

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

+ W.P.(C) No.110/2008

% 7th November, 2013

LT. COL. (RETD.) MR. S.S. DUBEY Petitioner
Through: Mr. H.K. Chaturvedi, Advocate.

Versus

THE DIRECTOR OF EDUCATION AND ORS. ... Respondents
Through: Ms. Sana Ansari, Advocate for
respondent No.1.
Ms. Parul Babbar, Advocate for
respondent Nos.2 and 3.

**CORAM:
HON'BLE MR. JUSTICE VALMIKI J.MEHTA**

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. The petitioner by means of this writ petition seeks the relief of payment of both the service gratuity and the retirement gratuity as provided in Rules 49 and 50 of the CCS (Pension) Rules, 1972. Petitioner claims that both the amounts in terms of Rules 49 and 50 are payable (and not only one of the amounts of retirement gratuity) in spite of the fact that petitioner is getting pension for his earlier services rendered in the military/Army prior to his being employed by the respondent no.3/Army

Public School. Rules 49 and 50 of the CCS Pension Rules are therefore required to be interpreted, and the same read as under:-

“Rule 49. Amount of Pension

(1) In the case of a Government servant retiring in accordance with the provisions of these rules before completing qualifying service of ten years, the amount of service gratuity shall be calculated at the rate of half month's emoluments for every completed six monthly period of qualifying service.

(1-A) The Dearness Allowance admissible on the date of retirement shall also be treated as emoluments for the purpose of sub-rule(1);

(2) In the case of a Government servant retiring in accordance with the provisions of these rules after completing the qualifying service of not less than ten years, the amount of pension shall be calculated at fifty per cent of emoluments or average emoluments, whichever is more beneficial to him, subject to a minimum of three thousand and five hundred rupees per mensem and a maximum of forty-five thousand rupees per mensem.

(2-A) In addition to pension admissible in accordance with sub-rule (2), after completion of eight years of age or above, additional pension shall be payable to the retired Government servant in the following manner:-

Age of pensioner	Additional pension
From 80 years to less than 85 years	20% of basic pension
From 85 years to less than 90 years	30% of basic pension
From 90 years to less than 95 years	40% of basic pension
From 95 years to less than 100 years	50% of basic pension
100 years or more	100% of basic pension.

(3) In calculating the length of qualifying service, fraction of a year equal to three months and above shall be treated as a completed one half-year and reckoned as qualifying service.

(4) The amount of pension finally determined under sub-rule (2), shall be expressed in whole rupees and where the pension contains a fraction of a rupee, it shall be rounded off to the next higher rupee.

Rule 50. Retirement/Death Gratuity

- (1) (a) A Government servant, who has completed five years' qualifying service and has become eligible for service gratuity or pension under [Rule 49](#), shall, on his retirement, be granted ¹[retirement gratuity] equal to one-fourth of his emoluments for each completed six monthly period of qualifying service, subject to a maximum of 16½ times the emoluments.

¹[(b) If a Government servant dies while in service, the death gratuity shall be paid to his family in the manner indicated in sub-rule (1) of [Rule 51](#) at the rates given in the Table below, namely:-

Length of qualifying service					Rate of death gratuity
(i)	Less	than	1		2 times of emoluments.
	year				
(ii)	One	year	or		
	more	but	less		6 times of emoluments.
	than	5	years		
(iii)	5	years	or	more	
	but	less	than	20	
	years				12 times of emoluments.
(iv)	20	years	or		
	more				Half of emoluments for every
					completed six-monthly period of
					qualifying service subject to a
					maximum of 33 times of
					emoluments.

Provided that the amount of retirement gratuity or death gratuity payable under this rule shall in no case exceed [ten lakh rupees;]

Provided further that where the amount of retirement or death gratuity as finally calculated contains a fraction of a rupee, it shall be rounded off to the next higher rupee.]

- (2) If a Government servant, who has become eligible for a service gratuity or pension, dies within five years from the date of his retirement from service including compulsory retirement as a penalty and the sums actually received by him at the time of his death on account of such gratuity or pension including ad hoc increase, if any, together with the retirement gratuity admissible under sub-rule (1) and the commuted value of any portion of pension commuted by him are less than the amount equal to 12 times of his emoluments, a residuary gratuity equal to the deficiency may be granted to his family in the manner indicated in sub-rule (1) of [Rule 51](#).

