

(2017) 03 CAL CK 0105

In the Calcutta High Court

Case No : Writ Petition 158(W) of 2016 with W.P. 160(W) of 2016 with W.P. 161(W) of 2016 with W.P. 162(W) of 2016

Seth Soorajmal Jalan Balika Vidyalaya

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 01-03-2017

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 2 LLN 105

Hon'ble Judges : Mr. Subrata Talukdar, J.

Bench : Single Bench

Advocate : Mr. Jasobanta Rakshit, Advocate, for the Petitioners; Mr. Rananesh Guha Thakurata, Mr. J. Khan and Ms. S. Das Chowdhury, Advocates, for the Respondent No. 5; Mr. Sadhan Chandra Halder and Mr. Asok kumar Ganguly, Advocates, for the State

Final Decision : Dismissed

Judgement

Mr. Subrata Talukdar, J.—The short point which requires to be examined in this bunch of analogous writ petitions is the challenge thrown to the respective final orders of the Controlling Authority (for short CA) each dated 20th November, 2015 under the Payment of Gratuity Act, 1972 (for short the 1972 Act).

2. By the said final orders, the CA came to finding that pension and gratuity are two different legal concepts. Accordingly, sanction of pension does not ipso facto mean payment of gratuity. Receipt of gratuity is a statutory right under the 1972 Act. Therefore, the claim of the private respondents to gratuity from their employer, the writ petitioner/School in issue stands justified.

3. Arguing on behalf of the writ petitioners/ School in issue, being the Seth Soorajmal Jalan Balika Vidyalaya, Mr. Jasobanta Rakshit, Ld. Advocate led by Mr. Soumya Majumdar, Ld. Counsel argues as follows:-

"(a) That the writ petitioner No.1/School is a Dearness Allowance (DA) getting aided School affiliated to the West Bengal Board of Secondary Education (for short the Board). The School receives the DA component of the salaries related to its permanent teaching and non-teaching staff from the Government of West Bengal (for short the State or, GWB).

b) The private respondents were employed with the School and each retired after a long period of service. Upon retirement, the private respondents claimed gratuity from the CA under the 1972 Act.

c) In the proceeding for claim to gratuity, the District Inspector of Schools was made a party respondent pursuant to orders of an Hon''ble Single Bench.

d) Although the School is guided by the Notifications issued from time to time by the State, the responsibility to pay gratuity against the DA component lies with the State alone. The School is liable only to release gratuity against Basic Pay.

e) In the event the School is compelled to pay the entire gratuity claimed by the private respondents the fees of the students are required to be raised.

f) The hearing before the CA was attended by the DI of Schools pursuant to the directions of the Hon''ble Single Bench (supra).

However, the DI of Schools preferred not to make any submissions connected to the claim of the private respondents.

g) By the final order of the CA dated 20th November, 2015 the School was directed to pay the gratuity amount within 30 days of issuing the said order.

h) That the private respondents are in receipt of pension vide orders issued by the Deputy Director of School Education. The private respondents, in terms of several Government Orders, are entitled to receive the pension and only gratuity against Basic Pay. Such retirement dues as applicable to DA getting Schools, are governed by Government Orders which form part of a special scheme.

i) Since the State bears the expenditure for paying bonus on the DA component actually paid by the State, the same analogy must apply to the claim to gratuity. Therefore, the private respondents are entitled to receive gratuity against the DA component paid by the State towards salaries and thereafter pension.

j) That since these writ petitions involves jurisdictional issues no appeal can lie under Section 7 (7) of the 1972 Act. Such jurisdictional issues are only subject to decision by a Writ Court.

(k) On the point of the ineligibility of a teacher of a School to claim gratuity reliance is placed on the decision of an Hon''ble Division Bench of this Court reported in 2001 (1) LLJ 1249.

The Hon''ble Division Bench, inter alia, observed that the vocation of a teacher in a School cannot be compared with the definition of an employee within the meaning of Section 2(e) of the 1972 Act. The Hon''ble Division Bench construed

the imparting of education as a noble mission.

l) On the point that a School is not a shop or establishment within the meaning of the 1972 Act, reliance is placed on another decision of an Hon''ble Division Bench of this Court reported in 2001 (1) LLJ 1594. In short, the activities of the School in issue are not a commercial activity which would qualify its staff to place claims under the 1972 Act.

4. Arguing for the private respondents in each of the writ petitions, Mr. Rananesh Guha Thakurata, Ld. Counsel makes the following points:-

(i) That the writ petition is not maintainable on the ground of availability of alternate remedy under the 1972 Act. The 1972 Act is a special enactment and, due process demands that the statutory appellate jurisdiction must be exhausted prior to invoking the extraordinary jurisdiction of the Writ Court.

In connection with the above noted point reliance is placed on the decision of the Hon''ble Apex Court reported in 2006 (1) LLJ 254, 2006 (1) LLJ 1108 and 2002 (92) FLR 175.

ii) That the time to file the statutory appeals as provided under Section 7(7) of the 1972 Act has expired and the present writ petitions have been filed thereafter. Therefore, the admission of this writ petition would tantamount to condoning the long delay in not preferring the statutory appeals.

