

CH. CUM MAN. DIRECTOR MAHANADI COALFIELD LTD. A

v.

RABINDRANATH CHOUBEY
(Civil Appeal No. 9693 OF 2013)

OCTOBER 29 , 2013

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[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

*Payment of Gratuity Act, 1972 – s.4(6)(a) and (b) – Employer's right to withhold gratuity pending departmental enquiry – Held: A three Judge Bench judgment of Supreme Court passed in *Ram Lal Bhaskar's case is contrary to the dicta laid down in **Jaswant Singh's case passed by a Division Bench of Supreme Court which laid down that employer does not have right to withhold gratuity pending departmental enquiry – Hence matter referred to larger Bench.*

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The question for consideration, in the present appeal was whether gratuity can be withheld in the wake of r. 34 of Conduct, Discipline and Appeal Rules, 1978 of the appellant-employer, when examined in juxtaposition with the provisions of Payment of Gratuity Act, 1972.

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Referring the appeal to larger Bench, the Court

HELD: In **Jaswant Singh Gill's case, a Two Judge Bench of Supreme Court directly answered the question that gratuity has to be necessarily released to the concerned employee on his retirement even if departmental proceeding are pending against him. The said judgment proceeds on the basis that after the retirement of an employee, penalty of dismissal cannot be imposed upon the retired employee. However, in *Ram Lal Bhaskar's case, penalty of dismissal, even after the retirement, was upheld by Three Judge Bench of Supreme Court. This goes contrary to the dicta laid down

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A in ****Jaswant Singh Gill's** case which took the view that no
 major penalty is permissible after retirement. If the view
 laid down in ****Jaswant Singh Gill's** case is not correct
 and the imposition of penalty of dismissal is still
 permissible, employer will get the right to forfeit the
 B gratuity of such an employee in the eventualities provided
 u/ss. 4(1) & 4 (6) of the Payment of Gratuity Act. [Paras
 22 and 23] [526-B-C, D-F]

2. For invoking s. 4(6) (a) and (b) of Payment of
 C Gratuity Act, necessary pre-condition is the termination
 of service on the basis of departmental enquiry or
 conviction in a criminal case. This provision would not
 get triggered if there is no termination of services. It is the
 case of the appellant that in the charge-sheet served
 D upon the respondent, there are very serious allegations
 of misconduct alleging dishonestly causing coal stock
 shortage amounting to Rs. 31.65 crores, and thereby
 causing substantial loss to the employer. If such a charge
 is proved and punishment of dismissal is given
 thereupon, the provisions of s. 4(6) of the Payment of
 E Gratuity would naturally get attracted and it would be
 within the discretion of the appellant to forfeit the gratuity
 payable to the respondent. As a corollary, one can say
 that the employer has right to withhold the gratuity
 pending departmental inquiry. However, this course of
 F action is available only if disciplinary authority has
 necessary powers to impose the penalty of dismissal
 upon the respondent even after his retirement. Therefore,
 the issue needs to be considered authoritatively by a
 larger Bench. Hence, the appeal needs to be decided by
 G a Bench of three Judges. [Paras 24 and 25] [528-B-F]

****Jaswant Singh Gill vs. Bharat Coking Coal Ltd. and Ors.**
 (2007) 1 SCC 663; 2006 (8) Suppl. SCR 1064; ***State Bank
 of India vs. Ram lal Bhaskar and Anr.** 2011(10) SCC 249:

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2011 (12) SCR 1036; *UCO Bank and Anr. vs. Rajinder Lal Capoor* 2007 (6) SCC 694; 2007 (7) SCR 543 – referred to. A

Case Law Reference:

2006 (8) Suppl. SCR 1064 referred to Para 13

2011 (12) SCR 1036 referred to Para 14 B

2007 (7) SCR 543 referred to Para 20

CIVIL APPELLATE JURISDICTION : Civil Appeal No.
9693 of 2013. C

From the Judgment & Order dated 17.07.2013 of the High
Court of Orissa, Cuttack in W.A. No. 115 of 2012.

