

compromises between the prosecutrix and the accused to get married, suggest or mandate mediation between the accused and the survivor, or any form of compromise as it is beyond their powers and jurisdiction;

(f) Sensitivity should be displayed at all times by judges, who should ensure that there is no traumatization of the prosecutrix, during the proceedings, or anything said during the arguments, and

(g) Judges especially should not use any words, spoken or written, that would undermine or shake the confidence of the survivor in the fairness or impartiality of the court."

(Emphasis by Court)

9. This Court had occasions to consider in **Pravin Kumar Singh and others v. State of U.P. Thru. Prin. Secy. Home Deptt. and another, 2023 SCC OnLine All 131**, the issue whether prosecutions under the Act of 2012 can be quashed on an application under Section 482 Cr.P.C founded on a compromise. In **Pravin Kumar Singh (supra)** it was held by Hon'ble Ajai Kumar Srivastava-I, J. thus:

"14. So far as the question of quashing of criminal proceeding of S. T. No.20 of 2014 "State vs. Pravin Kumar Singh and others" arising out of Case Crime No.345 of 2013, under Sections 376, 363, 366, 504, 506 I.P.C. and 3/4 POCSO Act, is concerned, Hon'ble Supreme Court in Narinder Singh and others vs. State of Punjab and another reported in (2014) 6 SCC 466, has specifically held that the matter under Section 376 I.P.C. is also such an offence, which, though committed in respect of a particular victim, cannot be termed to be a private dispute between the parties. It has serious adverse societal effect. Therefore,

any proceeding on the basis of alleged compromise of the accused vis-a-vis the victim cannot be quashed. Hon'ble Apex Court in State of Madhya Pradesh vs. Madanlal reported in (2015) 7 SCC 681 while repelling the acquittal on the basis of compromise in the matter pertaining to Sections 376 read with 511 I.P.C., has placed reliance upon principles laid down by three-Judge Bench in Shimbhu vs. State of Haryana reported in (2014) 13 SCC 318."

10. It has been held by the Punjab and Haryana High Court in similar terms in **Nardeep Singh Cheema @ Navdeep Singh Cheema v. State of Punjab and others, CRM-M-2270-2020**, decided on 07.09.2022. I also had occasion to consider this issue in **Om Prakash v. State of U.P. and another, 2023 SCC OnLine All 93**, where it was held that the proceedings under Section 376 I.P.C. and POCSO Act, cannot be quashed on the basis of a compromise between the accused and the victim.

11. On the conspectus of above facts, I do not find any good ground to quash proceedings of the ongoing trial.

12. This application is, accordingly, **rejected.**

(2023) 5 ILRA 1612

ORIGINAL JURISDICTION

CIVIL SIDE

DATED: ALLAHABAD 19.04.2023

BEFORE

THE HON'BLE KSHITIJ SHAILENDRA, J.

Writ-C No. 7730 of 2016

**Dr. Ashok Kumar Tomar
Versus
State of U.P. & Ors.**

**...Petitioner
...Respondents**

Counsel for the Petitioner:

Sri Siddharth Khare, Sri Ashok Khare

Counsel for the Respondents:

C.S.C.

(A) Civil Law – Constitution of India, 1950 - Article - 226 – Payment of Gratuity Act, 1972 – Sections 1(3)(c) & 2(e) -

Writ Petition – for quashing impugned orders by which authorities are denying Gratuity – petitioner was appointed as lecturer in an aided educational institution – thereafter, he applied and appointed as Principal – when he reached age of 50 years in 2009, he opted for voluntary retirement after completing 27 years, 9 months of service – all the voluntary retirement dues were accepted by the authorities and paid except Gratuity – Petitioner filed PG Case before the Controlling Authority under PG Act, 1972 – allowed – St. Govt. challenged in appeal – appeal allowed – petitioner challenged the appellate court order including denied order of authorities – court finds that, in view of Amending Act, No. 47 of 2009 it cannot be said that the petitioner would fall under the exceptional or exclusion clause of the definition of 'employee' – and government order or regulation – 11 would not restrain a teacher from seeking voluntary retirement at the age of 58 year or prior thereto - held, petitioner is fully covered by the definition of employee so as to entitle him to get gratuity – writ petition allowed – directions issued for payment of gratuity with @ 9% interest per annum.

Writ Petition Allowed. (E-11)

List of Cases cited:

1. Birla Institute of Technology Vs St. of Jharkhand & ors. (2019 vol. 4 SCC 513),
2. Ahmedabad Private Primary Teachers' Assc. Vs Administrative Officer (2004 vol. 1 SCC 755),
3. Independent Schools' Federation of India Vs U.O.I. & ors. (2022 SCC Online SC 1113),

(Delivered by Hon'ble Kshitij Shailendra, J.)

