SUPREME COURT OF INDIA

Grand Kakatiya Sheraton Hotel & Towers Employees & Workers Union

Vs.

Srinivasa Resorts Ltd.

C.A.No.6499 of 2002

(Lokeshwar Singh Panta and V.S. Sirpurkar JJ.)

27.02.2009

JUDGEMENT

V.S. SIRPURKAR, J.

This appeal is directed against the judgment and order passed by the High Court, whereby, Sections 47(3) and 47(4) of the Andhra Pradesh Shops &

Establishments Act, 1988 (hereinafter referred to as `the Shops Act') are declared unconstitutional, discriminatory and violative of the Articles 14 and 19(1)(g) of the Constitution of India. Following facts would be necessary to understand the controversy.

2. Respondent No. 1 M/s. Srinivasa Resorts Ltd. is a company incorporated under the Companies Act, while the respondent No. 2 is a shareholder of the said company. Respondent No. 1 company is engaged in business of managing and running hotels. They have hotel in the name and style of "ITC Kakatiya Sheraton", which is being run by the ITC Hotels Ltd., which is another company incorporated under the Companies Act. The said hotel is registered under the provisions of the Shops Act. The appellant is the Union of employees and workers of the said hotel. Assistant Labour Officer, respondent No.

4 herein, visited the hotel at the instance of the appellant Union on 31.5.2001 and as required by him, the respondent Nos. 1 & 2 furnished information regarding the employees, who had left the service of the hotel during last 2-3 years, as also the amounts paid to them towards full and final settlement of the dues. The respondent company, by letter dated 6.8.2001, also furnished the receipts signed by the employees who had left the hotel in token of the amounts received by them.

It seems that, thereafter, there was lot of correspondence between the respondent No. 1 company and respondent No. 4 Assistant Labour Officer on the issue, whereby, the Assistant Labour Officer was insisting upon the respondent Company to furnish the final settlement statements of the employees, who had left the service of the hotel, in order to know whether any service compensation had been paid to them or not in accordance with the provisions of the Shops Act. It was pleaded by the respondent company that no further documents except those which were already produced, were available with them. However, the Assistant Labour Officer, by his letter dated 7.8.2001, called upon the respondent company to show cause as to why penal action should not be taken under Section 16(3) of the Act for failure to furnish the required documents. It is at this juncture that a Writ Petition came to be filed before the Andhra Pradesh High Court by the

respondent Nos. 1 & 2 herein, whereby, constitutional validity of the provisions of Sections 47(3) and 47(4) of the Shops Act in question, was challenged on the ground that they are illegal, invalid, inoperative and unsustainable in law and violative of Article 13, 14 and 19(1)(g) of the Constitution of India. Since the action against the respondent company was initiated by the appellant Grand Kakatiya Sheraton Hotel & Towers Employees & Workers Union (hereinafter referred to as `the Union' for short), the said Union joined as a party, as the respondent No. 3 to the Writ Petition. An injunction was also sought for against the concerned authorities under the Act and more particularly, the State Government and the Assistant Labour Officer, restraining them from inferring the provisions of Sections 47(3) and 47(4) of the Shops Act against the respondent company. This Writ Petition was allowed by the High Court, whereby, the High Court declared the two aforementioned provisions as unconstitutional and amounting to unreasonable discrimination and violative of Article 14 of the Constitution of India.

3. The original respondent No. 3 Union has filed the present appeal, challenging the impugned judgment.

4. There was one other appeal being Civil Appeal No. 2746 of 2006, which was attached with the present Civil Appeal No. 6499 of 2002, however, when the matter was called for hearing on 5.11.2008, nobody remained present for arguing that appeal, which was dismissed for non-prosecution with no orders as to the costs. We are, therefore, left with Civil Appeal No. 6499 of 2002 only.

5. Before we note and appreciate the rival contentions, it will be better to see the impugned provisions along with the legislative history thereof.

6. The Andhra Pradesh Shops and Establishments Act (Act No. 15 of 1966) (hereinafter referred to as `the 1966 Act') came on the anvil in the year 1966. Section 40 of the 1966 Act provided for conditions for terminating the service of an employee, as also the payment of gratuity to him. This provision came to be amended in the year 1976 by reason of Act No. 53 of 1976, however, the said Act was repealed by the present Act of 1988. The present Act of 1988 provides for conditions of terminating the services of an employee and payment of service compensation for termination, retirement, resignation etc. In short, Section 40 of the 1966 Act and Section 47 of the 1988 Act are pari-materia Sections. It will be better to compare the unamended Section 40, that existed from 1966 till its amendment in 1976, secondly, the amended Section 40 of the 1966 Act as amended by Act No. 53 of 1976 and Section 47 of the present 1988 Act, more particularly, sub-Sections 3, 4 and 5 thereof, as they stood on the date of petition.

The following tables would succinctly bring out the qualitative changes made in the texture of the said Section. At the same time, they would give us the idea as to how a liability was created via sub-Sections 3 and 4 for the payment of the service compensation and the conditions for such payment.

Section 40 of A.P. Shops and Establishments Act, 1966 prior to 1976:- Conditions for terminating the service of an employee and payment of gratuity:- 1 No employer shall without a reasonable cause and except for misconduct, terminate the services of an employee and payment of gratuity.

