Bakshish Singh vs Darshan Engineering Works on 11 October, 1993

Equivalent citations: 1994 AIR 251, 1994 SCC (1) 9

Author: P.B. Sawant

Bench: P.B. Sawant, Yogeshwar Dayal

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           PETITIONER:
BAKSHISH SINGH

        Vs.

RESPONDENT:
DARSHAN ENGINEERING WORKS

DATE OF JUDGMENT11/10/1993

BENCH:
SAWANT, P.B.
BENCH:
SAWANT, P.B.
YOGESHWAR DAYAL (J)

CITATION:
 1994 AIR  251            1994 SCC  (1)   9
 JT 1993 (6)    85        1993 SCALE  (4)99


ACT:



HEADNOTE:



JUDGMENT:
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The Judgment of the Court was delivered by SAWANT, J.- These two appeals one by the Union of India and the other by the aggrieved employee are directed against the decision dated March 24, 1983 of the Punjab and Haryana High Court whereby the High Court has struck down Section 4(1)(b) of the Payment of Gratuity Act, 1972 (hereinafter referred to as the 'Act') as being violative of Article 19(1(g) of the Constitution of India.

2. The admitted factual matrix of the case is in a narrow compass. Bakshish Singh, the appellant-employee joined the services of the respondent-M/s Darshan Engineering Works as a

Fitter on March 2, 1968 and resigned from service on December 10, 1978 after a total period of continuous service of more than 10 years. His last drawn wages were Rs 335 per month. It is not disputed that at the time he joined the employment on March 2, 1968, his age was 54 years 3 months, his date of birth being December 17, 1913. This was known to the respondent-employer.

3. The Act came into force w.e.f. September 21, 1972. On the employee's resignation w.e.f. December 10, 1978 which was accepted by the respondent-employer, he claimed gratuity under Section 4(1)(b) of the Act. His claim not having been accepted, he approached the Controlling Authority under Section 7 of the Act. The claim was resisted by the employer on the ground firstly that the employee was entitled to gratuity only till the date he reached his superannuation age which was 58 years and since he had not completed 5 years of service by the time he attained 58 years of age, he was not entitled to gratuity under Section 4(1) of the Act. Secondly, it was contended that in any case the amount of gratuity payable to the employee was only for the period upto the superannuation age and since he was drawing wages of Rs 230 per month on the day he attained the superannuation age, he was entitled to a sum of Rs 460 only, being the gratuity calculated at the rate of 15 days' salary per year of service till the date of superannuation.

4. Both the contentions were negatived by the Controlling Authority by pointing out that Section 4(1) provided for payment of gratuity to the employee on the termination of his employment after he has rendered continuous service of not less than five years on the occurrence of any of the three events viz., (a) on the employee reaching his superannuation age, or (b) on his retirement or resignation, or (c) on his death or disablement due to accident or disease. In case of the third event, the qualifying continuous service of five years is not necessary. The 'retirement' is defined by Section 2(q) of the Act to mean 'termination of the service of an employee otherwise than on superannuation'. The first two events are independent of each other. Since in the present case the employer had not chosen to superannuate the employee on his attaining 58 years of age and had continued him in service till the employee himself resigned on December 10, 1978 by which date he had completed more than 10 years of service, the employee was entitled to the gratuity for the period of his entire service upto the date of his resignation. The Controlling Authority, therefore, calculated the amount of gratuity due to the employee as Rs 1782 at the rate of 15 days' wages per year of service for all the IO years taking the. last drawn wages of Rs 3 35 per month as the basis of the said calculation. This order was challenged by the employer before the Appellate Authority under the Act. The Appellate Authority confirmed the finding of the Controlling Authority and dismissed the appeal. In the writ petition filed before the High Court under Articles 226 and 227 of the Constitution, the High Court confirmed the interpretation placed on Section 4(1) of the Act by the Controlling as well as the Appellate Authority and also held that the age of superannuation is irrelevant when the gratuity is payable under clause (b) of Section 4(1) on retirement or resignation, the said clause being independent of clause (a) of that section which provided for payment of gratuity on attaining the age of superannuation. However, the court held that the provisions of Section 4(1)(b) of the Act which entitles an employee to gratuity on his retirement or resignation after a continuous service of only 5 years was an unreasonable restriction on the employer to carry on his business and, therefore, violative of Article 19(1)(g) of the Constitution. We should have thought that on the facts of the present case the court was not called upon to decide the alleged unreasonableness of the qualifying period of 5 years of service for entitlement to gratuity on

retirement or resignation, since as pointed out above the employee had put in more than 10 years of service. The court further not only went into the said question and struck down the provisions of Section 4(1)(b) but for reasons which are not apparent to us, also denied the gratuity awarded to the employee by the lower authorities even after accepting the finding of the lower authorities that the employee had put in more than 10 years of service. It does not appear from the judgment of the High Court whether, although it found that the five years' qualifying service was unreasonable, ten years' qualifying service would also be similarly unreasonable according to it. In fact, the High Court has not thought it necessary to indicate what according to it would be a reasonable qualifying period of service for entitlement to the gratuity in case of retirement or resignation by the employee. Further, if the alleged short period of 5 years was the reason for holding that the provision in question cast an unbearable burden on the employer so as to violate his fundamental right under Article 19(1)(g) of the Constitution, by the same reasoning the provision of Section 4(1)(a) of the Act, which lays down the same qualifying period to entitle the employee to the receipt of gratuity on superannuation had also to be, struck down.

