

**(2015) 02 RAJ CK 0305**

**In the Rajasthan High Court**

**Case No :** Special Appeal (Writ) No. 733 of 2014

Managing Committee, Badhir Vidhyala

APPELLANT

Vs

Commissioner, Elementary Education, Govt. of Raj. Bikaner  
and Others

RESPONDENT

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**Date of Decision :** 26-02-2015

**Acts Referred:**

Constitution of India, 1950 — Article 14

**Citation :** (2015) 4 RLW 3146 : (2015) 4 RLW 2860

**Hon'ble Judges :** Sunil Ambwani, Actg. C.J. and Prakash Gupta, J.

**Bench :** Division Bench

**Advocate :** Naina Saraf, for the Appellant; N.M. Lodha, Advocate General assisted by Sheetanshu Sharma and Vishal Sharma, for the Respondent

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## **Judgement**

Prakash Gupta, J.—We have heard learned counsels for both the parties. Special Appeal (Writ) No. 733/2014 and Special Appeal (Writ) No. 1422/2013 have been filed with delay of 165 days and 39 days respectively. The delay has been explained satisfactorily in both the appeals and is accordingly condoned.

2. By the order dated 04/09/2013 the learned Single Bench of this Court, while disposing of the S.B. Civil Writ Petition No. 5852/2012, following directions were issued:--

"In view of above, I find that liability to pay gratuity remains on the institution till it seeks exemption from the application of rules or from payment of gratuity. The institution can however make a representation for payment of gratuity to be approved expenditure to extend benefit of grant-in-aid, in the light of the observations made by the Apex Court in the case of Rajasthan Welfare Society (supra). In those circumstances, respondent-government is directed to consider it sympathetically taking note of the fact that the petitioner institution is doing pious duty of imparting education to disabled and mentally challenged children and not charging fee therefor.

So far as other benefits extended by the tribunal is concerned, no doubt, initial liability remains on the institution to pay it to the employee and then to get reimbursement of the amount from the government but that situation remains with the institution receiving grant-in-aid upto 90% as they are required to bear part of the benefit thus needs to first pay the amount and then to seek reimbursement but, in this case, it would be nothing but multiplicity of action which may otherwise delay extension of benefit to the employee.

In view of above, it becomes an exceptional case of its nature. The State Government is accordingly directed to pay other benefits directly to the employee to the extent of approved expenditure, however, it should be based on the calculation to be furnished by the institution and subject to scrutiny by the State Government. In doing so, multiplicity of the actions would be avoided for a case where institution is receiving 100% grant-in-aid."

3. Aggrieved by the same, the appellant-Managing Committee Badhir Vidhyala (for short Managing Committee) has filed this D.B. Special Appeal No. 733/2014, and respondent No. 2-Kailash Narain Kakkar (for short the employee) has filed the other Special Appeal No. 1422/2013. The "Managing Committee" of the school has filed a D.B. Civil Writ Petition No. 17136 of 2013 for following reliefs:

"(i) by an appropriate writ, order or direction the respondent may directed to declare Rule-14 ultra vires to the constitution and alternatively the respondents be grant relaxation of Rule-14 under rule 92 and 100% grant in aid be directed to pay the institution to meet expenditure incurred and also against the payment to be made to employees after retirement along with interest.

(ii) by an appropriate writ, order or direction the respondent be directed to amend the Rules of 1993 accordingly taken into consideration of institution working for disabled children.

(iii) Any other appropriate order or direction which this Hon"ble Court deems expedient in the facts and circumstances of the case may kindly passed in favour of the petitioner."

4. Both the appeals arise out of the same Order dated 04/09/2013. The issues involved in D.B. Civil Writ Petition No. 17136/2013 are also the same, and therefore, both appeals and the writ petition are being disposed of by this common order.

