

(2016) 07 JH CK 0066
JHARKHAND HIGH COURT
Case No: Writ Petition (S) No. 1729 of 2011.

Krishna Gopal Tiwary
son of late Babu Ram
Tiwary, resident of 3B,
3rd Floor, Sambhav
Apartment, Road No.
2, Near Gandhi Nagar
- Petitioner @HASH
Union of India
through Secretary,
Ministry of Coal, Govt.
of India, Shashtri
Bhawan, New Delhi

APPELLANT

Vs

RESPONDENT

Date of Decision: July 27, 2016

Acts Referred:

- Payment of Gratuity Act, 1972 - Section 4

Citation: (2016) 4 AIRJharR 661 : (2016) 4 JBCJ 624 : (2016) 4 JCR 642 : (2016) 4 JLJR 180

Hon'ble Judges: D.N. Patel and Amitav K. Gupta, JJ.

Bench: Division Bench

Advocate: Mr. D.K. Chakraverty, Advocate, for the Petitioner; Mr. Rajiv Sinha, ASGI, for the Union of India; Mr. Nagmani Tiwari, Advocate, for the Coal India Ltd.; Mr. Deepak Roshan, Advocate, for the Respondent No. 4

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Mr. D.N. Patel, J.(Oral) - With the following prayer, the petitioners have preferred the instant writ petition:

"For issuance of an appropriate writ/order/direction from this Hon"ble Court to direct the concerned respondent, to refund Gratuity amount deducted at source towards income tax against the enhanced limit of gratuity paid to the retired employees during the year 2009-10. AND petitioners further pray before this Hon"ble Court for issuance of direction to the Ministry of Labour & Employment, New Delhi to modify the effective date of Gazette Notification for payment of ceiling-limit of gratuity to the extent of Rs. 10,00,000/- (Rs. Ten lakhs) as per Govt. of India's approval from 01.01.2007 vide office memorandum No. 2(70)/08-DPE (WC) dated 26th November, 2008 issued by Ministry of Heavy Industries and Public Enterprises."

2. Learned counsel for the petitioners has neither read over any provision of the Income Tax Act nor any provision of the Payment of Gratuity Act, 1972 to show that why the amount of gratuity is exempted from the Income Tax.

3. Just bare assertion has no value in the eyes of law and hence, we are not accepting this argument that the amount of gratuity is outside the limit of Income Tax Act. No head and tail of this argument has been matched by the learned counsel for the petitioners. Ten times it has been asserted by the learned counsel for the petitioners that upon the amount of gratuity, no deduction can be made towards the income tax, but, this assertion is not justified at all by the learned counsel for the petitioners. It is the duty of a lawyer to point out correct facts and correct law. Judges are not supposed to know the facts and law. As this argument could not be substantiated by the learned counsel for the petitioners, the prayer viz. not to deduct the income tax from the amount of gratuity, is hereby declined.

4. So far as the second prayer for amendment of effective date of notification for payment of ceiling limit of gratuity amount to the extent of Rs. 10,00,000/- is concerned, the said amendment has been brought into force with effect from 24th May, 2010, looking to Annexure 4 and 4/1 to the memo of this writ petition.

5. It is contended by the learned counsel for the petitioners that the aforesaid date of bringing amendment should have been 1st January, 2007 instead of 24th May, 2010.

6. This contention is also not accepted by this Court, mainly for the following reasons:

(a) The Court cannot change the cut-off date, prescribed by the Parliament;

(b) Section 4 of Payment of Gratuity Act, 1972 is amended by Payment of Gratuity (Amendment) Act, 2010. This Amendment Act is dated 17th May, 2010 and as per Section 1(2) of this Amendment Act, 2010 it will come into force from the date, on which the Central Government may, by notification, appoint a date;

(c) Looking to Annexure 4/1 to the memo of this writ petition, the Central Government has prescribed 24th May, 2010 as the date, on which the Payment of

