REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9693 OF 2013

Chairman-cum-Managing Director,
Mahanadi Coalfields Limited ...Appellant

Versus

Sri Rabindranath Choubey ...Respondent

J U D G M E N T

M.R. SHAH, J.

The short but interesting questions of law which fell for consideration of this Court are, (i) as to whether is it permissible in law for the appellant (employer) to withhold the payment of gratuity of the respondent (employee), even after his superannuation from service, because of the pendency of the disciplinary proceedings against him?, and (ii) where the departmental enquiry had been instituted against an employee while he was in service and continued after he attained the age of superannuation, whether the punishment of dismissal can be

imposed on being found guilty of misconduct in view of the provisions made in Rule 34.2 of the CDA Rules of 1978?

2. While considering the issues involved, the facts in nutshell are required to be considered, which are as under:

The respondent herein (hereinafter referred to as the "employee") was posted as Chief General Manager (Production) at Rajmahal area under Mahanadi Coalfields Limited, the appellant herein (hereinafter referred to as the "employer"). That the employer Mahanadi Coalfield Limited has made the Conduct, Discipline & Appeal Rules, 1978 (hereinafter referred to as the "CDA Rules"). That these Rules are applicable to all the employees of the appellant company. Rule 27 of the CDA Rules mentions the authorities who are empowered to impose various punishments which are specified in column 3 of the schedule attached to the CDA Rules. Rule 29 of the CDA Rules enlists the procedure for imposing major penalties for misconduct and misbehaviour. Rule 30 of the CDA Rules provides for action on the Inquiry Report. Rule 34 of the CDA Rules, which is relevant for our purpose, provides for special procedure in certain cases and which permits continuance of disciplinary proceedings even after the final retirement of an employee, provided the

disciplinary proceedings are instituted while the employee was in service whether before his retirement or during his re-employment. It further provides that such disciplinary proceedings shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service. Rule 34.3 provides for withholding the payment of gratuity during the pendency of the disciplinary proceedings and it further permits for ordering the recovery from gratuity of the whole or part of any pecuniary loss caused to the company, if have been guilty of offences/misconduct as mentioned in sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972 or to have caused pecuniary loss to the company by misconduct or negligence, during his service. The relevant Rules of the CDA Rules shall be discussed in detail hereinbelow.

2.1 While the respondent-employee was in service and posted as Chief General Manager, he was served with the chargesheet dated 1.10.2007. There was very serious allegation of misconduct alleging dishonestly causing coal stock shortages amounting to Rs.31.65 crores and thereby causing substantial loss to the employer. The employee was thereafter suspended

from service on 09.02.2008 under Rule 24.1 of the CDA Rules, pending departmental enquiry against him. This suspension however was revoked from 27.02.2009 without prejudice to the departmental enquiry. On completion of 60 years of age, the respondent-employee was superannuated with effect from 31.07.2010. However, at the time of superannuation, the departmental enquiry which was initiated against the employee remained pending. Therefore, the appellant – employer withheld the gratuity due and payable to the respondent-employee. The respondent herein submitted an application dated 21.09.2010 to the Director (Personnel) for payment of gratuity. On the same date, he also submitted an application before the Controlling Authority under the Payment of Gratuity Act for payment of gratuity. Notice was issued to the appellant to appear. The appellant appeared and stated that the payment of gratuity was withheld due to the reason that the disciplinary proceedings are pending against him. The Controlling Authority held that in that view of the matter, the claim of the respondent was pre-mature.

The respondent-employee challenged the order by filing the writ petition. The learned Single Judge dismissed the writ petition holding that in view of the existence of an appellate

forum against the order passed by the Controlling Authority, the respondent may file an appeal before the Appellate Authority. However, instead of filing an appeal before the Appellate Authority, the respondent-employee then filed Intra Court Writ Appeal before the Division Bench of the High Court. The Division Bench of the High Court has held that the writ petition was maintainable. On merits and relying upon the decision of this Court in the case of *Jaswant Singh Gill v. Bharat Coking Coal Ltd., reported in (2007) 1 SCC 663*, the High Court ruled that the disciplinary proceedings against the respondent were initiated prior to the age of superannuation. However, the respondent retired from service on superannuation and hence the question of imposing a major penalty of removal from service would not arise. The Division Bench of the High Court has further held that the power to withhold payment of gratuity as contained in Rule 34(3) of the CDA Rules shall be subject to the provisions of the Payment of Gratuity Act, 1972. The Division Bench of the High Court has further held that the statutory right accrued to the respondent to get gratuity cannot be impaired by reason of the Rules framed by the Coal India Limited which do not have the force of a statute. Consequently, direction is given to the

appellant-employer to release the amount of gratuity payable to the respondent-employee. Hence, the present appeal.

3. Shri Mahabir Singh, learned Senior Advocate appearing on behalf of the appellant-employer has vehemently submitted that in the facts and circumstances of the case and in view of the specific provisions under the CDA Rules, namely, Rules 34.2 and 34.3 of the CDA Rules, the decision of this Court in the case of *Jaswant Singh Gill (supra)* shall not be applicable.

3.1 It is further submitted by Shri Mahabir Singh, learned Senior Advocate appearing on behalf of the employer that Rule 34.2 of the CDA Rules authorises and/or permits the authority to continue the disciplinary proceedings, if instituted while the employee was in service, even after the final retirement of the employee and such disciplinary proceedings shall be deemed to be the proceedings and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service. It is submitted that therefore even a major penalty of dismissal can be imposed on conclusion of departmental proceedings even after the final retirement of the employee, if the departmental proceedings are instituted while the employee was in service. It is submitted that

the afore-stated Rule 34.2 of the CDA Rules has not been properly appreciated and/or considered by this Court in the case of *Jaswant Singh Gill (supra)*. It is submitted that in the said decision, this Court has proceeded on the footing that after the final retirement of the employee, a penalty of removal or dismissal is not permissible. It is submitted that the aforesaid is just contrary to Rule 34.2 of the CDA Rules.

3.2 It is further submitted by Shri Mahabir Singh, learned Senior Advocate appearing on behalf of the employer that even otherwise Rule 34.3 authorises and/or permits the disciplinary authority to withhold the payment of gratuity, or order the recovery from gratuity of the whole or part of any pecuniary loss caused to the company if such an employee has been guilty of offences/misconduct as mentioned in sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972 or to have caused pecuniary loss to the company by misconduct or negligence, during his service. It is submitted that Rule 34.3 of the CDA Rules is in conformity and/or in consonance with sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972 and there is no conflict between the two.

3.3 Learned Senior Advocate appearing on behalf of the appellant has heavily relied upon the decision of this Court in the case of *State Bank of India v. Ram Lal Bhaskar, reported in (2011) 10 SCC 249*. It is submitted that while considering the *pari materia* provisions under the State Bank of India Officers' Service Rules, 1992, namely, Rule 19(3), this Court has confirmed the order of dismissal of an employee which was passed after his retirement. It is submitted that in the said decision, this Court distinguished another judgment of this Court in the case of *UCO Bank v. Rajinder Lal Capoor, reported in (2007) 6 SCC 694* on the ground that in the said case the delinquent officer had already been superannuated and the chargesheet was served upon him after his retirement. It is submitted that thereafter this Court has further held that if the chargesheet is served before the retirement, enquiry can continue even after the retirement as per Rule 19(3) of the State Bank of India Officers' Rules, 1992. It is submitted that therefore this Court in the case of *Ram Lal Bhaskar (supra)* specifically held that if the rules permit, enquiry can continue even after the retirement of the employee. It is submitted that in the present case Rule 34.3 of the CDA Rules

permits the enquiry to continue even after the retirement of the employee. It is submitted that the said decision is by a three Judge Bench, however, decision in the case of Jaswant Singh Gill (supra) is by a two Judge Bench.

3.4 It is further submitted by Shri Mahabir Singh, learned Senior Advocate appearing on behalf of the employer that therefore when Rule 34 of the CDA Rules permits continuation of the departmental enquiry even after the retirement of an employee and such a retired employee is deemed to be in service and on conclusion of the departmental enquiry initiated while the employee was in service, penalty of dismissal is permissible, the employer will get the right to forfeit the payment of gratuity of such an employee as provided under Section 4(1) and 4(6) of the Payment of Gratuity Act, 1972 and even under Rule 34.3 of the CDA Rules.

3.5 Making the above submissions and relying upon the decision of this Court in the case of *Ram Lal Bhaskar (supra)* and relying upon Rule 34.2 and 34.3 of the CDA Rules, it is prayed to allow the present appeal and quash and set aside the impugned judgment and order passed by the Division Bench of the High Court.

4. The present appeal is vehemently opposed by Shri Anukul Chandra Pradhan, learned Senior Advocate appearing on behalf of the respondent-employee. It is submitted by the learned Senior Advocate that two issues are referred to be considered by a larger Bench, namely, (1) Whether the Authority/Employer has power to dismiss/terminate an employee (respondent herein) even after retirement from service, if departmental disciplinary proceedings are initiated during his employment/service; and (2) Whether the employer is empowered with authority to withhold the payment of gratuity during pendency of disciplinary proceedings.

4.1 It is vehemently submitted by the learned Senior Advocate appearing on behalf of the employee that so far as issue No.1 is concerned, Rule 27 provides the nature of penalties. Rule 27.1(i) prescribes minor penalties, such as, withholding increment and promotion including recovery of any pecuniary loss caused to the company for misconduct, whereas the major penalties are prescribed under Rule 27.1(iii), such as, reduction to a lower grade, compulsory retirement, removal and dismissal from service. It is submitted that on simple reading of Rule 27.1(iii), it can be said un-mistakenly that the four major penalties can be imposed so long as an employee remains in employment. It is

submitted that there was no order issued to the respondent with regard to extension of his employment/service or re-employment for certain period. It is submitted that Rule 34.2 provides only the disciplinary proceedings will be deemed to be continued and concluded as if he was in service. It is submitted that hence the termination/dismissal cannot be passed after the retirement of an employee. It is submitted that while there is no service/re-employment, there arises no question of removal or dismissal from service.

4.2 Now so far as issue no.2, namely, whether the employer is empowered with authority to withhold the payment of gratuity during pendency of disciplinary proceedings is concerned, it is vehemently submitted by the learned Senior Advocate appearing on behalf of the respondent that as per mandate of Section 4(1) of the Payment of Gratuity Act, 1972, gratuity becomes payable as soon as the employee retires subject to the condition that the employee shall have five years continuous service.

4.3 It is further submitted by the learned Senior Advocate appearing on behalf of the employee that in terms of clauses (a) or (b) of sub-section 6 of Section 4 of the Payment of Gratuity Act, 1972, the exercise of power to forfeit the gratuity amount of an

employee is available when the authority satisfies the pre-condition that the service of the employee has already been terminated for any act, omission or negligence causing any damage or loss or destruction of property belong to an employer. It is submitted that therefore "termination from service" is sine qua non and basic requirement for invoking power under Sections 4(6)(a) or 4(6)(b) of the Payment of Gratuity Act.

4.4 It is further submitted by the learned Senior Advocate appearing on behalf of the employee that as per Section 4(1) of the Payment of Gratuity Act, gratuity shall be payable to the employee on the termination of his employment if he has rendered continuous service for not less than five years. It is submitted that termination of employment may take place on (i) on his superannuation; or (ii) on his retirement or resignation; or (iii) on his death or disability due to accident or disease. It is submitted that in the present case the respondent was terminated by superannuation and therefore the respondent shall be entitled to the amount of gratuity under Section 4(1) of the Payment of Gratuity Act, 1972.

4.5 It is further submitted by the learned Senior Advocate appearing on behalf of the employee that when there arises no

question for dismissal or removal from service after the employee has retired on attaining the age of superannuation, the appellant cannot withheld the amount of gratuity in exercise of powers under Rule 34 of the CDA Rules being inconsistent with the Payment of Gratuity Act.

4.6 Learned Senior Advocate appearing on behalf of the employee has heavily relied upon the decision of this Court in the case of *Jaswant Singh Gill (Supra)*. It is vehemently submitted that in the case of *Jaswant Singh Gill (supra)*, this Court has considered the very provisions of the CDA Rules and has categorically observed and held that if an employee is permitted to retire, thereafter a penalty of dismissal/removal from service cannot be imposed, may be the departmental proceedings were initiated prior to his retirement. It is submitted that therefore the decision of this Court in the case of *Jaswant Singh Gill (supra)* shall be applicable to the facts of the case on hand with full force.

4.7 Now so far as the reliance placed upon the decision of this Court in the case of *Ram Lal Bhaskar (supra),* relied upon by the learned Senior Advocate appearing on behalf of the appellant is concerned, it is vehemently submitted by the learned Senior Advocate appearing on behalf of the employee that the said

decision shall not be applicable to the facts of the case on hand as in the said decision, this Court neither discussed nor expressed as to whether the authority is empowered to dismiss or remove the employee from service after retirement. It is submitted that in the said decision, this Court has only stated that the employee shall be deemed to be in service only for the purpose of continuation and conclusion of the disciplinary proceedings if the memo of charges has been served before retirement as provided under Rule 19(3) of the State Bank of India Officers' Service Rules, 1992. It is submitted that therefore the said decision shall not be applicable to the facts of the case on hand. It is however submitted that in the case of J*aswant Singh Gill (supra)*, this Court has specifically held with reasons that the major penalties like dismissal or removal from service must be imposed so long as the employee remains in service, even if the disciplinary proceedings were initiated prior to attaining the age of superannuation.

4.8 It is further submitted by the learned Senior Advocate appearing on behalf of the employee that even otherwise in view of Section 14 of the Payment of Gratuity Act, 1972, the provisions of Gratuity Act shall override other enactments and therefore

Rule 34.2 and Rule 34.3 of the CDA Rules shall be un-enforceable and ineffective in the eyes of law as the same shall be inconsistent with the provisions of Payment of Gratuity Act, more particularly Sections 4, 7, 13 and 14 of the Payment of Gratuity Act.

4.9 It is further submitted by the learned Senior Advocate appearing on behalf of the employee that the preamble of the Payment of Gratuity Act clearly indicates the legislative intention that the payment of gratuity is to provide socio-economic justice and secure economic protection in the retired life when mental and physical fitness is deteriorated due to ageing process. It is submitted that Section 13 of the Payment of Gratuity Act gives total immunity to gratuity from attachment which is payable at the time of retirement. It is submitted therefore that the right to gratuity is a statutory right which cannot be withheld under any circumstances, other than those guidelines enumerated under Section 4(6) of the Payment of Gratuity Act, 1972.

4.10 Making the above submissions and heavily relied upon the decision of this Court in the case of *Jaswant Singh Gill (supra)*, it is prayed to dismiss the present appeal and answer the reference in favour of the respondent.

5. We have heard the learned counsel appearing for the respective parties at length.

5.1 The first question which is posed for the consideration of this Court is, whether is it permissible in law for the appellant-employer to withhold the payment of amount of gratuity payable to the respondent-employee, even after his superannuation from service, because of the pendency of the disciplinary proceedings against him? The second question which is posed for the consideration of this Court is, where departmental enquiry had been instituted against an employee while he was in service and continued after he attained the age of superannuation, whether the punishment of dismissal can be imposed on being found guilty of misconduct in view of the provisions made in Rule 34.2 of the CDA Rules?

5.2 It is not in dispute that a chargesheet came to be served upon the respondent-employee much before he attained the age of superannuation, i.e., on 1.10.2007. That while the disciplinary proceedings were pending, the respondent-employee attained the age of superannuation on 31.07.2010. In view of the pendency of the disciplinary proceedings, the appellant-employer withheld the payment of gratuity. It is the case on behalf of the

respondent-employee that as the respondent employee was permitted to retire and at the time when he attained the age of superannuation, there was no order of termination on the basis of the departmental enquiry or conviction in a criminal case and therefore considering Section 4 of the Payment of Gratuity Act, the respondent-employee shall be entitled to the amount of gratuity. It is also the case on behalf of the respondent-employee that even considering clause (b) of sub-section 6 of Section 4 of the Payment of Gratuity Act, the gratuity payable to the respondent-employee may be wholly or partially forfeited if the services of such employee have been terminated for his riotous or disorderly conduct or his services have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him during the course of his employment. Relying upon the decision of this Court in the case of *Jaswant Singh Gill (supra)*, it is the case on behalf of the respondent-employee that as held by this Court in the said decision that once an employee is permitted to retire on attaining the age of superannuation, no order of dismissal subsequently can be passed though the disciplinary proceedings are permitted to be continued under the CDA Rules and therefore

once the order of dismissal is not permissible, Section 4 of the Payment of Gratuity Act shall be attracted and therefore the respondent-employee shall be entitled to the amount of gratuity. On the other hand, as observed hereinabove, it is the case on behalf of the appellant-employer that Rule 34 permits the management to withhold the gratuity during the pendency of the disciplinary proceedings. It is submitted that Rule 34.2 of the CDA Rules permits the disciplinary proceedings, if instituted while the employee was in service, after the final retirement of the employee and such disciplinary proceedings shall be deemed to be proceedings and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service. It is submitted therefore that for the purpose of continuing and concluding the disciplinary proceedings, such an employee shall be deemed to be in service and therefore even after the employee had attained the age of superannuation, such an employee can be dismissed from service, provided the disciplinary proceedings are instituted while the employee was in service.

