

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **[W.P. (C) 6168 OF 2010]**

% **RESERVED ON: 18.10.2011**
PRONOUNCED ON: 02.12.2011

**INDEPENDENT SCHOOLS' FEDERATION
OF INDIA (REGD)**

... PETITIONER

Through: Ms. Shobha, Advocate with Ms.
Hema Shekhawat, Advocate.

VERSUS

UNION OF INDIA & ORS

... RESPONDENTS

Through: Mr. Saqib, Advocate.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

A.K. SIKRI, ACTING CHIEF JUSTICE

1. The petitioner Federation is an All India Association of Schools affiliated to CISCE and CBSE all over India. The federation works to serve the cause of proper independent School Education, to safeguard the interest of the member education institutions of all India, to render assistance to member schools in their quest for excellence in service etc. The petitioner Federation has 1500 schools as its members spread all over India, including large number of minority schools as its members. It is a registered federation of private schools not receiving any grant-in-aid from either state or central government.

2. The present writ petition has been filed invoking extra ordinary jurisdiction of this Court under Article 226 of the Constitution of India raising challenge to validity of sub-section 2 of Section 1 of the Payment of Gratuity (Amendment) Act, 2009 has given retrospective effect to the provisions of Amendment Act, 2009, deemed to have come into force w.e.f. the 3rd day of April, 1997, i.e. some more than 12 years back. Section 13-A has been newly inserted by section 3 of the Payment of Gratuity (Amendment) Act, 2009 in the Payment of Gratuity Act, 1972, which has validated the Notification dated 3.4.1997 with retrospective w.e.f. 3rd April, 1997.

3. The Payment of Gratuity Act, 1972 came into force w.e.f. 16th September, 1972 vide S.O. 601 (E). The Payment of Gratuity Act 1972, defined 'employee vide Section 2 (e) of the Act, 1972, which is reproduced as under:-

“Section 2 (3):- “employee” means any person (other than an apprentice) employed on wages, [***] in any establishment, factory, mine, oilfield, plantation, port, railway company or shop, to do any skilled, semi-skilled, or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are expressed or implied, 3 [and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State government and is governed by any other Act or by any rules providing or payment of gratuity.”

4. The Ministry of Labour and Employment, Government of India issued notification dated 3.4.1997, whereby the Payment of Gratuity Act, 1972 was extended to the Educational Institutions as well in which 10 or

more persons are employed or were employed on any day preceding twelve months.

5. An important issue cropped up in a writ petition filed by a teacher before the Gujarat High Court as to whether the teachers working in the education institutions are covered by the definition of “employees” as given in Section 2(e) of the Payment Gratuity Act, 1972. The Full Bench of the Gujarat High Court answered the issue in negative by unanimously holding that teachers are not covered by the definition of “employee” under Section 2 (e) of the Act, 1972. The Full Bench decision came up for consideration before the Supreme Court in the matter of Ahemdabad Primary Teachers’ Association’s case that teachers are clearly not covered in the definition.

6. The Union of India, in view of the law laid down by the Supreme Court in the Ahemdabad Pvt. Primary Teachers’ Association’s case, proposed to widen the definition of “employee” under the Payment of Gratuity Act, 1972, in order to extend the benefit of gratuity to teachers introduced the Payment of Gratuity (Amendment) Bill 2007 in Lok sabha. Though this bill, 2007 was later on withdrawn. New bill, namely the Payment of Gratuity (Amendment) Bill, 2009 was introduce in the Lok Sabha on 24th February, 2009. This bill proposed retrospective effect to be given to the amendments with effect from 3rd April, 1997, i.e. the date on which the provision of the Payment of Gratuity Act, 1972 were made applicable to the educational institutions vide notification dated 3rd April, 1997. The Payment of Gratuity (Amendment) Act, 2009 was notified in the Gazette on 31st December, 2009.

