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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**LETTERS PATENT APPEAL NO.242 OF 2007
IN
WRIT PETITION NO.4009 OF 1997**

Tata Global Beverages Limited
(Formerly known as Tata Tea Limited)
a company incorporated under the
provisions of the Companies Act, 1956
having its registered office at
1, Bishop Lefroy Road, Kolkatta – 700 020
and also having its executive office at
11/13, Botawala Building, 1st floor,
Office No.2-6, Horniman Circle, Fort,
Mumbai – 400 001. ... Appellant(Org. Respondent)
Versus

1. Tata Tea employees Union
a trade Union, registered under
the Trade Unions Act, 1926
having its office at Chartered Bank
Building, now at M.G.Road,
Mumbai 400 023,
New Excelsior Building,
A.K. Nair Marg, Fort,
Mumbai – 400 023.
2. Shri N.L.Bhalchandra,
Industrial Tribunal, Maharashtra,
Mumbai. ... Respondents(Org. Petitioners)

**WITH
CIVIL APPLICATION NO.67 OF 2009
IN
LETTERS PATENT APPEAL NO.242 OF 2007
IN
WRIT PETITION NO.4009 OF 1997**

Tata Global Beverages Limited
(Formerly known as Tata Tea Limited)

a company incorporated under the provisions of the Companies Act, 1956 having its registered office at 1, Bishop Lefroy Road, Kolkatta – 700 020 and also having its executive office at 11/13, Botawala Building, 1st floor, Office No.2-6, Horniman Circle, Fort, Mumbai – 400 001. ... Applicant (Org. Respondent)

Versus

1. Tata Tea employees Union
a trade Union, registered under the Trade Unions Act, 1926
having its office at Chartered Bank Building, now at M.G.Road, Mumbai 400 023,
New Excelsior Building, A.K. Nair Marg, Fort, Mumbai – 400 023.
2. Shri N.L.Bhalchandra,
Industrial Tribunal, Maharashtra, Mumbai. ... Respondents(Org.Petitioners)

....

Mr. Ajit Kapadia with Mr. Pratik Salgaonkar i/by Crawford Bayley & Co. for the Appellant and for applicant in CAL 67 of 2009.

Mr. Arshad Shaikh with Netaji Gawade i/by M/s Sanjay Udethi & Co. for Respondent No.1.

**CORAM : ANOOP V.MOHTA AND
P.R.BORA, JJ.**

**JUDGMENT RESERVED ON: 5th JANUARY, 2017.
JUDGMENT PRONOUNCED ON: 7th MARCH, 2017.**

JUDGEMENT (PER:- P.R.BORA, J.) :

- 1) The present appeal is directed against the order passed by the learned Single Judge in Writ Petition

No.4009/1997, on 19th of September, 2007. Present respondent no.1 had filed the said writ petition challenging the award passed by present respondent no.2 in Reference (I.T.) No.156/1985 on 31st of July, 1996. Following was the dispute referred to the Industrial Tribunal for adjudication.

SCHEDULE

“To determine the propriety, validity and legality of the Company’s circular dated 22nd May, 1974 intimating unilateral withdrawal of the Pension Scheme from 9th of May, 1974. “

The learned Industrial Tribunal rejected the Reference. In the writ petition, the learned Single Judge set aside the order passed by the Industrial Tribunal and held that the benefit which initially was extended unilaterally by the employer had metamorphosed into a privilege with the passage of time and the workers were entitled to receive pension as a matter of right. Aggrieved thereby, the employer has preferred the present appeal. For convenience, appellant is hereinafter referred to as 'Company' and respondent No.1 as 'Union'.

2) The company had introduced a Pension Scheme for its clerical staff and had informed the employees about the said

The Directors have agreed that, with effect from 1st January 1948 pensions on the following scale will be paid to employees retiring with the consent of the Company after 35 years' service.

50% of Salary drawn in last year of service less whatever sum the Company's contribution to the Provident Fund in respect of the employees and his share of the Capital Reserve Account will yield when invested at 4%

Assume 50% is Rs.100/- and the Company's Contribution and share of Capital Reserve Account in Provident fund payable to retiring employee is Rs.3,000/-. The maximum pension payable will be Rs.100/- less Rs.10/- (being interest of 4% p.a. on Rs.3000 or Rs.90/- per month.

For retirement with the consent of the company before 35 years' service but not before 30 years' service proportionate pension will be paid as follows: -

34 years as above. 47% of Salary less Provident Fund adjustment

33 years --do--

32 years --do--

31 years --do--

30 years --do--

Retirements under 30 years' service to be considered on their merits and will receive the sympathetic consideration they have received in the past. The same applies to assistance to widows and dependents in the event of the premature decease of the employee. No fixed rules regarding these will be laid down.

So long as a dearness allowance remains in force, a retiral dearness allowance equal to 50% of the minimum dearness

allowance payable from time to time to employees will be paid to retiring employees eligible for pensions.

It must be clearly understood that the above scheme is entirely discretionary on the part of the Directors and that they are at liberty to withdraw it any time and particularly if the legislature or any award made under legislation places the company in a position where the company is bound to pay any pension, gratuity or retiral or superannuation allowance.

