

GAHC030004002021



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WA/15/2021

State of Mizoram and 3 Ors
MINECO, Aizawl
Mizoram

VERSUS

Sh H. Zosiamliana and 1347 Ors
Electric Veng
Aizawl Mizoram

Advocate for the Petitioner : Ms. Mary Lalruatkimi Kiangte (Addl.AG/GA, Mizoram)

Advocate for the Respondent : Ms Dinari T Azyu

Linked Case : WA/14/2021

State of Mizoram and 3 Ors
MINECO
Aizawl Mizoram

VERSUS

Smt. Lalronghaki and 976 Ors
Dam Veng
Aizawl

Advocate for the Petitioner : Ms. Mary Lalruatkimi Kiangte
Advocate for the Respondent : Ms Dinari T Azyu for R1-R977

BEFORE

**HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MARLI VANKUNG**

JUDGEMENT

Date : 11-12-2023

(Michael Zothankhuma, J)

Heard Mr. D. Das, learned senior counsel assisted by Mrs. Mary L. Khiangte, learned Government Advocate for the appellants. Also heard Mrs. Dinari T. Azyu, learned counsel appearing for all the respondents/writ petitioners.

2. The two writ appeals are being taken up together for disposal, as the issue to be decided is the same in both the writ appeals. WA No. 15/2021 is an appeal against the impugned Judgment dated 12.02.2021 passed by the learned Single Judge in WP(C) No. 166/2019, while WA No. 14/2021 is an appeal against the impugned Judgment dated 25.03.2021 passed by the learned Single Judge in WP(C) No. 37/2021.

3. The issue to be decided is whether the learned Single Judge was correct in holding that the respondents/writ petitioners, who retired/died from Government service between 01.01.2016 to 30.08.2018, could not be denied the benefit of the revision of gratuity and commutation of pension in terms of the 7th Revision of Pay Rules, 2018, hereinafter referred to as the 7th ROP Rules, which came into force on 01.01.2016.

4. The facts of the case in brief is that in exercise of the powers conferred by the proviso to Article 309 read with Article 162 of the Constitution, the Governor of Mizoram was pleased to make the 7th Central Revision of Pay (as modified and extended to the employees under the Government of Mizoram) Rules, 2018 (hereinafter referred to as the 7th ROP Rules, 2018), vide Notification dated 16.08.2018. In terms of the Notification dated 16.08.2018, the 7th ROP Rules, 2018 was made effective w.e.f. 01.01.2016. The notification dated 16.08.2018 stated that the pay under 7th ROP Rules shall be fixed notionally w.e.f. 01.01.2016 and actual monetary benefit shall be paid w.e.f. 01.09.2018. Thereafter, the Government of Mizoram, Finance Department (APF) Branch, issued Office Memorandum dated 13.12.2018 stating that the Governor of Mizoram was pleased to introduce modifications in the rules regulating pension, gratuity, family pension, disability pension, Ex-Gratia Lumpsum Compensation under the CCS Pension Rules, 1972 and commutation of pension under the CCS (Commutation of Pension) Rules, 1981, CCS (Extraordinary Pension) Rules, 1931, etc.

5. In terms of para 3.1 of the OM dated 13.12.2018, the revised provisions as per the order would apply to Government servants, who retired/died in harness on or after 01.01.2016, with monetary benefit w.e.f. 01.09.2018. Para 3.2 of the OM dated 13.12.2018 stated that where pension/family pension/gratuity/commutation of pension, etc. had already been sanctioned in cases occurring on or after 2016, the same would be revised in terms of this order. In cases where pension had been finally sanctioned on the pre-revised orders and if it happened to be more

beneficial than the pension becoming due under this order, the pension already sanctioned shall not be revised to the disadvantage of the petitioners in view of Rule 70 of the CCS (Pension) Rules, 1972.