Mahabir Singh, Gp. Capt. Karan Singh Bhati, Monika
Sharma, Ayushi Mittal for the Appellant. D

Anukul Chand Pradhan, Kamal Baid, Saurabh Mishra for
the Respondent.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. Leave granted. E

2. The respondent was working as Chief General Manager
(Production) since 17.2.2006 at Rajmahal area under Mahanadi
Coalfields Ltd., the appellant herein. A memo containing articles
of charge was issued to him on 1.10.2007 alleging that there
was shortage of stock of coal in Rajmahal Group of mines
which was under his management and enquiry was proposed
to be conducted under Rule 29 of the Conduct, Discipline &
Appeal Rules. F

3. During the pendency of the departmental proceeding,
the Respondent was allowed to retire on 31.7.2010 on attaining
the age of superannuation. The Respondent submitted an
application on 21.9.2010 to the Director (Personnel) for
payment of gratuity. On the same date, he also submitted an H

A application before the Controlling Authority under Payment of Gratuity Act cum-Regional Labour Commissioner for payment of gratuity.

B 4. Notice was issued to the Appellant to appear. The appellant appeared and stated that the payment of gratuity was withheld due to reason that disciplinary case is pending against him. The controlling authority held that the claim of the Respondent was pre-mature.

C 5. The respondent challenged the order by filing the writ petition. The single Judge dismissed the writ petition holding that in view of the existence of an appellate forum against the order passed by the Authority, the Respondent may file an appeal before the Appellate Authority within 21 days from the date of passing of the impugned order.

D 6. The Respondent then filed Intra Court Writ Appeal. The Division Bench of the High Court has held that writ petition was maintainable. On merits, it ruled that the disciplinary proceedings against the respondent were initiated prior to attaining the age of superannuation. The respondent retired from service on superannuation and hence the question of imposing a major penalty of removal or dismissal from service would not arise as per the decision of the Supreme Court in *Jaswant Singh Gill vs. Bharat Coking Coal Ltd. & Ors.* (2007) 1 SCC 663. The High Court has further held that the power to withhold payment of gratuity as contained in Rule 34(3) of the Rules, 1978 shall be subject to the provisions of the Payment of Gratuity Act, 1972. Therefore, the statutory right accrued to the Respondent to get gratuity cannot be impaired by reason of the Rules framed by the Coal India Ltd. which do not have the force of a statute. On that basis, direction is given to the appellant to release the amount of gratuity payable to the respondent.

H 7. In the aforesaid circumstances, the question which falls for consideration is as to whether it is permissible in law for

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the appellant to withhold the payment of gratuity to the respondent, even after his superannuation from service, because of the pendency of disciplinary proceedings against him.

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8. Before we proceed to answer this question in the light of arguments advanced by Counsel on either side, we would like to point out that the question of maintainability of the writ petition against the order of the Controlling Authority under the Payment Gratuity Act was not raised before us by the learned Counsel for the appellant. Thus, the learned Counsel did not challenge the approach of the writ appeal Court in entertaining the writ appeal on merits by giving the reason that it was so doing to avoid confusion and ambiguity, more so when there were no disputed facts involved and the issue involved was pure question of law. We are, therefore, not called upon to decide as to whether the approach of the Division Bench in entertaining the writ appeal on merits was erroneous or not.

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9. Reverting to the issue framed above, before we examine the same, we would also like to narrate some more facts for clear understanding of the issue involved. The appellant- Ch.-cum-Man. Director Mahanadi Coalfield Limited (CIL) has framed the Conduct Discipline and Appeal Rules, 1978 (hereinafter to be referred as 'CDA Rules'). These are applicable to the employees of the appellant company as well.

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10. Rule 27 of these CDA Rules mentions the authorities who are empowered to impose various punishments which are specified in column III of the Schedule attached to these Rules. Rule 29 enlists the procedure for imposing major penalties for misconduct and misbehaviour. The CDA Rules are not statutory in nature. However, they govern the employees of the appellant.