5. Brief facts giving rise in these matters are that Shri. Kailash Narain Kakkar, after serving the institution, which receives 100% grant-in-aid from the State Government retired from service in the year 2006. When his retiral dues, which include selection scale, leave encashment and gratuity were not paid to him, to which he is otherwise entitled to under the provisions of the Rajasthan Non-Government Educational Institutions Act, 1989 (for short the Act of 1989), he approached the learned Rajasthan Non Government Educational Institution Tribunal by Tiling an application. The same was allowed by the learned Tribunal

vide Order dated 12/12/2011 and the "Managing Committee" was directed to pay gratuity, leave encashment and benefit of selection scale. Aggrieved by the same, the writ petition No. 5852/2013 was filed before the Single Bench by the appellant-Managing committee, which was disposed of as indicated above.

6. Brief facts of the D.B. Civil Writ Petition are that the petitioner-Managing Committee is providing education etc. to deaf and dumb children and is getting 100% grant-in-aid from the State. The petitioner is not charging any fees from the students and thus, is not in a position to pay retiral dues to its employees. The petitioner while filing the present writ petition challenged the validity of Rule 14 of the "Rules 1993" and has in the alternate prayed for 100% grant-in-aid against the payment due or exemption to pay gratuity by relaxing the relevant Rules.

7. Learned counsel for the appellant-Managing Committee Ms. Naina Saraf, submits that the learned Single Judge erred in not directing the State Government to pay the proportionate grant-in-aid to the appellant for payment of gratuity. Since the institution is getting 100% grant-in-aid, the institution need not consider whether a particular item falls in "approved expenditure" or not as the institute is discharging the duties of the State Government. The State is duty bound to provide grant-in-aid for payment of gratuity also. It is submitted that the appellant's request needs to be considered in light of The Right of Children to Free and Compulsory Education Act (for short the Act of 2009). The Persons with Disabilities (Equal Opportunities, Protection of Right in Full Participation) Act, 1995 (for short the Act of 1995) provides that the Persons with Disabilities should be provided free education by the Government. The duty has been delegated to institutes such as the appellant and thus, in light of the circumstances, the State Government should be directed to pay gratuity to the employees as there is no other source of income available to the appellant-Managing Committee. Also, the appellant-managing Committee is not charging any fees from the students. It is also submitted that Section 29 of the Act of 1989 and 34 of the Rajasthan Non-Government Educational Institutional (Recognition grant-in-aid and Service Conditions Etc.) Rules 1993 (for short the Rule of 1993) provide that the pay and other allowances of the staff of the aided educational institution shall not be less than those prescribed by the State Government for the staff of similar category in the Government educational institutions. The teachers and other staff of the Government educational institutions are getting gratuity but that under Rule 14 of the Rules 1993, gratuity is not included in "approved expenditure" therefore, the employees of the aided educational institutions are not getting gratuity which is discriminatory and arbitrary hence, Rule 14 of the Rules 1993 is unconstitutional. It is also submitted that rule 14 of the Rules 1993 is contrary to the aims and objects of the Act, 1995 and also the Act, 2009 and thus, it is violative of Article 14 of the constitution of India.

8. Alternatively, it is submitted that in view of the powers available under Rule 92

of the Rules of 1993, the appellant-institute should be given exemption for payment of gratuity by relaxing Rule 82 and Rule 14 of the Rules of 1993. The State Government, therefore, should have considered the case of the appellant and should have included gratuity in the grant-in-aid. In support of her submissions, she relied upon Satpal Antil and others Vs. Union of India and another, , Miss. Mohini Jain Vs. State of Karnataka and others, , S.R. Higher Secondary School Vs. Rajasthan Non Government Educational Institutions Tribunal and Others, .

