Tapan Kumar Mandal Vs The State of West Bengal

Court: Calcutta High Court

Date of Decision: Nov. 3, 2014

Acts Referred: Administrative Tribunals Act, 1985 â€" Section 19, 21
Civil Procedure Code, 1908 (CPC) â€" Section 80
Constitution of India, 1950 â€" Article 13(3), 136, 14, 141, 142
Contract Act, 1872 â€" Section 2(c), 23, 72
Limitation Act, 1963 â€" Section 22, 23, 27

Hon'ble Judges: D. Datta, J

Bench: Single Bench

Advocate: Prosenjit Mukherjee, Aritra Ghosh, Subhrangshu Panda, Sourav Mitra and Chandan Dutta, Advocate for the Appellant; Mintu Kumar Goswami, Sabyasachi Roychoudhury, Abhrotosh Majumder, Billawadal Bhattacharyya, D. Chatterjee and S. Kabir, Advocate for the Respondent

Judgement

Dipankar Datta, J.
These writ petitions, involving issues of law of frequent occurrence, were heard separately. Inter alia, several decisions

of learned Judges of this Court (either sitting in a Division Bench or singly) have been cited on behalf of the petitioners and it has been submitted

that the issues of law involved here are no longer res integra; hence I ought to simply follow the same without much ado. The State, while opposing

these writ petitions, has submitted that certain very important and relevant aspects were not placed before the concerned Benches on the earlier

occasions and the resultant decisions, without noticing such aspects, are sub-silentio rulings necessitating a re-look at the issues and further that in

the interest of ensuring certainty, consistency and predictability, I ought to refer the same for re-consideration to a Division Bench or to the

Hon"ble the Chief Justice for constituting an appropriate larger Bench. Considering such submissions advanced on behalf of the State, I have

considered it proper to ascertain the worth thereof and I propose to consider each of the writ petitions separately. However, whatever result is

reached in respect of all would be reflected in this common judgment and order.

The writ petitions:

2. W.P. No. 5291(W) of 2014 is at the instance of Sri Tapan Kumar Mandal, who was an Assistant Teacher of Brahman Sasan High School,

District Paschim Midnapore. He retired from service on attaining the age of superannuation on September 30, 2005. The Pension Payment Order

(hereafter the PPO in short) was issued on the same day, in terms whereof Rs. 2,47,434/- was mentioned as the entitlement of Sri Mandal on

account of death-cum-retiring gratuity (hereafter gratuity in short). However, it was further mentioned therein that a sum of Rs. 44,657/- had been

overdrawn by Sri Mandal and he was thus entitled to Rs. 2,02,777/- on account of net gratuity. He admits having received the said amount on

January 27, 2006.

The pleaded case, as appears from paragraphs 8 and 9 of the writ petition, is as follows:

8. That the petitioner states that the petitioner came to know the month of June, 2011 from a relative of his neighbour that one Rebindra (sic

Rabindra) Nath Mondal, a retired teacher is moved a writ petition being W.P. No. 7572 (W) of 2011 before the Hon''ble High Court and the said

writ petition was finally heard and disposed of by the Hon''ble Justice Jyotirmay Bhattacharya by a solemn order dated 17.05.2011 wherein His

Lordship was pleased to direct the authority concerned to release the alleged overdrawn money in favour of said Rabindra Nath Mondal which

has been deducted by the authority concerned after his retirement and having such information the petitioner decide (sic decided) to pray before

the Hon''ble Court for release of the alleged overdrawn money and also to revise the pension on the basis of the last pay drawn by the

petitioner.....

9. The petitioner states that the petitioner was taken a back (sic aback) by such abrupt incorporation of an imaginary amount in the PPO as an

overdrawal amount to which the petitioner lodged his protest but the respondent verbally informed that without deduction of the said amount, the

pensionary benefit cannot be released and accordingly the respondents Suo Moto (sic suo motu) deducted the said amount of Rs. 44,657/- from

the pensionary benefit of the petitioner and disbursed the remaining amount. The fact of such recovery would be evident from the memo No.

5691/S dated 30.09.2005.

The delay in approaching the Court has been sought to be explained in the following words:

18. That the petitioner submits that the petitioner is a inhabitant of a remote village and from the long time ago he was suffering from various

disease due to old age and more over he had no knowledge about the legal procedure to approach before the proper judicial forum for get relief.

Time without number he visited personally with the concerned Treasury Officer as well as the concerned District Inspector of Schools (SE)

Howrah and requested them to sanction and release 18% interest upon the gratuity amount for delayed payment very recently and he personally

met with the concerned Treasury Officer to release the 18% interest on the gratuity amount for delayed payment but the concerned Treasury

Officer straight way rejected the said prayer of the petitioner. Having no othis (sic other) alternative very recently he met with his Learned

Advocate of the Hon''ble High Court at Calcutta and requested him to take necessary steps before the Hon''ble High Court at Calcutta for

redressal his grievances and handed over the necessary papers and documents to him which were available to his. There was/is no wilful latches

(sic laches) or negligence on the part of the petitioner to move this application before the Hon''ble Court on earlier occasion.

Alleging that the action of the respondents in unilaterally deducting the sum of Rs. 44,657/- from the gratuity payable to Sri Mandal without putting

him on notice as well as without a hearing is illegal and arbitrary, the writ jurisdiction of this Court has been invoked by presenting the writ petition

on February 17, 2014 seeking, inter alia, the following main relief :

a) A writ in the nature of mandamus commanding the respondents, their men, agent and servants to refund the recovered amount of Rs. 44,657/-

which has been deducted by the authority concerned from the retrial gratuity as alleged overdrawn in favour of the petitioner along with interest @

18% per annum forthwith;

b) A writ in the nature of Mandamus commanding the respondents, their agents and servants to re fix the amount of monthly pension of petitioner

on the basic (sic basis) of last pay drawn by the petitioner and accrued interest therein since the date of retirement till the date of actual

disbursement, forthwith;

c) A writ in the nature of Mandamus commanding the respondents, their agents and servants to pay litigation cost to the tune of Rs. 10,000/-

forthwith;

3. Smt. Ratna Barman (hereafter Smt. Barman), wife of late Suresh Chandra Barman, is the petitioner in W.P. No. 23116(W) of 2014 dated July

24, 2014, filed in the department on August 8, 2014. The deceased, was an Assistant Teacher of Singimari High School (H.S.) in the district of

Cooch Behar. After putting in 33 (thirty-three) years of service, he retired on attaining the age of superannuation on March 31, 2002 and

subsequently passed away on March 30, 2011. The PPO dated February 27, 2004 issued in favour of the deceased showed Rs. 72,795/- as

overdrawn pay and it is not in dispute that the retirement benefits were paid deducting such sum. According to Smt. Barman, the basic pay drawn

by her husband at the time of his retirement was reduced and the aforesaid amount deducted without granting him any opportunity of hearing. In

her attempt to explain the belated approach, Smt. Barman has pleaded in paragraph 15 as follows:

15. The petitioner has been suffering from various ailments, due to ill her health and also suffering financial crises after retirement, of the

petitioner"s husband could not able to take appropriate legal step against such deduction as impugned herein within the reasonable time.

Considering such facts, delay in approaching this Hon"ble Court may kindly be condoned and be heard on merits.

The main prayers of the writ petition read as follows :

In these circumstances, your petitioner most humbly prays that Your Lordships would be graciously pleased to issue-

(a) A writ in the nature of Mandamus commanding the respondents specifically the respondent nos. 2 namely the Director of Pension, Provident

Fund & Group Insurance, West Bengal to refund the deductible amount of Rs. 72,795.00 with interest at the rate of 10% per annum from the date

of retirement till the date of actual payment and refix the pension on the basis of the last pay drawn by her husband at the time of retirement and

pay the arrears on the basis of such revised pension with interest to immediately and forthwith;

(b) A writ in the nature of Mandamus directing the respondents to sanction the pensionary benefits of the petitioner"s husband afresh on the basis

of his last basic pay drawn at the time of retirement and issue a fresh pension payment order in favour of the petitioner"s husband and pay all

benefits with arrears and also refund the deductible amount with interest of the entire amount which is to be paid at the rate of 10% per annum

from the date of retirement till such payment.

4. W.P. No. 9262(W) of 2014 has been presented by Sri Nepal Chandra Satapasti (hereafter Sri Satapasti) on March 19, 2014. After putting in

over 3 (three) decades of service as an Assistant Teacher of Sree Sree Karunamoyee High School in the district of Cooch Behar, Sri Satapasti

retired upon attaining the age of superannuation on April 30, 2010. The PPO was issued in his favour several months before retirement, on June

11, 2009 to be precise. An amount of Rs. 33,694/- was shown as "overdrawal in pay", adjustable with the gross retiring gratuity of Rs.

2,50,000/- payable to him.

In paragraph 7 of the writ petition, Sri Satapasti has pleaded that while issuing the PPO, the concerned authority reduced his basic pay drawn at

the time of retirement and deducted the amount of Rs. 33,694/- from his gratuity without granting him any opportunity of hearing. Claiming that

alleged excess payment made to him was not due to any fraud or misrepresentation on his part and, therefore, unrecoverable, this writ petition

dated March 20, 2014 was presented wherein prayer has been made for re-fixation of pension on the basis of the last pay drawn at the time of

retirement and refund of the said amount of Rs. 33,694/- together with 10% interest on the amount of Rs. 2,50,000/- from the day following

retirement till date of actual payment.

Paragraph 15 of the writ petition contains pleadings seeking to explain the belated approach made by Sri Satapasti, reading as follows:

15 The petitioner has been suffering from various ailments, due to ill his health and also suffering financial crises after retirement, he could not able

to take appropriate legal step against such deduction as impugned herein within the reasonable time. Considering such facts, delay in approaching

this Hon"ble Court may kindly be condoned and be heard on merits.

5. Smt. Santimoyee Ghosh (hereafter Smt. Ghosh), the petitioner in W.P. No. 20679(W) of 2014 was an Assistant Teacher of Bidyarthi Bhawan

Primary School in Burdwan district. She retired from service on May 31, 2007. According to her, she had submitted her pension papers before

the concerned respondents much prior to retirement but release of pensionary benefits was unnecessarily delayed for no fault on her part. Almost a

year after her retirement, PPO dated May 28, 2008 was issued. An amount of Rs. 34,828/- was shown as excess payment, which was sought to

be recovered from her gross retiring gratuity of Rs. 1,93,347/-. Deduction from the gratuity was effected unilaterally without any opportunity to put

forward any explanation. A communication dated May 23, 2011 originating from the office of the Assistant Director, Pension, Provident Fund &

Group Insurance was served purporting to inform her that on January 1, 2006, her pay in the pre-revised scale ought to have been Rs. 6,000/-

instead of Rs. 6,150/- and, accordingly, her pay in the revised scale would be Rs. 14,060/- instead of Rs. 14,340/-. A notice was sent to the

Director of Pension and the concerned District Inspector of Schools on March 25, 2014 claiming refund of the said amount of Rs. 34,828/- along

with interest @ 10% from the date following retirement till actual disbursement at an early date but the same did not evoke any response for which

the writ petition was presented on July 10, 2014 seeking, inter alia, the following relief:

Under the facts and circumstances stated hereinabove your petitioner most humbly prays that Your Lordship may graciously be pleased to pass

the following orders-

a) A writ in the nature of Mandamus commanding the respondents or their agents to release the alleged overdrawn amount of Rs. 34,828/- from

the next date of retirement to the date of actual disbursement along with interest at the rate of 10% p.a. being Annexure P-1 and P2 to this

petition;

Submissions on behalf of the respective parties

6. A preliminary objection to the maintainability of W.P. No. 5291(W) of 2014 was raised by Mr. Goswami, learned advocate for the official

respondents. According to him, as on date the PPO was issued, Sri Mandal ought to have become aware that Rs. 44,657/- was being deducted

from the gratuity payable to him because of overdrawn pay. If indeed Sri Mandal had any reservation in regard to such deduction, the normal

reaction would have been to raise a question as to why it was being effected without even informing him the details of overdrawn pay and without

calling for his explanation. There is no documentary evidence that Sri Mandal did raise such issue; on the contrary, he accepted Rs. 2,02,777/-

towards gratuity without raising any demur in January, 2006. More than 8 (eight) years after receipt of gratuity, the Court of Writ has been

approached being inspired by an order passed on the writ petition of another teacher who, allegedly, had suffered the same way. Even as per Sri

Mandal"s own admission, he came to learn about the order passed by this Court on W.P. No. 7572(W) of 2011 in June, 2011 and there is no

explanation as to what prevented the petitioner from approaching this Court within a reasonable period thereafter. That apart, the claims that have

been raised in paragraphs 9 and 18 of the writ petition are not supported by any documentary evidence. Before presenting this writ petition, not

even a notice demanding justice was sent by Sri Mandal.

7. The decisions reported in State of Madhya Pradesh Vs. Bhailal Bhai and Others, , A.P. Steel Re-Rolling Mill Ltd. Vs. State of Kerala and

Others, , Shiv Dass Vs. Union of India (UOI) and Others, , New Delhi Municipal Council Vs. Pan Singh and Others, , and Chandi Prasad Uniyal

and Others Vs. State of Uttarakhand and Others, were cited by Mr. Goswami in support of his submission that W.P. No. 5291(W) of 2014

deserves in limine dismissal.

8. Mr. Mukherjee, learned advocate for Sri Mandal contended that on facts and in the circumstances, delay in approaching this Court has been

sufficiently explained and hence W.P. No. 5291(W) of 2014 ought to be heard on its merits. Even otherwise, non-payment of Rs. 44,657/- to Sri

Mandal since long, based on an illegal and arbitrary deduction effected without the authority of law, is a continuing wrong and in a case of a

continuing wrong, delay has not been viewed by the law Courts to be a valid ground on which a writ petition should be dismissed. According to

him, there are several Division Bench and Single Bench decisions of this Court (upon considering authorities of the Supreme Court) in regard to

claims of similar nature and I being bound by the same, ought to overrule the objection raised by his adversary.

9. On the merits of W.P. No. 5291(W) of 2014, it was contended by Mr. Mukherjee that Sri Mandal has been a victim of illegal and arbitrary

action. Assuming that Sri Mandal had been paid excess amount, there was no allegation at any point of time that his pay was fixed erroneously

because of any fraud or misrepresentation on his part. If excess payment had been made, it must have been due to an erroneous application of

principles for fixation of pay by the official respondents or on misinterpretation of the relevant rules and for the same, Sri Mandal cannot be made

to suffer. That apart, if at all any amount has been paid in excess to Sri Mandal, there is no law permitting such amount to be adjusted with the

retirement benefits and the only course for the official respondents was to recover such amount by filing a civil suit.

10. The ratio decidendi of the decision in Chandi Prasad Uniyal (supra) was sought to be distinguished by Mr. Mukherjee by referring to the fact

that the employee before the Supreme Court was not a retired employee but a serving employee. According to him, the said decision has no

applicability for deciding the writ petition of a retired teacher aggrieved by adjustment/recovery of amounts from his retirement benefits.

11. Relying on quite a few reported and unreported decisions (to which I shall refer at a later part of this judgment), Mr. Mukherjee submitted that

W.P. No. 5291(W) of 2014 ought to be decided in favour of Sri Mandal by granting the relief claimed by him.

12. Insofar as the writ petitions presented by Smt. Barman and Sri Satapasti are concerned, Mr. Panda, learned advocate representing them

contended that the concerned teachers were not to be blamed for erroneous fixation of pay scales, which is the duty of the respondent authorities.

It was pointed out by him that on innumerable occasions in the past this Court had intervened and granted relief to similarly placed teachers who

found from the PPOs issued in their favour that unilateral deductions, which are arbitrary and unreasonable, had been effected without compliance

with principles of natural justice and the amounts that were deducted were directed to be returned with appropriate interest. In support of the plea

of Smt. Barman, he placed reliance on an unreported Division Bench decision of this Court in M.A.T. No. 1067 of 2010 (Smt. Nanda Rani Das v.

State of West Bengal) and submitted that this Court having interfered and granted relief in similar circumstances, she is entitled to claim parity. He

too prayed for similar orders as prayed for by Mr. Mukherjee.

13. A doubt had arisen in my mind on perusal of some of the authorities that were cited by Mr. Mukherjee regarding the authority and/or

competence of the official respondents in adjusting alleged excess payment and/or overdrawn amount with the retirement benefits of the teachers.

Payment of retirement benefits to the teachers and non-teaching staff is regulated by the West Bengal Recognised Non-Government Educational

Institution Employees (Death-cum-Retirement Benefit) Scheme, 1981 (hereafter the DCRB Scheme of 1981) introduced vide Memorandum No.

136-Edn.(B) dated May 15, 1985. It does not expressly empower the official respondents to adjust/deduct any amount, paid in excess to any

teacher or overdrawn by him. However, paragraph 45 of the DCRB Scheme of 1981 ordains that in respect of any matter for which provision has

not been made in such scheme, the relevant provisions of the West Bengal Services (Death-cum-Retirement) Rules, 1971 (amended from time to

time) (hereafter the Rules of 1971) shall apply mutatis mutandis subject to the approval of the State Government. Rule 140 of the Rules of 1971

empowers the Government to recover from a retiring Government servant ascertainable due on account of, inter alia, over-payment of pay and

allowance out of the gratuity payable to him. Rule 140 could legitimately be invoked provided of course such invocation had the approval of the

State Government. I had enquired from Mr. Majumder, learned Government Pleader representing the official respondents in W.P. No. 20679(W)

of 2014 as to whether approval, either general or in respect of specific instances, for invoking Rule 140 of the Rules of 1971 had been obtained or

not. Upon seeking adjournment for a few days, he ultimately submitted that he was fully prepared to clear the doubt.

14. In course of vehemently opposing the writ petition of Smt. Ghosh and in support of the contention that the officers of the State are entitled to

deduct or adjust overdrawn amount from the retirement benefits of the concerned retired teachers, Mr. Majumder first referred to the DCRB

Scheme of 1981. According to him: the scheme which is spread over 11 (eleven) chapters and part of Annexure-I of the said memorandum

contained detailed provisions in relation to release of benefits like provident fund, pension, gratuity, etc. to eligible retired teachers/non-teaching

staff of educational institutions, as defined in paragraph 5(b); Chapter IX provided for the procedure relating to application for and sanction of

pension; paragraph 31 of Chapter IX provided that an employee, who is eligible for pension under the scheme, shall submit to his appointing

authority a formal application for pension in the form as prescribed in Appendix-IV and other documents as mentioned in the application form and

other particulars, required in Appendix-V preferably one year in advance of the date of anticipated retirement; paragraph 34 contained in the same

chapter provided for payment of provisional pension, for a period not exceeding 12 (twelve) months, at the rate and in the manner mentioned

therein if the pension papers are detained for some reason, and that provisional pension including gratuity shall be subject to adjustment against the

amount of final pension including gratuity/relief or by short payment of pension, and further that all outstanding dues shall be adjusted in the same

manner as above.

15. Mr. Majumder next referred to Memorandum No. 86-SE (B) dated June 1, 1995 issued by the School Education Department, Budget

Branch, Government of West Bengal, prescribing the procedure regarding checking of pension papers of employees of non-Government State-

aided educational Institutions (Schools) at the district level. Paragraph 1 of the said memorandum provided that the senior most Assistant Inspector

of Schools (S.E./P.E.) of the District headquarters will be the in-charge of the pension cell at the office of the District Inspector of Schools

(S.E./P.E.). Paragraph 2 provided that the A.I. of Schools (Pension) shall check the pension papers as per ""Check List"" prescribed in Annexure-I

thereto and submit the pension papers along with Annexure-I and with his specific comments to the D.I. of Schools (S.E./P.E.). Paragraph 3

provided that the D.I. of Schools (S.E./P.E.) would send the pension papers and Annexure-I to the Assistant Director of Accounts/Finance

Officer of the District Primary School Council, as the case may be, for further examination. Paragraph 4 provided that the Assistant Director of

Accounts/Finance Officer, as the case may be, would examine the pension papers with special attention to the points mentioned in Annexure-II to

the said memorandum. Paragraph 5 provided that the Assistant Director of Accounts/Finance Officer, as the case may be, would then return the

pension papers along with Annexures-I & II, noting his specific objections thereto, if any, or otherwise recording the prescribed certificate as to

the corrections of the case to the pension sanctioning authority i.e. the D.I. of Schools (S.E./P.E.) who shall be designated as such for the purpose.