2 No employer shall without a reasonable cause and except for misconduct, terminate the services of an employee, who has been in his employment continuously for a period of not less than six months without giving such employee at least one month's notice in writing or wages in lieu thereof and gratuity amounting to fifteen days' average wages for each year of continuous service.

3 An employee who has completed the age of sixty years or who is physically or mentally unfit having been declared by a medical certificate, or who wants to retire on medical grounds or to resign his services, may give up his employment after giving to his employer, notice of at least one month in the case of an employee of sixty years of age, and fifteen days in any other case; and every such employee and the dependant of an employee who dies while in service, shall be entitled to receive a gratuity amounting to fifteen days' average wages for each year of continuous employment calculated in the manner provided in the explanation to sub-Section (1). He shall be entitled to receive the wages from the date of giving up the employment until the date on which the gratuity so payable is actually paid subject to a maximum of wages for two months.

Section 40 of A.P. Shops and Establishments Act, 1966 as amended by Act No. 53 of 1976:- Conditions for terminating the service of an employee and payment of gratuity:- 1 No employer shall without a reasonable cause and except for misconduct, terminate the services of an employee, who has been in his employment continuously for a period of not less than six months without giving such employee at least one month's notice in writing or wages in lieu thereof and in respect of an employee who has been in his employment continuously for a period of not less than five years, a gratuity amounting to fifteen days' average wages for each year of continuous service.

2 An employee who has completed the age of sixty years or who is physically or mentally unfit having been declared by a medical certificate, or who wants to retire on medical grounds or to resign his services, may give up his employment after giving to his employer, notice of at least one month in the case of an employee of sixty years of age, and fifteen days in any other case; and every such employee and the dependant of an employee who dies while in service, shall be entitled to receive a gratuity as provided in sub-Section (1). He shall be entitled to receive the wages from the date of giving up the employment until the date on which the gratuity so payable is actually paid subject to a maximum of wages for two months amounting to fifteen days' average wages for each year of continuous employment calculated in the manner provided in the explanation to sub-Section (1). He shall be entitled to receive the wages from the date of giving up the employment until the date on which the gratuity so payable is actually paid subject to a maximum of wages for two months.

Section 47(3), (4) and (5) of A.P. Shops and Establishments Act, 1988:- Conditions for terminating the service of an employee, payment of service compensation for termination, retirement, resignation, disablement etc.

and payment of subsistence allowance for the period of suspension:- 1 No employer shall without a reasonable cause and except for misconduct, terminate the services of an employee, who has been in his employment continuously for a period of not less than six months without giving such employee at least one month's notice in writing or wages in lieu thereof and in respect of an employee who has been in his employment continuously for a period of not less than one year, a service compensation amounting to fifteen days average wages for each year of continuous employment:

provided that every termination shall be made by the employer in writing and a copy of such termination order shall be furnished to the Inspector having jurisdiction over the area within three days of such termination.

2 The service of an employee shall not be terminated by the employer when such employee made a complaint to the Inspector regarding the denial of any benefit accruing to him under any labour welfare enactment applicable to the establishment and during the pendency of such complaint before the Inspector.

The services of an employee shall not also be terminated for misconduct except for such acts or omissions and in such manner as may be prescribed.

3 Every employee who has put in a continuous service of not less than one year, shall be eligible for service compensation amounting to fifteen days' average wages for each year of continuous employment (i) on voluntary cessation of his work after completion of 60 years of age, (ii) on his resignation, or (iii) on physical or mental infirmity duly certified by a registered medical practitioner or (iv) on his death or disablement due to accident or disease:

provided that the completion of continuous service of one year shall not be necessary where the termination of the employment of an employee is due to death or disablement:

provided further that in case of death of an employee service compensation payable to him shall be paid to his nominee or if no nomination has been made to his legal heir.

4 Where a service compensation is payable under this Section to an employee, he shall be entitled to receive his wages from the date of termination or cessation of his services until the date on which the service compensation so payable is actually paid.

5 The payment of service compensation under this Section shall not apply in cases where the employee is entitled to gratuity under the payment of Gratuity Act, 1972 and gratuity has been paid accordingly consequent on the termination or cessation of service.

At this juncture, it will be necessary to see definitions in the amended Act. Section 2 gives definitions in the Act.

2(5): `Commercial establishment' means an establishment which carries on any trade business, profession or any work in connection with or incidental or ancillary to any such trade business or profession or which is a commercial or trading or banking or insurance establishment and includes an establishment under the management and control of a co-operative society, an establishment of a factory or an industrial undertaking which falls outside the scope of the Factories Act, 1948 (Central Act 63 of 1948), and such other establishment as the Government may, by notification, declare to be a commercial establishment for the purposes of this Act but does not include a shop'.

2(8) `employee' means a person wholly or principally employed in and in connection with any establishment and includes an apprentice and any clerical or other staff of a factory or an industrial establishment who fall outside the scope of Factories Act, 1948 (Central Act 63 of 1948); but does not include the husband, wife, son, daughter, father, mother, brother or sister of an employer or his partner, who is living with and depending upon such employer or partner and is not in receipt of any wages;

2(9) `employer' means a person having charge of or owning or having ultimate control over the affairs of an establishment and includes the Manger, Agent or other person acting in the management or control of an establishment;

2(10) `establishment' means a shop, restaurant, eating house, residential hotel, lodging house, theatre or any place of public amusement or entertainment and includes a commercial establishment and such other establishment as the Government may, by notification, declare to be an establishment for the purpose of this Act;

2(21) `shop' means any premises where any trade or business is carried on where services are rendered to customers and includes a shop run by a co- operative society, an office, a store-room, go-down, warehouse or work place whether in the same premises or otherwise, used in connection with such trade or business and such other establishments, as the Government may, by notification, declare to be a shop for the purpose of this Act, but does not include a commercial establishment.