Gratuity (Amendment) Act, 2010 is brought into force. Thus, looking to Annexure 4 to be read with Annexure 4/1, it appears that the Payment of Gratuity (Amendment) Act, 2010 is brought into force with effect from 24th May, 2010. The Parliament in its wisdom is always prescribing the date of bringing into force the Act. This is a policy decision. This Court will be extremely slow in changing the date of applicability of the Amendment Act. Whenever such type of effective date is prescribed by the Central Government and if it is changed by the Court, it has wide ramifications. The finance is also involved and if this Court is giving a retrospective effect, there will be no end of giving further retrospective date. Cut-off date cannot be prescribed by the High Court in exercise of powers under Article 226 of the Constitution of India.

7. In the facts of the present case, the date on which the Payment of Gratuity (Amendment) Act, 2010 is made effective, is 24th May, 2010 and, therefore, the Central Government employees, who are retiring on or after 24th May, 2010, will get the gratuity with a maximum ceiling limit of Rs. 10,00,000/-. Initially the maximum ceiling limit of the gratuity was Rs. 3,50,000/-. Whenever any cut-off date is prescribed, there are bound to be few persons, falling on the wrong side of the cut-off date. That does not mean that the prescribed cut-off date is discriminative and violative of Article 14 of the Constitution of India. In fact, there cannot be any cutoff date, which can be prescribed, so accurately that, no body will fall on the wrong side of the said cut-off date. Even if, this Court prescribes 1st January, 2007 as cut-off by virtue of judicial activism, then also, there are bound to be few employees, who have retired prior to 1st January, 2007 and they will not get gratuity up to the maximum limit of Rs. 10,00,000/-. Even if, this High Court prescribes 1st January, 2007 as cut-off date instead of 24th May, 2010, still there will be a challenge to the same that this cut-off date is also wrongly prescribed.

8. It has been held by the Hon"ble Supreme Court in the case of Union of India v. Parameswaran Match Works, as reported in (1975)1 SCC 305, at paragraph no. 10 as under:

"10. The concessional rate of duty can be availed of only by those who satisfy the conditions which have been laid down under the notification. The respondent was not a manufacturer before September 4, 1967 as it had applied for licence only on September 5, 1967 and it could not have made a declaration before September 4, 1967 that its total clearance for the financial year 1967-68 is not estimated to exceed 75 million matches. In the matter of granting concession or exemption from tax, the Government has a wide latitude of discretion. It need not give exemption or concession to everyone in order that it may grant the same to some. As we said, the object of granting the concessional rate of duty was to protect the smaller units in the industry from the competition by the larger ones and that object would have been frustrated, if, by adopting the device of fragmentation, the larger units could become the ultimate beneficiaries of the bounty. That a classification can be founded on a particular date and yet be reasonable, has been held by this Court in

several decisions (see *Hatisingh Mfg. Co. Ltd. v. Union of India*, *Dr Mohammad Saheb Mahboob Medico v. Deputy Custodian-General, Bhikuse Yamasa Kshatriya (P) Ltd. v. Union of India* and *Daruka & Co. v. Union of India*). The choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. When it is seen that a line or a point there must be and there is no mathematical or logical way of fixing it precisely, the decision of the legislature or its delegate must be accepted unless we can say that it is very wide off the reasonable mark See *Louisville Gas Co. v. Alabama Power Co.* per Justice Holmes."

(Emphasis supplied)

9. It has been held by the Hon^{ble} Supreme Court in the case of *Union of India v. Sudhir Kumar Jaiswal*, as reported in (1994) 4 SCC 212, in paragraph nos. 7, 8 and 11, as under:

7. In this context, it would also be useful to state that when a court is called upon to decide such a matter, mere errors are not subject to correction in exercise of power of judicial review; it is only its palpable arbitrary exercise which can be declared to be void, as stated in *Metropolis Theater Co. v. City of Chicago* in which Justice McKenna observed as follows:

"It may seem unjust and oppressive, yet be free from judicial interference. The problems of Government are practical ones and may justify, if they do not require, rough accommodations, illogical, it may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not always discernible; the wisdom of any choice may be disputed or condemned. Mere errors of Government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void"

The aforesaid was noted by this Court in *Sushma Sharma v. State of Rajasthan* in which case also reasonability of fixation of a date for a particular purpose had come up for examination.

