

(2018) 04 BOM CK 0038
In the Bombay High Court
Case No : WRIT PETITION NO. 12966 OF 2017

VINODKUMAR NARAYAN DIXIT

APPELLANT

Vs

THE STATE OF MAHARASHTRA THROUGH PRINCIPAL
SECRETARY

RESPONDENT

Date of Decision : 03-04-2018

Acts Referred:

Indian Penal Code, 1860 — Section 34, 409
Payment of Gratuity Act, 1972 — Section 3A, 4(5), 7, 7(3A), 14
Constitution Of India, 1950 — Article 226, 227
Maharashtra Civil Services (Pension) Rules, 1982 — Rule 129A, 129A(1), 130, 130(1)
(c)

Citation : (2018) 04 BOM CK 0038

Hon'ble Judges : V.K. TAHILRAMANI, J, M.S. SONAK, J

Bench : Division Bench

Advocate : Shailendra Pendse, Shruti Vyas

Final Decision : Partly Allowed

Judgement

1] Heard learned counsel for the parties.

2] Rule.Â With the consent of and at the request of the learned counsel for the parties, Rule is made returnable forthwith.

3] The petitioner challenges judgment and order dated 29th January 2016 made by the Maharashtra Administrative Tribunal dismissing his Original

Application No. 114 of 2015 seeking inter alia interest on delayed payment of gratuity.

4] A prosecution was launched against the petitioner when he was posted as a Deputy Collector for certain offences under the Prevention of

Corruption Act 1988 read with sections 34 and 409 of the Indian Penal Code sometime in the year 1984. During the pendency of such prosecution, the

petitioner, retired from service on 1st April 1997 on attaining the age of superannuation. Since criminal prosecution was pending, no gratuity was released to the petitioner.

5] On 26th June 2009, the Sessions Court, Kalyan, acquitted the petitioner. On 12th August 2011, the Accountant General, Mumbai, issued

necessary authorization for payment of gratuity. The petitioner was granted an amount of Rs.36, 021/- by way of interest on delayed payment of

gratuity. This interest was computed from 26th June 2009 (date of acquittal) to 31st August 2011 (month prior to actual payment). The petitioner was

also granted an amount of Rs. 3581/- by way of interest of delayed payment of withheld increments.

6] Since, the petitioner was claiming interest on gratuity, as well as withheld increments from the date of his retirement / date of withholding of

increments, the petitioner, instituted OA No. 119 of 2015 before the MAT, primarily, for enforcement of such claim. By the impugned judgment and

order dated 29th January 2016, the MAT, has dismissed OA No. 119 of 2015. Hence, the present petition.

7] Mr. Shailendra Pendse, the learned counsel for the petitioner submits that the issue of payment of interest was required to be decided by the MAT

upon harmonious construction of the Maharashtra Civil Services (Pension) Rules 1982 (MCS Pension Rules) and the Government Resolution dated

6th May 1991. Mr. Pendse submits that in terms of the rules, gratuity becomes payable upon acquittal in criminal prosecution. However, upon

harmonious construction of the rules and the executive instructions in the GR dated 6th May 1991, it is quite clear that interest, from the date of

superannuation becomes payable on the amount of gratuity so payable, post acquittal. Mr. Pendse, relies on H. Gangahanume Gowda vs. Karnataka

Agro Industries Corporation Limited (2003) 3 SCC 40, Y. K. Singla vs. Punjab National Bank & Ors. (2013) 3 SCC 472 and Prabhakar Marotilal

Dalal vs. State of Maharashtra & Anr. 2009 (1) Mh.L.J. 209 in support of his contentions.

8] Mr. Pendse, the learned counsel for the petitioner submits that the very fact that the respondents have themselves awarded interest for the period

between 2009 and 2011 indicates acknowledgment of lapse on the part of the respondents. He submits that in such circumstances, the MAT, was not

at all justified in declining interest from the date of superannuation till the date of acquittal.Â Mr. Pendse submits that the executive instructionsÂ in

GR dated 6th May 1991 only supplement the statutory rules and the MAT, failed to exercise jurisdictionÂ by ignoring the executive instructions, even

though, such executive instructions were not at all in conflict with the statutory rules.

9] MsÂ Shruti Vyas â?" 'B' Panel Counsel for the respondent - State defended the impugned order by submitting that the view taken by the MAT is

entirely consistent with the position which emerges from Rules 129A and 130 of the Pension Rules. She submits that since gratuity, became payable

only on the acquittal of the petitioner in 2009, there is no question of payment of any interest on this amount for any period prior to 2009.