6. While considering the issues involved in the present appeal, the relevant provisions of the CDA Rules and Section 4 of the

Payment of Gratuity Act are required to be referred to and considered, which are as under:

> "34.2 Disciplinary proceeding, if instituted while the employee was in service whether before his retirement or during his reemployment shall, after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service.
>
> 34.3 During the pendency of the disciplinary proceedings, the Disciplinary Authority may withhold payment of gratuity, for ordering the recovering from gratuity of the whole or part of any pecuniary loss caused to the company if have been guilty of offences/ misconduct as mentioned in Sub-section (6) of Section 4 of the payment of gratuity act, 1972 or to have caused pecuniary loss to the company by misconduct or negligence, during his service including service rendered on deputation or on re-employment after retirement. However, the provisions of Section 7(3) and 7(3A) of the Payment of Gratuity Act 1972 should be kept in view in the event of delayed payment in the case the employee is fully exonerated."
>
> Section 4 - Payment of gratuity
>
> (1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years,--
>
> (a) on his superannuation, or
> (b) on his retirement or resignation, or
> (c) on his death or disablement due to accident or disease:
>
> Provided that the completion of continuous service of five years shall not be necessary where the termination of the employment of any employee is due to death or disablement:
>
> Provided further that in the case of death of the employee, gratuity payable to hi m shall be paid to his nominee or, if no nomination has been made, to his heirs, and where any such nominees or heirs is a minor, the share of such minor, shall be deposited with the controlling authority who shall invest the same for the benefit of such minor in such bank or other financial institution, as may be prescribed, until such minor attains majority.
>
> Explanation.--For the purposes of this section, disablement means such disablement as incapacitates an employee for the work which he was capable of performing before the accident or disease resulting in such disablement.
>
> Xxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

(6) Notwithstanding anything contained in sub-section (1),--
(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer' shall be forfeited to the extent of the damage or loss so caused;

(b) the gratuity payable to an employee may be wholly or partially forfeited]—
(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or
(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

7. Indisputably, the respondent was governed by the CDA Rules. Therefore, Rules 34.2 and 34.3 of the CDA Rules shall be applicable and the respondent-employee shall be governed by the said provisions. Rule 34 permits the management to withhold the gratuity during the pendency of the disciplinary proceedings. Rule 34.2 permits the disciplinary proceedings to be continued and concluded even after the employee has attained the age of superannuation, provided the disciplinary proceedings are instituted while the employee was in service. It also further provides that such disciplinary proceedings shall be deemed to be the proceedings and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service. Therefore, as such, on a fair reading of Rule 34.2 of the CDA Rules, an employee shall be deemed to be continued in service,

after he attains the age of superannuation/retired, for the limited purpose of continuing and concluding the disciplinary proceedings which were instituted while the employee was in service. Therefore, at the conclusion of such disciplinary proceedings any of the penalty provided under Rule 27 of the CDA Rules can be imposed by the authority including the order of dismissal. If the submission on behalf of the employee that after the employee has attained the age of superannuation and/or he has retired from service, despite Rule 34.2, no order of penalty of dismissal can be passed is accepted, in that case, it will be frustrating permitting the authority to continue and conclude the disciplinary proceedings after retirement. If the order of dismissal cannot be passed after the employee has retired and/or has attained the age of superannuation in the disciplinary proceedings which were instituted while the employee was in service, in that case, there shall not be any fruitful purpose to continue and conclude the disciplinary proceedings in the same manner as if the employee had continued in service.

8. It is true that while considering the very provisions of the CDA Rules, namely, Rule 34.2 and Rule 34.3 of the CDA Rules,

this Court in the case of *Jaswant Singh Gill (supra)* has observed and held that once the employee is permitted to retire on attaining the age of superannuation, thereafter no order of dismissal can be passed. However, for the reasons stated hereinabove, we are not in agreement with the view taken by this Court in the case of *Jaswant Singh Gill (supra)*. As observed hereinabove, if no major penalty is permissible after retirement, even in a case where the disciplinary proceedings were instituted while the employee was in service, in that case, Rule 34.2 would become otiose and shall be meaningless. On the contrary, there is a decision of three Judge Bench of this Court in the case of *Ram Lal Bhaskar (supra)* taking just a contrary view. In the case of *Ram Lal Bhaskar (supra)*, Rule 19(3) of the State Bank of India Officers Service Rules, 1992 came up for consideration which was *pari materia* with Rule 34.2 of the CDA Rules. The said Rule 19(3) of the State Bank of India Officers Service Rules, 1992 also permits the disciplinary proceedings to continue even after the retirement of an employee if those were instituted when the delinquent employee was in service. In that case, chargesheet was served upon the respondent before his retirement. The proceedings continued after his retirement and were conducted

in accordance with the relevant rules where charges were proved. Punishment of dismissal was imposed. The High Court allowed the petition and quashed the order of dismissal. This Court reversed the said decision of the High Court. In the said decision, it was specifically observed by this Court while considering the *pari materia* provisions that in case disciplinary proceedings under the relevant rules of service have been initiated against an officer before he ceased to be in the bank's service by the operation of, or by virtue of, any of the rules or the provisions of the Rules, the disciplinary proceedings may, at the discretion of the Managing Director, be continued and concluded by the authority by whom the proceedings were initiated in the manner provided for in the Rules as if the officer continues to be in service, so however, that he shall be deemed to be in service only for the purpose of the continuance and conclusion of such proceedings. In the said decision, this Court also took note of another decision of this Court in the case of *Rajinder Lal Capoor (supra)* and it is observed even in the said decision that the UCO Bank Officer Employees' Service Regulations, 1979 which were also *pari materia* to the SBI Rules as well as the CDA Rules, could be invoked only when the disciplinary proceedings had

been initiated prior to the delinquent officer ceased to be in service. It is to be noted that *Jaswant Singh Gill (supra)* was a judgment delivered by a two Judge Bench and the judgment in the case of *Ram Lal Bhaskar (supra)* is a judgment delivered by a three Judge Bench. Under the circumstances and even otherwise for the reasons stated above and in view of Rule 34.2 of the CDA Rules, even a retired employee who was permitted to retire on attaining the age of superannuation can be subjected to major penalty, provided the disciplinary proceedings were initiated while the employee was in service.

9. Once it is held that a major penalty which includes the dismissal from service can be imposed, even after the employee has attained the age of superannuation and/or was permitted to retire on attaining the age of superannuation, provided the disciplinary proceedings were initiated while the employee was in service, sub-section 6 of Section 4 of the Payment of Gratuity Act shall be attracted and the amount of gratuity can be withheld till the disciplinary proceedings are concluded.

9.1 Even otherwise, Rule 34.3 of the CDA Rules permits withholding of the gratuity amount during the pendency of the disciplinary proceedings, for ordering recovering from gratuity of

the whole or part of any pecuniary loss caused to the company if have been guilty of offences/misconduct as mentioned in sub-section 6 of Section 4 of the Payment of Gratuity Act, 1972 or to have caused pecuniary loss to the company by misconduct or negligence, during his service. It further makes clear that Rule 34.3 for withholding of such a gratuity would be subject to the provisions of Section 7(3) and 7(3A) of the Payment of Gratuity Act, 1972 in the event of delayed payment in the case of an employee who is fully exonerated. Rule 34.3 of the CDA Rules is in consonance with sub-section 6 of Section 4 of the Payment of Gratuity Act and there is no inconsistency between sub-section 6 of Section 4 of the Payment of Gratuity Act and Rule 34.3 of the CDA Rules. Therefore Section 14 of the Act which has been relied upon shall not be applicable as there is no inconsistency between the two provisions.

9.2 It is required to be noted that in the present case the disciplinary proceedings were initiated against the respondent-employee for very serious allegations of misconduct alleging dishonestly causing coal stock shortages amounting to Rs.31.65 crores and thereby causing substantial loss to the employer. Therefore, if such a charge is proved and punishment of

dismissal is given thereon, the provisions of sub-section 6 of Section 4 of the Payment of Gratuity Act would be attracted and it would be within the discretion of the appellant-employer to forfeit the gratuity payable to the respondent. Therefore, the appellant-employer has a right to withhold the payment of gratuity during the pendency of the disciplinary proceedings.

10. The second question for consideration is where departmental inquiry had been instituted against an employee while he was in service and continued after he attained the age of superannuation, whether the punishment of dismissal can be imposed on being found guilty of misconduct in view of the provisions made in Rule 34.2 of the CDA Rules.

10.1 Rule 34 (2) of the CDA Rules provides in case disciplinary proceeding, if instituted while the employee was in service whether before his retirement or during his re-employment, such proceedings shall be continued and concluded by the authority by which it was commenced in the same manner as if an employee had continued in service. There is a deemed fiction created by the rule concerning the continuance of employee in service during the departmental proceeding. The legal fiction is required to be given a logical effect.

10.2 Rule 34.3 of the CDA Rules provides for withholding the payment of gratuity during the pendency of the disciplinary proceedings and provides for recovery from gratuity of the whole or part of any pecuniary loss caused to the employer in case of misconduct as provided in section 4(6)(a) of the Payment of Gratuity Act, 1972. The gratuity can be wholly or partially forfeited as provided in section 4(6)(b) in case he is found guilty, and services are terminated for disorderly misconduct or act of violence or offence involving moral turpitude committed during the course of employment.

10.3 The question of the effect of deemed fiction of continuance of employee in service after the employee had attained the age of superannuation was considered in *D.V. Kapoor v. Union of India*, (1990) 4 SCC 314. Rule 9(2) of the Civil Services Pension Rules, 1972, came up for consideration. The rule provided that the departmental proceedings instituted while the employee was in service shall be deemed to be continued in service, the said rule was similar to Rule 34(2) of the CDA Rules. It was held that the departmental inquiry should be continued and concluded by the authority in the same manner as if the government employee had remained in service. The only condition provided in the

proviso to the rule was that a report to be submitted to the President. It was held:

> **"2.** The contention of Mr. Kapoor, learned counsel for the appellant is that the appellant having been allowed to retire voluntarily the authorities are devoid of jurisdiction to impose the penalty of withholding gratuity and pension as a measure of punishment and the proceedings stand abated. We find no substance in the contention. Rule 9(2) of the Rules provided that the departmental proceedings if instituted while the government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the government servant had continued in service. Therefore, merely because the appellant was allowed to retire, the government is not lacking jurisdiction or power to continue the proceedings already initiated to the logical conclusion thereto. The disciplinary proceedings initiated under the Conduct Rules must be deemed to be proceedings under the rules and shall be continued and concluded by the authorities by which the proceedings have been commenced in the same manner as if the government servant had continued in service. The only inhibition thereafter is as provided in the proviso namely "provided that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President". That has been done in this case and the President passed the impugned order. Accordingly, we hold that the proceedings are valid in law and they are not abated consequent to voluntary retirement of the appellant and the order was passed by the competent authority, i.e. the President of India."
>
> (emphasis supplied)

10.4 In *State Bank of Patiala & Anr. v. Ram Niwas Bansal (Dead) Thr. Lrs.* (2014) 12 SCC 106, a similar question came up for consideration. A departmental inquiry was initiated while the employee was in service. The relevant service Regulation 19.2

applicable to the employee of the bank was similar to Rule 34.2 of the CDA Rules. This Court held that departmental proceedings had been initiated against an officer during the period when he was in service, the said proceedings could continue even after his retirement. It was further held that the concept of deemed continuance in service of the officer would have full play and, therefore, the order of removal could have been passed after finalization of the departmental proceeding. Still, removal order could not have been passed retrospectively. However, that would not invalidate the order of dismissal, but the order of dismissal would have prospective effect as held in *R. Jeevaratnam v. the State of Madras*, AIR 1966 SC 951. The relevant portion of *State Bank of Patiala* (supra) is extracted hereunder:

> "**31.** In the case at hand, the said stage is over. The Full Bench on the earlier occasion had already rendered a verdict that serious prejudice had been caused and, accordingly, had directed for reinstatement. The said direction, if understood and appreciated on the principles stated in *B. Karunakar*[1], is a direction for reinstatement for the purpose of holding a fresh enquiry from the stage of furnishing the report and no more. In the case at hand, the direction for reinstatement was stayed by this Court. The Bank proceeded to comply with the order of the High Court from the stage of reply of enquiry. The High Court by the impugned order[2] had directed payment of back wages to the delinquent officer from the date of dismissal till passing of the appropriate order in the disciplinary proceeding/superannuation of the petitioner therein whichever is earlier. The Bank has passed an order of dismissal on 22-11-2001 with effect from 23-

1Ecil v. B. Karunakar, (1993) 4 SCC 727.
2Ram Niwas Bansal v. State Bank of Patiala, (2002) 2 SLR 375 (P&H).

4-1985. The said order, as we perceive, is not in accord with the principle laid down by the Constitution Bench decision in *B. Karunakar*, for it has been stated there that in case of non-furnishing of an enquiry report the Court can deal with it and pass an appropriate order or set aside the punishment and direct reinstatement for continuance of the departmental proceedings from that stage. In the case at hand, in the earlier round the punishment was set aside and direction for reinstatement was passed. Thus, on the face of the said order it is absolutely inexplicable and unacceptable that the Bank in 2001 can pass an order with effect from 23-4-1985 which would amount to annulment of the judgment[3] of the earlier Full Bench. As has been held by the High Court in the impugned judgment that when on the date of non-furnishing of the enquiry report the delinquent officer was admittedly not under suspension, but was in service and, therefore, he would continue in service till he is dismissed from service in accordance with law or superannuated in conformity with the Regulations. How far the said direction is justified or not or how that should be construed, we shall deal with while addressing the other points but as far as the order of removal being made retrospectively operational, there can be no trace of doubt that it cannot be made retrospective."

32. Presently, we shall proceed to deal with the issue of superannuation as envisaged under the Regulations. Regulation 19(1) deals with superannuation of an employee. The relevant part of Regulation 19(1) is as follows:

> "**19. Age of retirement**.—(1) An officer shall retire from the service of the Bank on attaining the age of fifty-eight years or upon the completion of thirty years' service whichever occurs first:
>
> Provided that the competent authority may, at its discretion, extend the period of service of an officer who has attained the age of fifty-eight years or has completed thirty years' service as the case may be, should such extension be deemed desirable in the interest of the Bank:
>
> Provided further that an officer who had joined the service of the Bank either as an officer or otherwise on or after 19-7-1969 and attained the age of 58 years shall not be granted any further extension in service:
>
> Provided further that an officer may, at the discretion of the Executive Committee, be retired from the Bank's service after he has attained 50

3Ram Niwas Bansal v. State Bank of Patiala, (1998) 4 SLR 711.

years of age or has completed 25 years' service as the case may be, by giving him three months' notice in writing or pay in lieu thereof:"

35. At this juncture, it is noteworthy to refer to Regulation 19(2) of the Regulations. It reads as follows:

> "**19. (2)** In case disciplinary proceedings under the relevant regulations of service have been initiated against an officer before he ceases to be in the Bank's service by the operation of, or by virtue of any of the said Regulations or the provisions of these Regulations the disciplinary proceedings may, at the discretion of the Managing Director, be continued and concluded by the authority by which the proceedings were initiated in the manner provided for in the said Regulations as if the officer continues to be in service, so however, that he shall be deemed to be in service only for the purpose of the continuance and conclusion of such proceedings.
>
> *Explanation*.—An officer will retire on the last day of the month in which he completes the stipulated service or age of retirement."