5. We may now turn to the reasons given by the High Court in its own words for holding the said provision unconstitutional. The court has held that:

> " A gratuity is essentially a retiring benefit payable to a workman which under the statute [Section 4(1)(b) of the Act] has been made payable on voluntary resignation as well. Gratuity is a reward for good, efficient and faithful service rendered for a considerable period. It is necessary that a long minimum period for earning gratuity in the case of voluntary resignation should be prescribed to curb the tendency on the part of the workmen to change employment frequently after putting in minimum service qualifying for gratuity. A workman gains experience during his tenure of employment. An experienced workman is capable of securing another employment with better emoluments. He can also be tempted by other employers with more lucrative salary. The exit of an experienced workman would surely be a loss for his employer. It has been aptly observed by their Lordships of the Supreme Court in British Paints (India) Limited case' that 'a longer minimum in the case of voluntary retirement or resignation makes it probable that the workmen would stick to the company where they are working. That is why gratuity schemes usually provide for a longer minimum in the case of voluntary retirement or resignation.' Keeping in view the intrinsic object for making provision for payment of gratuity to a workman on his voluntary resignation and the ratio of the decisions of the Supreme Court detailed above, there is no escape from the conclusion that the minimum period of qualifying service for five years by a workman for being eligible for gratuity on voluntary resignation under Section 4(1)(b) of the Act cannot be stamped sufficient long minimum in the context of making him stick to his existing employer and it does impose an unreasonable restriction on the fundamental right of the employer to carry on business and is, therefore, violative of Article 19(1)(g) of the Constitution."

6. Besides the decision of this Court in British Paints (India) Ltd. v. Workmen' the Court has also relied on other decisions of this Court. We may now discuss them here briefly.

7. In Express Newspapers (P) Ltd. v. Union of India2 what was questioned was the constitutional validity of the Working Journalists (Conditions of Service) and Miscellaneous Provisions Act, 1955 and the legality of the decision of the Wage Board constituted thereunder. The impugned Act was passed in order to implement the recommendations of the Press Commission and had for its object the regulation of the conditions of service of working journalists and other persons employed in newspaper establishments. Among other things, the Act provided for the payment of gratuity to a working Journalist who had been in continuous service for not less than 3 years, even when he voluntarily resigned from service. It is with reference to the said minimum period of qualifying service laid down in the Act that this Court observed that the said provision was not at all reasonable. The Court observed that a gratuity is a scheme of retirement benefit and the conditions for its being awarded had been laid down in the Labour Courts' decisions in this country. The Court then referred to the Labour Appellate Tribunal's decision in Ahmedabad Municipal Corpn. case3 where it was observed as under:

> "[T]he fundamental principle in allowing gratuity is that it is a for old age and the trend of the recent authorities as borne out from various awards as well as the decisions of this Tribunal is in favour of double benefit .... We are, therefore, of the considered opinion that Provident Fund provides a certain measure of relief only and a portion of that consists of the I British Paints (India) Ltd. v. Workmen, (1966) 2 SCR 523 : AIR 1966 SC 732 :(1966) 1 LLJ 407 2 1959 SCR 12: AIR 1958 SC 578 : (196 1) 1 LLJ 339 3 Workmen v. Ahmedabad Municipal Corpn., 1955 LAC 155, 158 employee's wages, that he or his family would ultimately receive, and that this provision in the present day conditions is wholly insufficient relief and two retirement benefits when the finances of the concern permit ought to be allowed."

8. The Court then observed that Ahmedabad Municipal Corpn. case3 as well as the Nundydroog Mines Ltd. case4 were cases where gratuity was to be allowed to the employees on their retirement. The Court then found that the Labour Court's decisions have, however, awarded gratuity benefits on the resignation of an employee also. It then referred to the Cipla Ltd. case5 and pointed out that the Court there took into consideration the capacity of the concern and other factors referred to therein and directed gratuity on full scale which included gratuity on voluntary retirement or resignation by an employee after 15 years' continuous service. The Court also referred to the decision in Indian Oxygen and Acetylene Co. Ltd. case6 where the Court had observed as follows:

> "It is now well-settled by a series of decisions of this Tribunal that where an employer company has the financial capacity, the workmen would be entitled to the benefit of gratuity in addition to the benefit of a provident fund. In considering the financial capacity of the concern what has to be seen is the general financial stability of the concern .... the factors to be considered before granting a scheme of gratuity are the broad aspects of the financial condition of the company, its profit earning capacity, the profits earned in the past, its reserves and the possibility of replenishing the reserves, the claim of capital put having regard to the risk involved, in short the financial stability of the concern."

