt of the said Report. The Opposite Party

No.3 duly received the copy of the said Report and chose not to submit any response to the findings given by the Inquiry Officer, though various letters were sent by him opposing to the place of enquiry, jurisdiction of NSIC, etc.

7. The Disciplinary Authority dealt with the points raised by the Opposite Party No.3 and was finally convinced that the inquiry was conducted as per the prescribed procedure. The charges being grave and serious in nature, putting investment of the Corporation at greater risk, it was held that the Opposite Party No.3 is liable for major penalty. Accordingly, it was ordered to dismiss him from service w.e.f. 30.11.2016 i.e. the date of his superannuation and to forfeit his retiral dues i.e. gratuity and encashment of leave. In the said Order, the Disciplinary Authority made it clear that the Appellate Authority in the said case would be the Board of Directors.

8. It is further case of the Petitioners-Corporation that in course of service of Opposite Party No.3 as Manager (B.D.) in the Branch Office of the Corporation at Salt Lake, Kolkata, regarding involvement in financial irregularities, FIR was lodged in Bidhan Nagar P.S. Case No.161/16 dated 26.07.2016 under sections 420/ 406/408/409/467/468 and 120-B of the IPC. Upon

investigation, charge sheet was submitted by the CID, West Bengal, on 28.04.2018 against the Opposite Party No.3 and others, who are facing criminal charges in the Special Court of Additional District Judge, Barasat, in Case No.157 of 2018. In the said case, the Opposite Party No.3 was arrested and subsequently released on bail.

9. Thereafter, he approached the High Court of West Bengal at Kolkata in W.P.(C) No.25663 of 2017 assailing the initiation of disciplinary proceeding at New Delhi. However, the Kolkata High Court not being inclined to entertain such Application, the Opposite Party No.3 did not press the Writ Petition and withdrew the case on 15.02.2018 with liberty to file the case before the appropriate forum.

10. Thereafter, the Opposite Party No.3 approached the Central Administrative Tribunal, Kolkata Bench vide O.A. No.382/2018, which was filed on 19.03.2018, challenging the legality of the disciplinary proceeding initiated against him. Ultimately, the Tribunal, vide Order dated 13.06.2019, disposed of the case by observing that no statutory Appeal has been preferred against the penalty imposed by the Disciplinary Authority. Accordingly, the Opposite Party No.3 was given liberty

to approach the Appellate Authority within four weeks from the date of receipt of the copy of the said Order, with a further direction to dispose of the said Appeal within a period of four weeks from the date of receipt of the said Order dated 13.06.2019. Liberty being so granted by the Tribunal, the Opposite Party No.3 preferred an Appeal before the Appellate Authority i.e. Board of NSIC, which is still pending for disposal.

11. When the matter stood thus, the Opposite Party No.3 approached the Controlling Authority under Payment of Gratuity Act, 1972 (present Opposite Party No.2) praying for release of the gratuity in his favour. The Petitioners-Corporation, being noticed, resisted the said prayer contending that the services of the Opposite Party No.3 were terminated for his involvement in financial irregularities amounting to Rs.173.50 crores. Hence, the Order of forfeiting gratuity by the Employer is justified. It was also contended before the Controlling Authority that when the matter regarding initiation of proceeding is pending before the Tribunal, any order passed by the Opposite Party No.2 (Controlling Authority) would lead to multiplicity of proceeding. Upon consideration of the materials on record and hearing the Parties, the Controlling Authority-Cum-Assistant Labour

Commissioner, Bhubaneswar, vide Order dated 12.11.2018 directed the Petitioners-Corporation to pay Rs.10.00 lacs with simple interest @ 10% per annum over the principal gratuity amount for the period from 01.12.2016 till the date of payment with a further direction to pay the said amount within a period of 30 days from the date of receipt of the said Order.

12. Being aggrieved by the said order dated 12.11.2018 passed by the Opposite Party No.2, the Petitioners-Corporation preferred P.G. Appeal No.36 (431)/2018-B.I. before the Opposite Party No.1. However, without application of mind to the facts and law involved in the case, the Opposite Party No.1 confirmed the order of the Opposite Party No.2 vide its Order dated 26.09.2019. Hence, this Writ Petition.

13. The Order passed by the Controlling Authority so also confirming Order passed by the Appellate Authority have been challenged basically on the following grounds:

i) The Petitioners-Corporation was justified to forfeit the gratuity of the Opposite Party No.3 as the Inquiry Officer submitted a report regarding fraud of Rs.173.50 Crores committed by the

accused persons, including the present Opposite Party No.3.

ii) The Opposite Party No.3 was very much in service while he was put under suspension on the allegation of financial irregularities. Only after service of charge sheet upon him on 24.11.2016, the Opposite Party No.3 was superannuated on 30.11.2016. In terms of rule 3(3) of the NSIC Ltd (C & A Rules, 1968), it will be deemed that the Opposite Party No.3 continued in service and the proceeding, which was instituted before his retirement, is allowed to be continued and concluded by the Authority after his retirement. So, the finding of the Authority under the P.G. Act, 1972 that such proceeding is technically not correct is untenable/ unsustainable in the eye of law.

iii) The Controlling Authority, so also Appellate Authority under the P.G. Act, 1972 have failed to appreciate that in course of departmental inquiry, several opportunities were provided to

the Opposite Party No.3 in order to defend himself. However, he chose not to participate in the said proceeding and was set ex-parte. Hence, the Disciplinary Authority has passed the Order rightly with regard to forfeiture of gratuity of the Opposite Party No.3.

iv) During pendency of the Appeal preferred by the Opposite Party No.3 before the Board of Directors, the impugned Orders have been passed without waiting for the outcome of the said Appeal, despite bringing the said fact to the notice of the Authorities under the P.G. Act, 1972.

v) The findings of the Opposite Parties about non-service of notice under the P.G. Act, 1972 on the issue of forfeiture of gratuity of Opposite Party No.3 is not sustainable in view of the settled position of law that technicality should not stand as a bar against dispensation of justice. Since the Opposite Party No.3 was given ample opportunity to safeguard his interest before the

Enquiry Officer on the allegation of huge financial irregularities, which culminated in the termination of the services so also forfeiture of gratuity of the Opposite Party No.3, the Opposite Party Nos.1 and 2 are not justified in passing the said impugned Orders.

vi) The view taken by the Appellate Authority under the Act, 1972 that after retirement, the Employer and employee relationship no more existed is incorrect in view of rule 3(3) of the NSIC Ltd. (C & A Rules, 1968) and the Opposite Party No.3 was deemed to have continued in service in view of the initiation of the departmental proceeding during his service tenure.

vii) The Opposite Party No.1 has misinterpreted the provision of section 14 of the P.G. Act, 1972, which categorically provides that the provision of the Act or any Rules made there under shall have effect notwithstanding anything inconsistent therewith, contained in any

enactment other than the Act or any instrument or contract having effect by virtue of any enactment other than the Act.

viii) Even though it was not possible to exactly quantify the amount of loss sustained by the Corporation for the negligence of the Opposite Party No.3, he may not be absolved from the charges on the ground that the criminal trial has not been concluded. Hence, the Opposite Party Nos. 1 and 2 should not have passed the Orders for release of gratuity of an amount of Rs.10,00,000/- with interest and the impugned Orders are unjustified and irrational.

14. Opposing to the prayer made in the Writ Petition, an affidavit-in-opposition has been filed by the Opposite Party No.3 stating therein that there is no infirmity in the impugned order dated 26th September, 2019 passed by the Appellate Authority in P.G. Appeal Case No.36(431)/2018-B.1 so also the Order dated 12th November, 2018 passed by the Controlling Authority in Application Case No.36(03)/2018-B.III. Apart from that, it has been stated in the said Affidavit

that in absence of conviction of the employee for an offence involving moral turpitude, a strict application of the said provision of the Act, 1972 does not disentitle the employee to receive gratuity amount. In the present case, the Employer held up the payment of gratuity in anticipation of the conviction likely to be awarded by the Special Criminal Court, which may lead to forfeiture of gratuity amount. It has further been averred in the said Affidavit that mere termination or dismissal of an employee concerned would not ipso facto constitute an offence involving moral turpitude to attract section 4(6)(b)(ii) of the Payment of Gratuity Act, 1972 and an Employer would have no jurisdiction to invoke the said provision to forfeit gratuity of an employee under the said Act, 1972. It has been further pleaded that no Show Cause for forfeiture of gratuity was issued at any point of time. Since the Opposite Party No.3 retired w.e.f. 30.11.2016 on attaining the age of superannuation, the relationship between the Employer and employee ceased from that date. Therefore, such act of Petitioners amount to violation of principles of natural justice.

15. Mr. Jena, learned Counsel for the Petitioners, reiterating the stand taken in the Writ Petition submitted, sub-section 6 of section 4 of P.G. Act, 1972 clearly provides for forfeiture of gratuity of an employee, whose services have been terminated for willful omission or negligence causing damage/loss or destruction of property belonging to the Employer to the extent of damage or loss so caused. He further submitted that during the course of enquiry, huge financial irregularity of Rs.173.50 crores was found to have been committed by the accused persons, including the Opposite Party No.3, to whom sufficient opportunity was given in order to defend his case. In spite of receiving notice and submission of reply, the Opposite Party No.-3 did not participate in the said proceeding for which he was rightly set ex-parte by the Inquiry Officer. He did not even prefer to submit any representation to the Disciplinary Authority after receiving the copy of the inquiry report, as a result of which the order of dismissal was passed vide which his gratuity as well as other after retiral dues were forfeited. Hence, it cannot be said that the Disciplinary Authority has passed the order in violation of principles of natural justice.

16. Mr. Jena further submitted, as per rule 3 (3) of Rules, 1968, since the Disciplinary Proceeding was instituted before his retirement, the Opposite Party No.3 is deemed to have continued in service and his dismissal from service and forfeiture of gratuity is justified. He further submitted that the Disciplinary Authority is competent to forfeit the Gratuity of Opposite Party No.3, who was provided opportunity by issuance of notice to participate in the departmental proceeding. Since the provisions under Rules, 1968 are not inconsistent with the provisions of P.G. Act and Rules made there under, no separate notice was required to be issued to Opposite Party No.3. He further submitted that both the Authorities under the Act, 1972 have failed to appreciate that when the order of dismissal and forfeiture of gratuity was passed by the Disciplinary Authority, the Opposite Party No.3 was informed that the Appellate Authority would be the Board of Directors. But the Opposite Party No.3 choose not to prefer any appeal in time. Rather, he challenged the order of the Disciplinary Authority before the Central Administrative Tribunal, which was not inclined to entertain the application, though liberty was given to him to approach the Appellate Authority of the Corporation vide order dated 13.06.2019. Though the

Opposite Party No.3 preferred an appeal against his termination and forfeiture of gratuity before the Board of Directors, NSIC, during pendency of the said Appeal, the Opposite Party No.1, without waiting for the outcome of the said Appeal, has passed the impugned order under Annexure-1, which is bad in the eye of law and deserves interference.