*For Pro JAMES FINLAY & Co., LIMITED
Sd/- Charles Forgan Worries.*

Bombay, 2nd March 1948”

3) On 22nd of May, 1974, the company issued another circular informing thereby that the clerical staff shall not be entitled to pension since the Payment of Gratuity Act 1972 had come into force and withdrew the said Pension Scheme w.e.f. 9th of May, 1974. In the year 1983, an employee by name P.S.Manian, claimed the pension as per the Scheme introduced by the Company vide circular dated 2nd of March, 1948. After his request was rejected by the Company informing him that the said Pension Scheme was withdrawn by the Company after introduction of Payment of Gratuity Act, 1972, the Union raised a dispute about withdrawal of the said Pension Scheme and the Government, in exercise of the powers conferred by sub-clause

(d) of sub-section (1) of Section 10 read with sub-section (5) of Section 12 of the Industrial Disputes Act, 1947 (hereinafter referred to as the “ID Act”) referred the said dispute for adjudication to the Industrial Tribunal.

4) Before the Industrial Tribunal it was the stand of the Union that the Pension Scheme so volunteered by the Company vide circular dated 2nd of March, 1948, was in force for continuous period of more than 24 years and had thus become the condition of service which could not have been unilaterally withdrawn by the Company without giving notice of change as envisaged under Section 9-A of the Industrial Dispute Act and on the ground that the Payment of Gratuity Act has come into force. As against it, it was the contention of the Company that the document of 2nd of March, 1948 was a settlement between the Company and the workmen containing a clause therein that the Pension Scheme so introduced was liable to be withdrawn at the total discretion of the Directors of the Company at any time and particularly if the Legislature or any award made under legislation places the Company in a position where the Company is bound to pay any pension, gratuity or retiral or

superannuation allowance. According to the Company, on enactment of the Payment of Gratuity Act, 1972, since the gratuity thereunder was made compulsorily payable, there had remained no scope for any member of the clerical staff to opt for pension in lieu of gratuity and, as such, the company was constrained to withdraw the said Pension Scheme. It was also contended by the Company that since the Pension Scheme was withdrawn in accordance with the settlement, the Company was not required to issue notice of change under Section 9A of the ID Act before withdrawal of the said benefit. The dispute so referred was also resisted by the Company on the ground of delay.

5) The learned Industrial Tribunal accepted the contentions raised on behalf of the Company and, resultantly, rejected the Reference. While rejecting the Reference, the Tribunal has recorded the following conclusions:

(i) That the Dispute as raised by Second Party Union after 11 years seems to be not within reasonable time.

(ii) That it was not necessary on the part of the Company to give notice of change under Section

9A of the Industrial Disputes Act before withdrawal of the Pension Scheme.

The conclusion that notice under Section 9A was not required to be given by the Company is based on the following inferences drawn by the Tribunal.

- (a) That the withdrawal of the Pension Scheme is not covered under Schedule IV of the Industrial Disputes Act and more particularly is not covered under Entry No.2 and 8 of the said Schedule IV as was canvassed by the Union.*
- (b) When there is no express provision and the benefits are extended, the said benefits can be termed as customary usage and the same cannot be withdrawn without giving notice under Section 9-A of the ID Act; however, in the matter in hand, when the Pension Scheme was expressly provided vide the circular dated 2nd of March, 1948, wherein the provision of withdrawal of the said Scheme was also incorporated, the same cannot be held to be a customary usage, and as such, was liable to be withdrawn in terms of the said circular, without giving any notice under Section 9-A of the ID Act.*

The learned Industrial Tribunal therefore, held that the Union had failed to justify its demand and also failed in proving that the circular dated 22nd of May, 1974, intimating unilateral

withdrawal of the Pension Scheme from 9th of May, 1974 was improper, invalid and illegal. The Reference was, therefore, rejected by the Tribunal for the aforesaid reasons.

6) In the Writ Petition filed by the Union, the learned Single Judge has set aside both the aforesaid findings recorded by the Tribunal; first, that there was inordinate delay in referring the dispute and other that the withdrawal of the Pension Scheme did not attract the provisions of Entry 2 or 8 of the 4th Schedule of the ID Act, thereby relieving the employer from compliance with the provisions envisaged under Section 9A of the ID Act. On the aspect of delay, the learned Single Judge has observed that there was no evidence on record to indicate that the Union or its members have, in fact, received the circular of 22nd of May, 1974. About the Pension Scheme, the learned Single Judge has observed that the unilateral grant of pension has fructified into a privilege over a period of 24 years which could not have been withdrawn without complying with the mandatory requirement of notice of change under Section 9A of the ID Act. The learned Single Judge has also observed that it was not open for the employer to contend that the workmen would be entitled to

either gratuity or pension after the Payment of Gratuity Act has come into force and that the introduction of the Payment of Gratuity Act cannot in any manner fetter the right of the employees to receive pension under the Document of 1948.

