IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Date of Decision: 27.11.2013

C.R.No.4315 of 2012

Management of S.D. Model Senior Secondary School & another

...Petitioner

Versus

District Judge –cum- Service Tribunal & another

...Respondents

CORAM: HON'BLE MR. JUSTICE HEMANT GUPTA
HON'BLE MR. JUSTICE FATEH DEEP SINGH

Present : Mr. Deepak Singh; Mr. Ajay Bhardwaj & Ms. Navdeep, Advocates, for the petitioners.

Mr. Pardeep S. Poonia, Additional Advocate General, Haryana.

Ms. Sonia G. Singh & Ms. Seema Pasricha, Advocates, for the respondents.

HEMANT GUPTA, J.

The present revision petition along with other similar petitions has been placed before this Bench on a reference made by the learned Single Bench of this Court formulating the following questions for consideration of the Larger Bench:

> "1. Whether the notification by the Haryana Government, latest of such notification is dated 07.05.2013, which is reiteration of the earlier notification dated 03.08.2008, empowers the Educational Tribunal to adjudicate disputes as to payment of gratuity to Teachers and whether the jurisdiction is not ousted by the express provision of the notification purported to have been issued in the light of direction of the Supreme Court in T.M.A. Pai Foundation & others Vs. State of Karnataka

& others (2002) 8 SCC 481 and more particularly with reference to the provisions of the Payment of Gratuity Act itself?

2. Whether the Educational Tribunal has jurisdiction to decide all "service disputes" other than matters arising out of disciplinary action?"

The brief background, leading to the aforesaid questions, is that the Supreme Court in a judgment reported as **T.M.A. Pai Foundation & others Vs. State of Karnataka & others (2002) 8 SCC 481** has directed constitution of Educational Tribunals. The Educational Tribunal, constituted in pursuance of such directions, directed the petitioners herein to pay gratuity to the Teachers. Such order passed by the Educational Tribunal is under challenge before this Court on two grounds i.e. (i) the Educational Tribunal constituted through the notification has no power to adjudicate on the dispute relating to entitlement or otherwise of gratuity to teachers, & (ii) the forum for adjudication shall be under the Payment of Gratuity Act and cannot be exercised by the Educational Tribunal.

In T.M.A.Pai Foundation's case (supra), the Supreme Court inter alia observed that the teachers and the institutions exist for the students and not vice versa. Where allegations of misconduct are made, it is imperative that a disciplinary enquiry is conducted and that a decision is taken. In the case of a private institution, the relationship between the Management and the employees is contractual in nature. It was observed that the Management of a private unaided educational institution should conduct disciplinary enquiry keeping in view the principles of natural justice. It was observed as under:

"64. …In the case of educational institutions, however, we are of the opinion that requiring a teacher or a member of the staff to go to a civil court for the purpose of seeking redress is not in the interest of general education. Disputes between the management and the staff of educational institutions must be decided speedily, and without the excessive incurring of costs. It would, therefore, be appropriate that an educational Tribunal be set up in each district in a State, to enable the aggrieved teacher to file an appeal, unless there already exists such an educational tribunal in a State the object being that the teacher should not suffer through the substantial costs that arise because of the location of the tribunal; if the tribunals are limited in number, they can hold circuit/camp sittings in different districts to achieve this objective. Till a specialized tribunal is set up, the right of filing the appeal would lie before the District Judge or Additional District Judge as notified by the government. It will not be necessary for the institution to get prior permission or ex post facto approval of a governmental authority while taking disciplinary action against a teacher or any other employee. The State government shall determine, in consultation with the High Court, the judicial forum in which an aggrieved teacher can file an appeal against the decision of the Management concerning disciplinary action or termination of service."

Later, answering question No.5, the Supreme Court observed as under:

"162-G. Q.5(c) Whether the statutory provisions which regulate the facets of administration like control over educational agencies, control over governing bodies, conditions of affiliation including recognition/withdrawal thereof, and appointment of staff, employees, teachers and Principals including their service conditions and regulation of fees, etc. would interfere with the right of administration of minorities?

