Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2379 OF 2020
[Arising Out of Special Leave Petition (C) No.5269 of 2019]

BCH ELECTRIC LIMITED …Appellant

VERSUS

PRADEEP MEHRA …Respondent

J U D G M E N T

Uday Umesh Lalit, J.

1. Leave granted.

2. This appeal challenges the judgment and order dated 12.2.2019 passed by the High Court[1] dismissing Letters Patent Appeal No.97 of 2019

1 The High Court of Delhi at New Delhi

and thereby affirming the decision of the Single Judge of the High Court in Writ Petition No.10318 of 2017.

3. By Trust Deed executed on 19.03.1979 between the appellant, a company registered under the Indian Companies Act, 1956 on one hand and three trustees on the other, an "Approved Gratuity Fund" was constituted "for the purpose of providing Gratuities to the employees of the Company under the Payment of Gratuity Act, 1972 (hereinafter referred to as 'the Act') and the Gratuity Scheme of the Company".

Clauses 4, 11 and 15(a) of the Trust Deed are as under:-

> "4. RULES:
> The Fund shall be governed by the Rules and any reference to the Rules in these presents shall mean the Rules for the time being in force which shall be binding on the Members, their Beneficiaries and on the Company. A copy of the current Rules is annexed to and the same shall be deemed to form part of these presents.
>
> 11. MEMBERS TO HAVE NO LEGAL RIGHT
> Except as provided in these presents and in the Rules, no Member or his Beneficiary shall have any legal claim, right or interest in the Fund. Provided always that the Trustees shall administer the Fund for the benefit of the Members and their Beneficiaries in accordance with the provisions of these presents and the Rules.
>
> 15. PAYMENT OF GRATUITY:
> (a) On behalf of the Company, the Trustees shall provide for the payment of gratuity on termination of

service, on death or retirement of the Member or otherwise as provided in the Rules of Scheme."

3.1 In the Rules appended to the Scheme the expressions "Company", "Employee" and "Gratuity" are defined as under:-

"**2.** (a) "Company" shall mean Bhartia Cutler Hammer Limited and its successors or assigns or any Company or body corporate which may by purchase or amalgamation acquire or take over in whole or in part, the undertaking of the company and with the previous approval of the Commissioner undertakes to perform the obligations of the Company under the Trust Deed or the Rules.

… … …

(b) "Employee" shall mean a person in the permanent, whole-time and bona fide employment of the Company, including a whole-time Director, but shall not include (i) any member of the staff who is or may be on probation or who is temporary or part-time (ii) any apprentice or (iii) a personal or domestic servant.

... … …

(m) "Gratuity" shall mean Gratuity payable under these Rules."

3.2 Rules 4(b) and 6 of the Rules are as under:-

"4. (a) … … …

(b) The Company shall pay to the Trustees in respect of each member an ordinary annual contribution in each year based on an actuarial valuation by a Qualified Actuary subject to Rule 103 of the Income Tax Rules 1962 or any statutory enactment or any modification thereof from time to time.

6. A member on ceasing to be a member of the Fund shall be entitled to be paid by the Trustees, the amount due as computed in the manner laid down hereunder in this Scheme: -

(a) The amount of Gratuity payable to the beneficiary shall be calculated in the manner provided in the Company's Gratuity Scheme.

(b) Notwithstanding the provision herein contained, if any member is covered by the provisions of the Payment of Gratuity Act 1972, the amount of gratuity shall be calculated in accordance with the provisions of that Act."

3.3 The Appendix to the Scheme prescribes the rates at which gratuity will be payable as under:-

"Gratuity will be payable to the Employees to whom the Payment of Gratuity Act, 1972 applies as per the rates prescribed by the said Act.
Gratuity will be payable to the other employee of the company at the following rates:-

(a) On the death or permanent total physical disablement, while in the service of the Company, or retirement at the age of 55 years or if retained by the Company after 55 years, then at the time of separation from the Company:
15 days basic salary for each completed year of service subject to maximum of 20 months basis pay, payable to the employees or payable to his heirs, executors or nominee in case of death of the employee.

(b) On termination of Service:

i. Beyond five years upto 8 years of continuous service at the rate of 5 (five) days basic

pay for every completed year of service.

ii. Beyond 8 years upto 10 years of continuous service at the rate of 10 days (ten) basic salary for every completed year of service.

iii. Beyond 10 years upto 15 years of continuous service at the rate of 12 (twelve) days basic salary for every completed year of service.

iv. Beyond 15 years of continuous service at the rate of 15 (fifteen) days basic salary for every completed year of service subject to maximum of 20 months basic salary.

