F.C.i. and anr. Vs. Assistant Labour Commissioner (Central) and ors.

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Court : Kolkata

Decided On : Jul-30-2007

Reported in : 2007(4)CHN191,(2008)ILLJ1107Cal

Judge : Pranab Kumar Chattopadhyay and ;Arunabha Basu, JJ.

Acts : Payment of Gratuity Act, 1972 - Sections 2A, 3, 4(5), 7, 7(4), 9(2), 13 and 14; ;Payment of Wages Act; ;Trade and Merchandise Marks Act, 1958; ;Food Corporation Act, 1964; ;Payment of Gratuity (Amendment) Act, 1994; ;Payment of Gratuity (Central) Rules, 1972 - Rules 7, 9, 11(4), 17 and 19; ;Food Corporation of India (Death-cum-Retirement Gratuity) Regulations, 1967 - Regulations 2, 4(3) and 5

Appeal No. : M.A.T. Nos. 812, 880, 912 and 1909 of 2007, M.A.T. No. 976 of 2007 with C.A.N. No. 2411 of 2007, M.A

Appellant : F.C.i. and anr.;f.C.i. and ors.

Respondent : Assistant Labour Commissioner (Central) and ors.;assistant Labour Commissioner (Central) - Ii and Co

Advocate for Def. : L.K. Gupta, ;Debjani Sengupta and ;Rama Prasad Sarkar, Advs.

Advocate for Pet/Ap. : P.S. Sengupta, ;Prabir Chowdhury, ;Arunabha Sengupta, ;Aniruddhha Bagchi and ;Md. Nizamuddin, Advs.

Disposition : Appeal dismissed

Judgement :

Pranab Kumar Chattopadhyay, J.

1. All these appeals were heard analogously as the facts are similar and the issues involved are also identical. The judgment under appeal has, in fact, been passed by the learned Single Judge in W.P. No. 5354 (W) of 2005 whereby and whereunder the learned Single Judge was pleased to dismiss the writ petition and the appeal preferred from the said judgment under appeal dated March 2, 2007 has been numbered as M.A.T. No. 812 of 2007.

2. Following the aforesaid judgment under appeal dated March 2, 2007 passed by the learned Single Judge in W. P. No. 5354 (W) of 2005 various other writ petitions filed on identical grounds under similar facts were also disposed of by the said learned Single Judge wherefrom several appeals have also been preferred out of which these appeals were listed before this Bench and heard analogously. Now, we dispose of all these appeals by this common judgment.

3. The writ petition bearing W.P. No. 5354 (W) of 2005 was filed challenging the order dated December 31, 2004 passed by the Assistant Labour Commissioner-II(C), inter alia, contending that the said Assistant Labour Commissioner in the context of the facts and provisions of law was not competent to embark upon adjudication of the claim application of the employee concerned. It was further contended in the said writ petition that the Assistant Labour Commissioner- II(C) proceeded on an erroneous appreciation of facts and law.

4. On behalf of the respondent/employee, however, a preliminary objection was raised before the learned Single Judge regarding maintainability of the writ petition on the ground of availability of alternative remedy and accordingly, the learned Single Judge heard the concerned parties on the aforesaid issue relating to the preliminary objection as to the maintainability of the writ petition.

5. The facts mentioned in all these appeals in brief are as follows:

The respondent/employees concerned were sent on deputation to the office of the appellant/Food Corporation of India Authorities.

6. By a Circular No. 21 of 1984 the concerned deputationists if they so desired, were asked to give an option in terms of the said Circular. In para 3 of the said Circular it was clearly mentioned that the F.C.I, will not bear any liability in respect of the service rendered prior to the date of permanent absorption in the service of the Corporation. In para 2(i) it was also mentioned that the employees who opt for absorption will be treated as direct recruits.

7. The concerned deputationists duly consented to and endorsed on the said option accepting the terms of the said Circular 21 of 1984 and were absorbed with the appellant authority with effect from 1st July, 1984.