Paragraph 6 provided that if the pension case is returned with objections, then after compliance with the objections raised, the D.I. of Schools

would send the case, once again, to the Assistant Director of Accounts/Finance Officer, as the case may be, for examination. The Assistant

Director of Accounts/Finance Officer would then follow the same procedure as in sub-para (5). Paragraph 7 provided that after obtaining the

prescribed certificates as to the pension cases, the pension sanctioning authority being the D.I. of Schools (S.E./P.E.) would forward the pension

cases to the Director of Pension, Provident Fund & Group Insurance (hereafter the D.P.P.G.), in Form-I as mentioned in Appendix-VI of

Memorandum No. 136-Edn. (B) dated May 15, 1985. Paragraph 8 provided that if these pension papers are returned by the D.P.P.G. with

objections on pay-fixation, pension calculation etc., then the pension sanctioning authority and the D.I. of Schools (S.E./P.E.) shall bring it to the

notice of the Assistant Director of Accounts/Finance Officer, as the case may be, requesting for necessary corrections and suggestions while

sending the case to the latter in terms of sub-paragraph (6). Serial No. 11(c) of the Check List contained in Annexure-I to the Memorandum dated

June 1, 1995 provided for a query in the following terms:

(c) Whether any overdrawal of salaries has been recorded in the Service Book & L.P.C. and No-Liability certificate of (sic or) Liability

Certificate for the purpose of adjustment out of retirement benefit (if not deposited in cash) has been submitted?

Serial No. 11(d) (ii) of the Check List provided for the following query:

(ii) Whether declaration of the pensioners for the adjustment of outstanding liabilities for recoveries of overdrawals etc. has been taken?

Serial No. 8 of Annexure-II which is to be used by the Assistant Director of Accounts/Finance Officer provided for the following query:-

L.P.C. shows all elements of pay and also the recoverable items (if any) from pension the last pay figure of L.P.C. tallies in the last pay as shown

in Service Book (Page No.).....

16. Reference was thereafter made by Mr. Majumder to Memorandum No. 88/SE (B) dated May 26, 1998 issued by the School Education

Department, Budget Branch, Government of West Bengal, laying down ""Scheme for payment of Pension and Gratuity on the date of

superannuation to the employees of West Bengal Recognized non-Government Educational Institutions and introduction of Comprehensive Form

in connection with sanction of pension cases"".

Paragraph 1.2 of the said memorandum provided that a notice shall be issued by the Headmaster/Headmistress/Administrator/Teacher-in-Charge,

as the case may be, to the retiring employees two years in advance from the date of superannuation enclosing along with the notice Part A of the

Comprehensive Form (Formal Application for Pension) as prescribed, Form ""C"" (for Commutation of Pension) and Forms for Nomination for

Death-cum-Retiring Gratuity and Lifetime Arrear of Pension, with the direction to submit the said forms along with other enclosures/documents as

indicated in the Comprehensive Forms 18 (eighteen) months in advance from the date of superannuation. Paragraph 3.2 provided that the pension

sanctioning authority shall check the pension papers and service book with reference to the check list prescribed in Annexure-I to G.O. No. 86-

SE(B) dated June 1, 1995 and apart from signing/countersigning the service book and other forms as required as per rule, he shall also give

necessary certificates in the service book as required as per rule. Form-A provided for the following declaration by the employee:

3(b) : I, ...of..... hereby declare that any amount of excess payment and overdrawal in pay and allowances, loans, advances,

etc, if found during scrutiny of any pension paper should be adjusted from the gratuity and pensions/relief. I hereby promise to raise no objection

whatsoever for such adjustment.

17. My attention was also invited to paragraph 11 of the aforesaid memorandum by Mr. Majumder. It reads as follows:

11. The relevant provisions of the West Bengal Recognised Non-Government Educational Institution Employees (Death-cum-Retirement Benefit)

Scheme" 81 shall be deemed to have been amended to the extent indicated in this order.

18. It was contended by Mr. Majumder that the DCRB Scheme of 1981 contained in Memorandum No. 136-Edn. dated May 15, 1985 read

together with Memoranda Nos. 86-SE(B) dated June 1, 1995 and 88/SE(B) dated May 26, 1998 provides a complete code for sanction of

pension and the manner of such sanction. Chapter IX contained in the DCRB Scheme of 1981 practically stood substituted by the procedure laid

down in the subsequent memoranda issued on June 1, 1995 and then again on May 26, 1998. According to him, a conjoint reading of different

clauses and the forms appended to the DCRB Scheme of 1981 and the memoranda referred to above makes it clear that a teacher or a non-

teaching staff is required to give an undertaking in the application form for pension that any amount paid in excess or overdrawn would be adjusted

against his/her final retirement dues whereupon overdrawn salary because of wrong pay fixation or otherwise is liable to be adjusted against the

retirement dues of the concerned employee. While also contending that the expressions ""outstanding"" or ""employer"s dues"" used in the DCRB

Scheme of 1981 and Appendix-V thereto would include overdrawn salary, he submitted that recourse to Rule 140 of the Rules of 1971 was not

required to be taken in view of the provisions introduced vide the memorandum dated May 26, 1998.

19. Citing Chandi Prasad Uniyal (supra), it was submitted by Mr. Majumder that the Supreme Court observed as follows:

A. The direction given in Syed Abdul Qadir and Others Vs. State of Bihar and Others, , is confined to the peculiar facts of that case (paragraph

12).

B. No proposition of law has been laid down in Shyam Babu Verma and Others Vs. Union of India (UOI) and Others, , Sahib Ram Vs. State of

Haryana and Others, , and Col. (Retd.) B.J. Akkara Vs. The Govt. of India and Others, , that only if the State or its officials establish that there

was misrepresentation or fraud on the part of the recipient of the excess pay, then only the amount paid could be recovered (paragraph 13).

C. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any

authority of law (paragraph 14).

D. Any amount paid/received without the authority of law can always be recovered barring few exceptions of extreme hardships but not as a

matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment

(paragraph 14).

20. Mr. Majumder contended that since the Supreme Court in Chandi Prasad Uniyal (supra) has made it abundantly clear that the decisions in

Shyam Babu Verma (supra), Sahib Ram (supra) and Syed Abdul Qadir (supra) are confined to the special/peculiar facts and circumstances of

those cases, no employee is entitled to claim a right to enjoy the tax payers'' money without any authority of law and such enjoyment of public

money, if allowed to continue, would amount to unjust enrichment. According to him, the immediate impact of the said decision is that the test as to

whether fraud or misrepresentation of the concerned employee was the direct result of excess payment/overdrawal is no longer relevant and once

excess payment/overdrawal is detected, no matter whether the employee is in service or not, the respondents have the authority and/or

competence to adjust such excess payment/overdrawal amount with the retirement dues in view of the undertaking/declaration given by the

employee without any reservation and it is only in a case where the retired employee establishes extreme hardship that the Court may step in and

restrain recovery.

21. Reacting to the Court''s observation that the undertaking given by the employee in the application for pension could be branded

unconscionable, since metaphorically it is a contract between the lion and the lamb, Mr. Majumder responded as under:

(i) A contract is said to be unconscionable if the employer exercises its unequal bargaining power.

(ii) Such an unconscionable contract is opposed to public policy and is, therefore, void as it offends Section 23 of the Indian Contract Act, 1872

(hereafter the 1872 Act).

(iii) An undertaking having the effect of recovering public money from an employee, which has been paid to him in excess of his entitlement, cannot

be said to be opposed to Section 23 of the Contract Act.

(iv) It is an undisputed position of fact that none of the petitioners was entitled to such public money. It is a bounty without any authority of law.

22. Inviting my attention to a pleading in the writ petition of Smt. Ghosh (paragraph 14) that she is entitled to the protection of Section 72 of the

1872 Act, it was contended that reliance thereon is absolutely misplaced inasmuch as instead of advancing her cause, Section 72 actually gives the

action taken by the State for recovery/adjustment of overdrawn salary a statutory backing.

23. To support his argument that a single Judge could doubt the correctness of a judgment of a Division Bench and therefore request the Hon''ble

the Chief Justice to place the matter for reference to a larger Bench, Mr. Majumdar relied on the decision reported in Central Board of Dawoodi

Bohra Community and Another Vs. State of Maharashtra and Another, wherein it was held as follows:

12(2). A Bench of lesser quorum cannot disagree or dissent from the view of the law taken by a Bench of larger quorum. In case of doubt all that

the Bench of lesser quorum can do is to invite the attention of the Chief Justice and request for the matter being placed for hearing before a Bench

of larger quorum than the Bench whose decision has come up for consideration. It will be open only for a Bench of coequal strength to express an

opinion doubting the correctness of the view taken by the earlier Bench of coequal strength, whereupon the matter may be placed for hearing

before a Bench consisting of a quorum larger than the one which pronounced the decision laying down the law the correctness of which is

doubted.

24. The Constitution Bench decision reported in Pradip Chandra Parija and Others Vs. Pramod Chandra Patnaik and Others, was also cited for

the following proposition:

In our view, judicial discipline and propriety demands that a Bench of two learned Judges should follow a decision of a Bench of three learned

Judges. But if a Bench of two learned Judges concludes that an earlier judgment of three learned Judges is so very incorrect that in no

circumstances can it be followed, the proper course for it to adopt is to refer the matter before it to a Bench of three learned Judges setting out, as

has been done here, the reasons why it could not agree with the earlier judgment. If, then, the Bench of three learned Judges also comes to the

conclusion that the earlier judgment of a Bench of three learned Judges is incorrect, reference to a Bench of five learned Judges is justified.

25. It was finally urged that since the learned Judges comprising the Division Benches and the learned Judges sitting singly on earlier occasions did

not have the benefit of consideration of the relevant clauses of the Memoranda dated June 1, 1995 and May 26, 1998 and the contentions urged in

regard to the impact of the decision in Chandi Prasad Uniyal (supra) and Section 72 of the 1872 Act, it is within the jurisdiction of this Bench to

doubt the correctness of such decisions including those delivered by Division Benches and to invite the attention of the Hon''ble the Chief Justice

and request for the matter being placed for hearing before a Bench of such strength as the Hon''ble Chief Justice may consider just and proper.

26. Mr. Mitra, learned advocate representing Smt. Ghosh contended that in terms of the DCRB Scheme of 1981, the respondents were duty

bound to release the admissible retirement benefits on the day following her retirement from service upon adjustment of any amount inadvertently

paid in excess or on account of overdrawal of pay and allowances because of wrong fixation of pay. If such admissible benefits had been released

on the following day of retirement, the undertaking given by Smt. Ghosh would be operative and she may not have any reason to feel aggrieved.

However, the retirement benefits having been released years after retirement without any allegation of fraud or misrepresentation at the instance of

Smt. Ghosh that might have resulted in excess payment being made in her favour, the declaration became inoperative and could not have been

given effect and Smt. Ghosh was entitled to receive the retirement benefits in its entirety without any adjustment being made to recover alleged

excess payment. The rationale behind this principle, it was argued, is that an employee before his retirement is to chalk out his financial programme

to meet the ends of his family after his retirement based on his retirement benefits and in such a case, deduction of any amount from the retirement

benefits would affect the livelihood of the employee and his family members after retirement.

27. That apart, it has been urged that neither any previous notice regarding adjustment nor any prior opportunity of hearing was afforded to Smt.

Ghosh; it was only upon receipt of the PPO that she came to learn of deduction of a huge amount from the gratuity payable to her. At the material

point of time, Smt. Ghosh was also not made aware of the precise reason for adjustment/deduction. If at all there has been erroneous fixation of

pay scale or a wrong principle had been applied while granting a particular pay, the respondents have to shoulder the blame therefor. It was

impossible for Smt. Ghosh to know in advance as to whether any amount was overdrawn by her when she served without having any responsibility

in the matter of fixation of pay scale. Grant of increments and fixation of pay scale are the job of the respondents and in the event there has been

any mistake in the process of calculation of service benefits, it is not just and proper on the part of the respondents to shift the responsibility on

Smt. Ghosh.

28. Referring to the DCRB Scheme of 1981, it was submitted that although it has been amended by the memorandum dated May 26, 1998

whereby the comprehensive Form-A has been introduced, the amended provisions do not empower the respondents to deduct any overdrawn

amount from the retirement dues after the retirement, particularly when clause 5.6 of the said memorandum clearly stipulates that PPO should be

issued one month prior to the retirement.

29. Mr. Mitra further argued that the question of dis-entitlement of Smt. Ghosh to a particular pay, which was given to her resulting in excess

payment, is not an issue in the writ petition as no question in regard thereto was raised during her service tenure and deduction of the alleged

overdrawn amount has been made from her retirement benefits after retirement, and that too without intimating her, is an act in flagrant violation of

the guarantees enshrined in Articles 14, 21 and 300A of the Constitution of India. It was contended that retirement benefit is nothing but a property

within the meaning of Article 300A of the Constitution of India and since such property produces sustenance of life of a retired employee,

deduction of any amount therefrom after retirement is impermissible. Moreover, there is no scope for initiating any proceeding for recovery of the

alleged overdrawn amount at this stage as the same would clearly be barred by the laws of limitation and estoppel. Reliance in this regard was

placed on the decision reported in 2008 (6) SLR 397 (Normoi Topno v. State of Jharkhand).

30. Responding to the objection of delay in presentation of the writ petition, it was submitted that such objection has no merit at all in view of the

decision reported in Union of India (UOI) and Others Vs. Tarsem Singh, . Mr. Mitra contended that the respondents have no authority to reopen

the issue of excess payment, which might have occurred some 10 (ten) or 20 (twenty) years before Smt. Ghosh''s retirement due to few increments

being wrongly given to her during the initial period of her service. Withdrawal of such incremental benefit at this late stage results in reduction in the

quantum of pension receivable by her each and every month. Accordingly, each and every month Smt. Ghosh has suffered and this is a continuous

source of injury for which belated approach, if any, ought not to be considered fatal. That apart it was contended that deduction of huge amount

made from the gratuity payable to her is a continuing wrong in view of its far reaching and telling consequences and effect in the twilight years of her

life and that there is no delay in approaching this Hon''ble Court in its writ jurisdiction.

31. Moreover, according to Mr. Mitra, no right of any third party is involved in the present case of granting the relief prayed for by Smt. Ghosh

and the Supreme Court in Tarsem Singh (supra) has held that where a service related claim is based on a continuing wrong, relief can be granted

even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced and if such continuing wrong

creates a continuing source of injury. The decision reported in M/s. Dehri Rohtas Light Railway Company Limited Vs. District Board, Bhojpur and

and District Board, Shahabad and others, was relied on for the proposition that dismissal of a writ petition on the point of delay is not a rule of law

but a rule of practice, and in case of a manifest illegality in State action which goes to the root of the matter delay cannot stand in the way.

32. As regards the undertaking given by Smt. Ghosh, it was submitted that such an undertaking in the prescribed proforma (Form-A) is a

requirement for release of retirement benefits and without filling in the said prescribed form, retirement benefits are not released. This aspect,

according to Mr. Mitra, has been dealt with by this Court in the decisions reported in Kalyan Kumar Chattopadhyay Vs. The State of West

Bengal and Others, and Smt. Amita Kundu (Rana) Vs. The State of West Bengal and Others, . According to him, the petitioner under compulsion

gave the undertaking or else would have found herself in deep waters without the retirement benefits. Such undertaking obtained a few months

before a teacher''s retirement, Mr. Mitra contended, cannot operate to his/her prejudice.

33. Several other decisions were cited by Mr. Mitra (which shall also be referred to later) to buttress his contention that this Court has come down

heavily against arbitrary adjustment of amounts from retirement benefits and, accordingly, he prayed for similar relief as granted to other similarly

placed teachers.

Questions arising for decision

34. Two important issues arise for decision on these writ petitions.

The first is whether the writ petitions ought to be entertained, bearing in mind the conduct of the respective petitioners. Sri Mandal, Sri Satapasti

and Smt. Ghosh retired from service nearly 8 (eight), 4 (four) and 7 (seven) years respectively prior to presentation of their respective writ

petitions, while Smt. Barman has approached the Court of Writ more than a decade after her husband retired from service. Retirement benefits,

albeit after adjusting excess payment, have been released in favour of the concerned teachers at least more than 3 (three) years before presentation

of these writ petitions. The State may not be unjustified in contending that the writ petitions are grossly delayed, but it would fall for decision

whether the respective petitioners are entitled to the relief claimed by them upon entertainment of their writ petitions overlooking the delay and

laches in approaching the Court, having regard to the innumerable decisions of this Court (cited by Mr. Mukherjee and Mr. Mitra) holding in

similar cases that the concerned teachers despite having approached the Court late were entitled to relief because the State has suffered no loss by

reason of such delay and that no third party interest would be affected, should relief be granted.

The second issue, which is likely to arise subject to the petitioners crossing the hurdle of delay and laches, is whether by reason of the concerned

teachers not challenging the requirement to declare that any amount paid in excess and/or overdrawn pay and allowances, if any, could be adjusted

from their retirement benefits and that they would not question such adjustment on any reason whatsoever, the writ petitions claiming refund of

money with interest are at all maintainable.

Notable features of the petitioners'' claims

35. Before I embark on deciding the specific issues noted above, it may not be irrelevant at this stage to discern the apparent similarities and the

dissimilarities in respect of the claims of these 4 (four) petitioners.

36. The claim set up by Sri Mandal, Sri Satapasti and Smt. Ghosh is common. They feel aggrieved by unilateral deduction of money from the

gratuity payable to them. Smt. Barman''s claim is a bit different in that she claims recovery of the money deducted from the gratuity, which was

payable to her husband.

37. Insofar as issuance of PPOs in favour of Sri Mandal, Sri Satapasti and Smt. Ghosh are concerned, three different time periods are noticeable.

Sri Mandal received the PPO on the date of retirement, Sri Satapasti before his date of retirement and Smt. Ghosh after her date of retirement.

Smt. Barman''s husband also received the PPO after his retirement.

38. Sri Mandal, Sri Satapasti and Smt. Barman have approached the Court without a formal notice being issued demanding justice from the official

respondents. Smt. Ghosh''s writ petition was, however, preceded by a representation to two of the official respondents in her writ petition, sent

almost 6 1/2 years after her retirement.

39. Apart from Sri Mandal (he received the retirement benefits on January 27, 2006), neither Smt. Barman nor Sri Satapasti has disclosed the

respective dates on which the retirement benefits were actually paid. Since Smt. Barman''s husband retired on March 31, 2002 and passed away

on March 30, 2011, a presumption could be drawn that he received his retirement benefits on any date in between. However, Sri Mandal, Smt.

Barman and Sri Satapasti are remiss in referring to any undertaking/declaration of the nature that was required to be given/signed by the teachers in

terms of the Memorandum dated May 26, 1998. Considering the contents of the said memorandum, it stands to reason that the concerned

teachers had received their retirement benefits only upon giving/signing such undertaking/declaration.

40. Certain additional features stand out from the writ petition of Smt. Ghosh. Although it is the specific pleaded case that retirement benefits were

released long after retirement (paragraph 4), Smt. Ghosh has not disclosed the exact date of receipt thereof. However, having regard to the

contents of the representation dated March 25, 2014 submitted by her, it is clear that gratuity was received by her prior to March 25, 2011. That

apart, she has referred to certain undertaking given by her at the time of preparation of her pension papers without being specific. One of the

grounds (no. 6) that has been urged is that retired persons in their eagerness and/or out of anxiety to receive their retirement benefits sign lots of

papers and that the State cannot take ""advantage of such undertaking and/or declaration to recovery (sic recover) any overdrawn amount, no such

undertaking and/or declaration is in (sic fact?) contemplated"". It follows that Smt. Ghosh was aware of certain undertaking/declaration that was

given/signed by her prior to receipt of retirement benefits, yet, has chosen not to question the action of the respondents in obtaining such

undertaking/declaration from her or to challenge the relevant law requiring such undertaking/declaration to be given/signed. Remarkably, there is no

explanation for the belated approach. Between the dates of issuance of the PPO and presentation of the writ petition, occurrences of only two

incidents have been referred to as noticed above.