1. Heard Shri Siddharth Khare, learned counsel for the petitioner and learned Standing Counsel for the State-respondents.

2. The petitioner was appointed on the post of lecturer in 1982 in an aided educational institution. Thereafter, pursuant to the process issued for appointment on the post of Principal, the petitioner applied and was appointed on the post of Principal on 23.10.2002.

3. The date of birth of the petitioner being 5.11.1959, when he reached age of 50 years in 2009, he opted for voluntary retirement after completing the length of service of 27 years, 9 months and 28 days. The voluntary retirement of the petitioner was accepted by the authorities.

4. While the retirement dues of the petitioner were not being paid, petitioner filed Writ-A No.58376 of 2010, which was disposed of by this Court vide order dated 22.9.2010, whereby the Joint Director of Education, Saharanpur Region Saharanpur was directed to consider the grievance of the petitioner with regard to non-payment of his dues. Pursuant to the order dated 22.9.2010, passed by this Court, the Joint Director of Education, Saharanpur, passed an order dated 9.12.2010, whereby the payment of pension to the petitioner was granted, however the gratuity was refused. Thereafter, the petitioner filed P.G. Case No.2 of 2012 before the Controlling Authority under the Payment of Gratuity Act, 1972 (herein after referred to as 'the Act, 1972'). The said authority vide order dated 6.9.2013 directed the respondents to pay a sum of Rs.6,46,041, as the amount of gratuity to the petitioner.

5. Challenging the order dated 6.9.2013, the State filed Writ-C No.5108 of 2014, which was dismissed by this Court vide order dated 27.1.2014 on the ground of availability of alternative remedy by filing statutory appeal.

6. Thereafter, the respondents filed P.G.A. Appeal No.2 of 2014 before the appellate authority under the Act, 1972, which has been allowed by the impugned order dated 3.12.2015.

7. This petition was filed in the year 2016 and during the pendency of the writ petition, an affidavit was filed on behalf of respondents annexing therewith another order dated 11.9.2020, whereby the Deputy Director of Education (Intermediate), Saharanpur Division Saharanpur again denied gratuity to the petitioner by placing reliance upon Government Order dated 29.8.1981. The petitioner by means of an amendment application challenged the order dated 11.9.2020. The amendment application was allowed and, therefore, the said order is also under challenge.

8. Shri Siddharth Khare, learned counsel for the petitioner, submits that the order impugned is based upon wrongful interpretation of Section 2 (e) of the 1972 Act and authority has taken a wrong view that the petitioner falls within the exclusion clause of the definition 'employee', as he is an employee of the State Government. Shri Khare further submits that another ground taken for denying the gratuity to the petitioner is applicability of Government Order dated 29.8.1981, which, in fact, does not apply in the case of the petitioner. He further submits that even the subsequent order dated 11.9.2020 is based upon same proposition of the applicability of the Government Order dated 29.8.1981.

9. Shri Khare has referred to the definition of 'employee' as contained under Section 2 (e) of the Act, 1972, which reads as follows:

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

10. He further submits that as per Section 1 (3)(c) of the Act, the provisions of the Act shall be applicable to such other establishments as the Central Government may by notification specify in this behalf. Shri Khare has placed reliance upon the notification F.No. S-42013/1/95-SS dated 3.4.1997, which reads as follows:

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

Provided that nothing contained in this notification shall affect the

operation of the notification of the Ministry of Labour, S.O. No.239, dated 8th January, 1982 (See above)."

11. He, therefore, submits that since educational institutions employing 10 or more persons are covered by the notification issued in exercise of powers under Section 1 (3)(c) of the Act, 1972, the ground taken for rejecting the claim of the petitioner by placing reliance upon Section 2 (e) becomes unsustainable. Shri Khare further points out that, later on, in the year 2009, the definition of 'employee', as contained in Section 2 (e) of the Act, 1972 was amended by Act No.47 of 2009 **with retrospective effect from 3.4.1997**, in the light of the aforesaid notification dated 3.4.1997.

12. In this regard, he has placed reliance upon the decision of Supreme Court in *Birla Institute of Technology vs. State of Jharkhand and others*, (2019) 4 SCC 513, wherein the Supreme Court dealt with a contrary decision taken in the case of *Ahmedabad Private Primary Teachers' Assn. vs. Administrative Officer*, (2004) 1 SCC 755. However, taking into consideration the retrospective effect of amendment made by amending Act No.47 of 2009, the Supreme Court held that reliance could not be placed upon the decision of Ahmedabad Private Primary Teachers' Assn. (supra). The Supreme Court also observed that though the constitutional validity of amending Act No.47 of 2009 was challenged before the Supreme Court in a writ petition, mere pendency of writ petition would not affect the constitutionality of the amending Act nor would it affect the rights of the parties concerned, unless the statute is declared ultra vires.