9. The Court then observed that in the cases cited by it though the gratuity was awarded on the employee's resignation from service, it was granted only after the completion of 15 years and not merely on a minimum of 3 years of service as in that case. The Court further observed that gratuity being a reward for good, long and faithful service rendered for a considerable period (vide Indian Railway Establishment Code, Vol. I at p. 614 Ch. XV, para 1503), there would be no justification for awarding the same when an employee voluntarily resigns and brings about a termination of his service, except in exceptional circumstances. One such exception is the operation of the "conscience clause", the other exception being that the employee is in continuous service of the employer for a period of more than 15 years. The Court then went on to say that where, however, an employee voluntarily resigns from service after a period of only 3 years, there will be no justification whatsoever for awarding him gratuity and any such provision is certainly unreasonable. The Court also held that the provision in question 4 Nundydroog Mines (KGF) Ltd. v. Workmen, 1956 LAC 265, 5 Chemical, Industrial and Pharmaceutical Laboratories Ltd. v. Workmen, (1955) 2 LLJ 355, 358 (IT, Bom) 6 Employees' Union v. Indian Oxygen and Acetylene Co. Ltd., (1956) 1 LLJ 435 (IT, Bom) imposes an unreasonable restriction on the employer's right to carry on business and was liable to be struck down as unconstitutional.

10. In Garment Cleaning Works v. Workmen7 the Industrial Tribunal had on a reference under the Industrial Disputes Act framed a gratuity scheme providing, among others, that on retirement or resignation of a workman after 10 years' service, 10 days' consolidated wages for each year's service should be awarded as gratuity. It was assailed on the ground that the said provision violated the fundamental rights of the employers under Article 19(1)(g) of the Constitution. It was also contended there that no gratuity should be admissible in case of voluntary retirement or resignation until and unless 15 years' service had been put in by the employee. In support of the attack against the said provision, reliance was placed on the decision in the Express Newspaper case2. This Court explained that the observations made in the Express Newspaper case2 that the employee should be entitled to gratuity on resigning his post where he had been in continuous service for a period of more than 15 years, were not meant to lay down a rule of universal application in regard to all gratuity schemes. The Court negatived the attack and upheld the minimum qualifying period of service of 10 years prescribed by the Tribunal for entitlement of gratuity on resignation. The second attack in that case was against the provision in the scheme that if the workman was dismissed or discharged for misconduct causing financial loss, he should be deprived of gratuity only to the extent of the said loss. It was contended that the payment of any amount as gratuity to such a workman was against the very principle on which gratuity schemes were generally based, gratuity being in the nature of a retrial benefit for long and meritorious service. The misconduct is itself a blot on the character of the employee's service and that disqualifies him from any claim of gratuity. Repelling the said contention, the Court observed that on principle, gratuity is earned by an employee for long and meritorious service. It is difficult to understand why the benefit thus earned by long and meritorious service should not be available to him even though at the end of such service, he may have been found guilty of misconduct which entails dismissal. The Court further observed that gratuity is not paid to the employee gratuitously or merely as a matter of boon. It is paid to him for the services rendered by him and when it is once earned it is difficult to understand why it should necessarily be denied to him whatever may be the nature of misconduct resulting in his dismissal. In this connection, the Court pointed out that even the concerned rule of Provident Fund Scheme

shows that the whole provident fund is not denied to the employee even if he is dismissed. It only authorises certain deductions to be made and the deductions thus made did not revert to the employer either. The Court did not accept the analogy which was sought to be drawn between the definition of 'retrenchment' contained in Section 2(oo) of the Industrial Disputes Act, 1947 and the retrenchment compensation payable on account of the retrenchment and the 'gratuity' payable under the scheme. It pointed 7 (1962) 1 SCR 711 : AIR 1962 SC 673 :(1961) 1 LLJ 513 out that the two stood on different footings in regard to the effect of misconduct on the rights of workmen.

11. In Wenger and Co. v. Workmen8 an industrial dispute arising out of various demands between various hotel establishments and their workmen was referred for adjudication to the Industrial Tribunal. The Tribunal framed a gratuity scheme which, among others, granted gratuity to an employee voluntarily resigning from service after completion of 10 years of service or more. The first objection to the gratuity scheme in general, was that in view of the Provident Fund Scheme already introduced in the establishments, it was not right to burden the employer with the additional liability. The Court pointed out that this argument had been considered by it on several occasions earlier and consistently rejected. In this connection, the Court stated that the object intended to be achieved by the Provident Fund Scheme is not the same as the object of the gratuity scheme and in any case where the financial position of the employer permits the introduction of both benefits there was no reason why the employee should not get the said two benefits. The Court then also pointed out that in dealing with the financial obligation involved on account of the introduction of a gratuity scheme, it was necessary to bear in mind that the magnitude of the theoretical impact did not matter so much as the extent of the actual impact of the scheme. There were two ways of looking at the problem of the burden imposed by the gratuity scheme. One was to capitalise the burden on actuarial basis and that would only show theoretically that the burden would be very heavy. The other was to look at the scheme in its practical aspect and this would show that broadly no more than 3 to 4 per cent of the employees retire every year. It was, therefore, desirable that in assessing the financial burden the practical approach should be taken into account. The Court, however, modified the gratuity scheme by substituting the minimum qualifying period of 5 years for 2 years contained in the scheme when the termination of service was caused by the employer and also added a clause that in case of termination as a result of the misconduct which had caused financial loss to the employer, that loss should first be compensated from the gratuity payable to the employee and the balance, if any, should be paid to him. As regards the gratuity payable on resignation of the employee, the Court enhanced the minimum qualifying service from 5 years to 10 years while maintaining the rate as well as the ceiling prescribed by the Tribunal which was 15 days' basic pay for every completed year of service subject to a maximum of 12 months' basic pay.