In connection with the above noted point reliance is placed on 1996 (1) LLJ 515 and 2007 (2) CHN 115.

iii) The 1972 Act is a beneficial legislation in the social welfare sphere. Accordingly, such beneficial legislation must be construed in favour of the employee and, in this connection reliance is placed on 2010 (1) SCC (LS) 1146.

iv) The decision of the Hon''ble Apex Court holding the field reported in 2004 (1) LLJ 596 to the effect that teachers do not fall within the purview of Section 2 (e) of the 1972 Act, being the definition of an employee, has been since redefined by an amendment to the 1972 Act on the basis of a legislative exercise. The amended Section 13A now imparts a wider meaning to the word "employee" which, includes teachers. The amendment to the 1972 Act (supra) was granted the assent of the president on 31st December, 2009 and, came into effect on 3rd April, 1997. The amendment was notified in respect of educational institutions by a Notification dated 3rd April, 1997, w.e.f. 8th January, 1982.

Therefore, Mr. Guha Thakurata points out that the eligibility of the private respondents to receive gratuity is now legally not negotiable.

5. Appearing for the State-respondents, Mr. Sadhan Kumar Halder, Ld. Senior Counsel reiterates that the 1997 Notification extends gratuity to all teachers. Mr. Halder clarifies that since the private respondents were in the employment of the School in issue, under the specific provisions of the 1972 Act, gratuity is liable to be paid by the School and not by the State.

6. In support of his submissions, Mr. Halder relies upon the decision reported in 2016 Lab IC 824. Ld. State Counsel further points out that it is now a settled legal position that the Payment of Gratuity (Amendment) Act, 2009 has widened the definition of employees to include teachers.

7. Accordingly, both Ld. State Counsel and Ld. Counsel for the private respondents submit that the order of the CA deserves not to be touched.

8. Having heard the parties and considering the materials placed, this Court arrives at the following findings:-

A) This Court, only for academic purposes to remove the fallacy in the stand taken by Ld. Counsel for the petitioners, must usefully refer to the judgment reported in 1988 (2) SCC 580, In Re: Union of India v. All India Services Pensioners' Association & Anr. for distinguishing the concepts of pension and gratuity. Paragraph 8 thereof reads as follows:-

"8. From the foregoing it is clear that this Court has made a distinction between the pension payable on retirement and the gratuity payable on retirement. While pension is payable periodically as long as the pensioner is alive, gratuity is ordinarily paid only once on retirement. No other decision of this Court which has taken a view contrary to the decision of Thakkar and Ray, JJ. in the Andhra Pradesh State Government Pensioners Association's case (supra) and to the decision in M. L. Abhyankar's case (supra) has been brought to our notice. The observations made in these two cases are binding on us insofar as the applicability of the rule in D.S. Nakara's case (supra) to the liability of the Government to pay gratuity on retirement. We respectfully agree with the views expressed in those decisions. It is also not shown that the Government notification in question either expressly or by necessary implication directs that those who had retired prior to 1.1.1973 would be entitled to any additional amount by way of gratuity. The Tribunal was, therefore, in error in upholding that gratuity was payable in accordance with the Government Notification No. 33/12/73-AIS(ii) dated 24.1.1975 to all those members of the All India Services who had retired prior to January 1, 1973."

B) That gratuity is part of the minimal service conditions which must be paid to the employee notwithstanding the financial capacity of the employer has been laid down in no uncertain terms by the Hon'ble Apex Court in 1994 (1) SCC 9, In Re: Bakshish Singh v. M/s. Darshan Engineering Works & Ors., Paragraphs 16, 17, 27, 31 and 32 thereof deserve reproduction below:-

"16. The aforesaid survey of the relevant authorities shows that in labour jurisprudence the concept of "gratuity" has undergone a metamorphosis over the years. The dictionary meaning may suggest that gratuity is a gratuitous payment, a gift or a boon made by the employer to the employee as per his sweet will. It necessarily means that it is in the discretion of the employer whether to make the payment or not and also to choose the payee as well as the quantum of payment. However, in the industrial adjudication it was considered as