17. Mr. Jena further submitted that finding of the Opposite Party No.1 that after retirement, the Employer and employee relationship no more existed is incorrect in view of rule 3(3) of the Rules, 1968. The Opp. Party No.3 was deemed to be continuing in service in view of the initiation of the disciplinary proceeding during his service-tenure. He further submitted that Opposite Part No.1 has misinterpreted the Provision of section 14 of the P.G. Act, 1972.

18. Mr. Jena submitted that the Opposite Party Nos.1 and 2 have failed to appreciate that a criminal case has already been instituted during the service tenure of the Opposite Party No.3 and charge sheet has been submitted on 28.04.2018 before the trial Court against the Opposite Party No.3 and others and in the disciplinary proceeding, financial irregularities amounting to Rs.173.50 Crores was recorded. He further submitted that both

the authorities have failed to appreciate that it is not possible to exactly quantify the amount of loss sustained by the Corporation for the negligence of the Opposite Party No.3 at this stage and on that ground he cannot be absolved from the charges, as the criminal trial is yet to be concluded. Therefore, the Opposite Party Nos.1 and 2 should not have passed orders for release of gratuity amount of Rs.10,00,000/- with interest.

19. Relying on Judgments of the apex Court in **Chairman-cum-Managing Director, Mahanadi Coalfields Limited vs. Rabindranath Choubey**, reported in AIR 2020 SC 2978, Mr. Jena submitted that since the impugned orders have been passed by the Controlling Authority so also the Appellate Authority relying on the judgment passed by the apex Court in **Jaswant Singh Gill vs. Bharat Cooking Co. Ltd.**, reported in (2007) 1 SCC 663, which has been over ruled by the apex Court in **Rabindranath Choubey** (supra), both the said impugned orders/judgments deserve to be set aside.

20. Though no such stand has been taken in the writ petition, Mr. Jena further submitted that even though there is no such finding given by the Inquiry Officer, in view of the judgment of the apex Court in **Allahabad bank and others Vs. Deepak**

Kumar Bhola, reported in (1997) 4 SCC 1, the misconducts, which have been proved against the Opposite Party No.3, amount to moral turpitude. Hence, the Petitioners-Employer was also justified to impose the punishment of forfeiture of gratuity of the Opposite Party No.3.

21. Apart from reiterating the facts detailed in the Counter Affidavit, vide which most of the averments made in the Writ Petition have been denied, Mr. Sarkar, learned Counsel for Opposite Party No.3 submitted that in view of the settled position of law, so also pleadings and evidences on record, taking into account his total period of service, the Appellate Authority was justified in upholding the order of the Controlling Authority, wherein a direction was given to the Opposite Party/Employer (Petitioners herein) to pay the gratuity amount of Rs.10,00,000/- and also simple interest thereon @ 10% per annum for the period from 01.12.2016 till the date of actual payment. He further submitted that the Controlling Authority, while passing the order, has rightly observed that though there was certain fraudulent activity where the Officers of United Bank of India (UBI), Hazra Branch and Jadavpur Vidyapith Branch issued two bank

guarantees on the same number against the rules and the bank officials were arrested, nothing has been recovered from Opposite Party No.3. Hence, the question of wrongful gain and wilful loss, as alleged, does not arise. Therefore, no offence can be attributed to the Opposite Party No.3, thereby forfeiting his gratuity by way of punishment.

22. Mr. Sarkar further submitted that mere termination or dismissal of an employee concerned would not ipso facto constitute an offence involving moral turpitude to attract section 4(6)(b)(ii) of the Act, 1972, without any finding or observation made to the said effect and the Petitioners-Employer has no jurisdiction to invoke the said provision to forfeit the gratuity of his client under the Payment of Gratuity Act, 1972.

To counter the submission made by the learned Counsel for the Petitioners as to applicability of the judgment of the apex Court in **Rabindranath Choubey** (supra), Mr. Sarkar submitted that the facts and circumstances of the said case is different from the present case. That apart, the said Judgment has been delivered after the impugned orders were delivered by the Controlling Authority as well as the Appellate

Authority under the Act, 1972 and hence, will have prospective effect.

Mr. Sarkar further submitted that though in **Rabindranath Choubey** (supra) it was held that the Employer has a right to withhold the gratuity during pendency of the disciplinary proceeding, but no where it has been held or observed vide the said Judgment that gratuity can be forfeited without any notice, that to by way of punishment, in absence of any rules to the said effect to impose such punishment.

Mr. Sarkar also submitted, though the Administrative Tribunal gave a direction to deal with and dispose of the Appeal of the Opposite Party No.3 within a period of four month from the date of receipt of the order dated 13.06.2019, but the same was intentionally kept pending to debar the Opposite Party No.3 from getting the gratuity and to take a plea before the Authority concerned as to pendency of the said Appeal before the Appellate Authority i.e. Board of Directors. Relying on the order dated 17.01.2020, which has been filed by the Opposite Party No.3 along with his written notes, Mr. Jena submitted, the Appeal was rejected much after the period as directed by the Administrative

Tribunal during pendency of the present Writ Petition. Even though there is no such provision under rule 5 of the NSIC Ltd.(C & A Rules, 1968) to impose the punishment of forfeiture of gratuity and the Appellate Authority could have dealt with the said issue while dealing with the Appeal of the Opposite Party No.3, but have left the said issue unattended on the plea of pendency of the present Writ Petition.

23. To substantiate his submission, Mr. Sarkar relied on Judgments of the apex Court in **Union Bank of India and others vs. C.G. Ajay Babu and** others, reported in (2018) 9 SCC 529, in **Jaswant Singh Gill vs. Bharat Cooking Coal Ltd. and others**, reported in (2007) 1 SCC 663, **D.V. Kappor vs. Union of India and** others, reported in (1990) 4 SCC 314 and in **H. Gangahanume Gowda vs. Karnataka Agro Industries Corpn. Ltd.**, reported in (2003) 3 SCC 40. He also relied on the Judgment of the High Court of Karnataka in **Karnataka State Road Transport Corporation and another vs. Mahadev and others**, reported in **2009 III LLJ 90 Kant** and Judgment of the High Court of Judicature at Bombay in **The Chairman and Managing Director, Bank of**

Maharashtra and others vs. Shri Kishore and others, passed in W.P.(C) No.1572 of 2022 on 19.08.2022.

24. So far as the judgments cited by the learned Counsel for the Petitioners, in **Rabindranath Choubey** (supra) the apex Court, vide paragraphs-9, 9.2, 10.21, 10.30, 11 and 28 held as follows:

> *"9. Once it is held that a major penalty which includes the dismissal from service can be imposed,* ***even after the employee has attained the age of superannuation and/or was permitted to retire on attaining the age of superannuation, provided the disciplinary proceedings were initiated while the employee was in service, sub-section 6 of Section 4 of the Payment of Gratuity Act shall be attracted and the amount of gratuity can be withheld till the disciplinary proceedings are concluded****.*
>
> *9.2 It is required to be noted that in the present case the disciplinary proceedings were initiated against the respondent- employee for very serious allegations of misconduct alleging dishonestly causing coal stock shortages amounting to Rs.31.65 crores and thereby causing substantial loss to the employer.* ***Therefore, if such a charge is proved and punishment of dismissal is given thereon, the provisions of sub-section 6 of Section 4 of the Payment of Gratuity Act would be attracted and it would be within the discretion of the appellant-employer to forfeit the gratuity payable to the respondent. Therefore, the appellant- employer has a right to withhold the payment of gratuity during the pendency of the disciplinary proceedings****.*
>
> *10.21 In view of the various decisions of this Court and considering the provisions in rules in question,* ***it is apparent that the punishment which is prescribed under Rule 27 of the CDA Rules, minor as well as major, both can be imposed. Apart from that, recovery can also be made of***

the pecuniary loss caused as provided in Rule 34.3 of the CDA Rules, which takes care of the provision under sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972. The recovery is in addition to a punishment that can be imposed after attaining the age of superannuation. The legal fiction provided in Rules 34.2 of the CDA Rules of deemed continuation in service has to be given full effect.

10.30 In view of the various decisions, it is apparent that under Rule 34.2 of the CDA Rules inquiry can be held in the same manner as if the employee had continued in service and the appropriate major and minor punishment commensurate to guilt can be imposed including dismissal as provided in Rule 27 of the CDA Rules ***and apart from that in case pecuniary loss had been caused that can be recovered. Gratuity can be forfeited wholly or partially***.

11. In view of the above and for the reasons stated above and in view of the decision of three Judge Bench of this Court in Ram Lal Bhaskar (supra) and our conclusions as above, it is observed and held that ***(1) the appellant – employer has a right to withhold the gratuity during the pendency of the disciplinary proceedings, and (2) the disciplinary authority has powers to impose the penalty of dismissal/major penalty upon the respondent even after his attaining the age of superannuation, as the disciplinary proceedings were initiated while the employee was in service.***

Under the circumstances, the impugned judgment and order passed by the High Court cannot be sustained and the same deserves to be quashed and set aside and is accordingly hereby quashed and set aside and the order passed by the Controlling Authority is hereby restored. However, the appellant-employer is hereby directed to conclude the disciplinary proceedings at the earliest and within a period of four months from today and pass appropriate order in accordance with law and on merits and ***thereafter necessary consequences as per Section 4 of the Payment of Gratuity Act, 1972, more particularly sub-section (6) of Section 4 of the Gratuity Act and Rule 34.3 of the CDA Rules shall follow.*** *The present appeal is*

accordingly allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

28. Thus, according to me, where the disciplinary proceedings are instituted while the employee was in service but retired thereafter during its pendency, under the special procedure provided under Rule 34.2 of the Rules, 1978 the authority is empowered to continue and conclude the disciplinary inquiry in the same manner as if the employee had continued in service by deeming fiction, ***however, the relationship of employer and employee shall not be severed until conclusion of the disciplinary enquiry but may withhold payment of gratuity in terms of Rule 34.3 pending disciplinary inquiry and in furtherance thereof if later held guilty, the competent authority to the extent pecuniary loss has been caused for the misconduct, negligence in the discharge of duties order for recovery from gratuity either be forfeited in the whole or in part, to the extent pecuniary loss has been caused to the company for the offences/misconduct as a measure of penalty in terms of Rule 34.3 of the Rules read with sub-section (6) of Section 4 of the Act, 1972****."*