6. Thus, in terms of the ROP Rules, 2018 read with the OM dated 13.12.2018, persons who retired from Government service between 01.01.2016 and 31.08.2018 would be able to enjoy the actual benefits of the ROP Rules, 2018 only from 01.09.2018 and the benefits of the ROP Rules, 2018 would be given notionally for the period between 01.01.2016 to 31.08.2018. Thus, the writ petitioners who retired between 01.01.2016 and 31.08.2018, were also entitled to receive the benefits of the revision of gratuity and commutation of pension in terms of the ROP Rules, 2018 read with the OM dated 13.12.2018. The Government of Mizoram, Finance Department (APF) Branch, thereafter issued OM dated 15.01.2019, which clarified para 3.2 of the OM dated 13.12.2018, by stating that revision of gratuity and commutation of pension as per the OM dated 13.12.2018 shall not apply to those Government servants who retired/died between 01.01.2016 and 31.08.2018, but shall apply to Government servants who retired/died between 01.09.2018 and 13.12.2018. The reason for the clarification regarding inadmissibility of Government servants, who retired between 01.01.2016 and 31.08.2018, to be granted revision of gratuity and commutation of pension, was that the above two payments were Lump-sum one-time payments, to be calculated at the payscale applicable on the date of retirement.

7. Being aggrieved, the writ petitioners approached the learned Single Judge vide WP(C) Nos. 166/2019 and 37/2021, praying that they should be

given gratuity, commutation and leave encashment in terms of the ROP Rules, 2018, even though they retired/died between 01.01.2016 and 31.08.2018. They also prayed for setting aside the letter dated 10.07.2019, by which one person was informed that gratuity, commutation and leave encashment could not be given before 01.09.2018, as per the ROP Rules, 2018. The learned Single Judge allowed the above two writ petitions, on the ground that the State respondents had illegally created two category of pensioners by the impugned OM dated 15.01.2019 and which was not provided in the ROP Rules, 2018, as notified on 16.08.2018. Further, the ROP Rules, 2018 having been made under the proviso to Article 309 read with Article 162 of the Constitution of India, the same could not have been altered or amended by the impugned OM dated 15.01.2019 which was an Executive order, as an Executive order could not override/supersede Rules made under Article 309 read with Article 162 of the Constitution of India.

8. The learned Single Judge also held that the State respondents could not have created two separate category of pensioners, i.e. those who retired/died between 01.01.2016 and 31.08.2018 as one category and those who retired/died between 01.09.2018 and 13.12.2018 as another category, inasmuch as, both belonged to one homogeneous class. The learned Single Judge relied upon the Judgment of the Supreme Court in the case of *D.S. Nakara & Others Vs. Union of India*, (1983) 1 SCC 305 and in the case of *All Assam Retired Officers, Teachers & Employees' Committee & Others Vs. The State of Assam & Others*, (2016) 4 GLT 85 decided by Single Bench of this Court, as the basis for allowing the writ petitions.

9. The learned Single Judge held that giving the benefits of revision of gratuity and commutation to the latter category, while denying the same to the first category, was impermissible. The learned Single Judge also held that the contention of the appellant that gratuity and commutation being a lump-sum and a onetime payment, which could not be revised in the same manner as monthly pension/family pension, appeared to be misconceived. The learned Single Judge, while setting aside the impugned OM dated 15.12.2019 and Communication dated 10.07.2019, directed the appellants to extend the benefit of revision of gratuity, commutation and leave salary to the petitioners as per their entitlement under the ROP Rules, 2018, by granting them the actual monetary benefit from the cut-off date, i.e., 01.09.2018.

10. Being aggrieved, the appellants/State Governments have filed the present two appeals.

11. The learned Advocate General submits that a reading of the 7th ROP Rules, 2018 read with OM dated 13.12.2018 and 15.01.2019, shows that while the actual monetary benefits of pension/monthly pension was to be granted w.e.f. 01.09.2018 for those persons who retired/died between 01.01.2016 and 31.08.2018. The lump-sum benefits of gratuity, leave encashment and commutation of pension in terms of the ROP Rules, 2018 could not be given to persons who retired/died prior to 01.09.2018, as the same are paid/calculated as per the prevailing revision of pay/pay scale being applied on the date of their retirement/death. As the ROP Rules, 2018 clearly provided that the payment under the said rules would be notionally fixed w.e.f. 01.01.2016 to 31.08.2018 and actual monetary

benefit paid w.e.f. 01.09.2018, the payment of gratuity, leave encashment and commutation would have to be calculated on the date of retirement/death, as per the pay scale and allowances being enjoyed and applicable ROP Rules in force on that date.