a reward for a long and meritorious service and its payment, therefore, depended upon the duration and the quality of the service rendered by the employee. At a later stage, it came to be recognised as a retiral benefit in consideration of the service rendered and the employees could raise an industrial dispute for introducing it as a condition of service. The industrial adjudicators recognised it as such and granted it either in lieu of or in addition to other retiral benefit(s) such as pension or provident fund depending mainly upon the financial stability and capacity of the employer. The other factors which were taken into consideration while introducing gratuity scheme were the service conditions prevalent in the other units in the industry and the region, the availability or otherwise of the other retiral benefits, the standard of other service conditions etc. The quantum of gratuity was also determined by the said factors. The recognition of gratuity as a retiral benefit brought in its wake further modifications of the concept. It could be paid even if the employee resigned or voluntarily retired from service. The minimum qualifying service for entitlement to it, rate at which it was to be paid and the maximum amount payable was determined likewise on the basis of the said factors. It had also to be acknowledged that it could not be denied to the employee on account of his misconduct. He could be denied gratuity only to the extent of the financial loss caused by his misconduct, and no more. Thus even before the present Act was placed on the statute book, the courts had recognised gratuity as a legitimate retiral benefit earned by the employee on account of the service rendered by him. It became a service condition wherever it was introduced whether in lieu of or in addition to the other retiral benefit(s). The employees could also legitimately demand its introduction as such retiral benefit by raising an industrial dispute in that behalf, if necessary. The industrial adjudicators granted or rejected the demand on the basis of the factors indicated above.

17. It is true that while doing so, the industrial adjudicators insisted upon certain minimum years of qualifying service before an employee could claim it whether on superannuation or resignation or voluntary retirement. This was undoubtedly inconsistent with the concept of the gratuity being an earning for the services rendered. What is, however, necessary to remember in this connection is that there is no fixed concept of gratuity or of the method of its payment. Like all other service conditions, gratuity schemes may differ from establishment to establishment depending upon the various factors mentioned above, prominent among them being the financial capacity of the employer to bear the burden. There has commonly been one distinction between a retiral benefit like provident fund and gratuity, viz. the former generally consists of the contribution from the employee as well. It is, however, not a necessary ingredient and where the employee is required to make his contribution, there is no uniformity in the proportion of his share of contribution. Likewise, the gratuity schemes may also provide differing qualifying service for entitlement to gratuity. It is true that in the case of gratuity an additional factor weighed with the industrial adjudicators and courts, viz. that being entirely a payment made by the employer without

there being a corresponding contribution from the employee, the gratuity scheme should not be so liberal as would induce the employees to change employment after employment after putting in the minimum service qualifying them to earn it. But as has been pointed out by this Court in the *Straw Board Mfg. Co. Ltd. case*" in view of the constantly growing unemployment, the surplus labour and meagre opportunities for employment, the premise on which a longer qualifying period of service was prescribed for entitlement to gratuity on voluntary retirement or resignation, was unsupported by reality. In the face of the dire prospects of unemployment, it was facile to assume that the labour would change or keep changing employment to secure the paltry benefit of gratuity.

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

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

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

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

C) Therefore, the stand taken by Ld. Counsel for the petitioner/School to the effect that since the private respondents are in receipt of pension, gratuity cannot be claimed or, can only be claimed qua the School confined to the Basic Pay received by them is not a legally sustainable position.

(D) This Court must further notice that by agreeing to pay gratuity in favour of the private respondents only confined to their Basic Pay, the petitioner/School implicitly recognises the right of the private respondents to receive gratuity independently of their pension.

E) On the basis of the settled legal views as discussed above, the private respondents are entitled to gratuity independently of the pension received by them. Undoubtedly, in law, such claim to gratuity will lie with their employer/School in issue. This Court therefore recognises the inalienable legal position that the State action of releasing the DA component of the salaries of the private respondents to bring them at par with Government Schools does not carry with it the employer's liability to disburse gratuity.

F) It is further relevant to notice that teachers are within the purview of gratuity through the amendment of the 1972 Act vide the Notification dated 3rd April, 1997. In this connection the judgment of an Hon'ble Single Bench of the Chhatisgarh High Court reported in 2016 Lab IC 824 (supra), In Re: St. Xavier's H.C. School, Ambikapur v. State of Chhatisgarh & Ors. analyses, in the view of this Court, the complete and contemporaneous legal position. Paragraphs 1, 2, 3, 13, 14, 15, 16 and 17 thereof may be exhaustively reproduced for the benefit of the present discussion.

"1. Critical question that arises for consideration is whether teacher of fully aided educational institution can be held to be "employee" within the meaning of Section 2(e) of the Payment of Gratuity Act, 1972 (hereinafter referred to as "the Act of 1972") to enable the teacher to claim gratuity ?

2. Petitioner-school is a minority institution and receiving 100% grant-in-aid from the State Government. Respondent No.5 herein was superannuated on 30.6.2003 from the petitioner's school as Assistant Teacher. He made an application under Section 4 read with Section 7 of the Act of 1972 and Rule 10 of the said Act stating inter-alia that he is entitled for gratuity from petitioner's school as definition of "employee" under Section 2(e) of the Act of 1972 has been amended with effect from 3.4.1997 bringing the "teacher" within the definition of Section 2(e) of the Act of 1972, therefore, he is entitled for amount of gratuity. The Controlling Authority by order dated 23.3.2013 allowed that application holding inter-alia that definition of "employee" has been amended with effect from 3.4.1997 by the Payment of Gratuity (Amendment) Act, 2009 and therefore, he is entitled for 3 amount of gratuity payable by the petitioner's Institution and accordingly, directed for payment of gratuity.