(c) On resignation or voluntary retirement:
After completion of 5 years of continuous service or more at the rate of 15 days basic salary per year of completed service, subject to maximum of 20 months basic pay provided that the management is satisfied that such resignation or voluntary retirement is in the interest of the administration.
The rate of basic salary for payment of Gratuity shall be the last pay drawn by the employee."

4. On 12.06.2000, the respondent was appointed as Chief Operating Officer of the appellant-company with basic salary of Rs.1,05,000/- per month on terms and conditions indicated therein. One of the terms was:-

"**11.** Gratuity
You will be entitled to gratuity on your becoming eligible as per laws."

At the same time, one of the conditions was:-

> “**9.** Your services will be governed by the Central services Rules of the Company.”

5. The emoluments payable to the respondent were raised from time to time. After having put in about 12 years’ of service, the respondent resigned with effect from 01.06.2012 when his last drawn wages were Rs.24,50,000/-per month. A sum of Rs.36,70,015/- was thereafter paid to the respondent towards retiral dues. The respondent raised a claim that he was entitled to gratuity amount of Rs.1,83,75000/-. By communication dated 09.08.2012, a bank draft in the sum of Rs.10,19,452/- was forwarded by the appellant to the respondent being the sum of Rs.10 Lakhs towards gratuity along with interest accrued thereon from the date of cessation of service of the respondent.

6. The respondent issued a legal notice on 19.10.2012, which was followed by filing of a Claim Petition[2] under Section 7 of the Act. It was submitted that the emolument sheets issued to the respondent from time to time indicated that a sum of 4.81% of his basic salary had been adjusted towards gratuity; in the year 2007 the respondent was promoted to the post of Chief Executive Officer and his emoluments had almost doubled; that his emolument sheet dated 03.06.2011 acknowledged that the amount set

2 Claim Petition No.ALC-HOTB/36(66)/2012/ALC-1/36(203)/16-NK

apart for contribution towards gratuity for that year alone was Rs.11,54,400/-, and that various other employees had actually received gratuities without any limit. It was thus prayed that the respondent was entitled to the balance sum of Rs.1,73,75,000/- (Rs.1,83,75,000/- less Rs.10,00,000/- which was received) towards gratuity along with interest at the rate of 18% per annum.

7. In its reply to the claim petition, the appellant relied upon Clause 15 of the Trust Deed and Rule 6(b) of the Rules. It was submitted:-

> ”(iv) From bare reading of the above Clause 15 read with Rule 6(b), it is apparent that the employees of the respondent No.1 Company, if covered by the provisions of the Gratuity Act were entitled for gratuity in accordance with the provisions of the Gratuity Act.
>
> (v) As per the aforementioned prescribed scheme, the gratuity was always determined as per the method prescribed under the Gratuity Act and when the gratuity for any employee exceeded the maximum limit (as prescribed from time to time), under the Gratuity Act, it was capped at the prevailing upper limit at the relevant time i.e. the gratuity amount was reduced so as to stay within the upper caps prescribed by the Gratuity Act.”

While responding to the submission that some of the employees had received gratuities in excess of Rs.10 lakhs, it was submitted that the respondent as Chief Executive officer was responsible for making such

excessive payments to said employees and that the respondent reserved its rights to take appropriate remedy in that behalf. It was further stated:-

> "In any event, the emoluments sheet never mentioned that the provisions on the letter of appointment, Trust Deed and provisions of the Gratuity Act are not to be followed. The petitioner was entitled to payment of gratuity as per the Gratuity Act in accordance with the terms and conditions of its letter of appointment and the Trust Deed as referred above."

8. By Order dated 31.07.2017, the Claim Petition was allowed by the Controlling Authority under the Act. After referring to some of the decisions of the High Court, it was observed:-

> "The proposition of law that emerges from the aforesaid judgment is that the employees are entitled to receive higher gratuity amount under contract, settlement, award, rules, regulations and schemes of the employer in view of section 4(5) of the Act and an employee can approach the controlling authority to claim determination of his gratuity under the more beneficial settlement, award, rules or scheme of the employer."