12. The learned Advocate General submits that the fixing of a cut-off date, for giving benefits under the 7th ROP Rules, 2018 is permissible on the ground of financial constraint of the State. As the State Government was in dire financial straits, there was no infirmity in fixing a cut-off date, for giving the actual monetary benefit of the ROP Rules, 2018 w.e.f. 01.09.2018. The learned Advocate General submits that the OM dated 13.12.2018 and 15.01.2019 were not issued under Article 309 of the Constitution, but were issued under Article 166 of the Constitution of India. Further, the impugned OM dated 15.01.2019 had not been made for the purpose of superseding the ROP Rules, 2018 and was only clarifactory in nature, i.e., it was not for the purpose of supplanting the ROP Rules, 2018.

13. The learned Advocate General submits that Government employees who retired/died between 01.01.2016 & 31.08.2018 and the Government employees who retired/died on or after 01.09.2018 do not form a homogeneous class. They in fact form two separate class of persons, for the purpose of payment of gratuity, commutation and leave encashment. However, for the purpose of pension/family pension, they form a homogenous class. In support of his submission that the State Government have the power to fix a cut-off date for the grant of benefit of pension and pensionary benefits, he has relied upon the judgments of the Apex Court in

Krishna Gopal Tiwary Vs. Union of India & Others, 2021 SCC Online SC 581 and *O.P Lather Vs. Satish Kumar Kakkar, (2001) 3 SCC 110*.

14. The learned counsel for the respondents/writ petitioners, on the other hand submits that the impugned OM dated 15.01.2019 cannot supersede the OM dated 13.12.2018 issued under the authority of the Governor of Mizoram, as the impugned OM dated 15.01.2019 is only an Executive Order. The learned counsel for the writ petitioners submits that the impugned OM dated 15.01.2019 is not clarificatory in nature. As the OM dated 13.12.2018 and the ROP Rules of 2018 clearly provides for grant of the actual monetary benefit in respect of gratuity, leave encashment and commutation to the petitioners who retired/died between 01.01.2016 and 31.08.2018, the impugned OM dated 15.01.2019 has made two separate class of persons out of one homogeneous class of persons. Thus, a clear case of discrimination having been made by the impugned OM dated 15.01.2019, by denying the writ petitioners their entitlement under the ROP Rules, 2018, merely because the petitioners retired/died between 01.01.2016 and 31.08.2018, there was no infirmity with the decision of the learned Single Judge.

15. In support of her submission that the petitioners who retired/died between 01.01.2016 and 31.08.2019 and persons who retired/died between 01.09.2018 and 13.12.2018 form one homogeneous class, the learned counsel for the petitioners has relied upon the judgment of the Supreme Court in the cases of (i) *D.S. Nakara & Others Vs. Union of India, (1983) 1 SCC 305* (ii) *State of Rajasthan & Others Vs. Mahendra Nath Sharma, (2015) 9 SCC 540* (iii) *All Assam Retired Officers, Teachers &*

Employees' Committee & Others Vs. State of Assam & Others, (2016) 4 GLT 85 (iv) All Manipur Pensioners Association by its Secretary Vs. The State of Manipur & Others, (2020) 14 SCC 625 (v) Indian Ex-Servicemen Movement & Others Vs. Union of India & Others, (2022) 7 SCC 323 (vi) Ajay Kumar Das Vs. State of Orissa & Others, (2011) 11 SCC 136.