10] Ms Vyas submits that because there was delay of two years in payment of gratuity amount, the State, on its own, offered and paid interest on the

amount of gratuity to the petitioner for the period between 2009 and 2011.Â She submits that such fair gesture on the part of the State cannot be

construed as acknowledgement of any alleged lapse. In any case, Ms Vyas submits that any such acknowledgement, at the highest, can relate to the

period post acquittal i.e. 2009 and not extend to any period prior to the acquittal.Â For all these reasons, Ms Vyas submits that there is absolutely no

jurisdictional error in the impugned judgment and order so as to warrant interference under Articles 226 and 227 of the Constitution of India.

11] The rival contentions now fall for our determination.

12] There is no serious dispute as regards material facts. The petitioner retired from service on 1st April 1997 on attaining the age of superannuation.

On this date, the gratuity otherwise payable to the petitioner was not released on account of pendency of criminal prosecution against him.Â The

petitioner was acquitted by the Sessions Court, Kalyan, on 26th June 2009.Â Even the respondents do not dispute that from 26th June 2009, gratuity,

became payable to the petitioner. Since, gratuity was actually paid to the petitioner on or about 31st August 2011, the respondents, on their own, have

paid an amount of Rs.36, 021/- towards interest on the delayed payment of gratuity. The period of delay as computed by the respondents is from 26th

June 2009 (date of acquittal) to 31st August 2011 (month prior to actual payment). The main issue involved in this petition is whether, in such facts and

circumstances, the petitioner is entitled to interest on the gratuity amount from 1st April 1997 i.e. the date of his superannuation when, but for the pending criminal prosecution, gratuity, became payable to the petitioner.

13] The MAT, in order to deny interest to the petitioner has mainly referred to Rule 130 of the MCS (Pension) Rules 1982. In this Court, in addition to

Rule 130, Ms Vyas has made reference to Rule 129A of the MCS (Pension) Rules 1982 as amended in the year 2008. Accordingly, it will be

appropriate to extract, for convenience of reference Rules 129A and 130 of the MCS (Pension) Rules: â??129A.Â Â Interest on delayed payment

of gratuity .-

(1) Where the payment of retirement gratuity or death gratuity, as the case may be has been delayed beyond the period of three months from the date

of retirement or death, and it is clearly established that the delay in payment was attributable to administrative lapse, an interest at the rate applicable

to General Provident Fund deposits shall be paid on the amount of gratuity, in respect of the period beyond three months.

Provided that, no interest shall be payable if the delay in payment of such gratuity was attributable to the failure on the part of the Government servant

to comply with the procedure laid down in this Chapter:

Provided further that no interest shall be payable in the case where a provisional gratuity is paid.

(2) Every case of delayed payment of retirement gratuity or death gratuity, as the case may be, shall suo motu, be considered by the concerned

Administrative Department, and where the

Department is satisfied that the delay in payment of such gratuity was caused on account of administrative lapse, that Department shall sanction

payment of interest after obtaining the admissibility report, in this behalf, from the Accountant General (Accounts and Entitlement), Maharashtra,

Mumbai or Nagpur, as the case may be. The approval of the Finance Department for payment of such interest shall not be necessary.

(3) In allÂ cases, where interest has been paid on retirement gratuity or death gratuity, as the case may be, due to administrative lapse, the concerned

Administrative Department shall fix the responsibility and take disciplinary action against the Government servant or servants concerned, including the

concerned officer, who are found responsible for the delay in the payment of such

gratuity and recover the amount of interest required to be paid from the Government Servant or servants concerned including the concerned officer who are found responsible for the delay in the payment of such gratuity.

130. Provisional pension where departmental or judicial proceedings may be pending.- (1) (a) In respect of a Gazetted or Non-gazetted Government servant referred to in sub rule (4) of rule 27 of the Head of Office shall authorise the provisional pension equal to the maximum pension which would have been admissible on the basis of qualifying service upto the date of retirement of the Government servant, or if he was under suspension on the date of retirement upto the date immediately preceding the date on which he was placed under suspension.

(b) The provisional pension shall be authorized by the Head of Office for a period of six months during the period commencing from the date of retirement unless the period is extended by the Audit Officer and such provisional pension shall be continued upto and including the date on which, after the conclusion of departmental or judicial proceedings, final orders are passed by the competent authority. (c) No gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final orders thereon.