The aforesaid Regulation, as it seems to us, deals with a different situation altogether. It clearly lays down that <u>if the disciplinary proceedings have been initiated against an officer during the period when he is in service, the said proceedings can continue even after his retirement at the discretion of the Managing Director and for the said limited purpose the officer shall be deemed to be in service.</u>

41. In the case at hand, the disciplinary proceeding was initiated against the delinquent officer while he was in service. The first order of dismissal was passed on 23-4-1985. The said order of punishment was set aside by the High Court and the officer concerned was directed to be reinstated for the limited purpose i.e. supply of enquiry report and to proceed in the disciplinary proceeding from that stage. The said order was not interfered with by this Court. The Bank continued the proceeding. Needless to emphasise, the said continuance was in pursuance of the order of the Court. <u>Under these circumstances, it has to be accepted that the concept of deemed continuance in service of the officer would have full play and, therefore, an order of removal could have been passed after finalisation of the departmental proceeding on 22-11-2001. We have already held that the said order would not have been made retrospectively operative, but</u>

that will not invalidate the order of dismissal but it would only have prospective effect as has been held in R. Jeevaratnam[4].

42. Having said that, it becomes necessary to determine the date of retirement and thereafter delve into how the period from the date of first removal and date of retirement would be treated. We may hasten to add that for the purpose of deemed continuance the delinquent officer would not be entitled to get any benefit for the simple reason i.e. the continuance is only for finalisation of the disciplinary proceedings, as directed by the Full Bench of the High Court. Hence, the effect and impact of Regulation 19(1) of the Regulations comes into full play. On a seemly construction of the first proviso we are of the considered view that it requires an affirmative act by the competent authority, for it is an exercise of power of discretion and further the said discretion has to be exercised where the grant of extension is deemed desirable in the interest of the Bank. The submission of Mr Patwalia to the effect that there should have been an intimation by the employer Bank is founded on the finding recorded by the High Court in the impugned order5 that no order had been brought on record to show that the delinquent officer had retired. As the facts would reveal, in the year 1992 the officer concerned stood removed from service and at that juncture to expect the Bank in law to intimate him about his date of superannuation or to pass an order would be an incorrect assumption. The conclusion which appears logical and acceptable is that unless an extension is granted by a positive or an affirmative act by the competent authority, an officer of the Bank retires on attaining the age of 58 years or upon the completion of 30 years of service, whichever occurs first.

43. In this regard the pronouncement in *C.L. Verma v. State of M.P.*[5] is apt to refer. In the said case the effect of Rule 29 of the Madhya Pradesh State Municipal Service (Executive) Rules, 1973 fell for interpretation. In the said Rule it was provided that a member of the service shall attain the age of superannuation on the date he completes his 58 years of age. The proviso to the said Rule stipulated that the State Government may allow a member of the service to continue in employment in the interest of Municipal Council or in public interest and, however, no member of service shall continue in service after he attains the age of 60 years. The appellant therein had attained the age of 58 years two days prior to the order of dismissal. The Court opined that the tenor of the proviso clearly indicates that it is intended to cover specific cases and individual employees. Be it noted, on behalf of the Government a notification was issued by the Department concerned. The Court opined that the said circular was not

4R. Jeevaratnam v. State of Madras, AIR 1966 SC 951.
51989 Supp (2) SCC 437.

> issued under the proviso to Rule 29 but was administrative in character and that on the face of mandate in Rule 29 the administrative order could not operate. The Court further ruled that as the appellant therein had attained the age of superannuation prior to the date of passing the order of dismissal, the Government had no right to deal with him in its disciplinary jurisdiction available in regard to employees.
>
> **44**. We have referred to this decision in C.L. Verma case30 to highlight that the Regulation herein also is couched in similar language and, therefore, the first proviso would have full play and it should be apposite to conclude that the delinquent officer stood superannuated on completion of 30 years of service on 25-2-1992. It is because the conditions stipulated under the first proviso to the said Regulation deal with a conditional situation to cover certain categories of cases and require an affirmative act and in the absence of that it is difficult to hold that the delinquent officer did not retire on completion of thirty years of service."
>
> (emphasis supplied)

10.5 It depends upon the rules in a case where a departmental inquiry was instituted while the employee was in service, proceedings had been continued, under the Rule what kind of punishment can be imposed after the employee had attained the age of superannuation.

10.6 In *Ramesh Chandra Sharma v. Punjab National Bank & Anr.* (2007) 9 SCC 15, a similar question arose for consideration. The employee was dismissed from service after superannuation. The High Court set aside the order on the ground that after superannuation, the disciplinary inquiry could not have been continued, and punishment of dismissal could not have been imposed. This Court set aside the order of the High Court,

allowed the appeal filed by the bank and dismissed the appeal filed by the employee, and held that order of dismissal could be passed in view of the rule in question. It was held that it depends upon the terms and conditions of the service of the employee by which he was governed. It was also observed that after attaining the age of superannuation, the question of imposition of dismissal of the employee from service would not ordinarily arise. At the same time, it was held that the imposition of such a punishment would not be impermissible in law. The legal fiction created by the rule concerning the continuance of employee on a deemed basis in service has to be given full effect. In case the order of dismissal from service was passed, the employee would not be entitled to the pensionary benefit. It was also held that if the employee is removed or dismissed from service under Regulation 4 of the (Discipline and Appeal) Regulations, the Bank need not take recourse to Regulation 48 of the Pension Regulations as Regulation 22 thereof would be attracted. Rule 43 of the Pension Regulation provided for withholding or withdrawal of the pension. Regulation 48 provided for recovery of pecuniary loss caused to the bank. In the case of deemed continuation,

regulation 48 was held to be inapplicable. The relevant portion is extracted hereunder:

> "**13.** The question as to whether a departmental proceeding can continue despite the delinquent officer's reaching the age of superannuation would depend upon the applicability of the extant rules. It may be true that the question of imposition of dismissal of the delinquent officer from service when he has already reached the age of superannuation would not ordinarily arise. However, as the consequences of such an order are provided for in the service rules, in our opinion, it would not be correct to contend that imposition of such a punishment would be wholly impermissible in law.
>
> **15.** The question, we may notice, came up for consideration before this Court in *State of U.P.* v. *Brahm Datt Sharma*[6] wherein this Court while interpreting Regulation 470 of the Civil Services Regulations in *State of U.P.* v. *Harihar Bhole Nath*[7] held as under: (*Brahm Datt Sharma case (*supra*)*, SCC p. 186, para 8)
>
> > "*8.* A plain reading of the regulation indicates that full pension is not awarded as a matter of course to a government servant on his retirement instead; it is awarded to him if his satisfactory service is approved. If the service of a government servant has not been thoroughly satisfactory the authority competent to sanction the pension is empowered to make such reduction in the amount of pension as it may think proper. Proviso to the regulation lays down that no order regarding reduction in the amount of pension shall be made without the approval of the appointing authority. Though the Regulations do not expressly provide for affording opportunity to the government servant before order for the reduction in the pension is issued, but the principles of natural justice ordain that opportunity of hearing must be afforded to the government servant before any order is passed. Article 311(2) is not attracted, nonetheless the government servant is entitled to opportunity of hearing as the order of reduction in pension affects his right to receive full pension. It is no more in dispute that pension is not bounty; instead it is a right to property earned by the government servant on his rendering satisfactory service to the State."

6(1987) 2 SCC 179
7(2006) 13 SCC 460

16. The question, thus, as to whether continuation of a disciplinary proceeding would be permissible or the employer will have to take recourse only to the pension rules, in our opinion, would depend upon the terms and conditions of the services of the employee and the power of the disciplinary authority conferred by reason of a statute or statutory rules.

17. We have noticed hereinbefore that the Bank has made Regulations which are statutory in nature. Regulation 20(3)(*iii*) of the said Regulations reads thus:

> "20. (3)(*iii*) The officer against whom disciplinary proceedings have been initiated will cease to be in service on the date of superannuation but the disciplinary proceedings will continue as if he was in service until the proceedings are concluded and final order is passed in respect thereof. The officer concerned will not receive any pay and/or allowance after the date of superannuation. He will also not be entitled for the payment of retirement benefits till the proceedings are completed and final order is passed thereon except his own contribution to CPF."

The said Regulation clearly envisages continuation of a disciplinary proceeding despite the officer ceasing to be in service on the date of superannuation. For the said purpose a legal fiction has been created providing that the delinquent officer would be deemed to be in service until the proceedings are concluded and final order is passed thereon. The said Regulation being statutory in nature should be given full effect.

18. The effect of a legal fiction is well known. When a legal fiction is created under a statute, it must be given its full effect, as has been observed in *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council*[8] as under: (All ER p. 599 B-D)

> If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.

81952 AC 109 : (1951) 2 All ER 587 (HL)

22. We are, therefore, of the opinion that it was permissible for the Bank to continue with the disciplinary proceedings relying on or on the basis of Regulation 20(3)(*iii*) of the Punjab National Bank (Officers) Service Regulations, 1979.

23. It is true that the disciplinary authority in its order while imposing punishment observed that the terminal dues of the appellant were to be settled. It was merely an observation to take care of a contingency which might arise. No positive direction was issued in that behalf and, thus, no legal right thereby was created in favour of the appellant to obtain the retiral benefits. What it meant thereby was that the law would take its own course.

25. Indisputably as a consequence of the order imposing the punishment of dismissal from service the appellant would not have qualified for the pensionary benefits. Our attention, however, has been drawn by Mr Saxena to Regulations 43 and 48 to contend that even for the purpose of withholding pension, a specific order in that behalf by a competent authority was required to be passed. The Pension Regulations are meant to be applicable where pension is required to be paid. It also provides for recovery of pecuniary loss caused to the Bank from the pensionary benefits of the employee. Regulations 43 and 48 of the Pension Regulations are as under:

> "43. *Withholding or withdrawal of pension.*—The competent authority may, by order in writing, withhold or withdraw a pension or a part thereof, whether permanently or for a specified period, if the pensioner is convicted of a serious crime or criminal breach of trust or forgery of (*sic* or) acting fraudulently or is found guilty of grave misconduct.
>
> Provided that where a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below the minimum pension per mensem payable under these Regulations.
>
> * * *
>
> 48. *Recovery of pecuniary loss caused to the Bank.*—(1) The competent authority may withhold or withdraw a pension or a part thereof, whether permanently or for a specified period and order recovery from pension of the whole or part of any pecuniary loss caused to the Bank if in any departmental or judicial proceedings the pensioner is found guilty of grave misconduct or negligence or criminal breach of trust or forgery or acts done fraudulently during the period of his service:

Provided that the Board shall be consulted before any final orders are passed;

Provided further that departmental proceedings, if instituted while the employee was in service, shall, after the retirement of the employee, be deemed to be proceedings under these Regulations and shall be continued and concluded by the authority by which they were commenced in the same manner as if the employee had continued in service;

(2) No departmental proceedings, if not instituted while the employee was in service, shall be instituted in respect of an event which took place more than four years before such institution:

Provided that the disciplinary proceedings so instituted shall be in accordance with the procedure applicable to disciplinary proceedings in relation to the employee during the period of his service.

(3) Where the competent authority orders recovery of pecuniary loss from the pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of the employee:

Provided that where a part of pension is withheld or withdrawn, the amount of pension drawn by a pensioner shall not be less than the minimum pension payable under these Regulations."

27. Regulation 48 empowers the Bank to recover pecuniary loss caused to it from the pensionary benefits. Regulation 20(3)(*iii*) of the (Discipline and Appeal) Regulations must be read in conjunction with the Pension Regulations. Where the employees are pension optees, Regulation 48(1) shall apply. In any event, <u>if an officer is removed or dismissed from service under Regulation 4 of the (Discipline and Appeal) Regulations, the Bank need not take recourse to Regulation 48 of the Pension Regulations as Regulation 22 thereof would be attracted."</u>

(emphasis supplied)

10.7 An inquiry has to be taken to a logical end. In *Union of India v. Ajoy Kumar Patnaik* (1995) 6 SCC 442, the question of continuance of departmental inquiry after retirement from service

on attaining the age of superannuation came up for consideration. It was opined that it would not be a ground to close the departmental inquiry without making any finding on merits; otherwise, in all cases, it would cause grave damage to public justice, and the employee would get away with pending proceedings. An employee cannot get rid of pending departmental proceedings by efflux of time. It was held:

> "**10.** Since the competent authorities at different levels had considered the material and ultimately had decided to compulsorily retire the respondent from service, it cannot be said that it is an arbitrary decision. It is true that pending the proceedings the respondent has already retired from service on attaining the age of superannuation, but that would not provide a ground to dispose of this matter without giving any finding on the action taken by the competent authority. Otherwise, in all cases it would cause grave damage to public justice. The employee would get away with it due to pending proceedings. Therefore, it needs to be considered and decision rendered thereon whether the action taken by the Government or the competent authority is valid in law. In that perspective, mere retirement of the officer by efflux of time pending proceedings would not be a ground to close the matter."
>
> (emphasis supplied)

10.8 In *Rajinder Lal Capoor (supra)*, it was held that when disciplinary proceedings had been initiated before employee attained the age of superannuation, the rule provided for deemed legal fiction of continuance of employee 'as if he was in service', till finalization of such proceedings, the employee would be

deemed to be in service although he has attained the age of superannuation. It was held:

> "*21*. The aforementioned Regulation, however, could be invoked only when the disciplinary proceedings had clearly been initiated prior to the respondent's ceasing to be in service. The terminologies used therein are of seminal importance. Only when a disciplinary proceeding has been initiated against an officer of the bank despite his attaining the age of superannuation, can the disciplinary proceeding be allowed on the basis of the legal fiction created thereunder i.e. continue 'as if he was in service'. Thus, only when a valid departmental proceeding is initiated by reason of the legal fiction raised in terms of the said provision, the delinquent officer would be deemed to be in service although he has reached his age of superannuation. The departmental proceeding, it is trite law, is not initiated merely by issuance of a show-cause notice. It is initiated only when a charge-sheet is issued…."
>
> (emphasis supplied)

A review was filed; the same was dismissed in *UCO Bank v. Rajinder Lal Capoor*, (2008) 5 SCC 257. It is clear that when an employee is deemed to be in service, the punishment as prescribed under the Rules can be imposed.

10.9 In *V. Padmanabham v. Government of Andhra Pradesh & Ors.* (2009) 15 SCC 537, Rule 9 of the Andhra Pradesh Pension Code provided that if the departmental inquiry is instituted when Government servant was in service, it could continue, and as a rule provided for the continuance of such an inquiry only for recovery of the amount from the pension and gratuity. It was held

that the continuation of the departmental proceedings was not illegal. The Pension Code raises a legal fiction and proceedings would be deemed to have continued. It was opined:

> "**10.** It has not been disputed before us that in terms of Rule 9(2) of the Andhra Pradesh Pension Code the disciplinary proceedings initiated against the appellant could continue. Rule 9(2)(*a*) reads as under:
>
> > "9. *Right of Government to withhold or withdraw pension.*—(1) * * *
> >
> > (2)(*a*) The departmental proceedings referred to in sub-rule (1), if instituted while the government servant was in service whether before his retirement or during his re-employment, shall after the final retirement of the government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the government servant had continued in service:
> >
> > Provided that where the departmental proceedings are instituted by an authority subordinate to the State Government, that authority shall submit a report recording its findings to the State Government."
>
> Indisputably, therefore, the departmental proceedings which have been pending against the appellant do not suffer from any legal infirmity and in law would be deemed to have been continuing.
>
> **11.** In *State of U.P.* v. *Harihar Bholenath*[9] this Court stated: (SCC p. 465, para 10)
>
> > "*10.* A departmental proceeding can be initiated for recovery of amount suffered by the State exchequer owing to the acts of omission or commission of a delinquent employee in three different situations:
> >
> > (*i*) when a disciplinary proceeding is initiated and concluded against a delinquent employee before he reaches his age of superannuation;
> >
> > (*ii*) when a proceeding is initiated before the delinquent officer reached his age of superannuation but the same has not been concluded and despite the

9(2006) 13 SCC 460

> superannuation of the employee, an order of recovery of the amount from the pension and gratuity is passed; and
>
> (*iii*) an enquiry is initiated after the delinquent employee reaches his age of superannuation."
>
> **13.** Mr Rama Krishna Reddy, however, would urge that having regard to the fact that the departmental proceedings were initiated in the year 1992-1993, this Court should not direct continuation of the departmental proceedings any further. Strong reliance in this behalf has been placed on *M.V. Bijlani* v. *Union of India*[10].
>
> **14**. We have noticed heretobefore that continuation of the departmental proceedings is not illegal. The Pension Code raises a legal fiction in terms whereof the departmental proceedings would be deemed to have continued. The Tribunal has passed an order in favour of the appellant on technical grounds. The High Court, therefore, in our opinion, cannot be said to have committed any illegality in passing the impugned judgment."

It is apparent that what kind of punishment can be imposed would depend upon the relevant service rule as in the aforesaid case, the relevant service Rule 9 provided deemed continuance of the employee in service for the purpose of withholding or withdrawal of pension.

