*** THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO**

+ WRIT PETITION Nos.7210, 8896, 9494, 9529, 9530, 9981, 9985, 9993, 9999, 10001, 10004, 10007, 10011, 10015, 10130, 10131, 10132, 10133, 10134, 10816, 10818, 10823, 10926, 10935, 10941, 10942, 10945, 10948, 10951, 10957, 11060, 11147, 11179, 11181, 11183, 11207, 11209, 11212, 11224, 11242, 11244, 11248, 11253, 11254, 11257, 11261, 11265, 11266, 11269, 11272, 11295, 11297, 11366, 11370, 11371, 11372, 11373, 11374, 11375, 11376, 11412, 11415, 11417, 11418, 11419, 11420, 11421, 11423, 11610, 11611, 11612, 11613, 11614, 11616, 11617, 11619, 11623, 11624, 11634, 11672, 11675, 11681, 11700, 12127, 12128, 12129, 12130, 12131, 12132, 12133, 12134, 12135, 12136, 12137, 12154, 12155, 12156 and 14028 of 2015

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% Dated 01.10.2015

The Krishna District Milk Producers
Mutually Aided Co.op Union ..... Petitioner

Vs.

$ The State of Andhra Pradesh and 2 others .... Respondents

! Counsel for the petitioner : Sri N. Rajeswar Rao

^ Counsel for the respondents : Government Pleader for Labour

<GIST:

> HEAD NOTE:

? Cases referred

1. AIR 1972 SC 1935
2. 2007 (1) SCC 584

THE HON'BLE SRI JUSTICE NOOTY RAMAMOHANA RAO

WRIT PETITION Nos.7210, 8896, 9494, 9529, 9530, 9981, 9985, 9993, 9999, 10001, 10004, 10007, 10011, 10015, 10130, 10131, 10132, 10133, 10134, 10816, 10818, 10823, 10926, 10935, 10941, 10942, 10945, 10948, 10951, 10957, 11060, 11147, 11179, 11181, 11183, 11207, 11209, 11212,

11224, 11242, 11244, 11248, 11253, 11254, 11257, 11261, 11265, 11266, 11269, 11272, 11295, 11297, 11366, 11370, 11371, 11372, 11373, 11374, 11375, 11376, 11412, 11415, 11417, 11418, 11419, 11420, 11421, 11423, 11610, 11611, 11612, 11613, 11614, 11616, 11617, 11619, 11623, 11624, 11634, 11672, 11675, 11681, 11700, 12127, 12128, 12129, 12130, 12131, 12132, 12133, 12134, 12135, 12136, 12137, 12154, 12155, 12156 and 14028 of 2015

COMMON ORDER:

All these writ petitions are directed against the common order passed by the Controlling Authority under Payment of Gratuity Act and Assistant Commissioner of Labour, Gudiwada, Krishna District, condoning the delay ranging from 63 to 1095 days in preferring claim petitions for payment of differential amount of gratuity by the respective employees of the writ petitioner/employer. Hence, they are heard together and are decided by this common order.

The petitioner is the Krishna District Milk Producers Mutually Aided Cooperative Union, Vijayawada (henceforth referred to as the employer). There is no dispute that the respondent/employee concerned in each of these cases has rendered service to the petitioner/employer and retired from its service on attaining the age of superannuation. It is also not in dispute that the petitioner/employer has settled and paid the amount of gratuity payable to them as expeditiously as possible after his retirement. However, each of these employees having thus accepted the payment of gratuity, has approached the

2nd respondent-Controlling Authority under the Payment of Gratuity Act (henceforth referred to as Controlling Authority), making a further claim for payment of differential amount of gratuity running to few thousand rupees more than what has been received by them, on the basis that the service rendered by each one of them prior to the regularization of their services by the employer is not taken into account and consideration for purpose of computation of gratuity. It is the claim of the respective employees that if the length of service rendered by them

prior to the date of regularization of their services was taken into account and consideration, the quantum of gratuity payable would be much higher, by few thousand rupees than what has already been settled and paid by the employer. Hence, they made the claim. They also filed miscellaneous petitions in each of the claims seeking condonation of delay ranging from 63 to 1095 days as noticed supra. Though the petitioner/employer has contested the matter, the 2nd respondent-Controlling Authority by his common order dated 23.02.2015 allowed all the miscellaneous petition Nos.1 of 2013 to 98 of 2013, condoning the delay in filing the claim petitions and accordingly ordered the claim petitions to be numbered as payment of gratuity case Nos.1 to 98 of 2015. Challenging the correctness of the orders dated 23.02.2015, the present batch of writ petitions have been instituted by the petitioner/employer.