3. Feeling dissatisfied with the order passed by the Controlling Authority, the petitioner herein preferred an appeal under Section 7 (7) of the Act of 1972 before the Appellate Authority and the Appellate Authority by order dated 22.8.2014 affirmed the order of the Controlling Authority finding inter-alia that respondent No.5 is entitled for amount of gratuity pursuant to the amendment in the Payment of Gratuity Act, in which educational institution has been brought into definition of "employee" under Section 2 (e) pursuant to the Payment of Gratuity (Amendment) Act, 2009 with effect from 3.4.1997.

13. The question whether "teacher" would come within the meaning of employee as defined in Section 2(e) of the Act of 1972 (unamended) came to be considered before the Supreme Court in the matter of Ahmedabad Pvt. Primary Teacher's Assn. (supra) and it has been held by the Supreme Court that employee as defined in Section 2(e) of the Act of 1972, the teachers are not covered. Their Lordships have held as under:-

"24. The contention advanced that teachers should be treated as included in the expression "unskilled" or "skilled" cannot, therefore, be accepted. The teachers might have been imparted training for teaching or there may be cases where teachers who are employed in primary schools are untrained. A trained teacher is not described in industrial field or service jurisprudence as a "skilled employee". Such adjective generally is used for an employee doing manual or technical work. Similarly, the words "semi-skilled" and "unskilled" are not understood in educational establishments as describing nature of job of untrained teachers. We do not attach much importance to the arguments advanced on the question as to whether "skilled", "semi-skilled" and "unskilled" qualify the words "manual", "supervisory", "technical" or "clerical" or the above words qualify the word "work". Even if all the words are read disjunctively or in any other manner, trained or untrained teachers do not plainly answer any of the descriptions of the nature of various employments given in the definition clause. Trained or untrained teachers are not "skilled", "semi-skilled", "unskilled", "manual", "supervisory", "technical" or "clerical" employees. They are also not employed in "managerial" or "administrative" capacity. Occasionally, even if they do some administrative work as part of their duty with teaching, since their main job is imparting education, they cannot be held employed in "managerial" or "administrative" capacity. The teachers are clearly not intended to be covered by the definition of "employee".

25. The Legislature was alive to various kinds of definitions of word "employee" contained in various previous labour enactments when the Act was passed in 1972. If it intended to cover in the definition of "employee" all kinds of employees, it could have as well used such wide language as is contained in section 2(f) of the Employees' Provident Funds Act, 1952 which defines "employee" to mean "any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment". Non-use of such wide language in definition of

""employee" in section 2(e) of the Act of 1972 reinforces our conclusion that teachers are clearly not covered in the definition."

14. While concluding, Their Lordships of the Supreme Court observed that it is for the legislature to take cognizance of situation of such teachers in various establishments where gratuity benefits are not available and think of a separate legislation for them in this regard by holding as under :-

26. Our conclusion should not be misunderstood that teachers although engaged in a very noble profession of educating our young generation should not be given any gratuity benefit. There are already in several States separate statutes, rules and regulations granting gratuity benefits to teachers in educational institutions which are more or less beneficial than the gratuity benefits provided under the Act. It is for the Legislature to take cognizance of situation of such teachers in various establishments where gratuity benefits are not available and think of a separate legislation for them in this regard. That is the subject-matter solely of the legislature to consider and decide."

15. The Legislature took cognizance of the judgment of the Supreme Court particularly observation made in paragraph 26 of the aforesaid judgment and the Payment of Gratuity (Amendment) Act, 2009 was introduced to widen the definition of "employee" and to extend the benefit of gratuity to teacher. Statement of objects and Reasons of the payment of Gratuity (Amendment) Act, 2009 states as under:- "Statement of Objects and Reasons.-The Payment of Gratuity Act, 1972 provides for payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishment and for 11 matters connected therewith or incidental thereto. Clause (c) of sub-section (3) of section 1 of the said Act empowers the Central Government to apply the provisions of the said Act by notification in the Official Gazette to such other establishments or class of establishments in which ten or more employees are employed, or were employed, on any day preceding twelve months. Accordingly, the Central Government had extended the provisions of the said Act to the educational institutions employing ten or more persons by notification of the Government of India in the Ministry of Labour and Employment vide number S.O.1080, dated the 3rd April, 1997.

2. The Hon"ble Supreme Court in its judgment in Civil Appeal No.6369 of 2001, dated the 13th January, 2004, in Ahmedabad Private Primary Teachers" Association v. Administrative Officer and others [AIR 2004 Supreme Court 1426] had held that if it was extended to cover in the definition of "employee", all kind of employees, it could have as well used such wide language as is contained in clause (f) of section 2 of the Employees" Provident Funds and Miscellaneous Provisions Act, 1952 which defines "employee" to mean any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of an establishment. It had been held that non-use of such wide language in the definition of "employee" under clause (e) of 12 section 2 of the Payment of Gratuity Act, 1972 reinforces the conclusion that teachers are clearly

not covered in the said definition.