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11. When the respondent was served with charge sheet dated 1.10.2007, he was posted as Chief General Manager, Rajmahal, Group of Mines, ECL. Shortly, after the service of charge sheet, respondent was made to join as Chief General

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A Manager, Mining in M-3 Grade on transfer and was posted as Chief General Manager, Production, MCL. On 9.2.2008, he was suspended from service under Rule 24.1. of the CDA Rules, pending departmental inquiry against him. This suspension, however, was revoked from 27.2.2009 without prejudice to the departmental inquiry. On completion of 60 years of age, the respondent was superannuated with effect from 31.7.2010 for which notice for retirement on superannuation was given by the appellant to the respondent vide letter dated 8.2.2010.

C 12. It would also be pertinent to mention that the inquiry against the respondent was concluded on 25.3.2009. However, thereafter nothing has been heard by the respondent. It is not known as to whether the Inquiry Officer has submitted the report on the said inquiry and if a report is submitted whether he has exonerated the respondent or held him guilty of the charges. Be as it may even if there is any report, no further action has been taken on the said report by the disciplinary authority till date and more than 4 ½ years have lapsed in the meantime.

E 13. On the aforesaid facts, the case of the respondent before the courts below was that his statutory rights to receive the gratuity could not be interdicted and as per the provisions of Payment of Gratuity Act he was entitled to have the payment of gratuity on his superannuation. Since, the appellant had referred to the Rules framed under which gratuity could be withheld pending inquiry, this position was sought to be countered by the respondent with a submission that such Rules which were non-statutory in nature could not thwart the right of the respondent to claim the gratuity which was statutorily recognised in his favour under the Payment of Gratuity Act, 1972. As noted above, while giving brief narration of facts, the High Court has accepted the aforesaid plea of the respondent and while doing so it has referred to the judgment of this Court in the case of *Jaswant Singh Gill v. Bharat Coking Coal Ltd. and Ors. (supra)*. Some of the judgments cited by the appellant

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before the High Court, which would be referred to at a later stage, have been distinguished by the High Court holding that they are not applicable.

14. The arguments of the learned Counsel for the respondent were same which were addressed before the High Court. Likewise, learned Counsel for the appellant also made the very same submissions. He argued that in view of Rule 34 of the CDA Rules, the management had a right to withhold payment of gratuity. He also submitted that this rule was not contrary to any provisions of the Payment of Gratuity Act. The submission in this behalf was that in Payment of Gratuity Act there is no provision that gratuity has to be released even when departmental proceedings are pending against an employee. The learned Senior Counsel for the appellant placed strong reliance on the judgment of this Court in *State Bank of India vs. Ram Lal Bhaskar and Anr.* ; 2011(11)SCALE 589; 2011(10)SCC249.

15. In so far as rule position is concerned, it is not in doubt that Rule 34 permits the management to withhold the gratuity during the pendency of the disciplinary proceedings. Rule 34.2 and 34.3 of the CDA Rules are relevant in this behalf which make the following reading:

“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 recovering 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-

A 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
 B 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.”

16. The bone of contention is as to whether this rule is
 contrary to the provisions of the Payment of Gratuity Act and,
 C therefore, this rule being non-statutory is to be ignored and the
 provisions of the Gratuity Act are to be preferred. In this behalf
 we will have to examine the scheme of the Gratuity Act to find
 whether as per the Gratuity Act, such a person like the
 respondent, would become entitled to receive the gratuity under
 D this Act.

17. It is because of the reason that a statutory right accrued,
 thus, cannot be impaired by reason of a rule which does not
 have the force of statute. It will bear repetition to state that the
 E Rules framed by Respondent No. 1 or its holding company are
 not statutory in nature.

18. It would be of interest to note that the inter play of these
 very CDA Rules, 1978 of CIL and the Provisions of Gratuity
 Act came for consideration in the case of *Jaswant Singh Gill*
 F (supra) and this Court explained the legal position of CDA
 Rules vis-a-vis Gratuity Act/ gratuity of an employee in the
 following manner:-

“The Act was enacted with a view to provide for a scheme
 G for payment of gratuity to employees engaged inter alia in
 mines. Section 3 of the Act provides for appointment of
 an officer to be the controlling authority. Controlling
 authority is to be responsible for administration of the act.
 Different authorities, however, may be appointed for
 H different areas. Section 4 of the Act entitles an employee

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to gratuity after he has rendered continuous service for not less than five years inter alia on his superannuation. Sub-Section (6) of Section 4 contains a non-obstante clause stating:

(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 or 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.