(Emphasis supplied)

25. In **Jaswant Singh Gill** (supra) which was partially overruled in **Rabindranath Choubey** (supra) the apex Court, vide paragraphs-7 and 10 to 14, held as follows:

"7. The short question which arises for consideration in this appeal is as to whether the provisions of the said Act shall prevail over the rules framed by Coal India Limited, holding company of Respondent No. 1, known as Coal India Executives' Conduct Discipline and Appeal Rules, 1978 (for short "the Rules"). Indisputably, the appellant was governed by the Rules. Rule 27 provides for the nature of penalties including 'recovering from pay or gratuity of the whole of or part of any pecuniary loss caused to the company by negligence or breach of orders or

trust'. Major penalties prescribed in Rule 27, however, include reduction to a lower grade, compulsory retirement, removal from service; and dismissal. Rule 34 provides for special procedure in certain cases stating:

> *"34.2 Disciplinary proceeding, if instituted while the employee was in service whether before his retirement or during his re-employment shall, after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service.*
>
> *34.3 During the pendency of the disciplinary proceedings, the Disciplinary Authority may withhold payment of gratuity, for ordering the recovery from gratuity of the whole or part of any pecuniary loss caused to the company if have been guilty of offences/ misconduct as mentioned in Sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972 or to have caused pecuniary loss to the company by misconduct or negligence, during his service including service rendered on deputation or on re-employment after retirement. However, the provisions of Section 7(3) and 7(3A) of the Payment of Gratuity Act, 1972 should be kept in view in the event of delayed payment, in the case the employee is fully exonerated."*

10. The provisions of the Act, therefore, must prevail over the Rules. ***Rule 27 of the Rules provides for recovery from gratuity only to the extent of loss caused to the company by negligence or breach of orders or trust. Penalties, however, must be imposed so long an employee remains in service. Even if a disciplinary proceeding was initiated prior to the attaining of the age of superannuation, in the event, the employee retires from service, the question of imposing a major penalty by removal or dismissal from service would not arise. Rule 34.2 no doubt provides for continuation of a disciplinary proceeding despite retirement of***

employee if the same was initiated before his retirement but the same would not mean that although he was permitted to retire and his services had not been extended for the said purpose, a major penalty in terms of Rule 27 can be imposed.

11. Power to withhold penalty (sic gratuity) contained in Rule 34.3 of the Rules must be subject to the provisions of the Act. Gratuity becomes payable as soon as the employee retires. The only condition therefor is rendition of five years continuous service.

12. A statutory right accrued, thus, cannot be impaired by reason of a rule which does not have the force of a statute. It will bear repetition to state that the Rules framed by Respondent No. 1 or its holding company are not statutory in nature. The Rules in any event do not provide for withholding of retrial benefits or gratuity.

13. The Act provides for a closely neat scheme providing for payment of gratuity. It is a complete code containing detailed provisions covering the essential provisions of a scheme for a gratuity. It not only creates a right to payment of gratuity but also lays down the principles for quantification thereof as also the conditions on which he may be denied therefrom. ***As noticed hereinbefore, sub-section (6) of Section 4 of the Act contains a non- obstante clause vis-a-vis sub-section (1) thereof. As by reason thereof, an accrued or vested right is sought to be taken away, the conditions laid down thereunder must be fulfilled. The provisions contained therein must, therefore, be scrupulously observed. Clause (a) of Sub-section (6) of Section 4 of the Act speaks of termination of service of an employee for any act, willful omission or negligence causing any damage. However, the amount liable to be forfeited would be only to the extent of damage or loss caused. The disciplinary authority has not quantified the loss or damage. It was not found that the damages or loss caused to Respondent No. 1 was more than the amount of gratuity payable to the appellant. Clause (b) of Sub-section (6) of Section 4 of the Act also provides for forfeiture of the whole amount of gratuity or part in the event his services had been terminated for his riotous or***

disorderly conduct or any other act of violence on his part or if he has been convicted for an offence involving moral turpitude. Conditions laid down therein are also not satisfied.

14. Termination of services for any of the causes enumerated in Sub- section (6) of Section 4 of the Act, therefore, is imperative.”

(Emphasis supplied)

26. In **Allahabad Bank** (supra) the apex Court, vide paragraphs-8 & 9, held as follows:

“8. *What is an offence involving "moral turpitude" must depend upon the facts of each case. But whatever may be the meaning which may be given to the term "moral turpitude" it appears to us that one of the most serious offences involving "moral turpitude" would be where a person employed in a banking company dealing with money of the general public, commits forgery and wrongfully withdraws money which he is not entitled to withdraw.*

9. This Court in Pawan Kumar vs. State of Haryana and another. (1996) 4 SCC 17 dealt with the question as to what is the meaning of expression "moral turpitude" and it was observed as follows:

> *"Moral turpitude" is an expression which is used in legal as also societal parlance to describe conduct which is inherently base, vile, depraved or having any connection showing depravity".*

This expression has been more elaborately explained in Baleshwar Singh vs. District Magistrate and Collector, Banaras, AIR 1959 all. 71 where it was observed as follows:

> *"The expression "moral turpitude' is not defined anywhere. But it means anything done contrary to justice, honesty, modesty or good morals. It implies depravity and weakness of*

> *character or disposition of the person charged with the particular conduct. Every false statement made by a person may not be moral turpitude, but it would be so if it discloses vileness or depravity in the doing of any private and social duty which a person owes to his fellowmen or to the society in general. If therefore the individual charged with a certain conduct owes a duty, either to another individual or to the society in general, to act in a specific manner or not to so act and he still acts contrary to it and does so knowingly, his conduct must be held to be due to vileness and depravity. It will be contrary to accepted customary rule and duty between man and man"*

27. So far as the judgment cited by the learned Counsel for the Opposite Party No.3 in **Union Bank of India** (Supra), the apex Court, vide Paragraph Nos.17 to 21, held as follows:

> *"17.* ***Though the learned counsel for the appellant Bank has contended that the conduct of the respondent employee, which leads to the framing of charges in the departmental proceedings involves moral turpitude, we are afraid the contention cannot be appreciated. It is not the conduct of a person involving moral turpitude that is required for forfeiture of gratuity but the conduct or the act should constitute an offence involving moral turpitude. To be an offence, the act should be made punishable under law. That is absolutely in the realm of criminal law. It is not for the Bank to decide whether an offence has been committed. It is for the court****. Apart from the disciplinary proceedings initiated by the appellant Bank, the Bank has not set the criminal law in motion either by registering an FIR or by filing a criminal complaint so as to establish that the misconduct leading to dismissal is an offence involving moral turpitude.*

Under sub-section (6)(b)(ii) of the Act, forfeiture of gratuity is permissible only if the termination of an employee is for any misconduct which constitutes an offence involving moral turpitude, and convicted accordingly by a court of competent jurisdiction.

18. In Jaswant Singh Gill v. Bharat Coking Coal Ltd. [Jaswant Singh Gill v. Bharat Coking Coal Ltd., (2007) 1 SCC 663 : (2007) 1 SCC (L&S) 584] , it has been held by this Court that forfeiture of gratuity either wholly or partially is permissible under sub-section (6)(b)(ii) only in the event that the termination is on account of riotous or disorderly conduct or any other act of violence or on account of an act constituting an offence involving moral turpitude when he is convicted. To quote para 13: (SCC p. 670)

xxx xxx xxx

"13. The Act provides for a close-knit scheme providing for payment of gratuity. It is a complete code containing detailed provisions covering the essential provisions of a scheme for a gratuity. It not only creates a right to payment of gratuity but also lays down the principles for quantification thereof as also the conditions on which he may be denied therefrom. As noticed hereinbefore, sub-section (6) of Section 4 of the Act contains a non obstante clause vis-à-vis sub-section (1) thereof. As by reason thereof, an accrued or vested right is sought to be taken away, the conditions laid down thereunder must be fulfilled. The provisions contained therein must, therefore, be scrupulously observed. Clause (a) of sub-section (6) of Section 4 of the Act speaks of termination of service of an employee for any act, wilful omission or negligence causing any damage. However, the amount liable to be forfeited would be only to the extent of damage or loss caused. The disciplinary authority has not quantified the loss or damage. It was not found that the damage or loss caused to Respondent 1 was more than the amount of gratuity payable to the appellant. Clause (b) of sub-section (6) of

> *Section 4 of the Act also provides for forfeiture of the whole amount of gratuity or part in the event his services had been terminated for his riotous or disorderly conduct or any other act of violence on his part or if he has been convicted for an offence involving moral turpitude. Conditions laid down therein are also not satisfied."*
>
> ***19. In the present case, there is no conviction of the respondent for the misconduct which according to the Bank is an offence involving moral turpitude. Hence, there is no justification for the forfeiture of gratuity on the ground stated in the order dated 20-4-2004 that the "misconduct proved against you amounts to acts involving moral turpitude". At the risk of redundancy, we may state that the requirement of the statute is not the proof of misconduct of acts involving moral turpitude but the acts should constitute an offence involving moral turpitude and such offence should be duly established in a court of law.***
>
> *20. That the Act must prevail over the Rules on Payment of Gratuity framed by the employer is also a settled position as per Jaswant Singh Gill. Therefore, the appellant cannot take recourse to its own Rules, ignoring the Act, for denying gratuity.*
>
> *21.* ***To sum up, forfeiture of gratuity is not automatic on dismissal from service; it is subject to sub-sections (5) and (6) of Section 4 of the Payment of Gratuity Act, 1972.***"
>
> ***(Emphasis supplied)***

28. In **D.V. Kappor vs. Union of India and** (supra) the apex Court, vide paragraph-10 held as follows:

> *"10. Rule 9 of the rules empowers the President only to with- hold or withdraw pension permanently or for a specified period in whole or in part or to order recovery of pecuniary loss caused to the State in whole or in part subject to minimum. The employee's right to pension is a statutory fight. The measure of*

deprivation therefore, must be correlative to or commensurate with the gravity of the grave misconduct or irregularity as it offends the right to assistance at the evening of his life as assured under Art. 41 of the Constitution. ***The impugned 'order discloses that the President withheld on permanent basis the payment of gratuity in addition to pension. The fight to gratuity is also a statutory right. The appellant was not charged with nor was given an opportunity that his gratuity would be withheld as a measure of punishment.*** *No provision of law has been brought to our notice under which, the President is empowered to withhold gratuity as well, after his retirement as a measure of punishment.* ***Therefore, the order to withhold the gratuity as a measure of penalty is obviously illegal and is devoid of jurisdiction****."*