8.1. While dealing with the Scheme, it was observed:-

> "The fact that the scheme of the respondents only talk about the method of calculation of gratuity and does not specially put any cap on the amount of gratuity payable under the scheme, the fact that the said scheme was never amended by the respondents to incorporate any ceiling on gratuity, the fact that it does not prescribe for any minimum qualifying service and the fact that the several employees have also been paid gratuity higher than the prescribed

> limit and that the management has continued to earmark 4.81% of the basic of the applicant and other co-employees, towards the gratuity and showing the same as cost to company in emoluments sheet despite the fact the that the said allocation had already crossed the gratuity limits provided under the Act, leaves no room for doubt that the respondents had intended to make more liberal and beneficial gratuity scheme by abandoning the cap on gratuity and minimum qualifying service which otherwise has been provided under the Act."

8.2 In the premises, it was held:-

> "The applicant is therefore entitled to gratuity under the scheme without any cap. The gratuity is to be calculated as per the formula of the Act as the applicant is admittedly covered by the Act, as provided in the scheme of the management, but the gratuity has to be paid without any ceiling."

8.3 The computation as regards the amount payable towards gratuity was as under:-

> "The last drawn salary of the applicant is therefore taken as Rs.24,50,000/-. The gratuity payable under the scheme is therefore determined as under:-
>
> 24,50,000 X 15 X 13/26 = 1,83,75,000/-
>
> Since there is no cap on the gratuity under the scheme of the employer, same is more beneficial to the applicant and he is entitled to receive full gratuity amount of Rs.1,83,75,000/- under the said scheme."

9. The appellant being aggrieved, filed appeal before the Appellate Authority under the Act challenging the aforesaid order dated 31.07.2017 passed by the Controlling Authority and applied for waiver of the requirement of pre-deposit of the amount directed to be paid to the

respondent. Submitting that said application for waiver was not being considered by the Appellate Authority, Writ Petition (Civil) No.10319 of 2017 was preferred in the High Court by the appellant. The Writ Petition was disposed of by the High Court on 22.11.2017 directing the appellant to submit appropriate bank guarantee in the sum representing the amount of gratuity along with interest till the date of filing of the appeal. After compliance, the appeal was taken up for hearing. By order dated 23.03.2018 the appeal[3] was dismissed by the Appellate Authority under the Act with following observations:-

> "The Gratuity Fund so created by the appellant to regulate the gratuity of the employees is necessarily a term of the service contract between the employer and the employees as per requirement under Section 4(5) of the Act.
>
> The CA has rightly held that the amount of gratuity under the scheme that does not provide any ceiling is very well covered under the Section 4(5) of the Act"

10. The appellant filed Writ Petition No.3385 of 2018 in the High Court challenging the Orders passed by the Authorities under the Act. By its order dated 13.04.2018 the High Court stayed the operation of the orders challenged upon the appellant furnishing appropriate bank guarantee. After exchange of pleadings, the Writ petition was taken up for final disposal. The submission advanced on behalf of the appellant was noted as under:-

3 No.36(26)/2017 P.A. DYC

> "As per clause 15 of this Trust Deed, the petitioner's employees are entitled to be paid gratuity out of the aforesaid Fund on the termination of their service, on death or retirement or otherwise as provided in the "Rules of the scheme". The Rules of the scheme and the Appendix thereto provide for two modes of computing an employee's gratuity. For employees covered under the PG Act, gratuity is to be calculated in accordance with the provisions of the Act itself, whereas for the other employees it is to be calculated as per the relevant clauses in the Appendix. He, however, submits that the rules for computing the gratuity of other employees are now redundant in the light of the Payment of Gratuity (Amendment) Act, 1994, which extended the applicability of the PG Act to all the employees engaged in a company. Resultantly, all the petitioner's employees, including the respondent are now covered under the PG Act and, as per the express provisions of the petitioner's gratuity scheme, their gratuity has to be calculated as per the statutorily prescribed rate and ceiling limit under Sections 4(2) and 4(3) respectively."

On the other hand the submission of the respondent on the point was noted as under:-

> "the respondent's claim for gratuity in excess of the ceiling limit prescribed under Section 4(3), is not in conflict with the provisions of the PG Act. In fact, contrary to what has been contended by the petitioner, Section 4(5) categorically protects the respondent's right to receive gratuity under better terms than those prescribed under the said Act."