A. So far as the statutory provisions regulating the facets of administration are concerned, in case of an unaided minority educational institution, the regulatory measure of control should be minimal and the conditions of recognition as well as the conditions of affiliation to an university or board have to be complied with, but in the matter of day-to-day management, like the appointment of staff, teaching and non-teaching, and administrative control over them, the management should have the freedom and there should not be any external controlling agency. However, a rational procedure for the selection of teaching staff and for

> taking disciplinary action has to be evolved by the management itself. For redressing the grievances of employees of aided and unaided institutions who are subjected to punishment or termination from service, a mechanism will have to be evolved, and in our opinion, appropriate tribunals could be constituted, and till then, such tribunals could be presided over by a Judicial Officer of the rank of District Judge.
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> The State or other controlling authorities, however, can always prescribe the minimum qualification, experience and other conditions bearing on the merit of an individual for being appointed as a teacher or a principal of any educational institution.
>
> Regulations can be framed governing service conditions for teaching and other staff for whom aid is provided by the State, without interfering with the overall administrative control of the management over the staff.
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> Fees to be charged by unaided institutions cannot be regulated but no institution should charge capitation fee."

The said observation is a majority view though there are some observations by other Hon'ble Members of the Bench in respect of constitution of the Educational Tribunal, but the operative part of the order the majority view, is as reproduced above.

After the aforesaid order was passed by the Supreme Court, a Circular was issued by the Registrar General of this Court on 03.04.2008, authorizing all the District & Sessions Judge in the State of Haryana to hear appeals of the employees of aided/unaided Medical/Dental/Ayurvedic/ Homeopathic/Educational Institutions against the decision of Management within their jurisdiction. Later, the State Government issued the following notification on 28.05.2008:-

> "No.18/18/07-2HBIV in pursuance of the judgment dated 30.12.02 of the Hon'ble Supreme Court of India in TMA Pai Foundation and others Vs. State of Karnataka (2002) 8 SCC 481, wherein Hon'ble Court has observed that for the redressal of grievances of employees of aided / unaided Medical/Dental/ Ayurvedic/Homeopathic Educational Institutions, who are subjected to punishment or termination of services, a mechanism will have to be evolved by constituting appropriate tribunals.

> The right of filing appeals would lie before the District & Sessions Judge or Addl. District & Sessions Judges till the Tribunals are set up.
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> It is notified that all the District & Sessions Judges in the State of Haryana have been authorized by the Hon'ble Punjab and Haryana High Court, Chandigarh vide their No.11233 Gaz.II/IX.CII, dated 03.04.2008 to hear the appeals of the employees of aided/unaided Medical/Dental/Ayurvedic/ Homeopathic/Health Educational Institutions against the decisions of Management within their jurisdiction.
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> xxx xxx xxx"

Subsequently, on 07.05.2013 another Notification has been issued by the Haryana Government, which reads as under:

> "No.7/45-2010 PS(2) – In pursuance of the judgment dated 30.12.2002 of the Hon'ble Supreme Court of India in TMA Pai Foundation and others Vs. State of Karnataka (2002) 8 SCC 481, wherein Hon'ble Court has observed that for the redressal of grievances of employees of unaided educational institutions, who are subjected to punishment or termination of services, a mechanism will have to be evolved by constituting appropriate tribunals. The right of filing appeals would lie before the District & Sessions Judge or Addl. District & Sessions Judges till the Tribunals are set up.
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> Accordingly, District & Sessions Judges in the State of Haryana have been authorized to hear appeals of employees of aided/unaided technical education institutions against decision of Management withint their jurisdiction by the Hon'ble Punjab and Haryana High Court, Chandigarh vide No.23414 Gaz.II/IX.CII, dated 10.08.200_. The Tribunals already notified by the Hon'ble High Court will also hear appeals of employees of aided/unaided schools against the orders of Management.
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> xxx xxx xxx"

Learned counsel for the petitioners have vehemently argued that the Circular of the High Court dated 03.04.2008 only crystallizes the Forum for hearing of the appeals against the action of the Management. The High Court has no legislative competence to determine the scope of the appeals to be presented before the learned District & Sessions Judges including

Additional District & Sessions Judges. Therefore, the words in the Circular 'against the decision of the Management' have to be read in the context of directions of the Supreme Court, which contemplates constitution of Educational Tribunal only against the action of the Management as a consequence of disciplinary proceedings. The District Judges, so empowered, can only decided those appeals, which are against the decision of the Management pertaining to dismissal, removal and reduction in rank etc. The issues relating to pay fixation or gratuity cannot become subject matter of adjudication by the Educational Tribunal. It is argued that some of the orders of this Court holding that the Educational Tribunal has the power to decide all disputes between the Management and the teachers is not made out from the reading of the judgment nor there is any Statute, which contemplates the filing of appeals in such matters before the Educational Tribunal.