7. Sub Section 2 of Section1 of the Payment of Gratuity (Amendment) Act, 2009 has given retrospective effect to the provisions of Amendment Act, 2009, deemed to have come into force w.e.f. the 3rd day of April, 1997 i.e. some more than 12 years back. Section 13-A has been newly inserted by Section 3 of the Payment of Gratuity (Amendment) Act, 2009 in the Payment of Gratuity Act, 1972, which has validated the Notification dated 3.4.1997 with retrospective w.e.f. 3rd April, 1997. Relevant sub-Section 2 of Section1 and Section 3 of the Payment of Gratuity (Amendment) Act 2009 are extracted as under:-

“Sec. 1. (1) *****

(2) It shall be deemed to have come into force on the 3rd day of April, 1997.

Sec. 3 After section 13 of the Principal Act, the following section shall be inserted, namely:

“13A. Notwithstanding anything contained in any judgment, decree or order of any court, for the period commencing on any 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.”

8. The position that emerges by virtue of the aforesaid mandate is that definition of “employee” extends to “Teacher” as well and thus Teacher in the Schools are covered by the payment Gratuity Act. As a result, the school are under statutory obligation to pay gratuity to the Teachers employed by the schools. Since it was within the province of the Parliament to amend the definition thereby including Teachers within the ambit and scope of “employee”, the petitioner cannot make any quarrel about the same nor that has been done. The challenge, however, is restricted to the retrospectivity to the said amendment. Though amendment is notified on 31st December, 2009 it is made applicable and enforced w.e.f. 3rd April, 1997. According to the petitioners, it was impermissible to do so.

9. The law of the land is very clear that the amendment which effect substantive changes and imposes substantive liability shall not be given retrospective effect are subject to judicial scrutiny if they have infringed fundamental rights guaranteed by the Constitution of India. The Courts though have recognized power of legislature to give retrospective effect to such legislations/amendments, but have categorically clarified that, nevertheless, such retrospective amendment and cannot take away vested right and the amended provision must be reasonable, not arbitrary or discriminatory or violative of Articles 14,19 (1) (g) and Article 21 of the Constitution. The provisions of the “Amended Act, 2009”, subject to

challenge in present writ petition, have created serious prejudice to the unaided private schools, member of petitioner federation.

10. According to the petitioners the effect of the same is that the educational institutions which were brought within the ambit of the Payment of Gratuity Act, 1972, w.e.f. 3rd April, 1997 vide Notification dated 3rd April, 1997, would become liable to pay gratuity to all their teachers who have retired or superannuated or died or resigned or became disabled due to accident or any disease in the last more than 12 years. This validating provision has also undone all such courts' verdicts which have given during this period in view of the un-amended provisions of law existing at that period of time. To demonstrate this, the petitioners have given an example on the assumption that the validating Section 13-A has validated the Notification dated 3rd April, 1997 with retrospective effect w.e.f. 3rd April, 1997 in an absolutely arbitrary and unreasonable manner without even taking into consideration that this re-validation of Notification with back date and giving retrospective effect to the amended provision of section 2 (e) would open Pandora Box of claims against the educational institutions by all such teachers who would have now become entitled for gratuity for that interregnum period from 3rd April, 1997 to 31st December, 2009 in view of Amendment Act, 2009. This would create an additional liability worth crores of rupees upon each such institution for which they have no source or resource to pay off. It is argued that if at an average two teachers are getting retired/resigned/superannuated/died/became disabled due to accident or disease each year, then for this period of 12 years i.e. between 3rd April, 1997 to 31st December, 2009, at an average 24 teachers would have become entitled for gratuity pursuant to this amendment and as per the last

drawn salary of said teachers, the gratuity amount payable to such teacher would come to approximating to ` 2.5 – 3.5 lacs and in this manner an additional burden for these 12 years pursuant to the amendment under challenge would come something between ` 80 lacs to 1 crore for each school. The Amendment Act, 2009 has created this additional burden with retrospective effect without at all whispering a single word about creation of any source for such funds for these institutions.

11. Since pure question of law is raised, rule D.B. was issued on the aforesaid limited question namely whether retrospective operation of the Amendment was permissible or not?