9. The Rules framed by the Coal India Limited are not statutory rules. They have been made by the holding company of Respondent No. 1. 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

A 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. Power to withhold penalty 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 therefore is rendition of five years continuous service. 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.

D 10. 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. 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

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

19. The principles which are laid down in the aforesaid judgment are recapitulated below:-

- (i) No doubt, Rule 34.2 of CDA Rules provides for continuation of disciplinary proceedings despite retirement of an employee if the same was initiated before his retirement. However, after his retirement, major penalty in terms of Rule 27 cannot be imposed. We may state here that rule 27 of CDA Rules provides for the nature of penalties including ‘recovery from pay or gratuity of the whole part of any back loss cause to the company by negligence or breach of orders for trust’. Major penalties which are prescribed under Rule 27 are reduction to a lower grade, compulsory retirement, removal from service and dismissal. The Court thus, held that these major penalties cannot be imposed upon a retired employee.
- (ii) Gratuity Act gives right to an employee to receive gratuity on rendition of 5 years continuous service. Gratuity become payable as soon as the employee retires. This statutory right which accrues to an employee cannot be impaired by reason of a rule which does not have the force of a statute. Therefore, Rule 34.3 of the CDA Rules, which is

A non-statutory in nature, is contrary to the provisions
of the Gratuity Act. As such, gratuity cannot be
withheld on the retirement of an employee even if
departmental proceedings were initiated against
him before his retirement and are pending at the
B time of retirement.

20. *Jaswant Singh Gill* (supra) was a judgment delivered
by two judge Bench. Mr. Mahavir Singh, learned senior counsel
has placed strong reliance to a three Bench judgment of this
Court which is later in point of time. This case is known as *State*
C *Bank of India vs. Ram Lal Bhaskar and Anr.* 2011(10)SCC249.
In that case, Rule 19(3) of the State Bank of India Officers
Service Rules, 1992 came up for interpretation which was *para*
materia with rule 13.42 of the CDA Rules. Said rule 19(3) of
SBI Officers Service Rules also permits disciplinary
D proceedings to continue even after the retirement of an
employee if those were instituted when the delinquent employee
was in service. Then for the purpose of such proceedings the
otherwise retired employee is deemed to be in service and
those proceedings shall be continued and concluded as if the
E employee had continued in service. Thus, such an employee
is deemed to be in service for limited and specified purpose
only viz. for the purposes of continuance and conclusion of the
proceedings. In that case, charge sheet was served upon the
respondent before his retirement. The proceedings continued
F after his retirement and were conducted in accordance with
relevant rules wherein charges were proved. On that basis
punishment of dismissal was imposed. After exhausting the
departmental remedies, the respondent filed the writ petition
in the High Court which was allowed and order of dismissal was
G quashed. This Court reversed the said decision of the High
Court. However, we find that there is no direct discussion, in
the said judgment, on the issue as to whether it is permissible
for the disciplinary authority to impose the penalty of dismissal
of service after the retirement of the employee. In fact the Court
H had dealt with two aspects. One question which was

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deliberated was as to whether inquiry could continue after the retirement of the respondent from service. This question was answered in the affirmative having regard to Rule 19(3) of the SBI Officers Service Rules. The Court distinguished another judgment in *UCO Bank & Anr. vs. Rajinder Lal Capoor*; 2007(6)SCC694 on a ground that in the said case the delinquent officer had already been superannuated and the charge sheet was served after his retirement. In these circumstances the court had taken the view in *Rajinder Lal Capoor's* case that when an employee is allowed to superannuate, no inquiry can be initiated against him thereafter. However, if charge sheet is served before the retirement enquiry can continue even after the retirement as per Rule 19(3). This proposition thus stands settled viz. if the Rules permit, enquiry can continue even after the retirement of the employee.