Decision on the two issues

41. I propose to deal with the issues together, since both relate to maintainability of the writ petitions.

42. It needs no reiteration that the High Court''s jurisdiction under Article 226 of the Constitution is couched in wide terms and the exercise thereof

is not subject to any restrictions except the territorial restriction which is expressly provided therein. However, exercise of the jurisdiction is

discretionary; it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be

exercised subject to certain self-imposed limitations. One of the self-imposed limitations is that the conduct of the party approaching the Court

under Article 226 ought not to be such that the same disentitles him to obtain any relief. The conduct may appear to be blameworthy if such party

has approached the Court with unclean hands, either by suppressing material facts or by making misleading statements or misrepresenting facts, or

the Court despite being satisfied that the party before it has placed full and complete facts arrives at a conclusion that it is disabled to grant relief on

the ground of intervening delay between accrual of the cause of action and the presentation of the writ petition, which is unexplained or even if

explained, is unworthy of acceptance. Insofar as delay being attributed as a ground for not entertaining a writ petition, it has to be remembered that

there is no prescribed period of limitation for approaching the Court of Writ but the Court has to be approached with utmost expedition and if any

third party is involved, at least before or soon after a right accrues in his favour. I would, however, add a caveat that in an exceptional case, where

the larger public interest so demands, accrual of a personal right of a third party/respondent may not stand in the way of judicial intervention in

exercise of extra-ordinary writ powers.

43. It would be profitable to note at this stage certain decisions on the aspect of delay and laches.

44. The principle of law relating to delay and laches as factors disentitling a party to discretionary remedy was succinctly laid down by Sir Barnes

Peacock in the decision reported in (1874) LR 5 PC 221 (Lindsay Petroleum Co. v. Hurd). The relevant passage reads as under:

11. ... Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a

remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his

conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to

place him if the remedy were afterwards to be asserted in, either of these cases, lapse of time and delay are most material. But in every case, if an

argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of

limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases,

are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or

injustice in taking the one course or the other, so far as relates to the remedy.

45. The above passage was quoted with approval by a Constitution Bench of the Supreme Court in the decision reported in The Moon Mills, Ltd.

Vs. M.R. Meher, President, Industrial Court, Bombay and Others, and a subsequent Bench comprising three learned Judges in the decision

reported in Maharashtra State Road Transport Corporation Vs. Balwant Regular Motor Service, Amravati and Others, . Of late, the Supreme

Court sitting in Division Benches of two learned Judges had the occasion to quote the said passage in Shiv Dass (supra) as well as in the decisions

reported in Yunus (Baboobhai) A Hamid Padvekar Vs. State of Maharashtra through its Secretary and Others, and Chennai Metropolitan Water

Supply and Sewerage Board and Others Vs. T.T. Murali Babu, . In Murali Babu (supra), a writ petition filed after 4 (four) years of dismissal from

service was entertained by the High Court. Relying on several previous decisions and reversing the decision of the High Court, the Supreme Court

held:

15. In State of M.P. and Others Vs. Nandlal Jaiswal and Others, , the Court observed that: (SCC p. 594, para 24)

''24. ... it is well settled that the power of the High Court to issue an appropriate writ under Article 226 of the Constitution is discretionary and the

High Court in the exercise of its discretion does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic.''

It has been further stated therein that: (Nandlal Jaiswal case, SCC p. 594, para 24)

''24. ... If there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court

may decline to intervene and grant relief in the exercise of its writ jurisdiction.''

Emphasis was laid on the principle of delay and laches stating that resort to the extraordinary remedy under the writ jurisdiction at a belated stage

is likely to cause confusion and public inconvenience and bring in injustice. 16. Thus, the doctrine of delay and laches should not be lightly brushed

aside. A writ court is required to weigh the explanation offered and the acceptability of the same. The court should bear in mind that it is exercising

an extraordinary and equitable jurisdiction. As a constitutional court it has a duty to protect the rights of the citizens but simultaneously it is to keep

itself alive to the primary principle that when an aggrieved person, without adequate reason, approaches the court at his own leisure or pleasure,

the court would be under legal obligation to scrutinise whether the lis at a belated stage should be entertained or not. Be it noted, delay comes in

the way of equity. In certain circumstances delay and laches may not be fatal but in most circumstances inordinate delay would only invite disaster

for the litigant who knocks at the doors of the court. Delay reflects inactivity and inaction on the part of a litigant--a litigant who has forgotten the

basic norms, namely, ''procrastination is the greatest thief of time'' and second, law does not permit one to sleep and rise like a phoenix. Delay

does bring in hazard and causes injury to the lis.

(underlining for emphasis by me)

46. While considering whether a belated writ petition (be it under Article 32 or under Article 226) for recovery of money ought to be entertained

or not, any discussion would be incomplete without reference to the decision reported in Tilokchand and Motichand and Others Vs. H.B. Munshi

and Another, . The Constitution Bench comprising five judges expressed divergent opinions and by a majority of 3:2, dismissed the writ petition

presented under Article 32 of the Constitution seeking refund of money that had been exacted from the petitioners as a tax in terms of a law which,

subsequent to the payment, had been declared ultra vires by the Supreme Court on September 29, 1967 vide the decision reported in Kanti Lal

Babulal Vs. H.C. Patel, . It is noticed that the process of recovery of tax had earlier been under challenge before the Bombay High Court at the

instance of the petitioners, albeit unsuccessfully, whereupon they were forced to pay the tax. It would be worthwhile to notice the relevant views of

each of the learned judges of the Bench in the sequence the same were prepared.

47. The responsibility of authoring the judgment, it seems, was entrusted to Hon''ble G.K. Mitter, J. (as His Lordship then was). The following

passages from the opinion of His Lordship clear the view that was taken on the subject dispute:

51. The Limitation Acts do not in terms apply to claims against the State in respect of violation of fundamental rights. A person complaining of

infraction of any such rights has one of three courses open to him. He can either make an application under Article 226 of the Constitution to a

High Court or he can make an application to this Court under Article 32 of the Constitution, or he can file a suit asking for appropriate reliefs. The

decisions of various High Courts in India have firmly laid down that in the matter of the issue of a writ under Article 226 the courts have a

discretion and may in suitable cases refuse to give relief to the person approaching it even though on the merits the applicant has a substantial

complaint as regards violation of fundamental rights. Although the Limitation Act does not apply, the courts have refused to give relief in cases of

long or unreasonable delay. As noted above in Bhailal Bhai case it was observed that the ''maximum period fixed by the Legislature as the time

within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which delay in seeking

remedy under Article 226 can be measured''. On the question of delay, we see no reason to hold that a different test ought to be applied when a

party comes to this Court under Article 32 from one applicable to applications under Article 226. There is a public policy behind all statutes of

limitation and according to Halsbury''s Laws of England (Third Edition Vol. 24), Article 330 at Page 181:

''The Courts have expressed at least three different reasons supporting the existence of statutes of limitation, namely, (1) that long dormant claims

have more of cruelty than justice in them, (2) that a defendant might have lost the evidence to disprove a stale claim and (3) that persons with good

causes of action should pursue them with reasonable diligence.''

52. In my view, a claim based on the infraction of fundamental rights ought not to be entertained if made beyond the period fixed by the Limitation

Act for the enforcement of the right by way of suit. While not holding that the Limitation Act applies in terms, I am of the view that ordinarily the

period fixed by the Limitation Act should be taken to be a true measure of the time within which a person can be allowed to raise a plea

successfully under Article 32 of the Constitution.***

53. A claim for money paid under coercion would be covered by Article 113 of the Limitation Act, 1963, giving a period of three years from the

first of January 1964 on which date the Act came into force. The period of limitation for a suit which was formerly covered by Article 120 of the

Act of 1908 would in case like this be covered by Article 113 of the new Act and the suit in this case would have to be filed by the 1st January,

1967. As the petition to this Court was presented in February 1968, a suit, if filed, would have been barred and in my view the petitioners'' claim in

this case cannot be entertained having been preferred after the 1st of January, 1967. The facts negative any claim of payment under a mistake of

law and are only consistent with a claim for money paid under coercion. As the petitioners have come to this Court long after the date when they

could have properly filed a suit, the application must be rejected.

48. Hon''ble R.S. Bachawat, J. (as His Lordship then was) writing a separate opinion concurred with Hon''ble G.K. Mitter, J. According to His

Lordship:

31. Two points arise for decision in this writ petition: (1) Would the claim be barred by limitation if it were the subject-matter of a suit in February,

1968 and (2) if so, are the petitioners entitled to any relief in this petition under Article 32 of the Constitution.

32. Subject to questions of limitation, waiver and estoppel, money paid under mistake or coercion may be recovered under Section 72 of the

Indian Contract Act. The right to relief under Section 72 extends to money paid under mistake of law i.e. ''mistake in thinking that the money paid

was due when, in fact, it was not due,''....

36. The next and the more fundamental question is whether in the circumstances the Court should give relief in a writ petition under Article 32 of

the Constitution. No period of limitation is prescribed for such a petition. The right to move this Court for enforcement of fundamental rights is

guaranteed by Article 32. The writ under Article 32 issues as a matter of course if a breach of a fundamental right is established. Technical rules

applicable to suits like the provisions of Section 80 of the Code of Civil Procedure are not applicable to a proceeding under Article 32.

But this does not mean that in giving relief under Article 32 the Court must ignore and trample under foot all laws of procedure, evidence,

limitation, res judicata and the like.***

37. The normal remedy for recovery of money paid to the State under coercion or mistake of law is by suit. Articles 32 and 226 of the

Constitution provide concurrent remedy in respect of the same claim. The extraordinary remedies under the Constitution are not intended to enable

the claimant to recover monies, the recovery of which by suit is barred by limitation. Where the remedy in a writ application under Article 32 or

Article 226 corresponds to a remedy in an ordinary suit and the latter remedy is subject to the bar of a statute of limitation, the Court in its writ

jurisdiction acts by analogy to the statute, adopts the statute as its own rule of procedure and in the absence of special circumstances imposes the

same limitation on the summary remedy in the writ jurisdiction.***

37-A. Similarly this Court acts on the analogy of the statutes of limitation in respect of a claim under Article 32 of the Constitution though such

claim is not the subject of any express statutory bar of limitation. If the right to a property is extinguished by prescription under Section 27 of the

Limitation Act, 1963, the petitioner has no subsisting right which can be enforced under Article 32, see Sobhraj Odharmal Vs. State of Rajasthan,

. In other cases where the remedy only and not the right is extinguished by limitation, it is on grounds of the public policy that the court refuses to

entertain stale claims under Article 32. The statutes of limitation are founded on sound principles of public policy. ***

49. Hon"ble K.S. Hedge, J. (as His Lordship then was) was unable to concur with the opinions of Hon"ble G.K. Mitter and Hon"ble R.S.

Bachawat, JJ. that remedy under Article 32 of the Constitution was also discretionary, like Article 226. According to His Lordship, it was the duty

of the Supreme Court to enforce a fundamental right if it were satisfied of breach of a fundamental right by State action, and delay or laches in

approaching the Court could not be a relevant consideration. His Lordship had the occasion to observe as follows:

58. *** it follows that the impugned collection was without the authority of law and consequently the same is an exaction resulting in the

infringement of one of the proprietary rights of the petitioners guaranteed to them under Article 19(1)(f) of the Constitution. Hence the petitioners

have a fundamental right to approach this Court under Article 32 of our Constitution for appropriate relief and this Court has a duty to afford them

appropriate relief. In Kharak Singh Vs. The State of U.P. and Others, , Rajagopala Ayyangar, J., speaking for the majority observed that once it is

proved to the satisfaction of this Court that by State action the fundamental right of a petitioner has been infringed it is not only the right but the duty

of this Court under Article 32 to afford relief to him by passing appropriate orders in that behalf. The right given to the citizens to move this Court

under Article 32 is itself a fundamental right and the same cannot be circumscribed or curtailed except as provided by the Constitution. It is

inappropriate to equate the duty imposed on this Court to the powers of the Chancery Court in England or the equitable jurisdiction of the

American courts. A duty imposed by the Constitution cannot be compared with discretionary powers under Article 32. The mandate of the

Constitution is clear and unambiguous and that mandate has to be obeyed. It must be remembered, as emphasised by several decisions of this

Court that this Court is charged by the Constitution with the special responsibility of protecting and enforcing the fundamental rights under Part III

of the Constitution.***

59. All of us are unanimous on the question that the impugned collection amounts to an invasion of one of the fundamental rights guaranteed to the

petitioners. Our difference primarily centres round the question whether their right to get relief under Article 32 is subject to any limitation or to be

more accurate whether this court has any discretion while exercising its jurisdiction under that Article? As mentioned earlier a right to approach this

court under Article 32 is itself a fundamental right. In that respect our Constitution makes a welcome departure from many other similar

constitutions. As seen earlier a party aggrieved by the infringement of any of its fundamental rights has a right to get relief at the hands of this court,

and this court has a duty to grant appropriate relief-see Josep Pothen Vs. State of Kerala, . The power conferred on this Court by that Article is

not a discretionary power. This power is not similar to the power conferred on the High Courts under Article 226 of the Constitution. Hence

laches on the part of an aggrieved party cannot deprive him of the right to get relief from this court under Article 32. ..... Law reports do not show

a single instance, where this Court had refused to grant relief to a petitioner in a petition under Article 32 on the ground of delay.

61. Admittedly the provisions contained in the Limitation Act do not apply to proceedings under Article 226 or Article 32. The Constitution

makers wisely, if I may say with respect, excluded the application of those provisions to proceedings under Articles 226, 227 and 32 lest the

efficacy of the constitutional remedies should be left to the tender mercies of the legislatures. *** The fear that forgotten claims and discarded

rights may be sought to be enforced against the Government after lapse of years, if the fundamental rights are held to be enforceable without any

time limit appears to be an exaggerated one. It is for the party who complains the infringement of any right to establish his right. As years roll on his

task is bound to become more and more difficult. He can enforce only an existing right. A right may be lost due to an earlier decision of a

competent court or due to various other reasons. If a right is lost for one reason or the other there is no right to be enforced. In this case we are

dealing with an existing right even if it can be said that the petitioners" remedy under the ordinary law is barred. If the decision of Bachawat and

Mitter, JJ., is correct, startling results are likely to follow. Let us take for example a case of a person who is convicted and sentenced to a long

period of imprisonment on the basis of a statute which had been repealed long before the alleged offence was committed. He comes to know the

repeal of the statute long after the period prescribed for filing appeal expires. Under such a circumstance according to the decision of Bachawat

and Mitter, JJ., he will have no right--the discretion of the Court apart--to move this Court for a writ of habeas corpus.

62. Our Constitution makers in their wisdom thought that no fetters should be placed on the right of an aggrieved party to seek relief from this

Court under Article 32. A comparison of the language of Article 226 with that of Article 32 will show that while under Article 226 a discretionary

power is conferred on the High Courts the mandate of the Constitution is absolute so far as the exercise of this Court"s power under Article 32 is

concerned. Should this Court an institution primarily created for the purpose of safeguarding the fundamental rights guaranteed under Part III of the

Constitution, narrow down those rights? The implications of this decision are bound to be far reaching. It is likely to pull down from the high

pedestal now occupied by the fundamental rights to the level of other civil rights. I am apprehensive that this decision may mark an important

turning point in downgrading the fundamental rights guaranteed under the Constitution.. I am firmly of the view that a relief asked for under Article

32 cannot be refused on the ground of laches. The provisions of the Limitation Act have no relevance either directly or indirectly to proceedings

under Article 32. Considerations which are relevant in proceedings under Article 226 are wholly out of place in a proceeding like the one before

us.***

50. Even though Hon"ble S.N. Sikri, J. (as His Lordship then was) held that the petitioner had explained the delay and was entitled to relief,

approaching the Supreme Court with an Article 32 petition with utmost expedition was reiterated in the following words:

17. *** Bearing in mind the history of these writs I cannot believe that the Constituent Assembly had the intention that five Judges of this Court

should sit together to enforce a fundamental right at the instance of a person, who had without any reasonable explanation slept over his rights for 6

or 12 years. The history of these writs both in England and the U.S.A. convinces me that the underlying idea of the Constitution was to provide an

expeditious and authoritative remedy against the inroads of the State. If a claim is barred under the Limitation Act, unless there are exceptional

circumstances, prima facie it is a stale claim and should not be entertained by this Court. But even if it is not barred under the Indian Limitation Act,

it may not be entertained by this Court if on the facts of the case there is unreasonable delay. For instance, if the State had taken possession of

property under a law alleged to be void, and if a petitioner comes to this Court 11 years after the possession was taken by the State, I would

dismiss the petition on the ground of delay, unless there is some reasonable explanation. The fact that a suit for possession of land would still be in

time would not be relevant at all. It is difficult to lay down a precise period beyond which delay should be explained. I favour one year because this

Court should not be approached lightly, and competent legal advice should be taken and pros and cons carefully weighed before coming to this

Court. It is common knowledge that appeals and representations to the higher authorities take time; time spent in pursuing these remedies may not

be excluded under the Limitation Act, but it may ordinarily be taken as a good explanation for the delay.

18. It is said that if this was the practice the guarantee of Article 32 would be destroyed. But the article nowhere says that a petition, howsoever

late, should be entertained and a writ or order or direction granted, howsoever remote the date of infringement of the fundamental right. In practice

this Court has not been entertaining stale claims by persons who have slept over their rights. There is no need to depart from this practice and tie

our hands completely with the shackles imposed by the Indian Limitation Act. ***

51. Hon''ble M. Hidayatullah, C.J. (as His Lordship then was) agreed with the views of Hon''ble R.S. Bachawat and G.K. Hon''ble Mitter, JJ. and

proceeded to dismiss the writ petition by observing that:

2. At the threshold it appears to me that as there is no law which prescribes a period of limitation for such petitions, each of my brethren has really

given expression to the practice he follows or intends to follow. I can do no more than state the views I hold on this subject and then give my

decision on the merits of the petition in the light of those views.

5. This Court does not take action in cases covered by the ordinary jurisdiction of the civil courts, that is to say, it does not convert civil and

criminal actions into proceedings for the obtainment of writs. Although there is no rule or provision of law to prohibit the exercise of its

extraordinary jurisdiction this Court has always insisted upon recourse to ordinary remedies or the exhaustion of other remedies. It is in rare cases,

where the ordinary process of law appears to be inefficacious, that this Court interferes even where other remedies are available. This attitude

arises from the acceptance of a salutary principle that extraordinary remedies should not take the place of ordinary remedies.

9. In India we have the Limitation Act which prescribes different periods of limitation for suits, petitions or applications. There are also residuary

articles which prescribe limitation in those cases where no express period is provided. If it were a matter of a suit or application, either an

appropriate article or the residuary article would have applied. But a petition under Article 32 is not a suit and it is also not a petition or an

application to which the Limitation Act applies. To put curbs in the way of enforcement of Fundamental Rights through legislative action might well

be questioned under Article 13(3). The reason is also quite clear. If a short period of limitation were prescribed the Fundamental Right might well

be frustrated. Prescribing too long a period might enable stale claims to be made to the detriment of other rights which might emerge.

10. If then there is no period prescribed what is the standard for this Court to follow? I should say that utmost expedition is the sine qua non for

such claims. The party aggrieved must move the Court at the earliest possible time and explain satisfactorily all semblance of delay. I am not

indicating any period which may be regarded as the ultimate limit of action for that would be taking upon myself legislative functions. In England a

period of 6 months has been provided statutorily, but that could be because there is no guaranteed remedy and the matter is one entirely of

discretion. In India I will only say that each case will have to be considered on its own facts. Where there is appearance of avoidable delay and this

delay affects the merits of the claim, this Court will consider it and in a proper case hold the party disentitled to invoke the extraordinary

jurisdiction.

11. Therefore, the question is one of discretion for this Court to follow from case to case. There is no lower limit and there is no upper limit. A

case may be brought within Limitation Act by reason of some article but this Court need not necessarily give the total time to the litigant to move

this Court under Article 32. Similarly in a suitable case this Court may entertain such a petition even after a lapse of time. It will all depend on what

the breach of the Fundamental Right and the remedy claimed are and how the delay arose.

12. Applying these principles to the present case what do I find? The petitioner moved the High Court for relief on the ground that the recovery

from him was unconstitutional. He set out a number of grounds but did not set out the ground on which ultimately in another case recovery was

struck down by this Court. That ground was that the provisions of the Act were unconstitutional. The question is: can the petitioner in this case take

advantage, after a lapse of a number of years, of the decision of this Court? He moved the High Court but did not come up in appeal to this Court.