7) After having heard the learned Counsel appearing for the parties and on perusal of the material on record, the first point which falls for our consideration is 'whether the circular dated 2nd March, 1948, whereby the Pension Scheme for clerical staff was introduced by the employer can be held to be a settlement, as contemplated under section 2(p) of the I.D.Act. According to employer, it is a settlement. The Industrial Tribunal has upheld the said contention. As against it, the learned Single Judge has held that the document of 2nd March, 1948 was not a settlement, but a voluntary offer given by the employer, which had fructified into a privilege by passage of time and has thus become a condition of service.

8) The observations made by the Tribunal reveal that it has held the document of 2nd March, 1948 to be a settlement relying upon the opening sentence used in the said Circular that

“The Directors have agreed”, giving an interpretation to the same that there was a demand from the workmen for Pension Scheme and the same was agreed and accordingly, the Circular of 2nd March, 1948 was issued to that effect and benefits were extended, which the workers availed till its withdrawal i.e. upto May, 1974. Before the learned Single Judge similar submission was made that the words “The Directors have agreed” indicate that the Directors had agreed with the workers that from 1st January, 1948 pension would be payable to the retiring employees on certain terms and conditions. The learned Single Judge however, has rejected the contention so raised, observing that it would be a complete misreading of the document to interpret it to mean that the Directors had agreed with the Union, when there is no other corroborative evidence on record. It is further observed that there is no material on record to establish that the pensionary benefits payable under the said document were extended to the workers due to an agreement arrived at between the Union and the Directors of the company. It is further observed that the aforesaid words will have to be therefore, construed in the context that they appear, meaning thereby, that the Directors had agreed amongst themselves that

pensionary benefits should be paid to the retiring employees. The learned Single Judge has therefore, held that the document of 1948, cannot be construed, as a settlement or as an agreement, but was a charter for payment of pension. The learned Single Judge has also observed that, had it been a bilateral document, there would be no room for such a clause in the said agreement, giving full discretion to the Directors to withdraw the said scheme. We do not see any infirmity in the finding recorded by the learned Single Judge .

9) It was also sought to be canvassed by the learned Counsel for the company that the 'Bilgrami' award had transformed the unilateral act of the company into an 'Award' and when the company became statutorily liable to pay gratuity the company was entitled to withdraw the benefit of pension, without giving any notice of change in that regard in as much as the change was pursuant to an award. Our attention was invited to paragraph No. 51 of the Bilgrami award, wherein the Tribunal has observed that,- *“Under the Agreement the pension is allowed to the clerical staff retiring from the company after 35 years service and the pension granted*

is quite liberal.” The aforesaid observations were made by the learned Tribunal while dealing with demand No. 8(b), whereby it was demanded that an employee entitled to receive pension under the Company's Pension Scheme shall have the option to claim gratuity in lieu of pension. The demand was accepted by the Tribunal and the clerical staff entitled to pension on retirement was provided with an option to claim gratuity, in lieu of pension. It was contended by the learned Counsel for the company that the Pension Scheme introduced by the company vide circular dated 2nd March, 1948 was thus approved in the Bilgrami award as an Agreement between the company and its employees. The learned Counsel further contended that, the Bilgrami award has been referred in all subsequent settlements arrived at between the Company and its employees and in all those subsequent settlements, it has been clearly averred that the service conditions not expressly altered as laid down in the award of the Industrial Tribunal of Mr. Bilgrami dated 15th January, 1964, as amended by the Agreement dated 1st July, 1965, shall remain unaltered. According to the learned Counsel, the learned Industrial Tribunal was right in holding that the circular dated 2nd March

1948 had become an award or settlement and since the pension scheme was withdrawn by the Company, according to the agreed terms incorporated in the said circular, the company was not required to give notice under Section 9-A of the Industrial Disputes Act.

10) We are, however, unable to agree with the proposition so canvassed. Similar such argument was advanced before the learned Single Judge on behalf of the Company that, the proviso to Section 9-A must be interpreted purposively and the word “agreement” should be read into the said proviso. It was further sought to be canvassed that as observed in the Bilgrami award the document of 1948 was bilateral document giving the Company the right to withdraw the benefit unilaterally and any bilateral document would attract the proviso of Section 9-A. The learned Single Judge, however, rejected the said contention stating that, the Industrial Disputes Act recognizes only the term “settlement” which is defined in Section 2(p) of the Act. The learned Single Judge has further observed that the term “Agreement” which has not been defined cannot be read into the proviso to Section 9-A, as the term

“Settlement” has a different connotation under the Industrial Disputes Act. The learned Single Judge has further observed that, every agreement between the parties need not be a settlement. The legislature has therefore with some purpose excluded the word “agreement” from the proviso. The learned Single Judge has also said that to read into the proviso the word “agreement” would be doing violence to the proviso. The learned Single Judge has further in clear terms held that, the document of 1948 is neither a settlement nor an agreement, but is a charter of the Company, unilaterally extending the pensionary benefits to the workmen. We fully subscribe the observations made and the conclusions recorded by the learned Single Judge.