3. Keeping in view the observations of the Hon"ble Supreme Court, it is proposed to widen the definition of "employee" under the said Act in order to extend the benefit of gratuity to the teachers. Accordingly, the Payment of Gratuity (Amendment) Bill, 2007 was introduced in Lok Sabha on the 26th November, 2007 and same was referred to the Standing Committee on Labour which made certain recommendations. After examining those recommendations, it was decided to give effect to the amendment retrospectively with effect from the 3rd April, 1997, the date on which the provisions of the said Act were made applicable to educational institutions.

4. Accordingly, the Payment of Gratuity (Amendment) Bill, 2007 was withdrawn and a new Bill, namely, this Payment of Gratuity (Amendment) Bill, 2009 having retrospective effect was introduced in the Lok Sabha on 24th February, 2009. However, due to dissolution of the Fourteenth Lok Sabha, the said Bill lapsed. In view of the above, it is considered necessary to bring the present Bill.

5. The Bill seeks to achieve the above objectives."

13. The above-stated amendment Act, amending the Act of 1972, bringing the "teacher" within the definition of "employee" was passed and brought into force w.e.f. 3.4.1997. The amended definition of "employee" under Section 2(e) states as under:-

"(e) "employee" means any person (other than an apprentice)) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, but does not include any such person who holds a post under the Central Government or a State Government and is governed by the any other Act or by any rules providing for payment of gratuity."

Section 13-A was also inserted by the Payment of Gratuity (Amendment) Act, 2009 which states about the validation of the Payment of Gratuity Act by stating as under:-

3. Insertion of new section 13A. After section 13 of the principal Act, the following section shall be inserted, namely:-

"13A. Validation of payment of gratuity.- Notwithstanding anything contained in any judgment, decree or order of any court, for 14 the period commencing on or from the 3rd day of April, 1997 and ending on the day on which the payment of Gratuity (Amendment) Act, 2009, receives the assent of the President, the gratuity shall be payable to an employee in pursuance of the notification of the Government of India in the Ministry of Labour and Employment vide number S.O.1080, dated the 3rd day of April, 1997 and the said notification shall be valid and shall be deemed always to have been valid as if the Payment of Gratuity (Amendment) Act, 2009 had been in force at all material times and the gratuity

shall be payable accordingly:

Provided that nothing contained in this section shall extend, or be construed to extend, to affect any person with any punishment or penalty whatsoever by reason of the non payment by him of the gratuity during the period specified in this section which shall become due in pursuance of the said notification."

16. Thus, the Legislature has taken cognizance of the observation made by the Supreme Court in paragraph 25 of Ahmedabad Pvt. Primary Teacher's Assn. case (supra), in which it has been held that definition of "employee" under Section 2(e) of the said Act has to be 15 couched in the wide language as is contained in the definition of "employee" under Section 2(f) of the Employees' Provident Funds Act, 1952 so as to include a teacher within the meaning of "employee" under Section 2(e) of the Act of 1972. Thus, taking a note of such observation, the Legislature has amended the definition of "employee" under Section 2(e) of the said Act with effect from 3rd April, 1997. The Objects and Reasons of such amendment makes the intention of the Legislature very clear to apply the provisions of the Payment of Gratuity Act to the teachers also. The amended definition is wide enough to cover the category of "teacher" for the purpose of applicability of the said Act. There is no escape but to hold that teacher is an "employee" within the meaning of Section 2(e) of the Act of 1972 and hence, the provisions of the said Act are applicable. The said amendment has brought in force w.e.f. 3.4.1997 by virtue of Section 13-A of the Amendment Act, 2009.

17. Submission of learned counsel appearing for petitioner school that petitioner-school is 100% Government 16 aided school and the Government has already taken a decision to make payment of gratuity to the employees. Copy of the said decision has been brought on record dated 7th June, 2013, in which the Government has taken a decision that so far as the retired employees from the Government aided school are concerned, gratuity would be payable to them as grant-in-aid with effect from 1.4.2013. Since respondent No.5 having retired from service prior to 1.4.2013, there is no decision of the State Government to make payment of gratuity and therefore, it will remain the liability of the petitioner and said circular is not applicable so far as payment of gratuity to respondent No.5 is concerned."

G) This Court must finally notice the plea on alternate remedy taken by Ld. Counsel for the private respondents. It is trite law that the rule of exclusion of writ jurisdiction on the ground of alternate remedy is a rule of discretion and, not of compulsion.

A Court under Article 226 of the Constitution of India cannot act in all circumstances as a court of appeal supplanting the specific statutory remedy. It is a consistent legal position that disputes relating to special statutes such as the Industrial Disputes Act, 1947 as also the 1972 Act are required to be adjudicated before the fora created under the special legislation.

Failing the above noted exercise of not approaching the competent fora under

the special statutory enactment, the entire legislative policy to extend relief on a solid assessment of facts first shall be rendered nugatory.