His contention is that the ground on which his petition was dismissed was different and the ground on which the statute was struck down was not

within his knowledge and therefore he did not know of it and pursue it in this Court. To that I answer that law will presume that he knew the exact

ground of unconstitutionality. Everybody is presumed to know the law. It was his duty to have brought the matter before this Court for

consideration. In any event, having set the machinery of law in motion he cannot abandon it to resume it after a number of years, because another

person more adventurous than he in his turn got the statute declared unconstitutional, and got a favourable decision. If I were to hold otherwise,

then the decision of the High Court in any case once adjudicated upon and acquiesced in, may be questioned in a fresh litigation revived only with

the argument that the correct position was not known to the petitioner at the time when he abandoned his own litigation. I agree with the opinion of

my brethren Bachawat and Mitter, JJ., that there is no question here of a mistake of law entitling the petitioner to invoke analogy of the article in the

Limitation Act. The grounds on which he moved the Court might well have impressed this Court which might have also have decided the question

of the unconstitutionality of the Act as was done in the subsequent litigation by another party. The present petitioner should have taken the right

ground in the High Court and taken it in appeal to this Court after the High Court decided against it. Not having done so and having abandoned his

own litigation years ago, I do not think that this Court should apply the analogy of the article in the Limitation Act and give him the relief now. The

petition, therefore, fails and is dismissed with costs.

(underlining for emphasis by me)

52. Close on the heels of the decision in Tilokchand Motichand (supra), it was urged before another Constitution Bench of the Supreme Court that

the said decision needs review. Speaking for the Bench in the decision reported in Rabindranath Bose and Others Vs. The Union of India (UOI)

and Others, , arising out of an Article 32 writ petition, Hon''ble S.N. Sikri, J. overruled the contention and held as follows:

32. The learned counsel for the petitioners strongly urges that the decision of this Court in Tilokchand Motichand case needs review. But after

carefully considering the matter, we are of the view that no relief should be given to petitioners who, without any reasonable explanation, approach

this Court under Article 32 of the Constitution after inordinate delay. The highest Court in this land has been given original jurisdiction to entertain

petitions under Article 32 of the Constitution. It could not have been the intention that this Court would go into stale demands after a lapse of

years. It is said that Article 32 is itself a guaranteed right. So it is, but it does not follow from this that it was the intention of the Constitution-makers

that this Court should discard all principles and grant relief in petitions filed after inordinate delay.

53. The view expressed in Tilokchand Motichand (supra) still holds good, not having been overruled by a larger Constitution Bench decision of the

Supreme Court.

54. That belated writ petitions under Article 32 ought not to be entertained was reiterated by the Supreme Court subsequently in its decisions

reported in Malcom Lawrence Cecil D''souza Vs. Union of India (UOI) and Others, , S.S. Moghe and Others Vs. Union of India (UOI) and

Others, and R.S. Makashi and Others Vs. I.M. Menon and Others, .

55. By now, it is well-settled that there exists no inviolable rule restricting the authority or competence of a Court of Writ to entertain stale claims;

whether or not a writ petition deserves entertainment despite delay and laches, however, ought to be decided on the facts of each case. If no

explanation is furnished for the belated approach, the writ petition could be summarily dismissed. If the petitioner furnishes an explanation, the merit

thereof has to be examined. If the explanation is unworthy of acceptance, dismissal of the writ petition would be the obvious outcome. However, if

the petitioner satisfies the Court that there were sufficient reasons that prevented him from approaching it earlier, entertainment of the writ petition

would not be automatic; in such a case, the Court is duty bound to assess the prejudice that the opponent is likely to suffer for entertainment of

such belated writ petition and/or acts done in the interregnum that could affect the balance of justice either way. If prejudice is patent, or injustice

bound to occur if the Court were to entertain the writ petition, the Court may still dismiss it despite being satisfied that the delay has been

adequately explained or that there were no laches on the part of the petitioner. If prejudice is not so patent or intervening acts that could affect the

balance of justice are not so obtrusive, a writ petition could be admitted but if the opponent in his/its counter pleads and proves prejudice or the

likely injustice that he/it would be subjected to if the Court were to grant relief to the petitioner, the Court would still be justified in declining relief

notwithstanding admission of the writ petition. The point of delay and laches is not one in the nature of a demurrer that unless raised at the first

instance, it cannot be raised at a subsequent stage of the proceedings.

56. It is, therefore, trite that whenever an objection to the entertainability of a writ petition on the ground of delay and laches in approaching the

Court of Writ is raised, the pleadings assume significance. I would think that the first and foremost duty of the Court is to examine whether the

delay has been sufficiently explained or not.

57. However, before proceeding in that direction, I consider it proper to look into the decisions that have been cited at the bar.

58. The law laid down in the decisions cited by Mr. Goswami and some of those referred to therein may be noticed first, one after the other.

59. In Bhailal Bhai (supra), the State of Madhya Pradesh was in appeal against orders passed by the High Court declaring certain taxing provisions

as unconstitutional and void and ordering refund of the amounts collected as taxes. While dealing with the points as to whether the High Court after

declaring the taxing provisions unconstitutional and void could by way of consequential relief order refund and as to whether the writ petitions

before the High Court were belatedly presented after payment of tax, the Supreme Court had the occasion to observe as under:

16. For the reasons given above, we are clearly of opinion that the High Court"s have power for the purpose of enforcement of fundamental rights

and statutory rights to give consequential relief by ordering repayment of money realised by the Government without the authority of law.

17. At the same time we cannot lose sight of the fact that the special remedy provided in Art. 226 is not intended to supersede completely the

modes of obtaining relief by an action in a civil court or to deny defences legitimately open in such actions. It has been made clear more than once

that the power to give relief under Art. 226 is a discretionary power. This is specially true in the case of power to issue writs in the nature of

mandamus. Among the several matters which the High Courts rightly take into consideration in the exercise of that discretion is the delay made by

the aggrieved party in seeking this special remedy and what excuse there is for it. Another is the nature of controversy of facts and law that may

have to be decided as regards the availability of consequential relief. Thus, where, as in these cases, a person comes to the court for relief under

Art. 226 on the allegation that he has been assessed to tax under a void legislation and having paid it under a mistake is entitled to get it back, the

Court, if it finds that the assessment was void, being made under a void provision of law, and the payment was made by mistake, is still not bound

to exercise its discretion directing repayment. Whether repayment should be ordered in the exercise of this discretion will depend in each case on

its own facts and circumstances. It is not easy nor is it desirable to lay down any rule for universal application. It may however be stated as a

general rule that if there has been unreasonable delay the Court ought not ordinarily to lend its aid to a party by this extraordinary remedy of

mandamus. Again, where even if there is not such delay the Government or the statutory authority against whom the consequential relief is prayed

for raises a prima facie triable issue as regards the availability of such relief on the merits on the grounds like limitation the Court should ordinarily

refuse to issue the writ of mandamus for such payment. In both these kinds of cases it will be sound use of discretion to leave the party to seek his

remedy by the ordinary mode of action in a civil court and to refuse to exercise in his favour the extraordinary remedy under Art. 226 of the

Constitution.

21. *** He argued that assuming that the remedy of recovery by action in a civil court stood barred on the date these applications were made that

would be no reason to refuse relief under Art. 226 of the Constitution. Learned Counsel is right in his submission that the provisions of the

Limitation Act do not as such apply to the granting of relief under Art. 226. It appears to us however that the maximum period fixed by the

legislature as the time within which the relief by a suit in a civil court must be brought may ordinarily be taken to be a reasonable standard by which

delay in seeking remedy under Art. 226 can be measured. This Court may consider the delay unreasonable even if it is less than the period of

limitation prescribed for a civil action for the remedy but where the delay is more than this period, it will almost always be proper for the Court to

hold that it is unreasonable. The period of limitation prescribed for recovery of money paid by mistake under the Limitation Act is three years from

the date when the mistake is known.***

(underlining for emphasis by me)

60. In A.P. Steel Re-Rolling Mill Ltd. (supra), one of the appellants (M/s. Victory Papers and Boards India Ltd.) had been making payment in

terms of the new tariff since 1998. A writ petition was filed by the appellant in 2003 only after the Supreme Court rendered its decision reported in

Hitech Electrothermics and Hydropower Ltd. Vs. State of Kerala and Others, . The High Court while dismissing the writ petition observed that the

appellant was not entitled to get concessional tariff. Dismissing the appeal, the Supreme Court in paragraph 40 held that:

40. The benefit of a judgment is not extended to a case automatically. While granting relief in a writ petition, the High Court is entitled to consider

the fact situation obtaining in each case including the conduct of the petitioner. In doing so, the Court is entitled to take into consideration the fact

as to whether the writ petitioner had chosen to sit over the matter and then wake up after the decision of this Court. If it is found that the appellant

approached the Court after a long delay, the same may disentitle him to obtain a discretionary relief. [See Chairman, U.P. Jal Nigam and Another

Vs. Jaswant Singh and Another, .]

61. In Jaswant Singh (supra), the High Court by the orders under appeal had disposed of several writ petitions filed by retired employees of the

appellant directing that such employees (respondents in the appeal) shall be entitled to the benefit flowing from the judgment reported in Harwindra

Kumar Vs. Chief Engineer, Karmik and Others, . In such decision, it was held that the employees of the appellant were entitled to continue in

service up to the age of 60 years. Allowing the appeal, the Supreme Court held:

6. The question of delay and laches has been examined by this Court in a series of decisions and laches and delay has been considered to be an

important factor in exercise of the discretionary relief under Article 226 of the Constitution. When a person who is not vigilant of his rights and

acquiesces with the situation, can his writ petition be heard after a couple of years on the ground that same relief should be granted to him as was

granted to person similarly situated who was vigilant about his rights and challenged his retirement which was said to be made on attaining the age

of 58 years. ***

7. ***In this connection, our attention was invited to a decision of this Court in Rup Diamonds and Others Vs. Union of India and Others, ,

wherein their Lordships observed that those people who were sitting on the fence till somebody else took up the matter to the court for refund of

duty, cannot be given the benefit.***

9. Similarly in Jagdish Lal and others Vs. State of Haryana and others, , this Court reaffirmed the rule if a person chose to sit over the matter and

then woke up after the decision of the court, then such person cannot stand to benefit.***

12. The statement of law has also been summarised in Halsbury''s Laws of England, para 911, p. 395 as follows:

''In determining whether there has been such delay as to amount to laches, the chief points to be considered are:

(i) acquiescence on the claimant''s part; and

(ii) any change of position that has occurred on the defendant''s part.

Acquiescence in this sense does not mean standing by while the violation of a right is in progress, but assent after the violation has been completed

and the claimant has become aware of it. It is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be

regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a

position in which it would not be reasonable to place him if the remedy were afterwards to be asserted. In such cases lapse of time and delay are

most material. Upon these considerations rests the doctrine of laches."

13. In view of the statement of law as summarised above, the respondents are guilty since the respondents have acquiesced in accepting the

retirement and did not challenge the same in time. If they would have been vigilant enough, they could have filed writ petitions as others did in the

matter. Therefore, whenever it appears that the claimants lost time or whiled it away and did not rise to the occasion in time for filing the writ

petitions, then in such cases, the court should be very slow in granting the relief to the incumbent.***

62. Shiv Dass (supra) involved a claim for disability pension of a member of the Army Medical Corps who approached the High Court in 2005

after he was relieved from service in 1983. The writ petition was dismissed by the High Court. While remitting the matter to the High Court, the

Supreme Court observed as follows:

10. In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in

filing the petition. It would depend upon the fact of each case. If petition is filed beyond a reasonable period say three years normally the Court

would reject the same or restrict the relief which could be granted to a reasonable period of about three years. The High Court did not examine

whether on merit the appellant had a case. If on merits it would have found that there was no scope for interference, it would have dismissed the

writ petition on that score alone.

11. In the peculiar circumstances, we remit the matter to the High Court to hear the writ petition on merits. If it is found that the claim for disability

pension is sustainable in law, then it would mould the relief but in no event grant any relief for a period exceeding three years from the date of

presentation of the writ petition. We make it clear that we have not expressed any opinion on the merits as to whether the appellant"s claim for

disability pension is maintainable or not. If it is sans merit, the High Court naturally would dismiss the writ petition.

(underlining for emphasis by me)

63. Pan Singh (supra) arose out of an appeal against the order of the High Court allowing a writ petition, filed in July, 1999, wherein it was held

that although the petitioners/employees (respondents in the appeal) were not covered by an award dated January 7, 1998, the appellant being a

model employer must treat the employees similarly situated alike and, thus, the respondents having passed a certain test in June, 1981 could not be

denied the pay scale granted to the award-holders. The award-holders had raised an industrial dispute alleging discrimination after an order dated

February 10, 1982 was passed protecting the pay of 17 (seventeen) meter-readers, and the reference was answered in their favour by directing

the appellants to pay arrears on the same analogy by which the said 17 (seventeen) meter-readers were given benefit by the order dated February

10, 1982. Setting aside the order of the High Court, the Supreme Court ruled that :

16. There is another aspect of the matter which cannot be lost sight of. The respondents herein filed a writ petition after 17 years. They did not

agitate their grievances for a long time. They, as noticed herein, did not claim parity with the 17 workmen at the earliest possible opportunity. They

did not implead themselves as parties even in the reference made by the State before the Industrial Tribunal. It is not their case that after 1982,

those employees who were employed or who were recruited after the cut-off date have been granted the said scale of pay. After such a long time,

therefore, the writ petitions could not have been entertained even if they are similarly situated. It is trite that the discretionary jurisdiction may not be

exercised in favour of those who approach the court after a long time. Delay and laches are relevant factors for exercise of equitable jurisdiction.

[See Government of West Bengal Vs. Tarun K. Roy and Others, , Chairman, U.P. Jal Nigam and Another Vs. Jaswant Singh and Another, and

Karnataka Power Corpn. Ltd. v. K. Thangappan, (1994) 6 SCC 524.]

17. Although, there is no period of limitation provided for filing a writ petition under Article 226 of the Constitution of India, ordinarily, writ petition

should be filed within a reasonable time. [See Lipton India Ltd. and Others Vs. Union of India (UOI) and Others, . and M.R. Gupta Vs. Union of

India and others, .].

64. In Chandi Prasad Uniyal (supra), the Supreme Court on consideration of its earlier decisions held (in paragraph 8) that such ""Court has not laid

down any principle of law that only if there is misrepresentation or fraud on the part of the recipients of the money in getting the excess pay, the

amount paid due to irregular/wrong fixation of pay be recovered"". It was also observed as follows:

12. Later, a three-Judge Bench in Syed Abdul Qadir case, after referring to Shyam Babu Verma, Col. B.J. Akkara, etc. restrained the

department from recovery of excess amount paid, but held as follows:

''59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part

and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be

out of place to mention here that the Finance Department had, in its counter-affidavit, admitted that it was a bona fide mistake on their part. The

excess payment made was the result of wrong interpretation of the Rule that was applicable to them, for which the appellants cannot be held

responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of

Bihar. Learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the

verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of

the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made."

(emphasis added)

We may point out that in Syed Abdul Qadir case such a direction was given keeping in view the peculiar facts and circumstances of that case since

the beneficiaries had either retired or were on the verge of retirement and so as to avoid any hardship to them.

13. We are not convinced that this Court in various judgments referred to hereinbefore has laid down any proposition of law that only if the State

or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be

recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either

because the recipients had retired or were on the verge of retirement or were occupying lower posts in the administrative hierarchy.

14. We are concerned with the excess payment of public money which is often described as "taxpayers" money" which belongs neither to the

officers who have effected overpayment nor to the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such

situations. The question to be asked is whether excess money has been paid or not, may be due to a bona fide mistake. Possibly, effecting excess

payment of public money by the government officers may be due to various reasons like negligence, carelessness, collusion, favouritism, etc.

because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at

fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by

the recipients also without any authority of law. Any amount paid/received without the authority of law can always be recovered barring few

exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise

it would amount to unjust enrichment.

15. We are, therefore, of the considered view that except few instances pointed out in Syed Abdul Qadir case and in Col. B.J. Akkara case, the

excess payment made due to wrong/irregular pay fixation can always be recovered.

(underlining for emphasis by me)

65. In Syed Abdul Qadir (supra), question that arose for decision was whether the appellants were entitled to the benefit of an additional increment

on promotion. Apart from an argument being advanced on behalf of the appellants to the effect that the benefit of additional increment on

promotion was rightly extended, it was also contended on their behalf that the excess amount that had been paid to them cannot and should not be

recovered, for, it was paid without any misrepresentation or fraud on their part. The Court found on consideration of the materials before it that

benefit was extended to the appellants on the basis of a rule i.e. FR 22-C, which had been substituted on the relevant date, that is December 18,

1989, and in place thereof FR 22(I)(A)(1) and (2) had been inserted. The appellants, it was held, would be governed by the amended provisions

of FR 22-C i.e. FR 22(I)(A)(1) and (2). The next question that arose for decision was whether the amended provisions of FR 22-C would apply

prospectively or retrospectively. The Court observed that ordinarily it would have held the amended provisions of FR 22-C to be applicable to the

appellants with effect from September 16, 1989, i.e. the date from which the amended provisions of FR 22-C were notified but due to the peculiar

facts and circumstances of the case, it was held that FR 22(I)(A)(1) and (2) shall apply with effect from February 2, 1993. The other question that

arose was whether the amount paid in excess to the appellants should be recovered or not. In answer to such question, it was held in paragraphs

57 and 58 as follows:

57. This Court, in a catena of decisions, has granted relief against recovery of excess payment of emoluments/allowances if (a) the excess amount

was not paid on account of any misrepresentation or fraud on the part of the employee, and (b) if such excess payment was made by the employer

by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently

found to be erroneous.

58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve

the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge

that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time

of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for

recovery of the amount paid in excess. ***

66. In Col. B.J. Akkara (supra), a common question relating to calculation of pension of officers who served as medical, dental and veterinary

officers in the Army Medical Corps, Army Dental Corps and Veterinary Corps was involved. The questions formulated for decision were four and

noted in paragraph 10. Only the fourth and final question is relevant for the purpose of a decision on these writ petitions. While answering the

same, the Court held as follows:

27. The last question to be considered is whether relief should be granted against the recovery of the excess payments made on account of the

wrong interpretation/understanding of the circular dated 7-6-1999. This Court has consistently granted relief against recovery of excess wrong

payment of emoluments/allowances from an employee, if the following conditions are fulfilled (vide Sahib Ram v. State of Haryana, Shyam Babu

Verma v. Union of India, Union of India v. M. Bhaskar and V. Gangaram v. Regional Jt. Director):

(a) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee.

(b) Such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular

interpretation of rule/order, which is subsequently found to be erroneous.

28. Such relief, restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in

exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant,

particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess

payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment

will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess

of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief

against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to

grant such relief against recovery.

29. On the same principle, pensioners can also seek a direction that wrong payments should not be recovered, as pensioners are in a more

disadvantageous position when compared to in-service employees. Any attempt to recover excess wrong payment would cause undue hardship to

them. The petitioners are not guilty of any misrepresentation or fraud in regard to the excess payment. NPA was added to minimum pay, for

purposes of stepping up, due to a wrong understanding by the implementing departments. We are therefore of the view that the respondents shall

not recover any excess payments made towards pension in pursuance of the circular dated 7-6-1999 till the issue of the clarificatory circular dated

11-9-2001. Insofar as any excess payment made after the circular dated 11-9-2001, obviously the Union of India will be entitled to recover the

excess as the validity of the said circular has been upheld and as pensioners have been put on notice in regard to the wrong calculations earlier

made.

67. Shyam Babu Verma (supra) involved a case where the employees were erroneously given a higher pay scale (Rs. 330-560) since 1973, which

was sought to be reduced to Rs. 330-480 in 1984 retrospectively. Such reduction was challenged and it was claimed by the employees that they

were entitled in law to the pay scale given to them in 1973. The Supreme Court held against the employees insofar as their claim for placement in

the pay scale of Rs. 330-560. However, since the employees were in no way responsible and the fault lay with the respondents, the writ petition

under Article 32 of the writ petition was allowed in part holding that it would only be just and proper not to recover any excess amount already

paid to them.

68. In Sahib Ram (supra), the Principal of the college where the appellant was employed as a librarian was instrumental in giving a pay scale to him

which he was not entitled in view of his educational qualifications. However, since such fixation was not on account of any misrepresentation of the

appellant, the Supreme Court restrained recovery of excess payment.

69. Now, I propose to consider each and every decision on which Mr. Mukherjee and Mr. Mitra placed reliance as listed in the compilations

furnished by them.

70. In the decision reported in 2005 (1) CHN (CAL) 55 (Kamalakant Jha v. State of West Bengal & ors.), the Court was approached by a

retired teacher aggrieved by non-finalisation of his retiral benefits (see paragraph 7). A learned single Judge upon hearing the parties ultimately

directed PPO to be issued and in the process held that if any amount has been overdrawn by the teacher on account of erroneous pay fixation, the

excess payment cannot be adjusted and/or realised from the retiral benefits in view of the decision in Shyam Babu Verma (supra). The learned

Judge neither had the occasion to deal with the question of delay nor the Memorandum dated May 26, 1998.