10.1. While considering these submissions, it was observed:-

> **"24.** In my considered opinion, there is nothing in the Trust Deed dated 19.03.1979 or the Rules thereunder that curbs the respondent's entitlement to gratuity to the ceiling limit prescribed under Section 4(3). The relevant Rule 6(b) of petitioner's gratuity scheme only stipulates that the amount of gratuity

payable to an employee shall be calculated in accordance with the provisions of the PG Act. The "provisions of the PG Act" is a broad phrase that not only contemplates the rate statutorily prescribed under Section 4(2) and the ceiling limit under Section 4(3), but also the exception carved out under Section 4(5) for employees who have better terms of gratuity under an award, or agreement/contract with the petitioner. Therefore, in the absence of a specific clause that caps the maximum amount of gratuity payable to the respondent, a broad stipulation in Rule 6(b) that gratuity will be calculated as per the provisions of the PG Act, cannot be construed to mean that the ceiling limit under Section 4(3) is applicable to the respondent. To my mind, such an interpretation would amount to selectively applying only Section 4(3) of the Act, by ignoring the mandate of Section 4(5), when Rule 6(b) in itself contemplates the provisions of the PG Act as a whole.

25. In other words, Rule 6(b) merely reiterates what is apparent on a plain reading of Section 4 of the PG Act, i.e., the respondent is entitled to a maximum of Rs.10,00,000/- as gratuity, unless there is an award, or contract/agreement whereunder he can claim gratuity in excess of the aforesaid ceiling limit. The said Rule is so broadly drafted that read by itself, it cannot be construed to contemplate only the ceiling limit under Section 4(3) of the PG Act, but also indicates the provisions of Section 4(5). Similarly, the Appendix to the aforesaid Rules only stipulates that the respondent's gratuity shall be calculated as per the *rates* prescribed under the PG Act, i.e., under Section 4(2). However, it does not in any way stipulate that he is subject to the statutory limit prescribed under Section 4(3).

26. Now coming to clause 11 of the respondent's terms of appointment which, as per the contentions of the learned counsel for the petitioner, clearly lays down that the respondent is only entitled to a maximum gratuity of Rs.10,00,000/- as prescribed under the PG Act. I am of the view that there can be two possible interpretations of Clause 11. In the first sense, the phrase "as per laws" can be read to qualify

the word "eligible" so that Clause 11 suggests that the respondent shall be entitled to receive gratuity on his meeting the eligibility criteria laid down by the laws in force. For obvious reasons, this particular interpretation of the clause cannot in any way be read to impose a limit on the amount of gratuity payable to the respondent. In the second sense, which is the interpretation that has been relied upon by the learned counsel for the petitioner, Clause 11 can be read to suggest that the respondent shall be entitled to gratuity "as per laws" on his becoming eligible. In this sense also, the phrase "as per laws" is at best a broad stipulation that takes within its sweep not only the provisions of Sections 4(2) and 4(3), but also of Section 4(5). Like Rule 6(b) under the Trust Deed dated 19.03.1979, the interpretation of clause 11 relied upon by Mr. Sethi has such a broad implication that it cannot be read so selectively to apply the ceiling limit under Section 4(3) to the amount of gratuity that can be claimed by the respondent. Thus, looked at from every possible angle, there is nothing in the documents relied upon by the learned counsel for the petitioner that curbs the gratuity payable to the respondent to the statutory ceiling limit under Section 4(3)."

10.2. As regards, the decision of this Court in ***Beed District Central Cooperative Bank Ltd. v. State of Maharashtra and others***[4] , it was observed:-

"**31.** Similarly, the decision in ***Beed District Central Coop. Bank Ltd. v. State of Maharashtra and Ors.***[4]**,** is also not applicable to the present case. In that case, the appellant/employer's internal gratuity scheme provided a better rate for computing the gratu9ity of the respondent/workman, but the ceiling limit thereunder was lower than that prescribed by the PG Act. When the respondent/workman sought to avail the benefit of the appellant/employer's internal gratuity scheme as also the ceiling limit under the PG Act, the Supreme Court held that the

4 (2006) 8 SCC 514

> respondent/workman must either avail the benefit of his contract with the appellant/employee in its entirety or the statute. He cannot avail the better terms of his contract with appellant/employer and at the same time keep his options open in respect of a part of the statute that suits him."

The Single Judge of the High Court, thus by order dated 06.02.2019 dismissed the aforesaid Writ Petition as well as connected petitions.