The principle of first exhaustion of the appellate forum in the labour field have been cogently explained by an Hon"ble Division Bench of this Court In Re: Asstt. P. F. Commissioners, Employees" Provident Fund Organisation v. Pawan Kumar Agarwala & Ors. reported in 2008 (1) CHN 469. Paragraphs 8 and 9 thereof read as follows:-

"8. We have considered the submissions made by the learned Counsel for the parties. We are of the considered opinion that remedy of appeal having been provided before the Appellate Tribunal the writ petition would not be maintainable. It is a settled position of law that the High Court ought not to entertain a writ petition under Article 226/227 of the Constitution of India when an adequate alternative remedy of appeal is provided in the statute itself. This may not be an absolute bar but it is not to be lightly ignored or by-passed. Indeed a writ petition may be entertained only to correct an error apparent on the face of the record or grave errors of jurisdiction. Therefore, only in exceptional circumstances can a writ petition be entertained. The law with regard to the principles governing the exercise of jurisdiction by the High Court under Article 226/227, when the remedy of statutory appeal is available have been restated by the Supreme Court in the case of U.P. State Spinning Co. Ltd. v. R.S. Pandey and Anr., 2005 (107) FLR 729 . Hon"ble Justice Arijit Pasayat, speaking for the Bench, observed:

16. There are two well-recognised exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings themselves are an abuse of process of law the High Court in an appropriate case can entertain a writ petition.

17. Where under a statute there is an allegation of infringement of fundamental rights or when on the undisputed facts the taxing authorities are shown to have assumed jurisdiction which they do not possess can be the grounds on which the writ petitions can be entertained. But normally, the High Court should not entertain writ petitions unless it is shown that there is something more in a case, something going to the root of the jurisdiction of the officer, something which would show that it would be a case of palpable injustice to the writ petitioner to force him to adopt the remedies provided by the statute....

20. In a catena of decisions it has been held that writ petition under Article 226 of the Constitution should not be entertained when the statutory remedy is available under the Act, unless exceptional circumstances are made out.

21. In *U.P. State Bridge Corporation Ltd. v. U.P. Rajya Setu Nigam S. Karamchari Sangh*, 2004(4) SCC 268, it was held that when the dispute relates to enforcement of a right or obligation under the statute and specific remedy is, therefore, provided under the statute, the High Court should not deviate from the general view and interfere under Article 226 except when a very strong case is made out for making a departure. The person who insists upon such remedy can avail of the process as provided under the statute. To same effect are the decisions in *Premier Automobiles Ltd. v. Kamlekar Shantaram Wadke* 1976 (1) SCC 496, *Hajaathan SRTC v. Krishna Kant*, 1995(5) SCC 75; *Chandrakant Tukaram Nikam v. Municipal Corporation of Ahmedabad*, 2002(2) SCC 542 and in *Scooters India v. Vijai E.V. Eldred*, 1998(6) SCC 549.

9. The same view is reiterated by the Supreme Court in the case of *Uttaranchal Forest Development Corporation and Anr. v. Jabar Singh and Anr*, 2007(2) SCC 112. Hon'ble Justice Dr. AR Laxshmanan, speaking for the Bench, observed:

44. In the instant case, the workmen have not made out any exceptional circumstances to knock the door of the High Court straightaway without availing the effective alternative remedy available under the Industrial Disputes Act. But the dispute relates to enforcement of a right or obligation under the statute and a specific remedy is, therefore, provided under the statute. The High Court should not deviate from the general view and interfere under Article 226 of the Constitution except when a very strong case is made out for making a departure. There are several decisions to the same effect. The respondents have not made out any strong case for making a departure. Accordingly, the conclusion is inevitable that the High Court was not justified in entertaining the writ petition."

The above noted proposition discussed by the Hon'ble Division Bench (supra), applies with full force to an adjudication process under the 1972 Act.

H) This Court must also notice that the present writ petitions have been filed after expiry of the period to prefer an appeal against the order of the CA. In this connection Paragraph 13 of the judgment reported in 2006-I LLJ 302, *In Re: U. P. State Spinning Co. Ltd. v. R. S. Pandey & Anr.* of the Hon'ble Apex Court fairly sums up the legal position and, reads as follows:-

"13. Another Constitution Bench of this Court in *State of Madhya Pradesh and Anr. v. Bhailal Bhai etc. etc.*, AIR (1964) SC 1006 held that the remedy provided in a writ jurisdiction is not intended to supersede completely the modes of obtaining relief by an action in a civil court or to deny defence legitimately open in such actions. The power to give relief under Article 226 of the Constitution is a discretionary power. Similar view has been re-iterated in *N.T. Veluswami Thevar v. G. Raja Nainar and Ors.*, AIR (1959) SC 422; *Municipal Council, Khurai and Anr. v. Kamal Kumar and Anr.*, AIR (1965) SC 1321; *Siliguri Municipality and Ors. v. Amalendu Das and Ors.*, AIR (1984) SC 653; *S.T. Muthusami v. K. Natarajan and Ors.*, AIR (1988) SC 616; *R.S.R.T.C. and Anr. v. Krishna Kant and Ors.*, AIR (1995) SC 1715; *Kerala State Electricity Board and Anr. v. Kurien E. Kalathil and*