12. In British Paints (India) Ltd., v. Workmen' the Industrial Tribunal had framed a gratuity scheme under which, among others, it had fixed 5 years' minimum service. in order to enable a workman to earn gratuity. It also fixed 21 days' basic wage or salary as the quantum of gratuity for each completed year of service and included dearness allowance in the definition of the words "basic wage or salary". This Court pointed out that the reason for providing a long minimum period of service for earning gratuity in the 8 1963 Supp 2 SCR 862: AIR 1964 SC 864: (1963) 2 LLJ 403 case of voluntary retirement or resignation is to see that the workmen did not leave one concern after another after putting the short minimum service qualifying them for gratuity. A longer minimum

service in the case of voluntary retirement or resignation makes it more probable that the workmen would stick to the company where they are working. That is why gratuity schemes usually provide for a longer minimum service in the case of voluntary retirement or resignation. In this connection, the Court referred to the decision in the Express Newspapers case2 where a short minimum service of 3 years for voluntary retirement or resignation was struck down and to the decision in Garment Cleaning Works case7 and Wenger and Co. case8 where 10 years' minimum service was prescribed to enable the employee to claim gratuity if he resigned. The Court then modified the gratuity scheme in that regard and ordered that in the case of voluntary retirement or resignation, the minimum qualifying service for entitlement to gratuity should be 10 years. The Court also restricted the wage for calculating the gratuity to basic wage and modified the definition of 'basic wage as given by the Tribunal on the ground that generally the gratuity is calculated only on basic wage and secondly, the gratuity scheme was being introduced in the company for the first time and the employees were already in receipt of another retiral benefit viz. provident fund.

13. In Delhi Cloth and General Mills Co. Ltd. v. Workmen9 the Industrial Tribunal framed two schemes relating to the payment of gratuity. One related to the DCM and SBM which were under the same management and the other relating to BCM and ATM which were under different managements. The Court pointed out as under:

> "[G]ratuity is not in its present day concept merely a gift made by the employer in his own discretion. The workmen have in course of time acquired a right to gratuity on determination of employment provided the employer can afford having regard to his financial condition, to pay it. There is undoubtedly no statutory direction for payment of gratuity as it is in respect of provident fund and retrenchment compensation. The conditions for the grant of gratuity are, as observed in Bharatkhand Textile Mfg. Co. Ltd. case10 (i) financial capacity of the employer;
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> (ii) his profit making capacity; (iii) the profits earned by him in the past; (iv) the extent of his reserves; (v) the chances of his replenishing them; and (vi) the claim for capital invested by him. But these are not exhaustive and there may be other material considerations which may have to be borne in mind in determining the terms and conditions of the gratuity scheme. Existence of other retiring benefits such as provident fund and retrenchment compensation or other benefits do not destroy the claim to gratuity: its quantum may however have to be adjusted in the light of the other benefits.

9 (1969) 2 SCR 307 : AIR 1970 SC 919: (1969) 2 LLJ 755 10 Bharatkhand Textile Mfg. Co. Ltd. v. 'Textile Labour Assn., (1960) 3 SCR 329 : AIR 1960 SC 833 : (1960) 2 LLJ 21 We may repeat that in matters relating to the grant of gratuity and even generally in the settlement of disputes arising out of industrial relations, there are no fixed principles, on the application of which the problems arising before the Tribunal or the Courts may be determined and often precedents of cases determined ad hoc are utilised to build up claims or to resist them. It would in the circumstances be futile to attempt to reduce the grounds of the decisions given by the Industrial Tribunals, the Labour Appellate Tribunals and the High Courts to the dimensions of any recognised principle."

(emphasis in original)

14. The Court then referred to some precedents relating to the grant of gratuity and by pointing out that the Tribunal in that case had failed to take into account the prevailing pattern in the textile industry all over the country, modified the gratuity scheme framed for DCM and SBM by restricting the payment of gratuity on the basis of basic wages as against the consolidated wages as was granted by the Tribunal. The Court also accepted that the gratuity should not be forfeited in all cases of misconduct. In cases of misconduct where financial loss is occasioned, the monetary value of the loss only should be deducted from the gratuity payable to the employee. The Court further reduced the minimum qualifying service for voluntary retirement to 10 years from 15 years. It must, however, be stated here that the counsel for the employer had also accepted that the length of the qualifying service should be reduced accordingly.