71. The next decision that would condign consideration is Kalyan Kumar Chattopadhyay (supra), also rendered by the same learned Judge who

decided Kamalakant Jha (supra). Kalyan Kumar Chattopadhyay was a teacher, who retired from service on January 31, 2003. An amount in

excess of Rs. 1,17,000/- was deducted from the gratuity payable to him on account of overdrawal of pay due to wrong fixation of pay scale. Such

erroneous fixation took place nearly two decades before his retirement. The decisions in Shyam Babu Verma (supra) and Kamalakant Jha (supra)

were relied on in support of the claim made in the writ petition for refund of the deducted amount with interest. The State did not oppose the writ

petition on the ground of delay, since it was not a case of belated approach. However, the formal application for pension submitted by the retiring

teacher was referred to where he had declared that if any amount of excess payment and overdrawal in pay and allowances, loans, advances, etc.

were found during scrutiny of the pension papers, such excess payment could be adjusted from the gratuity and the pension relief, and that he

would not raise any objection to such adjustment. Based thereon, it was contended on behalf of the State that ""once the petitioner gives such an

undertaking in the formal application for pension, the petitioner subsequently cannot object to such adjustment"". Reliance was placed by the State

on the decision reported in V. Gangaram Vs. Regional Joint Director and others, , wherein it was held that excess amount paid by mistake can be

recovered from the pension amount of the pensioner. The decision reported in Mafatlal Industries Ltd. and Others Vs. Union of India (UOI) and

Others, was relied on by His Lordship for the proposition that equitable considerations cannot be held to be irrelevant where a claim for refund is

made under Section 72 of the 1872 Act. Further, on perusal of the decisions cited on behalf of the petitioner His Lordship found that the Supreme

Court by taking note of equitable consideration directed that the amount paid in excess cannot be recovered from a retired person out of his retiral

dues, provided the retiree is not responsible in any way for payment of any amount in excess of his entitlement. The decision in V. Gangaram

(supra) was held not to have laid down good law since the ""earlier decision of the larger Bench of the Hon''ble Supreme Court"" in Shyam Babu

Verma (supra) was not considered.

72. Dealing with the effect of the declaration given by the petitioner at the time of submission of his application for grant of pension, His Lordship

proceeded to observe as follows:

39 On examination of the extant Scheme, it appears to this Court that no such application is contemplated under the said Scheme for grant of

pension to the retired person. Even the grant of such declaration is not provided under the said Scheme.

40. The retired persons always show their eagerness to get their retiral dues settled at an early date. With the usual anxieties and worries, the

retired persons often give such undertaking and/or declaration in expectation of early settlement of their retiral dues.

41. The State should not however take advantage of such undertaking and/or declaration given by such retired persons when the respondent''s

right to recover such overdrawal amount which was paid to the petitioner on account of mistake on the part of the respondent, has not been

recognised by the Hon''ble Supreme Court in the aforesaid decisions cited by Mr. Bhattacharya.

42. This Court also holds that when the petitioner was allowed to draw such excess amount due to no fault on the part of the petitioner, equity

demands that such excess amount should not be allowed to be adjusted against the retiral dues of the petitioner.

43. This Court further holds that since the declaration was taken from the petitioner by the concerned respondent in excess of the statutory

requirement, even such declaration cannot improve the defence of the respondents. As such, non-discloser (sic disclosure) of such a declaration

also cannot be fatal to the interest of the writ petitioner.

44. That apart, when the right to recover of (sic) the excess amount from the retired persons out of the retiral dues has not been recognised by the

Hon''ble Supreme Court in the aforesaid citations, even the grant of such declaration cannot improve the defence of the respondents.

45. It is not out of place to mention here that even no opportunity of hearing was given to the petitioner before taking the decision for deduction of

the said overdrawal amount from the retiral dues of the petitioner. This Court also cannot support the decision of the concerned respondent for

readjustment of the excess payment against the retiral dues of the petitioner inasmuch as such decision was taken in violation of the principles of

natural justice.

(underlining for emphasis by me)

73. On reading the aforesaid extract, it seems to be clear that His Lordship may not have had the benefit of looking into the contents of

Memorandum dated May 26, 1998 and more particularly paragraph 11 thereof whereby the DCRB Scheme of 1981 expressly stood amended to

the extent mentioned in such memorandum, which has been brought to my notice by Mr. Majumder. It may be inferred from the findings in the

aforesaid extract underlined by me that His Lordship proceeded to record the same oblivious of the said memorandum. Further, having regard to

the Supreme Court''s reading of the decision in Shyam Babu Verma (supra) itself in Chandi Prasad Uniyal (supra), His Lordship''s reading of the

decision in Shyam Babu Verma (supra) as if it laid down the law that recovery cannot be ordered unless the employee was responsible for the

excess payment may not be correct. In view of the same, I may respectfully observe that the efficacy of the decision in Kalyan Kumar

Chattopadhyay (supra) as a binding precedent is eroded.

74. For the same reasons as aforesaid, I prefer not to be guided by the decision of a learned single Judge reported in Sk. Md. Zakeria Vs. State of

West Bengal and Others, wherein His Lordship proceeded to grant relief on the basis of the decisions in Shyam Babu Verma (supra), Kamalakant

Jha (supra) and Kalyan Kumar Chattopadhyay (supra). It is also noted that His Lordship relied on the decision reported in Bhagwan Shukla Vs.

Union of India and others, . However, the proposition laid down therein was to the effect that recovery of excess pay entails civil consequences

and hence it ought to be preceded by compliance with principles of natural justice. I propose to examine this point subsequently.

75. While deciding the writ petition of Amita Kundu (Rana) (supra) by judgment and order dated April 30, 2008, a learned single Judge did

consider the undertaking given by the petitioner prior to her retirement that any amount paid in excess could be adjusted with her retirement dues

but such undertaking was considered from the angle of suppression of facts, which was an objection raised by the respondents. His Lordship

proceeded to hold that the petitioner was under a bona fide belief that she was an "A" category teacher, which she was, as held in the judgment. It

was further held that the mere fact of the petitioner putting her signature on the proforma and thereby agreeing to abide by the undertaking to

refund did not warrant deduction of Rs. 91,903/- by the Assistant Director of Pension since it was beyond the petitioner"s comprehension that a

deduction could be made on account of an alleged overdrawal spanning over a period of more than 3 (three) decades. It was also held that such

an undertaking barely 15 (fifteen) months before the retirement has an element of compulsion because it is inter-linked with the payment of pension

and other superannuation benefits like gratuity and is given under an apprehension that refusal to give such undertaking could put in jeopardy the

release of post-retirement financial benefits. It was for these reasons that His Lordship did not accept the objection relating to suppression of facts.

76. In my considered view, the reasons assigned by His Lordship for over-ruling the objection of suppression may not ipso facto apply to an

objection raised by the official respondents that the concerned teachers not having challenged the requirement of giving/signing the

undertaking/declaration, it is not open to the Court to find out what was the state of mind of the teachers prior to filling up Form-A and whether

any compulsion was involved or not. Even if the reasons are treated to be germane, I regret my inability to be ad idem therewith for reasons that

would follow after discussion of all the decisions of learned single Judges that have been cited.

77. It would appear on perusal of the decision reported in Jayanti Sengupta Vs. State of West Bengal and Others that a learned single Judge

observed that ""a State employer may not deduct any money out of the retiral benefits of an employee, but may otherwise pursue its claim"". Here

again, the point of delay in approaching the Court was not an issue. That apart, the other point as to whether the State employer did have the

authority in law to deduct any amount from the gratuity payable to the petitioning teacher had to be looked at bearing in mind the relevant law, i.e.

the DCRB Scheme of 1981 and the Memorandum dated May 26, 1998. It does not appear that the attention of His Lordship was drawn to the

relevant law.

78. The unreported decision dated May 14, 2009 of a learned single Judge while deciding W.P. 30264(W) of 2008 (Mohan Chandra Halder v.

State of West Bengal & ors.) and several other writ petitions did not arise out of a claim for refund of amount adjusted from payable gratuity on

account of excess payment. The issue was whether the petitioning teachers and non-teaching staff were entitled to award of interest for delayed

payment of gratuity. The petitioners were granted relief by His Lordship upon noticing that earlier orders passed by coordinate Benches directing

interest to be paid had not been challenged in appeal and that the State had accepted the position that for delayed payment of gratuity and other

benefits, it was liable to bear interest. Reliance was placed by His Lordship, inter alia, on the decision reported in Satya Ranjan Das Vs. State of

West Bengal and Others, for overruling the objection of delay in presentation of the writ petitions without even a formal demand for justice. The

decision in Tilokchand Motichand (supra) does not appear to have been noticed either in Satya Ranjan Das (supra) or in Mohan Chandra Halder

(supra). In any event, a claim for interest on delayed payment of retirement benefits and a claim for refund made years after receiving reduced

retirement benefits upon agreeing to adjustments being made do not stand on the same footing.

79. Another learned single Judge had the occasion to decide a bunch writ petitions involving similar issues, vide a common judgment and order

dated March 25, 2010 on W.P. No. 10885(W) of 2008 (Sachindra Nath Maiti v. State of West Bengal) and 6 (six) other writ petitions. His

Lordship found as a matter of fact that (i) deductions had been made (ii) on account of alleged overdrawal (iii) on the pretext of undoing wrongs

committed years back (iv) without giving opportunity to the petitioners to explain (v) despite there being no allegation of fraud or misrepresentation

against the petitioners, or (vi) any direct role of the petitioners in enjoying wrong fixation of pay scale. His Lordship was upset at the manner in

which recovery was sought to be made without any action having been initiated or contemplated against the architects of the controversy,

responsible for erroneous pay-fixation. Relief, as prayed for, was granted to the petitioners unfortunately without dealing with the contention urged

on behalf of the State that there has been suppression of the undertaking and further that the plea of giving undertaking under compulsion was

cooked up long after acceptance of the PPO and that too, without any demur or protest. It is this perceived deficiency to deal with the specific

contention raised on behalf of the State that dissuades me to follow His Lordship''s judgment.

80. In W.P. No. 10818(W) of 2010 (Monoj Kr. De v. State & ors.) the point that emerged for decision was, whether the authorities could

unilaterally deduct and/or adjust an amount as overdrawn at the time of payment of retiral benefits. The same point was also involved in another

writ petition, the decision whereof is reported in Lopa Das Vs. State of West Bengal and Others, . Both the writ petitions were disposed of by the

same learned Judge. The former decision dated June 5, 2012 was passed relying on the decision in Shyam Babu Verma (supra), Syed Abdul

Qadir (supra) and Nanda Rani Das (supra), holding that deduction from the retiral benefits was illegal, arbitrary and not sustainable. The question

of delay was not raised since none had appeared for the respondents and the writ petition was disposed of even without calling for affidavits. In the

latter decision, His Lordship held that the benefit of two increments was granted to the petitioner by the authorities on their own and that there was

no misrepresentation or commission of fraud by her. The question of delay was not in issue in the latter writ petition too. More importantly, the

DCRB Scheme of 1981 and its amendment vide Memorandum dated May 26, 1998, being the relevant law, had also not been brought to His

Lordship''s notice.

81. W.P. No. 7387 (W) of 2007 (Bhona Khan v. The State & ors.), was decided by me on September 11, 2007. The respondents sought to

recover Rs. 3000/- allegedly paid in excess to the petitioner who was employed under a gram panchayat. That the writ petition was belatedly filed

was one of the points raised by the respondents. I held therein as follows:

However, the action of the respondents in deducting Rs. 3,000/- being in breach of principles of natural justice which is now recognized to be a

part of Article 14 of the Constitution, this Court holds the writ petition maintainable despite the belated approach, for, in case of established breach

of a citizen"s fundamental right, a Writ would issue as a matter of course and it no longer remains in the realm of a discretionary remedy.

Consequently, the respondents are directed to pay to the petitioner Rs. 3,000/-....

It is, however, noticed that the petitioner"s claim for interest on belated payment of gratuity was rejected on the ground that he had received the

amount that was released in his favour without raising any demur and had approached the Court more than 6 1/2 years from date of receipt of

gratuity without there being any explanation for such belated approach. It was observed as follows:

The petitioner has no fundamental right to claim interest. A Court of Law, in an appropriate case, may direct interest to be paid on equitable

considerations, but, delay defeats equity. In view thereof, this Court is not inclined to make any direction for payment of interest to the petitioner

for belated payment of retiring gratuity.

82. The first point of distinction is that the claim was not at the instance of an employee, payment of whose retirement benefits is regulated by the

DCRB Scheme of 1981 read with the Memorandum dated May 26, 1998. Secondly, interference was considered necessary because of

deduction effected in clear breach of principles of natural justice without any material being on record that the employee concerned had agreed to

recovery of excess amount, if any, from his retirement benefits. The decision in Bhona Khan (supra) does not, therefore, assist the petitioners.

83. W.P. No. 17021(W) of 2010 (Hari Pada Pal v. State of W.B.) was disposed of by me on September 17, 2010. Bearing in mind the decision

in Syed Abdul Qadir (supra), which had noticed almost all previous decisions of the Supreme Court and was considered to be the law on the

subject by this Court in several of its decisions, appropriate directions were issued for ascertaining as to whether excess payment had been made

because of any fraud or misrepresentation on the part of the petitioner within the time mentioned therein failing which the petitioner was to be paid

the amount deducted together with 5% interest calculated from the date of presentation of the writ petition. The point of delay was overruled in

view of the decision in Nanda Rani Das (supra) and I had observed that since the matter relates to payment of retiral benefits, an estoppel would

not operate against the petitioner even though the respondents might be at fault in relation to excess payment being made in his favour. However, it

has to be repeated that Memorandum dated May 26, 1998 was not under consideration and the decision in Chandi Prasad Uniyal (supra) had not

yet seen the light of the day. It is well settled that an additional or different fact makes a world of difference between conclusions in two cases even

when the same principles are applied in each to similar facts and, therefore, all identical cases disposed of by me with similar directions in the year

2010 including Hari Pada Pal (supra) cannot come to the rescue of the petitioners.

84. The decision reported in Kashi Nath Bose and Others Vs. The State of West Bengal and Others, was delivered by a learned single Judge on a

writ petition filed by the employees of the West Bengal Council of Higher Secondary Education. They were aggrieved by a memo of the Secretary

of the Council who, while dealing with a representation dated January 2, 2008, advised them to approach the Court of law for redressal of their

grievances. A prayer was made for a direction upon the respondents to revise the basic scale of pay at Rs. 450/- with effect from October 10,

1981 and to release consequential benefits on account of subsequent revisions of pay scales. On behalf of the respondents, the point of delay was

raised and in support of such objection various decisions including the decisions in A.P. Steel Re-Rolling Mills Limited (supra) and Jaswant Singh

(supra) were placed for consideration of the learned Judge. His Lordship overruled the objection. In paragraph 34 of the decision, it was held that

there was no delay because the case related to a prayer for fixation of pay and if the petitioners were paid less every month then every month there

is a fresh cause of action. The decision, therefore, does not assist the petitioners here.

85. A decision dated May 18, 2011 in W.P. 7704 (W) of 2011 (Amalendu Sekhar Bera v. State of West Bengal & ors.) of the learned Judge

who decided Kamalakant Jha (supra) and Kalyan Kumar Chattopadhyay (supra) came to my notice while hearing another matter. Immediately

after issuance of the PPO on July 3, 2003, the petitioning teacher was paid his retirement benefits upon deduction of a sum of Rs. 82,423/- shown

as overdrawal in pay. The writ petition, presented more than 7 (seven) years after receipt of retirement benefits, was entertained and relying on

Shyam Babu Verma (supra), the deducted amount was directed to be returned within the period mentioned in the order. Towards the end of the

order, the following observation can be noticed:

Since the petitioner has filed this writ petition after enormous delay without any proper explanation, this court refuses to grant any relief to the

petitioner so far as his claim for interest on the deducted amount is concerned"".

With due respect to His Lordship, I am unable to agree that a writ petition ""without any proper explanation for the enormous delay"" can be

entertained and part of the relief claimed by the petitioner granted.

86. The decisions of learned single Judges dated February 9, 2012 in W.P. 7843 (W) of 2007 (Mihir Kumar Maity v. State of West Bengal and

ors.) and September 17, 2014 disposing of a batch of 38 writ petitions (Suvendu Mukhopadhyay v. State of West Bengal and ors.) cannot also

be held to have laid down a proposition of law that is binding, because Memorandum dated May 26, 1998 was not brought to Their Lordships''

notice.

87. Insofar as the decision reported in Parbati Maiti Vs. The State of West Bengal and Others, is concerned, it would appear that a claim for

payment of interest on account of delayed payment of gratuity was raised and the claim was not related to deduction of any amount from payable

gratuity. It is recorded in paragraph 18 of the decision that the objection of delay stood overruled in view of ""the peculiar facts and circumstances

of the case. Hence, this decision is distinguishable on facts.

88. The question of delay was also not in issue in W.P. No. 18119 (W) of 2014 (Gopal Chandra Naskar v. State & ors.), W.P. No. 18822 (W)

of 2014 (Abani Kr. Chatterjee v. State of West Bengal & ors.), and W.P. No. 21662 (W) of 2014 (Bhupendranath Roy v. State of West Bengal

& ors.) [decided by the same learned Judge who decided Sk. Md. Zakeria (supra) and Satya Ranjan Das (supra)] because the respective

petitioners before His Lordship had approached the Court within 2 (two) years of retirement seeking interest on delayed payment of retirement

benefits. His Lordship followed the decision in Mohan Chandra Halder (supra) and disposed of the writ petitions with appropriate directions.

These decisions are, therefore, distinguishable on facts.

89. Heavy reliance was placed by Mr. Mukherjee on the decision reported in Niranjan Kumar Mondal Vs. The State of West Bengal and Others,

rendered by the same learned Judge before whom Kamalakant Jha (supra) and Kalyan Kumar Chattopadhyay (supra) came up for consideration.

According to him, it is one of several decisions that went on to hold that the objection relating to delay must be viewed bearing in mind as to

whether third party interest would be affected or not, if relief prayed for by the petitioner is granted by the Court in exercise of its extraordinary

writ jurisdiction. He also contended that keeping in mind the concept of continuing wrong as explained in the said decision, nonpayment of Rs.

44,657/- to Sri Mandal by the respondents is a continuing wrong which has been causing continuous injury and, therefore, the ground of delay

should not stand in the way of a direction for refund of excess payment.

90. It appears from a reading of the decision in Niranjan Kumar Mondal (supra) that His Lordship referring to the decision reported in S.K. Dua

Vs. State of Haryana and Another, held that ""claim of interest on delayed payment of retiral dues is the fundamental right of the petitioner which he

can enforce in the writ jurisdiction of this Court"". His Lordship also referred to the decision reported in Alok Shanker Pandey Vs. Union of India

(UOI) and Others, and observed in paragraph 13 as follows:

13. The said decision of the Hon''ble Supreme Court makes it clear that the claim of interest on delayed payment of retinal (sic retiral) dues flows

from the fundamental rights guaranteed under the Constitution. Claim for interest cannot be held to be a stale claim as right to claim interest on

delayed payment of retiral dues accrues due to continuing wrong committed by the State respondents for withholding the payment of the

petitioner''s retiral dues causing continues injury to the petitioner until such payment is made.

91. Referring to Alok Shanker Pandey (supra), it has been held in paragraph 13 of the decision in Niranjan Mondal (supra) that interest on

delayed payment of retiral dues flows from the fundamental rights. In Alok Shanker Pandey (supra), interest was held to be an accretion on capital

and not a penalty or punishment. Regarding the rate at which interest could be awarded, it was held that it depends on the facts and circumstances

of each case. An example was cited for explaining what interest is. Referring to such example, it can well be argued that if A had not at all offered

the amount to B which he took 10 years ago, any claim made by B for recovery of the amount after 3 years would have been barred by limitation.

I perceive it to be an inadvertent mistake to refer to the decision in Alok Shanker Pandey (supra) as laying down the law that award of interest

flows from Part III of the Constitution; such an observation is found in S.K. Dua (supra) only.