9. Per contra, the learned Advocate General Sh. N.M. Lodha, submitted that the liability to pay gratuity is on the management of the educational institution and payment of gratuity is not an "approved expenditure" as per Rule 14 of the Rules of 1993 and hence, the gratuity is payable only by the employer & not by the Government. Grant-in-aid can be claimed only as reimbursement by the institution from the State Government. A writ of mandamus is not maintainable for grant of relaxation or concession. It is further, submitted that vires of the Rule has been challenged but State of Rajasthan has not been made a party, hence, the writ petition is not maintainable for want of necessary party. In the writ petition, the petitioner-Managing Committee has stated that out of 18 employees, 5 have already retired and remaining are working in the school and providing special education to disabled children. The factual position is that, after the promulgation of the Rajasthan Voluntary Rural Education Service Rules, 2010, there is neither any sanctioned post nor any employee is working in the appellant-institution. The employees absorbed in the schools in rural areas have also agreed in writing that they will not make any demands against liability which arose in the past. The writ petition is thus not maintainable. In support of his submissions, the learned Advocate General has relied upon Rajasthan Welfare Society Vs. State of Rajasthan, , Rajasthan Welfare Society Vs. Director Primary and Secondary Education and Others, , DB Civil Special Appeal (Writ) No. 94/2013, Managing Committee, S.S. Jain Subodh Shiksha Samiti & Anr. v. State of Rajasthan & Ors. decided on 14.5.2013, K.V. Rajalakshmiah Setty and Another Vs. State of Mysore and Another, , Divisional Forests Officers and Others Vs. M. Ramalinga Reddy, , Shri Ranjeet Mal Vs. General Manager, Northern Railway, Baroda House, New Delhi and Another, and K.D. Sharma Vs. Steel Authority of India Ltd. and Others, .

10. Learned counsel for the appellant-employee, submitted that the appellant retired in the year 2006 and that the Tribunal passed the order in favour of the appellant-employee in the year 2011 but till date, no payment has been made in respect of retirement benefits to the appellant-employee. It is also submitted that directions issued by the learned Single Judge are of such nature that would further delay the payment of the retirement dues to the appellant-employee. The appellant-employee is a low paid retired employee and thus retiral dues should be paid to him at the earliest.

11. In support of his submissions, he relied upon S.R. Higher Secondary School

v. Rajasthan Non Government Educational Institutions Tribunal Jaipur & Others reported in RLW 2003(1) Raj. 530, State of Rajasthan & Anr. v. Sr. Hr. Sec. School, Lachhmangarh & Ors. reported in 2005(1) 301, Rajasthan Welfare Society v. State of Rajasthan reported in 2005(1) WLC (SC) Civil 668 - RLW 2005(2) SC 219, Adarsh Vidya Mandir Samiti, Bharatpur & Anr. v. Raju Lal & Others reported in 2013(4) WLC (Raj.) 612 : 2014(2) RLW 1753, Children's Garden Play School Education Society v. Raj. Non Government Educational Institutions Tribunal & Others reported in 2008(3) WLC page 165 : 2009(1) RLW 169 & Lrs. of Rashida Gajdar Vs. State of Rajasthan and Others, .

12. We have considered the rival submissions of the parties and perused the material on record and considered the case law cited.

13. So far as other retiral benefits except gratuity are concerned, the learned Single Judge has directed the State respondents to pay the same directly to the appellant-employee, to the extent of "approved expenditure". In this regard, learned Single Judge further observed that it should be based on the calculation to be furnished by the institution, subject to the scrutiny of the State Government.

14. So far as the directions to the State Government to pay retiral benefits (except gratuity) to the appellant-employee is concerned, we find no illegality or error in the said direction. Looking to the facts and circumstances of the case, we are of the opinion that the State Government is in a better position than the appellant-institution to pay the retiral benefits (except gratuity). In our view since the directions were issued against the State, the State of Rajasthan should have filed the appeal. Since the government has not challenged the above direction and by an interim order dated 30/05/2014 out of an approximate sum of Rs. 7,60,000/- due, Rs. 4,00,000/- have already been paid to the appellant-employee by the State Govt., we do not propose to give any further directions in the Special Appeal filed by the appellant-employee.