15. In Straw Board Mfg. Co. Ltd. v. Workmen" on a reference, on October 31, 1969, the Industrial Tribunal had made an award framing a gratuity scheme. While the appeal against the award was pending in the court, the present Act came into operation. This Court upheld the 5 years' minimum qualifying period of service for entitlement to gratuity to workmen who had voluntarily retired or resigned by pointing out that in cases like British Paints' the qualifying period of 10 years was laid down so that the workmen should not leave one concern for another after putting in short minimum service qualifying for gratuity. The Court observed that the current conditions must control the Tribunal's conscience in finalising the terms of the gratuity scheme. Taking things as they are in our country presently, there is unemployment at the level of workers. Colossal unemployment means that the worker will not leave his employment merely because he has qualified himself for gratuity. In an economic situation where there is a glut of labour in the market and unemployment stares the working class in the face, it is theoretical to contend that employees will hop from industry to industry unless the qualifying period for earning gratuity is raised to 10 years. The Court also pointed out that sense of national consciousness in this field is reflected in the present Act which fixed the period of 5 years as the qualifying period for earning gratuity.

16. The aforesaid survey of the relevant authorities shows that in labour jurisprudence the concept of "gratuity" has undergone a metamorphosis over 11 (1977) 2 SCC 329: 1977 SCC (L&S) 243 : (1977) 3 SCR 91 the years. The dictionary meaning may suggest that gratuity is a gratuitous payment, a gift or a boon made by the employer to the employee as per his sweet will. It necessarily means that it is in the discretion of the employer whether to make the payment or not and also to choose the payee as well as the quantum of payment. However, in the industrial adjudication it was considered as a reward for a long and meritorious service and its payment, therefore, depended upon the duration and the quality of the service rendered by the employee. At a later stage, it came to be recognised as a retiral benefit in consideration of the service rendered and the employees could raise an industrial dispute for introducing it as a condition of service. The industrial adjudicators recognised it as such and granted it either in lieu of or in addition to other retiral benefit(s) such as pension or provident fund depending mainly upon the financial stability and capacity of the employer. The other factors which were taken into consideration while introducing gratuity scheme were the service conditions prevalent in the other units in the industry and the region, the availability or otherwise of the other retiral benefits, the standard of other service conditions etc. The quantum of gratuity was also

determined by the said factors. The recognition of gratuity as a retiral benefit brought in its wake further modifications of the concept. It could be paid even if the employee resigned or voluntarily retired from service. The minimum qualifying service for entitlement to it, rate at which it was to be paid and the maximum amount payable was determined likewise on the basis of the said factors. It had also to be acknowledged that it could not be denied to the employee on account of his misconduct. He could be denied gratuity only to the extent of the financial loss caused by his misconduct, and no more. Thus even before the present Act was placed on the statute book, the courts had recognised gratuity as a legitimate retiral benefit earned by the employee on account of the service rendered by him. It became a service condition wherever it was introduced whether in lieu of or in addition to the other retiral benefit(s). The employees could also legitimately demand its introduction as such retiral benefit by raising an industrial dispute in that behalf, if necessary. The industrial adjudicators granted or rejected the demand on the basis of the factors indicated above.

17. It is true that while doing so, the industrial adjudicators insisted upon certain minimum years of qualifying service before an employee could claim it whether on superannuation or resignation or voluntary retirement. This was undoubtedly inconsistent with the concept of the gratuity being an earning for the services rendered. What is, however, necessary to remember in this connection is that there is no fixed concept of gratuity or of the method of its payment. Like all other service conditions, gratuity schemes may differ from establishment to establishment depending upon the various factors mentioned above, prominent among them being the financial capacity of the employer to bear the burden. There has commonly been one distinction between a retiral benefit like provident fund and gratuity, viz. the former generally consists of the contribution from the employee as well. It is, however, not a necessary ingredient and where the employee is required to make his contribution, there is no uniformity in the proportion of his share of contribution. Likewise, the gratuity schemes may also provide differing qualifying service for entitlement to gratuity. It is true that in the case of gratuity an additional factor weighed with the industrial adjudicators and courts, viz. that being entirely a payment made by the employer without there being a corresponding contribution from the employee, the gratuity scheme should not be so liberal as would induce the employees to change employment after employment after putting in the minimum service qualifying them to earn it. But as has been pointed out by this Court in the Straw Board Mfg. Co. Ltd. case" in view of the constantly growing unemployment, the surplus labour and meager opportunities for employment, the premise on which a longer qualifying period of service was prescribed for entitlement to gratuity on voluntary retirement or resignation, was unsupported by reality. In the face of the dire prospects of unemployment, it was facile to assume that the labour would change or keep changing employment to secure the paltry benefit of gratuity.