16. We have heard the learned counsels of the parties. The issue here is whether the pensioners who retired/died prior to 31.08.2018 and the pensioners who retired/died after 31.08.2018 can be said to form one homogeneous class in respect of payment of gratuity, leave encashment and commutation.

17. For a better understanding of the issue raised, Rule 1 of the 7th ROP Rule, 2018, para 1, 2 & 3 of the OM dated 13.12.2018 and the contents of the OM dated 15.01.2019 are reproduced below:-

7th ROP Rules, 2018

In exercise of the powers conferred by the proviso to article 309, read with article 162 of the Constitution of India, the Governor of Mizoram hereby makes the following rules -

1. Short title and commencement:-

(i) These rules may be called The Seventh Central Revision of Pay (as modified and extended to the employees under the Government of Mizoram) Rules, 2018.

(2) They shall be deemed to have come into force on the 1st day of January, 2016. The pay under these rules shall be fixed notionally with effect from 01.01.2016 Actual monetary benefits shall be paid with effect from 01.09.2018."

OM dated 13.12.2018

A. For Post – 01.01.2016 Retirees

1. *The undersigned is directed to state that in pursuance of Government's decision on implementation of the Seventh Central Revision of Pay (as modified and extended to the employees under the Government of Mizoram) Rules, 2018, the Governor of Mizoram is pleased to introduce the following modifications in the rules regulating Pension, Gratuities, Family Pension, Disability Pension and Ex-gratia lump-sum compensation under the CCS (Pension) Rules, 1972 (hereafter referred to as Pension Rules) and Commutation of Pension under CCS (Commutation of Pension) Rules, 1981, CCS (Extraordinary Pension) Rules, 1939 etc.*

2. *These orders shall apply only to those Mizoram Government Employees being governed by the CCS (Pension) Rules, 1972.*

Date of Effect

3.1. *The revised provisions as per these orders shall apply to Government servants who retire/die in harness on or after 1.1.2016 with monetary benefits with effect from 1/9/2018.*

3.2. *Where pension/family pension/Gratuity/Commutation of pension, etc has already been sanctioned in cases occurring on or after 1.1.2016, the same shall be revised in terms of these orders. In cases where pension has been finally sanctioned on the pre-revised orders and if it happens to be more beneficial than the pension becoming due under these orders, the pension already*

sanctioned shall not be revised to the disadvantage of the pensioner in view of Rule 70 of the CCS (Pension) Rules, 1972."

X

Aizawl, the 15th January, 2019

OFFICE MEMORANDUM

Subject: Clarification on Para 3.2 of the Revised Pension Scheme 2018 for POST - 01.01.2016 RETIREES.

To avoid confusion and mis-interpretation of Para 3.2 of this Department's O.M of even number Dt. 13.12.2018, it is hereby clarified as follows:-

Revision of Gratuity and Commutation as per O.M No. G. 19011/23/2014-F.APF/LOOSE shall apply to Government Servants who retired/died between 1.9.2018 and 13.12.2018 i.e date of issue of the said O.M, but shall not apply to those Government Servants who retired/died between 1.1.2016 and 31.8.2018 since Gratuity and Commutation are lump-sum one-time payment and since monetary benefit is effective from 1.9.2018 only. In cases where pension has been finally sanctioned on the pre-revised orders and if it happens to be more beneficial than the pension becoming due under these orders, the pension already sanctioned shall not be revised to the disadvantage of the pensioner in view of Rule 70 of the CCS (Pension) Rules, 1972."

18. Section 4(1) of the Payment of Gratuity Act, 1972 (hereinafter referred to as "the Gratuity Act") provides that gratuity shall be payable to an employee on termination of his employment after he has rendered continuous service for not less than five years, -

(a) on his superannuation, or

- (b) on his retirement or resignation, or
- (c) on his death or disablement due to accident or disease:

Section 4(2) of the Gratuity Act provides that for every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of fifteen days wages based **on the rate of wages last drawn** by the employee concerned.