15. So far as Special Appeal filed by the appellant Managing Committee is concerned, Hon''ble Supreme Court in Rajasthan Welfare Society Vs. State of Rajasthan, observed as under:--

"13. The position becomes further clear on a plain reading of Note 2 appended to Rule 14. It is clear that ordinarily the charges on account of payment of gratuity paid to former teachers are not admitted for the purpose of grant-in-aid unless the Rules on the subject are approved by the Government. The words "the rules on the subject" in Note 2 cannot be interpreted to mean rule contained in other part of the Rules, namely, Rule 82. We are unable to accept the contention that Rule 82 would be the rule on the subject approved by the Government. If Rule 82 is to be interpreted as a rule approved by the Government to contribute the amount of gratuity while computing grant-in-aid, the question of appending Note 2 would not have arisen. Clearly, Note 2 refers to rules framed by non-government educational institutions which are to be approved by the

Government and not the Government itself making the rules and approving the same. As already stated, Rule 82 only makes it obligatory for aided educational institutions to pay gratuity to their employees in accordance with the Gratuity Act.

14. The gratuity cannot be termed to be an emolument for the time being payable to the employees so as to come within the definition of salary defined in Section 2(r) of the Act. Further, Rule 14 uses the word "actual salary". Be that as it may, it seems clear that nonrecurring payment of this nature cannot be included in the definition of salary. Gratuity is payable at the time of retirement/termination of the employment. Reliance on the decision in the case of *Metal Box Co. of India Ltd. v. Workmen* can render little assistance to the appellant. It is a case under Payment of Bonus Act. It was only dealing with accountancy principles. Observations were made that an estimated liability under the gratuity schemes even if it amounts to a contingent liability and is not a debt under the Wealth Tax Act, if properly ascertainable and its present value is fairly discounted, is deductible from the gross receipts while preparing the profits and loss account. In trading circles or in rule or direction in the Bonus Act, there was no prohibition from such a practice. The question in that case was whether while working out the net profits the trader can provide from his gross receipts his liability to pay a certain sum for every additional year of service which he receives from his employees. It was answered in affirmative. If such liability was properly ascertainable, it was possible to arrive at a proper discounted value. This decision, in our view, is not relevant to determine the point in issue in the present case.

15. Further, gratuity cannot be included in the approved expenditure as under Rule 9 the State Government can sanction the grants under four Heads provided therein and gratuity does not fall under any one of them. It is not claimed that the gratuity falls under Heads 2 to 4. Head 1 is "maintenance or recurring grant". Admittedly a gratuity cannot come under the category of maintenance. It is also not a recurring grant as already noticed hereinbefore. It is, thus, clear that payment of gratuity cannot come under any of the four categories mentioned in Rule 9.

16. In view of the aforesaid, the gratuity within the meaning of the Act and the Rules cannot form part of recurring grant. It is not includable as part of approved expenditure for the purposes of computing the amount of grant payable to the appellant. In this view, communication dated 26-5-1994 of Government of Rajasthan to the effect that the Rules do not provide for grant-in-aid on amount of gratuity, the same being not included in the approved expenditures, cannot be held to be illegal. This will, however, not affect the rights of the employees to get the gratuity from the institution concerned."

16. In view of the decision of the Apex Court, the learned Single Judge rightly held that liability to pay gratuity is that of the institution, until the rules in this regard are framed by the State. The learned Single Judge however, gave liberty to make a representation for payment of gratuity to be included in "approved

expenditure" in light of the observations made by the Apex Court. It was further directed by the learned Single Judge that if any representation is made by the Institution, the State Govt. may consider it sympathetically, treating the matter as a special case taking note of the fact that the appellant-Managing Committee is doing a pious duty of imparting education to disabled and mentally challenged children and not charging fees therefrom.

17. We find no illegality or error in the direction given by the learned Single Judge. The same is in consonance with the observations made by the Apex Court in the case of Rajasthan Welfare Society (supra).