8. According to the appellants, after absorption the concerned employees were covered by the F.C.I. (Death-cum-Retirement Gratuity) Regulations, 1967 but Regulation 2 of the said Regulations clearly stipulated that the Regulations shall not apply to the employees who are covered by the provisions of the Payment of Gratuity Act, 1972.

9. It has been submitted on behalf of the appellants that Regulation 4(3) Explanation 4 provided that Qualifying service shall include service rendered in the Govermnent provided that the amount of death-cum-retirement gratuity received by him from the Government is deposited with the Corporation immediately on receipt of such gratuity after his absorption in F.C.I.

10. It has, also, been submitted on behalf of the appellants/ F.C.I. Authorities that the concerned deputationists were duly paid gratuity for the period of service rendered by them with the Food Corporation of India with effect from the date of absorption of the said deputationists that is with effect from lst July, 1984 till the date of superannuation.

11. On behalf of the FCI Authorities it has been urged before this Court that the concerned deputationists purported to claim gratuity clubbing the period of service rendered by them with the State of West Bengal and approached the Assistant

Labour Commissioner (Central), Kolkata for appropriate relief, even though no amount was deposited with the FCI Authorities in terms of Explanation 4 to Regulation 4(3).

12. The Assistant Labour Commissioner (Central) granted relief to the aforesaid deputationists upon holding that they are entitled to such benefits and passed necessary order in this regard in favour of the concerned deputationists by directing the F.C.I. authorities to pay the additional amount to the said deputationists. As a matter of fact several similar types of orders were passed by the Assistant Labour Commissioner (Central) while deciding the claims of the concerned deputationists.

13. Challenging the aforesaid similar types of orders and/or directions passed by the said Assistant Labour Commissioner (Central) in favour of the concerned deputationists the appellants/F.C.I. authorities filed several writ petitions on identical grounds and this Honourable Court ultimately dismissed all the writ petitions filed at the instance of the appellants herein pursuant to the judgment and order under appeal dated March 2, 2007 passed by the learned Single Judge in W. P. No. 5354 (W) of 2005.

14. Mr. Partha Sarathi Sengupta, learned Advocate, advanced the main arguments on behalf of the appellants-FCI authorities and Mr. R.N. Das, learned Senior Advocate representing the appellants-F.C.I. authorities in several other appeals virtually adopted the arguments made by Mr. Sengupta.

15. The submissions made on behalf of the appellants in these appeals are summarised hereunder:

(i) The Payment of Gratuity Act deals with payment of gratuity under the said Act. The claim made by the concerned employees herein are not under the said Act but in terms of Explanation 4 to Regulation 4(3) under the Food Corporation of India (Death-cum-Retirement Gratuity) Regulations, 1967.

(ii) Section 4(5) of the Act only protects the right of an employee to receive better terms of Gratuity under any award or agreement or contract. But the gratuity is

payable under that award/agreement/contract and not under the Act. So the authority has no jurisdiction.

(iii) The remedy of appeal provided under the Act is not at all an alternative remedy as deposit of the amount awarded by the Controlling authority is a condition precedent. In the present context the problem involves hundreds of such deputationists and the amount to be so deposited will be a huge amount, which will affect FCI's functioning as can be reasonably understood. Such a remedy can hardly be called an alternative remedy. In this context reliance has been placed on the Constitution Bench judgement of the Supreme Court in the case reported in AIR 1954 SC 403 (para 19) and also AIR 1966 SC 197 (Para 15).

(iv) Even if the remedy of appeal is treated as an alternative remedy, in the facts of this case the same is not an efficacious remedy in view of requirement of deposit of huge amount. The aforesaid argument was not accepted only on the ground of absence of pleading even though it is a question of law. A remedy which can otherwise be treated as efficacious in a case involving one person depositing a paltry amount may not be an efficacious remedy when hundreds of persons are involved and a huge amount is required to be deposited.