11) It was further contended by the learned Counsel for the company that the Pension Scheme introduced by the company cannot become a privilege within the meaning of Item 8 of the 4th schedule since it was the concession voluntarily offered by the company containing a clause therein that the same was liable to be withdrawn at the discretion of the direction of the company. The learned Counsel in order to

support his aforesaid contention placed reliance on the judgment of the Madras High Court in the case of *Secretary of Tamilnadu Electricity Board Accounts Subordinate Union Vs Tamilnadu Electricity Board and others - 1984 II LLJ 478*.

However, the ratio laid down in the said judgment cannot be made applicable to the facts of the present case. In the said case, two workmen of the Tamilnadu Electricity Board were permitted to do trade union work on a full time basis and the said permission was subsequently withdrawn. A dispute was therefore raised claiming that, it was a privilege within the meaning of item 8 of Schedule 4 of the Industrial Disputes Act and could not have been withdrawn without following the procedure under Section 9A of the Act. Concession so granted in the said case cannot be in any way equated or compared with the Pension Scheme voluntarily introduced by the Company, which remained in force for long 24 years. As has been observed by the Madras High Court, the concession granted for a limited period and extended periodically cannot be claimed as of right. In the instant case, the well prepared Pension Scheme was offered to the employees and the same remained in force over the period of 24 years. The learned Single

Judge, therefore held that the unilateral grant of pension had fructified into a privilege which could not have been withdrawn by the stroke of pen without following the mandatory requirement of notice of change under Section 9-A. We do not see any error in the finding recorded by the learned Single Judge.

12) Relying on the judgment of the Hon'ble Apex Court in the case of **MGB Gramin Bank Vs. Chakrawarti Singh AIR 2013 SC 3365**, it was argued by the learned Counsel for the company that the pension was not the vested right as has been claimed by the Union. Referring to the discussion made by the Apex court in paragraphs No. 10, 11 and 12 of the aforesaid judgment the learned counsel submitted that the right which is independent of any contingency only can be held to be a vested right. The learned counsel submitted that the document of 1948 undisputedly contains a provision that the benefit of pension was liable to be withdrawn at any time at the discretion of the Directors of the company and if the legislature or any award made under legislation places the company in a possession where the company is bound to pay any pension,

gratuity or retiral or superannuation allowance. It was therefore, sought to be canvassed by the learned counsel that the right of pension can not be held to be a vested right and consequently cannot be held to be a privilege and therefore cannot acquire the status of condition of service. As such, according to the learned counsel, no notice of change under section 9A of the Act was required to be given by the company before withdrawing the benefit extended vide the document of 1948.

13) In our opinion, the aforesaid judgment does not have any application to the facts of the present case. Though it is true that the document of 1948 contains a clause permitting the withdrawal of the said benefit by the Directors of the company, at their discretion or on a contingency as mentioned therein, it is difficult to accept that the aforesaid clause was acquiesced by the union or workers. From the material on record, it is quite clear that there was no occasion in past for the Union to make any grievance in respect of the aforesaid provision. However, after the said clause was acted upon by the Company, the Union raised its objection. As against it, the

benefit extended vide the said document was enjoyed by the employees over the period of 24 years and that was the reason that the learned Single Judge held that it had acquired the status of privilege enjoyed by the employees and consequently become the condition of service. We upheld the conclusion arrived at by the learned Single Judge.

14) In the impugned order the learned Single Judge has relied upon the judgment of the Hon'ble Apex Court in the case of **Bareilly Holdings Limited Vs. Their Workmen, (1979) 3 Supreme Court Cases 257**, wherein it is held that double benefit of sick leave; one as a condition of service and the other under the Employees State Insurance Act 1948, can co-exist, as the later benefit is not substitute for a former. The learned Single Judge has also referred to the judgment of the Hon'ble Apex Court in the case of **Calcutta Electric Supply Corporation Limited Vs. Calcutta Electric Supply Workers Union and ors., (1994)6 Supreme Court Case 548**, wherein it is held that withdrawal of the medical benefits available, as part of service conditions by the employer, without giving statutory notice in Form-E to the Union and the Authorities

was impermissible merely because the employees were covered by the ESI Act.

15) The learned counsel appearing for the company submitted that both the aforesaid judgments of the Hon'ble Apex Court are distinguished by the Madras High Court in the case of **Indian Oxygen Employees' Union and others Vs Boc India Limited, 1998 II LLJ 1248 (Formerly known as Indian Oxygen Limited and others)**. The learned counsel submitted that facts of the present matter are more akin to the facts involved in the case before the Madras High Court. The learned counsel submitted that in the case before the Madras High Court the medical benefits scheme was introduced in terms of settlement reached between the management and the union. In the settlement so arrived at, there was a specific clause to the effect that "as and when the provisions of Employees State Insurance Act or any other enactment covering medical facilities for the time being in force or as may be enforced in future are made applicable to the employees, who are not covered by the said Act/ such enactment, the medical reimbursement of domiciliary treatment and

hospitalization/chamber consultations facilities will stand withdrawn with effect from the date such employees are brought under the purview of the ESI Act or such other enactment.” The learned counsel submitted that the medical benefit scheme was withdrawn in terms of the aforesaid agreement and in such circumstances, the Madras High Court held that it was well open to the employer to enforce the particular clause in the agreement, which provides for withdrawal of the scheme in respect of the employees, who are brought under the coverage of the ESI Act. The learned counsel submitted that in the instant matter also a clear understanding was given in the document of 1948 itself that on coming into force any enactment providing for gratuity or similar pensionary benefits, the existing Pension Scheme will be withdrawn at the discretion of the Directors of the company. The learned counsel submitted that in view of the judgment of the Division Bench of the Madaras High Court no fault can be found in the action of the company in withdrawing the Pension Scheme in terms of the document of 1948 after coming into force of the Payment of Gratuity Act, 1972.