18. As discussed above, we find no merit in the Special Appeal Nos. 733/2014, 1422/2013.

19. So far as writ petition filed by the Managing Committee is concerned, the statutes or provisions can be challenged in the Courts subject to the scope of judicial review of legislation. In *Ram Krishna Dalmia Vs. Shri Justice S.R. Tendolkar and Others*, it has been held by the Hon'ble Apex Court that there is always a presumption in favour of constitutionality of an enactment and the burden is upon him, who attacks it to show that there has been a clear transgression of the constitutional principles. Rule 9 of Chapter III of Rajasthan Non Government Educational Institutional Rules 1993, clearly provides that the State Government may by its discretion give grant-in-aid as enumerated in Sub-rule (1), (2), (3) and (4). The Supreme court has held in *Rajasthan Welfare Society case* (supra) that the payment of gratuity does not come within the ambit of grants under Rule 14. Moreover, it is a discretionary power of the State Government and therefore, payment of recurring grants and non-recurring as provided under Rule 15 and 16 are discretionary in nature. Further it was observed by the Hon'ble Supreme Court in *Rajasthan Welfare Society case* (supra) that the institution receiving grant can not by way of reimbursement claim the amount of gratuity paid to the employees.

20. Rule 14 provides that gratuity shall be excluded from the ambit of "grant-in-aid" to be given by the government to aided educational institution unless the government makes statutory rules in this regard. Further, Rule 82 exclusively deals with the payment of gratuity to the employees of the aforesaid institution as is provided under the Payment of Gratuity act, 1972. The legislative intent to exclude gratuity from grant-in-aid is clear and unambiguous to admit any ambiguity. The cardinal rule of interpretation of any statute is the rule of literal interpretation providing that when the language of the statute is plain and admits of one meaning only, the task of interpretation hardly arises. In the case at hand, the legislature, has excluded gratuity from being included in grant-in-aid under Rule 14. It has unambiguously provided a separate provision in this regard under Rule 82. The legal position is settled on the point that gratuity does not fall within the meaning of "Pay and allowances" for it is not a recurring payment given. It is either paid upon retirement of the employee or the termination of the employment. The "Payment and Allowance" of the employees of the aided

educational institution under the Act shall be the same as those of the other State Government employees. Article 14 of the Constitution does not come into picture since gratuity is excluded from such payment and allowances; the latter being at par with those of the State Government employees and not the former. Rule 14 is neither arbitrary nor discriminatory, in as much as, the legislature has clearly omitted the reimbursement of gratuity to the aided institutions by the State Government and has not denied the payment of the same altogether; casting the liability on the institution.

21. In addition to the presumption of constitutionality of any statute, Rule or provision of law, there is a presumption regarding the powers of the State to the extent of its legislative competence. The hardship of few can not be the basis of determining the validity of any statute. In the present writ petition the petitioner has not even stated how Rule 14 is unconstitutional or ultra vires Article 14 of the constitution.

22. The argument regarding the binding nature of the provisions of the RTE and the subsequent grant of expenditure to the tune of 100% to the schools providing free education after the upper primary level does not ipso facto make the Rule relating to approved expenditure i.e. Rule 14 ultra vires. It is a settled principle that for proving any illegality or unconstitutionality of a particular Act, Rule, or provision the burden lies on the person who challenges it. The Courts by way of judicial review, would not declare a provision bad in law merely because there could be a better provision. The framing of statutory rules is an exclusive domain of the legislature. Since, there is no illegality or unconstitutionality in the making of provision as to what should be treated as approved expenditure, we cannot add words to the provision and declare that particular expenditure namely payment of gratuity should also be treated as another head under approved expenditure.

23. So far as alternate contention is concerned, though Rule 92 of the Rules 1993 provides that any Rule may be relaxed, it is for the State Government to consider any relaxation. The court can not direct the State to relax the rules. A writ of mandamus is not ordinarily issued for relaxation of rules or for concessions.

24. In the result, both the appeals and the Writ Petition are dismissed with a direction to comply with the directions given by the Single Bench within a period of two months from the date of this order.

There shall be no Order as to costs.

A copy of this Order be placed in all the connected files.