Heard Sri N. Rajeswara Rao, learned counsel for the petitioner/employer, and the learned Assistant Government Pleader, Sri Durga Prasad, who has accepted notice on behalf of the 1st respondent-State.

Sri N.Rajeswara Rao had contended that all the employees have accepted the gratuity settled and paid by the petitioner/employer without any demur or protest and having thus, accepted the payment of gratuity in full and final settlement thereof are estopped now from making any further claim. This apart, the claim of the respective employees lacks any tenability. Further, no justifiable reason or ground has been urged seeking condonation of huge amounts of delay in lodging the claim petitions and hence, no such claim/delay condonation petition ought to have entertained by the 2nd respondent-Controlling Authority. In spite of pointing out lack of tenability behind the claim as well as the petition for condonation of delay, the 2nd respondent-Controlling Authority has gone about mechanically in condoning the delay. For purpose of condoning the delay, the 2nd

respondent-Controlling Authority has considered that claim for payment of gratuity is a continuous claim and hence, there is no delay in lodging a claim at all. Sri N.Rajeswara Rao would submit that this is a completely erroneous view of the matter. He would further submit that in spite of bringing to the notice of the 2nd respondent-Controlling Authority the judgment rendered by a Division Bench of Calcutta High Court, the judgment of the Bombay High Court and that of the Jharkhand High Court in support of the point that the delay cannot be condoned beyond the limit prescribed under the statue in as much as the Payment of Gratuity Act is a complete code by itself and hence, the provisions of Section 5 of the Limitation Act cannot be invoked for condoning huge delay, the delay was condoned mechanically. Sri N.Rajeswara Rao would further submit that for condonation of delay there must be justifiable reason or ground, the same cannot be claimed as a matter of right nor can the delay be condoned in a routine manner.

The Payment of Gratuity Act, 1972 (henceforth referred to as 'the Act') as a social security and welfare measure, has been providing for a scheme for payment of gratuity to the employees engaged in factories, mines, oil fields, plantations, ports, railway companies, shops or other establishments. Sub Section 3 of Section 1 of the Act made it clear that it shall apply to every factory, mine, oil field, plantation, port and Railway Company. In so far as shops and other establishments are concerned, wherever there are 10 or more number of persons employed, or were employed, on any day of the preceding twelve months, the Act gets attracted. There is no dispute on the factual score that the petitioner/employer is covered by the provisions of the Act.

Section 2-A has been incorporated in the Act by amending Act 26 of 1984, which was brought into force with effect from 11.02.1981. Section 2-A has provided for the definition of the expression "continuous service". The claim of the respective employees is

obviously rested upon this provision. Section 4 of the Act has created an obligation for payment of gratuity 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 resignation or retirement, or on his death or disablement due to accident or disease. Sub Section 2 thereof would spelt out that 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. Thus, Section 4 has created a right in the hands of the employee to receive gratuity upon his superannuation, retirement or resignation or disablement due to accident or disease or upon his death. There was also a corresponding liability cast upon every employer to pay gratuity calculated at the rate of fifteen days' wages for every completed year of service put in by the employee. Section 5 which conferred power on the appropriate government to exempt any establishment from the operation of the provisions of this Act made it clear that such exemption can be granted, if, in the opinion of the appropriate government, the employees in such establishment are in receipt of gratuity or pensionary benefits not less favourable than the benefits conferred under the Act. Therefore, the power to grant exemption is clearly circumscribed by the consideration that the employee of the concerned establishment must be in receipt of amount of gratuity, which cannot be less favourable than the one which he is entitled to receive in terms and in accordance with this Act.

Section 7 of the Act dealt with the determination of amount of gratuity. It would be appropriate to notice in detail the said provision (as also the provision contained in Section 7A).

> "7. **Determination of the amount of Gratuity**.- (1) A person who is eligible for payment of gratuity under this Act or any person authorised, in writing, to act on his behalf shall send a written application to the employer, within such time and in such form, as may be prescribed, for payment of such gratuity.

(2) As soon as gratuity becomes payable, the employer shall, whether an application referred to in sub-section (i) has been made or not, determine the amount of gratuity and give notice in writing to the person to whom the gratuity is payable and also to the controlling authority specifying the amount of gratuity so determined.

(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.

(3-A) 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].

(4)(a) If there is any dispute as to the amount of gratuity payable to an employee under this 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.