(v) In any event, existence of an alternative remedy is not an absolute bar and in the facts of the case all the petitions should not have been dismissed on the ground of alternative remedy and the matter should have been heard and decided on merits. Reliance has been placed on the decision of the Supreme Court in the case reported in : 2000(120)ELT29(SC) (J.M. Baxi and Co., Gujarat v. Commissioner of Customs, New Kandla and Anr.).

(vi) Further, the Regulation in its applicability clause being Regulation 2 clearly says that the Regulation shall not apply to employees who are covered by the provisions of the Payment of Gratuity Act, 1972. So if an employee is covered by the Payment of Gratuity Act, 1972, Regulations shall not apply to him.

(vii) In any event, the Regulation and the Act provided for two separate packages and one has to take either of them. One cannot take best of both the packages.

(viii) Though the impugned judgement was to be delivered on the question of maintainability, the Court has made observations on merits also.

(ix) There are instances where some of the deputationists have approached this Hon'ble Court directly invoking its Constitutional writ jurisdiction without forwarding their cases to the respective Assistant Labour Commissioners (Central) and the same being pending and since the question of entitlement will have to be decided in the said case being W.P. No. 16856 (W) of 2006 (Chandra Ghosh v. Food Corporation of India and Ors.) this Hon'ble Court should have decided the instant writ petition on merits upon calling for affidavits along with that case.

16. Mr. Partha Sarathi Sengupta, learned Counsel representing the appellants in one of these appeals submitted before this Court that the State Government and FCI are different employers. The total service of the concerned employee in the aforesaid two organisations, therefore, cannot be clubbed together to count 'continuous service' within the meaning of Section 2A of the Payment of Gratuity Act, 1972 (hereinafter referred to as the said 'Act'). Mr. Sengupta also submits that the appointment of ALC under Section 3 of the Act being 'for the administration of this Act...; the claim under Section 7 for payment of gratuity should only be 'under this Act....' This expression also occurs in the proviso to Section 9(2) and in Section 13 as well as in Rules 7, 9, 11(4), 17 and 19 of the Payment of Gratuity (Central) Rules, 1972. Thus, the argument of FCI is that the other claims cannot be decided by ALC. Mr. Sengupta further submits that the employee concerned has been claiming benefit under Food Corporation of India (Death-cum-Retirement Gratuity) Regulations, 1967 (hereinafter referred to as Regulations) and not under the Act and therefore, Assistant Labour Commissioner (hereinafter referred to as ALC) cannot decide the same. According to Mr. Sengupta, though the right of an employee to receive better terms of gratuity under any contract etc. is protected by Section 4(5), ALC is not the forum to decide such right and the employee may pursue in other forums.

17. Mr. Sengupta strongly urged before this Court that the order of ALC is without jurisdiction and, therefore, the appellants herein are not required to file statutory appeal as the writ petition is very much maintainable. Mr. Sengupta also argued

that when question of jurisdiction is involved, a writ petition is maintainable and the same has to be decided on merits. In the aforesaid context, Mr. Sengupta also submitted that if the case was decided on merits by the Trial Court, F.C.I. could rely on the provisions of the Regulations including Regulation 5 in order to ensure an effective proper adjudication. According to the learned Counsel of the appellants, in view of the decision of the learned Single Judge, F.C.I, will suffer serious prejudice for want of any forum to challenge the decision of the ALC at this stage.