10.10 In *State of Maharashtra v. M.H. Mazumdar* (1988) 2 SCC 52, Rules 188 and 189 of Bombay Civil Services Rules came up for consideration. The rules provided for withholding or withdrawing of a pension or any part of it. In terms of the rule, it was held that in case the pensioner was found guilty of grave misconduct while he was in service, the grant of pension and its

10(2006) 5 SCC 88

continuation would depend upon the outcome of the inquiry. The proceeding under the relevant rule was not for the imposition of the penalty of dismissal etc. but for the purpose of withdrawal or withholding of the pension provided under the rules 188 and 189. This Court opined thus:

> "**5.** The aforesaid two rules empower Government to reduce or withdraw a pension. Rule 189 contemplates withholding or withdrawing of a pension or any part of it if the pensioner is found guilty of grave misconduct while he was in service or after the completion of his service. Grant of pension and its continuance to a government servant depend upon the good conduct of the government servant. Rendering satisfactory service maintaining good conduct is a necessary condition for the grant and continuance of pension. Rule 189 expressly confers power on the Government to withhold or withdraw any part of the pension payable to a government servant for misconduct which he may have committed while in service. This rule further provides that before any order reducing or withdrawing any part of the pension is made by the competent authority the pensioner must be given opportunity of defence in accordance with the procedure specified in Note I to Rule 33 of the Bombay Civil Services Conduct, Discipline and Appeal Rules. The State Government's power to reduce or withhold pension by taking proceedings against a government servant even after his retirement is expressly preserved by the aforesaid rules. The validity of the rules was not challenged either before the High Court or before this Court. In this view, the Government has power to reduce the amount of pension payable to the respondent. In *M. Narasimhachar* v. *State of Mysore*[11] and *State of Uttar Pradesh* v. *Brahm Datt Sharma*[12] similar rules authorising the Government to withhold or reduce the pension granted to the government servant were interpreted and this Court held that merely because a government servant retired from service on attaining the age of superannuation he could not escape the liability for misconduct and negligence or financial irregularities which he may have committed during the period of his service and the Government was entitled to withhold or reduce the pension granted to a government servant.

11AIR 1960 SC 247
12(1987) 2 SCC 179

> **6.** The High Court in our view committed serious error in holding that the State Government had no authority to initiate any proceedings against the respondent. In *B.J. Shelat* v. *State of Gujarat*[13] disciplinary proceedings had been initiated against the government servant for purposes of awarding punishment to him after he had retired from service. The ratio of that decision is not applicable to the instant case as in the present case the purpose of the enquiry was not to inflict any punishment; instead the proceedings were initiated for determining the respondent's pension. The proceedings were taken in accordance with Rules 188 and 189 of the Rules. It appears that the attention of the High Court was not drawn to these rules."
>
> (emphasis supplied)

10.11 In *State of West Bengal & Ors. v. Pronab Chakraborty* (2015) 2 SCC 496, right of the Governor to withhold the pension in certain circumstances under rule 10 of the West Bengal Services (Death-cum-Retirement Benefit) Rules, 1971 came up for consideration. Rule 10(1) provides for two kinds of punishments. Firstly, the right of withholding or withdrawal of pension. Secondly, the right to order the recovery from the pension of the whole or part of any pecuniary loss caused to the Government. It was held that the employee could be proceeded against after the date of his retirement on account of grave misconduct or negligence. Even in the absence of any pecuniary loss caused to the Government, it is open to the employer to

13(1978) 2 SCC 202

continue the departmental proceedings after the employee has retired from service. It was observed:

> **4.** The State of West Bengal has assailed the order passed by the High Court on 22-12-2010[14] by asserting that Rule 10 of the 1971 Rules had been incorrectly interpreted by the High Court. Therefore, the solitary issue that arises for our consideration in the present appeal is the interpretation of Rule 10 of the 1971 Rules. Rule 10(1) aforementioned is extracted hereunder:
>
> "**10.** ***Right of the Governor to withhold pension in certain cases***.—(1) The Governor reserves to himself the right of withholding or withdrawing a pension or any part of it whether permanently or for a specified period, and the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to Government, if the pensioner is found in a departmental or judicial proceeding to have been guilty of grave misconduct or negligence, during the period of his service, including service rendered on re-employment after retirement:
>
> Provided that—
>
> (*a*) such departmental proceeding if instituted while the officer was in service, whether before his retirement or during his re-employment, shall after the final retirement of the office, be deemed to be a proceeding under this article and shall be continued and concluded by the authority by which it was commenced in the same manner as if the officer had continued in service;
>
> (*b*) such departmental proceedings, if not instituted while the office was in service, whether before his retirement or during his re-employment—
>
> (*i*) shall not be instituted save with the sanction of the Governor;
>
> (*ii*) shall not be in respect of any event which took place more than four years before such institution; and
>
> (*iii*) shall be conducted by such authority and in such place as the Governor may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the officer during his service;
>
> (*c*) no such judicial proceeding, if not instituted while the officer was in service, whether before his retirement or during his re-employment shall be instituted in respect

14Pranob Chakraborty v. State of W.B., W.P. ST No. 497 of 2010, order dated 22.12.2010 (Cal.)

> of a cause of action which arose or an event which took place more than four years before such institution; …"
>
> A perusal of Rule 10(1) extracted hereinabove reveals, that two different kinds of punishments are contemplated thereunder. Firstly, "… the right of withholding or withdrawing a pension …" which the delinquent employee is entitled to, permanently or for a specified period. And secondly, "… the right of ordering the recovery from a pension of the whole or part of any pecuniary loss caused to the Government …". The above two punishments can be inflicted on a delinquent, even after he retires on attaining the age of superannuation, provided he is found guilty of "… grave misconduct or negligence …" during the period of his service.
>
> **5.** It is therefore apparent, that it is not only for pecuniary loss caused to the Government that proceedings can continue after the date of superannuation. An employee can be proceeded against, after the date of his retirement, on account of "… grave misconduct or negligence …". Therefore/, even in the absence of any pecuniary loss caused to the Government, it is open to the employer to continue the departmental proceedings after the employee has retired from service. Obviously, if such grave misconduct or negligence entails pecuniary loss to the Government, the loss can also be ordered to be recovered from the employee concerned. It was therefore not right for the High Court, while interpreting Rule 10(1) of the 1971 Rules to conclude that proceedings after the date of superannuation could continue only when the charges entailed pecuniary loss to the Government."
>
> (emphasis supplied)

10.12 In *State Bank of India v. A.N. Gupta & Ors.* (1997) 8 SCC 60, it was observed that unless the service rules provide for continuance of disciplinary proceedings after the date of superannuation, the pension cannot be withheld when no decision was taken for eight years the proceedings were quashed. The relevant portion is quoted hereunder:

> **16.** Right to receive pension is a right to property under Rule 7 of the Pension Rules when it says that no employee shall have any right of property in the pension fund beyond the amount of his contribution to the pension section of the fund with interest accrued thereon. That being so Rule 11 cannot be interpreted to mean that claim to pension of an employee on superannuation can be defeated by the Bank by merely withholding sanction of retirement. For about 8 years when these two matters were pending in the Delhi High Court the Bank did not take any decision in terms of Rule 11 to sanction retirement of the respondents. The Bank never communicated to the respondents that it had withheld sanction to their retirement or did not approve their service. It is only during the course of proceedings in the High Court that the Bank came up with the plea that it wanted to have the allegations against the respondents enquired into. To us the language of Rule 11 appears quite explicit. No sanction is required from the Bank to leave the service on reaching the age of superannuation as provided in Rule 26 of the Service Rules applicable to Assistants. Rule 26 of the Service Rules clearly mandates the retirement of an employee on his attaining the age of superannuation and there cannot be two opinions on that. We, therefore, hold that Rule 11 has no application in the case of the respondents who retired on attaining the age of superannuation. We cannot agree with the plea of the Bank that sanctioning of retirement must be understood as sanctioning of service which in terms must be understood as approval of service. Proceeding in the garb of disciplinary proceedings cannot be permitted after an employee has ceased to be in the service of the Bank as Service Rules do not provide for continuation of disciplinary proceedings after the date of superannuation. Sanction of the Bank is required only if the retirement of an employee is by any other method except superannuation. We do not think that the decision of the Andhra Pradesh High Court in *T. Narasiah* v. *State Bank of India*[15] and that of the Bombay High Court in *J.K. Kulkarni* v. *State Bank of India*[16] have laid down good law.
>
> (emphasis supplied)

10.13 In *Takhatray Shivadattray Mankad v. State of Gujarat* (1989) Supp. 2 SCC 110, the question of departmental inquiry instituted before retirement and its continuation after the age of superannuation was considered. It was held that proceedings could be continued under the relevant rules, and as provided, the

15(1978) 2 LLJ 173
16MP No. 964 of 1977 decided on 29-11-1977

order could have been passed with respect to pension and gratuity. The proceedings did not become infructuous. The order passed by the Government to withhold pension and gratuity was upheld. What is of significance is that proceedings do not lapse, and punishment, as may be considered appropriate, can be imposed in terms of the rules. The relevant portion is extracted hereunder:

> "**25.** An examination of Rule 188 shows that the Government may reduce the amount of pension of a government servant as it may think fit if the service of the government servant has not been thoroughly satisfactory. As per Rule 189 the government may withhold or withdraw a pension or part of it if the petitioner is convicted of serious crime or found to have been guilty of misconduct during or after the completion of service provided that before any order to this effect is issued, the procedure referred to the Bombay Civil Services (Conduct, Discipline and Appeal) Rules are followed. These rules, thus, have expressly preserved the State Government's power to reduce or withhold pension by taking proceedings against a government servant even after his retirement. The validity of these rules has not been challenged. These two rules came for interpretation before this Court in *State of Maharashtra* v. *M.H. Mazumdar*[17] and this Court expressed its view with reference to these rules as follows: (SCC pp. 55-56, para 5)
>
> > "The aforesaid two rules empower Government to reduce or withdraw a pension. Rule 189 contemplates withholding or withdrawing of a pension or any part of it if the pensioner is found guilty of grave misconduct while he was in service or after the completion of his service. Grant of pension and its continuance to a government servant depend upon the good conduct of the government servant. Rendering satisfactory service maintaining good conduct is a necessary condition for the grant and continuance of pension. Rule 189 expressly confers power on the government to withhold or withdraw any part of the pension payable to a

17(1988) 2 SCC 52

> government servant for misconduct which he may have committed while in service. This rule further provides that before any order reducing or withdrawing any part of the pension is made by the competent authority the pensioner must be given opportunity of defence in accordance with the procedure specified in Note I to Rule 33 of the Bombay Civil Services (Conduct, Discipline and Appeal) Rules. The State Government's power to reduce or withhold pension by taking proceedings against a government servant even after his retirement is expressly preserved by the aforesaid rules. The validity of the rules was not challenged either before the High Court or before this Court. In this view, the Government has power to reduce the amount of pension payable to the respondent. In *M. Narasimhacharv*. *State of Mysore*[18] and *State of Uttar Pradesh* v. *Brahm Datt Sharma*[19] similar rules authorising the Government to withhold or reduce the pension granted to the government servant were interpreted and this Court held that merely because a government servant retired from service on attaining the age of superannuation he could not escape the liability for misconduct and negligence or financial irregularities which he may have committed during the period of his service and the Government was entitled to withhold or reduce the pension granted to a government servant."

In compliance with the principle of natural justice requiring an opportunity of hearing to be afforded to a government servant before an order affecting his right is passed and in accordance with the procedure specified in Note I to Rule 33 of the Bombay Civil Services (Conduct, Discipline and Appeal) Rules a show-cause notice as pointed out earlier had been issued to the appellant on 17-7-1971 calling upon him to show-cause within 30 days from the date of the receipt of the notice as to why the proposed reduction should not be made in the pension and death-cum-retirement gratuity. But the appellant failed to avail that opportunity to disprove the allegations and satisfy his appointing authority that he rendered satisfactory service throughout. It was in those circumstances the appointing authority taking into consideration the serious allegations levelled against him in the disciplinary proceedings had thought it fit to impose reduction in the pension and gratuity in accordance with Rules 188 and 189 of the Bombay Rules on the ground that the appellant had not rendered satisfactory service. The appellant is not entitled to take advantage of clause (*b*)(*ii*) of the proviso to Section 189-A of the Bombay Rules since the proceedings had been instituted long before his retirement.

18(1960) 1 SCR 981
19(1987) 2 SCC 179

Further as per clause (*a*) of the said proviso, the proceedings already instituted while the government servant was in service could be continued and concluded even after his retirement. Hence for the reasons stated above the impugned order dated 15-11-1977 reducing the pension and gratuity cannot be said to contravene the Bombay Rules.

26. At the risk of repetition, we may point out that three departmental proceedings containing serious allegations of misconduct were instituted against the appellant of which one was instituted even before he was compulsorily retired on 12-1-1961 and other two proceedings were instituted in the year 1963 that is much earlier to the appellant attaining the age of superannuation on 14-1-1964. These departmental proceedings are stated to have become infructuous consequent upon the retirement of the appellant on attaining the age of superannuation. To the show-cause notice dated 17-7-1971 proposing to inflict reduction in pension and gratuity the appellant, instead of giving a proper reply, disproving the charges and satisfying the appointing authority that he rendered satisfactory service throughout had delayed the matter for over a period of six years. It was in that situation that the impugned order dated 15-11-1977 happened to be passed.

27. The learned counsel for the appellant strenuously contended that after the disciplinary inquiries had been dropped on the ground that they had become infructuous, the Government was not right and justified in reducing the pension and gratuity on the same charges which were the subject-matter of the enquiries. This argument of the learned counsel, in our opinion, does not merit consideration because the charges against the appellant were not made use of for awarding any punishment after his retirement from service but only for determining the quantum of the appellant's pension in accordance with the rules relating to the payment of pension and gratuity. In this connection it would be apposite to refer the observation of the Supreme Court in *State of Uttar Pradesh* v. *Brahm Datt Sharma* which we quote below: (SCC p. 184, para 5)

> "If disciplinary proceedings against an employee of the government are initiated in respect of misconduct committed by him and if he retires from service on attaining the age of superannuation, before the completion of the proceedings it is open to the State Government to direct deduction in his pension on the proof of the allegations made against him. If the charges are not established during the disciplinary proceedings or if the disciplinary proceedings are quashed it is not permissible to the State Government to direct reduction

> in the pension on the same allegations, but if the disciplinary proceedings could not be completed and if the charges of serious allegations are established, which may have bearing on the question of rendering efficient and satisfactory service, it would be open to the Government to take proceedings against the government servant in accordance with rules for the deduction of pension and gratuity."

10.14 In *The* Secretary, *Forest Department & Ors. v. Abdur Rasul Chowdhury* (2009) 7 SCC 305, it was held that the employer could proceed with the departmental inquiry though the Government servant has retired from service for imposing 'punishment' contemplated under the rules. It was held:

> "**13.** Rule 10 of the Rules speaks of the right of the Governor to withhold pension in certain cases. Rule 10(1) says that the Governor reserves to himself the right of withholding or withdrawing pension or any part of it whether permanently or for a specified period and the right of ordering the recovery from pension of the whole or the part of any pecuniary loss caused to the Government, if the pensioner is found in a departmental or judicial proceedings to have been guilty of grave misconduct or negligence during the period of service, including service rendered on re-employment after retirement. Proviso appended to the Rules specifically provides that the resort to sub-rule (1) to Rule 10 can be made only apart from others, that the departmental proceedings had been instituted while the officer was in service.
>
> **15.** In the present case, while the delinquent employee was in service, the departmental enquiry proceedings had been instituted by the employer by issuing the charge memo and the proceedings could not be completed before the government servant retired from service on attaining the age of superannuation and in view of Rule 10(1) of the 1971 Rules, the employer can proceed with the departmental enquiry proceedings though the government servant has retired from service for imposing only punishment contemplated under the Rules."