Section 7 of the Gratuity Act provides that a person who is eligible for payment of gratuity or any authorised person shall send a written application to the employer, within such time as may be prescribed, for payment of such gratuity. It further states that as soon as gratuity becomes payable, the employer shall, whether an application has been made or not, determine the amount of gratuity and give notice of the same to the person to whom the gratuity is payable and to the Controlling Authority. Further, the employer shall arrange to pay the amount of gratuity within thirty days from the date it becomes payable to the person to whom the gratuity is payable.

19. Rule 27 of the Central Civil Services Leave Rules, 1972 provides the manner in which Earned Leave is to be calculated. Rule 27(1) provides that Earned Leave shall be credited to the leave account of a Government servant at the rate of 2½ days for each completed calendar month of service which he is likely to render in a half-year of the calendar year in which is appointed.

Rule 27(2)(a) provides that the credit for the half-year in which a Government servant is due to retire or resigns from the service shall be

afforded only at the rate of 2½ days per completed calendar month up to the date of retirement or resignation.

Rule 27(2)(b) provides that the credit of Earned Leave is to be allowed up to the end of a calendar month, preceding the calendar month in which a Government employee is removed or dismissed from service.

Rule 27(2)(c) provides that when a Government servant dies while in service, credit of Earned Leave shall be allowed 2½ days per completed month of service up to the date of death of the Government servant. Similar is the method of crediting 2½ days pay leave in terms of Rule 29 of the CCS Service Rules, 1972. As such a reading of Rule 27 of the CCS Leave Rules, 1972 clearly shows that the calculation for encashment of Earned Leave can only be up to the date of retirement, resignation or date of death.

20. Commutation of pension is a voluntary option for a Government servant, allowing them to receive a lump sum payment by sacrificing a portion of the monthly pension at the time of their retirement or from the date of notional superannuation. Calculation of the commutation value is based on specific value and factors, such as pensioner's age, commutation factor and any penalties or deduction applicable. It involves the payment of a lump sum payment upfront and a reduced monthly pension thereafter. As such, the payment of commutation pension would have to be made on the basis of the last 10 months pay that the Government servant was enjoying, depending upon the Revision of Pay Rules that was applicable at the relevant time. As such, if a Government servant retired between 01.01.2016 and 31.08.2018, he would not be entitled to the actual

monetary benefit provided under the R.O.P. Rules, 2018, while calculating the commutation of pension payable to him, as that would come into effect only on 01.09.2018. However, the reduced monthly pension that the Government servant would be entitled to, in lieu of the commutation of pension received by him earlier would have to be done in terms of the R.O.P. Rules, 2018, as when the calendar date reaches 01.09.2018. Thus, though the value of the commutation of pension would have to be made as per the pay scale enjoyed by a Government person at the time of his pension, the remaining pension would have to be paid as per the revised rate w.e.f. 01.09.2018.

21. In the present case, there is no challenge to the R.O.P Rules, 2018 wherein it is stated that pay shall be fixed notionally w.e.f. 01.01.2016 and the actual monetary benefit shall be paid w.e.f. 01.09.2018. The fact that the pensioners would be getting their actual pension/monthly pension, in terms of R.O.P Rules, 2018 is not in dispute.

22. In the case of ***B. J. Akkara vs Govt. of India***, reported in **(2006) 11 SCC 709**, the Supreme Court has held that all retirees retiring with a particular rank do not form a single class for all purposes. Where the reckonable emoluments as on the date of retirement (for the purpose of computation of pension) are different in respect of two groups of pensioners, who retired with the same rank, the group getting lesser pension cannot contend that their pension should be identical with or equal to the pension received by the group whose reckonable emolument was higher. In other words, pensioners who retire with the same rank need not be given identical pension, where their average reckonable emoluments at

the time of their retirement were different, in view of the difference in pay, or in view of different pay scales being in force. It was further stated that pension is determined as per relevant rules/orders, by calculating the average of reckonable emoluments (basic pay etc.) drawn during the last 10 months of service and then taking 50% thereof as the retiring pension applicable to retirees with lesser period of qualifying service.