[Provided that where departmental proceedings have been instituted under Rule 10 of the Maharashtra Civil Service (Discipline & Appeal) Rules, 1979, for imposing any of the minor penalties specified in sub clause (i), (ii) and (iv) of clause (1) of Rule 5 of the said rules, the payment of gratuity shall be authorised to be paid to the Government Servant]

(2) Payment of provisional pension made under sub-rule (1) shall be adjusted against final retirement benefits sanctioned to such Government servant upon conclusion of such proceedings but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld either permanently or for a specified period. [Emphasis supplied]

14] The MAT, relying upon Rule 130(1) (c) has held that since no gratuity was required to be paid to the petitioner until the conclusion of the departmental or judicial

Proceedings and the issue of final orders thereon, gratuity, in the present case,

became payable to the petitioner only on 26th June 2009, when the petitioner was acquitted by the Sessions Judge at Kalyan. On this basis, the MAT, has held that since, the gratuity had not become payable to the petitioner until 26th June 2009, there was no delay in payment of gratuity until 26th June 2009 and consequently, there was no obligation for payment of any interest on the ground of any alleged delay in the payment of gratuity.

15] The MAT has made reference to Rule 129A of the MCS (Pension) Rules 1982 but not discussed its scope, import or applicability to the facts of the present case. Similarly, the MAT, has made some limited reference to the Government Resolutions, but again, there is no discussion as regards the scope, import and applicability of GR dated 6th May 1991 to the facts of the present case.

16] Rule 130(1) (c) of the MCS (Pension) Rules 1982, no doubt, provides that no gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and the issue of final orders thereon. However, this rule does not deal with the issue of payment of interest on the gratuity amount in a situation where the government servant is exonerated in the departmental proceedings or acquitted in the judicial proceedings. Therefore, relying solely upon the provisions in Rule 130(1) (c) of the MCS (Pension) Rules 1982, the MAT, was not justified in rejecting the petitioner's claim for interest on the gratuity amount.

17] Rule 129A (1) of the MCS (Pension) Rules 1982 is relevant in as much as it provides that where payment of retirement gratuity has been delayed beyond the period of three months from the date of retirement, and it is clearly established that the delay in payment was attributable to administrative lapse, an interest at the rate applicable to general provident fund deposits shall be paid on the amount of gratuity, in respect of the period beyond three months.

18] In order to supplement Rule 129A of the MCS (Pension) Rules 1982 and to clarify issues which clearly arise in the matter of implementation of the said rule, the State Government has issued a GR dated 6th May 1991. The GR, is in the nature of executive instructions. It is settled position in law that executive instructions may supplement statutory rules though not supplant the same.

19] As noted earlier, the MAT, in the present case, in the impugned judgment and order, has not discussed the implications and applicability of Rule

129A and GR dated 6th May 1991 to the facts and circumstances of the petitioner's case.

20] Clause 2 and clause 3 of the GR dated 6th May 1991, to the extent of relevancy, is extracted, for convenience of reference:-

2. It has been brought to the notice of Government that in case of retirement on superannuation the work of the assessment of the demands

outstanding against the retiring Government servants commences two years in advance whereas in other cases of retirement, assessment of

Government dues, etc. can begin only after the retirement of the Government servants has been approved by Government. A doubt has therefore,

been raised whether the provisions of rule 129-A are also applicable to those who retired otherwise on superannuation and if so, whether the time limit

of 3 months is to be observed in such cases. The position has been reviewed and the Government is now pleased to decide that if the payment of

gratuity has been delayed due to administrative lapses for no fault of the retiring Government servant in cases of retirement other than superannuation,

the payment of interest may be regulated by the concerned Administrative Department, in consultation with Finance Department in the following

manner:-

Â (i) In case of Government servant against whom disciplinary / judicial proceedings are pending on the date of retirement and or which gratuity is

withheld till the conclusion of the proceedings:-

(a) In such cases if the Government servant is exonerated of all charges and where the gratuity is paid on the conclusion of such proceedings, the

payment of gratuity will be deemed to have fallen due on the date following the date of retirement. If the payment of gratuity has been authorised

after 3 months from the date of his retirement, interest may be allowed beyond the period of 3 months from the date of retirement.

(b) !.....