10.15 In *Ram Lal Bhaskar (supra)*, the employee was in service when the inquiry was initiated. He was dismissed from service after attaining the age of superannuation. This court considered the argument that the order of the appellate authority was illegal and without jurisdiction. The Rules provided that disciplinary proceedings could be continued in the same manner as if the officer continued to be in service. Thus, it was held that the employee was deemed to be in service for the continuance of proceedings. No merit was found in the submission that inquiry and order of dismissal passed after superannuation was illegal and without jurisdiction. The relevant discussion is extracted hereunder:

> **"8.** The learned counsel for Respondent 1, on the other hand, supported the impugned order of the High Court and submitted that there is no infirmity in the impugned order of the High Court. He further submitted that in any case Respondent 1 had retired from service on 31-1-2000, and though the charge-sheet was served on him on 22-12-1999 when he was still in service, the enquiry report was served on him by letter dated 28-9-2000 and he was dismissed from service on 15-5-2001 after he had retired from service. He submitted that after the retirement of Respondent 1, the appellant had no jurisdiction to continue with the enquiry against Respondent 1. In support of this contention, he cited the decision of this Court in *UCO Bank* v. *Rajinder Lal Capoor*[20].
>
> **9.** We have perused the decision of this Court in *UCO Bank* v. *Rajinder Lal Capoor* and we find that in the facts of that case the delinquent officer had already superannuated on 1-11-1996 and the charge-sheet was issued after his superannuation on 13-11-

20(2007) 6 SCC 694

> 1998 and this Court held that the delinquent officer having been allowed to superannuate, the charge-sheet, the enquiry report and the orders of the disciplinary authority and the appellate authority must be held to be illegal and without jurisdiction. In the facts of the present case, on the other hand, we find that the charge-sheet was issued on 22-12-1999 when Respondent was in service and there were clear provisions in Rule 19(3) of the State Bank of India Officers Service Rules, 1992, that in case disciplinary proceedings under the relevant rules of service have been initiated against an officer before he ceased to be in the bank's service by the operation of, or by virtue of, any of the rules or the provisions of the Rules, the disciplinary proceedings may, at the discretion of the Managing Director, be continued and concluded by the authority by whom the proceedings were initiated in the manner provided for in the Rules as if the officer continues to be in service, so however, that he shall be deemed to be in service only for the purpose of the continuance and conclusion of such proceedings.
>
> **10.** We may mention here that a similar provision was also relied on behalf of UCO Bank in *UCO Bank* v. *Rajinder Lal Capoor* (supra) in Regulation 20(3)(*iii*) of the UCO Bank Officer Employees' Service Regulations, 1979, but this Court held that the aforesaid regulation could be invoked only when the disciplinary proceedings had been initiated prior to the delinquent officer ceased to be in service. Thus, the aforesaid decision of this Court in *UCO Bank* v. *Rajinder Lal Capoor* (supra) does not support Respondent 1 and there is no merit in the contention of the counsel for Respondent 1 that the enquiry and the order of dismissal were illegal and without jurisdiction."
>
> (emphasis supplied)

In the instant case, Rule 34.2 of the CDA Rules holds the field and is binding, in the absence of any statutory interdiction made by any other provision regarding continuance of the inquiry and for taking it to a logical end in terms of the deemed continuation of the employee in service. Decision of this Court in the case of *Ram Lal Bhaskar (supra)* is by a three Judge Bench, which is binding.

10.16 The reliance placed on the provision contained in section 4(6) of the Payment of Gratuity Act, 1972, is devoid of substance. The Act is to provide for a scheme for payment of gratuity to the employees. Section 2(A) of the Act specifies the continuous service and what would amount to interruption and exclusion therefrom. An employee in continuous service, within the meaning of section 2(A)(1), for one year or six months, as provided, shall be deemed to be in continuous service. Section 3 deals with the appointment of the Controlling Authority. Section 4 deals with the payment of gratuity. Section 4(1) provides that 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, on his superannuation, or retirement or resignation, or his death or disablement due to accident or disease. Five years of continuous service shall not be necessary in case a person ceased to be in service due to death or disability. Section 4(2) provides for entitlement of gratuity for every completed year of service or part thereof, in excess of six months, the employer shall pay gratuity at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned. Section 4(5) provides that 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. What is ensured under the Act is the minimum amount of gratuity.

10.17 Section 4 provides for payment of gratuity. Section 4(6) contains a *non-obstante* clause to sub-section 1. In case of service of the employee have been terminated for wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, gratuity shall be forfeited to the extent of the damage or loss so caused as provided under section 4(6)(a). Even in the absence of loss or damage, gratuity can be wholly or partially forfeited under the provisions of section 4(6)(b), in case termination of services was based upon disorderly conduct or act of violence on his part or offence involving moral turpitude committed during the course of employment. Thus, it is apparent that not only damage or loss can be recovered, but gratuity can be wholly or partially withheld in case services are terminated for the reasons specified in section 4(6)(b).

10.18 The Payment of Gratuity Act, 1972, makes no provision with respect to departmental inquiries. Since no statutory provisions of the Payment of Gratuity Act, 1972 come in

the way of the CDA Rules to continue the inquiry after superannuation of the employee in case it was instituted while he was in service and his deemed continuance in service; thus, no fetter is caused upon operation of Rule 34.2 providing for a continuation of the inquiry and deemed continuation of the employee in service after the age of superannuation.

10.19 The provisions of Section 4(6) of the Act of 1972 prevail over Section 4(1) as provisions of Section 4(6) contain *non-obstante* clause as to Section 4(1). It would prevail over the provisions made in Section 4(1) and gratuity would not become payable mandatorily as provided in Section 4(1). The provisions of Section 4(6) provide recovery or forfeiture where services of employee have been terminated for the reasons prescribed in Section 4(6)(a) and 4(6)(b). Section 4(6)(a) and (b) both provide for recovery of loss caused or forfeiture wholly or partially in the case of termination of services. In case after superannuation of employee there cannot be any dismissal i.e., termination of services as contemplated in Section 4(6), then there can be no recovery of pecuniary loss caused by employee or forfeiture of gratuity wholly or partially as that can only be done in the event of termination of services on charges found established. Such an

interpretation would render continuance of inquiry otiose and would defeat the public policy and the provisions of Act of 1972. The recovery of loss or forfeiture is one of the punishments which depends on exigency of termination by way of dismissal as mandated by Section 4(6). To give effect to the provisions of the Act, the punishment of dismissal can be imposed in view of Rule 34.2, otherwise it would defeat the intendment of provisions contained in Section 4(6)(a) and 4(6)(b) of the Act of 1972.

10.20 Section 4(1) used the expression 'termination of employment after five years by way of superannuation, retirement or resignation or on his death or disablement due to accident or disease' that is in a normal course. It does not deal with a situation where departmental inquiry is instituted and continued and completed after the age of superannuation and termination of employment had not taken place on completion of the age of superannuation as there is a deemed continuation of the employment for the purpose of holding an inquiry and passing the appropriate punishment order after the conclusion of the departmental inquiry on the basis of misconduct if any found established. Provisions of section 4(1) do not impinge upon the continuation of inquiry. Section 4(6) prevails on it. The Payment

of Gratuity Act, 1972, can govern the conditions concerning payment of gratuity. It cannot control and provide with respect to an employer's right to hold a departmental inquiry after retirement, and there is no provision prescribing what kind of punishment can be imposed in the departmental inquiry if it is continued after attaining the age of superannuation. The relevant rules would govern such matters. In case the Payment of Gratuity Act, 1972, is interpreted to interdict the departmental inquiry after the age of superannuation and to deal with the nature of punishment to be imposed, it would be taken as a case of over-inclusion in the Act which deals exclusively with the payment of gratuity.

10.21 In view of the various decisions of this Court and considering the provisions in rules in question, it is apparent that the punishment which is prescribed under Rule 27 of the CDA Rules, minor as well as major, both can be imposed. Apart from that, recovery can also be made of the pecuniary loss caused as provided in Rule 34.3 of the CDA Rules, which takes care of the provision under sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972. The recovery is in addition to a punishment that can be imposed after attaining the age of superannuation.

The legal fiction provided in Rules 34.2 of the CDA Rules of deemed continuation in service has to be given full effect.

10.22 The expression used in section 4(1) "termination" does not include "dismissal." The Constitution Bench considered the difference between the termination and dismissal in *M. Ramanatha Pillai v. The State of Kerala & Ors.* (1973) 2 SCC 650 wherein the following observations were made as to the distinction between the terms dismissal and termination considering the provisions of Article 311 of the Constitution. It was observed:

> "19. When Article 311 states that no person shall be dismissed, removed or reduced in rank until he has been given a reasonable opportunity of showing cause against the action proposed to be taken in regard to him it affords a protection and security of government service. Article 311 applies to all government servants holding permanent, temporary or officiating post. The protection afforded by Article 311 is however limited to the imposition of three major penalties. These are dismissal, removal or reduction in rank. The words "dismissed", "removed" and "reduced in rank" are technical words. Both in the case of removal or dismissal there is a stigma. It also involves loss of benefit. There may also be an element of personal blame worthiness of the government servant. Reduction in rank is also a punishment. The expression "rank" in Article 311(2) has reference to a person's classification and not to his particular place in the same cadre in the hierarchy of the service to which he belongs. Merely sending back a servant to his substantive post has been held not to be a reduction in rank as a punishment since he had no legal right to continue in officiating post. The striking out of a name from the panel has been held to affect future rights of promotion and to be a reduction in rank."

(a) Dismissal by way of punishment, termination of employment by means of exigencies provided in section 240 of the Government of India Act was considered in *Jagdish Mitter v. Union of India* AIR 1964 SC 449. It was held:

> 8. Having regard to the legislative history of the provisions contained in Article 311, the words "dismissed", "removed" and "reduced in rank" as used in Article 311(1), have attained the significance of terms of Article. As has been observed by Das, C.J. in Parshotam Lal Dhingra v. Union of India[21], "both at the date of the commencement of the 1935 Act and of our Constitution the words 'dismissed', 'removed' and 'reduced in rank' as used in the service rules, were well understood as signifying or denoting the three major punishments which could be inflicted on government servants. The protection given by the rules to the Government servants against dismissal, removal or reduction in rank, which could not be enforced by action, was incorporated in sub-section (1) and (2) of Section 240 to give them a statutory protection by indicating a procedure which had to be followed before the punishments of dismissal, removal or reduction in rank could be imposed on them and which could be enforced in law. These protections have now been incorporated in Article 311 of our Constitution". It is thus clear that every order terminating the services of a public servant who is either a temporary servant, or a probationer, will not amount to dismissal or removal from service within the meaning of Article 311. It is only when the termination of the public servant's services can be shown to have been ordered by way of punishment that it can be characterised either as dismissal or removal from service.

(b) Similarly, in *P. Balakotaiah v. Union of India*, AIR 1958 SC 232 the provisions of Article 311 came up for consideration, the distinction between the dismissal and termination was discussed thus:

---

21 1958 SCR 828 at pp.856-857

"(18)(IIc) It is then contended that the procedure prescribed by the Security Rules for the hearing of the charges does not satisfy the requirements of Article 311, and that they are, in consequence, void. But Article 311 has application only when there is an order of dismissal or removal, and the question is whether an order terminating the services of the employees under Rule 3 can be said to be an order dismissing or removing them. Now, this Court has held in a series of decisions that it is not every termination of the services of an employee that falls within the operation of Article 311, and that it is only when the order is by way of punishment that it is one of dismissal or removal under that Article. Vide Satish Chandra Anand v. Union of India[22], Shyam Lal v. State of Uttar Pradesh and the Union of India)[23], State of Bombay v. Saubhagchand M. Doshi[24] and Parshotam Lal Dhingra v. Union of India[25]. The question as to what would amount to punishment for purposes of Article 311 was also fully considered in Parshotam Lal Dhingra case. It was therein held that if a person had a right to continue in office either under the service rules or under a special agreement, a premature termination of his services would be a punishment. And, likewise, if the order would result in loss of benefits already earned and accrued, that would also be punishment. In the present case, the terms of employment provide for the services being terminated on a proper notice, and so, no question of premature termination arises. Rule 7 of the Security Rules preserves the rights of the employee to all the benefits of pension, gratuities and the like, to which they would be entitled under the rules. Thus, there is no forfeiture of benefits already acquired. It was stated for the appellants that a person who was discharged under the rules was not eligible for re-employment, and that that was punishment. But the appellants are unable to point to any rule imposing that disability. The order terminating the services under Rule 3 of the Security Rules stands on the same footing as an order of discharge under Rule 148, and it is neither one of dismissal nor of removal within the meaning of Article 311."

(emphasis supplied)

(c) In *Shyam Lal v. State of Uttar Pradesh & Ors.*, AIR 1954 SC 369, it was held that every termination is not dismissal or removal. In *Ravindra Kumar Misra v. UP State Handloom Corpn.*

22 (1953) SCR 655
23 (1955) 1 SCR 26
24 CA No.182 of 1955
25 CA No.65 1957

Ltd. & Anr. 1987 Supp. SCC 739, the distinction between termination simpliciter and punitive dismissal was considered, and it was observed:

> "6. As we have already observed, though the provisions of Article 311(2) of the Constitution do not apply, the Service Rules which are almost at par make the decisions of this Court relevant in disposing of the present appeal. In several authoritative pronouncements of this Court, the concept of "motive" and "foundation" has been brought in for finding out the effect of the order of termination. If the delinquency of the officer in temporary service is taken as the operating motive in terminating the service, the order is not considered as punitive while if the order of termination is founded upon it, the termination is considered to be a punitive action. This is so on account of the fact that it is necessary for every employer to assess the service of the temporary incumbent in order to find out as for whether he should be confirmed in his appointment or his services should be terminated. It may also be necessary to find out whether the officer should be tried for some more time on temporary basis. Since both in regard to a temporary employee or an officiating employee in a higher post such an assessment would be necessary merely because the appropriate authority proceeds to make an assessment and leaves a record of its views the same would not be available to be utilised to make the order of termination following such assessment punitive in character. In a large democracy as ours, administration is bound to be impersonal and in regard to public officers whether in government or public corporations, assessments have got to be in writing for purposes of record. We do not think there is any justification in the contention of the appellant that once such an assessment is recorded, the order of termination made soon thereafter must take the punitive character."

(d) In *Registrar General, High Court of Gujarat & Anr. v. Jayshree Chamanlal Buddhbhatti* (2013) 16 SCC 59, termination was held to be dismissal. The relevant portion is extracted hereunder:

"25. The respondent relied upon the law laid down from Parshotam Lal Dhingra v. Union of India onwards. In that case it was held by the Constitution Bench that: (AIR p. 49, para 28)

> "28. … if the Government has, by contract or under the rules, the right to terminate the employment without going through the procedure prescribed for inflicting the punishment of dismissal or removal or reduction in rank, the Government may, nevertheless, choose to punish the servant and if the termination of service is sought to be founded on misconduct, negligence, inefficiency or other disqualification, then it is a punishment and the requirements of Article 311 must be complied with."

26. The next judgment cited is one of three Judges of this Court in State of Bihar v. Shiva Bhikshuk Mishra6 wherein it was observed as follows: (SCC p. 875, para 5)

> "5. … So far as we are aware no such rigid principle has ever been laid down by this Court that one has only to look to the order and if it does not contain any imputation of misconduct or words attaching a stigma to the character or reputation of a government officer it must be held to have been made in the ordinary course of administrative routine and the court is debarred from looking at all the attendant circumstances to discover whether the order had been made by way of punishment."

27. These judgments have been followed by a Bench of seven Judges in Samsher Singh v. State of Punjab, where this Court was concerned with the termination of the services of a probationary judicial officer on the basis of a vigilance inquiry, which was conducted by the State Government on the request of the High Court. The Court held the termination to be bad, and while doing so laid down the law in this behalf in no uncertain terms in paras 63 to 66 (of the SCC report) which read as follows: (SCC pp. 851-52)

> "63. No abstract proposition can be laid down that where the services of a probationer are terminated without saying anything more in the order of termination than that the services are terminated it can never amount to a punishment in the facts and circumstances of the case. If a probationer is discharged on the ground of misconduct, or inefficiency or for similar reason without a proper enquiry and without his getting a reasonable opportunity of showing cause against his discharge it may in a given case amount to removal from service within the meaning of Article 311(2) of the Constitution.

64. Before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the probationer is satisfactory or whether he is suitable for the post. In the absence of any rules governing a probationer in this respect the authority may come to the conclusion that on account of inadequacy for the job or for any temperamental or other object not involving moral turpitude the probationer is unsuitable for the job and hence must be discharged. No punishment is involved in this. The authority may in some cases be of the view that the conduct of the probationer may result in dismissal or removal on an inquiry. But in those cases the authority may not hold an inquiry and may simply discharge the probationer with a view to giving him a chance to make good in other walks of life without a stigma at the time of termination of probation. If, on the other hand, the probationer is faced with an enquiry on charges of misconduct or inefficiency or corruption, and if his services are terminated without following the provisions of Article 311(2) he can claim protection. In State of Bihar v. Gopi Kishore Prasad8 it was said that if the Government proceeded against the probationer in the direct way without casting any aspersion on his honesty or competence, his discharge would not have the effect of removal by way of punishment. Instead of taking the easy course, the Government chose the more difficult one of starting proceedings against him and branding him as a dishonest and incompetent officer.