(Emphasis supplied)

29. In **H. Gangahanume Gowda** (supra) the apex Court, vide paragraph-9, held as follows:

"9. *It is clear from what is extracted above from the order of learned Single Judge that interest on delayed payment of gratuity was denied only on the ground that there was doubt whether the appellant was entitled to gratuity, cash equivalent to leave etc., in view of divergent opinion of the courts during the pendency of enquiry. The learned Single Judge having held that the appellant was entitled for payment of gratuity was not right in denying the interest on the delayed payment of gratuity having due regard to Section 7(3A) of the Act.* ***It was not the case of the respondent that the delay in the payment of gratuity was due to the fault of the employee and that it had obtained permission in writing from the controlling authority for the delayed payment on that ground****. As noticed above, there is a clear mandate in the provisions of Section 7 to the employer for payment of gratuity within time and to pay interest on the delayed payment of gratuity. There is also provision to recover the amount of gratuity with compound interest in case amount of*

gratuity payable was not paid by the employer in terms of Section 8 of the Act. ***Since the employer did not satisfy the mandatory requirements of the proviso to Section 7(3A), no discretion was left to deny the interest to the appellant on belated payment of gratuity.*** *Unfortunately, the Division Bench of the High Court, having found that the appellant was entitled for interest, declined to interfere with the order of the learned Single Judge as regards the claim of interest on delayed payment of gratuity only on the ground that the discretion exercised by the learned Single Judge could not be said to be arbitrary. In the first place in the light of what is stated above, the learned Single Judge could not refuse the grant of interest exercising discretion as against the mandatory provisions contained in Section 7 of the Act. The Division Bench, in our opinion, committed an error in assuming that the learned Single Judge could exercise the discretion in the matter of awarding interest and that such a discretion exercised was not arbitrary."*

(Emphasis supplied)

30. In **Karnataka State Road Transport Corporation** (supra) the Karnataka High Court, vide paragraphs-3, 4 & 5, held as follows:

"3. A bare reading of the aforesaid provision of the Act discloses that the full amount of Gratuity can be forfeited, in the event the employee is convicted for an offence involving moral turpitude. ***In the absence of a conviction, of the respondent for an offence involving moral turpitude, a strict application for the said provision of the Act does not disentitle, the respondent to receive gratuity amount, and the petitioner was not justified in denying the gratuity to the respondent****.*

4. The observation of the Apex Court in JASWANT SING GILL –VS- BHARAT COOKING COAL LOTD & OTHERS reported in (2007) 1 SCC 663 while interpreting Sec.4(6)(b)(ii) of the Act in the circumstances is apposite:

"The Act provides for close-knit scheme providing for payment of gratuity. It is complete code containing detailed provisions covering the essential provisions of a scheme for a gratuity. It not only creates a right to payment of gratuity but also lays down the principles for quantification thereof as also the conditions on which he may be denied therefrom. As noticed hereinbefore, sub-section(6) of Section 4 of the Act contains a non obstante clause vis-à-vis sub section (1) thereof. As by reason thereof, an accrued or vested rights is sought to be taken away, the conditions laid down thereunder must be fulfilled. ***The provisions contained therein must, therefore, be scrupulously observed. Clause (a) of sub-section (6) of Section 4 of the Act speaks of termination of service of an employee for any act, willful omission*** *or negligence causing any damage.* ***However, the amount liable to be forfeited would be only to the extent of damage or loss caused. The disciplinary authority has not quantified the loss or damage.*** *It was not found that the damages or loss caused to respondent was more than the amount of gratuity payable to the appellant. Clause (b) of sub-section (6) of Section 4 of the Act also provides for forfeiture of the whole amount of gratuity or part in the event his services had been terminated for his riotous or disorderly conduct or any other act of violence on his part* ***or if he has been convicted for an offence involving moral turpitude****. Conditions laid down therein are also not satisfied."*

(emphasis supplied)

5. In the light of the aforesaid observations, an exception can be taken to the orders impugned of the controlling authority and the appellate authority, holding that the petitioner is liable to make payment of the entire sum of gratuity due and payable to the respondent under the Act."

(Emphasis supplied)

31. In **Chairman and Managing Director** (supra) the Bombay High Court, vide paragraphs-30 & 31, held as follows:

> *"30.* ***This Court is of the opinion that an employer cannot simply issue notice in Form-M to the employee rejecting claim for payment of gratuity. This has to be preceded by a show cause notice, because the gratuity amount to which the employee is otherwise entitled is to be forfeited, which is a drastic consequence for the employee****. Such a notice would enumerate the basis and extent of financial loss as claimed by the petitioner- employer, due to the alleged willful omission or negligence of the employee. An opportunity would also be available for the employee to contest the same, ensuring fairness of procedure. In the present case, admittedly show cause notice was not issued to the respondent No.1 before the said notice rejecting claim for payment of gratuity was directly issued to him under Form-M on 06/10/2012. The reason stated by the petitioner-employer in the said notice for forfeiting gratuity reads as follows:*
>
> > *"Reasons: - There is a loss to the Bank to the extent of Rs.69.72 lacs plus unapplied interest thereon on account of your misconduct."*
>
> *31. The said reason is not only cryptic, but there are no details as to on what basis, the petitioner-employer concluded that the respondent No.1 was responsible for loss to the extent of Rs.69.72 Lakhs plus unapplied interest thereon. The manner in which the petitioner-employer proceeded is clearly arbitrary, apart from being violative of the principles of natural justice. The petitioner-employer is not justified in referring to and relying upon the enquiry report, on the basis of which the respondent No.1 was compulsorily retired from service. An attempt was made on behalf of the petitioner-employer to refer to the contents of the enquiry report to contend that grave financial loss was caused due to the alleged willful negligence on*

the part of respondent No.1. It is found that on the basis of the conclusions rendered in the enquiry report, the respondent No.1 has already suffered the punishment of compulsory retirement. ***The respondent No.1 is justified in contending that even if the contents of the enquiry report are to be referred, it is recorded therein that due to the alleged negligence of the respondent No.1, certain loan amounts disbursed to individuals, could be only partially recovered or not recovered at all. But, there was no material on record to indicate as to what steps the petitioner-employer had taken for recovery of amounts from those individuals and after having taken any such steps, as to what was the extent of financial loss really caused to the petitioner-employer****."*

(Emphasis supplied)

32. So far as applicability of a Judgment, in **General Manager Uttaranchal Jal Sansthan vs. Laxmi Devi & others** reported in AIR 2009 SC 3121, vide paragraph Nos.23 & 24, it was held as follows.

"***23. Submission of the learned counsel for the respondents is that the said decision in Umadevi (3) case [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] is not applicable****:*

(a) as it was rendered in 2006 whereas the cause of action for filing the writ petition arose in 2002; and

(b) a distinction must be made between the appointment on ad hoc basis and appointment on compassionate ground.

24. ***As to the first submission above, it is worth mentioning that judicial decisions unless otherwise specified are retrospective. They would only be***

> ***prospective in nature if it has been provided therein***. *Such is clearly not the case in Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] . Accordingly, even though the cause of action would have arisen in 2002 but the decision of Umadevi (3) [(2006) 4 SCC 1 : 2006 SCC (L&S) 753] would squarely be applicable to the facts and circumstances of the case. Secondly, before a person can claim a status of a government servant not only his appointment must be made in terms of the recruitment rules, he must otherwise fulfil the criterion therefor. Appointment made in violation of the constitutional scheme is a nullity. Rendition of service for a long time, it is well known, does not confer permanency. It is furthermore not a mode of appointment."*
>
> ***(Emphasis supplied)***

33. Similarly, in **B.A. Linga Reddy Etc. Etc. Vs. Karnataka State Transport Authority** reported in 2015 AIR SCW 279 vide paragraph No.36, the apex Court held as follows:

> *"36. The view of the High Court in Ashrafulla (AIR 2002 SC 629) (supra) has been reversed by this Court. The decision is of retrospective operation, as it has not been laid down that it would operate prospectively; moreso, in the case of reversal of the judgment.* ***This Court in P.V.George and Ors. v. State of Kerala and Ors. [2007 (3) SCC 557 : (AIR 2007 SC 1034 in paras 19 and 29)] held that the law declared by a court will have a retrospective effect if not declared so specifically. Referring to Golak Nath v. State of Punjab [AIR 1967 SC 1643] it had also been observed that the power of prospective overruling is vested only in the Supreme Court and that too in constitutional matters***. *It was observed :*
>
> *"19. It may be true that when the doctrine of stare decisis is not adhered to,*

> *a change in the law may adversely affect the interest of the citizens.* ***The doctrine of prospective overruling although is applied to overcome such a situation, but then it must be stated expressly. The power must be exercised in the clearest possible term. The decisions of this Court are clear pointer thereto****.x x x x x*
>
> *29. Moreover, the judgment of the Full Bench has attained finality. The special leave petition has been dismissed. The subsequent Division Bench, therefore, could not have said as to whether the law declared by the Full Bench would have a prospective operation or not. The law declared by a court will have a retrospective effect if not otherwise stated to be so specifically. The Full Bench having not said so, the subsequent Division Bench did not have the jurisdiction in that behalf."*
>
> (***Emphasis supplied***)

34. So far as the doctrine of per incuriam, in **Madhya Pradesh Road Development Authority and another Vs. L.G. Chaudhary Engineers and Contractors,** reported in (2012) 3 SCC 495, the apex Court vide paragraph Nos.26 to 34 held as follows.

> "*26. It is clear, therefore, that in view of the aforesaid finding of a coordinate Bench of this Court on the distinct features of an Arbitral Tribunal under the said M.P. Act in Anshuman Shukla case [(2008) 7 SCC 487] the provisions of the M.P. Act are saved under Section 2(4) of the AC Act, 1996.* ***This Court while rendering the decision in Va Tech [(2011) 13 SCC 261] has not either noticed the previous***

decision of the coordinate Bench of this Court in Anshuman Shukla [(2008) 7 SCC 487] or the provisions of Section 2(4) of the AC Act, 1996. Therefore, we are constrained to hold that the decision of this Court in Va Tech [(2011) 13 SCC 261] was rendered per incuriam*.*

27. This was the only point argued before us by the learned counsel for the appellant.

28. The principle of per incuriam has been very succinctly formulated by the Court of Appeal in Young v. Bristol Aeroplane Co. Ltd. [1944 KB 718 (CA)] Lord Greene, Master of Rolls formulated the principles on the basis of which a decision can be said to have been rendered "per incuriam". The principles are: (KB p. 729)

> *"... Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law, but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different****. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam****."*

29. The decision in Young [1944 KB 718 (CA)] was subsequently approved by the House of Lords in Young v. Bristol Aeroplane Co. Ltd. [1946 AC 163 (HL)] , AC at p. 169 of the Report. Lord Viscount Simon in the House of Lords expressed His Lordship's agreement with the views expressed by Lord Greene, the Master of Rolls in the Court of Appeal on the principle of per incuriam (see the speech of Lord Viscount

Simon in Bristol Aeroplane Co. Ltd. case [1946 AC 163 (HL)] , AC at p. 169 of the Report).