12. In support of the aforesaid proposition, learned counsel for the petitioner referred to various judgments. It is argued that in the case of ***P.D. Aggarwal and others Vs. State of U.P. & Others***, (1987) 3 SCC 622 Supreme Court held that though the Government has the power to amend the laws with retrospective effect to any substantive provision, but such but such retrospective amendment cannot take away vested rights and amendments must be reasonable not arbitrary or discretionary violating Article 14 of the Constitution. The Supreme Court has further held that “as as been stated herein before that Government has power to make retrospective amendments to rules but if the rules purport to take away the vested right and are arbitrary and not reasonable then such retrospective amendments are subject to judicial scrutiny, if they have infringed Article 14 and 16 of the Constitution”.

13. It was submitted that similar view was expressed by the Supreme Court in ***Sales Tax Officer Ward-II, Moradabad Ors. Vs. M/s Oriental Coal Corporation, Moradabad***, 1988 (supp) SCC 308. It was pointed out

that in that case the amendment with retrospective effect was brought to undone the law laid down by the Supreme Court in the matter of *State of U.P. Vs. Kasturi Lal Harilal*, reported in 1988 (Supp) SCC 302. The Supreme Court was of the view that the amendment is in respect of a substantive provision which imposes a substantive liability on the unregistered dealers, who was not otherwise found liable by the Supreme Court in view of the un-amended provision and therefore it was held that such amendment which is imposing a substantive liability cannot be given retrospective effect. Other judgments which are cited at the Bar taking similar view are:-

- (i) *Ex. Capt. K.C. Arora and another Vs. State of Haryana and others*, (1984) 3 SCC 281
- (ii) *Glass Miniature Bulb Industries Vs. Addl. Commissioner of Income Tax, Kanpur (UP)* 1994 Supp (3) SCC 44.
- (iii) *T.R. Kapur and others Vs. State of Haryana and Others*, 1986 (Supp) SCC 584
- (iv) *Chairman, Railway Board and others Vs. C.R. Rangadhamaiah and others*, (1997) 6 SCC 623
- (v) *K. Ravindranath and another Vs. State of Karnataka and another*, 1995 Supp (2) SCC 246.

14. Learned Counsel for the respondent countered the aforesaid submissions. In the first instance, he drew our attention to the historical background under which the instant amendment came to be enacted justifying its retrospective operation. In this behalf, he referred to the Counter Affidavit where the events are traced out. He pointed out that the Payment of Gratuity Act, 1972 was made applicable to local bodies with effect from 8.1.1982 and accordingly all the schools under local bodies

were also covered under the Act. However, the “employees” of private schools were not able to get the benefits. Hence, it was decided to extent the provisions of the Act to educational institutions employing ten or more persons and a Gazette notification was issued on 3rd April, 1997 to this effect. Teachers were getting the benefits accordingly. Vide notification dated 3rd April, 1997, educational institutions were brought under the umbrella of Payment of Gratuity Act, 1972 and accordingly teachers were also covered under the Act.

15. It is further submitted that the Supreme Court in the case of Ahmedabad Private Teachers’ Association Vs. Administrative Officers and Others, 2004 (1) SCR 470) held that teachers are not entitled to gratuity under the Act in view of the fact that the teachers do not answer description of definition of ‘employee’ under Section 2 (e) of the Payment of Gratuity Act, 1972. The ruling also states that non-use of wide language similar to definition of ‘employee’ as is contained in section 2 (f) of Employees’ Provident Funds and Miscellaneous Provisions Act, 1952 reinforces the conclusion that teachers are not covered in the definition. The Apex Court observed as under:-

“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 (1) 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.”

The Supreme Court further held that:

“Our conclusion should not be misunderstood that teachers although engaged in very noble profession of education our young generation should not be given any gratuity benefit. There are already in several States separate statutes, rules and regulations granted 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 or a separate legislation for them in this regard. That is the subject-matter solely of the Legislature to consider the decide.”