Chapter II deals with registration of establishments. Chapter III relates to shops and Chapter IV relates to establishments other than shops. Chapter V relates to employment of women, children and young persons. Chapter VI relates to health and safety, Chapter VII relates to leave and holidays with wages and insurance scheme for employees. Chapter VIII deals with wages, conditions for termination of services, appeals, and suspension and terminal benefits.

At this juncture, it will be better to see a few provisions of Payment of Gratuity Act, 1972. Sub-Section (3) of Section 1 provides as under:- (3) It shall apply to:- (a) every factory, mine, oil field, plantation, port and railway company;

(b) every shop or establishment within the meaning of any law for the time being in force in relation to shops and establishments in a State, in which ten or more persons are employed or were employed, on any day of the preceding twelve months;

(c) such other establishments or class of establishments in which ten or more employees are employed, or were employed, on any day of the preceding twelve months, as the Central Government, may, by notification, specify in this behalf.

3A. A shop or establishment to which this Act has become applicable shall continue to be governed by this Act, notwithstanding that the number of persons employed therein at any time after it has become so applicable falls below ten.

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.

xxx xxx xxx (2) For every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days' wages based on the rate of wages last drawn by the employee concerned provided that in the case of a piece-rated employee, daily wages shall be computed on the average of the total wages received by him for a period of three months. Immediately preceding the termination of his employment and for this purpose, the wages paid for any over time work shall not be taken into account.

Section 7 of the Payment of Gratuity Act, 1972 provides for the determination of the amount of

grautuity. Under sub-Section (1), an eligible employee under the said Act has to make a written application, while sub-Section (2) makes it binding on the employer to determine the amount of gratuity and specify the same to the controlling authority, even if such application is not made.

The mandate of sub-Section (3) is to make the payment of gratuity within 30 days of the date, it becomes payable to such eligible employee. Section 3A provides for the interest, where gratuity is not paid within the prescribed period.

7. The challenge before the High Court was that the impugned provisions of the Shops Act, viz., Sections 47(3) and 47(4) are ex-facie unreasonable, since the service compensation is now payable under the same even to the employee, who has resigned or voluntarily left service after attaining the age of 60 years though he had not put in long and continuous service, as required under the Payment of Gratuity Act. The further challenge was that the employee becomes entitled to receive wages from the date of termination or cessation of his services till the date he is actually paid the service compensation as per sub-Section 4 of the Shops Act.

The respondent company (petitioner before the High Court) urged that this was arbitrary, oppressive, discriminatory and violative of the Article 14 of the Constitution of India. It was urged that the employer was forced to pay the service compensation, even though cessation of service in cases of resignation and voluntary cessation after completion of 60 years, was not on account of any act on the part of the employer.

8. Heavy reliance was placed by the appellant/petitioner on the judgment 578.

9. Before the High Court, the State sought to defend the said provisions on the ground that the impugned provisions were made for the payment of extra wages. It was urged that the provisions of Sections 47(3) and 47(4) were applicable only to those employees, who were not governed by the Payment of Gratuity Act. It was pointed out that the provisions of Payment of Gratuity Act were applicable only to those employees, who had completed minimum of 5 years of service, while the provisions of the impugned sub-Sections (3) and (4) of the Shops Act would be applicable to the employees, who had served even less than 5 years. According to State, this was a reasonable classification, having a nexus with the purpose for which the provisions were brought into existence. It was stated further that considering objects and reasons of the Shops Act, it was apparent that there was no conflict between the Payment of Gratuity Act and the Shops Act. It was also urged that since the number of employees in a shop, governed by the Shops Act could be limited to one or two persons and their services also might not continue for a long period, therefore, in order to help such employees, a special provision was made considering such employees as a separate class. Section 47(4) was sought to be saved on the logic that it was nothing, but a concept of Section 25F of the Industrial Disputes Act, 1947 and on that basis, the said sub-Section would be constitutionally valid.

10. The High Court in its judgment firstly found that the respondent company admittedly had not complied with the provisions of sub-Sections (3) and (4) of the Shops Act on the basis of the Reply Affidavit filed on behalf of the appellant/petitioner. The Court further found on comparison of the provisions of the 1966 Act and 1988 Act that they were almost identical and the payment of gratuity was replaced by the introduction of the concept of service compensation.