(c) In cases where the Government servant is not fully exonerated on the conclusion of disciplinary / judicial proceedings, and where the competent

authority decides to allow payment of gratuity, in such cases, the payment of gratuity will be deemed to have been fallen due on the date of the issue

24] The issue almost identical to the issue raised in this petition came up for consideration before the Hon'ble Supreme Court in the case of Y. K.

Singla (supra). The MAT has attempted to distinguish this decision of the Hon'ble Supreme Court. However, we are of the opinion that the basis for distinction is not appropriate.

25] In the said case, an employee of the Punjab National Bank (PNB) whose claim for gratuity was governed by the Punjab National Bank

(Employees) Pension Regulations, 1995, retired on attaining the age of superannuation on 31st October 1996. At that stage, since, criminal prosecution was pending against him, the gratuity amount payable to him, was withheld by the bank. The employee was ultimately acquitted on 31st October 2009.

Thereupon, PNB, released all the employee's retiral benefits, including gratuity on 12th February 2010. Acknowledging delay between 31st October

2009 (date of acquittal) and 12th February 2010 (date of actual payment), the PNB, paid to the employee, interest on the gratuity amount at the rate of

5.5% per annum.

26] The employee instituted a writ petition claiming for interest from the date of superannuation i.e. 31st October 1996. The learned Single Judge of

the Hon'ble Punjab and Haryana High Court upheld the employee's contention and directed the payment of interest at the rate of 8% per annum from

the date of retirement. PNB appealed to the Division Bench, which reversed the Single Judge mainly relying upon Rule 46 of the 1995 Regulations,

which is substantially similar to Rule 130 of the MCS (Pension) Rules 1982 in material aspects. Rule 46 of 1995 Rules had provided that where

departmental or judicial proceedings are pending against an employee on the date he retires on superannuation, gratuity shall not be paid to such

employee until the conclusion of proceedings against him and subject to the decision in such proceedings.

27] The Hon'ble Supreme Court, reversed the view taken by the Division Bench and restored the view taken by the Single Judge.Â The Hon'ble

Supreme Court made detailed reference to the provisions of the Payment of Gratuity Act 1972, including in particular the provisions contained in

Section 7(3A) of the said Act. This provision states that if the amount of gratuity is not paid by the employer within the period specified, the employer

shall pay, from the date on which the gratuity becomes payable to the date on

which it is paid, simple interest at such rate, not exceeding the rate

notified by the Central Government from time to time for repayment of long term deposits, as that government may, by notification specify.Â

Provided that no such interest shall be payable if the delay in payment is due to the fault of the employee and the employer has obtained permission in

writing from the controlling authority for the delayed payments on this ground.

28] The Hon'ble Supreme Court has held thatÂ consequent upon the acquittal of the employee, it would be erroneous to concludeÂ that the gratuity

payable to the employee on attaining the age of superannuation i.e. on 31st October 1996 was withheld on account of some faultÂ on the part of the

employee himself. Accordingly, the employee, in such a situation, has to be awarded interest under section 7(3A) of the Gratuity Act.

29] The Hon'ble Supreme Court, therefore concluded that if the provisions of Payment of Gratuity Act were to be applicable to the employee of theÂ

PNB, then,Â he would definitely, be entitled to interest under sub section 3A of section 7 of the Payment of Gratuity Act, on account of delayed

payment of gratuity.Â Thereafter, the Hon'ble Supreme Court, took cognizance of the fact that the issue of payment of gratuity to the employee of

the PNB was governed not by the Payment of Gratuity Act directly but by the 1995 Regulations. The Hon'ble Supreme Court, by reference to section

14 of the Payment of Gratuity Act, which provides that the provisions of the Payment of Gratuity ActÂ shall have effect notwithstanding anything

inconsistentÂ therewith contained in any other enactment other than the said Act or in any instrument or contract having effect by virtue of any

enactment other than the said Act, concluded thatÂ such provision leaves no room for any doubt that the superior status has been vested in the

provisions of the Payment of Gratuity Act, vis-a-vis, any other enactment, includingÂ any other instrument or contract inconsistentÂ therewith.Â

30] Upon such reasoning, the Hon'ble Supreme CourtÂ held that even if the provisions of the 1995 Regulations had debarred payment of interest on

account of delayed payment of gratuity, the same would have beenÂ inconsequential andÂ the benefit of interest enuring to an employee as has

been contemplated in section 7 (3-A) of the Gratuity Act. Cannot be denied to an employee whose gratuity is regulated by some provision / instrument

other than the Payment of Gratuity Act. This is so because the terms of payment

of gratuity under the alternative instrument have to ensure better terms than the ones provided under the Gratuity Act. The effect would be the same when the provision concerned is silent on the issue. This is so because the situation is not worse than where there is a provision expressly debarring payment of interest in the manner contemplated under section 7(3-A) of the Payment of Gratuity Act.