16. It is submitted that the Ministry of Labour & Employment, Government of India introduced the Payment of Gratuity (Amendment) Bill, 2007 in the Lok Sabha on 26th November, 2007 and it was referred to the Standing Committee on Labour for examination and report. The Standing Committee on labour held discussions on the Bill with the Ministry of Labour & Employment, Govt. of India on 28th December, 2007. The Committee presented its Twenty-sixth Report to the Lok Sabha on 26th February, 2008 and the Report was also laid in the Rajya Sabha on the same day containing certain recommendations. The Standing Committee made four major recommendations, namely:-

- (i) Government should ensure that the new definition of ‘employee’ should be unambiguous, encompassing with clear reference to the targeted group, i.e. teachers of the private educational institutions.

- (ii) Ceiling of ten or more persons should be removed and the gratuity should be payable to all irrespective of the number of persons employed.
- (iii) The amendment should be made applicable retrospectively with effect from 3rd April, 1997 i.e the date of notifying the educational institutions under the Act.
- (iv) Contract workers should be brought under the purview of the Act by laying down specific provisions in the Act itself.

17. It is submitted that based on the concluding observation of the Supreme Court in the Ahmedabad Private Teachers' Association case (supra) the Govt. of India took a conscious decision and had decided to cover "teachers" by amending the definition of 'employee' under Section 2 (e) of Payment of Gratuity Act, 1972 on the pattern of the definition given under Employees' Provident Funds and Miscellaneous Provisions Act, 1952 and therefore an amendment has been made in the Payment of Gratuity Act, 1972 for covering the teachers in the private schools/educational institution w.e.f. 3rd April, 1997. An notification has therefore been published vide Act No. 47 on 31st December 2009.

18. Learned Counsel sought to justify the retrospective operation with the aid of certain judgments. He first referred to the judgment of SC in the case of *Keswananda Bharti's* (1973) 4 SCC 225 and argued that this decision clearly mandated the need for bearing in mind the Directive Principles of state Policy while judging the reasonableness of the restriction imposed on Fundamental Rights. The ratio of the Apex court's judgment in this case is that, the interest of a citizen or section of a community, howsoever important, is secondary to the interest of the

country or community as a whole. For judging the reasonability of restrictions imposed on Fundamental Rights the relevant considerations are not only those as stated in Article 19 itself or in Part-III of the Constitution; the Directive Principles stated in Part-IV are also relevant. Changing factual conditions and State policy including the one reflected in the impugned enactment, have to be considered and given weightage to by the courts while deciding the constitutional validity of legislative enactments. A restriction placed on any Fundamental Right, aimed at securing directive Principles will be held as reasonable and hence intra vires subject to two limitations: first, that it does not run in clear conflict with the fundamental right, and secondly, that it has been enacted within the legislative competence of the enacting legislature under Part XI Chapter I of the Constitution.

19. Learned Counsel then referred to the judgment of the Apex Court in the case of *Jeewanlal (1929) Ltd. Etc. Etc. Vs. The Appellate Authority Under the Payment of Gratuity Act & Ors.* 1985 SCR (1) 664 was pleased to observe: **para 13. He also relied upon another judgment of the SCE para 14.**

“In construing a social welfare legislation, the court should adopt a beneficent rule of construction and if a section is capable of two constructions, that construction should be preferred which fulfils the policy of the Act, and is more beneficial to the persons in whose interest the Act has been passed. When, however, the language is plain and unambiguous, the Court must give effect to it whatever may be the consequence, for, in that case, the words of the statute speak the intention of the legislature. When the language is explicit, its consequences are for the legislature and not for the

courts to consider. The argument of inconvenience and hardship is a dangerous one and is only admissible in construction where the meaning of the statute is obscure and there are two methods of construction. In their anxiety to advance beneficent purpose of legislation, the courts must not yield to the temptation of seeking ambiguity when there is none.....

In retrospect, we wish to impress upon the Government that whenever such doubt or difficulty is expressed by the High Courts in the application of provisions of social security measures viz., retiral benefits, gratuity, provident fund and pension and the like, they must always introduce legislation to cure the defect rather than wait for judicial interpretation by the highest Court.”