8. Having known the legal parameters within which we have to function, let it be seen whether fixation of 1st August as cut-off date for determining the eligibility of applicants qua their age can be held to be arbitrary despite preliminary examination being conducted before that date. As to why the cut-off date has not been changed despite the decision to hold preliminary examination, has been explained in paragraph 3 of the special leave petition. The sum and substance of the explanation is that preliminary examination is only a screening test and marks obtained in this examination do not count for determining the order of merit, for which purpose the marks obtained in the main examination, which is still being held after 1st August, alone are material. In view of this, it cannot be held that continuation of treating 1st August as the cut-off date, despite the Union Public Service Commission having introduced the method of preliminary examination which is held before 1st August,

can be said to be "very wide off any reasonable mark" or so capricious or whimsical as to permit judicial interference.

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11. For the aforesaid reasons, equity does not demand any favour to be shown to the respondent. The result is that appeal is allowed with costs by setting aside the impugned order of the Tribunal. Cost assessed as Rs. 10,000. The respondent would not be treated or deemed to have passed the examination in question and whatever benefit of the same was given to him pursuant to Tribunal's directions shall stand cancelled."

(Emphasis supplied)

10. It has been held by the Hon"ble Supreme Court in the case of Dr. Ami Lal Bhat v. State of Rajasthan and ors., as reported in (1997) 6 SCC 614, in paragraph nos. 5 and 7, as under:

"5. This contention, in our view, is not sustainable. In the first place the fixing of a cut-off date for determining the maximum or minimum age prescribed for a post is not, per se, arbitrary. Basically, the fixing of a cut-off date for determining the maximum or minimum age required for a post, is in the discretion of the rule-making authority or the employer as the case may be. One must accept that such a cut-off date cannot be fixed with any mathematical precision and in such a manner as would avoid hardship in all conceivable cases. As soon as a cut-off date is fixed there will be some persons who fall on the right side of the cut-off date and some persons who will fall on the wrong side of the cut-off date. That cannot make the cut-off date, per se, arbitrary unless the cut-off date is so wide off the mark as to make it wholly unreasonable. This view was expressed by this Court in Union of India v. Parameswaran Match Works and has been reiterated in subsequent cases. In the case of A.P. Public Service Commission v. B. Sarat Chandra the relevant service rule stipulated that the candidate should not have completed the age of 26 years on the 1st day of July of the year in which the selection is made. Such a cut-off date was challenged. This Court considered the various steps required in the process of selection and said,

"when such are the different steps in the process of selection the minimum or maximum age of suitability of a candidate for appointment cannot be allowed to depend upon any fluctuating or uncertain date. If the final stage of selection is delayed and more often it happens for various reasons, the candidates who are eligible on the date of application may find themselves eliminated at the final stage for no fault of theirs. The date to attain the minimum or maximum age must, therefore, be specific and determinate as on a particular date for candidates to apply and for the recruiting agency to scrutinise the applications".

This Court, therefore, held that in order to avoid uncertainty in respect of minimum or maximum age of a candidate, which may arise if such an age is linked to the process of selection which may take an uncertain time, it is desirable that such a cut-off date should be with reference to a fixed date. Therefore, fixing an independent cut-off date, far from being arbitrary, makes for certainty in determining the maximum age.