65. The fact of holding an enquiry is not always conclusive. What is decisive is whether the order is really by way of punishment (see State of Orissa v. Ram Narayan Das9). If there is an enquiry the facts and circumstances of the case will be looked into in order to find out whether the order is one of dismissal in substance (see Madan Gopal v. State of Punjab10). In R.C. Lacy v. State of Bihar11 it was held that an order of reversion passed following an enquiry into the conduct of the probationer in the circumstances of that case was in the nature of preliminary inquiry to enable the Government to decide whether disciplinary action should be taken. A probationer whose terms of service provided that it could be terminated without any notice and without any cause being assigned could not claim the protection of Article 311(2) (see Ranendra Chandra Banerjee v. Union of India12). A preliminary inquiry to satisfy that there was reason to dispense with the services of a temporary employee has been held not to

> attract Article 311 (see Champaklal Chimanlal Shah v. Union of India13). On the other hand, a statement in the order of termination that the temporary servant is undesirable has been held to import an element of punishment (see Jagdish Mitter v. Union of India14).
>
> 66. If the facts and circumstances of the case indicate that the substance of the order is that the termination is by way of punishment then a probationer is entitled to attract Article 311. The substance of the order and not the form would be decisive (see K.H. Phadnis v. State of Maharashtra15)."

(e) In *Dinesh Chandra Sangma v. State of Assam and Ors.*, (1977) 4 SCC 441, it was held that compulsory retirement is not a dismissal or removal. In *Workers Employed in Hirakud Dam v. State of Orissa & Ors.* (1971) 1 SCC 583, it was held:

> "15. The question that arises for consideration is about the connotation of the expression "dismissed" used in para 11. The contention of Mr Ramamurthy that the expression "dismissed" has reference only to termination of the services of an employee as and by way of punishment is largely based upon the provisions contained in the Government of India Act and in Article 311 of the Constitution. Based upon those provisions Mr Ramamurthy claims that the expression "dismissal" is a technical word used in cases in which a person's services are terminated by way of punishment. Quite naturally he relied upon the Service Rules where the word "dismissal" has been used to denote a major punishment inflicted upon an employee for misconduct. Mr Ramamurthy, no doubt, is well-founded in his contention that the word "dismissal" used in the Government of India Act as also in the Constitution and the Service Rules has been interpreted to mean termination of a person's service by way of punishment."

(f) In *Satish Chandra Anand v. Union of India* AIR 1953 SCC 250 it was held that termination by notice is not dismissal or removal. It was held:

> "8. Taking Article 14 first, it must be shown that the petitioner has been discriminated against in the exercise or enjoyment of some legal right which is open to others who are similarly situated. The rights which he says have been infringed are those conferred by Article 311. He says he has either been dismissed or removed from service without the safeguards which that Article confers. In our opinion, Article 311 has no application because this is neither a dismissal nor a removal from service, nor is it a reduction in rank. It is an ordinary case of a contract being terminated by notice under one of its clauses."

(g) Similarly, in *State Bank of India v. The Workmen of State Bank of India & Ors.* (1991) 1 SCC 13 retrenchment under section 25F was held not to be dismissal.

10.23 It is a settled proposition of law that in case of termination of service there is a distinction as to whether it is a simpliciter termination or a punitive dismissal and this court can lift the veil and find out the real nature of termination whether it is simpliciter termination or punitive dismissal as held in *B.T. Krishnamurthy v. Sri Basaveswara Education Society* (2013) 4 SCC 490, *Paramjit Singh v. Director of Schools (Public Instructions)*, (2010) 14 SCC 416, *State of U.P. v. Ram Vinai Sinha*, (2010) 15 SCC 305, *Jaswantsingh Pratapsingh Jadeja v. Rajkot Municipal Corpn.* (2007) 10 SCC 71, *the State of Punjab v. Rajesh Kumar* (2006) 12 SCC 418, *Jai Singh v. Union of India* (2006) 9 SCC 717.

10.24 In the case of dismissal by way of punishment, gratuity is not payable because of special provisions made in the Working Journalists Act was held by this Court in *P. Rajan Sandhi v. Union of India & Anr.* (2010) 10 SCC 338. The relevant portion is extracted hereunder:

> "11. It may be seen that there is a difference between the provisions for denial of gratuity in the Payment of Gratuity Act and in the Working Journalists Act. Under the Working Journalists Act gratuity can be denied if the service is terminated as a punishment inflicted by way of disciplinary act, as has been done in the instant case. We are of the opinion that Section 5 of the Working Journalists Act being a special law will prevail over Section 4(6) of the Payment of Gratuity Act which is a general law. Section 5 of the Working Journalists Act is only for working journalists, whereas the Payment of Gratuity Act is available to all employees who are covered by that Act and is not limited to working journalists. Hence, the Working Journalists Act is a special law, whereas the Payment of Gratuity Act is a general law. It is well settled that special law will prevail over the general law, vide G.P. Singh's Principles of Statutory Interpretation, 9th Edn., 2004, pp. 133 and 134.
>
> 12. The special law i.e. Section 5(1)(a)(i) of the Working Journalists Act, does not require any allegation or proof of any damage or loss to, or destruction of, property, etc. as is required under the general law i.e. the Payment of Gratuity Act. All that is required under the Working Journalists Act is that the termination should be as a punishment inflicted by way of disciplinary action, which is the position in the case at hand. Thus, if the service of an employee has been terminated by way of disciplinary action under the Working Journalists Act, he is not entitled to gratuity."

10.25 Section 4(1) deals with normal superannuation and does not cover the cases where the departmental inquiry is pending, or dismissal had been ordered. It did not interdict the

departmental inquiry if it was initiated while the employee was in service and continued after superannuation as if the employee continued in service. Section 4 of the Payment of Gratuity Act, 1972 contains no bar, and purposive construction has to be made of the provisions contained in section 4(1). Section 4(6) provides where particular misconduct is found established, how gratuity to be dealt with, but provisions cause no fetter on the power of an employer to impose a punishment of dismissal. It makes no provision in particular with respect to the departmental inquiry but rather buttresses the power of an employer to forfeit gratuity wholly or partially or to recover loss provided in Section 4(6). Neither the provisions in section 4(1) nor section 4(6) of the Payment of Gratuity Act create embargo on the departmental inquiry and its continuance after superannuation. Thus, provisions of Rule 34.2 of the CDA Rules would prevail. Even the executive instruction can hold the field in the absence of statutory rules and are equally binding as laid down in *State of Madhya Pradesh and Anr. v. Kumari Nivedita Jain and Ors.,* (1981) 4 SCC 296, *State of Andhra Pradesh and Anr. v. Lavu Narendranath and Ors. etc.,* AIR 1971 SC 2560, *Distt. Registrar, Palghat and Ors. v. M.B. Koyakutty and Ors.,*

(1979) 2 SCC 150, *Union of India and Anr. v. Tulsiram Patel,* AIR 1985 SC 1416. This Court held that only when statutory provision is otherwise, executive instructions cannot prevail. In our opinion, no dint is caused by the Payment of Gratuity Act, 1972, and the efficacy of Rules is not adversely affected on the proper interpretation of Section 4(1) and 4(6) of the Act of 1972.

10.26 In *UCO Bank & Ors. v. Rajendra Shankar Shukla*, (2018) 14 SCC 92 this court did not interfere on the ground that there was an enormous delay of about seven years in issuing a charge sheet. Efficiency bar was permitted to be crossed during that period, and the employee was not paid the subsistence allowance or pension during the pendency of the disciplinary inquiry. It was observed that the employee was entitled to subsistence allowance during the inquiry. The decision of *UCO Bank & Ors. v. Prabhakar Sadashiv Karvade* (2018) 14 SCC 98 was referred. An observation was made that punishment of dismissal could not have been imposed after superannuation, but the same could not be said to be the ratio of the decision. It was mainly for the reasons mentioned by this court concerning delay, non-payment of subsistence allowance and the employee was deprived of meaningful participation under the departmental

inquiry. After giving the aforesaid findings, it was not necessary to go into the aforesaid question. Thus, the opinion expressed as to the punishment of dismissal could not be said to be the ratio of the decision. The reliance was placed on *UCO Bank & Ors. v. Prabhakar Sadashiv Karvade* (supra). Though the decision of *UCO Bank v. Rajinder Lal Capoor* (supra) was referred to by this court, but it did not consider the effect of deeming fiction of continuance of inquiry and continuance of the employee in the service as pointed out above in the various decisions and it relied upon Regulation 48 providing for pecuniary loss caused to the bank. Whereas in *Ramesh Chandra Sharma v. Punjab National Bank & Anr.* (supra) it was held to the contrary that once the inquiry is initiated under Regulation 4 of the (Discipline & Appeal) Regulations, Regulation 48 of the Pension Regulations had no application, and order of dismissal was upheld. The decision in *Ramesh Chandra Sharma v. Punjab National Bank & Anr. (supra)* and other decisions which were binding upon the Division Bench were not considered. In the absence of consideration of the said decision and other decisions mentioned above in which it was held that legal fiction of deemed

continuation has to be taken to a logical conclusion consequently, the observation made that after superannuation punishment of dismissal cannot be imposed in *UCO Bank & Ors. v. Rajendra Shankar Shukla* (supra), was not the ratio of decision, and the opinion expressed on the strength of the said decision in *UCO Bank v. Prabhakar Sadashiv Karvade* (supra) suffers from infirmity and cannot prevail.

10.27 In *Jaswant Singh Gill v. Bharat Coking Coal Ltd.* (2007) 1 SCC 663, it was held that the provisions of section 4(6) of the Payment of Gratuity Act, 1972 would prevail over the non-statutory Bharat Coking Coal Ltd. - a subsidiary of Coal India Ltd. Rules 34.2 and 34.3 and provisions of Payment of Gratuity Act, 1972, were considered. It was held that even if the disciplinary inquiry was initiated before attaining the age of superannuation, if the employee attains the age of superannuation, the question of imposing a major penalty by removal or dismissal from service would not arise. Once the employee had retired and his services had not been extended for the purpose of imposing punishment, a major penalty could not be imposed. It was also held that the rule framed by Coal India Ltd. are non-statutory rules, and in view of the provisions of the

Payment of Gratuity Act, 1972, they cannot prevail. In the said case, the order of dismissal was passed after the age of superannuation. It was found that misconduct did not cover the grounds mentioned in section 4(6)(a) for recovery of the loss, nor it was the case of misconduct in which gratuity could have been withheld wholly or partially in the exigencies as provided in section 4(6)(b). We find it difficult to agree with the said decision as Rules hold the field and are not repugnant to provisions of the Payment of Gratuity Act, 1972. This Court held that Rules could not hold the field as they were not statutory; thus, the effect of the rule providing of deeming legal fiction as if he had continued in the service notwithstanding crossing the age of superannuation was not considered. Apart from that, the validity of Rules 34.2 or 34.3 could not have been decided as it was not in question in the said case. The Controlling Authority and the Appellate Authority ordered the payment of gratuity. The main ground employed was that in the order passed by the departmental authority, the quantum of damage or loss caused was not indicated, and it was not the case covered by Section 4(6)(a) and 4(6)(b). A writ petition filed by the employer was dismissed. However, the Intra Court Appeal was allowed, and it

was opined that the Controlling Authority could not have gone into the validity of the dismissal order and forfeiture of the gratuity since it was not an appellate authority of disciplinary authority imposing the punishment of dismissal. Thus, the jurisdictional scope in the *Jaswant Singh Gill* case (supra) was limited. We are unable to agree with the decision rendered in *Jaswant Singh Gill* case (supra) *inter alia* for the following reasons:

(i) The order of termination was not questioned, nor the authority under the Payment of Gratuity Act, 1972, had jurisdiction to deal with it.

(ii) The validity or enforceability and vires of service Rules 34.2 and 34.3 were not questioned

(iii) The Controlling Authority under the Payment of Gratuity Act, 1972, had no jurisdiction to go into the legality of order of the disciplinary authority.

(iv) The scope of the case before this Court was confined to validity of order of Controlling Authority and to questions which could have been dealt with by Controlling Authority.

(v) No fetter is caused on the efficacy of the Rules by Section 4(1) and 4(6) of the Payment of Gratuity Act, 1972. The Rules need not be statutory to have efficacy as they are not repugnant to the Payment of Gratuity Act, 1972. This Court did not consider the scope of provisions of the Gratuity Act and provisions of Rule 34.2, providing legal fiction of employee deemed to be in service even after superannuation.

(vi) The Controlling Authority had no jurisdiction to deal with Rules 34.2 and 34.3 or to pronounce upon validity thereof or of dismissal. Thus, the observations made, traveling beyond the scope of the proceedings, cannot be said to be binding and cannot constitute the ratio with respect to continuance of departmental inquiry after superannuation and what kind of punishment can be imposed by an employer. The jurisdiction of authority was only to consider payment of gratuity under Section 4(6) of the Payment of Gratuity Act, 1972.

Thus, we overrule the decision in *Jaswant Singh Gill* (supra).

10.28 This court in *Anant R. Kulkarni v. Y.P. Education Society & Ors.* (2013) 6 SCC 515 considering the decision in *Noida Entrepreneurs Association v. Noida & Ors.* (2011) 6 SCC 508 held that inquiry against an employee who had retired depends upon the nature of the statutory rule, which governs the terms and conditions of his service. A general observation was made that services cannot be terminated after the age of superannuation. The relevant portion is extracted hereunder:

> "24. Thus, it is evident from the above, that the relevant rules governing the service conditions of an employee are the determining factors as to whether and in what manner the domestic enquiry can be held against an employee who stood retired after reaching the age of superannuation. Generally, if the enquiry has been initiated while the delinquent employee was in service, it would continue even after his retirement, but nature of punishment would change. The punishment of dismissal/removal from service would not be imposed."

(a) In the aforesaid decision, reference was made to *State of Assam & Ors. v. Padma Ram Borah* AIR 1965 SC 473, in which it was opined that it was not possible to continue with the inquiry unless the service was continued by issuing a notification before 31st March 1961. Following observations were made in *State of Assam v. Padma Ram Borah* (supra):

> "11. Let us proceed on the footing, as urged by learned counsel for the appellant, that the order dated December 22, 1960 itself amounts to an order retaining the respondent in service till

departmental proceedings to be drawn up against him are finalised. We shall also assume that the finalisation of the departmental proceedings mentioned in the order is a public ground on which the respondent could be retained in service. As the order was passed by the State Government itself, no question of taking its sanction arises and we think that the High Court was wrong in holding that the absence of sanction from the State Government made the order bad. Therefore, the effect of the order dated December 22, 1960 was two-fold: firstly, it placed the respondent under suspension and secondly, it retained the respondent in service till departmental proceedings against him were finalised. We treat the order as an order under Fundamental Rule 56 which order having been made before January 1, 1961, the date of respondent's retirement, cannot be bad on the ground of retrospectivity. Then, we come to the order dated January 6, 1961. That order obviously modified the earlier order of December 22, 1960 inasmuch as it fixed a period of three months from January 1, 1961 or till the disposal of the departmental proceedings, whichever is earlier, for retaining the respondent in service. The period of three months fixed by this order expired on March 31, 1961. Thus the effect of the order of January 6, 1961 was that the service of the respondent would come to an end on March 31, 1961 unless the departmental proceedings were disposed of at a date earlier than March 31, 1961. It is admitted that the departmental proceedings were not concluded before March 31, 1961. The clear effect of the order of January 6, 1961 therefore was that the service of the respondent came to an end on March 31, 1961. This was so not because retirement was automatic but because the State Government had itself fixed the date up to which the service of the respondent would be retained. The State Government made no further order before March 31, 1961, but about a month or so after passed an order on May 9, 1961 extending the service of the respondent for a further period of three months with effect from April 1, 1961. We do not think that the State Government had any jurisdiction to pass such an order on May 9, 1961. According to the earlier order of the State Government itself, the service of the respondent had come to an end on March 31, 1961. The State Government could not by unilateral action create a fresh contract of service to take effect from April 1, 1961. If the State Government wished to continue the service of the respondent for a further period, the State Government should have issued a notification before March 31, 1961. In Rangachari v. Secretary of State for India2 Their Lordships of the Privy Council were dealing with a case in which a Sub-Inspector of police was charged with certain irregular and improper conduct in the execution of his duties. After the Sub-Inspector had retired on invalid pension and his pension had been paid for three months, the matter was re-opened and an

order was made removing the Sub-Inspector from service as from the date on which he was invalided. Lord Roche speaking for the Board said:

> "It seems to require no demonstration that an order purporting to remove the appellant from the service at a time when, as Their Lordships hold, he had for some months duly and properly ceased to be in the service, was a mere nullity and cannot be sustained."