[***]

[(b) 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.]

[(c)] 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.]

[(d)] The Controlling Authority shall pay the amount deposited, including the excess amount, if any, deposited by the employer, to the person entitled thereto.

[(e)] As soon as may be after a deposit is made under Clause (a), the Controlling Authority shall pay the amount of the deposit-

(i) to the applicant where he is the employee; or

(ii) where the applicant is the employee, to the [nominee or, as the case may be, the guardian of such nominee or] heir of the employee if the Controlling Authority is satisfied that there is no dispute as to the right of the applicant to receive the amount of gratuity.

(5) For the purpose of conducting an inquiry under Sub-Section (4), the controlling authority shall have the same powers as are vested in a Court, while trying a suit, under the Code of Civil Procedure,1908 (5 of 1908), in respect of the following matters namely:-

(a) enforcing the attendance of any person or examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses.

(6) Any inquiry under this Section shall be a judicial proceeding within the meaning of Sections 193 and 228, and for the purpose of Section 196, of the Indian Penal Code, 1860 (45 of 1860).

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

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

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

(8) The appropriate Government or the appellate authority, as the case may be, may, after giving the parties to

the appeal a reasonable opportunity of being heard, confirm, modify or reverse the decision of the controlling authority.

[7A. Inspectors.-(1) The appropriate Government may, by notification, appoint as many Inspectors, as it deems fit, for the purposes of this Act.

(2) The appropriate Government may, by general or special order, define the area to which the authority of an Inspector so appointed shall extend and where two or more Inspectors are appointed for the same area, also provide, by such order, for the distribution or allocation of work to be performed by them under the Act.

(3) Every Inspector shall be deemed to be a public servant within the meaning of Sec. 21 of the Indian Penal Code, 1860 (Act 45 of 1860).

[7B. Powers of Inspectors.- (1) Subject to any rules made by the appropriate Government in this behalf, an Inspector may, for the purpose of ascertaining whether any of the provisions of this Act or the conditions, if any, of any exemption granted thereunder, have been complied with, exercise all or any of the following powers, namely:-

(a) require an employer to furnish such information as he may consider necessary;

(b) enter and inspect, at all reasonable hours, with such assistants (if any), being persons in the service of the Government or local or any public authority, as he thinks fit, any premises of or place in any factory, mine, oil-field, plantation, port, railway company, shop or other establishment to which this Act applies, for the purpose of examining any register, record or notice or other document required to be kept or exhibited under this Act or the rules made thereunder, or otherwise kept or exhibited in relation to the employment of any person or the payment of gratuity to the employees, and require the production thereof for inspection;

(c) examine with respect to any matter relevant to any of the purposes aforesaid, the employer or any person whom he finds in such premises or place and who, he has reasonable cause to believe, is an employee employed therein;

(d) make copies of, or take extracts from any register, record, notice or other document, as he may consider relevant, and where he has reason to believe that any offence under this Act has been committed by an employer, search and seize with such assistance as he may think fit, such register, record, notice or other document as he may consider relevant in respect of that offence;

(e) exercise such other powers as may be prescribed.

(2) Any person required to produce any register, record, notice or other document or to give any information, by an Inspector under sub-section (1) shall be deemed to be legally bound to do so within the meaning of Sections 175 and 176 of the Indian Penal Code (45 of 1860).

(3) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974), shall so far as may be, apply to any search or seizure under this section as they apply to any search or seizure made under the authority of a warrant issued under Section 94 of that Code.]"

Under sub Section 1 of Section 7, the person who is eligible for payment of gratuity was required to send a written application to the employer, within such time and in such form, as may be prescribed, for payment of such gratuity. Since Section 15 of the Act conferred rule making power on the appropriate government, rules have been accordingly framed.

So far as the Central Government is concerned, it made the Payment of Gratuity (Central) Rules, 1972. Rule 7 dealt with the application of gratuity and spelt out that the employee who is eligible for payment of gratuity shall apply, ordinarily within 30 days from the date the gratuity became payable in Form-I to the employer. Sub Rule 5 thereof made it clear that an application for payment of gratuity filed after the expiry of the period specified in this Rule shall also be entertained by the employer, if the applicant adduces sufficient cause for the delay in preferring the claim. However, it did not stop there but proceeded to clarify that no claim for gratuity under the Act shall be invalid merely because the claimant failed to present his application within the specified period. Thus, it was abundantly clear that no claim for payment of gratuity shall be treated as invalid merely because the said claim is not made within the period of 30 days from the date the gratuity becomes payable. Thus clearly bringing out that delay in submission of the claim is not fatal.