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7. In the present case, the cut-off date has been fixed by the State of Rajasthan under its Rules relating to various services with reference to the 1st of January following the year in which the applications are invited. All Service Rules are uniform on this point. Looking to the various dates on which different departments and different heads of administration may issue their advertisements for recruitment, a uniform cut-off date has been fixed in respect of all such advertisements as 1st January of the year following. This is to make for certainty. Such a uniform date prescribed under all Service Rules and Regulations makes it easier for the prospective candidates to understand their eligibility for applying for the post in question. Such a date is not so wide off the mark as to be construed as grossly unreasonable or arbitrary. The time-gap between the advertisement and the cut-off date is less than a year. It takes into account the fact that after the advertisement, time has to be allowed for receipt of applications, for their scrutiny, for calling candidates for interview, for preparing a panel of selected candidates and for actual appointment. The cut-off date, therefore, cannot be considered as unreasonable. It was, however, strenuously urged before us that the only acceptable cut-off date is the last date for receipt of applications under a given advertisement. Undoubtedly, this can be a possible cut-off date. But there is no basis for urging that this is the only reasonable cut-off date. Even such a date is liable to question in given circumstances. In the first place, making a cut-off date dependent on the last date for receiving applications, makes it more subject to vagaries of the department concerned, making it dependent on the date when each department issues an advertisement, and the date which each department concerned fixes as the last date for receiving applications. A person who may fall on the wrong side of such a cutoff date may well contend that the cut-off date is unfair, since the advertisement could have been issued earlier; or in the alternative that the cut-off date could have been fixed later at the point of selection or appointment. Such an argument is always open, irrespective of the cut-off date fixed and the manner in which it is fixed. That is why this Court has said in the case of Parameswaran Match Works and later cases that the cut-off date is valid unless it is so capricious or whimsical as to be wholly unreasonable. To say that the only cut-off date can be the last date for receiving applications, appears to be without any basis. In our view the cut-off date which is fixed in the present case with reference to the beginning of the calendar year following the date of application, cannot be considered as capricious or unreasonable. On the contrary, it is less prone to vagaries and is less uncertain.

(Emphasis supplied)

11. It has been held by the Hon^{ble} Supreme Court in the case of University Grants Commission v. Sadhana Chaudhary and ors., as reported in (1996) 10 SCC 536, in paragraph no. 21, as under:

"21. We find considerable force in the aforesaid submissions of Shri Banerjee. It is settled law that the choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. When it is seen that a line or a point there must be and there is no mathematical or logical way of fixing it precisely, the decision of the legislature or its delegate must be accepted unless it can be said that it is very wide off the reasonable mark. (See: Union of India v. Parameswaran Match Works at p. 579 and Sushma Sharma (Dr) v. State of Rajasthan at p. 269.) In the present case, the date, 31-12-1993, as fixed by notification dated 21-6-1995, in the matter of grant of exemption from the eligibility test for appointment on the post of lecturer has a reasonable basis keeping in view the time taken in submitting the Ph.D. thesis or obtaining M. Phil. degree by candidates who had undertaken the study for Ph.D. or M. Phil. degree prior to the issuance of the 1991 Regulations and the date, 31-12-1993, cannot be held to be capricious or whimsical or wide off the reasonable mark. The High Court of Punjab and Haryana has proceeded on the basis that the cut-off date for the purpose of granting exemption from eligibility test should have nexus with the date of the advertisement inviting applications for appointment on the post of Lecturers. The High Court was in error in taking this view....."

(Emphasis supplied)

12. It has been held by the Hon^{ble} Supreme Court in the case of Ramrao v. All India Backward Class Bank Employees Welfare Assn., as reported in (2004) 2 SCC 76, from paragraph nos. 29 to 36, as under:

"29. It is now well settled that for the purpose of effecting promotion, the employer is required to fix a date for the purpose of effecting promotion and, thus, unless a cut-off date so fixed is held to be arbitrary or unreasonable, the same cannot be set aside as offending Article 14 of the Constitution of India. In the instant case, the cut-off date so fixed having regard to the directions contained by the National Industrial Tribunal which had been given a retrospective effect cannot be said to be arbitrary, irrational, whimsical or capricious.