11. The matter was carried further by the appellant by filing Letters Patent Appeal No. 97 of 2019 before the Division Bench of the High Court which by its judgment and order dated 12.02.2019 affirmed the view taken by the Single Judge and dismissed the appeal. The Division Bench considered the decision of this Court in ***Beed District Central Cooperative Bank Ltd.*** [4] and found as under:-

> "**18.** … …There, the employees had opted for the Scheme of the Management which was less advantageous than the PGA. Their plea that they should be given gratuity as per the then upper limit as per the PGA was negative. It was held by the Supreme Court that an employee while reserving his right to opt for the beneficient provisions of the statute or the agreement had to opt "for either of them and not the best of the terms of the statute as well as those of the contract." In the present case, the Appellant's Gratuity Scheme, which was relied upon by the Respondent, itself provided for the rates as per Section 4(2) of the PGA but without the upper limit under Section 4(3) PGA. By opting for the Appellant's Scheme, the Respondent did not lose the benefit of Section 4(2) PGA.
>
> … … …

> **20.** The Court finds that not all elements of the PGA have been adopted in the Gratuity Scheme of the Appellant. While the 'rate' stipulated under Section 4(2) PGA has been adopted, the ceiling limit under Section 4(3) of the PGA has not. As noted both by the CA and the learned Single Judge, the Appellant itself calculated the gratuity not just in the case of the Respondent but in the cases of ten other employees. The Chairman and Managing Director (CMD) of the Appellant would decide the emoluments of the Respondent and issue EES which invariably contained an entry towards gratuity, which amount was computed at the rate of 4.81% of the Respondent's annual basic salary. The EEs were issued under the signature of the CMD before being handed over to the Respondent in original, thereby becoming a part of the contract between the Appellant and the Respondent. In 2007-08 the gratuity amount was Rs.6,34,920/- which was nearly twice the then ceiling limit of Rs.3.5 lakhs under the PGA. In 2011-12 it was Rs.11,54,400/- which was higher than the ceiling limit of Rs.10 lakhs."

12. In this appeal challenging the view taken by the High Court, we heard Mr. C.U. Singh, learned Senior Advocate for the appellant and Mr. J.P. Cama, learned Senior Advocate for the respondent.

13. In the submission of Mr. C.U. Singh, learned Senior Advocate, the respondent was clearly covered by the Payment of Gratuity Act, 1972 and subject to the ceiling or limit of Rs.10 lacs as provided under Section 4(3).

He submitted that while an employee would be entitled to receive better terms of gratuity under Section 4(5) of the Act, such better terms could be claimed only under specific circumstances as set out in Section

4(5); that at no stage any claim was raised regarding existence of any award, agreement or contract nor was there any pleading about the existence of any award, agreement or contract. It was further submitted that in terms of law laid down by this Court in ***Beed District Central Cooperative Bank Ltd.***[4] and ***Union Bank of India and others vs. C.G. Ajay Babu and Another***[5] either the statutory provisions or the contractual scheme can be followed and not a combination of both the elements.

14. In response, it was submitted by Mr. J.P. Cama, learned Senior Advocate for the respondent that since Section 4(5) of the Act has been given overriding effect over other provisions of Section 4, as held by this Court in ***Union Bank of India***[6]***,*** it would override the provisions of Section 3 of the Act and as such, all that the respondent needed to show was that the appellant had a scheme for its employees (contract) and that it did not prescribe any ceiling and that such a scheme would be protected by Section 4(5) of the Act. As regards the applicability of Rule 6(b) of the Scheme, it was submitted:-

> "It is true that Rule 6(b) contains a non-obstante clause. However, Section 4(5) also contains a non-obstante clause. Section 4(5) being a statutory provision, will prevail. In any case Rule 6(b) must also be reconciled with Rule 6(a) which makes "the Company's Gratuity Scheme" applicable to every

5 (2018) 9 SCC 529
6 (2018) 9 SCC 529

> member, otherwise Rule 6(a) would become otiose. Thus, if "the Company's Gratuity Scheme" is more beneficial than the Act, Rule 6(a) will get its play. There is nothing in Rule 6(b) that excludes a more beneficial scheme under Section 4(5) and / or Rule 6(a)."