18. Even assuming that the presumption that a longer period of service for entitlement to gratuity on voluntary retirement or resignation is necessary to prevent labour from changing employment frequently, that consideration has no bearing on the question whether a short period of qualifying service is violative of Article 19(1)(g) of the Constitution. That article comes into picture only if, among others, (a) it is shown that the short qualifying period of service throws on any particular employer such financial burden as would force him to close his establishment and (b) the provision is not one of the minimum service conditions which must be made available to the employees. Hence, the provision for a short qualifying period per se is not invalid and cannot be struck down

generally as being violative of Article 19(1)(g) of the Constitution as is done by the High Court in the present case. The High Court's reliance on the decisions referred to by it, for the purpose of holding that the provision of a period of service of five years is violative of Article 19(1)(g) of the Constitution, is misplaced for the Court has failed to notice that the view taken by this Court was in a different factual context. In the first instance, at that time, gratuity had not come to be accepted as one of the minimum service conditions, much less any particular scheme of gratuity. Secondly, the courts in those cases were concerned with establishments of differing financial capacity in a particular industry and with evolving uniform service conditions for the industry as a whole for the maintenance of industrial peace. Further, except the decision of this Court in Express Newspaper case2 the other decisions which have laid down more than five years' qualifying service, have not based their conclusion on the vulnerability of the shorter qualifying service on the anvil of Article 19(1)(g) of the Constitution.

19. On the other hand, in Wenger and Co. case8 this Court pointed out that in dealing with the financial obligations involved on account of the introduction of the gratuity scheme, it was necessary to bear in mind the actual rather than the theoretical impact of the scheme. Since not more than 3 to 4 per cent of the employees retired every year, the financial burden caused by the gratuity scheme was much less than what its theoretical enunciation would indicate. The Court there also held that the minimum qualifying period of five years' service was reasonable.

20. In Delhi Cloth and General Mills Co. Ltd. case9 the Court was at pains to point out that in matters relating to the grant of gratuity and even generally in the settlement of disputes arising out of industrial relations, there were no fixed principles on the application of which the problems arising before the tribunals or the courts could be determined and often precedents of cases determined ad hoc were utilised to win the claims or to resist them. It was, therefore, futile to attempt to reduce the grounds of the decisions given by the courts to the dimensions of any recognised principle.

21. In Straw Board Mfg. Co. Ltd. case11 which was decided after the present statute came into operation, as pointed out above, the Court upheld the five years' minimum qualifying period of service for entitlement to gratuity on voluntary retirement or resignation, by stating that the qualifying period of ten years' service prescribed in British Paints case, was not meant to be laid down as a uniform standard to be followed in all cases. This is apart from the fact that the court also stated there that the premise underlying the reasons which impelled the said higher qualifying service was not in conformity with the current reality.

22. As regards the decision of this Court in Express Newspaper case2 this Court has explained the view taken there in a later decision viz., U. Unichoyi v. State of Kerala 12. The Court has stated there as follows:

> "....in appreciating the nature and effect of the said observations it is necessary to recall that in that case the Court was dealing with the problem of fixation of wages in regard to Working Journalists as prescribed by Section 9 of the Working Journalists (Conditions of service) and Miscellaneous Provisions Act, 1955 (45 of 1955) Section 9

of the said Act required that in fixing rates of wages in respect of working journalists the Board had to have regard to the cost of living, the prevalent rates of wages for comparable employments, the circumstances relating to newspaper industry in different regions of the country and to any other circumstance which the Board may deem relevant. It was held that the wage structure contemplated by Section 9 was not the structure of minimum wage rates, it was a wage structure permitted to be prescribed by that statue after taking into account several relevant facts and the scheme of that Act showed that the wage structure thus contemplated was very much beyond the minimum wage rates and was nearer the concept of a fair wage. That is why the Court took the view that the expression 'any other circumstance' specified by Section 9 definitely included the circumstance, namely, the capacity of the industry to bear the burden and so the Board was bound to take that factor into account in fixing the wage structure. It appeared to the Court 12 (1962) 1 SCR 946: AIR 1962 SC 12: (1961) 1 LLJ 631 that this important element had not been considered by the Board at all and that introduced a fatal infirmity in the decisions of the Board. Thus, the wage structure with which the Court was concerned in that case was not the minimum wage structure at all. It is essential to remember this aspect of the matter in appreciating the argument urged by Mr Nambiar on the strength of certain observations made by this Court in the course of its judgment."

23. What is observed by this Court in relation to the award of the Wage Board with regard to the wage-structure in the Express Newspaper case2 applies equally to the gratuity scheme framed by the Wage Board under the said Act. The gratuity scheme introduced by the Wage Board was not a minimal service condition. This is apart from the fact that in that case the gratuity scheme which was held to be violative of Article 19(1)(g) was fixed not by any statute laying down minimum condition of service but by a Wage Board, constituted under an Act.