The only change was to extend the minimum requirement period of six months to one year. The High Court also found that the establishment of the respondent company was indisputably covered

under the Shops Act. The High Court thereafter noted that the unamended provisions of Sections 40(1) and 40(3) of the 1966 Act had been challenged earlier before the Division Bench and the same were declared invalid under Article 14 of the Constitution of India on the ground that while in factories which are large in size, the workers, in order to earn the gratuity, would have to render long and meritorious service under a scheme of Payment of gratuity prior to enactment of the Payment of Gratuity Act, 1972, however, the employees working in the nearby office, which is much smaller in its operations, would be entitled to such gratuity on rendering a mere six months of unbroken service. The High Court then commented that even when the earlier judgment of the High Court had attained finality, by way of the present amendment only a cosmetic amendment was made. The High Court then went on to analyse Section 47 and pointed out that in contrast with sub-Section thereof, under sub-Section (3), the amount of service compensation is required to be paid even if the cessation of service is caused not by the employer, but at the instance of the employee. It was further noted that in case of termination of an employee due to death or disablement, even the condition of completion of continuous service of one year was not necessary. The onerousness of sub-Section 4 was also noted by the High Court that the employee becomes entitled to be paid the wages from the date of his termination or cessation of his service right until the date of the actual payment of service compensation. The High Court also saw the contradictions that the Shops Act was applicable to the administrative offices of the factories and the employees working therein. While the employee working in the factory would be eligible for gratuity only after rendering five continuous years of meritorious service, the employees working in the administrative office adjacent to the said factory, would, however, be eligible for service compensation under Section 47(3) by merely
rendering one year's service. The High Court then held that the service compensation was nothing, but a gratuity. Considering the meaning of the word "gratuity", the High Court found that the service compensation was nothing, but the gratuity, which was payable to the employee as a gift or reward for rendering long and continuous service. It also found that a mere service of one year or so could not be viewed as a long and continuous service, so as to entitle the employee to earn the service compensation or in other words, the "gratuity". The High Court took into consideration the provisions of the Gratuity Act and found that the minimum period of service therein was five years, as also for the Government servants of the State, the minimum qualifying period for earning gratuity was 10 years of service. Comparatively, the High Court came to the conclusion that limiting this period of long, continuous and satisfactory service only to one year was unreasonable and discriminatory. The High Court also severely commented on the provisions that in case of death or disablement, the condition of completion of one year of service was also not necessary. The High Court then relying on the SC 106, held that to treat unequals equal, would amount to discrimination and held that Section 47(3) had that effect. The High Court then referred to the cases Thereafter, the High Court considered the scheme of payment of gratuity as required by the Payment of Gratuity Act and observed that Section 4(1)(b) has been held to be a reasonable classification within the meaning of Article 19(1)(g) of the Constitution of India. Referring to number of other decisions, the High Court observed:- "It may be true that having regard to the provisions contained in List III of the VII Schedule of the Constitution, the State can also lay down certain conditions of service. But, the same would not mean that smaller units will be burdened with a harsher, oppressive and more onerous statutory obligations than their big brothers."

It was found that the same field was being covered by the Central legislation, as well as, the impugned State legislation. The High Court, however, pointed out that merely because the State legislation had received the Presidential assent, that, by itself, could not save the State legislation if it was otherwise discriminatory. This observation was made on finding that there existed no

evidence that the possible conflict in Central Act and the State Act was brought to the notice of the President before the assent was obtained. On the factual aspect, the High Court observed that, in fact, there were number of employees, who had left the service and thereafter, had not been heard for a few years and as such, they could not be said to have rendered any work which would entitle them to receive gratuity or service compensation. The High Court ultimately held that those, who had abandoned their services, were not entitled to get any benefits under the impugned provisions. Thus, the High Court specifically found the two provisions, viz., 47(3) and 47(4) to be unreasonable. These provisions and more particularly, Section 47(4) was found to be contrary to the basic principles of service jurisprudence. The High Court ultimately allowed the Writ Petition. It is this judgment, which has fallen for our consideration in the present appeal.

11. The Learned Counsel for the appellant firstly pointed out that impugned Sections 47(3) and 47(4) are constitutionally valid and suffer from no infirmity. He secondly urged that as has been done by the High Court, the legislation cannot be struck down on the ground of mere hardship. His third contention was that the High Court had resorted to the comparisons between two legislations by two different legislatures while deciding upon the constitutionality of the aforementioned provisions, which was not permissible. The Learned Counsel fourthly urged that merely because the lesser period for the purpose of grant of service compensation was provided, it did not impinge upon constitutionality and it was perfectly permissible for the legislature to prescribe lesser period. Fifthly, the Learned Counsel urged that in the impugned judgment, it was not shown as to how the fundamental rights of the respondent Nos. 1 & 2 under Article 14 and 19(1)(g) were violated. The Learned Counsel also suggested that the High Court erred in holding that the Presidential assent under Article 254 (2) was inconsequential. Lastly, the Learned Counsel urged that the decision in reported in 1972(2) ALT 163 was not correctly decided and could not be relied upon for striking down Section 47(3) of the Shops Act.

12. Shri L. Nageshwar Rao, Learned Senior Counsel appearing on behalf of the respondent company urged that the High Court had not struck down concerned impugned provisions merely on the ground of hardship. He pointed out that the High Court had taken the overall effect of the provisions and had come to conclusion that the provisions were unreasonable and hence, unconstitutional. As regards the third contention raised by the Learned Counsel for the appellant, Shri Rao pointed out that the Court had not made any comparisons between two legislations by two different legislatures. On the other hand, the Court had found that the basic concept of "service compensation" or as the case may be, "gratuity", was completely abused by Section 47(3), while Section 47(4) was inherently bad, as it was unreasonable and capable of misused. The Learned Senior Counsel pointed out that the Court had also pointed out that Section 47(3) was capable of giving different treatment to the two sets of employees, who were similarly circumstanced and, therefore, it was hit by Article 14 of the Constitution of India. As regards the Darshan Engineering Works & Ors. reported in 1994 (1) SCC 9 and pointed out that the principles on which the gratuity was granted, were completely abused by providing a period of one year's service or even lesser period for the entitlement of gratuity or as the case may be, service compensation. Shri Rao further pointed out that the Court had given good reasons relying on the judgment of Express (cited supra) that the High Court had properly tested the impugned provisions and showed as to how the fundamental rights of the respondent Nos. 1 & 2 under Article 14 and 19(1)(g) were violated. The Learned Senior Counsel pointed out that the finding of the High Court was that there was no evidence placed before it regarding the material placed before the President for obtaining the consent.