15. Before we deal with the rival submissions, the effect of various amendments making changes in Section 2(e), Section 4(2) and Section 4(3) of the Act are required to be considered. The Act was enacted in the year 1972 "to provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shop or other establishments and for matters connected there with and incidental thereto". The expression "*employee*" as originally defined in Section 2(e) was as under:-

> "(e) "employee" means any person (other than an apprentice) employed on wages, not exceeding one thousand rupees per mensem, in any establishment, factory, mine, oilfield, plantation, port, railway company or shop, to do any skilled, semi-skilled, or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, but does not include any such person who is employed in a managerial or administrative capacity, or who holds a civil post under the Central Government or a State Government, or who is subject to the Air Force Act, 1950, the Army Act, 1950, or the Navy Act, 1957.
>
> *Explanation.*- In the case of an employee, who, having been employed for a period of not less than five years on wages not exceeding one thousand rupees per mensem, is employed at any time thereafter on wages exceeding one thousand rupees

per mensem, gratuity, in respect of the period during which such employee was employed on wages not exceeding one thousand rupees per mensem, shall be determined on the basis of the wages received by him during that period;"

The original text of Sub-Sections (2) and (3) of Section 4 of the Act was as under:-

"**Payment of gratuity:**

4. (1) … … …

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

Provided that in the case of a piece rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account:

Provided further that in the case of an employee employed in a seasonal establishment, the employer shall pay the gratuity at the rate of seven days' wages for each season.

(3) The amount of gratuity payable to an employee shall not exceed twenty months' wages.

(4) to (6) … … …"

15.1 By Act 25 of 1984 the expression "*one thousand six hundred rupees*" was substituted in place of expression "*one thousand rupees*" in

Section 2(e). Further, in explanation to Section 2(e), similar expression "*one thousand six hundred rupees*" was substituted at two places for "*one thousand rupees*". Similarly, expression "*and whether or not such person is employed in a managerial or administrative capacity*" was inserted in Section 2(e) before the clause beginning with "but does not include any person who holds the post under the Central Government …".

15.2 By Act 22 of 1987 further amendments were effected and expression "*two thousand five hundred rupees per mensem or such higher amount the Central Government may, having regard to the general level of wages, by notification specify*" was substituted in place of "*one thousand six hundred rupees per mensem*" in the main part of Section 2(e) defining "*employee*". Similarly, for the expression "*one thousand six hundred rupees per mensem*", the expression "*that amount*" was substituted at two places in the Explanation to Section 2(e). Said amendment Act also inserted following *explanation* after Second Proviso to Sub-Section (2) of Section 4.

> "*Explanation.*- In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen."

Sub-Section (3) of Section 4 was also amended and instead of "*twenty months' wages*" the expression "*fifty thousand rupees*" was substituted.

15.3 In exercise of power conferred upon it, the Central Government by Notification No. S.O. 863 (E), dated 26.11.1992 raised the "*higher amount*" of wages referred to in Section 2(e) of the Act to "*three thousand and five hundred rupees*".

15.4 Act 35 of 1994 made further amendments and expression "*not exceeding two thousand five hundred per mensem, or such higher amount as the Central Government may, having regard to the general level of wages, by notification specify*" occurring in Section 2(e) was omitted. The *explanation* to Section 2(e) was also omitted. Consequently, the definition of "*employee*" now ceased to have any limit on wages and all employees, who otherwise answer the description in the definition, regardless of wages that they would receive, now stand covered.

This Amendment Act also substituted expression "*one lakh*" in place of the earlier expression "*fifty thousand*" occurring in Section 4(3) of the Act.

15.5 By Act 47 of 2009, for Clause *(e)* of Section 2 following Clause was substituted:-

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

15.6 The ceiling limit of "*one lakh rupees*" as stipulated in Section 4(3) of the Act was successively raised by Act 11 of 1998 and by Act 15 of 2010 to "*rupees three lakhs and fifty thousand rupees*" and "*ten lakh rupees"* respectively.

15.7 By Act 12 of 2018 the expression *"ten lakh rupees"* now stands substituted by the expression *"such amount as may be notified by the Central Government from time to time"*.

15.8 The provisions of Section 2(e) and Section 4 of the Act, as they stand this date, are as under:-

<u>Section 2(e)</u>

> "employee" means any person (other than an apprentice who is employed for wages, whether the

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

Section 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.

(2) For every completed year of service or part thereof in excess of six months, the employer shall pay

gratuity to an employee at the rate of fifteen days wages based on the rate of wages last drawn by the employee concerned:

Provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months immediately preceding the termination of his employment, and, for this purpose, the wages paid for any overtime work shall not be taken into account.:

Provided further that in the case of [an employee who is employed in a seasonal establishment and who is riot so employed throughout the year], the employer shall pay the gratuity at the rate of seven days wages for each season.

Explanation: In the case of a monthly rated employee, the fifteen days wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen.

(3) The amount of gratuity payable to an employee shall not exceed three lakhs and fifty thousand] rupees.

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced.