92. The decision in S.K. Dua (supra) has no direct nexus with the lis with which I am concerned. However, upon the petitioners being held entitled

to refund, the question of awarding interest would arise. Because of its relevance incidentally, I would consider whether S.K. Dua (supra) lays

down a principle of law having binding effect under Article 141 of the Constitution, which could guide me to appreciate the law in the proper

perspective and arrive at a proper decision on these writ petitions.

93. In S.K. Dua (supra), although provisional pension was paid to the appellant, other retirement benefits were not paid which included commuted

value of pension, leave encashment, gratuity, etc. totalling to about Rs. 12 lakhs. According to the appellant, the withholding of the aforesaid

amount and payment thereof after considerable delay made the respondents liable to pay interest and ""(e)ven otherwise, the action of non-payment

of interest was arbitrary, unreasonable and violative of Articles 14 and 21 of the Constitution"". In my humble understanding of the facts, as

discussed, it was non-payment of interest that was challenged as arbitrary, unreasonable and violative of Articles 14 and 21 of the Constitution.

Therefore, recovery of any amount from the retiral dues was not impugned. This is the first point of distinction to hold that S.K. Dua (supra) may

have limited application in the sense that question of awarding interest to the concerned petitioners would arise only if they are held entitled to

refund of the amount adjusted/deducted. One other noteworthy fact is that it was not even the claim of the appellant himself that an employee can

claim interest under Part III of the Constitution relying on Articles 14, 19, and 21 of the Constitution. The observation made by the Supreme Court

to that effect in S.K. Dua (supra) has to be understood in the light of the observations made by Hon''ble Sabyasachi Mukharji, J. (as His Lordship

then was) in the decision reported in Goodyear India Ltd., Gedore (India) Pvt. Ltd., Kelvinator of India Ltd. and the Food Corporation of India

and Another Vs. State of Haryana and Another, . Relying upon the decision reported in Rajput Ruda Meha and Others Vs. State of Gujarat, , His

Lordship had the occasion to observe that ""a decision on a question which has not been argued cannot be treated as a precedent"". One may also

profitably refer to the Constitution Bench decision reported in AIR 1960 SC 633 (Superintendent, Central Prison v. Ram Manohar Lohia), where

it was observed that it ""is not the Supreme Court''s province to express or give advice or make general observations on situations that are not

presented to it in a particular case"".

94. Besides, the relevant observation in S.K. Dua (supra) referred to by His Lordship cannot be read and understood divorced from the preceding

two sentences. The relevant extract from paragraph 14 of S.K. Dua (supra) reads:

14. *** If there are statutory rules occupying the field, the appellant could claim payment of interest relying on such rules. If there are

administrative instructions, guidelines or norms prescribed for the purpose, the appellant may claim benefit of interest on that basis. But even in

absence of statutory rules, administrative instructions or guidelines, an employee can claim interest under Part III of the Constitution relying on

Articles 14, 19 and 21 of the Constitution.***

(underlining for emphasis by me)

95. Retirement benefits are paid to the teachers in terms of the provisions contained in the DCRB Scheme of 1981, as amended. It is an

ascertained sum of gratuity that a teacher is entitled to receive thereunder on the day following his retirement. While in an appropriate case the

action of non-payment of interest by a State employer because of delayed payment of retirement benefits to a retired employee without justification

and without caring to respond to his request for payment of interest could be challenged by approaching the Court of Writ on the ground that the

action of not bearing the burden of interest is arbitrary and unreasonable, thereby violating Articles 14 and 21 of the Constitution, interest could be

claimed either under the rule/scheme that regulates the payment of retirement benefits, if so provided, and if not so provided, by laying a claim

under the Interest Act, 1978 (hereafter the 1978 Act). Government Order No. 995-F dated January 29, 2004, entitled employees who had

received retirement benefits belatedly to 5% interest thereon from the day following retirement till actual payment. Mr. Mitra informed me that a

learned single Judge quashed the said order dated January 29, 2004, but the decision has not been produced. Assuming his submission to be

correct, insofar as cases of the present nature are concerned, the petitioners could invoke the 1978 Act for payment of interest by the State by

instituting appropriate proceedings since the unpaid gratuity is covered by the definition of "debt" as in Section 2(c) thereof. Right to interest could

flow from the concerned scheme or rule/instructions or even from the 1978 Act for belated payment of retirement benefits, but does the right to

claim interest flow from Part III of the Constitution? In my understanding of the law on the subject, the answer ought to be in the negative because

right to claim interest in a case of the present nature, as observed above, is a statutory right flowing from the 1978 Act. That an employee has no

fundamental right to claim interest was also the view that I had taken in Bhona Khan (supra), since interest is either awarded on equitable

considerations or in terms of the 1978 Act. In no other cited decision has the Supreme Court laid down the law that right to claim interest on any

amount that is paid to a party by the State (being under an obligation to pay) belatedly without justification flows from Part III of the Constitution,

except S.K. Dua (supra), and for reasons assigned above I am to observe that a proper debate as to whether right to interest on delayed payment

of retirement benefits is a statutory right or a Constitutional right may be required for giving an authoritative answer thereto.

96. His Lordship in Niranjan Mondal (supra) while referring to the concept of continuing wrong referred to the decision in Tarsem Singh (supra).

Relevant portions from Tarsem Singh (supra) read as follows:

4. The principles underlying continuing wrongs and recurring/successive wrongs have been applied to service law disputes. A "continuing wrong"

refers to a single wrongful act which causes a continuing injury. "Recurring/successive wrongs" are those which occur periodically, each wrong

giving rise to a distinct and separate cause of action. This Court in Balkrishna Savalram Pujari and Others Vs. Shree Dnyaneshwar Maharaj

Sansthan and Others, , explained the concept of continuing wrong (in the context of Section 23 of the Limitation Act, 1908 corresponding to

Section 22 of the Limitation Act, 1963): (AIR p. 807, para 31)

"31. ... It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act

responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong

even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by it itself

continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the

wrongful act and what may be described as the effect of the said injury."

** ** ** ** ** ** ** **

7. To summarise, normally, a belated service related claim will be rejected on the ground of delay and laches (where remedy is sought by filing a

writ petition) or limitation (where remedy is sought by an application to the Administrative Tribunal). One of the exceptions to the said rule is cases

relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in

seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of

injury. But there is an exception to the exception. If the grievance is in respect of any order or administrative decision which related to or affected

several others also, and if the reopening of the issue would affect the settled rights of third parties, then the claim will not be entertained. For

example, if the issue relates to payment or refixation of pay or pension, relief may be granted in spite of delay as it does not affect the rights of third

parties. But if the claim involved issues relating to seniority or promotion, etc., affecting others, delay would render the claim stale and doctrine of

laches/limitation will be applied. Insofar as the consequential relief of recovery of arrears for a past period is concerned, the principles relating to

recurring/successive wrongs will apply. As a consequence, the High Courts will restrict the consequential relief relating to arrears normally to a

period of three years prior to the date of filing of the writ petition.

97. I am of the view that the decisions in Balakrishna Savalram Pujari Waghmare (supra) and Tarsem Singh (supra) on the concept of continuing

wrong have to be carefully examined to come to a decision as to whether failure or neglect to refund the amounts adjusted/deducted to the

respective petitioners, at all amounts to a continuing wrong creating a continuing source of injury thereby saving their writ petitions from being

dismissed on the ground of delay and laches. It is not always necessary to look upon the controversy as a service related dispute; on the contrary,

even though the controversy may emanate from an employer-employee relationship, it could legitimately be seen as a pure and simple money claim.

The situation (alleged wrongful adjustment and claim for restitution) is not so peculiar or unusual that it happens only in service related disputes; it

could transpire even between two individuals or between a natural person and a juristic person.

98. The wrongful act complained of here is deduction of the amounts without putting the teachers on notice on the ground of excess payment and

adjusting the same with the gratuity payable to them, and the writ petitions have been presented seeking restitution i.e. refund of such money. The

wrongful act was complete when Rs. 2,02,777/- was paid on account of gratuity to Sri Mandal upon deduction of Rs. 44,657/-, retirement

benefits were paid to the husband of Smt. Barman upon deduction of Rs. 72,795/-, Rs. 2,16,306/- was paid on account of gratuity to Sri

Satapasti upon deduction of Rs. 33,694/-, and Rs. 1,58,519/- was paid to Smt. Ghosh upon deduction of Rs. 34,828/- from her retiring gratuity.

There was no further wrongful act that was committed after the payments were received by the teachers without demur, although it could be true

that the damage resulting from the initial wrongful act of adjustment/deduction may have continued. For a writ petition to be entertained

overlooking the point of delay, the continuing wrong must create a continuing source of injury as held in Balakrishna Savalram Pujari Waghmare

(supra) and Tarsem Singh (supra). Obviously, in disputes relatable to quantum of pension payable to a pensioner, the wrong continues each month

the pensioner is paid less than his entitlements. That was the position in Shiv Dass (supra) as well as Tarsem Singh (supra). The wrongful act of

paying fewer pensions is of such a character that the injury caused by it, itself continues. What is worthy of being noticed is that the Supreme Court

was alive to the situation that relief in such cases could not be granted from the date of retirement but had to be restricted to a period not exceeding

three years prior to presentation of the claim before the concerned Courts. That is, however, not the precise case here. If only it is held that the

official respondents acted illegally in seeking to recover excess payment/overdrawn pay and allowances and consequentially it is also held that the

last pay drawn by the teachers concerned has to be worked out afresh, and appropriate directions in that regard follow leading to recognition of

the right of the concerned teachers to receive higher pensions, then only the question of a continuing wrong may arise for holding the writ petitions

maintainable, and not otherwise. The facts as they presently are do not persuade me to hold that there has been a continuing wrong.

99. I am minded to visualize the DCRB Scheme of 1981 together with its amendments as a coin, which invariably has two sides. In common

parlance, "head" and "tail" are the two sides of a coin. One is inseparable from the other. If recognition of the right of an employee due to retire

shortly to receive retirement benefits to the extent admissible to him is viewed as the "head" of the coin, the liability or burden to return excess

payment received during one"s service tenure is the "tail". The benefits receivable and the burden imposed are, thus, two sides of the same coin i.e.

the DCRB Scheme of 1981. The comprehensive form for sanction of pension under the DCRB Scheme of 1981 being Form-A appended to the

Memorandum dated May 26, 1998 required the teachers, inter alia, to declare that any amount of excess payment and/or overdrawal in pay and

allowances, if found, should be adjusted from the gratuity and pensions/relief and that no objection whatsoever for such adjustment would be

raised. Such undertaking/declaration is, therefore, a necessary concomitant of the right of a teacher to receive retirement benefits. It cannot be

gainsaid that an employee may find processing of his pension application stalled in the absence of the undertaking/declaration in Form-A.

However, it is inconceivable that a teacher upon reading the DCRB Scheme of 1981 and its amendments would make himself aware of the

"head", without being unduly perturbed about the effect of the "tail". Reciprocal rights and obligations that arise out of a contract for the purpose of

enforcement are not dependent upon whether a contracting party finds it prudent to abide by the terms of the contract. A party who incurs an

obligation voluntarily cannot avoid it through writ remedy. That writ remedy is not intended to facilitate avoidance of obligations voluntarily

incurred, is settled law. If any authority is required, one may refer to the decision of the Supreme Court reported in Har Shankar and Others Vs.

The Dy. Excise and Taxation Commr. and Others, where it has been held that those who contract with open eyes must accept the burdens of the

contract along with its benefits.

100. Although it is a fact that the undertaking/declaration had to be given/signed in Form-A 18 (eighteen) months prior to retirement, can it be

accepted that the concerned teachers became aware of the requirement of giving/signing the undertaking/declaration only at the time of preparation

of the pension papers? Memorandum dated May 26, 1998 had come into existence 3 (three) years at the least prior to the respective dates of

retirement of the concerned teachers and, therefore, could have been challenged by them if they felt aggrieved by any of its terms at any earlier

point of time. If at all there was a compulsion, it was the creation of the concerned teachers themselves who were tardy and indolent. It is beyond

comprehension that the concerned teachers were aware of the benefits they are entitled to at the time of retirement but were not aware of the

consequences that might follow the undertaking/declaration in Form-A. It is trite that a statutory right conceived in the interest of a person may be

waived by him. Here, the right to receive gratuity does not even flow from a statute; it flows from the DCRB Scheme of 1981, as amended, which

is a non-statutory scheme but having the force of law. If a statutory right can be waived, a fortiori, a non-statutory right flowing from a scheme

having the force of law could also be waived. The right claimed by the petitioners cannot be equated with a fundamental right, which cannot be

waived and, therefore, the reasons assigned in Amita Kundu (Rana) (supra) for overruling the objection relating to suppression of facts, with the

deepest of respect I have for His Lordship, do not hold good for countering the objection raised by the official respondents.

101. Since Memorandum dated May 26, 1998 was not noticed in Niranjan Mondal (supra) and host of other decisions, the Courts did not have

the occasion to consider one vital aspect, that is, whether the concerned teachers having given the undertaking and/or signed the declaration as in

Form-A could at all claim refund of the adjusted amount and interest thereupon. A party who without reservation receives retirement benefits upon

permitting adjustment of excess payment/overdrawn amount may not even have the locus standi to challenge the action of adjustment, not to speak

of any right to claim interest, for there could be a conscious abandonment of the right to claim interest once the undertaking/declaration is

given/signed.

102. Regard being had to the scheme of the DCRB Scheme of 1981 and the procedure for working out release of retirement benefits in favour of

the teachers due to retire, Sri Mandal, Sri Satapasti, Smt. Ghosh and the late husband of Smt. Barman by giving/signing the undertaking/declaration

could be perceived to have abandoned their right to even challenge the adjustments that were ultimately made. In terms of the DCRB Scheme of

1981, preparation of the pension papers commences 18 (eighteen) months prior to retirement, including signing of Form-A. If indeed the

requirement of signing such declaration was considered by the teachers unconscionable, unfair, unreasonable or against public policy, the same

ought to have been challenged and appropriate interim directions obtained from the Court for release and receipt of the admissible amount of

retirement benefits (if retirement was due shortly) without prejudice to the rights and contentions of the teachers, while urging the Court to decide

the issue finally at a later date subject to its convenience. Not only no challenge thereto was laid prior to the respective dates of retirement of the

concerned teachers, they acquiesced and even after receipt of reduced retirement benefits there has been no sincere effort to clearly disclose the

factum of giving/signing the undertaking/declaration, leave alone challenge the same. The petitioners, save Smt. Barman, and her late husband were

all aware that they had to retire at some point of time. They must have made themselves aware of the quantum of retirement benefits by reading the

DCRB Scheme of 1981 and the amendments thereto, for, no other provision existed regulating release of such benefits. If the concerned teachers

could be aware of their entitlements upon reading the DCRB Scheme of 1981 together with its amendments and claim right to enforce the same, at

the same time it can be presumed that they knew what was required of them to receive their dues. That included, inter alia, giving/signing the

undertaking/declaration. I fail to see reason as to how the undertaking/declaration that the concerned teacher gave/signed could at all be claimed in

the writ petitions to have been obtained under compulsion or were given by any or all of the teachers out of anxiety/worry to receive their

respective retirement benefits, and such claim accepted in certain decisions referred to above. The observations in this behalf, with deepest of

regard for Their Lordships'', are not founded on any clinching creditworthy evidence on record and may be based on personal perceptions.

103. Mr. Mitra''s contention that since the retirement benefits were not paid in terms of the said memorandum immediately after retirement of the

concerned teachers and, thus, the competence of the State to adjust/recover excess payment ceased, has not impressed me. The amended scheme

for payment of retirement benefits has no default clause that failure to effect payment of retirement benefits following the date of retirement or within

a reasonable period of retirement would result in cessation of the authority of the State to adjust/recover excess payment from the payable gratuity.

I am inclined to the view that the time-schedule for release of retirement benefits has been incorporated to gear up the system to ensure expeditious

release of such benefits following retirement as well as to fix responsibility on delinquent officers failing to abide thereby, thereby paving the way for

initiation of disciplinary action. Should there be failure or neglect to abide by the time-schedule, the State would have to incur interest for delayed

payment but in the absence of any express provision regarding the consequence of failure, it is not considered logical and prudent to accept such

contention.

104. One very vital facet of disposal of claims of the present nature by the Supreme Court seems to have been missed at times by this Court, that

is, an order granting relief against recovery is one in equity as distinguished from a relief that a party is entitled to as of right on established breach

of a known right. Relief in equity restraining recovery in individual service related cases, more often than not, is the exercise of judicial discretion by

the Courts to relieve the employees of hardship, should recovery be allowed. Satisfaction of the Court that a party seeking relief in equity has

approached it with clean and untainted hands is a sine qua non for exercise of equity jurisdiction. A party making averments to suit his convenience

without having regard for truth is precluded from getting equitable relief. Such a party cannot be enriched at the cost of others. Having regard to the

undertaking/declaration that must have been given/signed by the concerned teachers in Form-A, of which there has been no fair and clear

disclosure, question of exercise of jurisdiction in equity may not ordinarily arise. For granting relief under Article 226 of the Constitution, public

interest litigations excepted, a satisfaction has to be reached that the party approaching the Court has suffered a legal wrong. It is too well settled

that relief has to be granted within the framework of law and should be logical and tenable, instead of incurring and justifying a criticism of

degenerating into misplaced sympathy, generosity or private benevolence. Legitimacy of the conclusions reached in a judicial decision must rest on

legal reasoning. Given the necessities of a case, discretionary relief could be granted on balancing the interests and equities. However, doses of

sympathy, generosity or private benevolence by Courts have no place in a society governed by rule of law. The equity jurisdiction is not to be

misunderstood for sympathy jurisdiction. Apart from that, a Court cannot also overlook that delay defeats equity. A party who claims equity must

enforce his claim within a reasonable time. Approaching the High Court after long delay may lead to denial of relief irrespective of the fact that

similarly circumstanced parties had been granted relief earlier on an approach being made within reasonable time of accrual of cause of action.

These are elementary principles, which I have stated to refresh my mind that a lenient outlook may at times put a premium on dishonest intentions.

Since equity has to yield to law, a judicial review Court gives primacy to what is legal and not what is right. The teachers having agreed to

adjustment at the relevant time, the bogey of hardship at a later stage [ranging from more than 3 (three) years to 9 (nine) years in some cases] may

be of little relevance. Harming of public interest and public exchequer by grant of equitable relief, in the circumstances, may have to be eschewed.

105. On the aspect of delay defeating equity, reference can profitably be made to the decision reported in The Municipal Council, Ahmednagar

and Another Vs. Shah Hyder Beig and Others, . The Supreme Court taking note of the equitable doctrine applied it to negate the claim of a

landloser who approached the High Court more than a decade and half after losing possession of his land through a process of land acquisition.

Portion of paragraph 14, relevant in the present context, is extracted below:

14. *** It is now a well-settled principle of law and we need not dilate on this score to the effect that while no period of limitation is fixed but in

the normal course of events, the period the party is required for filing a civil proceeding ought to be the guiding factor. While it is true that this

extraordinary jurisdiction is available to mitigate the sufferings of the people in general but it is not out of place to mention that this extraordinary

jurisdiction has been conferred on to the law courts under Article 226 of the Constitution on a very sound equitable principle. Hence, the equitable

doctrine, namely, ''delay defeats equity'' has its fullest application in the matter of grant of relief under Article 226 of the Constitution. The

discretionary relief can be had provided one has not by his act or conduct given a go-by to his rights. Equity favours a vigilant rather than an

indolent litigant and this being the basic tenet of law, the question of grant of an order as has been passed in the matter as regards restoration of

possession upon cancellation of the notification does not and cannot arise.***

106. There is little reason to believe that attention of the learned single Judges was invited to the contents of Memorandum dated May 26, 1998 in

its entirety, yet, the same were not considered by Their Lordships while authoring the decisions placed before me for consideration. Be that as it

may, for the reasons aforesaid, I am minded to observe that the rulings of the concerned Judges (including myself) on the point of authority of the

State to adjust excess payments/overdrawn amounts from retirement benefits, without considering the effect of the undertaking/declaration as in

Form-A forming part of Memorandum dated May 26, 1998, are sub-silentio.

107. It is now time to consider the decisions of various Division Benches of this Court, which have been cited before me.