Lastly, the Learned Senior Counsel pointed out that after decision in case of (cited supra) by the

Division Bench of the High Court, striking down Section 47(3) of the Shops Act, mere cosmetic changes were brought about in the fresh legislation, which was impermissible for the legislature.

13. We shall collectively consider the arguments. The High Court has (cited supra), more particularly, from paragraph 205, which is the final verdict of this Court in that case, but before that also, in paragraph 198, it is observed:- "198. When we come, however, to the provision in regard to the payment of gratuity to working journalists who voluntarily resigned from service from newspaper establishments, we find that this was a provision which was not at all reasonable. A gratuity is a scheme of retirement benefit and the conditions for its being awarded have been thus laid down in the Labour Court decisions in this country."

This Court then referred to the case of Workmen employed under the reported in 1955 Lab A C 155, as also, the observations made in the case of Indian Oxygen & Acetylene Co. Ltd. reported in 1956-1 Lab L J 435 and observed in paragraph 202 to the following effect:- "It will be noticed from the above that even in those cases, where gratuity was awarded on the employee's resignation from service, it was granted only after the completion of 15 years' continuous service and not merely on a minimum of 3 years' service as in the present case. Gratuity being a reward for good, efficient and faithful service rendered for a considerable period (vide Indian Railway Establishment Code, Vol. I at page 614 - Chapter XV, Para 1503), there would be no justification for awarding the same when an employee voluntarily resigns and brings about a termination of his service, except in exceptional circumstances."

The Court, thereafter, quoted a passage in relation to Journalists' Working Conditions and their Moral Rights, as also from the collective agreement between the Geneva Press Association and the Geneva Union of Newspaper Publishers and ultimately found in paragraph 205 that such provision, providing for a payment of gratuity even to an employee who voluntarily resigns from service after a period of only three years, was certainly unreasonable, imposing unreasonable restrictions on the right of the petitioner to carry on business and was, therefore, liable to be struck down as unconstitutional. The other judgment relied upon by Shri L. Nageshwar Rao was Peerless General Finance and SCC 343. Following observation from paragraph 48 from this judgment is extremely apposite. The observation is as follows:- "48. .... Article 19(1)(g) provides fundamental rights to all citizens to carry on any occupation, trade or business. Clause (6) thereof empowers the State to make any law imposing in the interest of the general public, reasonable restrictions on the exercise of the said rights. Wherever a statute is challenged as violative of the fundamental rights, its real effect or operation on the fundamental rights is of primary importance. It is the duty of the Court to be watchful to protect the constitutional rights of a citizen as against any encroachment gradually or stealthily thereon. When a law has imposed restrictions on the fundamental rights, what the Court has to examine is the substance of the legislation without being beguiled by the mere appearance of the legislation. The legislature cannot disobey the constitutional mandate by employing an indirect method. The Court must consider not merely the purpose of the law, but also the means how it is sought to be secured or how it is to be administered. The object of the legislation is not conclusive as to the validity of the legislation..... The Court must lift the veil of the form and appearance to discover the true character and the nature of the legislation and every endeavour should be made to have the efficacy of fundamental right maintained and the legislature is not invested with unbounded power. The Court has, therefore, always to guard against the gradual encroachment and strike down a restriction as soon as it reaches that magnitude of total annihilation of the right."

The observations are extremely relevant in the present context. Now, there could be no dispute that

the impugned provision 47(3) is nothing, but an award of gratuity, though it has been given a nomenclature of "service compensation". When we closely examine Section 47(3), it suggests that an employee, who has to be in a continuous service of not less than one year, becomes eligible for service compensation, amounting to fifteen days average wages for each year of continuous employment (i) on voluntary cessation of his work after completion of 60 years of age or (ii) on his resignation or (iii) on physical or mental infirmity duly certified by a Registered Medical Practitioner or (iv) on his death or disablement due to accident or disease. This is nothing but the provision of a gratuity. It is already held by this Court time and again that the concept of gratuity as conceived in the Payment of Gratuity Act and even earlier to that in labour jurisprudence is that gratuity is a reward for long and continuous service.

It is for the first time by that Act, a worker or an employee was made entitled to the gratuity by his rendering continuous service for five years. If this is so, then providing only one year for entitlement to get the gratuity, is certainly unreasonable. What we have to see is the real nature of the so-called service compensation. The service compensation is nothing, but a gratuity and the High ourt has correctly held it to be a gratuity. If we are required to lift the veil as per the mandate of this Court in Peerless General Finance and Investment Co. Limited then it is obvious that the unnatural name of "service compensation" is given to what in fact, is a "gratuity". We need not dilate on this subject as the High Court has given good reasons to hold it to be a "gratuity". As if this is not sufficient, the proviso to sub-Section (3) provides that in case of termination of the employment due to death or disablement, even this one year's service will not be necessary. In spite of the presumption of constitutionality of a provision, we do not think that such a provision can be held to be reasonable. It is undoubtedly an unreasonable inroad on the fundamental right of the respondent (petitioner before the High Court) under Article 19(1)(g) of the Constitution of India.