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

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

(a) 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.

(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"

16. Thus, as on the day, when the respondent resigned from his service, that is on 01.06.2012, the relevant ceiling in Sub-Section (3) of Section 4 was at the level of *"ten lakh rupees"* and for an employee to be covered by the definition obtaining in Section 2(e) of the Act, there was no wage-bracket or ceiling.

17. In terms of Section 4(1) of the Act gratuity shall be payable to an employee in the eventualities referred to therein if he had rendered continuous service for not less than five years. Explanation to Section 4(2) *inter alia* states that the gratuity shall be payable at the rate of 15 days' wages for every completed year of service or part thereof in excess of six months. Explanation to Section 4(2) lays down how the gratuity is to be

calculated, while Section 4(3) stipulates that the amount of gratuity payable to an employee shall not exceed certain limit and thus puts a cap on the amount payable towards gratuity. Section 4(5) then states that nothing in said Section shall affect the right of an employee to receive better terms of gratuity under "any award or agreement or contract with the employer".

18. For Section 4(5) of the Act, to get attracted, there must be better terms of gratuity available and extendable to an employee "under any award or agreement or contract with the employer" as against what has been provided for under and in terms of the Act. In other words, as against what is made applicable by the Act, if better terms are available under any such arrangement with the employer, Section 4(5) stipulates that nothing in Section 4 shall affect the right of any employee to receive such better terms. Thus, when two choices are available, one under provisions of the Act and one under such arrangement with the employer and if the latter offers better terms, the employee cannot be denied right to receive those higher benefits.

19. But the question still remains whether in the present case there was such a choice available or not. According to Mr. C.U. Singh, learned Senior Advocate, the case of the respondent would be clearly covered by the provisions of the Act and not under the Scheme at all. Similar submissions

were advanced on behalf of the appellant before the High Court, as noted by the Single Judge. However, the submissions were rejected after placing reliance on Section 4(5) of the Act.

20. We must, therefore, see what exactly has been provided for in the Trust Deed, Scheme and the Rules framed thereunder. The Trust Deed was executed "for the purpose of providing gratuities to the employees of the company under the Payment of Gratuity Act". Clause 15 of the Trust Deed casts an obligation on the trustees to provide payment of gratuity upon termination of service or upon death or retirement of service of the Member "as provided in the Rules of Scheme" Rule 6(b) of the Rules clearly stipulates that notwithstanding the Scheme of the Company, if any member is covered by the Act, the amount of gratuity shall be calculated in accordance with the provisions of the Act. Similar thought is expressed in the Appendix to the Scheme which prescribes the rates at which the gratuity is to be paid.

The Scheme thus divides the employees in two categories. First, the employees to whom the Act applies and with respect to whom the amount of gratuity shall be "calculated in accordance with the provisions of the Act and as per the rates prescribed by the Act"; the Second category of employees are those to whom the Act does not apply. According to said

Rule 6(b) and Appendix, the calculation of amount of gratuity at the rates prescribed in the manner laid down in the Appendix, is to be done only in the case of employees in the Second category.

21. The intent of the Trust Deed and the Scheme is thus clear that the governing principles as regards the amount to be calculated and the rates to be applied have to be in accordance with the provisions of the Act, if an employee is covered by the provisions of the Act. If the amount is to be so calculated according to the provisions of the Act, in case of employees covered by the provisions of the Act, there is no other alternative which is offered by the Company or which is part of any award or agreement or contract entered into between the employer and employees. Thus, no reliance could be placed on Section 4(5) of the Act to submit that the employees are entitled to some greater advantage than what is available under the Act. As stated earlier, for Section 4(5) to apply there must be two alternatives, one in terms of the Act and one as per the award or agreement or contract with the employer. The Scheme on which heavy reliance was placed to submit that it afforded and made available better terms of gratuity itself emphasizes that in case of the employees who are covered under the Act, the amount payable as gratuity shall be in terms of the provisions of the Act. The Scheme does not therefore offer to the

employees covered by the Act any other alternative apart from what is payable under the Act.