30. Those principles have been followed by the Constitution Bench of this Court in Bengal Immunity Co. Ltd. v. State of Bihar [AIR 1955 SC 661 : (1955) 2 SCR 603] (see the discussion in SCR at pp. 622 and 623 of the Report).

31. The same principle has been reiterated by Lord Evershed, Master of Rolls, in Morelle Ld. v. Wakeling [(1955) 2 QB 379 (CA)] , QB at p. 406. The principle has been stated as follows:

> *"... As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned; so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong."*

32. In State of U.P. v. Synthetics and Chemicals Ltd. [(1991) 4 SCC 139] this Court held (SCC p. 162, para 40) that the doctrine of "per incuriam" in practice means "per ignoratium" and noted that the English courts have developed this principle in relaxation of the rule of stare decisis and referred to the decision in Bristol Aeroplane Co. Ltd. [1946 AC 163 (HL)] The learned Judges also made it clear that the same principle has been approved and adopted by this Court while interpreting Article 141 of the Constitution (see Synthetics and Chemicals Ltd. case [(1991) 4 SCC 139] , SCC para 41).

33. In MCD v. Gurnam Kaur [(1989) 1 SCC 101] a three-Judge Bench of this Court explained this principle of per incuriam very elaborately in SCC para 11 at p. 110 of the Report and in explaining the principle of per incuriam the learned Judges held:

> ***"11. ... A decision should be treated as given per incuriam when it is***

> ***given in ignorance of the terms of a statute or of a rule having the force of a statute.***"
>
> *34. In para 12 the learned Judges observed as follows: (Gurnam Kaur case [(1989) 1 SCC 101] , SCC p. 111)*
>
> *"12. … One of the chief reasons for the doctrine of precedent is that a matter that has once been fully argued and decided should not be allowed to be reopened. The weight accorded to dicta varies with the type of dictum. Mere casual expressions carry no weight at all. Not every passing expression of a Judge, however eminent, can be treated as an ex cathedra statement, having the weight of authority."*
>
> ***(Emphasis supplied)***

35. Similarly, in **V Kishan Rao Vs. Nikhil Super Speciality Hospital and another,** reported in (2010) 5 SCC 513 vide paragraphs No.54, the apex Court held as follows:

> "*54.* ***When a judgment is rendered by ignoring the provisions of the governing statute and earlier larger Bench decision on the point such decisions are rendered per incuriam****. This concept of per incuriam has been explained in many decisions of this Court. Sabyasachi Mukharji, J. (as his Lordship then was) speaking for the majority in A.R. Antulay v. R.S. Nayak [(1988) 2 SCC 602 : 1988 SCC (Cri) 372] explained the concept in the following words : (SCC p. 652, para 42)*
>
> *"42. …* ***'Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision*** *or of some authority binding on the court concerned,* ***so that in such cases some part of the decision or some step in the reasoning on which it is***

> ***based, is found, on that account to be demonstrably wrong.***"
>
> *Subsequently also in the Constitution Bench judgment of this Court in Punjab Land Development and Reclamation Corpn. Ltd. v. Labour Court [(1990) 3 SCC 682 : 1991 SCC (L&S) 71] , similar views were expressed in para 40 at p. 705 of the report."*
>
> ***(Emphasis supplied)***

36. As is revealed from one of the impugned orders, as at Annexure-2, while deciding the Application filed by the Opposite Party No.3, the Controlling Authority framed the following two issues.

> *"1. Whether the OP has the right to forfeit the amount of gratuity payable to the applicant and has done so in accordance with the provision of the law?*
>
> *2. Whether there is delay in payment of gratuity and if so whether the applicant is entitled to get interest upon delayed payment of gratuity amount?"*

37. So far as Issue No.1 as to right to forfeit the amount of gratuity payable to Opposite Party No.3, the Controlling Authority (Opposite Party No.2) observed as follows:

> *"As far as 1st issue is concerned,* ***it is an admitted fact that the OP/employer has withheld the gratuity if any payable to the applicant. The same was not communicated to the applicant at all and only after filing of this application before Controlling Authority the reasons have been brought in writing. Thus, it remains primarily un-***

notified and non-communicated. It is also an admitted fact that the OP has not communicated any order regarding forfeiture of gratuity as required under Section 4 Sub Section (6) of PG Act, 1972 to be read with rule (8) (ii) under the Payment of Gratuity (Central) Rules, 1972 which is against the Principle of Natural justice*. The reason communicated during hearing indicates, since the criminal proceeding initiated by the departmental lodged through an FIR filed by the authorities of NSIC Ltd. is still pending before the Special Court, it is not possible at this stage to arrive at the conclusion regarding imposition of penalty or otherwise is considered against provision of law.* ***Moreover, the criminal proceeding has been submitted by the police in favour of 11 persons including the applicant over fraudulent bank guarantees issued by the respective branches of UBI for releasing the payment to different suppliers of raw materials.***

Moreover, a department regulation cannot override the provisions of the Act. A departmental enquiry is to meet the obligations of an employer to follow the procedure stipulated under the standing order/service rules so as to find out whether an employee has committed any misconduct. The scope and focus of the enquiry is thus different from that of given under section 4(6) of the act. ***Even though a charge sheet is issued and even if the financial loss is quantified therein and departmental enquiry is conducted and the charges are proved, it would not amount to compliance of requirement under section 4(6) as the employee is not put on notice about forfeiture of gratuity in a departmental enquiry. The object of section 4(6) is to require the employer to put the employee on notice that his conduct would result in forfeiture of gratuity. Therefore, it is incumbent upon the employer to serve a show cause notice on the employee, putting him on notice that his conduct would lead to***

> ***forfeiture of his gratuity and after hearing his submission, the employer has to pass an order of forfeiture.***"
>
> ***(Emphasis supplied)***

38. Similarly, while confirming the said order dated 12.11.2018 passed by the Controlling Authority under the Act, 1972, the Appellate Authority, vide Order dated 26.09.2019, observed as follows:

> "***Findings of the Appellate Authority***
>
> *1. That the respondent had joined as a Lower Division Clerk on 10.03.1981 and retired from service w.e.f. 30.11.2017 on attaining the age of superannuation. At the time of superannuation, the respondent was working as Manager (under suspension) Sub-Branch, Balasore, Bhubaneswar. He had served with the appellant bank for 36 years and 8 months. The disciplinary action were initiated on 24.8.2016 and termination took place on 20.02.2018 which is much after his retirement/superannuation on 30.11.2016.*
>
> *2. That though the disciplinary proceedings were contemplated which matured to termination after superannuation the same is technically wrong as by that time the non-applicant has already retired from the services. That the entitlement of gratuity starts soon after retirement as per section 4(1)(a) read with section 7(3) of the P.G. Act, 1972.*
>
> *3. In the instant case, it is found that Section 4(6)(a)(b) of the Gratuity Act, 1972 has not been followed because the non-applicant has already retired from service on 30.11.2016 whereby his service with the aforesaid management is already dispensed with. In the event of having no employer and employee relationship following the provision of Payment of Gratuity Act, 1972 under*

Section 4(6)(a) and (b) does not arise. That the aforesaid situation only would have arisen when the applicant was still in job. A look at the case of Jaswant Singh Vrs Bharat Cooking coal Ltd the Hon'ble Supreme Court has categorically stated that it is infirm to forfeit gratuity in the event of a person who has already retired from his services.

4. In the present case department rule which mandates for disciplinary action after superannuation cannot overrule the statutory provision as per section 14 of the PG Act, 1972. More so when the departmental rule and statutory rule and regulations both apply to a situation statutory rule will always prevail.

5. ***That the quantum of loss has not been quantified before the forfeiture of gratuity. It has been pointed out by the appellant that quantum could not be assessed because loss is attributed to a group of people. However, as per section 4(6)(a) of the PG Act 1972 gratuity can be forfeited to the extent of damage or loss which has not been quantified hence the forfeitures is not as per the statutory provision.***

6. No notice has been given to the applicant as a part of natural justice before such forfeiture.

That there is no provision under the Gratuity Act, 1972 to forfeit gratuity without following due procedure of law as gratuity is being considered as property under article 300 A of the constitution which can be forfeited only after following due procedure of law*.*

7. As far as the present case is concerned the non-applicant has become entitled for gratuity and as per section 4(1) read with section 7(3) and 7(3A) when he has superannuated from this service which is much before imposition of penalty.

8. ***That there is no such decision of the Apex Court which mandates to withhold gratuity with interest if a criminal***

***proceeding/Termination is not in consonance with Section 4(6)(a) and (b) of the PG Act 1972 and the rules there under.*"**

(Emphasis Supplied)

39. In view of the stand taken by the Petitioners in the Writ Petition so also the stand of the contesting Opposite Party No.3, it would be apt to extract below the rules 3 & 5 of the National Small Industries Corporation Ltd. (Control & Appeal Rules, 1968), shortly, hereinafter "Rules, 1968", being relevant for the purpose of proper adjudication of the present lis.

"Rules 3 & 5 of NSIC Ltd (C & A Rules, 1968)

3. Application:

(1) These rules shall apply to every employee but shall not apply to:

a. Those employees working in the Prototype Production & Training Centres to whom the Standing Orders framed for the respective P.T.Cs, are applicable.

b. Any person in casual employment.

(2) If any doubt arises relating to the interpretation of these rules, it shall be referred to the Corporation whose decision shall be final.

(3) Note: As amended vide Board's Resolution No. 4 dt. 31 Oct. 2000.

"Disciplinary proceedings, ***if instituted while the employee was in service whether before his retirement or during his re-employment, shall after the final***

retirement of the employee, be deemed to be proceeding and shall be continued and concluded *by the authority by which it was commenced in the same manner as if the employee had continued in service.*

5. Penalties:

The following penalties may, for good and sufficient reasons and as hereinafter provided, be imposed on an employee…..