(3) Deleted

⁴(4) Deleted.

(5) The emoluments for the purpose of gratuity admissible under this rule, shall be reckoned in accordance with Rule 33:

[Provided that if the emoluments of a Government servant have been reduced during the last ten months of his service otherwise than as a penalty, average emoluments as referred to in Rule 34 shall be treated as emolument.]

(Provided further that the dearness allowance admissible on the date of retirement or death as the case maybe, shall also be treated as emoluments for the purpose of this rule)

(6) For the purposes of this rule and [Rule 51,52](#) and [53](#), 'family', in relation to a Government servant, means -

- (i) wife or wives [including judicially separated wife or wives] in the case of a male Government servant,
- (ii) husband, [including judicially separated husband] in the case of a female Government servant,
- (iii) sons including stepsons and adopted sons,
- (iv) unmarried daughters including stepdaughters and adopted daughters,
- (v) widowed daughters including stepdaughters and adopted daughters,
- (vi) father, including adoptive parents in the case of individuals whose personal law permits adoption,
- (vii) mother, including adoptive parents in the case of individuals whose personal law permits adoption,
- (viii) brothers below the age of eighteen years including stepbrothers,
- (ix) unmarried sisters and widowed sisters including stepsisters,
- (x) married daughters, and
- (xi) children of a pre-deceased son.

2. For the purpose of entitlement to both the service gratuity and the retirement gratuity, reliance is placed upon the order of the Director of Education dated 30.4.2004 and the same reads as under:-

“

ORDER

The Central Government has made a provision of Gratuity Act, 1972, applicable to Educational Institutions w.e.f. 1-4-1997 vide its Notification No.S-42013/95-SS-2. The provisions of the Payment of Gratuity Act, 1972 are applicable to Educational Institutions as well in accordance with proviso of sub section 1 of Section 10 of Delhi School Education Act, 1973 and rule 49(1) of CCS (Pension) Rules.

An employee who retires from service with a qualifying service of less than 10 years is not entitled for the payment of ‘pension’ but is entitled for payment of a lump-sum amount termed “Gratuity” (otherwise called ‘Service Gratuity’). A lump sum payment known as service gratuity at the rate of half month’s emoluments for every completed six monthly period of qualifying service is payable. This gratuity is in addition to retirement gratuity admissible to those who have completed five years’ qualifying service.

This Hon’ble Apex Court in Civil Appeal No.6369/2001 on 13-1-2004 in the matter of *Ahmedabad Private Primary Teacher’s Association v. Administrative Officers and Ors* has directed that the teachers should be given the benefit of gratuity on the basis of the following observations:-

“Notification No.5-42013/1/95-SS 11, dated 3rd April, 1997-In exercise of the powers conferred by clause (c) of sub-clause (3) of section 1 of the Payment of Gratuity Act, 1972 (39 of 1972), the Central Government hereby specifies the educational institutions in which ten or more persons are employed or were employed on any day preceding 12 months as a class of establishments to which the said Act shall apply with effect from the date of publication of this notification.

Under section 2(13) of the Payment of Bonus Act, 1965, Employee means any person (other than an apprentice) employed on a salary or
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wage no exceeding (three thousand and five hundred rupees) per mensem in any industry to do any skilled or unskilled manual, supervisory, managerial, administrative or clerical work for hire or reward, whether the terms of employment be express or implied.

Under section 2(1) of the Employees' Provident Fund Act, 1952- 'employee' means any person who is employed for wages in any kind of work, manual or otherwise, in or in connection with the work of and who gets his wages directly or indirectly from the employer.

Under rule 49(1) of CCS (Pension) Rules-No pension is admissible to a permanent employee who retires before completion of 10 years qualifying service. Instead a lump sum payment known as Service Gratuity at the rate of half month's emoluments for every completed six monthly period of qualifying service is admitted.

Therefore, it is once again reaffirmed that the Gratuity is payable as per the provisions laid down in the preceding paragraphs.