13. Shri Khare further argues that insofar as the constitutional validity of

amending Act No.47 of 2009 is concerned, the same has been upheld by the Supreme Court in its subsequent decision dated 29.8.2022 passed in the case of *Independent Schools' Federation of India (Regd.) vs. Union of India and another*, 2022 SCC OnLine SC 1113.

14. Shri Khare has further placed reliance upon a decision of this Court in the Case of *Sarnam Singh vs. Smt.Pushpa Devi and others* [1986 UPLBEC 348], in which this Court has held that Committee of Management of an educational institution is not an agency or instrumentality of the State Government nor does a teacher hold a post under the Government.

15. In view of the above, the contention of learned counsel for the petitioner is that the first ground taken in the order impugned that the petitioner would fall in the exceptional clause of Section 2 (e) of the Act, 1972 and, therefore, not entitled to get payment of gratuity, becomes unsustainable.

16. Insofar as the second ground contained in the order impugned that is applicability of the Government Order dated 29.8.1991 is concerned, Shri Khare Submits that the said Government Order deals with a situation where the teacher concerned gives an option for retirement at the age of 58 years. He, therefore, submits that the Government Order has no application in the case of the petitioner nor does it affect those matters where a Principal or a Teacher opts for voluntary retirement at any age.

17. Respondents have filed counter affidavit in which a stand has been taken that the retirement age of the teachers has been extended from 60 years to 62 years

and since the petitioner opted for 60 years as age of retirement in place of 58 years, he would not be entitled for gratuity.

18. Learned Standing Counsel has vehemently argued that petitioner is estopped from claiming payment of gratuity as despite giving an option of retirement at the age of 60 years, he took voluntary retirement at the age of 50 years. Learned Standing Counsel, with reference to paragraph-17 of the counter affidavit, has argued that the petitioner could not abandon the services prior to 60 years.

19. After hearing learned counsel for the parties, I find that in view of amending Act No.47 of 2009, which came into force retrospectively on 3.4.1997 and in view of the judgment of Supreme Court in Birla Institute of Technology (supra) and Independent Schools' Federation of India (supra), it cannot be said that the petitioner would fall under the exceptional or exclusion clause of the definition 'employee'. I find that petitioner is fully covered by the definition of employee so as to entitle him to get gratuity. Insofar as the applicability of Government Order dated 29.8.1981 is concerned, I do not find that it is a restriction in claiming voluntary retirement by a teacher concerned. The said Government Order only provides for submitting option for retirement either at the age of 58 years or 60 years and has nothing to do with the aspect of voluntary retirement. I further find from perusal of the said Government Order that it is accompanied by Regulations, Clause-4 whereof reads as follows:

"४. इस नियमावली की विज्ञप्ति की तिथि के उपरांत नियुक्ति अध्यापकों द्वारा

स्थायीकरण की तिथि के दो वर्षों के अंदर ५८ वर्ष के आयु पर सेवानिवृत्त होने के पक्ष में अपना विकल्प न देने पर यह नियमावली उस पर लागू नहीं होगी . विकल्प का एक बार प्रयोग कर लेने पर वह अंतिम समझा जायेगा."

20. A perusal of aforesaid Clause-4 shows that the regulations will not apply for those teachers, who did not give option for retirement at the age of 58 years. Regulation-11 deals with voluntary retirement aspect and I do not find anything, which would restrain a teacher from seeking voluntary retirement at the age of 58 years or prior thereto.

21. From overall interpretation of the Government Order and regulations forming part thereof, I find that the reasons assigned for denying gratuity in both the orders impugned on this score are unsustainable.

22. Consequently, the writ petition is **allowed**. The impugned orders dated 3.12.2015 and 11.9.2020 are hereby quashed by issuing a Writ of **Certiorari**.

23. A Writ of **Mandamus** is issued to the respondents 3, 4 and 6 to compute the amount of gratuity payable to the petitioner after hearing the petitioner and release the same in his favour within a period of **two months** from the date of production of certified copy of this order. The petitioner shall also be entitled for interest @ 9% per annum on the amount of gratuity from the date of his retirement till the date of actual payment. This amount shall be in addition to the amount of pension, which the petitioner is already getting.