Ors., AIR (2000) SC 2573; A. Venkatasubbiah Naidu v. S. Chellappan and Ors., [2000] 7 SCC 695; and L.L. Sudhakar Reddy and Ors. v. State of Andhra Pradesh and Ors., [2001] 6 SCC 634; Shri Sant Sadguru Janardan Swami (Moingiri Maharaj) Sahakari Dugdha Utpadak Sanstha and Anr. v. State of Maharashtra and Ors., [2001] 8 SCC 509; Pratap Singh and Anr. v. State of Haryana, [2002] 7 SCC 484 and G.K.N. Driveshafts (India) Ltd. v. Income Tax Officer and Ors., [2003] 1 SCC 72.

In Harbans Lal Sahnia v. Indian Oil Corporation Ltd., [2003] 2 SCC 107, this Court held that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere if it comes to the conclusion that the petitioner seeks enforcement of any of the fundamental rights; where there is failure of principles of natural justice or where the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged.

In G. Veerappa Pillai v. Raman and Raman Ltd., AIR (1952) SC 192; Assistant Collector of Central Excise v. Dunlop India Ltd., AIR (1985) SC 330; Ramendra Kishore Biswas v. State of Tripura, AIR (1999) SC 294; Shivgonda Anna Patil and Ors. v. State of Maharashtra and Ors., AIR (1999) SC 2281; .AC. Abraham v. I.T.O. Kottayam and Ors., AIR (1961) SC 609; Titaghur Paper Mills Co. Ltd. v. State of Orissa and Anr., AIR (1983) SC 603; H.B. Gandhi v. M/s Gopinath and Sons, [1992] Suppl. 2 SCC 312; Whirlpool Corporation v. Registrar of Trade Marks and Ors., AIR (1999) SC 22; Tin Plate Co. of India Ltd. v. State of Bihar and Ors., AIR (1999) SC 74; Sheela Devi v. Jaspal Singh, [1999] 1 SCC 209 and Punjab National Bank v. O.C. Krishnan and Ors., [2001] 6 SCC 569, this Court held that where hierarchy of appeals is provided by the statute, party must exhaust the statutory remedies before resorting to writ jurisdiction.

(emphasis supplied).

If, as was noted in Ram and Shyam Co. v. State of Haryana and Ors., AIR (1985) SC 1147 the appeal is from "Caeser to Caesar"s wife" the existence of alternative remedy would be a mirage and an exercise in futility. In the instant case the writ petitioners had indicated the reasons as to why they thought that the alternative remedy would not be efficacious. Though the High Court did not go into that plea relating to bias in detail, yet it felt that alternative remedy would not be a bar to entertain the writ petition. Since the High Court has elaborately dealt with the question as to why the statutory remedy available was not efficacious, it would not be proper for this Court to consider the question again. When the High Court had entertained a writ petition notwithstanding existence of an alternative remedy this Court while dealing with the matter in an appeal should not permit the question to be raised unless the High Court"s reasoning for entertaining the writ petition is found to be palpably unsound and irrational. Similar view was expressed by this Court in First Income-Tax Officer, Salem v. M/s. Short Brothers (P) Ltd., [1966] 3 SCR 84 and State of U.P. and Ors. v. M/s. Indian Hume Pipe

Co. Ltd., [1977] 2 SCC 724. That being the position, we do not consider the High Court's judgment to be vulnerable on the ground that alternative remedy was not availed. There are two well recognised exceptions to the doctrine of exhaustion of statutory remedies. First is when the proceedings are taken before the forum under a provision of law which is ultra vires, it is open to a party aggrieved thereby to move the High Court for quashing the proceedings on the ground that they are incompetent without a party being obliged to wait until those proceedings run their full course. Secondly, the doctrine has no application when the impugned order has been made in violation of the principles of natural justice. We may add that where the proceedings itself are an abuse of process of law the High Court in an appropriate case can entertain a writ petition."

The judgment reported in 2010 (3) SCC 192, In Re: Harjinder Singh v. Punjab State Warehousing Corporation, sets forth the approach of Constitutional Courts in cases involving interpretation of social welfare legislations. Paragraphs 30, 31 and 32 thereof read as follows:-

"30. Of late, there has been a visible shift in the courts approach in dealing with the cases involving the interpretation of social welfare legislations. The attractive mantras of globalization and liberalisation are fast becoming the *raison d'être* of the judicial process and an impression has been created that the constitutional courts are no longer sympathetic towards the plight of industrial and unorganized workers. In large number of cases like the present one, relief has been denied to the employees falling in the category of workmen, who are illegally retrenched from service by creating by-lanes and side-lanes in the jurisprudence developed by this Court in three decades. The stock plea raised by the public employer in such cases is that the initial employment/engagement of the workman-employee was contrary to some or the other statute or that reinstatement of the workman will put unbearable burden on the financial health of the establishment. The courts have readily accepted such plea unmindful of the accountability of the wrong doer and indirectly punished the tiny beneficiary of the wrong ignoring the fact that he may have continued in the employment for years together and that micro wages earned by him may be the only source of his livelihood.