(RAJENDRA KUMAR)
DIRECTOR OF EDUCATION"

3. Since the language of the order of the Director of Education dated 30.4.2004 seems to suggest that service gratuity and retirement gratuity were both payable simultaneously in spite of petitioner receiving pension for his Army services by an order dated 24.1.2013, the Director of Education was asked to file its affidavit with regard to Rules 49 and 50 as also its order dated 30.4.2004. Two affidavits dated 19.2.2013 and 2.5.2013 have been filed however I find that the same really are not in compliance of the orders of this Court and this Court is left with the impression that matters have been for some reason left vague.

4. The affidavit dated 2.5.2013 refers to Rule 7 of the CCS Pension Rules and sub-Rule (2) of the same would be relevant in deciding the present case. Rule 7 of the CCS Pension Rules reads as under:-

“Rule 7. Limitations on number of pensions

(1) A Government servant shall not earn two pensions in the same service or post at the same time or by the same continuous service.

(2) Except as provided in Rule 19, a Government servant who, having retired on a superannuation pension or retiring pension, is subsequently re-employed shall not be entitled to a separate pension or gratuity for the period of his re-employment.”

5. The facts of the case are that petitioner worked as a Manager (Administration) with the respondent no.3/Army Public School w.e.f 11.12.2000. The petitioner retired from respondent no.3 on 31.3.2007 on attaining the age of superannuation at 60 years. Petitioner before his appointment with the respondent no.3 had worked in the military services and for which service he is already drawing pension on his superannuation from the Army on 30.3.1998.

6(i) On behalf of the petitioner, it is argued before me that the only consequence of Rule 19 which applies in the present case is that the period of service with military will not be joined with the service rendered with the respondent no.3 for the purpose of calculation of the retirement

gratuity as per Rule 50. Rule 19 of the CCS Pension Rules reads as under:-

“19. Counting of military service rendered before civil employment

(1) A Government servant who is re-employed in a civil service or post before attaining the age of superannuation and who, before such re-employment, had rendered military service, may, on his confirmation in a civil service or post, opt either -

- (a) to continue to draw the military pension or retain gratuity received on discharge from military service, in which case his former military services shall not count as qualifying service; or
- (b) to cease to draw his pension and refund -

Footnote : 2. Substituted by G.I., M.H.A., Dept. of Per. & A.R., Notification No. 6 (1)-Pen. (A)/80, dated the 30th July, 1981.

- (i) the pension already drawn, and
- (ii) the value received for the commutation of a part of military pension, and
- (iii) the amount of ³[retirement gratuity] including service gratuity, if any,

and count previous military service as qualifying service, in which case the service so allowed to count shall be restricted to a service within or outside the employee's unit or department in India or elsewhere which is paid from the Consolidated Fund of India or for which pensionary contribution has been received by the Government :

Provided that -

- (i) the pension drawn prior to the date of re-employment shall not be required to be refunded.
- (ii) the element of pension which was ignored for fixation of his pay including the element of pension which was not taken into account for fixation of pay on re-employment shall be

- refunded by him,
- (iii) the element of pension equivalent of gratuity including the element of commuted part of pension, if any, which was taken into account of fixation of pay shall be set off against the amount of ¹[retirement gratuity] and the commuted value of pension and the balance, if any, shall be refunded by him.

EXPLANATION. - In this clause, the expression '*which was taken into account*' means the amount of pension including the pension equivalent of gratuity by which the pay of the Government servant was reduced on initial re-employment, and the expression '*which was not taken into account*' shall be construed accordingly.

- (2) (a) The authority issuing the order of substantive appointment to a civil service or post as is referred to in sub-rule (1) shall along with such order require in writing the Government servant to exercise the option under that sub-rule within three months of date of issue of such order, if he is on leave on that day, within three months of his return from leave, whichever is later and also bring to his notice the provisions of Clause (b).

Footnote : 2. Substituted by G.I., M.F., Notification No. F. 3 (6)-E. V (A)/75, dated the 24th February, 1976.

- (b) If no option is exercised within the period referred to in Clause (a), the Government servant shall be deemed to have opted for Clause (a) of sub-rule (1)
- (3) (a) A Government servant, who opts for Clause (b) of sub-rule (1) shall be required to refund the pension, bonus or gratuity received in respect of his earlier military service, in monthly instalments not exceeding thirty-six in number, the first instalment beginning from the month following the month in which he exercised the option.