18. Mr. L.K. Gupta, learned Senior Counsel representing the concerned employees submits that the counting of prior service is a promise made by the appellant-F.C.I. in the Regulation and in circular and also in the Circular No. 47 of 1996 dated 21st November, 1996. According to Mr. Gupta, Section 4(5) of the Act also recognises the said benefit. Mr. Gupta submits that the ALC has been appointed in the present case under Section 3 for the administration of the said Act but the said jurisdiction of ALC obviously includes those conferred on him under Section 7(4) which authorises the ALC in the instant case to decide as to the admissibility of any claim of, or in relation to, any employee for payment of gratuity. Mr. Gupta further subxnits that in the present case, dispute relating to the admissibility of the claim by counting prior service in terms of Explanation 4 to Regulation 4(3) has been raised and, therefore, the ALC had the jurisdiction to decide the same. The learned Senior Counsel of the employees specifically submits that the aforesaid claim under the Regulation is a claim for better terms under a contract by applying the ratio laid down in : (1986)IILLJ171SC (CIWTC v. Brojonath Ganguly) Paras 9 & 10 and hence, the same is well within the ambit of Section 4(5) of the Act.

19. Mr. Gupta also submits that requirement of refund of gratuity amount received from the State Government to the F.C.I, as a condition for counting of prior service as provided in Explanation 4 to Regulation 4(3) was waived by the F.C.I, by the letter dated 4th March, 1994 which specifically provides that such money need not be refunded but will be adjusted against final payment. Mr. Gupta, learned Senior Counsel representing the concerned employees in these appeals specifically urged before this Court that the F.C.I. (Death-cum-Retirement Gratuity)

Regulations, 1967 became redundant in 1994 when the Payment of Gratuity Act, 1972 was amended by lifting the ceiling. Mr. Gupta submits that in view of the aforesaid amendment of the Payment of Gratuity Act by the Parliament by lifting the ceiling, the said Act started holding the Field relating to the payment of gratuity in the establishment of F.C.I. Mr. Gupta also submits that in spite of the aforesaid amendment of the Payment of Wages Act, appellant-F.C.I. because of the specific provision of Section 4(5) of the Act issued the circular dated 21st November, 1996 allowing continuation of the benefit of the provision for counting of past service.

20. It has been argued on behalf of the appellants-F.C.I. authorities that the better terms of gratuity under any contract etc. although is protected under Section 4(5) of the Act, the ALC is not the appropriate forum to decide any claim relating to the payment of the gratuity amount. Mr. Gupta, learned Senior Counsel of the respondent employees, however, opposed the aforesaid contentions of the appellants and submits that Section 7(4)(a) of the Act confers jurisdiction upon ALC to decide the dispute relating to admissibility of any claim for gratuity. Mr. Gupta also referred to and relied on the decisions of the Bombay High Court in the case of Ramjilal Chimanlal Sharma v. Elphinston Spinning and Weaving Mill Co. Ltd. and Anr. reported in 1984 Lab. I.C. 1703 and the decision of this Hon'ble Court in the case of Eastern Coal Fields Ltd. v. Regional Labour Commissioner (Central), Calcutta and Ors. reported in 1981(2) CLJ 478 and submitted that a statutorily recognised right under Section 4(5) of the Payment of Gratuity Act, 1972 is also enforceable under the statute and by the authority prescribed by the said statute.

21. Respondents-employees concerned in these appeals raised disputes relating to the admissibility of the claim for payment of gratuity by counting prior service in terms of Explanation 4 to Regulation 4(3). In our considered opinion, Mr. Gupta, learned Senior Counsel representing the respondent employees has rightly submitted that the aforesaid claim for payment of gratuity by counting prior service in terms of Explanation 4 to Regulation 4(3) should be regarded as a claim for better terms under a contract in view of the ratio laid down by the Supreme Court in the case of CIWTC v. Brojonath Ganguly (Supra) and therefore, the said claim for better terms of gratuity under the Contract (Regulation) is protected under

Section 4(5) of the Payment of Gratuity Act, 1972. The respondent employees in these appeals claimed the right to receive better terms of gratuity as provided in the Regulations and protected under Section 4(5) of the Payment of Gratuity Act and therefore, the said claim to receive better terms of gratuity under Section 4(5) has to be made before the controlling authority constituted under the Payment of Gratuity Act and the said controlling authority is competent to decide such claims of the employees in terms of Section 7(4)(b) & (c) of the said Payment of Gratuity Act.