14. As if this is not sufficient, we find from the definitions of "Commercial Establishment" and "Establishment" under the Shops Act that there are always two sets of employees in an establishment, being administrative or clerical and technical employees. While the factory owner would be required to pay the gratuity to the employee working in the factory only on his completing five years of continuous service, in case of the employee working on the administrative or clerical side of the factory or in the office, which may be in the same premises where the factory is situated, merely one year of service or even lesser than that, would be sufficient and the factory owners would have to pay the gratuity or the service compensation, as the case may be, to such person. Thus, the provision is clearly discriminatory and unreasonable. One look at the definition of "Commercial Establishment" would convince that the inclusion of an establishment of a factory or an industrial undertaking which falls outside the scope of Factories Act, 1948 and thereby entitling the employees working therein for the payment of service compensation, clearly brings out the discrimination between such employees and the employees working in the factories as covered by Factories Act, 1948. The definition of "Employee" is also extremely relevant in this behalf, and when the two provisions, viz., Sections 2(5) and 2(8) are read together along with Sections 2(11) and 2(10), the position becomes crystal clear that the provision of Section 47(3) is clearly discriminatory and, therefore, hit by Article 14 of the Constitution of India. We, therefore, cannot accept the argument of the appellant that the said provision under Section 47(3) is made for a classification and, therefore, there is no discrimination as the classification has a nexus with the object of the Act. Much debate went on the said object, which was stated in the Statement of Objects and Reasons and was also clear from the Preamble. We, however, do not see as to how such discrimination is permissible in the two sets of employees and what is the rationale for providing a short period of one year as compared to five year period in case of employees covered under the Factories Act, 1948

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15. In our opinion, the High Court was absolutely correct in holding that the provision of Section 47(3) is hit by Article 14 of the Constitution of India.

16. We must, at this juncture, take stock of the argument that it was legally permissible for the legislature to prescribe lesser period for the purpose of grant of service compensation. Our attention was invited to the oft quoted case of L. Nageshwar Rao, Learned Senior Counsel for the respondents also relied on the Workmen reported in 1966 (2) SCR 523 and Straw Board Manufacturing Co. Ltd.

Learned Counsel for the appellant, more particularly, to paragraph 16 and 17 in observations are, in fact, adverse to the case put up by the appellant. In paragraph 16, this Court observed that the concept of gratuity had undergone metamorphosis over the years. This Court further recognized that though "gratuity" meant payment, gift or a boon made by the employer to employee in industrial adjudication, it was considered as a reward for long and meritorious service and the payment of gratuity depended upon duration and the quality of service rendered by the employee. The Court further observed that at a later stage in the industrial jurisprudence, the gratuity came to be recognized as a retiral benefit in consideration of the service rendered and the employees could raise an industrial dispute for introducing the concept of gratuity as a condition of service.

The Court also went on to observe that such payment of gratuity depended on various factors like financial stability and capacity of the employer, the service conditions prevalent in the industry and the region, availability of the other retiral benefits and the standard of other service conditions. The Court very specifically observed that the quantum of gratuity was determined by the said factors. The Court then made observations that the minimum qualifying service for the entitlement to the gratuity or the rate at which it was to be paid and the maximum amount payable was determined on the basis of the aforementioned factors. In paragraph 17, the Court observed that the industrial adjudicators insisted upon certain minimum years of qualifying service before an employee could claim it whether on superannuation or resignation or voluntary retirement, which was inconsistent with the concept of gratuity being an earning for the services rendered. The Court then went on to observe that there was no fixed concept of gratuity or of the method of its payment, and like all other service conditions, the gratuity schemes could differ from establishment to establishment depending upon various factors mentioned earlier. One such prominent factor was the financial capacity of the employer to bear the burden. The Court was also not unmindful of the distinction between the provident fund and gratuity. While in former, there was a contribution from the employer, in case of gratuity such contribution was not a necessary ingredient. The Court then observed in paragraph 17 as under:- "17. ..... Likewise, the gratuity schemes may also provide differing qualifying service for entitlement to gratuity. It is true that in the case of gratuity, an additional factor weighed with the industrial adjudicators and courts, viz., that being entirely a payment made by the employer without there being a corresponding contribution from the employee, the gratuity scheme should not be so liberal as would induce the employees to change employment after employment after putting in the minimum service qualifying them to earn it." (Emphasis supplied) This would suggest that before introducing any such concept of service compensation which was nothing but the gratuity, the aforementioned factors were bound to be taken into consideration and to be provided for. What we see from the impugned provisions is, firstly, the compulsory nature of the service compensation and secondly, the total absence of guidelines. It is not understood as to how and why in all employments through out, such a short period of one year or even lesser than that has been provided and what is the rationale for the same.

Works & Ors. (cites supra), it is clear that there has to be some minimum qualifying service. To reduce the service to one year or even to the lesser period, a qualifying service would, in our opinion, be absurd and was rightly rejected by the High Court. Therefore, it cannot be said that in all the circumstances, it is permissible for the legislatures to prescribe a lesser period. We can understand the period being a lesser, but not to the extent of non-existent period of one year or as the case may be, six months, as provided in Section 47(3), which would not amount to reasonable period for the entitlement to get the gratuity. Such provision is, therefore, obviously, unreasonable. The contention of the Learned Counsel for the appellant is, therefore, rejected.