24. Coming now to the provisions of the present Act, it will be seen that the Act extends to the whole of India except to plantations and ports in the State of Jammu & Kashmir. The provisions of the Act apply uniformly to "(a) every factory, mine, oil field, plantation, port and railway company; (b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed, or were employed, on any day of the preceding twelve months; and (c) such other establishments or class of establishments, in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government may, by notification, specify in this behalf' as provided in subsection (3) of Section 1 of the Act. It defines "retirement" under Section 2(q) to mean "termination of the service of an employee otherwise than on superannuation". Section 2(s) defines "wages" to mean "all emoluments which are earned by an employee while on duty or on leave in accordance with the terms and conditions of his employment and which are paid or are payable to him in cash and includes dearness allowance but does not include any bonus, commission, house rent allowance, overtime wages and any other allowance". The relevant provisions of Section 4 under which an employee becomes entitled to gratuity, are as follows:

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

(a) on his superannuation, or

(b) on his retirement or resignation, or

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

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

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

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

Provided further that in the case of an employee who is employed in a seasonal establishment and who is not so employed throughout the year, the employer shall pay the gratuity at the rate of seven days' wages for each season. Explanation.- In the case of a monthly rated employee, the fifteen days' wages shall be calculated by dividing the monthly rate of wages last drawn by him by twenty-six and multiplying the quotient by fifteen. (3) The amount of gratuity payable to an employee shall not exceed fifty thousand rupees.

(4) For the purpose of computing the gratuity payable to an employee who is employed, after his disablement, on reduced wages, his wages for the period preceding his disablement shall be taken to be the wages received by him during that period, and his wages for the period subsequent to his disablement shall be taken to be the wages as so reduced. (5) Nothing in this section shall affect the right of an employee to receive better terms of gratuity under any award or agreement or contract with the employer. (6) Notwithstanding anything contained in sub-section

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

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

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act 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."

25. Section 5 then makes provision for exemption of those establishments, factories etc. and those employees or class of employees employed in any establishment, factory etc. who in the opinion of the appropriate Government are in receipt of gratuity or pensionary benefits which are not less favourable than the benefits conferred under the Act. Section 9 provides for penalties for those who avoid payment of gratuity to their employees, or contravene or make default in compliance with any other provision of the Act. Section 13 protects the amount of gratuity payable to the employee from attachment in execution of any decree or order of any civil, revenue or criminal court. Section 14 states that the provisions of the Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other enactment or in any instrument or contract having effect by virtue of any other enactment.

26. As the object of the statute shows, it was enacted because there was no central Act to regulate the payment of gratuity to industrial workers except the Working Journalists (Conditions of Service) Miscellaneous Provisions Act, 1955 which had come up for consideration in the Express Newspaper case2. The Governments of Kerala and West Bengal had enacted their own statutes for payment of gratuity to workers employed in establishments in their States. Since the enactment of the Kerala and West Bengal Acts, some other State Governments had also voiced their intention to enact similar legislations in their States. It had, therefore, become necessary to have a central law on the subject so as to ensure a uniform pattern on payment of gratuity to the employees throughout the country. The enactment of a central law was also necessary to avoid different treatment to the employees of establishments having branches in more than one State particularly when under the conditions of their service, the employees were liable to be transferred from one State to another. The proposal for central legislation on gratuity was discussed in the Labour Ministers' Conference and also in the Indian Labour Conference. There was general agreement in these conferences that the legislation on payment of gratuity be enacted as early as possible. While enacting the statute for West Bengal in August 1971, care had been taken to so design its provisions that they could serve, as far as possible, as norms for the central law. The bill had, therefore, been drafted on the lines of the West Bengal statute on the subject with some modifications which had been made in the light of the views expressed at the Indian Labour Conference. Hence, the present statute, which was also amended twice once in 1984 to correct the definition of 'continuous service' under Section 2(c) of the Act and second time in 1987 to provide, among other things, for a time-limit for the payment of gratuity and for recovery of interest in cases where the payment was not made in time. The second amendment also made certain other changes in the Act including extension of its coverage to employees drawing salary upto Rs 2500 per month as against the earlier limit which was Rs 1600 per month.

27. It would thus be apparent both from its object as well as its provisions that the Act was placed on the statute book as a welfare measure to improve the service conditions of the employees. The provisions of the statute were applied uniformly throughout the country to all establishments covered by it. They applied to all employees drawing a monthly salary upto a particular limit in factories, shops and establishments etc. whether the employees were engaged to do any skilled, semi-skilled, unskilled, manual, supervisory, technical or clerical work. The provisions of the Act were thus meant for laying down gratuity as one of the minimal service conditions available to all employees covered by the Act. There is no provision in the Act for exempting any factory, shop etc. from the purview of the Act covered by it except those where, as pointed out above, the employees are in receipt of gratuity or pensionary benefits which are no less favourable than the benefit conferred under the Act. The payment of gratuity under the Act is thus obligatory being one of the minimum conditions of service. The noncompliance of the provisions of the Act is made an offence punishable with imprisonment or fine. It is settled law that the establishments which have no capacity to give to their workmen the minimum conditions of service prescribed by the Statute have no right to exist [vide Bijay Cotton Mills Ltd. v. State of Ajmerl, Crown Aluminium Works v. Workmen'4 and U. Unichoyi v. State of Kerala 12].