22. In the case of Eastern Coal Fields Ltd. (Supra), Justice G.N. Ray (as His Lordship then was) specifically observed as hereunder:

7. ...In my view, it will not be a proper construction in keeping with the beneficial purpose of the legislation, that although under Section 4(5) of the Act an employee may be entitled to a higher payment of gratuity but for enforcing such favourable terms of service for higher gratuity, he should move a different forum and the authority under the Gratuity Act cannot entertain such claim of higher amount of gratuity....

23. In the present case, we are also of the opinion that the provisions of Section 4(5) of the Payment of Gratuity Act, 1972 have protected the rights of the respondents F.C.I. employees to receive better terms of gratuity under any contract with the employer (DCRG Regulations) and, therefore, the disputes relating to the claims of the concerned F.C.I. employees namely, the respondent employees in these appeals are to be decided by the ALC in terms of Section 7(4)(b) & (c) of the Payment of Gratuity Act, 1972. Accordingly, the ALC has acted clearly within jurisdiction in entertaining the claims of the respondent employees concerned and deciding the same on merits. Therefore, the orders of the ALC cannot be said to be without jurisdiction under any circumstances.

24. Mr. Sengupta, learned Counsel representing the appellants-F.C.I. authorities relying on the judgment in Whirlpool's case reported in 1998(8) SCC 1, argued before this Court that when question of jurisdiction is involved, a writ petition is to be decided on merits. In the aforesaid case, a show-cause notice under the Trade and Merchandise Marks Act, 1958 was challenged in a petition under Article 226

on the ground that the same was without jurisdiction. The High Court did not entertain the petition, as there was a provision for appeal. The writ petition was dismissed in limine. In appeal, the Supreme Court went into the question of the existence of jurisdiction and it found that a show-cause notice was issued without statutory authority and without jurisdiction. Accordingly, the notice was quashed. In the present case, the learned Single Judge also strictly followed the aforesaid procedure. The question of existence or otherwise of jurisdiction of the ALC to decide the admissibility of benefit under Regulations was gone into on merits. Thus, the writ petition was entertained and the same was not dismissed in limine because of existence of alternative statutory remedy. Upon consideration of merits regarding the jurisdiction issue, learned Single Judge held that ALC did have jurisdiction.

25. It has also been argued on behalf of the appellants-FCI authorities that the circular dated 21st November, 1996 is contrary to the Food Corporation of India (Death-cum-Retirement Gratuity) Regulations, 1967 (hereinafter referred to as 'DCRG Regulations') and it cannot be legally valid since an administrative order cannot override a statutory regulation. We are unable to accept the aforesaid contentions of the appellants herein in the facts and circumstances of the present case. The DCRG Regulations was made in the year 1967 under the Food Corporation Act, 1964 for providing payment of gratuity to the employees. DCRG Regulations continued even after the Payment of Gratuity Act, 1972 came into force in respect of such of the employees of the F.C.I. who were not covered by the said 1972 Act because of the ceiling limit of salary provided in the said Act. In 1994 Payment of Gratuity Act, 1972 was amended and the ceiling limit of salary was lifted, as a result whereof all employees in the establishment of F.C.I. came within the purview of the 1972 Act as amended by the Payment of Gratuity (Amendment) Act, 1994. The aforesaid Act thus covered the field and in view of Section 14 of the 1972 Act, the provisions thereof would have effect notwithstanding anything inconsistent therewith contained in any enactment other than the said Act or any instrument or contract having effect by virtue of any enactment other than the said Act.