Minor Penalties*:*

(i) Censure

(ii) With holding of his promotion

(iii) Recovery from his pay of the whole or part of any pecuniary loss caused by him to the Corporation by negligence or breach of orders;

(iv) With holding of increment of pay;

Major Penalties*:*

(v) Reduction to a lower stage in the time scale of pay for a specified period, with further directions as to whether or not the employee will earn increments of pay during the period of such reduction and whether on the expiry of such period, the reduction will or will not have the effect of postponing the further increments of his pay.

(vi) Reduction to a lower time scale of pay 'grade' post or service which shall ordinarily be a bar to the promotion of the employee to the time scale of pay, grade, post or service from which he was reduced, with or without further directions regarding condition of restoration to the grade or post or service from which the employee was reduced and his seniority and pay on such restoration to that grade; post or service.

(vii) Compulsory retirement;

(viii) Removal from service which shall not be disqualification for future employment.

(ix) Dismissal from service which shall ordinarily be a disqualification for future employment.

(x) Note: As amended vide Board's Resolution No.4 dt. 31 Oct. 2000.

"During the pendency of the disciplinary proceedings, the disciplinary authority, may withhold payment of gratuity, for ordering the recovery from gratuity of the whole or part of any pecuniary loss caused to the Company if the employee is found in a disciplinary proceedings or judicial proceeding to have been guilty of offences /misconduct as mentioned in Sub-section(6) of section 4 of the Payment of Gratuity Act, 1972 or to have caused pecuniary loss to the Company by misconduct or negligence, during his service including service rendered on deputation or on re-employment after retirement. However, the provisions of Section 7(3) and 7(3A) of the Payment of Gratuity Act, 1972 should be kept in view the event of delayed payment, in case the employee is fully exonerated."

(Emphasis supplied)

40. Since in rule 5 of the said Rules, 1968, there is a reference to sub-section (6) of Section 4 so also section 7(3) and section 7(3A) of the Payment of Gratuity Act, 1972, the said provisions under the Act, 1972 are also extracted below for ready reference.

"Sub-section (6) of section 4 of P.G. Act, 1972

(6) Notwithstanding anything contained in sub-section (1), -

(a) the gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, ***shall be forfeited to the extent of the damage or loss so caused****.*

(b) the gratuity payable to an employee may be wholly or partially forfeited] –

(i) if the services of such employee have been ***terminated for his riotous or disorderly conduct or any other act of violence on his part, or***

(ii) if the services of such employee have been ***terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment****.*

Section-7(3) & (3A) of P.G. Act, 1972

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

(3A) If the amount of gratuity payable under sub-section (3) is not paid by the employer within the period specified in sub-section (3), the employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify:

Provided that no such interest shall be payable if the delay in the payment is due to the fault of the employee and the employer has

obtained permission in writing from the controlling authority for the delayed payment on this ground.]"

(Emphasis supplied)

41. To decide the issue involved in the present lis, it would also be appropriate to reproduce below section 4(1) of the Act, 1972 so also rules, 7(1)(5) & (6), 8 (1) & (4) & 10 of Rules, 1972 and Form 'M' (as prescribed under Clause (ii) of sub-rule (1) of rule 8 of the 1972 Rules).

"**Section-4(1) of Payment of Gratuity Act, 1972**

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

(a) on his superannuation, or

(b) on his retirement or resignation, or

(c) on his death or disablement due to accident or disease:

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

Explanation. : For the purposes 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.

Relevant portions of Rules-7, 8 & 10 & Form 'M' under clause(ii) of sub-rule (1) of Rule-8 of Payment of Gratuity (Central) Rules, 1972

***7. Application for gratuity**.— (1) An employee who is eligible for payment of gratuity under the Act, or any person authorised, in writing, to act on his behalf, shall apply, ordinarily **within thirty days from the date the gratuity became payable, in Form 'I' to the employer**:*

Provided that where the date of superannuation or retirement of an employee is known, the employee may apply to the employer before thirty days of the date of superannuation or retirement.

(2) XXX
(3) XXX
(4) XXX

*(5) An application for payment of gratuity filed after the expiry of the periods specified in this rule shall also be entertained by the employer, if the applicant adduces sufficient cause for the delay in preferring his claim, and **no claim for gratuity under the Act shall be invalid merely because the claimant failed to present his application within the specified period**. Any dispute in this regard shall be referred to the controlling authority for his decision.*

(6) An application under this rule shall be presented to the employer either by personal service or by registered post acknowledgement due.

"*8.* ***Notice for payment of gratuity****.— (1) Within fifteen days of the receipt of an application under rule 7 for payment of gratuity, the employer shall—*

(i) if the claim is found admissible on verification, issue a notice in Form 'L' to the applicant employee, nominee or legal heir, as the case may be, specifying the amount of gratuity payable and fixing a date, not being later than the thirtieth day after the date of receipt of the application, for payment thereof, or

(ii) ***if the claim for gratuity is not found admissible, issue a notice in Form 'M' to the applicant employee, nominee or legal heir, as the case may be, specifying the reasons why the claim for gratuity is not considered admissible.***

In either case a copy of the notice shall be endorsed to the controlling authority*."*

(2) xxx

(3) xxx

(4) A notice in form 'L' or Form 'M' shall be served on the applicant either by personal service after taking receipt or by registered post with acknowledgement due.

(5) xxx

10. Application to controlling authority for direction*.—(1) If an employer—*

(i) refuses to accept a nomination ***or to entertain an application sought to be filed under rule 7****, or*

(ii) ***issues a notice under sub-rule (1) of rule 8*** *either specifying an amount of gratuity which is considered by the applicant less than what is payable or* ***rejecting eligibility to payment of gratuity****, or*

(iii) having received an application under rule 7 fails to issue any notice as required under rule 8 within the time specified therein, the claimant employee, nominee or legal heir, as the case may be, may, within ninety days of the occurrence of the cause for the application, apply in Form 'N' to the controlling authority for issuing a direction under

sub-section (4) of section 7 with as many extra copies as are the opposite parties:

Provided that the controlling authority may accept any application under this sub-rule, on sufficient cause being shown by the applicant, after the expiry of the specified period.

(2) Application under sub-rule (1) and other documents relevant to such an application shall be presented in person to the controlling authority or shall be sent by registered post acknowledgement due.

FORM 'M'

[See clause (ii) of sub-rule (1) of rule 8]

NOTICE REJECTING CLAIM FOR PAYMENT OF GRATUITY

To

.....

[Name and address of the applicant employee/ nominee/ legal heir]

You are hereby ***informed as required under clause (ii) of sub-rule (i) of rule 8 of the Payment of Gratuity (Central) Rules, 1972*** *that your claim for payment of gratuity as indicated on your application in Form..... .....under the said rules* ***is not admissible for the reasons stated below****:*

REASONS

*[**Here specify the reasons**]*

Place *Signature of the employer/*
Date *Authorised Officer.*
Name or description of establishment or rubber stamp thereof.

Copy to : The Controlling Authority*.*

Note: Strike out the words not applicable."

(***Emphasis supplied***)

42. On examination of the various legal provisions under the Act, 1972 and Rules made thereunder so also the Judgments cited by the learned Counsel for the parties, as detailed above, this Court is of the following views:

a) As prescribed under section 4(1) of the 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 five years on his superannuation or on his retirement or resignation or on his death or disablement due to accident or disease. However, 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.

b) In terms of section 7(1) of the Act, 1972 read with rule 7(1) & (6) of the Rules, 1972, a person, who is eligible for payment of gratuity under the said Act, 1972 or any person authorized, in writing, to act on his behalf, shall send a written application to the Employer in Form 'I'

ordinarily within thirty days from the date the gratuity became payable, either by personal service or by registered post acknowledgement due.

c) As provided under rule 7 (1) of the Rules, 1972, where the date of superannuation or retirement of an employee is known, the employee may apply to the Employer before thirty days of the date of superannuation or retirement for payment of gratuity.

d) Rule 7(5) of the Rules, 1972 provides that an application for payment of gratuity filed after the expiry of the periods specified in rule 7(1) of the Rules, 1972 shall also be entertained by the Employer, if the applicant adduces sufficient cause for the delay in preferring his claim.

e) As provided under rule 7(5) of the Rules, 1972, no claim for the gratuity under the Act, 1972 shall be invalid merely because the claimant

has failed to present his application within the specified period.

f) In terms of Rule-8(1) under Rules, 1972, within fifteen days of the receipt of an application under rule 7 for payment of gratuity, the Employer shall, if the claim is found admissible on verification, issue a notice in Form 'L' to the applicant employee, nominee or legal heir, as the case may be, specifying the amount of gratuity payable and fixing a date, not being later than the thirtieth day after the date of receipt of the application, for payment thereof.

g) As provided under rule 8(1) (ii) of the Rules, 1972, if the claim for gratuity is not found admissible, the Employer is to issue a notice in Form 'M' to the applicant employee, nominee or legal heir, as the case may be, specifying the reasons as to why the claim for gratuity is not considered admissible. In either case, where the gratuity claimed is admissible or inadmissible, a copy of the notice in Form 'L' or

'M' given to the applicant shall be endorsed to the Controlling Authority.

h) An Employer cannot simply issue notice in Form-M to the employee rejecting claim for payment of gratuity. If the Employer so desires to forfeit the gratuity, a Show Cause Notice has to be given, because the gratuity amount to which the Employee is otherwise entitled is to be forfeited, which is a drastic consequence for the Employee concerned.

i) As provided under rule 10(1)(iii) of the Rules, 1972, if pursuant to the application filed in terms of rule 7 of Rules, 1972 a notice is given under rule 8(1) either specifying an amount of gratuity which is considered by the application less than what is payable or rejecting his/her eligibility for payment of gratuity or the Employer fails to issue any notice as required under rule 8 within the time specified therein, the claimant employee, nominee or legal heir, as the case may be, may, within ninety days of the

occurrence of the cause for the application, apply in Form 'N' to the Controlling Authority for issuing a direction under section 7(4) of the Act, 1972 with as many extra copies as are the opposite parties.

j) In view of the provisions enshrined under section 7(2) of the Act, 1972, as soon as gratuity becomes payable, the Employer shall, whether an application referred to in sub-section (1) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also the Controlling Authority, specifying the amount of gratuity so determined.

k) As prescribed under section 7(3) of the Act, 1972, the Employer shall arrange to pay the amount of gratuity, within thirty days from the date it becomes payable to the person to whom the gratuity is payable.

l) In terms of section 7(3-A) of the Act, 1972, if the amount of gratuity payable under sub-section (3) is not paid by the Employer within the period specified in sub-section (3), the Employer shall pay, from the date on which the gratuity becomes payable to the date on which it is paid, simple interest at such rate, not exceeding the rate notified by the Central Government from time to time for repayment of long-term deposits, as that Government may, by notification specify (As per the notification dated 10.10.1987 issued by the Central Government, in exercise of powers conferred under sub-section (3-A) of section 7 of the P.G. Act, 1972, 10% interest is payable).