28. In Bijay Cotton Mills Ltd. case' 3 it is observed as follows:

> "It can scarcely be disputed that securing of living wages to labourers which ensure not only bare physical subsistence but also the maintenance of health and decency, is conducive to the general interest of the public. This is one of the Directive Principles of State Policy embodied in Article 43 of our Constitution. It is well known that in 1928 there was a Minimum Wages Fixing Machinery Convention held at Geneva and the resolutions passed in that convention were embodied in the International Labour Code. The Minimum Wages Act is said to have been passed with a view to give effect to these resolutions vide South India Estate Labour Relation Organisation v. State of Madras 15. If the labourers are to be secured in the enjoyment of minimum wages and they are to be protected against exploitation by their employers, it is absolutely necessary that restraints should be imposed upon their freedom of contract and such restrictions cannot in any sense be said to be unreasonable. On the other hand, the employers cannot be heard to complain if they are compelled to pay minimum wages to their labourers even though the labourers, on account of their poverty and helplessness are willing to work on lesser wages.
>
> We could not really appreciate the argument of Mr Seervai that the provisions of the Act are bound to affect harshly and even oppressively a particular class of employers who for purely economic reasons are unable to pay the minimum wages fixed by the authorities but have absolutely no dishonest intention of exploiting their labourers. If it is in the interest of the general public that the labourers should be secured 13 (1955) 1 SCR 752: AIR 1955 SC 33 :(1955) 1 LLJ 129 14 1958 SCR 651 : AIR 1958 SC 30: (1958) 1 LLJ 1 15 (1954) 1 MLJ 518, 521 : AIR 1955 Mad 45 adequate living wages, the intentions of the employers whether good or bad are really irrelevant. Individual employers might find it difficult to carry on the business on the basis of the minimum

> wages fixed under the Act but this must be due entirely to the economic conditions of these particular employers. That cannot be a reason for the (sic) striking down the law itself as unreasonable."

29. In Crown Aluminum Works case14 the Court observed as under: "There is, however, one principle which admits of no exceptions. No industry has a right to exist unless it is able to pay its workmen at least a bare minimum wage. It is quite likely that in under-developed countries, where unemployment prevails on a very large scale, unorganised labour may be available on starvation wages; but the employment of labour on starvation wages cannot be encouraged or favoured in a modem democratic welfare state. If an employer cannot maintain his enterprise without cutting down the wages of his employees below even a bare subsistence or minimum wage, he would have no right to conduct his enterprise on such terms."

30. The present Act is of the genre of Minimum Wages Act, the Payment of Bonus Act, the Provident Funds Act, Employees State Insurance Act, and other like statutes. These statutes lay down the minimum relevant benefits which must be made available to the employees. We have solemnly resolved to constitute this country, among others, into a socialist republic and to secure to all its citizens, which, of course, include workmen, social and economic justice. Article 38 requires the State to strive to promote the welfare of the people by securing and protecting as effectively as it may, a social order in which, among other things, social and economic justice shall inform all the institutions of the national life. Article 39 states that the State shall, in particular, direct its policy towards securing, among others, that the citizens have the right to an adequate means to livelihood and that the health and strength of workers are not abused. Article 41 of the Constitution directs the State to make effective provision, among others, for securing public assistance in old age and in other cases of undeserved want. Article 42 enjoins the State to make provision for securing just and humane conditions of work while Article 43 requires the State to endeavour to secure by suitable legislation to all workers a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. Article 47 requires that the State shall regard the raising of the level of nutrition and standard of living of its people and the improvement of public health as one of its primary duties.

31. Further, there is a restriction placed on the exercise of the Fundamental Right under Article 19(1)(g) by clause (6) of the said article. That clause states that nothing in sub-clause (g) of clause (1) shall affect the operation of any existing law or prevent the State from making any law imposing in the interests of the general public reasonable restrictions on the exercise of the right conferred by that sub-clause. It cannot be disputed that the present Act is a welfare measure introduced in the interest of the general public to secure social and economic justice to workmen to assist them in their old age and to ensure them a decent standard of life on their retirement.

32. On both grounds, therefore, viz. that the provisions for payment of gratuity contained in Section 4(1)(b) of the Act are one of the minimal service conditions which must be made available to the employees notwithstanding the financial capacity of the employer to bear its burden and that the said provisions are a reasonable restriction on the right of the employer to carry on his business within the meaning of Article 19(6) of the Constitution, the said provisions are both sustainable and

valid. Hence the decision of the High Court has to be set aside.

33. In the result, we allow the appeals, set aside the decision of the High Court and uphold the validity of Section 4(1)(b) of the Payment of Gratuity Act, 1972. The respondents to pay the costs.

34. Interim orders of stay granted by this Court on February 27, 1984 and September 10, 1984 are made final.