26. Mr. Gupta has rightly submitted that DCRG Regulations is not an Act and must yield to the Parliamentary Act. In any event, in view of the overriding provision of Section 14 of 1972 Act, DCRG Regulations has become redundant. It is only the better terms contained in the contract etc. which are specifically saved in view of the clear provision of Section 4(5) of the said Act. Realising the aforesaid legal position, F.C.I. authorities issued the circular dated 21st November, 1996 wherein it has been specifically provided that all future claims of gratuity are to be decided as per the 1972 Act but in view of Section 4(5) of the Payment of Gratuity Act, the right of an employee to receive better terms of gratuity under DCRG Regulations regarding counting of prior service will continue to remain effective. The relevant Clause of the aforesaid circular dated 21st November, 1996 is set out hereunder:

3. Consequently, all future settlements of payment of gratuity will be under the provisions of the Payment of Gratuity Act as amended from time to time. As per Section 4(5) of the Payment of Gratuity Act, the provisions exist to project the right of an employee to receive better terms gratuity, if it had been extended so far. As per the said proviso, the favourable benefits shall continue to be extended to the existing employees covered under F.C.I. (DCRG) Regulations to the extent applicable. In this regard, the favourable benefits that shall be applicable under the F.C.I. (DCRG) Regulations are:i) Counting of prior service before joining the Corporation....

27. The arguments advanced on behalf of the appellants-F.C.I. authorities that the aforesaid circular dated 21st November, 1996 is an administrative circular and hence, cannot override a statutory regulation namely, the DCRG Regulations cannot be accepted in the facts of the present case since DCRG Regulations itself has suffered a legal death by reason of Payment of Wages Act covering the field. The administrative circular dated 21st November, 1996 correctly lays down the effect of the 1994 Amendment of the Payment of Gratuity Act, 1972 read in the context of Sections 14 and 4(5) of the said Act.

28. In this context, we like to add further that the Circular dated 21st November, 1996 was issued by the competent authority when the 1967 Regulations had become redundant and was not in force. The overriding effect of the Act would

cover the field in view of Section 14 of the Act. Section 4(5) of the Act protected better terms and the same is reflected in the Circular dated 21st November, 1996. The authority, in our view, is now estopped from challenging its own circular in order to deny the benefits to its employees.

29. Mr. Sengupta, learned Counsel representing the appellants specifically argued that the requirement of pre-deposit of the disputed amount of gratuity makes the right of appeal nugatory. Mr. Gupta, learned Senior Counsel of the respondents employees, however, submits that the 1972 Act is a complete Code containing provisions for dealing with all situations and the right of appeal in the present case is statutorily conferred right which should be availed of with the conditions attached to it. There is no doubt that the statutory remedy is to be availed of with the conditions attached to it.

30. The learned Counsel of the appellants although relied on the decision of the Supreme Court in the case of Himmatlal v. State of M.P., reported in : [1954]1SCR1122 , but we fail to understand how the ratio of the aforesaid decision applied in the present case since nothing was illegally imposed on the appellants herein nor anything was threatened to be realised without the authority of law. On the identical grounds the Hon'ble Supreme Court also in a subsequent decision reported in : 1978(2)ELT297(SC) , Chaturbhai M. Patel v. Union of India and Ors., distinguished the earlier decision of the Apex Court in the case of Himmatlal : [1954]1SCR1122 .

31. The learned Counsel of the appellants also cited another decision of the Supreme Court in the case of Customs Collector, Bombay v. Shanti Lal and Co. reported in : [1966]1SCR284 . In the case of Customs Collector, Bombay (Supra), the Supreme Court upheld the High Court judgment which entertained a writ petition against an order imposing penalty by the Customs Authority even where no statutory appeal was filed therefrom as the High Court found the imposition of penalty to be without jurisdiction. Before the Supreme Court, a plea was taken by the authorities that no pre-deposit was made which was a condition precedent for filing an appeal. In the context of the order impugned being without jurisdiction, the Supreme Court held that the High Court was right in such a case in deciding that

the appeal with such a condition is not an effective remedy.