16) The fact apart that we have certain reservations as regards to the view taken by the Madras High Court, the endeavour of the company to take support of the aforesaid judgment so as to hold its action of withdrawing Pension Scheme legal and valid must fail only on the count that in the said case the medical benefits scheme was not unilaterally withdrawn or it was not an unilateral change in conditions of service. The employer had issued notices consequent to the amendment of ESI notification before withdrawing the said scheme. Whereas in the instant matter the company without giving notice of change as envisaged under Section 9-A of the I.D. Act, unilaterally withdrew the Pension Scheme. In the circumstances, the contention of the company that there was no illegality in its action has to be rejected.

17) It was also sought to be canvassed by the learned counsel appearing for the company that the learned Single Judge assigned to itself the role of an Appellate Court and stepped into reappreciating and evaluating the evidence and substituted his own findings in place of those arrived at by

the Industrial Tribunal. According to the learned counsel such course was not permissible in exercise of certiorari jurisdiction by the High Court. To buttress the said contention the learned counsel has relied upon the judgment of the Hon'ble Supreme Court in case of **Surya Deo Rai V/s Ram Chander Rai and ors., (2003)6 Supreme Court Cases 675.**

18) We are however, not at all impressed with the submissions so made. The parameters for exercise of jurisdiction under Article 226 or 227 of the Constitution cannot be tied down in a straight jacket formula or rigid rules. The High Court may in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice, should occasion, can exercise its jurisdiction. In the instant case, it does not appear to us that the learned Single Judge has committed any error in exercising its jurisdiction to set aside the award passed by the Industrial Tribunal.

19) In view of the foregoing discussion, we are of the clear opinion that the learned Single Judge has correctly held

that the document of 1948 was neither a settlement nor an agreement. We also concur with the finding recorded by the learned Single Judge that the document of 1948, which originally was a voluntary benefit granted to the workers by the company had crystalized into privilege with the passage of time and the clause for withdrawal therein can not operate to the disadvantage of the workers, when the said benefit has become a privilege over the years. Apart from the justness in the action of the company to withdraw the Pension Scheme on the ground that payment of gratuity is made compulsorily payable, withdrawal of such privilege without a notice of change, in no case was permissible.

20) In the Reference the Industrial Tribunal was to determine the 'propriety', 'validity' and 'legality' of the company's circular dated 22nd May, 1974, whereby the company withdrew the Pension Scheme. In the award passed by the Tribunal it has not at all dealt with the aspect of propriety. The learned Single Judge, no doubt has held that, it was not open for the employer to contend that the workman would be entitled to only one benefit; either of gratuity or of pension on

the ground that Payment of Gratuity has come into force. However, this issue has not been elaborated as it ought to have been. According to us, prime importance must have been given by the Tribunal to determine the “Propriety” of the circular dated 22nd May, 1974. However, it appears that legality and validity issues were focused more and propriety aspect lost sight of. The word “Propriety” is nowhere defined. It is capable of variety of meanings. In the context of the present matter the word ‘propriety’ would mean ‘Justness’. The circular dated 22nd May, 1974 is to be thus tested on the anvil of justness and it has to be determined whether the action of the company to unilaterally withdraw the Pension Scheme, which was in existence for more than 24 years, can be held to be just on the ground that the payment of Gratuity Act had come into force?”

21) Similar such issue “*whether the employee was entitled to receive full amount of pension payable to him even after receipt of provident fund and gratuity*” was for determination for the Hon'ble Apex court in the case of ***Som Prakash Rekhi Vs Union of India and Anr. - (1981) 1 SCC 449***. Deciding the matter in

favour of an employee the Hon'ble Apex court held that, “

“ The pensions are paid out of regard for past meritorious services. The root of gratuity and the foundation of provident fund are different. Each one is a salutary benefaction statutorily guaranteed independently of the other.”

The Hon'ble Apex Court, has further held that, -

“ The pension scheme came into existence prior to the two beneficial statutes and Parliament when enacting these legislation must have clearly intended extra benefits being conferred on employees. Such a consequence will follow only if over and above the normal pension, the benefits of provident fund and gratuity are enjoyed. To hold that, on receipt of gratuity and provident fund the pension of the employee may be reduced pro tanto is to frustrate the supplementary character of the benefits.”