22. Rather than making available an alternative to the model and modalities of calculation of amount of gratuity, as placed on statute book by the provisions of the Act, the Trust Deed and the Scheme contemplates two kinds of employees. One, who are covered under the provisions of the Act and the other, who are not so covered. The historical background and the changes that the provisions of Section 2(e) and Section 4 have undergone show that not all employees were initially sought to be covered under the Act. Those, who were in wage-brackets greater than what was stipulated in Section 2(e) till it was finally amended to do away with the wage-bracket, were not covered by the Act. The Trust Deed and the Scheme sought to devise an apparatus and make provision for those who were otherwise not covered by the Act and for this reason contemplated two kinds of employees. The Trust Deed and the Scheme were executed and formulated in the year 1979 when the wage-bracket was a definite parameter for an employee to be covered under the Act. The intent of the Trust Deed and the Scheme has to be understood in that perspective. The idea was not to afford to the employees who are covered by the provisions of the Act, a package better than what was made available by the Act, but

it was to extend similar benefit to those who would not be covered by the Act.

23. In ***Beed District Central Cooperative Bank Ltd.***[4], the gratuity scheme provided by the employer had better rate for computing gratuity but the ceiling limit was lower; whereas the entitlement under the provisions of the Act was at a lesser rate but the ceiling prescribed by the Act was higher than what was provided by the employer. This Court laid down that an employee must take complete package as offered by the employer or that which is available under the Act and he could not have synthesis or combination of some of the terms under the scheme provided by the employer while retaining the other terms offered by the Act. That was a situation where two alternatives were available to the employee. The High Court in the present case, however, distinguished said decision on the ground that the Scheme of the appellant "itself provided for the rates as per Section 4(2) of the Act but without upper limit under Section 4(3) of the Act". In our view, the High Court failed to consider the effect and impact of Rule 6(b) of the scheme. The Single Judge did refer to said Rule 6(b) but found that the Rule was so broadly drafted that it could not be construed to contemplate the ceiling limit under Section 4(3) of the Act. In our view, the true import of Rule 6(b) which gets further emphasized by

stipulation in the Appendix to the Scheme was lost sight of by the authorities under the Act and by the High Court. If an employee is covered by the provisions of the Act, according to said Rule 6(b), the amount of gratuity has to be calculated in accordance with the provisions of the Act. The Appendix to the Scheme reiterates the same principle. Thus, in case of such an employee the gratuity has to be calculated in accordance with the provisions of the Act and while so calculating, not only the basic principle available in Section 4(2) as to how the gratuity is to be calculated must be applied but also the ceiling which is part of Section 4(3) must also apply. The rates and the modalities of calculations of gratuity as available under the Scheme of the Rules are to apply only to those employees who are not covered by the provisions of the Act.

24. We have, therefore, no hesitation in holding that the Authorities under the Act and the High Court erred in accepting the claim preferred by the respondent. We hold that the appellant was right in going by the provisions of the Act in the present matter and by the ceiling prescribed under Section 4(3) of the Act. Any mistakes on its part in making some extra payments to some of the other employees would not create a right in favour of others in the face of the stipulations in the Trust Deed and the Scheme.

25. We, therefore, allow this appeal, set aside the impugned judgment and order and dismiss the Claim Petition preferred by the respondent. No costs.

..……………………….J.
(Uday Umesh Lalit)

...…..……………….J.
(Sanjiv Khanna)

New Delhi;
April 29, 2020.

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 2382 OF 2020
[Arising Out of Special Leave Petition (C) No.6307 of 2019]

M/S BCH ELECTRIC LIMITED …. APPELLANT

VERSUS

DIBYENDU BHATTACHARJEE …. RESPONDENT

WITH

CIVIL APPEAL NO. 2380 OF 2020
[Arising Out of Special Leave Petition (C) No.6322 of 2019]

AND

CIVIL APPEAL NO. 2381 OF 2020
[Arising Out of Special Leave Petition (C) No.6164 of 2019]

O R D E R

Uday Umesh Lalit, J.

1. Leave granted.

2. Appeals from SLP (Civil) Nos.6307 and 6322 arise from the final judgments and orders dated 13.02.2019 passed by the High Court in L.P.A. Nos.102 of 2019 and 103 of 2019 respectively while appeal from SLP (Civil) No.6164 of 2019 arises from the final judgment and order dated 15.02.2019 passed by the High Court in LPA No.110 of 2019 where the

view taken in decision dated 12.02.2019 in L.P.A. No.97 of 2019 was followed and the concerned L.P.As were dismissed.

3. Since we have allowed the appeal against the decision dated 12.02.2019, these appeals are allowed in terms of our judgment in Civil Appeal arising from SLP(C) No.5269 of 2019. No Costs.

..……………………….J.
(Uday Umesh Lalit)

...…..………………….J.
(Sanjiv Khanna)

New Delhi;
April 29, 2020.