31. It need no emphasis that if a man is deprived of his livelihood, he is deprived of all his fundamental and constitutional rights and for him the goal of social and economic justice, equality of status and of opportunity, the freedoms enshrined in the Constitution remain illusory. Therefore, the approach of the courts must be compatible with the constitutional philosophy of which the Directive Principles of State Policy constitute an integral part and justice due to the workman should not be denied by entertaining the specious and untenable grounds put forward by the employer - public or private.

32. In the result, the appeal is allowed. The impugned order of the High Court is set aside and the award passed by the Labour Court is restored. The appellant shall get cost of Rs.25,000/- from the corporation."

I) Last, but not the least, the utterly frivolous plea that the release of gratuity is connected to the proportion of collection of fees from the students made by the petitioners in the teeth of their simultaneous readiness to disburse gratuity calculated on the Basic Pay of the private respondents, deserves to be curtly turned down by quoting the observations of the Hon'ble Apex Court In Re: Frank Anthony Public School Employees' Association v. Union of India & Ors., reported in 1986 (4) SCC 707 at Paragraphs 6 and 23 below:-

"6. To recall the contentions of the learned counsel for either side, on the one hand it was submitted by Shri C.S. Vaidyanathan, learned counsel for the petitioner that these drastic departures which result from giving effect to section 12, make Section 12 discriminatory and offensive to Article 14 of the Constitution. The provisions which are made inapplicable to aided minority institutions because of Section 12 are no more than regulatory measures aimed at the excellence of the institution and in no way impinge on the Fundamental Right of the minorities, religious or linguistic, to administer educational institutions of their choice. On the other hand, it was the contention of the learned Additional Solicitor General that these provisions are inapplicable to minority institutions since they interfere with the right of management vested in the minorities. According to him, payment of salary, allowances etc. is part of the right of the management to appoint members of the staff. The economics of an unaided institution is entirely in the hands of its management and the right of the management to pay such salaries and allowances as the management deems fit is a part and parcel of the right to administer the institution. More so the right to take disciplinary action which cannot be the subject of any supervision by any other authority. But for Section 12, Sections 8 to 11 would impinge on the right of the minorities to administer Educational Institutions of their choice and would therefore, be inapplicable to minority Educational Institutions. Shri Frank Anthony made submissions on the same lines as the learned Additional Solicitor General and in addition pointed out that the Frank Anthony Public School was an Educational Institution of great repute and that the excellence of the institution was such that it did not necessitate any regulation by any other authority. The excellence of the institution spoke for itself. He submitted that the scale of fee charged by the institution was low compared with other private institutions and it was the desire of the management that the scale of fee should continue to be low so that it may be within the reach of the ordinary people whom it was intended to reach. It was because of this desire of the management to keep the scale of fee low that the management could not pay higher salaries and allowances and we were repeatedly told that if Section 12 was struck down and the management was compelled to pay the same scale of salary and allowances as was paid to employees of Government schools, the Frank Anthony Public School would have to be closed down.

23. We must refer to the submissions of Mr. Frank Anthony regarding the excellence of the institution and the fear that the institution may have to close down if they have to pay higher scales of salary and allowances to the members

of the staff. As we said earlier the excellence of the institution is largely dependent on the excellence of the teachers and it is no answer to the demand of the teachers for higher salaries to say that in view of the high reputation enjoyed by the institution for its excellence, it is unnecessary to seek to apply provisions like Section 10 of the Delhi School Education Act to the Frank Anthony Public School. On the other hand, we should think that the very contribution made by the teachers to earn for the institution the high reputation that it enjoys should spur the management to adopt at least the same scales of pay as the other institutions to which Section 10 applies. Regarding the fear expressed by Shri Frank Anthony that the institution may have to close down we can only hope that the management will do nothing to the nose to spite the face, merely to "put the teachers in their proper place". The fear expressed by the management here has the same ring as the fear expressed invariably by the management of every industry that disastrous results would follow which may even lead to the closing down of the industry if wage scales are revised."

9. In the backdrop of the above discussion, this Court finds that the writ petitions have been designed only to delay, deny and defeat the legitimate claims of the private respondents. The writ petitions are utterly vexatious to comment the least. It is not in doubt that the CA exercised jurisdiction vested in him by law.

10. Accordingly WPs 158 (W), 160(W), 161(W) and 162(W) of 2016 stand dismissed with costs assessed at Rs. 10,000/- (Rupees Ten Thousand only) each payable by the writ petitioners/School in favour of each of the private respondents.

11. The final orders of the CA dated 20th November, 2015 in each of the writ petitions stand affirmed.

12. Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.