20. He also relied upon another judgment of Supreme Court in the case of *Secretary, Haryana State Electricity Board Vs. Suresh and Ors.* AIR 1999 SC 1160 wherein the Apex Court held as under:-

“This Court in *Minerva Mills'* case (AIR 1980 SC 1789) in no uncertain terms laid down that the equality clause in the Constitution does not speak of mere formal equality before the law but embodies the concept of real and substantive equality which strikes at the inequalities arising on account of vast social and economic differentiation and is thus consequently an essential ingredient of social and economic justice. In short, this Court has equated the equality clause in the Constitution so as to mean that the people of the country ought to be secured of socio-economic justice by way of a fusion of Fundamental Right and Directive Principles of State Policy. As a matter of fact this Court has been candid enough on more occasions than one and rather, frequently to note that socialism ought not to be

treated as a mere concept or an ideal, but the same ought to be practised in every sphere of life and be treated by the law courts as a constitutional mandate since the law courts exists for the society and required to act as a guardian-angel of the society. As a matter of fact the socialistic concept of society is very well laid in Part III and Part IV of the Constitution and the Constitution being supreme, it is a bounden duty of the law courts to give shape and offer reality to such a concept.”

21. We have considered the submissions of counsel on either side. Before we proceed to discuss the same and give our analysis, it will be apt to recapitulate once again some of the important facts having bearing on the issue. In order to give benefit of gratuity payable under the Payment of Gratuity Act, 1972 to the teachers, the respondent decided to issue Notification dated 3rd April, 1997. This was issued by the Central Government in exercise of its power conferred upon it by clause (c) of sub-section (3) of Section 1 of Gratuity Act, 1972. Clauses (a) and (b) of sub-Section (3) of sub-Section (1) enlist the various establishments to which Payment of Gratuity Act is applicable. Clause (c) empowers the Central Government to cover other establishments or class of establishments as well with only condition that there should be 10 or more employees employed therein. It is under this provision, the aforesaid notification was issued covering ‘educational institutions’.

22. It also cannot be disputed that it was a benevolent and beneficiary measure thereby extending the scope of this Act to the employees of educational institutions/schools. It is worthwhile to mention here that Payment of Gratuity Act was made applicable to local bodies w.e.f. 8th January, 1992. Therefore, the schools under the control of legal bodies stood cover from 8th January, 1982 itself. Thus, whereas the employees of

the government schools were entitled to gratuity. Insofar as government schools are concerned, their employees were already entitled to gratuity under the extent rules of government governing gratuity and pension. It is only the employees of the private school which were left out. As the gratuity is an old age retiral social security benefit, the Central Government deemed it proper to extent the benefit of this Act to all employees employed in all educational institutions having 10 or more persons. With this objective in mind, the aforesaid notification dated 3rd April, 1997 was issued.

23. While issuing this notification it was not realized that any person employed by the school has also to come within the definition of employees under Section 2 (e) of the Payment of Gratuity Act but this definition existing at that time did not cover the teachers. It is for this reason that the Supreme Court held that with the aforesaid notification teachers would still be not the beneficiary of the said Act. At the same time, all other category of staff in the schools who fit in the definition of “employee” stood cover by the aforesaid notification and started getting gratuity. In order to remove this anomaly, it became necessary to amend the definition of ‘employee’ contained in Section 2 (e) of the Act and that is precisely is done by the impugned amendment. As the Act is otherwise extended to all the educational institutions vide Notification dated 3rd April, 1997 w.e.f. 19th April, 1997 and all other employees except teachers stood cover by the aforesaid notification, in order to cover teachers as well from the same date, the Parliament has amended the definition of teachers with retrospective effect i.e. w.e.f. 3rd April, 1997.

24. Keeping in view the aforesaid parameters, we now consider the question as to whether such retrospective amendment is valid or not.

25. As noted above, there is no quarrel with the proposition that the Legislature has power to amend the laws with retrospective effect to any substantive provision. It is quite trite that such retrospective action takes away vested rights and the amendment must be reasonable and not arbitrary or discriminatory violating Article 14 of the Constitution. Amendment in question is not arbitrary. Rather, it achieves the equity by bringing within the ambit of Gratuity Act also as beneficiary which only remained excluded. The only question, therefore, is as to whether this amendment has taken away any vested rights of the petitioner.