23. The provisions relating to the payment of gratuity and earned leave clearly shows that gratuity and earned leave is payable to an employee at the time of retirement, resignation, dismissal or date of death of the Government servant, as per the wages/salary and dearness allowance drawn on the date of the happening of the events. The payment of the revised gratuity and earned leave cannot be postponed to a date beyond the date of retirement, resignation, death or dismissal from service etc. It will have to be done in terms of the Revision of Pay Rules that is being enjoyed by the Government servant on the date that he retired, died or dismissed etc.

24. As can be seen from the Notification dated 16.08.2018, the ROP Rules, 2018 have been made in exercise of the powers conferred by the proviso to Article 309, read with Article 162 of the Constitution of India. However, the OM's dated 13.12.2018 and 15.01.2019 have not been made under the proviso to Article 309, but are infact executive instructions. The issue to be decided herein is whether the OM dated 15.01.2019 supersedes or overrides the ROP Rules, 2018. In so far as it relates to payment of gratuity, commutation, leave encashment etc., it shows that the same makes a clarification with regard to the ROP Rules of 2018. However, it

appears that the impugned OM dated 15.01.2019 overrides the OM dated 13.12.2018. Be that as it may, the O.M. dated 15.01.2019 is not in conflict with the R.O.P. Rules, 2018.

25. Benefits such as gratuity, leave encashment and commutation are not recurring benefits and payment is to be calculated and paid as per the pay scale and existing applicable Revision of Pay, as on the date of retirement and cannot be carried over to a date subsequent to the date of retirement of the Government Employee.

26. In the case of ***Indian Ex-Servicemen Movement & Others Vs. Union of India & Others***, reported in (2022) 7 SCC 323, the Supreme Court, in para 70, has referred to the issue of the pensioner therein forming a homogeneous, where it has stated as follows:-

"70. The principles governing pensions and cut-off dates can be summarised as follows:

70.1. All pensioners who hold the same rank may not for all purposes form a homogeneous class. For example, amongst Sepoys differences do exist in view of the MACP and ACP Schemes. Certain Sepoys receive the pay of the higher ranked personnel.

70.2. The benefit of a new element in a pensionary scheme can be prospectively applied. However, the scheme cannot bifurcate a homogeneous group based on a cut-off date.

70.3. The judgment of the Constitution Bench in Nakara cannot be interpreted to read the one rank one pension rule into it. It was only held that the same principle of computation of pensions must be applied uniformly to a homogeneous class.

70.4. It is not a legal mandate that pensioners who held the same rank must be given the same amount of pension. The varying

benefits that may be applicable to certain personnel which would also impact the pension payable need not be equalised with the rest of the personnel.”

27. As gratuity, leave encashment and commutation are to be paid as onetime lumpsum payments and as the petitioners had retired/died during the period when the pay was fixed notionally, i.e., 01.01.2016 to 31.08.2018, in terms of the ROP Rules of 2018, the payment of the above would have to be calculated as per the actual pay scale being received by the said employee on the date of his retirement and not from a date subsequent to the date of retirement/death of the employee. As the actual monetary benefits are to be given only from 01.09.2018, the Govt. employees retiring/died prior to 01.09.2018 cannot be put in the same boat vis-à-vis those retiring on or after 01.09.2018, in so far as payment of gratuity, commutation and leave encashment is concerned. However, for the purpose of pension/family pension, the petitioners and those persons retiring before and after 01.09.2018 form one homogeneous class, as pension/family pension are recurring payments to be made.