It is pointed out that Haryana School Education Act, 1995 (for short 'the Act') deals with disciplinary proceedings against the teachers, but it does not provide for a Forum to challenge the order of the Management, therefore, the order of the Supreme Court has to be read in that context so as to provide right of appeal against the decision of the Management regarding the disciplinary proceedings alone. It is contended that the dispute resolution in respect of pay fixation of the teachers of aided / unaided institution has to be by the Civil Court in the absence of any other Forum created under the Statute.

It is further argued that the issue of payment of gratuity falls within the jurisdiction of Payment of Gratuity Act, 1972 particularly after amendment in the said Act on 31.12.2009, when the definition of

'employee' was substituted so as to take into ambit any person, who is employed for wages in any kind of work, manual or otherwise instead of any person employed in skilled, unskilled or semi-skilled categories, as the definition original stood. Reliance is placed upon the judgments of Division Bench of Karnataka High Court reported as Shamaraja Udupa Vs. The Assistant Labour Commissioner, Mangalore & others 2013 LIC 810 and Single Bench judgment of Madhya Pradesh High Court in Mahendra Singh Chhabra Vs. Appellate Authority, Under the Payment of Gratuity Act, Indore & another 2012 (1) LLJ 432. Thus, the Members of the teaching faculty are governed by Central Statute. Therefore, the Educational Tribunal constituted in exercise of executive powers of the State Government will not include the subject which is covered by a Central Statute.

On the other hand, learned counsel for the respondents argued that the basic intention of the court to constitute Educational Tribunal as per the directions of the Supreme Court in T.M.A.Pai Foundation's case (supra), is that the teachers should not be made to fight their claims before the Civil Court. Therefore, all disputes which could be decided by the Civil Court would be required to be decided by the Educational Tribunal. Reference is made to the orders passed in CWP No.4148 of 2008 titled 'Ramesh Kumar & others Vs. State of Haryana & others' on 16.03.2009 and 20.05.2009. Reference is also made to an order passed in CWP No.20611 of 2010 titled 'Ramesh Kumar Vs. Ambala College of Engineering and Applied Research, Devsthali (near Mithapur), Ambala & others' decided on 12.03.2012 and subsequent order dated 06.02.2013 passed in LPA No.1084 of 2012 titled 'Ambala College of Engineering and Applied Research Devsthali (near Mithapur), Ambala & another Vs. Ramesh Kumar & others', whereby the

appeal has been allowed and the matter remitted back to the Educational Tribunal.

We find that the issue has been touched in some of the orders passed by the Learned Single Judges of this Court but the Division Bench orders does not deal with the issue specifically.

It may be noticed that on 29.10.2013, learned Additional Advocate General, Haryana sought time to examine the provisions of the Act, its scope and the powers to be exercised by the Educational Tribunal in terms of the judgment of Supreme Court in T.M.A.Pai Foundation's case (supra). Thereafter, Mr. Poonia made a statement on 14.11.2013 that the State Government is contemplating amendment in the Act to provide disputes settlement mechanism between the teachers and the management of the recognized schools within six months. It was stated that such mechanism will address issues of disputes regarding pay-scales and disciplinary proceedings. It was, thus, noticed that the surviving issue is in respect of gratuity alone.

We have heard Learned Counsel for the parties at length. It appears that directions in T.M.A.Pai Foundation's case (supra) are in the context of disciplinary action against a teacher or other employees though clarifying that approval of any Government authority before taking any disciplinary action by the Management of a private unaided educational institution is not required. The direction of the Supreme Court was to provide a judicial Forum against the decision of the Management relating to the termination of services. Therefore, strictly speaking, the direction of the Supreme Court was to constitute Educational Tribunal for determining the issues arising of disciplinary action initiated against the teacher.