Further, the reason behind Sub Section 1 of Section 7 requiring submission of an application to the employer seeking payment of

gratuity can be gathered from Section 4 of the Act itself which created the obligation for payment of gratuity. Gratuity is liable to be paid to those who have resigned from service and also in case of death of an employee, who served the employer for a period of 5 years. It is conceivable, hence, that when an employee resigns and thus terminates the employment with the employer, payment of gratuity may not have occasioned on the last day of his employment. Hence if an application is filed by him, the settlement of gratuity becomes easy and effective, giving little or no scope for disputes thereafter. Similarly in case of death of an employee, the employer may not be keeping the data of family members of such an employee. Further, there can be many claimants in such cases like a surviving spouse, children, some of them could be minors and parents etc. The employer by entertaining an application from any of them can settle the gratuity amount payable to the employee and can also seek indemnification from any subsequent claim. Hence the requirement of submission of an application is contemplated by sub Section 1 of Section 7 of the Act. Sub Sections 2 and 3 of Section 7 of the Act are most vital for understanding as to whether the Parliament has contemplated to forfeit the right to receive gratuity at all. Sub Section 2 of Section 7 of the Act brings out emphatically that as soon as the 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 to the Controlling Authority specifying the amount of gratuity so determined. Thereafter, Sub Section 3 spelt out that employer shall arrange payment of the amount of gratuity within 30 days from the date it becomes payable to the person to whom the gratuity is payable. Therefore, when Sub Sections 1, 2 and 3 of Section 7 of the Act are read together it emerges that the employee is entitled to make a formal claim for payment of gratuity, but however, irrespective of the fact whether or not such a claim has been made by the employee, the

employer is under an obligation not only to determine the amount of gratuity payable to the employee but also effect the payment within 30 days from the date the gratuity becomes payable. Therefore, to my mind the provisions contained under Sub Section 1 of Section 7 of the Act are purely directory, while the provisions contained under Sub Sections 2 and 3 of Section 7 are mandatory in content and scope. The payment of gratuity is a statutorily created obligation on the employer. It is for him to make a calculation and determine the amount of gratuity payable and also effect its payment. For payment of gratuity, the employer need not wait for receipt of a claim in Form-I from the employee. The employer was required, on his own, to comply with Sub Sections 2 and 3 of Section 7, independent of the provision contained in Sub Section 1 of Section 7 of the Act. That was the mandate contained in Sub Section 2 of Section 7, by employing the words "whether an application referred to in Sub Section (1) has been made or not." As a matter of ordinary prudence and also as a golden rule of construction no part/words of a statute should be left out as redundant. If there is a dispute between the employee and employer, then perhaps, such dispute becomes resolvable by the Controlling Authority. My opinion about the mandatory nature of the provisions contained under Sub Sections 2 and 3 of Section 7 derive additional support, apart from the tone and tenor of the words employed therein suggest, from the provisions contained under Sections 7-A, 7-B, 8, 9 and 11 of the Act. Sections 7-A and 7-B have been incorporated by the amending Act 25 of 1984, which has been brought into force from 01.07.1984. Under Section 7-A, the appropriate government was required to appoint as many inspectors as it deems fit for purpose of the Act. Under Section 7-B, powers have been conferred upon the Inspector for the purpose of ascertaining whether any of the provisions of the Act or the conditions, if any, of exemption granted thereunder, have been complied with or not by the employer. Inter-alia the Inspector can require an employer to furnish such information as he

may consider it necessary or enter and inspect at all reasonable hours any premises of any place in any factory, mine, oil field, plantation, port, railway company, shop or other establishment to which the Act applies for purpose of examining any register, record or notice or other document required to be kept or exhibited; examine with respect to any matter relevant for any other purpose spelt out above, the employer or any person etc. Thus, during the course of an inspection, if it is revealed that accurate payment of gratuity to any employee has not occurred, there was scope provided for rectification of such an error at the behest of Inspector/Enforcement Officer. Employees may be getting superannuated regularly or routinely in any establishment depending upon the date of their superannuation. But the inspections are not required to be carried out on month to month basis. It may be undertaken once in a while, let us say 6 months or 1 year or even after a longer period. That is the reason why the statute has not attempted to either insulate the payment once made or the right to receive the accurate amount of gratuity. Section 8 enables the Controlling Authority to issue a certificate for that amount to the Collector, to recover the same together with compound interest thereon as arrears of land revenue. Section 8 has not set out any time limit within which an application is required to be made by the aggrieved person to whom the amount of gratuity payable under the Act is not paid. Therefore, it is clear that the Parliament has not intended to prescribe any specific period of time for payment of gratuity by the employer at the behest of the Controlling Authority. Section 9 recognizes any false statement or false representation made for purpose of avoiding any payment of gratuity as punishable with imprisonment for a term which may extend to six months, or with fine which may extend to Rs.10,000/- (with effect from 01.10.1987) or with both. Sub Section 2 thereof clearly spelt out that any employer who contravenes, or makes default in complying with any of the provisions of the Act or any Rule or order made thereunder shall be punishable with imprisonment for a term