28. As such, we are not in agreement with the finding of the learned Single Judge that the petitioners belong to the same homogeneous group/class of Government Servants, who retired on 01.09.2018 and onwards, in so far as payment of gratuity commutation and leave encashment is concerned as the actual monetary benefits of the ROP Rules, 2018 would only have to be paid from 01.09.2018 and not from a date prior to the same. We are aware that pensioners for the purpose of pension, form a class and the schemes which classify pensioners in two

classes on the basis of cut-off date, have always been frowned upon by the Supreme Court. However, the cut-off date has not been put to challenge and the making of a cut-off is allowed, if it is done due to financial constraints of a State. In any event, the State respondents have treated all the pensioners alike, insofar as payment of pension/family pension is concerned. Also, there is no infirmity with the clarification made, that the pensioners, who retire/die prior to 31.08.2018 would not get their gratuity, earned leave, commutation of pension etc., in terms of R.O.P. Rules, 2018, as the reasons given in the foregoing paragraphs make it clear that the same have to be calculated as on the date of the retirement/dismissal/death of the pensioners.

29. We are also of the view that the learned Single Judge had committed an error in coming to a finding that gratuity and commutation, though being a lumpsum onetime payment can be revised in the same manner as monthly pension/family pension, inasmuch as, benefits such as gratuity and commutation etc. are not recurring benefits. On the other hand, payment of monthly pension and family pension are recurring benefits and subsequent Revisions of Pay would continuously have an effect on the pension/monthly pension being paid to pensioners and their family. On the other hand, gratuity and commutation would have to be paid as a onetime lumpsum payment, which would depend upon the pay scale being enjoyed by the pensioner on the date of his retirement/death and the applicable Revision of Pay Rules.

30. Rule 70 of the CCS Pension Rules, 1972 states as follows:-

Rule 70. Revision of Pension after authorization:

(1) Subject to the provisions of Rules 8 & 9, pension once authorised after final assessment shall not be revised to the disadvantage of the Government Servant, unless such revision becomes necessary on account of detection of a clerical error subsequently:

Provided that no revision of pension to the disadvantage of the pensioner shall be ordered by the Head of Office without the concurrence of the Department of Personnel & Administrative Reforms if the clerical error is detected after a period of 2 years from the date of authorization of pension."

31. A perusal of the same would go to show that Rule 70 is only with regard to payment of revision of pension, which has been also reflected in the second part of para 3.2 of the OM dated 13.12.2018. On a perusal of para 3.2 of the OM dated 13.12.2018, we are of the view that the first sentence of para 3.2 relates to the revision of pension/family pension/gratuity/commutation of pension etc. However, the second part/sentence of para 3.2 of the OM dated 13.12.2018 is confined only to the payment of pension and is not relatable to family pension/gratuity/commutation etc. As such, the clarification made vide the impugned OM dated 15.01.2019 would only be applicable to the first part/sentence of para 3.2 of the OM dated 13.12.2018.

32. The OM dated 15.01.2019 is only clarificatory in nature and does not override the provisions of the ROP Rules, 2018. The learned Single Judge has referred to the judgment of the Supreme Court in ***D.S. Nakara & Others (supra)*** at para 42, wherein the Supreme Court has held that it

found no rational principle for granting pension benefits only to those who retired subsequent to a particular date, while denying the same to those who retired prior to that date. It was in that context that the Supreme Court had held that classification of pensioners into two classes, which was not based on any rational principle, with a view to giving something more to persons otherwise equally placed, amounted to discrimination. Similar decisions were referred to by the learned counsel for the writ petitioners in line with the judgment in ***D.S. Nakara & Others (supra)***. However, as stated in the foregoing paragraphs, the learned Single Judge has failed to consider the fact that the issue here is with regard to payment of pension/family pension on one part and payment of gratuity and commutation etc. on the other part. Payment of pension and family pension is a recurring benefit and would naturally be different, depending upon the benefits given by subsequent Revisions of Pay. On the other hand, payment of gratuity, commutation etc. being a onetime lumpsum payment, to be calculated in terms of pay scale being enjoyed by the retiring person on the date of his retirement, the two classes of persons, which is decided on the basis of the cut-off date, i.e., 01.09.2018, cannot be considered to be one homogeneous class of persons.

33. In the case of ***D.S. Nakara & Others (Supra)***, the Supreme Court held that the granting of different pension to retirees on the basis of a cut-off date was arbitrary. It however held that the benefit of gratuity stands on a different footing.