26. The legislative power either to introduce enactment for the first time or to amend the enacted law with retrospective effect is subject to certain judicially recognised limitations, some of which are as under:

- (i) There should be express language used by the Legislature expressly providing for or clearly applying retrospective operation;
- (ii) The retrospectivity must be reasonable and not excessive or harsh. Otherwise, it runs the risk of being struck down as unconstitutional; and
- (iii) Where the Legislation is introduced to overcome a judicial decision, the power cannot be used to subvert the decision without removing the statutory basis of the decision.

27. In the present case, the first two limitations are clearly not attracted. It is not in dispute that the Legislature has expressly made the amendment retrospective. The date from which the amendment to Section 2(e) of the

Gratuity Act has to come into force has been specified. It also cannot be disputed that the amendment does not suffer from the vice of arbitrariness. On the contrary, it is a benevolent measure introduced for the welfare of teachers by making them as well beneficiary of the Gratuity Act. Therefore, it cannot be said to be harsh.

28. As pointed out above, the Legislature had intended to extend the Gratuity Act to the educational institutions as well with effect from 3.4.1997 and it stands extended to all the employees of educational institutions. Only teachers remained out as consequential amendment in the definition of “employee” was not made. The retrospective amendment thus only seeks to remove the statutory basis of the earlier decision. This is permissible and it is so held by the Apex Court time and again. In *Ujagar Prints v. Union of India*, (1989) 3 SCC 488, the Supreme Court explained the permissibility of such a power in the following words:

“ A competent legislature can always validate a law which has been declared by courts to be invalid, provided the infirmities and vitiating infactors noticed in the declaratory judgment are removed or cured. Such a validating law can also be made retrospective. If in the light of such validating and curative exercise made by the legislature – granting legislative competence – the earlier judgment becomes irrelevant and unenforceable, that cannot be called an impermissible legislative overruling of the judicial decision. All that the legislature does is to usher in a valid law with retrospective effect in the light of which earlier judgment becomes irrelevant. (See *Sri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality*, (1969) 2 SCC 283 : (1907) 1 SCR 388 : (1971) 79 ITR 136.

66. Such legislative expenditure of validation of laws is of particular significance and utility and is quite often applied, in taxing statutes. It is necessary that the legislature should be able to cure defects in statutes. No individual can acquire a vested right from a defect in a statute and seek a windfall from the legislature's mistakes. Validity of legislations retroactively curing defects in taxing statutes is well recognized and courts, except under extraordinary circumstances, would be reluctant to override the legislative judgment as to the need for and wisdom of the retrospective legislation."

The aforesaid observations qua taxing statute would apply in the present context as well.

29. We may also usefully refer to the judgment of the Apex Court in *Krishnamurthi and Co. v. State of Madras*, AIR 1972 SC 2455 : [1973] 2 SCR 64. In that case, the Madras General Sales Tax Act, 1959 (as it stood) provided under entry 47 for tax on "lubricating oils, all kinds of mineral oils (not otherwise provided for in this Act) quenching oil and greases with effect from 1-4-1964". The question was whether this entry covered furnace oil. The Madras High Court construed the phrase and came to the conclusion that it did not. The Legislature then enacted an amendment Act in 1967. Entry 47 was amended - so as to expressly provide that furnace oil would be subjected to tax. The Act was made effective from 1964. The Act was challenged as being unreasonable since it retrospectively made the dealers liable for sales tax which they had not passed on to others. The challenge was negatived and it was said that (page 197 of 31 STC and page 2459 of AIR 1972):

"The object of such an enactment is to remove and rectify the defect in phraseology or lacuna of other nature and

also to validate the proceedings, including realisation of tax, which have taken place in pursuance of the earlier enactment which has been found by the court to be vitiated by an infirmity. Such an amending and validating Act in the very nature of things has a retrospective operation. Its aim is to effectuate and carry out the object for which the earlier principal Act had been enacted. Such an amending and validating Act to make small repairs is a permissible mode of legislation and is frequently resorted to in fiscal enactments."