22) In the said matter, the petitioner was employed as a Clerk in the Burmah Shell Oil Storage Ltd and retired at the age of 50 after qualifying for a pension on April 1, 1973. He was covered by a scheme under the Employees' Provident Funds and Family Pension Fund Act, 1952. The pensionary provision was also applicable for the Burmah Shell employees depended on the terms of a Trust Deed of 1950 under which a pension Fund was set up and regulations were made for its administration.

Regulation 13 and 15 entitled the petitioner to pension and contained the formula for quantification. Regulation 13 has a significant clause: “less the authorized deductions specified in Regulation 16, namely...” The Regulation 16 reads thus, :

“16. The authorized deductions to be made in calculating the amount of non-contributing member's pension shall be as follows:

(1) A sum equal to four per cent of such amount standing to the credit of the member at the relevant date in any Provident Fund as represents any Company's contributions to that fund in respect of the period of the member's Accredited Service (including bonuses and interest on such contributions up to that date),

(2) A sum equal to four per cent of any amount which before the relevant date the member has withdrawn from a Provident Fund in so far as such withdrawal is under the Rules of the Provident Fund charged against the period of the member's Accredited Service (including bonuses and interest thereon) or has been paid out to him during the Accredited Service under the Rules of Provident Fund, together with interest thereon from the date of such withdrawal or receipt to the relevant date.

(3) If the Company so elects, a sum not exceeding six per cent of the amount of any payment which any company has made or may make or which any company shall be or have been required by law to make to the member in connection with the termination of his service with that company together with interest thereon from the date of payment down to the relevant date.

By virtue of Regulation 13, the Petitioner was entitled to a

pension of Rs.165.99 subject to certain deductions which form the controversy in the matter. By letter dated September 25, 1974, the employer (Burmah Shell) explained that from out of pension of Rs.165.99 two deductions were authorised by regulation 16. One such deduction was based on Regulation 16(1) because of Employees' Provident Fund Payment to the pensioner and the other rested on Regulation 16(3) on account of payment of gratuity. The Hon'ble Apex Court after elaborating the objects behind bringing the enactments in respect of Pension, Provident Fund and Gratuity held that:

“ We must realize that the pension scheme came into existence prior to the two beneficial statutes and Parliament when enacting these legislations must have clearly intended extra benefits being conferred on employees. Such a consequence will follow only if over and above the normal pension, the benefits of provident fund and gratuity are enjoyed. On the other hand, if consequent on the receipt of these benefits there is proportionate reduction in the pension, there is no real benefit to the employee because the Management takes away by the left hand what it seems to confer by the right, making the legislation itself left-handed. To hold that on receipt of gratuity and provident fund the pension of the employee may be reduced pro tanto is to frustrate the supplementary character of the benefits. Indeed, that is why by Sections 12 and 14 overriding effect is imparted and reduction in the retiral benefits on account of provident fund

and gratuity derived by the employee is frowned upon. We, accordingly, hold that it is not open to the second respondent to deduct from the full pension any sum based upon Regulation 16 read with Regulation 13. If Regulation 16 which now has acquired statutory flavor, having been adapted and continued by statutory rules, operates contrary to the provision of the PF Act and the Gratuity Act, it must fail as invalid. We uphold the contention of the petitioner.”

In the said matter also there was a private treaty between the parties i.e. employer and employee whereby the employees had agreed to deductions before coming into force of the beneficial enactment of Provident Fund and Gratuity. The Hon'ble Apex Court in this context held that, even if it is assumed that by private treaty the parties have otherwise agreed to deductions before coming into force of these beneficial enactments they cannot now be deprivatory.

23) The Hon'ble Apex Court has further held that -

“ Welfare benefits such as pensions, payment of provident fund and gratuity are in fulfilment of the directive principles. The payment of gratuity or provident fund should not occasion any deduction from the pension as a “set-off”. Otherwise, the solemn statutory provisions ensuring provident fund and

gratuity become illusory. Pensions are paid out of regard for past meritorious services. The root of gratuity and the foundation of provident fund are different. Each one is a salutary benefaction statutorily guaranteed independently of the other. Even assuming that by private treaty parties had otherwise agreed to deductions before the coming into force of these beneficial enactments they cannot now be deprivatory. It is precisely to guard against such mischief that the *non obstante* and overriding provisions are engrafted on these statutes.”

24) In the case of **Shalimar Paints H.O. Employees Union Vs. Shalimar Paints Ltd. and Ors. 1981 Labour and Industrial Cases 349**, the Division Bench of the Calcutta High Court has held that payment of gratuity is not an alternative to pension. In the said case, a settlement between the employer and its workmen was arrived at providing benefit of gratuity and pension. During the operation of the said settlement, the West Bengal legislature passed an Act known as the West Bengal employees' Payment of Compulsory Gratuity Act, 1971. Then come into force the Central Act: Payment of Gratuity Act 1972,

whereupon the Company made an application under section 5 thereof requesting the State Government to exempt the Company from the operation of the Central Act. The request so made was however rejected. The Company thereafter issued a circular to its employees to the effect that since gratuity is made compulsorily payable, the pension benefit should be withdrawn. The dispute, therefore, arose between the Company and its employees which was referred for adjudication to the Tribunal. The issue that was referred for adjudication before the Tribunal was as follows :

“Whether the management is justified in refusing to continue the existing scheme of pension benefit consequent on the enforcement of legislation providing for payment of gratuity? To what relief, if any, are the workmen entitled?”