31] The Hon'ble Supreme Court therefore, reasoned that even though the 1995 Regulations may be silent on the issue of payment of interest, the employee would still be entitled to the benefit of section 7(3-A) of the Payment of Gratuity Act. If such benefit were not to be extended to the employee, the protection contemplated under section 4(5) of the Payment of Gratuity Act would stand defeated. Likewise, even the mandate contained in section 14 of the Gratuity Act as deliberated in details by the Hon'ble Supreme Court would stand negated.

32] Finally, the Hon'ble Supreme Court, not only directed payment of interest at the rate of 8% per annum from the date of retirement till actual payment on the amount of gratuity deemed to be withheld but also directed the PNB to pay costs of Rs.50,000/- to the employee concerned.

33] The provisions in Rule 129A of the MCS (Pension) Rules 1982 make reference to administrative lapses on the part of the government leading to delay in the payment of gratuity to an employee. The GR dated 6th May 1991 explains this position by reference to delay in the payment of gratuity due to administrative lapse for no fault of the retiring government servant. In fact, clause 3 of the GR dated 6th May 1991 provides that as far as retirement on superannuation is concerned, the existing procedure for grant of interest if the payment of gratuity is delayed due to administrative reason or lapse for no fault of the retiring government servant will continue to be applicable. In other words, interest will be allowed for the period of delay beyond three months from the date of retirement.

34] As has been held by the Hon'ble Supreme Court in Y. K. Singla (supra), consequent upon the acquittal of an employee, it would be erroneous to conclude that the gratuity payable to such employee on attaining the age of superannuation was withheld on account of some fault of the employee himself. In the present case, it is not as if the petitioner, was ultimately convicted in criminal prosecution launched against him, in which case, the

petitioner, could have been held to be at fault. Therefore, applying the principle explained by the Hon'ble Supreme Court in Y. K. Singla (supra), we

hold that the delay in payment of gratuity to the petitioner beyond three months from the date of retirement was for no fault of the petitioner. In terms

of Rule 129A of the MCS (Pension) Rules, 1982, read with clause 3 of the GR dated 6th May 1991 therefore, the petitioner is entitled to be paid

interest for the period of delay beyond three months from the date of first retirement i.e. with effect from 1st July 1997.

35] In Prabhakar Dalal (supra), the Division Bench of this Court, in the context of Rules 129A, 130 (1)(c) of the MCS (Pension) Rules, 1982 and

GR dated 23rd June 1986 has held that paragraph 3 of the GR will have to be construed to mean that on a person against whom disciplinary or

judicial proceedings were pending, if he is discharged or the disciplinary authority comes to the conclusion that no punishment needs to be imposed and

in case of judicial authority, such authority acquits such person, than in those cases, on the competent authority authorising the release of gratuity,

it will be presumed that the gratuity is deemed to have been fallen due on the date immediately following the date of retirement for the purpose of

interest. The Division Bench has commended harmonious construction of the statutory rules and the executive instructions in the GR, so that executive

instructions would not fall foul of the rules.

36] In so far payment of interest on withheld increments or for that matter payment of interest on pension amount is concerned, we see no good

ground to award same to the petitioner. Interest on withheld increments has already been paid to the petitioner at least to some extent. There is no

dispute that the petitioner was in receipt of provisional pension. Therefore, in terms of MCS (Pension) Rules, 1982, there is no question of payment

of any interest on pension.

37] For the aforesaid reasons, we partly allow this writ petition and direct the respondents to pay to the petitioner interest at the rate of 8% per annum

on the gratuity amount with effect from 1st April 1997 and upto 26th June 2009. In determining this rate of interest, we draw sustenance from Rule

129A of the MCS (Pension) Rules, 1982, as also, the decision of the Hon'ble Supreme Court in the case of Y. K. Singla (supra). This amount shall be

paid to the petitioner within a period of three months from today.

38] Rule is made absolute to the aforesaid extent. There shall be no order as to costs.