30. The learned counsel could not point out as to how the said date can be said to be arbitrary and, thus, violative of Article 14 of the Constitution of India.

31. It is not in dispute that a cut-off date can be provided in terms of the provisions of the statute or executive order. In University Grants Commission v. Sadhana Chaudhary it has been observed: (SCC p. 546, para 21)

"21. ... It is settled law that the choice of a date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances. When it is seen that a line or a point there must be and there is no mathematical or logical way of fixing it precisely, the decision of the legislature or its delegate must be accepted unless it can be said that it is very wide off the reasonable mark.(See: Union of India v. Parameswaran Match Works, SCC at 310 : SCR at p. 579 and Sushma Sharma (Dr) v. State of Rajasthan, SCC at 66 : SCR at p. 269.)"

32. If a cut-off date can be fixed, indisputably those who fall within the purview thereof would form a separate class. Such a classification has a reasonable nexus with the object which the decision of the Bank to promote its employees seeks to achieve. Such classifications would neither fall within the category of creating a class within a class or an artificial classification so as to offend Article 14 of the Constitution of India.

33. Whenever such a cut-off date is fixed, a question may arise as to why a person would suffer only because he comes within the wrong side of the cut-off date, but, the fact that some persons or a section of society would face hardship, by itself cannot be a ground for holding that the cut-off date so fixed is ultra vires Article 14 of the Constitution.

34. In State of W.B. v. Monotosh Roy it was held: (SCC pp. 76-77, paras 13-15)

"13. In All India Reserve Bank Retired Officers Assn. v. Union of India a Bench of this Court distinguished the judgment in Nakara and pointed out that it is for the Government to fix a cut-off date in the case of introducing a new pension scheme. The Court negatived the claim of the persons who had retired prior to the cut-off date and had collected their retiral benefits from the employer. A similar view was taken in Union of India v. P.N. Menon. In State of Rajasthan v. Amrit Lal Gandhi the ruling in P.N. Menon case was followed and it was reiterated that in matters of revising the pensionary benefits and even in respect of revision of scales of pay, a cut-off date on some rational or reasonable basis has to be fixed for extending the benefits.

14. In State of U.P. v. Jogendra Singh a Division Bench of this Court held that liberalized provisions introduced after an employee's retirement with regard to retiral benefits cannot be availed of by such an employee. In that case the employee retired voluntarily on 12-4-1976. Later on, the statutory rules were amended by notification dated 18-11-1976 granting benefit of additional qualifying service in case of voluntary retirement. The Court held that the employee was not entitled to get the benefit of the liberalized provision which came into existence after his retirement. A similar ruling was rendered in V. Kasturi v. Managing Director, State Bank of India.

15. The present case will be governed squarely by the last two rulings referred to above. We have no doubt whatever that the first respondent is not entitled to the relief prayed for by him in the writ petition."

35. In *Vice-Chairman & Managing Director, A.P. SIDC Ltd. v. R. Varaprasad* in relation to "cut-off" date fixed for the purpose of implementation of Voluntary Retirement Scheme, it was said: (SCC p. 580, para 11)

"The employee may continue in service in the interregnum by virtue of clause (i) but that cannot alter the date on which the benefits that were due to an employee under VRS were to be calculated. Clause (c) itself indicates that any increase in salary after the cut-off point/date cannot be taken into consideration for the purpose of calculation of payments to which an employee is entitled under VRS."

36. The High Court in its impugned judgment has arrived at a finding of fact that the Association had failed to prove any malice on the part of the authorities of the Bank in fixing the cut-off date. A plea of malice as is well known must be specifically pleaded and proved. Even such a requirement has not been complied with by the writ petitioners."