The decision is of no avail, in view of the rule in question, which provides for legal fiction with respect to continuance in service, and it has to be given full effect to the ratio of decision negate the submission of the employee.

(b) The decision in *State of Punjab v. Khemi Ram* (1969) 3 SCC 28 was also referred to in *Anant R. Kulkarni* (supra) in which it was observed that though the disciplinary inquiry has to be concluded before the date of retirement, once the employee is permitted to retire. In case inquiry was to be continued, he has to be suspended and retained in service till such inquiry is completed and the final order is passed. The relevant portion of observations made in *Khemi Ram* (supra) is extracted hereunder:

> "12. There can be no doubt that if disciplinary action is sought to be taken against a government servant it must be done before he retires as provided by the said rule. If a disciplinary enquiry cannot be concluded before the date of such retirement, the course open to the Government is to pass an order of suspension and refuse to permit the concerned public servant to retire and retain him in service till such enquiry is completed and a final order is passed therein. That such a course was adopted by the

> Punjab Government by passing the order of suspension on July 31, 1958 cannot be gainsaid. That fact is clearly demonstrated by the telegram, Ex. P-1, which was in fact despatched to the respondent on July 31, 1958 by the Secretary, Cooperative Societies to the Punjab Government, informing the respondent that he was placed under suspension with effect from August 2, 1958. As the telegram shows, it was sent to his home address at Village Batahar, Post office Haripur, as the respondent had already by that time proceeded on leave sanctioned by the Himachal Pradesh Administration. Ex. R-1 is the memorandum, also dated July 31, 1958, by which the Punjab Government passed the said order of suspension and further ordered not to permit the respondent to retire on August 4, 1958. That exhibit shows that a copy of that memorandum was forwarded to the respondent at his said address at village Batahar, Post-Office Haripur. Lastly, there is Annexure H to the respondent's petition which consists of an express telegram, dated August 2, 1958 and a letter of the same date in confirmation thereof informing the respondent that he was placed under suspension with effect from that date. Both the telegram and the letter in confirmation were despatched at the address given by the respondent i.e. at his Village Batahar, Post Office Haripur. These documents, therefore, clearly demonstrate that the order of suspension was passed on July 31, 1958 i.e. before the date of his retirement and had passed from the hands of the Punjab Government as a result of their having been transmitted to the respondent. The position, therefore, was not as if the order passed by the Punjab Government suspending the respondent from service remained with the Government or that it could have, therefore, changed its mind about it or modified it. Since the respondent had been granted leave and had in fact proceeded on such leave, this was also not a case where, despite the order of suspension, he could have transacted any act or passed any order in his capacity as the Assistant Registrar."

The aforesaid decision does not buttress the case of the employee rather defeats. It was held by this court in *Khemi Ram* (supra) that employee has to be continued in service till such inquiry is completed and final order is passed. That is precisely done by the deeming fiction in the instant matter.

(c) In *Anant R. Kulkarni* (supra) the decision in *Kirti Bhusan Singh v. State of Bihar* (1986) 3 SCC 675 was also considered in which it was observed:

> "6. The expression "compulsory retirement" found in Rule 73(f) of the Bihar Service Code refers to retirement of a government servant on his attaining the age of superannuation. This is not a case in which the appellant had been permitted to retire from service on the ground that he had attained the age of superannuation. No order asking the appellant to continue in service before he had attained the age of superannuation for the purpose of concluding a departmental inquiry instituted against him had also been passed by the competent authority. On the other hand the appellant had been permitted to retire from service on invalid pension on medical grounds even before he had attained the age of superannuation. Rule 73(f) of the Bihar Service Code is clearly inapplicable to the case of the appellant. No other provision which enabled the State Government or the competent authority to revoke an order of retirement on invalid pension is brought to our notice. The order of retirement on medical grounds having thus become effective and final it was not open to the competent authority to proceed with the disciplinary proceedings and to pass an order of punishment. We are of the view that in the absence of such a provision which entitled the State Government to revoke an order of retirement on medical grounds which had become effective and final, the order dated October 5, 1963 passed by the State Government revoking the order of retirement should be held as having been passed without the authority of law and is liable to be set aside. It, therefore, follows that the order of dismissal passed thereafter was also a nullity."
>
> (emphasis supplied)

The question in the aforesaid case was with respect to the revocation of the order of retirement passed on medical grounds. That does not impinge upon Rule 34.2 due to the operation of which superannuation would not be effective.

(d) The decision in *Bhagirathi Jena v. Board of Directors, O.S.F.C. & Ors.* (1999) 3 SCC 666 was also referred to in which it was held:

> 7. In view of the absence of such a provision in the abovesaid regulations, it must be held that the Corporation had no legal authority to make any reduction in the retiral benefits of the appellant. There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30-6-1995, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement.

As there was no provision for conducting a disciplinary inquiry after retirement and that in case misconduct was established, a deduction could be made from the retiral benefits. Thus, it was held that retiral benefits could not have been deducted and became payable. The rule was different.

(e) In *Anant R. Kulkarni* (supra), the decision in *U.P. State Sugar Corporation Ltd. & Ors. v. Kamal Swaroop Tandon* (2008) 2 SCC 41 was also considered in which the proceedings were initiated after retirement in which it was held that in case of retirement, master and servant relationship continue for grant of retiral benefits. Proceedings for recovery of financial loss from an

employee was permissible even after his retirement. The case relates to the departmental inquiry to be instituted post-retirement for the financial loss caused during the course of employment. The question of dismissal did not arise as the inquiry was instituted after retirement. There cannot be any quarrel that it would depend upon the relevant rule.

10.29 On the basis of the abovementioned decisions in the *State of Assam & Ors. v. Padma Ram Borah*, *State of Punjab v. Khemi Ram*, *Bhagirathi Jena v. Board of Directors, O.S.F.C. & Ors.*, *Kirti Bhusan Singh v. State of Bihar*, *U.P. State Sugar Corporation Ltd. & Ors. v. Kamal Swaroop Tandon* (supra) this court in *Anant R. Kulkarni* (supra) opined that relevant rules governing the service conditions of an employee are the determining factor as to whether or not the domestic inquiry can be held against an employee who stood retired after reaching the age of superannuation. To this extent, there is no problem caused by the aforesaid decision. However, this court made a general observation that if the inquiry had been initiated while the delinquent employee was in service, it would continue even after his retirement, but the nature of punishment would change. The punishment of dismissal, removal from service would not be

imposed. The general observation made cannot come in the way of a specific rule and decision cannot be said to be of universal application and cannot be said to be binding in a case the rules provide legal fiction and continuance of employee in the service as if he had continued in service.

10.30 In view of the various decisions, it is apparent that under Rule 34.2 of the CDA Rules inquiry can be held in the same manner as if the employee had continued in service and the appropriate major and minor punishment commensurate to guilt can be imposed including dismissal as provided in Rule 27 of the CDA Rules and apart from that in case pecuniary loss had been caused that can be recovered. Gratuity can be forfeited wholly or partially.

10.31 Several service benefits would depend upon the outcome of the inquiry, such as concerning the period during which inquiry remained pending. It would be against the public policy to permit an employee to go scot-free after collecting various service benefits to which he would not be entitled, and the event of superannuation cannot come to his rescue and would amount to condonation of guilt. Because of the legal fiction provided under the rules, it can be completed in the same

manner as if the employee had remained in service after superannuation, and appropriate punishment can be imposed. Various provisions of the Gratuity Act discussed above do not come in the way of departmental inquiry and as provided in Section 4(6) and Rule 34.3 in case of dismissal gratuity can be forfeited wholly or partially, and the loss can also be recovered. An inquiry can be continued as provided under the relevant service rules as it is not provided in the Payment of Gratuity Act, 1972 that inquiry shall come to an end as soon as the employee attains the age of superannuation. We reiterate that the Act does not deal with the matter of disciplinary inquiry, it contemplates recovery from or forfeiture of gratuity wholly or partially as per misconduct committed and does not deal with punishments to be imposed and does not supersede the Rules 34.2 and 34.3 of the CDA Rules. The mandate of Section 4(6) of recovery of loss provided under Section 4(6)(a) and forfeiture of gratuity wholly or partially under Section 4(6)(b) is furthered by the Rules 34.2 and 34.3. If there cannot be any dismissal after superannuation, intendment of the provisions of Section 4(6) would be defeated. The provisions of section 4(1) and 4(6) of Payment of Gratuity Act, 1972 have to be given purposive interpretation, and no way

interdict holding of the departmental inquiry and punishment to be imposed is not the subject matter dealt with under the Act.

10.32 Thus considering the provisions of Rules 34.2 and 34.3 of the CDA Rules, the inquiry can be continued given the deeming fiction in the same manner as if the employee had continued in service and appropriate punishment, including that of dismissal can be imposed apart from the forfeiture of the gratuity wholly or partially including the recovery of the pecuniary loss as the case may be.

11. In view of the above and for the reasons stated above and in view of the decision of three Judge Bench of this Court in *Ram Lal Bhaskar (supra)* and our conclusions as above, it is observed and held that (1) the appellant – employer has a right to withhold the gratuity during the pendency of the disciplinary proceedings, and (2) the disciplinary authority has powers to impose the penalty of dismissal/major penalty upon the respondent even after his attaining the age of superannuation, as the disciplinary proceedings were initiated while the employee was in service.

Under the circumstances, the impugned judgment and order passed by the High Court cannot be sustained and the same deserves to be quashed and set aside and is accordingly hereby quashed and set aside and the order passed by the Controlling Authority is hereby restored. However, the appellant-employer is hereby directed to conclude the disciplinary proceedings at the earliest and within a period of four months from today and pass appropriate order in accordance with law and on merits and thereafter necessary consequences as per Section 4 of the Payment of Gratuity Act, 1972, more particularly Sub-section (6) of Section 4 of the Gratuity Act and Rule 34.3 of the CDA Rules shall follow. The present appeal is accordingly allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.

.....J.
[ARUN MISHRA]

.....J.
[M.R. SHAH]

NEW DELHI;
May 27, 2020.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 9693 OF 2013

CHAIRMAN-CUM-MANAGING DIRECTOR
MAHANADI COALFIELDS LIMITED ....APPELLANT(S)

VERSUS

SRI RABINDRANATH CHOUBEY ....RESPONDENT(S)

J U D G M E N T

Rastogi, J.

1. I had the privilege of going through the elaborate judgment proposed by my brother Shah, J. Two legal questions have been raised for our consideration (i) whether it is permissible in law for the employer to withhold the payment of gratuity to the employee after retirement from service on account of pendency of the disciplinary proceedings against him and (ii) whether it is permissible for the disciplinary authority to impose penalty of dismissal after the employee stood retired from service.

2. While I entirely agree with a view on question no. (i) that in view of rule 34.3 of the Coal India Executives' Conduct Discipline and Appeal Rules, 1978(hereinafter being referred to as "Rules 1978"), it is permissible for the employer to withhold gratuity even after retirement/superannuation during pendency of the disciplinary proceedings. However, unable to persuade myself on question (ii).

3. The facts giving rise to the controversy have been set out at great length in the judgment of my erudite brother Shah J. I, therefore, do not consider it necessary to recapitulate the same once again except to the extent it may be necessary in the case of this judgment to do so.

4. Before adverting to the factual matrix, it may be relevant to take note of the scheme of Rules, 1978.

5. The Scheme of Rules, 1978 with which we are presently concerned was earlier examined by a two Judge Bench of this Court in the case of ***Jaswant Singh Gill Vs. Bharat Coking Coal Ltd. & Ors.***[1]. The view expressed by the two Judge Bench of this Court came up for consideration in the instant case before another two Judge Bench of this Court and this Court was of the

1 2007(1) SCC 663

view that in ***Jaswant Singh Gill***(supra), the issue of permissibility of penalty of dismissal or removal from service on a retired employee was neither raised nor any direct discussion has been followed thereupon and taking note of the stated pari materia Rule 19(3) of the State Bank of India Officers Service Rules, 1992 examined by the three Judge Bench of this Court in ***State Bank of India Vs. Ram Lal Bhaskar and Another***[2] and keeping in view the discussion in the case of ***Jaswant Singh Gill***(supra), the two Judge Bench of this Court was of the view that the question as to whether the disciplinary authority has necessary powers to impose penalty of dismissal or removal to an employee after retirement from service requires to be examined by a larger Bench of this Court by its judgment dated 29th October, 2013 which has been placed before us for consideration.

6. The facts in brief to be culled out are that the first respondent was working as a Chief General Manager(Production) since 17th February, 2006 and while he was in service for the alleged misconduct which he had committed in discharge of his duties, he was served with a memo along with article of charges on 1st October, 2007. There could not be any restraint over

2 2011(10) SCC 249

passing of the age factor of the delinquent and on attaining the age of superannuation, he stood retired from service on 31st July, 2010. It revealed from the record that inquiry officer had submitted a report of inquiry to the disciplinary authority on 25th March, 2009 but what further action has been taken by the authority thereafter is not made known to this Court. A presumption has to be drawn that fate of disciplinary inquiry is still pending with the competent authority for taking its decision as per the procedure prescribed under the scheme of Rules, 1978.

7. The appellant Mahanadi Coalfields Limited is a subsidary company of Coal India Limited, a Government owned company registered under the Companies Act and is a State within the meaning of Article 12 of the Constitution and amenable to the writ jurisdiction under Article 226 of the Constitution of India. For maintaining discipline in service, with the approval of the Board of Directors of Coal India Limited(CAL) in its meeting held on 24th February, 1978, framed these rules called Coal India Executive Conduct, Discipline and Appeal Rules, 1978 and is applicable to all employees holding posts in the executive cadre scales of pay of Coal India Limited and its subsidiary companies

and to such other employees as may be notified from time to time has a binding force and is indeed not in derogation to the provisions of the Payment of Gratuity Act, 1972(hereinafter being referred to as Act, 1972").

8. The scheme of Rules, 1978 not only defines the duties and obligations of the executives and employees but to the extent illustrates any act or omission or commission which shall be treated as misconduct under Chapter II and any misconduct, if committed by an employee, in discharge of his official duties, the disciplinary action could be initiated against an employee for the stated misconduct while he is in service as provided under Chapter IV of the scheme of Rules, 1978.

9. The Scheme of Rules, 1978 further provides a procedure which has to be followed for imposing minor/major penalties under Rule 29 and Rule 31 of the Rules. That apart, a special procedure has been provided in certain cases notwithstanding the regular procedure contained in Rules 29, 30 or 31 of the said rules, the authority may impose any of the penalties specified in Rule 27 in the circumstances as referred to under clause (i) to (iii) of Rule 34.1 of the rules. It will be apposite to take note of the

term 'employee' and Rule 27(nature of penalties) and Rule 34.1, 34.2 and 34.3 relevant for the purpose ad infra:-

> "3(f) **'Employee'** means an officer holding a post in the executive cadre scales of pay or any other person notified by the Company, if such officer or person is employed on a whole time basis by the Company provided that such persons on deputation to the Company shall continue to be governed by these rules or the rules applicable to them in their parent organizations, as may be settled at the time of finalization of their terms and conditions of deputation.
>
> **27.0 NATURE OF PENALTIES**
>
> 27.1 The following penalties may, for good and sufficient reasons, be imposed on an employee for misconduct, viz. :
>
> **(i) Minor Penalties**
>
> (a) Censure;
>
> (b) Withholding increment, with or without cumulative effect;
>
> (c) Withholding promotion; and
>
> (d) Recovering from pay of the whole of or part of any pecuniary loss caused to the Company by negligence or breach of orders or trust (Rule 27.1 (i) (d) amended vide CIL OM No. CIL/C-5A (vi)/ 50774/CDA/184 dated 23.11.05)
>
> **(ii) Major Penalties**
>
> (a) Reduction to a lower grade or post or stage in a time scale;
>
> **Note :**

The Authority ordering the reduction shall state the period for which it is effective and whether, on the expiry of that period, it will operate to postpone future increments or, to affect the employee's seniority and if so, to what extent.

(b) Compulsory retirement;

(c) Removal from service; and

(d) Dismissal.

Note 1

Removal from service will not be a disqualification for future employment in Coal India Limited and its Subsidiary Companies while dismissal disqualifies a person for future employment.

34.0 Special procedure in certain cases

34.1 Notwithstanding anything contained in rule 29 or 30 or 31 the Disciplinary Authority may impose any of the penalties specified in rule 27 in any of the following circumstances :

(i) where the employee has been convicted on a criminal charge, or on the strength of facts or conclusions arrived at by a judicial trial; or

(ii) where the Disciplinary Authority is satisfied for reasons to be recorded by it in writing that it is not reasonably practicable to hold an inquiry in the manner provided in these rules; or

(iii) where the Disciplinary Authority is satisfied that in the interest of the security of the Company, it is not expedient to hold any inquiry in the manner provided in these rules.