32. In the present case, we have already held that the ALC had acted within the jurisdiction conferred on him by the 1972 Act. Accordingly, the ratio decided in the case of Customs Collector, Bombay (Supra) AIR 1966 SC 197 cannot have any manner of application in the facts of the present case.

33. We are, however, not inclined to decide whether the statutory remedy available in the present case is an alternative remedy or even if it is so, whether in the facts of this case, the same is efficacious one. Undisputedly, the appellants herein did not avail the statutory remedy by preferring the statutory appeal but we are not inclined to dismiss this appeal only on the aforesaid ground of non-availing the statutory remedy by not preferring an appeal to the appropriate authority under Section 7 Clause (vii) of the Payment of Gratuity Act, 1972 as the same would result in miscarriage of justice on account of lapse of time. Therefore, we propose to decide the issues raised before us on behalf of the appellants on merits.

34. The learned Counsel of the appellants specifically urged before this Court that the respondent employees are entitled to choose the benefits available either under the Act or under the DCRG Regulations. According to the learned Senior Counsel of the appellants, Section 4(5) of the Payment of Gratuity Act, 1972 protects the right of an employee to receive better terms of gratuity under a Contract (DCRG Regulations etc.) but not the best of both the benefits, one under the Act and the other under the Contract.

35. Referring to the decision of the Supreme Court in the case of Beed Districts Central Co-operative Bank Ltd. v. State of Maharashtra and Ors. reported in : (2007)ILLJ1SC , Mr. Sengupta, learned Senior Counsel of the appellants submits that the respondent employees cannot be permitted to claim one part of the benefits under the Act and the rest of the. benefits from the Regulations. According to Mr. Sengupta, either benefits to be received under the Act or under the Regulations and not under both Act and the Regulations as per suitability and convenience.

36. The concept of existence of two packages and the option to be exercised by an employee to come under either of them as in the aforesaid reported judgment does not exist in the present case. We have already held that DCRG became redundant after the 1994 Amendment of the Payment of Gratuity Act, 1972. The gratuity receivable by a retiring F.C.I. employee is provided in the 1972 Act. Under Section 4(5) of the said Act only the better terms of DCRG Regulations [which is a contract by applying the ratio of Brojonath Ganguly's case (Supra)] continues and available to the concerned employees. There is no existence of two packages in the present case.

37. The better terms of gratuity with which we are concerned here is the counting of prior service only. By the circular dated 21st November, 1996, the appellants-F.C.I. authorities have recognised the continued existence of the favourable benefits including the counting of prior service before joining the Corporation in view of Section 4(5) of the Act. In the case of Beed Districts Central Co-operative Bank Ltd. : (2007)ILLJ1SC (supra), there were two distinct and separate packages, one under the Act and the other under the Scheme framed by the Bank. The said scheme was not an instrument or contract having effect 'by virtue of any enactment' and accordingly, that scheme did not suffer a legal death by reason of Section 14 of the 1972 Act. In the said reported judgment, both the packages were existing and it was for an employee to choose either of them. In the aforesaid reported judgment, under the scheme the employees would get gratuity calculated at the rate of 26 days of wages in a year and a ceiling limit was prescribed whereas under the 1972 Act, the gratuity was to be calculated on the basis of 15 days pay in a year subject to a ceiling limit. The provision in the scheme for taking into account 26 days was more beneficial than the 15 days provided in the 1972 Act but the ceiling as per the scheme was lower than that provided in the Act. The employees in the aforesaid reported case took the better terms of gratuity in the scheme in the form of calculation of 26 days wages in a year and then claimed the higher ceiling provided in the Act. It was held that the scheme and the Act provided two separate packages and one cannot have best of both the benefits. This is not at all the factual situation in the present case.