108. In the decision of the Division Bench reported in 2007 (1) CLJ (Cal) 21 (Smt. Padmarani Thakur v. Secretary, Department of Home and

ors.), the appellant had approached the Court of Writ for a direction upon the State Government to pay compensation of Rs. 35 lakh to her owing

to the death of her son in police custody resulting from torture inflicted by the police officials, 12 years after such death. The writ petition was

dismissed on the ground of delay. It would appear from paragraph 13 of the decision that Their Lordships of the Division Bench were not

prepared to accept the contention of the learned Advocate for the State Government that ""there was any gross delay in presenting the writ

application for which the same should be dismissed"". Even then, the Division Bench inter alia referred to paragraph 13 of the Constitution Bench

decision of the Supreme Court reported in Lohia Machines Ltd. and Another Vs. Union of India (UOI) and Others, for holding that ""there cannot

be waiver of fundamental right by applying the doctrine of acquiescence"". However, it does not appear from the submissions of the learned

Attorney General [recorded in paragraph 12 of the decision in Lohia Machines (supra)] that any objection to the maintainability of the Article 32

writ petition before the Supreme Court on the ground of acquiescence was raised. Also, the earlier Constitution Bench decisions in Tilokchand

Motichand (supra) and Rabindranath Bose (supra) were not even referred to. I am inclined to form the view on reading the decision that since the

Article 32 writ petition raising an issue of substantial importance regarding the competence of the relevant Government to impose a tax having been

heard at length for days and all but one of the learned Judges of the Constitution Bench having decided to dismiss such petition on merits, Their

Lordships may have been dissuaded to dismiss the same only on the ground of acquiescence of the petitioner in paying the impugned tax for 19

(nineteen) years prior to its presentation.

109. Having regard to the decisions in Tilokchand Motichand (supra) and Rabindranath Bose (supra), as well as the one reported in Durga

Prashad Vs. Chief Controller of Imports and Exports, where the Supreme Court, relying on two previous decisions, held that:

7. The learned Counsel for the appellant contends that this matter involved fundamental rights and this Court atleast should not refuse to give relief

on the ground of delay. But we are exercising our jurisdiction not under Article 32 but under Article 226, and as observed by Gajendragadkar,

C.J., in the passage extracted above, even in the case of alleged breach of fundamental rights the matter must be left to the discretion of the High

Court.

it may require consideration, in an appropriate case, as to whether established breach of a fundamental right would necessitate interference of the

Court of Writ under Article 226 throwing asunder all objections relating to the petitioner"s conduct that could ordinarily be considered for declining

relief to him.

110. The Division Bench decision dated September 6, 2010 in Nanda Rani Das (supra) proceeded to grant relief to the wife of a deceased

teacher on the ground that since there was no misrepresentation or fraud on the part of the deceased, the excess payment could not have been

recovered from his retirement benefits. The decisions in Shyam Babu Verma (supra) and Syed Abdul Qadir (supra) were relied on to support such

ruling. While setting aside the judgment and order of the learned single Judge under appeal, the finding relating to delay in approaching the Court of

Writ was overruled referring to an example cited in paragraph 7 of the decision in Tarsem Singh (supra) and observing that the deduction ""cannot

affect the rights of any third party and following the aforesaid decision of the Supreme Court, we are inclined to grant relief to the petitioner inspite

of the delay"".

111. The facts pleaded in the writ petition of Smt. Barman are similar to the facts in Nanda Rani Das (supra) and Mr. Panda may not be unjustified

in submitting that since such decision is pat on the point, Smt. Barman is entitled to similar treatment. However, despite the decision in Nanda Rani

Das (supra) being rendered by a Division Bench, certain important aspects can never be overlooked.

112. The writ petition of Nanda Rani Das [W.P. No. 11781(W) of 2010] was dismissed by a learned single Judge of this Court on June 10, 2010

primarily on the ground that the teacher concerned (the deceased husband of Nanda Rani Das) after issuance of the PPO on April 10, 2000 and

before his death on September 5, 2003 had received the benefits in terms of the PPO without any protest and as a matter of fact did not demand

refund of the amount of Rs. 1,08,891/- which was adjusted with the gratuity payable to him. It was ruled that ""(t)he teacher, the only person who

could be aggrieved, if at all, by the recovery, never said in any manner that he was aggrieved by the recovery. He accepted the decision of the

state. The petitioner has no independent right of action"".

113. It does not appear from the decision of the Division Bench that any exception to this reasoning of the learned single Judge was taken. The

view of the Division Bench on such point is, thus, not known. I am not unmindful of legal position that the order of the Division Bench in Nanda

Rani Das (supra) may have attained finality and it is not open to a Judge sitting singly to make any observation in regard thereto, but after all any

precedent sub-silentio and without argument are of no moment"" is well settled. Reference in this connection may be made to the decision of the

Supreme Court reported in Municipal Corporation of Delhi Vs. Gurnam Kaur, .

114. In my view, if a teacher while in service signs Form-A allowing the official respondents to adjust excess payment/overdrawn amount with his

retirement dues and during his/her life-time does not take exception to such adjustment with his/her retirement dues and accepts without any demur

whatever amount is tendered to him/her, the spouse of the teacher does not have a superior or better right to maintain a writ petition and contend

that the adjustment being without jurisdiction is liable to be interdicted.

115. It would also not be out of place to note paragraph 15 of the writ petition of Nanda Rani Das, appearing from the order dated June 10, 2010

of the learned single Judge, reading as under:

15. Your petitioner states and submits that due to her prolonged illness she could not take any steps against the impugned deduction and she

could not also take legal advice regarding recovery of such deductable (sic) amount.

The learned single Judge dealt with paragraph 15 as follows:

The case stated in para 15, not supported by any material, is of no consequence, especially because it is evidently a made to fit untrue word for

word case stated in para 15 of as many as three other art. 226 petitions the same advocate has filed seeking similar relief.

The three petitions are there: W.P. No. 11763(W) of 2010 (Ramani Mohan Roy v. The State of West Bengal & ors.), W.P. No. 11765(W) of

2010 (Basudeb Halder v. The State of West Bengal & ors.) and W.P. No. 11769(W) of 2010 (Prafulla Chandra Saha v. The State of West

Bengal & ors.).

The contents of paragraph 15 of the writ petition of Nanda Rani Das and paragraph 15 of the writ petition of Smt. Barman bear resemblance.

Paragraph 15 of Sri Satapasti''s writ petition is also more or less to the same effect. Since Mr. Panda is the common advocate-on-record, the

reason therefor is not far to seek.

116. That apart, except for the sole sentence in the second paragraph of the order running into 4 (four) pages, one is likely to form an opinion on

reading the subsequent paragraphs thereof that the Division Bench may have considered the writ petition and the writ appeal to be at the instance

of the teacher concerned.

117. For whatever my observations are worth, I most humbly express my reservation to regard the decision in Nanda Rani Das (supra) as one

having precedential value. A delay of 9 (nine) years in presentation of the writ petition was not considered fatal for the maintainability of the writ

petition despite the learned single Judge''s observations in regard to paragraph 15 of the writ petition, extracted supra, on the specious ground that

no third party right has accrued and it is the appellant who suffered due to non-payment of the amount of Rs. 1,08,891/-. Decisions of the

Supreme Court are legion that a stray sentence in a Supreme Court decision is not the ratio of a decision, and judgments are not to be read as

statutes. Tarsem Singh (supra) did not deal with a claim for refund but a claim for proper quantum of pension. It is settled principle of law that

delay deprives a person of the remedy available to him in law, and that a party who has lost his remedy by lapse of time, unless there arises a fresh

cause of action or any legislation intervenes, loses his right as well. In the absence of consideration of the several decisions of the Supreme Court

referred to above and more particularly Memorandum dated May 26, 1998, I now find it difficult to agree with the view expressed in Nanda Rani

Das (supra) despite having followed it in Hari Pada Pal (supra).

118. M.A.T. No. 933 of 2010 (Ramendra Nath Mukherjee v. State of West Bengal) was disposed of by the same Division Bench that decided

Nanda Rani Das (supra). Since both the appeals were allowed on the same day, the reasons recorded therefor are more or less similar; and the

same reasons that have dissuades me to consider the decision in Nanda Rani Das (supra) as a binding precedent, the decision in Ramendra Nath

Mukherjee (supra) cannot come to the rescue of the petitioners.

119. It is of some significance to note from the order dated September 6, 2010 in Ramendra Nath Mukherjee (supra) that the writ appeal was not

directed against the parent order dated August 12, 2009 dismissing the writ petition but against an order dated June 18, 2010 whereby the

application containing a prayer for review of the parent order was rejected. Having regard to the principle flowing from Order XLVII Rule 7 of the

Code of Civil Procedure, the appeal may not have been maintainable. This is one additional reason for my inability to follow the reasoning of the

Division Bench.

120. Order dated September 12, 2001 on M.A.T. No. 1592 of 2011 (Md. Josimuddin v. State of West Bengal) proceeded to direct the

respondents to bear interest on the amount adjusted from the gratuity payable to the appellant, which the learned single Judge had directed to

refund. This order, at this stage, does not help the petitioners.

121. For approaching the Court of Writ belatedly, a learned single Judge while disposing of a writ petition (Biswanath Sarkar v. State of West

Bengal) directed that the deducted amount be returned to the petitioner with interest @ 10% per annum limited to a period not exceeding 3 (three)

years. An appeal was preferred there against by the petitioner. Modifying the order under appeal while hearing the application for stay by an order

dated July 12, 2010, Their Lordships of the Division Bench observed that ""for no valid reason, the said learned single Judge directed that payment

of such interest should be limited to a period not exceeding three years"". The reason may not have been mentioned in the order disposing of the

writ petition but inspiration for the direction of the learned single Judge leaving the petitioner aggrieved, I guess, must have been derived from the

decision of the Supreme Court in Shiv Dass (supra) which was not noticed by the Division Bench and, therefore, there seems to be no good

reason to accept the said decision as precedent worthy of being followed.

122. While proceeding to dismiss a writ appeal, an Hon''ble Division Bench in the decision reported in The State of West Bengal and Others Vs.

Sri Harekrishna Sardar and Another held that the learned single Judge was right in directing refund of the amount deducted from the gratuity of the

concerned teacher on the twin grounds of breach of principles of natural justice and that the appellants had failed to satisfy the Court that there had

actually been any over-payment to the concerned teacher. This decision, therefore, does not assist the petitioners except to the extent of breach of

principles of natural justice.

123. The decision of the Division Bench, reported in Manohar Mishra Vs. State of West Bengal and Others , related to the grievance of pay

protection of a police constable governed by the West Bengal Service Rules, Part-I. It appears that while complying with an earlier order of this

Court, the pay of the constable had been fixed wrongly. An order was later passed by the Superintendent of Police re-fixing his pay in accordance

with law. Challenge laid to such order before the State Administrative Tribunal failed. Since by the time the Tribunal was approached the constable

had retired from service and wrong fixation had occurred while complying with this Court''s order, the Division Bench restrained the respondents

from recovering the excess amount paid to him but upheld the order relating to re-fixation of pay. It is clear that the benefit of non-recovery was

extended to the constable for a special reason, which is non-existent here.

124. State of West Bengal and Others Vs. Sri Sheo Ram Giri, has been cited, which reports the decision rendered by a Division Bench while

sitting in appeal over a decision of a learned single Judge directing interest to be paid @ 7% p.a. on delayed payment of pension and gratuity.

Referring to the decision of the Supreme Court in Alok Shanker Pandey (supra), the Division Bench declined to interfere. It was neither a case of

belated approach nor a claim for refund and, thus, this decision is also of no assistance to the petitioners.

125. The Division Bench in the decision reported in Rajendra Nath Biswas Vs. State of West Bengal, was called upon to decide as to whether

recovery of Rs. 43,629/- from the commuted value of pension payable to the employee concerned was permissible or not. Relying on Shyam

Babu Verma (supra) and S.K. Dua (supra), it was held by the Division Bench that the State Government was not authorised to effect

adjustments/deduction and while setting aside the order of the tribunal that was impugned in the writ petition, the respondents were directed to pay

the deducted amount together with interest. It does not appear from a reading of the cited decision that the employee concerned had given any

undertaking or signed any declaration of the nature which retiring teachers in the writ petitions under consideration were called upon to give/sign.

The said decision is, therefore, distinguishable on facts.

126. The decision of the Division Bench reported in State of West Bengal and Others Vs. Asis Das Gupta, was rendered on a writ petition

wherein an order of the State Administrative Tribunal directing refund of Rs. 41,244/- to the retired public servant was under challenge. The writ

petition did involve an objection raised by the learned Advocate General for the State relating to delay. Referring to Section 21 of the

Administrative Tribunals Act, 1985, it was observed by the Division Bench that no objection relating to maintainability of the application under

Section 19 of the Act of 1985 was raised before the learned tribunal and, ""therefore, at this belated stage, we are not inclined to decide the

aforesaid objection raised on behalf of the State Government since the issue with regard to the maintainability should have been raised before the

learned tribunal at the first instance and not before this Court after disposal of the application....."". The ratio of the decision in Asis Das Gupta

(supra) on the point of delay, in my humble opinion, is inapplicable here. However, insofar as the Division Bench''s reading of the decisions in

Shyam Babu Verma (supra), Syed Abdul Qadir (supra) and Chandi Prasad Uniyal (supra) is concerned, my humble view is that although the

Division Bench held the decisions in Syed Abdul Qadir (supra) and Shyam Babu Verma (supra) to have been accepted in Chandi Prasad Uniyal

(supra), it would appear from a reading of the latter decision that the former decisions were in fact distinguished.

127. The next in the line of Division Bench decisions cited is the one reported in 2014 (1) CLJ (Cal) 644 (Sipra Mukherjee v. State of West

Bengal & ors.). In paragraph 8 of the judgment and order dated December 18, 2013, it was held as follows:

8. Having considered the submissions of the parties it is true that the employee husband of the appellant raised no objection to the recovery made

from the gratuity amount but accepted the same. It is only after his demise in 2009 that the writ petition was filed in 2010 challenging such recovery

by his legal heir and representative the widow. While the retired employee would be entitled to retiral benefits his legal heir and representative

would be entitled to family pension and only to that extent would be entitled to the retiral benefits. Gratuity is a one time payment and upon receipt

of the same by the employee no issue can be raised on the same. But in the instant case the sums from the gratuity amount have been withheld and

the appellant as the legal heir and representative being entitled to the retiral benefit would be entitled to challenge such withholding of the amount by

the authorities. In the absence of any misrepresentation and fraud on the part of the employee husband so also the PPO issued by the office of the

Director of Pension and Provident Fund and Group Insurance in 2007 and the circular issued, subsequent to the decision of the Supreme Court of

India in the case of Syed Abdul Kader (supra) on 19th July, 2010, one of the four situations in which excess pavmem (sic payment) is not be

deducted from the past retiral benefit applies to the appellant. It is on the basis of the said decision and circular that the appellant became aware of

her entitlement and without a doubt the appellant is an aggrieved person.

128. It is clear on a reading of the aforesaid extract that the decision, apart from reliance on Syed Abdul Qadir (supra), rested on a circular dated

July 19, 2010 issued by the Director of Pension upon consideration of the impact of the law laid down in Syed Abdul Qadir (supra). Apart from

the fact that the decision in Chandi Prasad Uniyal (supra) was not placed before the Division Bench, a subsequent circular dated March 6, 2013

issued by the self-same Director upon reading the law laid down in Chandi Prasad Uniyal (supra) was also not placed. The circular dated March

6, 2013 cancelled the circular dated July 19, 2010; therefore, on the date the appeal of Sipra Mukherjee was disposed of setting aside the order

under appeal and holding the point of maintainability of the writ petition in her favour, the circular dated July 19, 2010 ceased to exist in the eye of

law. I need not express any further on the issue.

129. M.A.T. 1829 of 2013 (Smt. Jaya Ghosh v. State of West Bengal & ors.) and M.A.T. 1189 of 2014 (Dayaram Barma v. State of West

Bengal & ors.) are the other two decisions of Division Benches, which have been cited on behalf of the petitioners. The orders under appeal,

passed by the same learned Judge who decided Satya Ranjan Das (supra), reveal a distinct change in the approach of His Lordship. The earlier

liberal view had given way to the well-recognised view that relief in equity is not available to the indolent.

130. By the order under appeal, the writ petition of Smt. Jaya Ghosh was dismissed primarily on the ground of delay in approaching the Court.

While allowing the appeal by an order dated January 9, 2014, Their Lordships held that the issue as to whether overdrawal in pay can be adjusted

against the retiral dues of a retired employee was no longer res integra in view of the decisions in Shyam Babu Verma (supra) and Syed Abdul

Qadir (supra). According to Their Lordships, the Supreme Court had uniformly held in those cases that to avoid any hardship to the retired

teachers, recovery of any overdrawal in pay by way of adjustment against the retiral dues of such retired teacher should not be made; however, in

the event any excess payment was made to any teacher during the tenure of his service on account of any misrepresentation or fraud on the part of

the employee, such excess payment could be adjusted even against the retiral dues of the employee after his retirement. Referring to Chandi

Prasad Uniyal (supra), it was observed that the Supreme Court in such decision had not taken any contrary view with regard to realisation of

overdrawal in pay from the retiral benefits of a retired person. Dealing with the point of delay, the Division Bench observed as follows:

In our opinion, the writ petition ought not to have been dismissed on the ground of delay alone, as the State-respondents did not suffer any loss

due to the delay in approaching the court by the petitioner for the relief claimed by her in the writ petition. On the contrary, the State-respondents

were benefited for such delay in approaching the court by the petitioner, as the State-respondents merrily enjoyed the petitioner"s money which

ought to have been paid to the petitioner by the State-respondents immediately after her retirement.

131. Regarding the test propounded while deciding the writ appeal of Jaya Ghosh (supra), it seems to be the considered view of the Their

Lordships that a belated writ petition could be entertained if by reason of the delay the respondents have not suffered any prejudice. Since Their

Lordships did not record that the delay in moving the writ petitions had been satisfactorily explained or that they had not waived their rights by their

conduct, which were the precise reasons for which the concerned learned single Judge had dismissed the writ petition of Jaya Ghosh, it logically

follows that notwithstanding no explanation for the belated approach being put forward, the Court may entertain a grossly delayed writ petition

only on the ground that the respondents have not suffered any prejudice between the dates of accrual of cause of action and presentation of the

writ petition. Any decision of the Supreme Court that supports the view of the said Division Bench and lays down the law that no matter whether

there is any explanation or what the explanation is, non-sufferance of prejudice by the respondents per se is sufficient ground to overlook the delay

and that claims for interest or refund of adjusted/deducted amount with interest, which are essentially money claims, could be entertained by a

Court of Writ which is also a Court of equity, beyond the period prescribed by the limitation laws for instituting a civil suit, has not been brought to

my notice by the learned advocates for the respective petitioners. On the contrary, the passage from the decision in Murali Babu (supra) and the

decisions in Bhailal Bhai (supra) and Tilokchand Motichand (supra), in my humble view, lay down a law with which the observations of Their

Lordships seem to be inconsistent. It has consistently been held that the period of time for filing a civil suit for recovery of money could be taken as

a measure for judging whether presentation of the writ petitions have been grossly delayed or not. If a suit is barred by limitation, it cannot be

entertained on the ground that the defendant has not suffered prejudice by reason of the belated institution of the suit. With all the humility at my

command, I regret my inability to accept the test propounded by the Division Bench in the decision in Jaya Ghosh (supra) as correct.

132. Dayaram Barma (supra) was decided by the Division Bench by judgment and order dated September 9, 2014. It appears on perusal of the

decision in Dayaram Barma (supra) that paragraph 14 of the decision in S.K. Dua (supra) was relied on to hold that even in the absence of ""any

statutory rule, administrative instruction and/or guideline, an employee can claim interest under Part III of the Constitution relying on Articles 14, 19

and 21 of the Constitution"". That apart, it appears that the appellant had approached the Writ Court on March 18, 2014 seeking interest on

delayed payment of retirement benefits, which were released in his favour on September 10, 2013. Their Lordships interfered because the

approach was made within 6 (six) months from date of accrual of cause of action. I need not repeat my understanding of the decision in S.K. Dua

(supra). Insofar as the objection of delay is concerned, the decision rests on the facts before it and does not assist the petitioners.

133. A decision of a neighbouring High Court has been cited by Mr. Mitra. In Normoi Topno (supra), the learned Judges of the Full Bench of the

Jharkhand High Court was called upon to answer a question framed by a Division Bench of the same Court as to ""(w)hether, without cancelling the

order of promotion by any competent authority and merely on the recommendation of audit objection, the order of promotion can be treated to be

illegal and thereby pension and other retiral benefits can be reduced?"" The question was answered keeping in mind the provisions of Rule 43(b) of

the Bihar Pension Rules, 1950. Such rule empowers the State to recover any amount from pension and gratuity following the prescribed

procedure. The Full Bench was of the view that such procedure had not been followed and, therefore, no amount could be recovered except in

accordance with the prescribed procedure. It was of the further view that since there was no misrepresentation or concealment on the part of the

petitioner, no opportunity of hearing was given to her against recovery, the order of promotion was not cancelled by the competent authority after

due enquiry and the order of recovery could not have been based merely on the basis of audit objection, the impugned order of recovery could not

be sustained. The decision in Normoi Topno (supra), therefore, cannot be pressed into service in aid of the petitioners.