- (b) The right to count previous service as qualifying service shall not revive until the whole amount has been refunded.

(4) In the case of a Government servant, who, having elected to refund the pension, bonus or gratuity, dies before the entire amount is refunded, the unrefunded amount of pension or gratuity shall be adjusted against the [death gratuity] which may become payable to his family.

(5) When an order is passed under this rule allowing previous military service to count as part of the service qualifying for civil pension, the order shall be deemed to include the condonation of interruption in service, if any, in the military service and between the military and civil services.

(ii) On behalf of the petitioner, great reliance is placed upon sub-Rule 19(2)(a) read with sub-Rule (1)(a) to argue that since no option is exercised by the petitioner, the only consequence is that for the purpose of payment of pension to the petitioner the service rendered by the petitioner with the military before his joining the respondent no.3 will not be joined with the respondent no.3 for the purpose of pension.

7. This argument urged on behalf of the petitioner does not help him to claim entitlement of both service gratuity and retirement gratuity to be simultaneously paid although the petitioner is receiving pension, because, issue in the present case is not of pension but of grant of gratuity. Sub-Rule (2) of Rule 7 which is reproduced above makes it more than abundantly clear that a person on being re-employed will not be entitled to a separate pension or gratuity for the period of his re-employment. The object of law is twofold: firstly that the security in the form of pension has

to be granted by one employer and not by two employers and secondly that both pension and service gratuity are not payable together as one is the substitute of the other. Pension and service gratuity are alternative to the other. It is because the service period of an employee does not touch the minimum period required for grant of pension that he is paid service gratuity. Even a cursory reading of sub-Rule (2) of Rule 7 makes it clear that except as provided in Rule 19 for the period of re-employment pension and gratuity will not be again payable to the employee who was previously in government service. Accordingly, in my opinion, the contention of the petitioner by placing reliance upon the circular dated 30.4.2004 that the petitioner will be granted both the service gratuity and the retirement gratuity is misconceived. Petitioner will be entitled to only one gratuity and which is retirement gratuity, and that too under the Payment of Gratuity Act, 1972 as stated below. I hold that the circular dated 30.4.2004 is illegal if it provides for payment of both service gratuity and retirement gratuity where an employee also is being paid pension by his previous employer, and if it does not say so qua an employee who is receiving pension, the same is valid.

8. I must also at this stage put an important conclusion on record as I find that Director of Education is unnecessarily causing confusion.

This confusion is created by the first para of the circular dated 30.4.2004 because it seems to suggest application of both the payment of Gratuity Act, 1972 as also the CCS(Pension) Rules to the same educational institution. There are three types of schools in Delhi: private unaided schools, private aided schools and government schools. To employees of government schools only CCS(Pension) Rules will apply for grant of gratuity and not the Payment of Gratuity Act, 1972, and which Act applies to private unaided schools for grant of gratuity by such schools to its employees as to such private unaided schools CCS (Pension) Rules will not apply. As regards aided private schools either CCS (Pension) Rules will apply for grant of gratuity or Payment of Gratuity Act, 1972 but both CCS (Pension) Rules and 1972 Act cannot apply at the same time otherwise gratuity will be paid twice over. In my opinion, since the aided schools are not government schools, though they may be financed by the Government of NCT of Delhi through the Director of Education, yet as they continued to remain private schools, therefore, they will be governed by the Payment of Gratuity Act, 1972 and not CCS (Pension) Rules.

9. In view of the above, in fact, no relief under CCS (Pension) Rules can be granted to the petitioner for the additional reason that the respondent no.3-school is a private unaided school and to which Payment

of Gratuity Act, 1972 will apply and not CCS(Pension) Rules. The writ petition is not maintainable even independently on this score alone and hence liable to be dismissed.

10. In view of the above, the relief as prayed for in the writ petition cannot be granted and the same is therefore dismissed, leaving the parties to bear their own costs. A copy of this judgment be sent to the Director of Education for necessary information and compliance and affidavit be filed in this Court in eight weeks showing note taken of by the Director of Education of the observations and legal position as stated in this judgment, failing which the Registry will list the matter in Court.

NOVEMBER 07, 2013
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VALMIKI J. MEHTA, J.