30. It is not necessary to multiply the judgments. Our purpose would be served by taking note of another judgment of the Supreme Court in the case of *National Agricultural Co-operative Marketing Federation of India Ltd. & Anr. v. Union of India & Ors.*, [2003] 260 ITR 548 where entire law on the subject was re-visited by the Court.

31. In that case, Section 80P(2)(a)(iii) of the Income-tax Act, 1961, as originally inserted, provided that in the case of a co-operative society engaged in "(iii) the marketing of the agricultural produce of its members" the whole of the amount of profits and gains of business attributable to such activity would be deducted from the gross total income. The Supreme Court, in the decision of *Assam Co-operative Apex Marketing Society Ltd. v. CIT(Addl.)*, [1993] 201 ITR 338 rendered under the corresponding earlier provision, section 81, had held that the phrase "produce of its members" must refer to agricultural produce actually "produced by its members". In a later decision, *Kerala State Co-operative Apex Marketing Federation Ltd. v. CIT*, [1993] 231 ITR 814, a larger Bench of the Supreme Court overruled the decision in the case of *Assam Co-operative Apex marketing Society Ltd.*, [1993] 201 ITR 338 and held that the exemption under section 80P(2)(a)(iii), was not restricted only to primary societies and that "produce of its members" in that provision had

to be construed as including the “produce belonging to “ a member society. Immediately thereafter, in 1999 the provisions of section 80P(2)(a)(iii), were amended by the Income-tax (Second Amendment) Act, 1998 (No. 11 of 1999), with retrospective effect from April 1, 1968, by substituting sub-clause (iii) to read “the marketing of agricultural produce grown by its members”. The appellant, an apex co-operative society of a chain of societies operating at different levels, challenged, by a writ petition, the validity of section 80P(2)(a)(iii) as amended retrospectively. The High Court dismissed the writ petition. On appeal to the Supreme Court, the Supreme Court held as follows:

“...the retrospective amendment was valid. By the impugned amendment Parliament had, in effect, substituted the word “of” in section 80P(2)(a)(iii), and which had been construed by the Supreme Court in 1998 as “belonging to”, with the phrase “grown by”. The clear effect of the retrospective substitution would be that section 80P(2)(a)(iii) must be read as if the substituted phrase were included from April 1, 1968. In making this change Parliament did not overrule the decision of the Supreme Court in *Kerala State Co-operative Marketing Federation* [1998] 231 ITR 814. Where the law, as in this case, had been changed and was no longer the same, there was no question of the Legislature overruling the Supreme Court. Once the circumstances were altered by legislation, it neutralized the effect of the earlier decision of the Supreme Court.”

(Taken from the case notes)

32. The judgments cited by learned counsel for the petitioner are not relevant in the context as these do not deal with the issue at hand. In ***Oriental Coal Corporation*** (supra), the question was as to whether the amendment could be construed to be retrospective inasmuch as there was no specific stipulation in the amending Act making the amendment

retrospective. The Court decided in that case that the words used in the amendment did not expressly or impliedly make the amendment retrospective and since amendment affected substantive changes and also conferred jurisdiction on concerned officer, it was a substantive averment and not mere procedure and, therefore, could not be construed to be of retrospective operation. In *P.D. Aggarwal* (supra), which was a case under service law, the Court had held that those who had already been appointed to the temporary post had acquired vested right to be considered for promotion along with their counterparts holding permanent posts and this vested right could not be taken away by retrospective amendment. In the present case, question of such vested right does not arise. Other cases cited by the petitioner also deal with this principle of vested right in service jurisprudence.

33. No doubt, this amendment may cause financial burden on the schools who will have to pay gratuity to all those teachers who retired after 3.4.1997. However, that may not be a reason sufficient to set at naught the retrospective operation of the amendment. We thus do not find any merit in this writ petition which is dismissed. There shall, however, be no order as to costs.

ACTING CHIEF JUSTICE

**(RAJIV SAHAI ENDLAW)
JUDGE**

DECEMBER 02, 2011
skb/pk