Provided that the employee may be given an opportunity of making a representation to the penalty proposed to be imposed

before any order is made under clause (i) above.

34.2 Disciplinary proceeding, if instituted while the employee was in service whether before his retirement or during his re-employment shall, after the final retirement of the employee, be deemed to be proceeding and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service.

34.3 During the pendency of the disciplinary proceedings, the Disciplinary Authority may withhold payment of gratuity, for ordering the recovery from gratuity of the whole or part of any pecuniary loss caused to the company if have been guilty of offences/misconduct as mentioned in Sub-Section (6) of Section 4 of the Payment of Gratuity Act, 1972 or to have caused pecuniary loss to the company by misconduct or negligence, during his service including service rendered on deputation or on re-employment after retirement. However, the provisions of Section 7(3) and 7(3A) of the Payment of Gratuity Act, 1972 should be kept in view in the event of delayed payment, in the case the employee is fully exonerated."

(Emphasis supplied)

10. Under the scheme of Rules 1978, apart from the procedure which has to be followed for imposing minor/major penalties after holding a procedure prescribed under Rule 29 or 31 of the scheme of Rules, special procedure has been provided under Rule 34 for meeting out certain exigencies. Rule 34.1 is couched with a non-obstante clause which could be invoked in the special

circumstances indicated under clauses (i) to (iii) notwithstanding a procedure for holding a disciplinary inquiry provided under Rule 29 or 31 of the Rules while inflicting penalties specified under Rule 27 of the Rules. At the same time, for the delinquent employee who stood retired from service pending disciplinary enquiry, a special procedure has been provided under Rule 34.2 to continue and conclude such disciplinary proceedings in the same manner as if the delinquent employee had deemed to be continued in service for all practical purposes and with the aid of Rule 34.3 which cannot exist without Rule 34.2, the authority competent may withhold the payment of gratuity during pendency of the disciplinary proceedings and order for recovery from gratuity of the whole or part of the pecuniary loss caused to the company, if the delinquent employee is later held to be guilty of offences/misconduct or it has caused any pecuniary loss to the company by misconduct or negligence during discharge of official duties as a measure of penalty mentioned under Rule 34.3 of the Rules, 1978 or under sub-section (6) of Section 4 of the Act, 1972. At the same time, if the delinquent employee is exonerated in the disciplinary inquiry, he will be entitled for the

gratuity in the event of delayed payment in terms of Section 7(3) and 7(3A) of Act, 1972.

11. The Division Bench of the High Court in LPA placing reliance on the judgment of this Court in ***Jaswant Singh Gill***(supra) directed the appellants pending disciplinary proceedings to release the amount of gratuity payable to the respondent under the impugned judgment.

12. It is well settled that retiral benefits are earned by an employee for a long and meritorious service rendered by him/her and it is not paid gratuitously or merely as a matter of boon, it is paid to him/her for dedicated and devoted work. The Act, 1972 also acknowledges under sub-section (6) of Section 4 to forfeit it to the extent pecuniary loss so caused from the amount of gratuity payable to the employee.

13. Sub-sections (1) and (6) of Section 4 of the Act, 1972 relevant for the purpose are ad infra:-

> "**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) .....
(3) .....
(4) .....
(5) .....

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

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

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

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act of violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

14. The purpose of holding an inquiry against a delinquent is not only with a view to establish the charge levelled against him or to impose a penalty, but is also conducted with the object of such an inquiry recording the truth of the matter, and in that sense, the outcome of an inquiry may either not establishing or vindicating his stand, hence result in his exoneration. Therefore, what is required is that there should be a fair action on the part of the authority concerned in holding disciplinary inquiry for the misconduct, if any, being committed by an employee in discharge of his duties even if retired from service during pendency of disciplinary proceedings after adopting the procedure prescribed under the relevant disciplinary rules alike Rules, 1978 in the instant case and indeed the scheme of Rules, 1978 with which we are concerned is neither in derogation nor in contravention to the scheme of the Act, 1972.

15. It is also well settled that the competence of an authority to hold an enquiry or to continue enquiry against an employee who has retired from service depends upon the scheme of rules and the terms and conditions of service of the employee are the determining factors as to whether and in what manner the

disciplinary enquiry can be held against an employee who stood retired or superannuated from service.

16. To clarify it further that those who were the serving employees, if held guilty on conclusion of the disciplinary proceedings, minor/major penalties as referred to under Rule 27 could be inflicted by the disciplinary authority after recording good and sufficient reason commensurate with the nature of misconduct and in the case of an employee who stood retired/superannuated from service pending disciplinary proceedings, the disciplinary authority has a right to withhold the payment of gratuity pending disciplinary inquiry and if found guilty in the inquiry for the offences/misconduct as indicated in sub-section (6) of Section 4 of Act 1972, can be recovered from his gratuity payable under Section 4 of the Act, 1972. At the same time, if he is exonerated by the disciplinary authority after retirement/superannuation from service, he shall be entitled for payment of gratuity along with interest for the delay in payment in terms of Section 7(3) and Section 7(3A) of Act, 1972.

17. Thus, according to me, where the disciplinary proceedings are instituted while the employee was in service but retired thereafter during its pendency, under the special procedure

provided under Rule 34.2 of the Rules, 1978 the authority is empowered to continue and conclude the disciplinary inquiry in the same manner as if the employee had continued in service by deeming fiction, however, the relationship of employer and employee shall not be severed until conclusion of the disciplinary enquiry but may withhold payment of gratuity in terms of Rule 34.3 pending disciplinary inquiry and in furtherance thereof if later held guilty, the competent authority to the extent pecuniary loss has been caused for the misconduct, negligence in the discharge of duties order for recovery from gratuity either be forfeited in the whole or in part, to the extent pecuniary loss has been caused to the company for the offences/misconduct as a measure of penalty in terms of Rule 34.3 of the Rules read with sub-section (6) of Section 4 of the Act, 1972.

18. The emphasis of the learned counsel for the respondent taking note of the view expressed by this Court in ***Jaswant Singh Gill***(supra) is that gratuity can be withheld under sub-section (6) of Section 4 of the Act, 1972, if the service of an employee is terminated for the alleged misconduct or negligence which has been committed by him during discharge of his official duties. But after retirement from service since there cannot be

any punishment of dismissal from service with retrospective effect, the authority is not competent to withhold gratuity under the guise of non-statutory rules, 1978.

19. In my considered view, the submission is misplaced for the reason that gratuity became payable to an employee under Section 4(1) of the Act, 1972 on termination of his employment after he rendered a minimum qualifying service and termination of his employment is either can be on his superannuation or retirement or resignation or death or disablement due to accident or disease or any other cause may be. The word 'termination' referred to under sub-section (1) or under sub-section (6) of Section 4 of the Act, 1972 is in reference to the severance of relationship of employer and employee and sub-section (6) of Section 4 being couched with a non-obstante clause empowered the authority in case the delinquent employee held guilty of wilful omission or negligence causing any damage or loss or destruction to the property of the company during the course of employment as a measure of penalty gratuity may be forfeited wholly or partially to the extent misconduct found proved.

20. The term 'termination' may not be understood with the penalty of dismissal or removal from service specified under Rule

27 of Rules, 1978. To make it further clear, the expressions in the schedule of substantive penalties under Rule 27 of the Rules, 1978 refers to various penalties including reduction in rank, compulsory retirement, dismissal, removal, etc. and could possibly be inflicted on the serving employee and indeed cannot be effected with retrospective effect on the delinquent employee who stood retired from service. The term 'termination' as referred to under sub-section (6) of Section 4 of the Act is a technical word used in cases where the relationship of employer and employee is severed on account of stated misconduct stands proved although connotations are different.

21. Many a times 'termination' and 'dismissal' are held to be synonymous but the difference between 'termination' and 'dismissal' is that dismissal could be on account of misconduct with loss of future employment involving dishonesty or criminality and penal in character but that is not in the case of termination. The "termination" as per Black's Law Dictionary is the complete severance of relationship of employer and employee which in the instant case could be saved during pendency of the disciplinary proceedings in view of Rule 34.2 of the Rules, 1978 which clearly envisaged that disciplinary proceedings, if

instituted while the employee was in service, shall be deemed to be pending and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service and by legal fiction, the relationship of employer and employee shall be deemed to continue for the limited purposes of conclusion of the disciplinary proceedings and the delinquent employee becomes qualified to claim gratuity subject to the outcome of the disciplinary proceedings in terms of Rule 34.3 of the Rules, 1978 read with sub-section (6) of Section 4 of the Act, 1972.

22. The three Judge Bench of this Court in ***State of Maharashtra Vs. M.H. Mazumdar***[3] taking note of the pari materia rule 188 and 189 of the Bombay Civil Services Conduct, Discipline and Appeal Rules and relying on earlier precedents held in paragraph 5 as under:-

> **"5.** The aforesaid two rules empower Government to reduce or withdraw a pension. Rule 189 contemplates withholding or withdrawing of a pension or any part of it if the pensioner is found guilty of grave misconduct while he was in service or after the completion of his service. Grant of pension and its continuance to a government servant depend upon the good conduct of the government servant. Rendering satisfactory service maintaining good conduct is a necessary condition for the grant and continuance of pension. Rule 189 expressly confers

3 1988(2) SCC 52

> power on the Government to withhold or withdraw any part of the pension payable to a government servant for misconduct which he may have committed while in service. This rule further provides that before any order reducing or withdrawing any part of the pension is made by the competent authority the pensioner must be given opportunity of defence in accordance with the procedure specified in Note I to Rule 33 of the Bombay Civil Services Conduct, Discipline and Appeal Rules. The State Government's power to reduce or withhold pension by taking proceedings against a government servant even after his retirement is expressly preserved by the aforesaid rules. The validity of the rules was not challenged either before the High Court or before this Court. In this view, the Government has power to reduce the amount of pension payable to the respondent. In *M. Narasimhachar* v. *State of Mysore* [AIR 1960 SC 247 : (1960) 1 SCR 981] and *State of Uttar Pradesh* v. *Brahm Datt Sharma* [(1987) 2 SCC 179] similar rules authorising the Government to withhold or reduce the pension granted to the government servant were interpreted and this Court held that merely because a government servant retired from service on attaining the age of superannuation he could not escape the liability for misconduct and negligence or financial irregularities which he may have committed during the period of his service and the Government was entitled to withhold or reduce the pension granted to a government servant."

23. It is supported by the judgment of this Court in the recent judgment in ***UCO Bank & Ors. Vs. Rajendra Shankar Shukla***[4] wherein it was held as under:-

> "Under the circumstances, we have no hesitation in dismissing the appeal filed by the Bank also on the ground that the punishment of dismissal could not have been imposed on Shukla after his superannuation."

4 2018(14) SCC 92

(Emphasis supplied)

24. The exposition of law is further supported in ***UCO Bank and Ors.*** ***Vs.*** ***Prabhakar Sadashiv Karvade***[5] as under:-

> "The sum and substance of these Regulations is that even though a departmental inquiry instituted against an officer employee before his retirement can continue even after his retirement, none of the substantive penalties specified in Regulation 4 of 1979 Regulations, which include dismissal from service, can be imposed on an officer employee after his retirement on attaining the age of superannuation. Therefore, we have no hesitation to hold that order dated 12.10.2004 passed by the disciplinary authority dismissing the respondent from service, who had superannuated on 31.12.1993 was ex facie illegal and without jurisdiction and the High Court did not commit any error by setting aside the same."
>
> (Emphasis supplied)

25. The two Judge Bench of this Court in ***UCO Bank and Ors.*** ***Vs.*** ***Rajinder Lal Capoor***[6] on which the reliance has been placed by the respondent employee was a case where the explanation was called for by the delinquent employee in reference to the alleged misconduct which he had committed in discharge of his official duties but charge-sheet was indubitably issued after he stood retired from service. The question which arose for consideration was as to whether mere explanation

5 2018(14) SCC 98
6 2007(6) SCC 694

which was called for from the delinquent would be considered to be the initiation of the disciplinary proceedings or it can be said to be initiated only when the charge-sheet is issued in terms of Regulation 20(3)(iii) of the UCO Bank Officer Employees Service Regulations, 1979 and this Court after examining the scheme of Rules, 1979 held that domestic inquiry can be said to be initiated only when the charge-sheet is issued to the delinquent and since the charge-sheet was issued after retirement from service this Court held that the disciplinary proceedings initiated against the delinquent became vitiated in law and consequently set aside the disciplinary proceedings initiated against the retired personnel.

26. The judgment in ***Ram Lal Bhaskar and Anr.***(supra) on which reliance was placed to refer the matter may not be of any assistance in the instant facts of the case for the reason that it was a case where a substantial question raised before this Court for consideration was as to whether the High Court was justified in reappreciating with the finding of the disciplinary authority which was supported by a cogent evidence while inflicting penalty of dismissal from service within its limited scope of judicial review under Article 226 of the Constitution. At this stage, a passing reference was made by learned counsel for the delinquent

employee that as he stood retired from service pending disciplinary enquiry, there could not be an order of dismissal from service. This Court taking note of Rule 19(3) of the State Bank of India Officers Service Rules, 1992, in para 9 of the judgment observed that in case the disciplinary proceedings were initiated against an officer before he ceased to be in service, the disciplinary authority vest at its discretion to continue and conclude the disciplinary proceedings in the manner as if the officer continues to be in service but what nature of substantive penalty could be inflicted upon the retired delinquent employee remain unanswered. In the instant case, the specific question has been raised for determination as to whether dismissal or any other substantive penalties provided under Rule 27 of the scheme of Rules, 1978 could be open to be inflicted to the delinquent employee after he stood retired from service which was primarily not considered by this Court in ***Ram Lal Bhaskar and Anr.*** referred to supra.

27. Taking note of the exposition of law which has been noticed and of the scheme of Rules, 1978, which indubitably has a binding force and are not a subject matter under challenge and are neither in derogation nor in contravention to the scheme of

Payment of Gratuity Act, 1972. I have no hesitation in holding that the substantive penalties provided under the schedule of penalties referred to under Rule 27 could be inflicted on a delinquent employee while he is in service but in case where the delinquent employee stood retired or superannuated from service pending disciplinary inquiry, at least either of the substantive penalties provided under Rule 27 are not available to the disciplinary authority to be inflicted with retrospective effect but at the same time punishment of forfeiture of gratuity if held guilty for misconduct or negligence to the extent damage or pecuniary loss has been caused to the employer can be inflicted upon the delinquent in terms of Rule 34.3 of Rules 1978 read with sub-section (6) of Section 4 of the Act, 1972 and in case the delinquent employee stands exonerated he became entitled for gratuity for the delay in payment in terms of Sections 7(3) and 7(3A) of Act, 1972 and as a matter of caution, it should not be pre-supposed that where the disciplinary inquiry remain pending and could not be concluded while the delinquent employee was in service in due course of time, he shall be held guilty and punished under the scheme of Rules, 1978.

28. To sum up, my conclusion to the question is as under:-

Que. 1-Whether it is permissible in law for the employer to withhold the payment of gratuity even after the employee has attained his superannuation from service because of the pendency of disciplinary proceedings against him?

Ans. I am in agreement with the view expressed by brother Justice Shah that in view of Rule 34.3 of the Rules, 1978, the employer has a right to withhold gratuity during pendency of the disciplinary proceedings.

Que. 2- Whether the penalty of dismissal could be imposed after the employee stood retired from service?

Ans. In my considered view, after conclusion of the disciplinary inquiry, if held guilty, indeed a penalty can be inflicted upon an employee/delinquent who stood retired from service and what should be the nature of penalty is always depend on the relevant scheme of Rules and on the facts and circumstances of each case, but either of the substantive penalties specified under Rule 27 of the Rules, 1978 including dismissal from service are not open to be inflicted on conclusion of the disciplinary proceedings and the punishment of forfeiture of gratuity commensurate with the nature of guilt may be inflicted upon a delinquent employee

provided under Rule 34.3 of Rules, 1978 read with sub-section (6) of Section 4 of the Act, 1972.

29. To conclude, the impugned judgment of the High Court dated 17th July, 2013 is not sustainable and deserves to be set aside and the disciplinary authority may proceed and conclude the pending disciplinary proceedings expeditiously and take a final decision in accordance with the scheme of Rules, 1978 read with sub-section (6) of Section 4 of the Payment of Gratuity Act, 1972.

30. The appeal is accordingly disposed of.

.....J.
(AJAY RASTOGI)

NEW DELHI
MAY 27, 2020