17. At the same time, insofar as Section 47(4) is concerned, the provision is per se unreasonable. We have already quoted Section 40(3) of the 1966 Act in the earlier part of the judgment. We, therefore, do not reproduce the Section here. It is to be remembered that this Section was found to be unconstitutional in the earlier judgment of the Division Bench in case of Suryapet Market Cooperative judgment had become final. The Section is clearly comparable to Section 47(3) and also Section 47(4), as the last part of that Section is identical with the wording in Section 47(4). The only difference, which we find is that instead of word "gratuity", the terminology of "service compensation" is substituted. In our opinion, the High Court was right in opining that a mere cosmetic amendment could not have been made by way of introduction of Sections 47(3) and 47(4). It was tried to be argued before us that in the present 1988 Act, the mischief pointed out by the High Court in earlier Section 40(3) of the 1966 Act has been remedied.

We are unable to agree with such argument. We do not see as to how and in what manner, the mischief has been remedied. In its judgment, the High Court has compared both the provisions and has found that the period of six months, as contemplated in the 1966 Act, was made one year. The High Court also noted that the provision was declared ultra-vires on the ground that the workmen working in the factory which would be large in size are eligible to be paid gratuity on rendering long and meritorious service under the scheme of Payment of Gratuity by industrial adjudication, i.e., prior to the enactment of Payment of Gratuity Act, 1972, whereas, the employees of a shop or an establishment which is smaller in its operations covered under the 1966 Act, will be entitled to such gratuity on rendering of minimum qualifying period of only six months' unbroken service.

The High Court also noted that the provisions of Sections 47(3) and 47(4) were nothing, but a cosmetic amendment to the earlier Section 40(3). It is, therefore, clear that no attempt has been made, whatsoever, to point out the mischief found by the High Court in Section 40(3) of the 1966 Act. It was tried to be urged that the Payment of Gratuity Act was not in existence at the time the High Court Suryapet and Ors. (cited supra). We do not see as to how it is relevant at all. On the other hand, with the advent of Payment of Gratuity Act, the unreasonableness of the provision of Section 47(3) would be all the more prominent. We are also not in a position to agree that Section 47(4) is, in any manner, a valid piece of Legislation and is only in the nature of a procedure and does not amount to penalty. Now, merely because there is a remedy to the employer under Sections 50 and 51 to point out reasons for not being able to have complied with Section 47(3), the Section does not become a valid Section, particularly, when the identical provision was found to be unconstitutional in case of Suryapet Market Cooperative become final. We, therefore, cannot accept that Section 47(4) is a valid piece of Legislation. This is apart from the fact that this provision is also capable of being abused or misused by an employee, who may bring out a situation to avoid accepting the payment of gratuity, so as to be able to claim later the wages of the interregnum period.

18. It was argued by the Learned Counsel for the appellant that there could not have been a comparison between the provisions of Payment of Gratuity Act and the present provisions, while deciding the constitutionality. For this purpose, the Learned Counsel relied on the law laid down by this Court in State of in that case were relied upon:- "Article 14 does not authorize the striking down of a law of one State on the ground that in contrast with a law of another State on the same subject, its provisions are discriminatory nor does it contemplate a law of the Centre or of the State dealing with similar subjects being held to be unconstitutional by a process of comparative study of the provisions of the two enactments. The sources of authority for the two statutes being different, Article 14 can have no application."

It may immediately be clarified that though it is true that both the laws, i.e., the Shops Act and the Payment of Gratuity Act have been passed validly under Entry 24 of List III of the VII Schedule, it is incorrect to say that the High Court has compared the two provisions. It is one thing to refer to a provision and quite another to compare it with impugned provision. The High Court has actually gone into the concept of gratuity right from its inception and has come to the conclusion that for earning the gratuity, the employee does not have to contribute anything, as in the case of a provident fund. Gratuity is more or less a gratuitous payment by the employer in consideration of long and faithful service by the employee. The concept of gratuity came to be developed firstly in the industrial jurisprudence and was crystallized by the Central Legislation by way of an Act, where a provision of five years of minimum service was made for an employee to be entitled for payment of gratuity. However, as has been held in five years of service could not have been reduced in absurd manner to a minuscule period of one year or even less than that. The High Court, therefore, found fault that the basic concept of gratuity was being abused by the reduction of the required service to an almost non-existent level. It cannot, therefore, be said that the High Court compared the two provisions. This is apart from the fact that the reduction to a period of six months was already held to be unconstitutional in the and Ors. (cited supra), which judgment had attained finality. The High Court found that instead of remedying the defects pointed out in the judgment of (cited supra), a cosmetic change was made by raising the period of six months to one year. We are, therefore, unable to accept the submission of the Learned Counsel for the appellant that the High Court proceeded on to decide the constitutionality on the basis of a comparison. We do not, therefore, see how the SCR 599 (cited supra) can be of any application and help to the present case.

19. A further criticism was leveled by the Learned Counsel for the appellant that the High Court had struck down the provisions only on the grounds of hardship and that was not permissible. Learned Counsel relied on a decision in 614 and our attention was invited to paragraph 45 thereof. Learned Counsel also reported in 2004 (11) SCC 753, particularly on the observations made in Devi reported in 2008 (4) SCC 720. Insofar as the last decision is concerned, we do not see as to how it helps the appellant, as in that decision, this Court has recognized the presumption of constitutional validity of a statute. There can be no quarrel with that proposition. Our attention was invited to paragraphs 70, 72, 73 and 78. We could not find anything in those paragraphs, which supports the contention that a mere hardship cannot be a ground for striking down a provision.