which shall not be less than three months but which may extend to one year, or with fine which shall not be less than 10,000/- but which may extend to Rs.20,000/- or with both. Thus, Section 9 has recognized the default in complying with any of the provisions of the Act as an offence by itself. It stands to good sense, therefore, to assume that any failure to comply with sub Sections 2 and 3 of section 7 of the Act envisages action contemplated by Section 9 of the Act to be taken against the employer. The Act never contemplated any such corresponding penal action against the employee for his failure to comply with sub Section 1 of Section 7 of the Act. Section 11 of the Act provided for matters of cognizance to be taken of such offences. When all these provisions have been kept in view, it emerges that every employer was required to comply with sub Sections 2 and 3 of Section 7 on his own without waiting for a formal application to be made under Sub Section 1 of Section 7 of the Act by the employee.

The provisions of the Gratuity Act have been brought forth as a social security measure for providing the necessary financial support and assistance to the employee concerned. Apart from payment of wages, once the provisions of the Act become applicable to any establishment, an additional obligation is thrust upon the employer to make the payment of gratuity, irrespective of whether he likes the quality of services rendered by the employee or not. The statute itself, therefore, has not recognized any outer period of limitation for payment of gratuity to the employee concerned at the behest of the Controlling Authority.

The criticism of N. Rajeswara Rao that payment of gratuity is not a continuous affair, but is only a one time affair and hence an outer limit of period is in the realm of contemplation requires serious consideration. If an employer has properly and correctly calculated the amount of gratuity payable to the employee, the payment thereof is only a one time measure and it will not recur once again. Only in the

event of any dispute in the matter of calculation/quantification of the amount of gratuity payable, perhaps, such a dispute is capable of being resolved by the Controlling Authority later in point of time to the occurring of the event of liability. If there exists, no such dispute between the employer and employee, the payment of gratuity is made strictly a one time affair. In that respect, therefore, the criticism of Sri N.Rajeswara Rao that payment of gratuity is not a continuous affair is required to be accepted in all such cases where there is no dispute raised. In contrast to payment of pension, which is regulated on month to month basis, appropriate and correct payment of gratuity being a one time affair is confined to a third time affair. However, where there is a dispute, the actual payment of gratuity once before made does not attain any such finality. Lest the very scope for resolution of disputes becomes illusory and an unfaithful employer can wash his hands off, once he tenders the amount of gratuity, even if the same is not accurate.

Incidentally one of the questions that is required to be resolved is whether the provisions of the limitation Act are purely procedural or they are also substantive legal principles. Such a question is not free from doubt or ambiguity. However, in a classic exposition, the Supreme Court in **Bharat Barrel and Drum Mfg. Company Private Limited and Another Vs. The Employees' State Insurance Corporation**[1], at page No.860 has brought out the relevant principles as under:

> "4. The topic of procedure has been the subject of academic debate and scrutiny as well as of judicial decisions over a long period but in spite of it, it has defied the formulation of a logical test or definition which enables us, to determine and demarcate the bounds where procedural law ends and substantive law begins, or in other words it hardly facilitates us in distinguishing in a given case whether the subject of controversy concerns procedural law or substantive law. The reason for this appears to be obvious, because substantive law deals with right and is fundamental while procedure is concerned with legal process involving actions and remedies, which Salmond defines "as that branch of law which governs the process of litigation", or to put

it in another way, substantive law is that which we enforce while procedure deals with rules by which we enforce it. We are tempted in this regard to cite a picturesque aphorism of Therman Arnold when he says "Substantive law is canonised procedure. Procedure is unfrocked substantive law(HLJ 617 at p.645)".