38. In the instant case upon the 1972 Act becoming applicable to all F.C.I. employees irrespective of their pay by reason of the 1994 Amendment, the DCRG Regulations, which is at the highest a subordinate legislation, ceases to be operative except in respect of the better terms as protected by the circular dated 21st November, 1996 which was issued by the F.C.I. authorities in the context of Section 4(5) of the 1972 Act. Hence, the situation of the existence of two packages as in the case of Beed Districts Central Co-operative Bank Ltd. JT 2006(9) (SC) 260 (para 14) (supra) is absent in the present case. Because of the 1994 Amendment of the 1972 Act, there is only one package of gratuity available to F.C.I. employees, namely that under the Act. Benefits of Gratuity under DCRG Regulations are no longer applicable as a package. It is only the better terms of DCRG Regulations, namely counting of past service in State Government, protected under Section 4(5) of the Act.

39. Mr. Sengupta although urged before this Court that the requirement of refund of gratuity account received from the State Government to the F.C.I. authorities is a condition precedent for counting of prior service as provided in Explanation 4 to Regulation 4(3), which, in our opinion, is not a mandatory requirement since the F.C.I. authorities thus decided that the amount of gratuity so received by the employees concerned from the State Government during their tenure under the Government of West Bengal should be entered into service books of the respective employees and the same has to be deducted at the time of final settlement of gratuity. The aforesaid decision of the F.C.I. authorities has been specifically mentioned in the office memorandum dated 4th March, 1994 issued by the Deputy Manager (Personnel), Food Corporation of India. The said office Memorandum is quoted hereunder:

FOOD CORPORATION OF INDIA

REGIONAL OFFICE, WEST BENGAL,

6. ROYD STREET. CALCUTTA - 700016.

Ref. No. Estt/32(25)/90-Pt.I. Dated: 4th March, 1994.To -- 1. All District Managers, FCI, W.B. Region.

2. Deputy Manager (CSO), FCI, W.B. Region.

3. Asstt. Manager (A/cs. P) FCI, W.B. Region.

4. Asstt. Manager (Pen. Cell), F.C.I., W.B. Region.

Subject: Settlement/payable of Gratuity to Absorbed Class III & IV Employees retired from F.C.I.

Sir,

In continuation to this office instructions communicated vide this office order of even No. dated 13.11.90 on the aforesaid subject I am to say that it has also been decided that the amount of gratuity so received by the employees concerned from the A.G.W.B. during their tenure under the Government of West Bengal should be entered into the service books of the respective employees and the same has to be deducted at the time of final settlement of gratuity on retirement on expiry during the service in this organisation.

Considering the gravity of the matter you are requested to take follow-up action in a time-bound manner and apprise this office its development from time to time.

Yours faithfully,

Sd/- D.L. Mukherjee

Deputy Manager (Personal)

for Sr. Regional Manager.

40. The learned Senior Counsel of the appellants-F.C.I. authorities urged before this Court that the learned Single Judge made observations on merits although dismissed the writ petition only on the ground of maintainability and thus, deprived the appellants for preferring the appeal on merits. In any event, the learned Senior Counsel representing the appellants-F.C.I. avithorities admittedly urged various points apart from the maintainability of the writ petitions before us, which we have duly considered and decided on merits and, therefore, there is no scope to send

the matter back to the learned Single Judge for deciding any issue on merits as suggested by the learned Senior Counsel of the appellants.

41. For the reasons discussed hereinabove, we do not find any merit in these appeals and the same are, therefore, dismissed. In view of the dismissal of the aforesaid appeals, all the applications filed in connection with the said appeals also stand dismissed.

There will be, however, no order as to costs.

42. Let urgent xerox certified copy of this Judgment and order, if applied for, be given to the learned Advocates of the parties on usual undertaking.

Arunabha Basu, J.

I agree.

Later:

43. After pronouncement of the judgment, the learned Counsel of the appellants prays for stay of the operation of the said judgment and order. We do not find any reason to grant such stay. Accordingly, the prayer for stay is refused.