m) In view of the proviso under section 7(3-A) of the Act, 1972, no such interest is payable if the delay in the payment is due to the fault of the employee and the Employer has obtained permission in writing from the Controlling

Authority for the delayed payment on the said ground.

n) As prescribed under section 7(4)(a) of the Act, 1972, if there is any dispute as to the amount of gratuity payable to an employee under the said Act or as to the admissibility of any claim of, or in relation to, an employee for payment of gratuity, or as to the person entitled to receive the gratuity, the Employer shall deposit with the Controlling Authority such amount as he admits to be payable by him as gratuity.

o) Where there is a dispute with regard to any matter or matters specified in clause (a), the Employer or employee or any other person raising the dispute may make an application to the Controlling Authority for deciding the dispute, in terms of section 7(4)(b) of the Act, 1972.

p) As provided under section 7(4)(c) of the Act, 1972, the Controlling Authority shall, 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 a 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 or, as the case may be, such amount as reduced by the amount already deposited by the Employer.

q) As provided in sub-section (6) of section 4 of the Act, 1972, the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the Employer, shall be forfeited to the extent of the damage or loss so caused.

r) As per the settled position of law, as detailed above, before forfeiting the gratuity of an employee in terms of clause (1) of sub-section 6 of section 4 of the Act, 1972, any damage or loss

to, or destruction of, property belonging to the Employer has to be quantified by the Employer.

s) Similarly, as prescribed in clause (b) of sub-section 6 of section 4 of the Act, 1972, the gratuity payable to an employee may be wholly or partially forfeited, if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in course of his employment.

t) As held by the apex Court in **Union Bank of India** (supra), under sub-section (6)(b)(ii) of section 4 of the Act, forfeiture of gratuity is permissible if the termination of an employee is for any misconduct which constitutes an offence involving moral turpitude, and the employee concerned is convicted accordingly by a Court of competent jurisdiction. It is not for the

Employer to decide whether the offence has been committed amounting to involving moral turpitude.

u) As held in **Rabindranath Choubey** (supra), if departmental proceeding has been initiated against an employee before his retirement, if the service rules of the Employer provide so, the departmental proceeding can continue even after retirement of an employee and if the employee is found guilty, minor or major punishment, including the punishment of dismissal can be imposed by the Employer, even the employee has retired.

v) As was further held by the apex Court in **Rabindranath Choubey** (supra), the enquiry proceeding has to be concluded first on merit and after passing appropriate order in accordance with law, thereafter necessary consequences as per section 4 of the Act, 1972, more particularly sub-section (6) of section-4 of the Act, 1972 and the Rules of the Employer

shall to follow. The recovery, as provided under section-4(6) of the Act, 1972, is in addition to a punishment that can be imposed on an employee after his superannuation.

43. Admittedly, as per sub-rule (3) of rule 3 of the Rules, 1968 of the Petitioners-Corporation, as quoted above, disciplinary proceedings, if instituted while the employee was in service, whether before his retirement or during his re-employment, shall after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded by the Authority by which it was commenced in the same manner, as if the employee had continued in service. Similarly, in terms of sub-rule (x) of rule 5 of the said Rules, 1968, during pendency of the disciplinary proceeding, the Disciplinary Authority may withhold payment of gratuity for ordering the recovery from gratuity of the whole or part of any pecuniary loss caused to the Company, if the employee is found in a disciplinary proceeding or judicial proceeding to have been guilty of offences/misconduct, as prescribed under sub-section (6) of section 4 of the Payment of Gratuity Act, 1972 or have caused pecuniary loss to the Company by misconduct or negligence,

during his service, including service rendered on deputation or on re-employment after retirement, which will be subject to provisions of section 7(3) and 7(3A) of the P.G. Act, 1972. On a bare reading of the said rules, as quoted above, it is amply clear that the Employer (present Petitioners) has to follow the provisions under sub-section (3A) of section 7, which mandates that the Employer shall not be liable to pay interest on the gratuity payable, if the delay in payment is due to the fault of the employee and the Employer has obtained permission in writing from the Controlling Authority for the delayed payment on the said ground. Apart from the same, rule 8 of the Payment of Gratuity (Central) Rules, 1972 deals specifically with regard to notice for payment of gratuity. Clause (ii) in sub-rule (1) of rule 8 of the Rules, 1972 prescribes that if the claim for gratuity is not found admissible, the Employer has to issue notice in Form 'M' to the applicant employee, nominee or legal heirs, as the case may be, specifying the reasons as to why the claim for gratuity is not considered admissible and copy of the same has to be endorsed to the Controlling Authority.

44. Though there is no such pleadings in the Writ Petition so also Affidavit-in-Opposition filed by the Opposite Party No.3-

employee, in the list of date of events filed by the Opposite Party No.3, it has been mentioned that he claimed gratuity in Form 'I' on 23.11.2017 and the same was rejected by the Employer on 28th November, 2017, as a result of which the Opposite Party No.3 filed an application in Form 'N' before the Controlling Authority on 29th December, 2017 claiming gratuity. Neither the Petitioners nor the Opposite Party No.3 has disclosed the said alleged communication/rejection of the application submitted by the Opposite Party No.3 claiming gratuity to ascertain the reason for rejection of the said application. It is not the case of the Petitioners that due communication was made to the Opposite Party No.3 to withhold his gratuity on the ground of pendency of the departmental proceeding against him and permission was sought for from the Controlling Authority in terms of the proviso in section 7 (3A) of the P.G. Act, 1972. No communication was made in Form-'M' to the Opposite Party No.3 and also no intimation was given to the Controlling Authority regarding rejection of the application of the Opposite Party No.3 for gratuity. For the first time, while passing the order of dismissal dated 27.11.2018, as at Annexure-6, apart from imposing the major penalty of dismissal from service with effect from the date

of his superannuation i.e. 30.11.2016, it was also ordered to forfeit the retiral dues of the Opposite Party No.3 i.e. gratuity and encashment of leave as a punishment. The relevant portion of the order of dismissal, vide which it was ordered to forfeit the gratuity of the Opposite Party No.3, is extracted below:

> *"NOW, THEREFORE, the undersigned being the Appointing Authority in the above case decided to* ***impose the major penalty of "Dismissal from service with effect from the date of his superannuation i.e. 30.11.2016 and forfeiture of his retiral dues (i.e. Gratuity and Encashment of Leave)" on Shri Jayanta Das, Manager (u/s) under the NSIC Control & Appeal Rules, 1968*** *and orders accordingly, with immediate effect. As such, the Appellate Authority in this case would be the Board of Directors.*
>
> *The undersigned, in view of the charges having been proved against Shri Jayanta Das and a penalty imposed upon his, has decided that his period of suspension i.e. from 24.08.2016 to 30.11.2016, will not be treated as period spent on duty by Shri Jayanta Das and he will not be paid any pay and allowances for the said period. However, the subsistence allowance already paid to him will remain paid.*
>
> *(RAVINDRA NATH)*
> *Chairman-cum-Managing Director/*
> *Appointing Authority"*
>
> ***(Emphasis supplied)***

45. Admittedly, the said order of dismissal is based on the ex-parte Enquiry Report dated 20.02.2018 submitted by the

Enquiry Officer, as at Annexure-5. The findings of the Enquiry Officer, being relevant, are extracted below:

> *"**Findings of the Inquiry Officer:***
>
> *From the deposition of MW-1, MW-2 & MW-3 and the documents on record of inquiry (MEs), **it is proved that the CE has not diligently observed the guidelines specified in the Financial Services Manual regarding appraisal of application received for assistance under RMA against Bank Guarantees as detailed below**:-*
>
> *a) Inadequate infrastructure was available as per the inspection reports, the value of machinery available was inadequate, yet CE recommendation was made for huge sanction of Rs.300 lakh each to these units under RMA.*
>
> *b) At the time of appraisal, VAT registration status was not checked, increase/decrease in turnover/raw material was not diligently analyzed by CE in proper perspective.*
>
> *c) Further at the time of processing of contingent bill for release of payment to supplies, verification of VAT, status of the registration of the supplies etc. was not properly analyzed by CE, but payment was released to the suppliers by CE.*
>
> *d) The memorandum of receipts being the signature of CE are not backed by forwarding letters of units for such receipts and there have been instances as narrated above where receipt from one unit has been adjusted to accounts of other two units without any supporting document. In few instances as stated above, there has been adjustment of invocation proceeds as repayment from the units and subsequent issue of payment to supplier on account of this false memorandum adjustment causing exposure of NSIC funds to greater rist.*

> *e) There have been instances as stated above of renewal of limits by the CE to the RMA units without completion of proper procedure and approval of the competent authority.*
>
> *From the above facts detailed, it is proved that the charges laid down in the Articles of Charge-I to VII are proved"*
>
> ***(Emphasis supplied)***

46. Though in para-10 of the Writ Petition it has been stated that the Appeal preferred by the Opposite Party No.3 before the Board of Directors is pending, during hearing of this case, both the Petitioners-Corporation as well as Opposite Party No.3 filed photocopy of the order dated 17.01.2020 passed by the Appellate Authority, the contents of which is extracted below:

> ***"ORDER***
>
> *WHEREAS departmental disciplinary proceedings for a major penalty, under Rule 8 of the NSIC Control & Appeal rules, 1968 were initiated against Shri Jayanta Das, the then Manager (u/s). NSIC Ltd., Sub Branch, Balasore vide Office Memorandum No.ZOE/02/2016-17 dated 24.11.2016.*
>
> *AND WHEREAS after concluding the inquiry proceedings, the manor penalty of "Dismissal from service with effect from the date of his superannuation i.e. 30.11.2016 and forfeiture of his retiral dues (i.e. Gratuity and Encashment of Leave)" was imposed on Shri Jayanta Das, Manager (u/s) vide order No.3/79/SIC/VIG/2016 dated 27.03.2018.*
>
> *AND WHEREAS, Shri Jayanta Das has made an appeal dated 09.07.2019 to the Appellate Authority (i.e. Board of Directors, NSIC) against the aforementioned order.*

AND WHEREAS the appeal dated 09.07.2019 of Shri Jayanta Das was placed before the Board of Directors in its 526th meeting held on 28.08.2019 wherein the Board of Directors decided to have more deliberation on the matter. The said appeal was further considered by the Board of Directors in its 528th meeting held on 16.12.2019. In the said meeting, as directed by the Board, Shri Jayanta Das appeared before the Board of Directors in person. The Board heard the submissions made by Shri Jayanta Das for quashing the dismissal order and for release of his Gratuity.