134. I shall now devote attention to the other decisions of the Supreme Court that have been cited on behalf of the petitioners.

135. The decision reported in 1995 Supp (3) SCC 600 (Union of India vs. Indian Railway SAS Staff Association and others) does not lay down

a law within the meaning of Article 141 of the Constitution that recoveries cannot be made from the employees who have retired from service. The

last sentence in paragraph 8 of the decision, on which reliance has been placed, has to be read having regard to the facts of the case and is more in

the nature of a direction under Article 142 of the Constitution.

136. In the decision reported in S.R. Bhanrale Vs. Union of India and others, , the Supreme Court noted that the case of the appellant was

unfortunate. Repeated claims raised by the appellant for service benefits, while in service were denied. Even after his retirement, he was made to

run from pillar to post. Ultimately the department conceded that claims made by the appellant towards leave encashment, efficiency bar arrears and

proforma promotion arrears were due, which were thereafter paid. Certain other claims were, however, not admitted. Having regard to the fact

that some amounts had been belatedly paid, the bar of limitation raised on the part of the Union of India was held to be improper and particularly

when the department had defaulted in making the payments promptly when the same fell due. Since the appellant had been asking the department

to pay his dues both while in service and also after superannuation but to no avail, it was in such circumstances that the plea of limitation was turned

down. A significant observation appears in paragraph 4 of the decision to the effect that it was not as if the appellant had woken up after a decade

to claim his dues. I have failed to find out the materiality of this decision to the facts of the instant writ petitions.

137. The Supreme Court in the decision reported in S.K. Mastan Bee Vs. The General Manager, South Central Railway and Another, entertained

the claim of the appellant as maintainable despite delay on the grounds that she is an illiterate lady who at the time of her husband''s death did not

know of her legal right to family pension and the remedy to enforce such right, and that the factum of the appellant''s lack of resources to approach

the legal forum timely was not disputed by the respondents. The ultimate direction to grant relief to the appellant from the date from which it

became due to her, i.e. the date of death of her husband (November 21, 1969) interfering with the decision of the Division Bench which restricted

the payment of family pension to the appellant from April 1, 1992, i.e. the date on which the appellant issued a legal notice to the Railways is,

however, not consistent with the later view expressed by the Supreme Court in Shiv Dass (supra). I am, therefore, inclined to take the view that

the cited decision is one given by the Supreme Court in exercise of the power conferred on it by Article 142 of the Constitution.

138. The decision reported in G.L. Batra Vs. State of Haryana and Others, lays down the law that a Bench cannot overrule the judgment of a

coordinate Bench and that in case of disagreement, the matter must be referred for decision by a larger Bench.

139. Having considered the decisions cited, it would suffice to note that the pleadings of the respective petitioners do tend to suggest that adequate

explanations for the delayed approach have not been furnished. While Sri Mandal, Smt. Barman and Sri Satapasti have approached the Court

without even making any representation to the respondents to refund the monies that have been deducted, Smt. Ghosh appears to have made a

representation immediately before approaching the Court but after 3 (three) years of receipt of the retirement benefits. It is more in the nature of an

attempt to show that justice was demanded but refused. There is neither any explanation whatsoever as to what prevented Smt. Ghosh from

sending the representation earlier nor has the long unreasonable delay in approaching the Court of Writ been adequately explained. All the

petitioners appear to be fence-sitters who have approached the Court deriving inspiration from orders passed on writ petitions/writ appeals

preferred by their colleagues directing refund of amounts adjusted. Law is well settled that such fence-sitters do not deserve equity.

140. Turning attention to the legality and permissibility of recovery of excess payment made to an employee by the State, the law prior to Chandi

Prasad Uniyal (supra) seems to have developed on the lines that payment made by an employer to an employee in excess of his entitlement can be

recovered only in certain exceptional situations, viz. (i) the employee was aware of receiving payment in excess of what is lawfully due and payable

to him, either due to a bona fide mistake of the employer or for other reasons, (ii) there has been no great loss of time to detect or correct the error

of wrong payment, and (iii) the employee was guilty of fraud or misrepresentation resulting in excess amount being paid to him, and not otherwise.

Except in V. Gangaram (supra), recovery process was aborted considering that the employee had retired before effecting recovery. The relevant

decisions aborting recovery from retirement benefits noticed above, to my mind, could be seen as Article 142 decisions, which were rendered in

equity with a view to relieve retired employees from financial hardship. However, having regard to the strong reasons that were assigned by the

Supreme Court in Chandi Prasad Uniyal (supra) permitting a State employer to recover excess payment made to an employee erroneously either

by mistake or otherwise on the ground that any amount paid/received without the authority of law can always be recovered barring few exceptions

of extreme hardships but not as a matter of right, and that in such situations law implies an obligation on the payee to repay the money, otherwise it

would amount to unjust enrichment, my understanding of the dictum is that recovery of payment made in excess of an employee''s entitlement even

after retirement is not totally barred since tax payers'' money is at stake. Also, it is well-nigh permissible to effect recovery from retirement benefits

if the employee concerned while in service had agreed to recovery being effected therefrom, as in the present cases. A benefit given by an

employer to an employee by mistake may be recoverable upon such mistake being detected on the principle that extension of a benefit by mistake

or error cannot confer a right on the recipient or act as an estoppel against the employer who has by mistake granted the wrong benefit. Chandi

Prasad Uniyal (supra) has laid down broadly that recovery of excess payment is permissible, notwithstanding no fraud or misrepresentation of the

recipient thereof, to prevent unjust enrichment and in the process of reasoning the ''hardship'' aspect has also been noticed. However, with respect

to the learned Judges, the decision does not proceed so far as to spell out the factors that ought to weigh in the mind of the authority effecting

recovery while determining ''hardship'' in any given case. Further, since the appellant before the Supreme Court had not retired, it was perhaps not

necessary for the Court to opine as to whether the principles laid down therein would equally apply in regard to recovery of excess payment from

the retirement benefits of a retired employee. Pertinently, when exemption from recovery is to be directed needs to be addressed by laying down

the law in authoritative terms. Left to myself, I would approach the problem thus. While permitting recovery in a case where the retired employee is

not at fault for receiving excess wrong payment while in service, are factors like the status of the retiree, the quantum of money received by him on

account of retirement benefits, the manner in which he has planned his twilight years and the quantum sought to be recovered from him not

important considerations that the Court should bear in mind? I am inclined to the view that they are. While dealing with a challenge thrown to a

process of recovery of excess payment, the above factors should never be disregarded. The imminent hardship which a retired Group ''D'' or even

a Group ''C'' employee would face, if recovery were allowed, is not comparable with the hardship to be faced by a retired Group ''A'' or even a

Group ''B'' employee. No matter how high or lowly a post one might have held under the State, any monetary benefit to which he is not legally

entitled, if paid due to a delinquent act of an officer or officers of the administration, has to be refunded on the delinquency and/or excess payment

being detected. Laying down the law in broad terms that recovery from retirement benefits would not be permissible unless the retiree was at fault

while in service, might have serious ramifications. No matter the high office one may have held and the corresponding status enjoyed while in

service, exemption from recovery could be claimed on the ground that he is not responsible for the excess payment. Should such claim be allowed

to be urged? Restricting the process of recovery in respect of all classes of retired employees who are not at fault for the excess payment made in

their favour, without any concern for the plea of "hardship" that might be raised, would neither be conducive to the interests of the retirees nor the

administration of the system. If recovery from retirement benefits upon detection of excess payment is permitted in all cases without any

reservation, the officer concerned charged with the duty of fixing proper pay of an employee might feel encouraged to be less diligent and indulge in

delinquency, thereby allowing wastage of tax payers'' money by contributing to doling out of excess money to which the employee is not entitled.

Moreover, if the error is detected by someone else at a subsequent stage when the delinquent officer has retired and the time to initiate disciplinary

proceeding after retirement has also lapsed, he goes scot-free. In such a case, it is public interest that is rendered a casualty. Then again, it is not

that the State or its officers is/are always correct in their conclusions. Recovery has civil consequences and, therefore, cannot be effected without

compliance with natural justice. If opportunity were extended, it could be shown that either no adjustment at all or a part adjustment ought to be

made, and not the entire amount that the State initially intended to adjust/recover. It cannot be overemphasized that scrupulous care ought to be

taken while releasing salaries and other allowances to employees from tax payers'' money, since it is neither the money of the employer nor of the

employee. Bearing in mind that recovery of excess amount paid from tax payers'' money to an employee is intended to prevent unjust enrichment, I

perceive it to be the fundamental duty of every responsible citizen of the country including persons engaged in the noble profession of teaching to

safeguard public property by not laying claim to money beyond his entitlement and to refund payment which is conclusively proved to have been

made to him in excess of his entitlement, in abiding by the rich heritage of our composite culture. It follows from the above discussion that if fraud

or misrepresentation of an ex-employee is the immediate cause for the excess payment, recovery can always be made from the retirement benefits.

Even if there be no fraud or misrepresentation of an ex-employee but the excess payment is the result of erroneous application of the principles for

pay fixation or erroneous interpretation of the relevant law and excess payment has been made due to a bona fide mistake or inadvertent error on

the part of the State employer, process for recovery may be commenced and concluded by putting the retiree on notice. If the retiree is successful

in repelling the stand of the State and establishes that no amount ought to be adjusted with his retirement benefits, there can be no doubt that he

should be paid the entire benefits and that too with interest that might accrue due to delayed payment. Even otherwise, upon the retiree pleading

''hardship'' if the amount paid in excess were to be recovered from his retirement benefits, it is open to the employer to bestow his consideration to

this aspect in the light of the above referred factors and to decide whether the recovery process should be taken to its logical conclusion or not.

However, simply because an employee has retired may not be a good defence in all cases of attempted recovery. After all, what is sought to be

recovered is public money. The doctrine of unjust enrichment, a just and salutary doctrine, would stand in the way of any citizen unjustly getting

more than his entitlement at the cost of the public. The power of the Court is, most certainly, not meant to be exercised for unjustly enriching even a

retired employee.

141. Consideration of these writ petitions has resulted in formation of prima facie views by me on certain aspects which are at variance with

decisions of Division Benches and learned Judges, sitting singly, precluding me to decide the issue of maintainability of these writ petitions.

Ordinarily, when a learned Judge is required to decide a point, he is bound by the decision of a Division Bench on a similar point. However, if such

learned Judge is unable to agree with the view taken by such Division Bench on the ground that it has either not considered relevant decisions of

the Supreme Court or the relevant law, what is the course of action to be followed in such a case? Guidance flows from the decision of the

Supreme Court authored by Hon''ble P.B. Gajendragadkar, C.J. (as His Lordship then was), reported in Shri Bhagwan and Another Vs. Ram

Chand and Another, . Paragraph 18, to the extent relevant, is quoted hereunder:

18. Before we part with this appeal, however, we ought to point out that it would have been appropriate if the learned Single Judge had not taken

upon himself to consider the question as to whether the earlier decisions of the Division Benches of the High Court needed to be re-considered and

revised. It is plain that the said decisions had not been directly or even by necessary implication overruled by any decision of this Court, indeed, the

judgment delivered by the learned Single Judge shows that he was persuaded to re-examine the matter himself and in fact he had substantially

recorded his conclusion that the earlier decisions were erroneous.... It is hardly necessary to emphasise that considerations of judicial propriety and

decorum require that if a learned Single Judge hearing a matter is inclined to take the view that the earlier decisions of the High Court, whether of a

Division Bench or of a Single Judge, needed to be reconsidered, he should not embark upon that enquiry sitting as a Single Judge, but should refer

the matter to a Division Bench or, in a proper case, place the relevant papers before the Chief Justice to enable him to constitute a larger Bench to

examine the question. That is the proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum

and propriety. It is to be regretted that the learned Single Judge departed from this traditional way in the present case and chose to examine the

question himself.

(underlining for emphasis by me)

142. The portion of the passage from paragraph 18 of the decision in Lala Shri Bhagwan (supra) underlined above has been quoted with approval

in decisions of not too distant origin reported in Official Liquidator Vs. Dayanand and Others, and U.P. Power Corporation Ltd. Vs. Rajesh

Kumar and Others, .

143. The passage from the Constitution Bench decision in Central Board of Dawoodi Bohra Community (supra) relied on by Mr. Majumder says

much the same thing as to what a single Judge ought to do when he is disinclined to agree with the view expressed by a Division Bench of the same

High Court without, however, referring to Lala Shri Bhagwan (supra).

144. The Supreme Court in the decision reported in Tribhuvandas Purshottamdas Thakur Vs. Ratilal Motilal Patel, had the occasion to observe as

follows:

When it appears to a Single Judge or a Division Bench that there are conflicting decision of the same Court, or there are decisions of other High

Courts in India which are strongly persuasive and take a different view from the view which prevails in his or their High Court, or that a question of

law of importance arises in the trial of a case, the Judge or the Bench passes an order that the paper be placed before the Chief Justice of the High

Court with a request to form a Special or Full Bench to hear and dispose of the case or the question raised in the case. For making such a request

to the Chief Justice, no authority of the Constitution or of the Charter of the High Court is needed,.....".

145. Reserving my final opinion on the claims of the respective petitioners on merits but bearing in mind the rival contentions advanced from the bar

and the decisions cited as well as those requiring attention, I strongly feel that the discussions hereinbefore have yielded number of substantial

questions of law for being answered. I am of the further considered view that an appropriate Bench dealing with the contentions raised and

answering such questions and/or additional questions that might be framed by such Bench, would not only facilitate proper disposal of these writ

petitions but also other writ petitions involving identical and incidental issues, which are pending. It would thus appear to be in tune with judicial

discipline, propriety and prudence to refer the questions to the Hon''ble the Chief Justice for considering the desirability of constituting an

appropriate Bench for examining and/or considering the same. The questions that I perceive to be of some importance, formulated on the basis of

the materials and evidence on record and arising for answers, read thus:

(a). While considering a grossly delayed writ petition that is listed for admission, is it not open to the Court of Writ to enquire and satisfy itself

regarding the acceptability of the cause(s) set forth by the petitioner in the writ petition for the belated approach and to reject the same if such

cause(s) is/are unworthy of acceptance and thereby dismiss the writ petition, or should the Court of Writ, irrespective of whether any explanation

or any satisfactory explanation for the belated approach has been furnished or not, apply the test of prejudice that the respondents would suffer if

the writ petition were admitted despite the belated approach?

(b). Assuming that the respondents would not suffer any prejudice if a grossly delayed writ petition (seeking recovery of money illegally deducted

from retirement benefits) without explanation or without satisfactory explanation for the belated approach were admitted, could such writ petition

essentially raising a money claim be entertained if it is found to have been presented beyond a period of 3 (three) years from the date of receipt of

payment of retirement benefits after deduction of amount for alleged excess payment/overdrawn pay and allowance bearing in mind the majority

opinion in Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, , extracted supra?

(c). Whether any decision of this Hon''ble Court proceeding to grant relief against recovery of excess payment and directing refund of the deducted

amount wherein Memorandum No. 88/SE (B) dated May 26, 1998 issued by the School Education Department, Budget Branch, Government of

West Bengal, laying down ""Scheme for payment of Pension and Gratuity on the date of superannuation to the employees of West Bengal

Recognized non-Government Educational Institutions and introduction of Comprehensive Form in connection with sanction of pension cases"" and

more particularly Form-A appended thereto has not been considered, has the efficacy of a binding precedent?

(d). In the absence of any challenge to the requirement of the DCRB Scheme of 1981, as amended, that an employee has to give an undertaking

or to sign a declaration for receiving retirement benefits (that the official respondents could adjust excess payment/overdrawal of pay and

allowance with the payable gratuity and pensions/relief, and such employee would not question such adjustment) at the time of submission of the

relevant form for pension or even thereafter before issuance of the Pension Payment Order in his/her favour, and particularly when such

requirement could be viewed as a measure to protect tax payers'' money, are the writ petitions at the instance of the retired teachers maintainable?

(e). Assuming the writ petitions to be maintainable, is it open to the Court of Writ to grant relief of refund together with interest on the ground that

such requirement, despite being unchallenged, is opposed to public policy and, thus, hit by Section 23 of the Indian Contract Act, 1872 or on any

other ground, or is the State entitled to claim the protection of Section 72 thereof?

(f). Does retirement of an employee from service afford a valid defence in all cases of attempted recovery of excess payment? If not, what are the

factors that the recovering authority must bear in mind while passing an order in this behalf?

(g). Since relief against recovery is granted not because of any right of the employees but in equity, would it be proper for the Court of Writ to

grant relief despite the Court having been approached by a party after inordinate delay and laches, which is not properly explained, and that too

without clean and untainted hands?

(h). Whether the beneficiaries of erroneous or mistaken acts can be allowed to retain the monetary benefits arising out of excess payment on the

ground that retirement benefits were not paid to them immediately upon their retirement from service?

(i). Could the spirit of the law laid down in Chandi Prasad Uniyal and Others Vs. State of Uttarakhand and Others, , extend to protection of an

action of an employer (State) relating to recovery of excess payment made to an employee, during the period of service rendered by him, from his

retirement benefits to prevent unjust enrichment and to save tax payers'' money?

(j). Does failure, neglect or deemed refusal to refund the amount deducted from the retirement benefits to the retired employee without anything

more, amounts to a continuing wrong creating a continuing source of injury?

(k). Despite a retiring teacher having agreed to adjustment/recovery of excess payment/overdrawal in pay and allowances from the payable

gratuity and further agreeing not to question such adjustment, should the rules of natural justice be not read in the process of adjustment thereby

implying that an opportunity to the teacher to contest the version of the official respondents is a condition precedent for effecting such adjustment?

(l). In regard to claims of the present nature seeking refund of deducted amount with interest or claims for interest on delayed payment of

retirement benefits, does the right to receive interest flow from Part III of the Constitution, or the Interest Act, 1978 or the orders issued by the

Government in furtherance of the DCRB Scheme of 1981?

146. I direct that the cause papers of these writ petitions be transmitted to the Secretariat of the Hon''ble the Chief Justice at once for being placed

before the Hon''ble the Chief Justice for appropriate orders.

147. Before parting, I place on record that immediately before this judgment was pronounced, Mr. Joytosh Majumder, learned Assistant

Additional Advocate General invited my attention to a recent decision of the Supreme Court reported in State of Punjab Vs. Rafiq Masih (White

Washer), which, according to him, affirmed the decision in Chandi Prasad Uniyal (supra). A prayer was made to consider the decision before

pronouncement of the judgment. Mr. Mukherjee and Mr. Mitra were given the opportunity to look into the decision. According to them, the

Supreme Court returned the subject reference to the Division Bench since no conflict in the two sets of decisions was noticeable and the cited

decision cannot be understood as affirming the decision in Chandi Prasad Uniyal (supra). On perusal of the cited decision, I noticed that the

subject reference to three learned Judges was held to be unnecessary on the ground that there was no conflict in the views expressed in Shyam

Babu Verma (supra) and Sahib Ram (supra) on the one hand and Chandi Prasad Uniyal (supra) on the other. In the process, the contours of the

provisions of Articles 136 and 142 of the Constitution were traced and the decisions in Shyam Babu Verma (supra) and Sahib Ram (supra) were

held to contain directions issued in exercise of the powers of the Supreme Court under Article 142 of the Constitution, whereas the decision in

Chandi Prasad Uniyal (supra), it was observed, laid down the law under Article 136 thereof while dismissing the petition of the employee.

However, head-note (E) of the report appears to me to be misleading. Since the judgment I proposed to pronounce instead of coming into conflict

with the views in Rafiq Masih (supra) would express views consistent therewith, I proceeded to do so. It would be open to the parties, as and

when the occasion arises, to advance further arguments on the effect of such decision.

Photostat copy of this judgment, duly countersigned by the Assistant Registrar (Court), shall be retained with the records of W.P. 23116(W) of

2014, W.P. 9262(W) of 2014 and W.P. 20679(W) of 2014.

Urgent photostat certified copy of this judgment and order, if applied, may be furnished to the applicant at an early date.