The Tribunal held that, the Company could not have discontinued the existing pensionary benefits on the ground that payment of gratuity has been made compulsory by the Central Act. The Company challenged the award of the Central Tribunal before the Calcutta High Court. It was argued before the High Court on behalf of the Company that, under the settlement, payment of gratuity was alternative of pension. In other words,

if an employee opted for pension, he was not entitled to gratuity. As gratuity was made compulsorily payable under the Central Act, according to the Company, it was justified in discontinuing the scheme for pension. The learned Single Judge of the High Court took a view that, on the basis of settlement, gratuity, although payable in a limited number of cases was clearly an alternative to pension. The learned Single Judge of the High Court, therefore, set aside the award of the Central Tribunal. The appeal was filed against the judgment of the learned Single Judge, which came to be allowed by the Division Bench. While allowing the appeal, the Division Bench has held that the employees of the respondent Company were entitled to the benefit of pension in accordance with the scheme for pension, besides the payment of gratuity which is compulsorily payable by virtue of Section 4 of the Payment of Gratuity Act, 1972. In the said case, it was argued on behalf of the employees that, as the employees were entitled to the benefit of the pension under the terms of settlement, the respondent Company cannot deprive them of the said benefit simply because the payment of gratuity has been made compulsory by Section 4 of the Central Act. Accepting the said argument it is observed by the Division

Bench that, “there is no provision in the payment of Gratuity Act divesting the employees of their vested right to get pension in terms of the agreement arrived at between the respondent Company and its employees.” The Division Bench has further observed that, “had it been the intention of the legislature to deprive the employees of the existing benefits of retirement, it would have made an express provision in that regard, at least, by necessary implication such intention could be gathered.” It is further observed that, in a beneficial legislation, deprivation of an existing benefit cannot be inferred without a provision to that effect, either express or implied. The Division Bench has recorded a clear finding that, the employees of the respondent Company were entitled to the benefit of the pension in accordance with the scheme for pension, besides the payment of gratuity which is compulsorily payable by virtue of Section 4 of the Central Act.

25) The Hon'ble Apex court in **Union of India Vs. All India Services Pensioners' Association – (1988) 2 SCC 580** has explained that there is always a distinction between the pension payable on retirement and the gratuity payable on

retirement by observing that “*while pension is payable periodically as long as the pensioner is alive, gratuity is ordinarily paid only once on retirement.*”

26) In **Allahabad Bank and Another Vs. All India Allahabad Bank Retired Employees Association – (2010) 2 SCC 44**, the Hon'ble Apex court has held that, -

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

(We may at this stage note that the appellant establishment did not succeed in its attempt to get the establishment exempted from the operation of the provisions of the Payment of Gratuity

Act.)

27) In view of the law laid down as above, the withdrawal of Pension Scheme by the company on the ground that the payment of gratuity is made compulsory after coming into force of the payment of Gratuity Act, in no case can be held to be 'just'. Moreover, as has been observed by the learned Single Judge only those employees of the company, who were working in Mumbai were not being paid both the benefits, whereas the workmen in Calcutta were being paid gratuity, as per Gratuity Act and Pension under the 1948 document. The benefit of gratuity, which is payable statutorily does not substitute the benefits payable, as condition of service. In the circumstances, it has to be held that the act of the company of withdrawing the Pension Scheme after coming into force of the Payment of Gratuity Act was proprietyless.

28) The point now remains to be considered is that of limitation. According to the Industrial Tribunal, the dispute raised by the Union after 11 years cannot be said to be within the reasonable time. Relying on the judgment in the case of

Nedungadi Bank Limited Vs. K.P.Madhavantutty and ors.,
(2002) Supreme Court Cases 455 and the other in the case of
Haryana State Co-operative Land Development Bank vs.
Neelam, 2005 II CLR 45, it was vehemently argued by the
learned Counsel for the company that the Industrial Tribunal
was right in rejecting the Reference, holding the same to be not
filed within the reasonable time. It was also argued that not
raising of any dispute by the Union for the period of 10 years,
though there was a cause of action for raising such dispute
would lead to an inference that Union had accepted the decision
of the company and it shall be held that the Union has
acquiesced to the withdrawal of the Pension Scheme by its
conduct of remaining silent on the issue for the period of 10
years.

29) Our attention was invited by the learned counsel for
the company to some of the observations made by the learned
Single Judge in paragraph No.26 of the impugned order, to the
effect that in the examination-in-chief the witness examined by
the Union had stated that four employees from the Bombay
office had received pensionary benefits upto 26th May, 1984.

The learned Counsel took us through the evidence of the witnesses examined by the Union to show that none of the witnesses has stated any such fact. The learned counsel submitted that the finding recorded by the learned Single Judge on the basis of non existing evidence is unsustainable. The learned Counsel asserted that the Reference was liable to be rejected on the ground of limitation also.