5. ……The necessity for enacting periods of limitation is to ensure that actions are commenced within a particular period, firstly to assure the availability of evidence documentary as well as oral to enable the defendant to contest the claim against him; secondly to give effect to the principle that law does not assist a person who is inactive and sleeps over his lights by allowing them when challenged or disputed to remain dormant, without asserting them in a court of law. The, principle which forms the basis of this rule is expressed in the maxim vigilantibus, non dormientibus, jura subveniunt (the laws give help to those who are watchful and not to those who sleep). Therefore the, object of the statutes of limitations is to compel a person to exercise his right to action within a reasonable time as also to discourage and suppress stale, fake or fraudulent claims. While this is so there are two aspects of the statutes of limitation the one concerns the extinguishment of the right if a claim or action is not commenced with a particular time and the other merely bars the claim without affecting the right which either remains merely as a moral obligation or can be availed of to furnish the consideration for a fresh enforceable obligation. Where a statute prescribing the limitation extinguishes the right, it affects substantive rights while that which purely pertains to the commencement of action without touching the right is said to be procedural."

In this context, it will also be useful to notice the judgment of the Supreme Court in **E.S.I.C. Vs. C.C.Santhakumar**[2], wherein a similar question has been answered as under:

"On a plain reading of Sections 45A and 45B in Chapter IV and 75 and 77 in Chapter VI of the Act, as indicated above, there cannot be any doubt that the area and the scope and ambit of Sections 45A and 75 are quite different.

If the period of limitation, prescribed under proviso (b) of Section 77(1A) is read into the provisions of Section 45A, it would defeat the very purpose of enacting Sections 45A and 45B. The prescription of limitation under Section 77(IA)(b) of the Act has not been made applicable to the adjudication proceedings under Section 45A by the legislature, since such a restriction would restrict the right of the Corporation to determine the claims under Section 45A and the right of

recovery under Section 45B and, further, it would give a benefit to an unscrupulous employer. The period of five years, fixed under Regulation 32(2) of the Regulations, is with regard to maintenance of registers of workmen and the same cannot take away the right of the Corporation to adjudicate, determine and fix the liability of the employer under Section 45A of the Act, in respect of the claim other than those found in the register of workmen, maintained and filed in terms of the Regulations."

The distinction to be borne in mind, therefore, is where there exists any extinguishment of rights or obligations under the statute, particularly, due to the delay and default on the part of the opposite party. The analysis of the provisions contained in the Act revealed that only sub Section 1 of Section 7 required the person eligible to receive gratuity to file his application with the employer seeking such payment. The right of the employee to receive gratuity under Section 4 has not been extinguished by the failure to comply with sub Section 1 of Section 7 of the Act. On the other hand, the obligation thrust upon the employer under sub Section 2 of Section 4 has found its full echo in sub Sections 2 and 3 of Section 7 of the Act. The obligations thrust upon the employer under Sub Section 2 of Section 4 will not get discharged until and unless the payment in toto, subject to the limit of ceiling fixed on the maximum amount has been achieved. In other words, the obligation to make payment of gratuity will never get discharged, particularly, due to default of the employee to lodge a claim under Sub Section 1 of Section 7 of the Act. In the absence of any such extinguishment of rights and obligations statutorily created by Section 4 of the Act, the provisions of any period of limitation become purely procedural and they are liable to be treated as non-substantive. This apart, any exercise of rule making power under Section 15 of the Act, is not open to the appropriate Government to prescribe any period of limitation, which might work out to extinguish the right itself. A rule making power is conferred only for purpose of giving effect to the provisions of the Act and they are not liable to be utilized for creating

additional burdens or liabilities which are not contemplated by the Act itself. Any such exercise of power, which tends to limit the applicability of the provisions of the statute amounts to unauthorized exercise of power and consequently, the Doctrine of Ultra Vires gets attracted. In fact, the judgment in **Bharat Barrel's case (Supra 1)** and **E.S.I. Corporation's case (Supra 2)** would lend great support to this view of mine.

Further the cases on which reliance was placed by Sri Rajeswara Rao, deal with, the powers of the Appellate Authority to condone delay beyond what is provided by the Gratuity Act. That was not the present case. Hence, I am of the opinion, that they do not have any bearing upon the present cases.

Hence, these writ petitions are dismissed. No order as to costs.

The miscellaneous petitions, if any pending in these petitions, shall stand dismissed.

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JUSTICE NOOTY RAMAMOHANA RAO

01.10.2015
Note: L.R. Copy to be marked
(B/o)
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[1] AIR 1972 SC 1935

[2] 2007 (1) SCC 584