21. Other aspect which was dealt with was as to whether the High Court could interdict the findings of disciplinary authority and arrive at its conclusion that the findings recorded by the Inquiry Officer was not substantiated by any officer on record on the basis of evidence produced. This Court held that so long the findings of the disciplinary authority are supported by some evidence, the High Court is not empowered to re-appreciate the evidence as an appellate authority and come to a different and independent findings on the basis of that evidence. This is not the issue before us in the instant case.

22. It is thus, clear that the question as to whether penalty of dismissal could be imposed after a retirement was not categorically raised or dealt with. No doubt, penalty of dismissal was inflicted upon the employee in that case. But it was not specifically on in clear terms contended that such a penalty could not be imposed on an employee who is already permitted to retire. At the same time, innuendo, the judgment gives a semblance of indication that such a penalty is permissible because of the reason that as per the rules, for the purposes of enquiry, the employee shall be deemed to be in service. As

- A a sequittor, one can deduce the principle that when the Rules, by creating fiction, treat the officer still in service, albeit for the limited purpose of the continuance and conclusion of such proceedings, then any of the prescribed penalties, including dismissal, can be imposed. However, as we have pointed out
- B above, the issue of permissibility of penalty of dismissal on such a retired official was neither raised nor any direct discussion followed thereupon. At the same time, fact remains that penalty of dismissal, even after the retirement, was upheld. This goes contrary to the dicta laid down in *Jaswant Singh Gill* (supra)
- C which took the view that no major penalty is permissible after retirement was not even referred to.

23. The issue which confronts us in the instant appeal is as to whether gratuity can be withheld in the wake of Rule 34 of CDA Rules when examined in juxtaposition with the provisions of the Gratuity Act. To put it otherwise, whether in the scheme of Gratuity Act, gratuity has to be necessarily released to the concerned employee on his retirement even if departmental proceedings are pending against him. We find that *Jaswant Singh Gill*'s case directly answers this question,

D that too in the context of these very CDA Rules. However, it is because of the reason that the said judgment proceeds on the basis that after the retirement of an employee, penalty of dismissal cannot be imposed upon the retired employee. If this view is not correct and the imposition of penalty of dismissal

E is still permissible, employer will get the right to forfeit the gratuity of such an employee in the eventualities provided under Sections 4(1) & 4 (6) of the Payment of Gratuity Act which reads as under:-

G 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,—

H (a) on his superannuation, or

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(b) on his retirement or resignation, or

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(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:

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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 nominee 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.]

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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.

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(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;

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

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(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

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A (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.

B 24. Thus for invoking Clause (a) or (b) of sub-section 6 of Section 4 necessary pre-condition is the termination of service on the basis of departmental enquiry or conviction in a criminal case. This provision would not get triggered if there is no termination of services.

C 25. It is the case of the appellant that in the charge sheet served upon the respondent herein, there are very serious allegations of misconduct alleging dishonestly causing coal stock shortage amounting to Rs. 31.65 crores, and thereby causing substantial loss to the employer. If such a charge is proved and punishment of dismissal is given thereupon, the provisions of Section 4(6) of the Payment of Gratuity would naturally get attracted and it would be within the discretion of the appellant to forfeit the gratuity payable to the respondent. As a corollary one can safely say that the employer has right to withhold the gratuity pending departmental inquiry. However, as explained above, this course of action is available only if disciplinary authority has necessary powers to impose the penalty of dismissal upon the respondent even after his retirement. Having regard to our discussion above of *Jaswant Singh Gill* (supra) and *Ram Lal Bhaskar* (supra), this issue needs to be considered authoritatively by a larger Bench. We, therefore, are of the opinion that present appeal be decided by a Bench of three Judges.

G 26. We accordingly direct the Registry to place the matter before Hon'ble the Chief Justice for constituting a larger Bench to hear this appeal.

K.K.T.

Appeal referred to Larger Bench.