AND WHEREAS the Board of Directors in its 529th meeting held on 27.12.2019 noted that as the gratuity matter is already under adjudication before the High Court, Cuttack, the relief cannot be considered in another forum and the claim to that extent is barred by res judicata.

AND WHEREAS the Board after deliberations on the facts and circumstances of the case noted that the appeal does not contain any additional points / facts, which were not examined by the inquiry officer. ***The Board further noted that as the gratuity matter is already under adjudication before the High Court, Cuttack, the relief cannot be considered in another forum and the claim to that extent is barred by res judicata****.*

NOW, THEREFORE, the Board decided that the appeal submitted by Shri Jayanta Das is not sustainable and is liable to be rejected. Accordingly, the order issued by the then CMD dated 27.03.2018 is upheld.

By order and on behalf of the
Board of Directors
Sd/-
(Nistha Goyal)
Company Secretary"

(Emphasis supplied)

Admittedly, the said order was passed much after the period as directed by the Central Administrative Tribunal,

Kolkata Bench vide order dated 13.06.2019, vide which it was directed to dispose of the Appeal of the Opposite Party No.3 within a period of four weeks from the date of receipt of the Appeal. Since one of the punishments imposed was forfeiture of gratuity and the Opposite Party No.3 had prayed before the Appellate Authority for release of his gratuity, instead of dealing with the said issue, the Appellate Authority has passed the order dated 17.01.2020, as quoted above, keeping it open to be decided by this Court.

47. Law is well settled that any judgment contrary to the statute is hit by the law of per incuriam. Admittedly, the Rule, 1968 is a delegated legislation, whereas Act, 1972 is a parliamentary legislation and provisions under the Act, 1972 will have an overriding effect over the provisions in Rules, 1968, if there is any inconsistency between the Rule, 1968 vis-a-vis the Act, 1972. Rather, in the present case, rule 5 of the 1968 Rules prescribes that so far as withholding of gratuity, the same shall be governed by section 7(3A) of the P.G. Act, 1972, the proviso under which enshrines that the Authority concerned should take permission from the Controlling Authority, if it desires to

withhold the payment of gratuity on the plea of pendency of disciplinary proceeding or judicial proceeding.

48. The law is also well settled that power of prospective overruling is vested only in the Supreme Court. Unless it is so mentioned in a judgment, vide which an earlier judgment of the apex Court is overruled, that the same will be made applicable prospectively, it will have a retrospective operation and will be made applicable to all the pending litigations, even though the impugned order/judgment in the pending litigation is based on a judgment of the apex Court, which was in vogue at the relevant juncture, but was subsequently overruled by a larger Bench.

49. From the background admitted facts, various provisions under the P.G. Act, 1972 and rules made thereunder, so also relevant Rules of the Petitioners-Employer pertaining to continuance of Departmental Enquiry after retirement of an employee and penalties to be imposed on the delinquent employee so also settled position of law, as detailed above, this Court is of the following irresistible conclusions:

i) The provisions of the Rules, 1968 cannot be in derogation of the provisions enshrined under section 7(3) & 7(3A) of the P.G. Act, 1972.

ii) In view of the provisions under rule 3(3) of the Rules, 1968, the Petitioners-Employer had a right to continue with the disciplinary proceeding till its conclusion, as the same was instituted before retirement of the Opposite Party No.3.

iii) The Petitioners-Employer had a right to impose the major penalty of dismissal with retrospective effect i.e. the date when the Opposite Party No.3 was superannuated, and legality of punishment imposed is subject to judicial scrutiny.

iv) In terms of proviso in sub-section (3-A) of section 7 of the Act, 1972, if the Employer wants to withhold the gratuity of a retired employee, it has to seek permission from the Controlling Authority to do so, failing which the Employer is liable to pay interest. But no such

permission was sought for in the present case to withhold the gratuity of Opposite Party No.3, till it was mentioned in order of dismissal dated 27.03.2018 that from the date of dismissing him from service i.e. with effect from 30.11.2016, his gratuity and encashment of leave stand forfeited.

v) So far as the penalty to be imposed by the Disciplinary Authority has been detailed in rule 5 of the Rules, 1968. There is no such provision under the said rule to impose the punishment of forfeiture of gratuity. Though the said rule prescribes as to withholding payment of gratuity, for ordering the recovery from the gratuity of whole or part of the pecuniary loss caused to the Corporation, in the order of dismissal, it was mentioned that the Appointing Authority decided to impose major penalty of "**Dismissal from service with effect from the date of his superannuation i.e. 30.11.2016, and forfeiture of his retiral dues i.e. Gratuity**

and Encashment of Leave." The said act of the Petitioners-Employer is illegal and is devoid of jurisdiction, as held by the apex court in Para-10 of its judgment reported in **D.V. Kappor** (supra)

(**Emphasis supplied**)

vi) There is no such findings given by the Enquiry Officer or the Disciplinary Authority that the misconduct, allegedly proved against the present Opposite Party No.3, amounts to moral turpitude. Apart from that, as held in Paras-17 & 19 of the judgment of the apex Court in **Union Bank of India** (supra), the requirement of the statute is not the proof of misconduct of acts involving moral turpitude, but the acts should constitute an offence involving moral turpitude and such offence should be duly established in a Court of law. It is not for the Petitioners-Employer to decide whether the offence has been committed amounting to involving moral turpitude.

vii) Though there was an alleged loss caused to the Corporation for the misconduct proved against the Opposite Party No.3, the said loss has never been quantified by the Enquiry Officer or the Disciplinary Authority. Still, invoking the alleged power delegated under rule 5 of the Rules, 1968, the Disciplinary Authority imposed the punishment of forfeiture of gratuity in addition to forfeiture of earned leave, without following the procedure to forfeit the Gratuity prescribed under the Act, 1972.

viii) As held by the apex Court in **Jaswant Singh Gill** (supra), which was partially overruled in **Rabindranath Choubey** (supra), it is held that the amount liable to be forfeited would be only to the extent of damage or loss caused and the disciplinary authority has to quantify the same before ordering for forfeiture of the gratuity.

ix) Though the Opposite Party No.3 submitted an application in Form 'I' in terms of sub-rule (1) of rule 7 of the Rules, 1972 claiming gratuity, no

communication was made to him in Form 'M' in terms of Clause (i) in sub-rule (1) of rule 8 of Rules, 1972, intimating him that his claim for payment of gratuity, as indicated in his application in Form 'I' under the said rule, is not admissible assigning cogent reason to do so marking a copy of the same to the Controlling Authority.

x) Admittedly, the judgment in **Rabindranath Choubey** (supra) is a larger Bench judgment, vide which the judgment of the apex Court in **Jaswant Singh Gill** (supra) was partially overruled to the effect that the Disciplinary Authority has power to impose the penalty of dismissal/major penalty upon the delinquent employee even after his attaining the age of superannuation, as the disciplinary proceedings were initiated while the employee was in service.

As there is no such observation in the said judgment as to applicability of the said judgment prospectively, the principles decided

in the said case shall be made applicable to the present case.

xi) In view of the observation made by the apex Court in Para-11 of the judgment in **Rabindranath Choubey** (Supra), the Appellant– Employer has a right to withhold the gratuity during pendency of the disciplinary proceedings and the Disciplinary Authority has power to impose the penalty of dismissal/major penalty on the Opposite Party No.3 even after his attaining the age of superannuation, as the disciplinary proceeding was initiated against him while he was in service. Hence, the observation made in paras- 2 to 4 of the impugned order passed by the Opposite Party No.1 (the Appellate Authority under the P.G. Act, 1972), relying on the judgment of the apex Court in **Jaswant Singh Gill** (Supra), the same having been overruled to the effect as indicated above, is bad and liable to be set aside.

xii) However, further observations of the Appellate Authority, as detailed in Paragraphs-5 to 8 of the impugned judgment passed in P.G. Appeal No.36(431)/2018-B.I., being in consonance with the various provisions under the P.G. Act, 1972, as detailed above, so also the settled position of law, needs no interference.

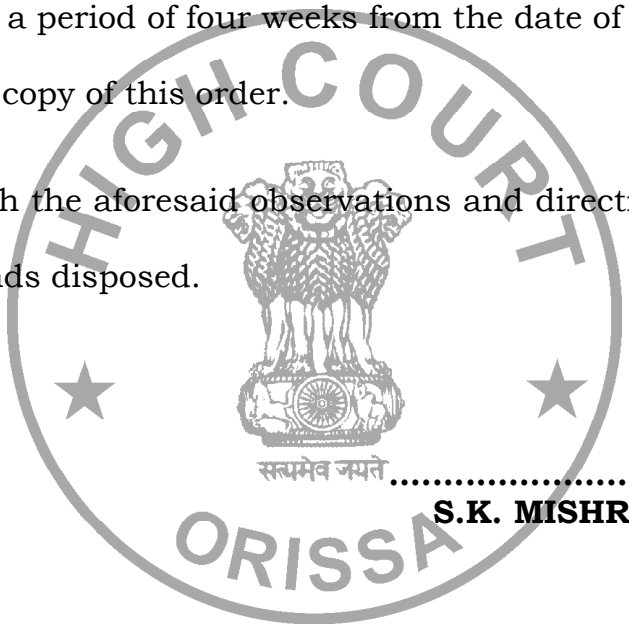
xiii) There being no error or infirmity in the impugned order dated 12.11.2018 passed by the Controlling Authority, as at Annexure.2, needs no interference.

50. In view of the observations as detailed above so also the views taken by this Court, as detailed in Para-42 above, the findings of the Appellate Authority in Paras 2 to 4 of the impugned order dated 26.09.2019 as at Annexure-1, being contrary to the observations made in **Rabindranath Choubey** (supra), are hereby set aside.

51. Though there is a specific mechanism provided under section 8 of the Act, 1972 read with rule 19 of Rules, 1972 for recovery of gratuity ordered by the Controlling Authority, in the

peculiar facts and circumstances, as the issue regarding payment of gratuity to the Opposite Party No.3 is pending since 2016 and the Petitioners obtained an order of stay of operation of the impugned orders, thereby debarring the Opposite Party No.3 to get his gratuity in terms of the order passed by the Controlling Authority, this Court directs the Petitioners to promptly act in terms of the direction given by the Controlling Authority vide order dated 12.11.2018, as at Anenxure-2 and implement the same within a period of four weeks from the date of production of the certified copy of this order.

52. With the aforesaid observations and directions, the Writ Petition stands disposed.



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S.K. MISHRA, J.

Orissa High Court, Cuttack
The 15th of March, 2024/Prasant