34. In the case of *All Assam Retired Officers, Teachers & Employees' Committee & Others (supra)*, the Single Bench of this Court had held that classifications of employees to get arrear pension, DCRG would not be permissible in law, at it would violate Article 14 of the Constitution of India. In the present case, the State respondents have given 01.09.2018 as the date the actual monetary benefit would be given under the R.O.P. Rules, 2018. There is no classification of pensioners in two different groups regarding payment of pension/family pension. The State Government has only made a clarification to the effect that pensioners who retired between 01.01.2016 and 31.08.2018 would not be entitled to payment of their gratuity, commutation of pension and earned leave, in terms of the R.O.P. Rules 2018. We do not find any infirmity with the said clarification made by the State Government, inasmuch as, payment of the above can only be calculated on the basis of the pay scale and allowance that the pensioners were entitled to at the time of their retirement/death/dismissal etc.

35. In the case of *State Government Pensioners' Association Vs. State of Andhra Pradesh, 1986 3 SCC 501*, the Supreme Court has held that the amount of gratuity payable gets crystallized on the date of retirement on the basis of salary drawn by the retired person on the date of retirement. The transaction thus becomes completed and closed. In **para 2**, the Supreme Court, in the above case has held as follows:-

"2. ... Similar is the case with regard to gratuity which has already been paid to the petitioners on the then prevailing basis as it obtained at the time of their respective dates of retirement. The amount got crystallized on the date of retirement on the basis

of the salary drawn by him on the date of retirement. And it was already paid to them on that footing. The transaction is completed and closed. There is no scope for upward or downward revision in the context of upward or downward revision of the formula evolved later on in future unless the provision in this behalf expressly so provides retrospectively (downward revision may not be legally permissible even)...."

36. In the case of ***Himachal Road Transport Corporation and Another Vs. Himachal Road Transport Corporation Retired Employees Union, 2021 4 SCC 502***, the Supreme Court has held that in case of payment of increased quantum of death-cum-retirement gratuity (DCRG), the cut-off date cannot be said to be arbitrary, which was fixed keeping in view financial constraints. The Supreme Court held at para 18 in the above case as follows:-

"18. Though there are long line of cases, where validity of fixation of cut-off date is considered by this Court, we confine and refer to the case law which is relevant to the facts of the case on hand. In State of Punjab v. Amar Nath Goyal [State of Punjab v. Amar Nath Goyal, (2005) 6 SCC 754: 2005 SCC (L&S) 910], while examining the validity of cut-off date fixed for grant of benefit of increased quantum of death-cum-retirement gratuity, this Court has held that the financial constraint pleaded by the Government, was a valid ground for fixation of cut-off date and such fixation was not arbitrary, irrational or violative of Article 14 of the Constitution....."

37. In the case of ***Union of India Vs. All India Services Pensioners' Association, 1988 2 SCC 580***, the Supreme Court has held that pension is payable periodically whereas gratuity is ordinarily paid only once on

retirement. The Supreme Court in para 8 of the above judgment held 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 Andhra Pradesh State Government Pensioners' Association case [(1986) 3 SCC 501 : 1986 SCC (L&S) 676] and to the decision in N.L. Abhyankar case [(1984) 3 SCC 125: 1984 SCC (L&S) 486] 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 case [(1983) 1 SCC 305: 1983 SCC (L&S) 145 (1983) 2 SCR 165: 1983 UPSC 263] 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-AISC(ii) dated 24-1-1975 to all those members of the All-India Services who had retired prior to 1-1-1973."

38. In view of the above reasons stated, we are of the view that the learned Single Judge was in error in allowing the writ petition. We find that there is no reason to interfere with the O.M. dated 01.09.2018. Consequently, the impugned judgment dated 12.02.2021 passed in WP(C) No.166/2019 and impugned judgment dated 25.03.2021 passed in WP(C)

No.37/2021 being found not sustainable, the writ appeals are allowed. The writ petitions are accordingly dismissed.

JUDGE

JUDGE

Comparing Assistant