30) It is true that though the Pension Scheme was withdrawn by the company by a circular dated 22nd May, 1974, the dispute in that regard was raised in the year 1983. It is also true that in the period between 1974 to 1983 four employees got retired and none of them or the Union raised any dispute, though the benefit of pension was not extended to the said employees. Ostensibly, it may, therefore, appear that the dispute was raised after about 9 years which certainly cannot be said to be within reasonable time. However, it was rightly pointed out by the learned Counsel for the Union that though the circular, whereby the Pension Scheme was withdrawn, was issued on 22nd May, 1974, the first retirement thereafter took place in the year 1980, when an employee by name Shri

J.R.Redkar got retired. The other three employees got retired thereafter in the year 1981 and in 1982. Thereafter, one Shri P.S.Manian was issued with the notice dated 29th February, 1983 informing him that he will be retiring on attaining the age of superannuation with effect from 29th February 1984. When the request of Shri P.S.Manian to process his case for pension was refused, the Union immediately raised the dispute. It, therefore, cannot be said that there was delay in raising the dispute by the Union. Even if it is assumed that the cause of action had arisen in 1980 when first retirement took place after issuance of the notice of 1974 and Pension Scheme was not made applicable to the retiring employee viz. Shri Redkar, the delay caused, at the most was of three years, which cannot be held to be inordinate or unreasonable and the dispute so raised cannot be held to be a stale or belated claim.

31) In the case of **Nedungadi Bank Limited Vs. K.P.Madhavantutty and ors.**, the workman was dismissed after lawfully and properly conducting the disciplinary proceedings against him. His dismissal was upheld in the appeal and the benefits legally due to him were paid to him. The

said workman, after seven long years, raised a dispute against his dismissal on the ground that two other employees dismissed in similar situation, were reinstated. In these circumstances, it was held by the Honourable Apex Court that reference of the said dispute after about seven and half years was bad; both on the grounds of delay as well as non existence of an industrial dispute. Moreover, as observed by the Hon'ble Apex court under what circumstances the said two employees were dismissed and subsequently reinstated was nowhere mentioned by the concerned workman. It is evident that the observations made and the law laid down in the aforesaid judgment cannot be made applicable to the facts of the present case.

32) In the case of **Haryana State Co.op. Land Development Bank V/s Neelam**, 2005 II CLR 45, the conduct of the appellant therein in approaching the Labour Court after more than seven years, was considered to be a relevant factor by the Labour Court for refusing to grant any relief to her. Such a consideration on the part of the Labour Court was justified by the Honourable Apex Court observing that the Labour Court in

the afore mentioned situation cannot be said to have exercised its discretionary jurisdiction injudiciously, arbitrarily or capriciously. The facts of the present case are quite different and, as such, the law laid down in the aforesaid judgment also would not apply to the present case.

33) We reiterate that the dispute raised by the union against withdrawal of the pension scheme cannot be said to have raised belatedly. The learned Industrial Tribunal was wrong in holding that the union did not raise the dispute within reasonable time. Though some of the observations made by the learned Single Judge are factually incorrect, we affirm the conclusion recorded by the learned Single Judge that the dispute so raised was not liable to be rejected on the point of limitation.

34) After hearing considered the submissions advanced on behalf of the appellant from all angles we have reached to the conclusion that there is no merit in the appeal.

For the reasons stated, the appeal is dismissed. Pending Civil Applications, if any, stand disposed of. No costs.

(P.R.BORA,J.)

(ANOOP V.MOHTA,J.)

Later on :

1. The learned counsel appearing for the Appellant prayed for staying the effect and operation of the order passed today for next eight weeks, so as to enable the Appellant to approach the Hon'ble Apex Court.
2. The learned counsel for Respondent No.1 opposed the prayers so made.
3. The request so made can not be considered by a Single Judge. Since Hon'ble Shri Justice Anoop V. Mohta is presently sitting at Goa (Panji), the Registry is directed to place the matter for consideration of the request so made by the Appellant on a convenient date in consultation with Hon'ble Shri Justice Anoop V. Mohta on video conferencing.

7.3.2017

(P.R.Bora,J.)

10 MARCH 2017

P.C.:

1. In view of the order passed on 7 March, 2017 the Registry has placed the present matter after having consulted with Hon'ble Shri Justice Anoop V. Mohta today at 2.10 p.m. by video conferencing at Judges Conference Hall, 4th Floor, Annex Building. Accordingly, the matter was heard by the Bench on video conferencing.

2. The learned counsel appearing for the Appellant prayed for staying the effect and operation of the order passed by the Bench on 7th March, 2017 for next eight weeks.

3. The learned counsel appearing for Respondent No. 1 opposed the request so made.

4. In view of the fact that during pendency of the present Appeal the stay was operating in favour of the Appellant. We deem it appropriate to stay the effect and operation of the order passed by us on 7th March, 2017 for next six weeks. Order accordingly.

(P.R.BORA,J.)

(ANOOP V.MOHTA,J.)

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