(Emphasis supplied)

13. It has been held by the Hon"ble Supreme Court in the case of *Government of Andhra Pradesh v. N. Subbarayudu*, as reported in (2008) 14 SCC 702, in paragraph nos. 5 to 9, as under:

"5. In a catena of decisions of this Court it has been held that the cut-off date is fixed by the executive authority keeping in view the economic conditions, financial constraints and many other administrative and other attending circumstances. This Court is also of the view that fixing cut-off dates is within the domain of the executive authority and the court should not normally interfere with the fixation of cut-off date by the executive authority unless such order appears to be on the face of it blatantly discriminatory and arbitrary. (See *State of Punjab v. Amar Nath Goyal*.)

6. No doubt in *D.S. Nakara v. Union of India* this Court had struck down the cut-off date in connection with the demand of pension. However, in subsequent decisions this Court has considerably watered down the rigid view taken in *Nakara* case as observed in para 29 of the decision of this Court in *State of Punjab v. Amar Nath Goyal*.

7. There may be various considerations in the mind of the executive authorities due to which a particular cut-off date has been fixed. These considerations can be financial, administrative or other considerations. The court must exercise judicial restraint and must ordinarily leave it to the executive authorities to fix the cut-off date. The Government must be left with some leeway and free play at the joints in this connection.

8. In fact several decisions of this Court have gone to the extent of saying that the choice of a cut-off date cannot be dubbed as arbitrary even if no particular reason is given for the same in the counter-affidavit filed by the Government (unless it is shown to be totally capricious or whimsical), vide *State of Bihar v. Ramjee Prasad*, *Union of India v. Sudhir Kumar Jaiswal* (vide SCC para 5), *Ramrao v. All India Backward Class Bank Employees Welfare Assn.* (vide SCC para 31), *University Grants Commission v. Sadhana Chaudhary*, etc. It follows, therefore, that even if no reason has been given in the counter-affidavit of the Government or the executive authority as to why a particular cut-off date has been chosen, the court must still not declare that date to be arbitrary and violative of Article 14 unless the said cut-off date leads to some blatantly capricious or outrageous result.

9. As has been held by this Court in *Aravali Golf Club v. Chander Hass* and in *Govt. of A.P. v. P. Laxmi Devi* the court must maintain judicial restraint in matters relating to the legislative or executive domain."

(Emphasis supplied)

14. Learned counsel for the petitioners submitted that, in fact, though the Act has been made applicable with effect from 24th May, 2010, the respondents have paid the gratuity of Rs. 10,00,000/- to those, who have retired with effect from 1st January, 2007.

There is no such type of circular, ever issued by anyone, because the officers cannot be wiser than the Parliament. As stated herein above, Section 1(2) of the Payment of Gratuity (Amendment) Act, 2010 prescribes that this Amendment Act will be brought into force from such date, as the Central Government may, by notification, appoint the date and looking to Annexure 4/1, it appears that such appointed date is 24th May, 2010. Thus, the amended Section 4 of the Payment of Gratuity Act, 1972 having been brought into force with effect from 24th May, 2010, no officer of the Central Government can give retrospective date.

15. So far as deduction of income tax from gratuity is concerned, except bare assertion, nothing has been argued out by the learned counsel for the petitioners. Neither any provision of Income Tax Act has been read out nor any provision of the Payment of Gratuity Act, 1972 has been read out and nothing has been justified by the learned counsel for the petitioners that why the amount of gratuity is exempted from the Income Tax Act.

16. In view of the aforesaid fact, there being no substance, this writ petition is hereby dismissed with a cost of Rs. 6,000/-, to be paid by the petitioners @ Rs. 1,000/- each. This amount will be deposited by each of the petitioners before the Advocates Association Welfare Development Fund, Jharkhand High Court, Ranchi within a period of twelve weeks from today. Registrar General of this Court is hereby directed to send a copy of this order to the President and Secretary of Advocates Association, Jharkhand High Court, Ranchi. If the amount is not deposited by the

petitioner(s) within the aforesaid period, then application can be moved by the President and/or Secretary of the Advocates Association before this Court.