This Court had only shown the presumption of constitutionality and has cautioned against the light treatment being given to the subject. In our opinion, that is not the case here. The High Court's judgment proceeds on solid bedrock of lucid reasoning and is not restricted to hardship alone.

SCC 753 (cited supra), while repealing the constitutional challenge to the rules, which was observed by this Court that if the Rules framed under Article 309 of the Constitution of India were for general good, but caused hardship to the individual, the same could not be a ground for striking down the

Rules. These observations are not apposite to the present controversy. Here the impugned provisions have not been struck down merely because they would cause hardship to any individual or any class. In fact, the provisions have been shown to be totally unreasonable and in total contradiction with the established norms for the concept of gratuity.

Not only that, the provisions have been shown to be discriminatory in respect of the two sets of workers, who are similarly, if not identically circumstanced. In case specifically observed in paragraph 45 that the Legislature had the requisite jurisdiction to pass appropriate Legislation, which would do justice to its employees. The Court went on to hold that if a balance is sought to be struck down by reason of the impugned Legislation, it would not be permissible for the Court to declare the legislation ultra vires only because it may cause some hardships to the petitioners. These observations were made in relation to the service jurisprudence, where, the constitutional validity of Orissa Administrative Service, Class II (Appointment of Officers Validation) Amendment Act, 1992, was in challenge. By that amendment, relative seniority was awarded to the direct recruits for the year 1973, who were appointed in the year 1975, over and above, the mergerists born in the said Service by virtue of merger of their parent cadre with the Orissa Administrative Service, Class II. The argument was raised that such grant of seniority would amount to a hardship to the petitioners in the matter of seniority. The Constitution Bench of this Court thoroughly examined the provisions of Section 2 of the Amendment Act with reference to the earlier cases ecided on the question and came to the conclusion that it was disinclined to temper with the settled practice, particularly, in view of the law laid down in 1990 (2) SCC 715. It was found that the concept of the "year of allotment" was workable and it was within the powers of the Government to recruit the officers from variety of sources. It was also found that the seniority awarded was on the basis of a legal fiction, which had to be given its full effect. It was in that context that the observations regarding hardship were made. We are afraid, the fact- situation in the present case is entirely different and the observations made are not applicable to the present matter. We, therefore, reject the argument raised by the appellant. This is apart from the fact that the High Court has correctly observed that even if the law cannot be declared ultra vires on the ground of hardship, it can be so declared on the ground of total unreasonableness applying Wednesbury's "unreasonableness" principles. The Court, specifically, has also found that this reasonableness is apparent from the fact that the employees falling within Sub-Sections (1) and (3), although from different classes, had been treated equally, giving them the same benefit. For this purpose, the Court also relied on in AIR 1973 SC 106.

21. The High Court also referred to in this behalf, the observations made in Bank of India (cited supra) and rightly concluded that the impugned provision was totally unreasonable.

22. This takes us to the last contention raised by the Learned Counsel for the appellant, regarding the question of "Doctrine of occupied field". The High Court has observed:- "It may be true that having regard to the provisions contained in List III of VII Schedule of the Constitution, the State can also lay down certain conditions of service. But, the same would not mean that smaller units will be burdened with a harsher, oppressive and more onerous statutory obligations than their big brothers. The Payment of Gratuity Act covers the field. Both the State Act and the Central Act, in view of sub-Section (5) of Section 47 deal with the matter relating to gratuity."

The High Court then referred to a decision in Ramachandra Mowa Lal SCC 661 and relying on the observations made in that judgment, came to the conclusion that the State could not take aid from the provisions of Article 254(2) of the Constitution. The Court further observed that mere assent of the President may not be adequate and the provision in question, being directly in conflict with the Central Act, the same cannot be valid. Further, the Court observed:- "Mechanical assent given by

the President may be held to be an idle formality, as there does not exist any evidence that the possible conflict had been brought to the notice of the President before his assent was obtained."

The High Court then went on to hold that the instant case would stand on the worse footing, as factually, it would not be disputed that the employees had left the services and those who abandoned the service voluntarily, had not been heard of for a few years. It was noted by the High Court that if the provisions of Sections 47(3) & 47(4) are held valid, then such persons who had voluntarily abandoned the service, would be taking the advantage of their own wrong, particularly, in relation to Section 47(4). The High Court also further observed that the union could not have taken the cause of the persons, who had abandoned their services.

23. The impugned judgment is a complete answer to the question raised regarding Article 254(2). There can be no doubt that both the Central Act and the impugned State Act operate in the same field in as much as, the "service compensation" is nothing, but the "gratuity", though called by different name.

Under such circumstances, unless it was shown that while obtaining the Presidential assent for the State Act, the conflict between the two Acts was specifically brought to the notice of the President, before obtaining the same, the State could not have used the escape route provided by Article 254(2) of the Constitution. We fully agree with the High Court when the High Court held that the two Acts occupy the common field and were in conflict with each other. The contention of the appellant that Article 254(2) would save the impugned provisions is, therefore, rejected.

24. In the result, we concur with the judgment of the High Court and confirm the same. The appeal has no merits and it is dismissed, but without any order as to the costs.