Though the circular of the High Court is only to provide a Forum for presentation of the appeals, but the determination of the scope of hearing of such appeals falls within the legislative domain of the State Government independent of the order passed by the Supreme Court. The notification dated 28.05.2008 specifically does not specify as to which orders passed by the management would be appealable, but it is notified that all the District & Sessions Judges have been authorized by the High Court to hear appeals of the employees of aided/unaided Medical/Dental/Ayurvedic/ Homeopathic/Educational Institutions against the decision of Management within their jurisdiction. In other words, the circular of this Court contemplating 'Forum' has been adopted by the State for the purposes of presentation of appeals. Such decision to provide an appeal against the decision of the Management would include all orders which the Management pass in relation to employee of the institution. Such decision to contemplate filing of an appeal against the decision of the Management shall be deemed to be taken in exercise of executive powers of the State in terms of Article 162 of the Constitution of India in the absence of any other legislative enactment dealing with the issue.

The education including technical education, vocational and technical training of Labour specifically falls in Entry 25 of List III of 7th Schedule to the Constittuion. However, in terms of Article 243G of the Constitution read with 11th Schedule, Adult and non-formal education is a function assigned to institution of rural self-government. Similarly, Entry 13 of 12th Schedule read with Article 243W empowers the Urban Local Bodies to promote education. In fact, the subject of education may fall in one or the other Entry of the 7th Schedule, but it could not be pointed out that there is

any other legislation on the subject of teachers and the management of aided or unaided educational institutes in the States except the Act. In the absence of any specific Statute enacted by the Parliament, to regulate the terms of employment of teachers of the educational institutions and the State having enacted the Act, prima facie, it appears that all disputes relating to pay scales and disciplinary proceedings etc. would fall within the legislative competence of the State Government.

The subsequent notification dated 07.05.2013 does not change the scope or jurisdiction of the Educational Tribunal in any substantial manner. Therefore, any decision of the Management could be challenged by way of an appeal before the Educational Tribunal. Consequently, we find that though the Supreme Court in T.M.A.Pai Foundation's case (supra), directed constitution of Educational Tribunal relating to disciplinary matters, but in view of the decision of the State Government, taken in exercise of the executive powers of the State, the decision of the Management regarding pay scale can also be subject matter of appeal before the Educational Tribunal.

However, the question; whether the State Government is competent to empower Educational Tribunal to hear appeals in the matters pertaining to payment of gratuity, requires consideration.

Initially, the definition of 'employee' as contained in Section 2 (e) of the Payment of Gratuity Act, 1972 (for short the "Gratuity Act") contemplated to mean any person engaged to do any skilled, semi-skilled or unskilled, manual, supervisory, technical or clerical work. Such definition was examined by the Supreme Court in **Ahmedabad Pvt. Primary Teachers Association Vs. Administrative Officer & others (2004) 1 SCC**

755, wherein it was held that the teachers do not answer description of being employees who are skilled, semi-skilled or unskilled. Thus, the teacher as a class does not fall within the definition of 'employee' as contained in Section 2 (e) of the Gratuity Act. Thereafter, Section 2 (e) has been substituted vide the Payment of Gratuity (Amendment) Act, 2009 (No.47 of 2009) on 31.12.2009 with retrospective effect i.e. from 03.04.1997. It may be noticed that 03.04.1997 is the date, when a notification was issued to extend the provisions of the Payment of Gratuity Act, 1972 to the Educational Institutions. The said notification reads as under:

> "Notification No.5-42013/1/95-SS II dated 3rd April, 1997 – In exercise of the powers conferred by Clause (c) of sub-clause (3) of Section 1 of the Payment of Gratuity Act, 1972 (39 of 1972), the Central Government hereby specifies the educational institutions in which ten or more persons are employed or were employed on any day preceding 12 months as a class of establishments to which the said Act shall apply with effect from the date of publication of this notification.
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> Provided that nothing contained in this notification shall affect the operation of the notification of the Ministry of Labour S.O. 239 dated 8th January, 1982."

Therefore, though the Educational Institutions were governed by Payment of Gratuity Act, but the teachers were excluded out of it for the reason that they were not falling in the category of skilled, semi-skilled or unskilled workers. But after the substitution of definition of 'employee' under Section 2 (e) vide Act No.47 of 2009 on 31.12.2009, any person, who is engaged in any kind of work manual or otherwise, is an employee governed by the Gratuity Act. Thus, the teachers of an Educational Institution would be employees governed by the Gratuity Act. Such is the view taken by Karnataka High Court in Shamaraja Udupa's case (supra), wherein it has been held that teachers working in Educational Institutions are

now entitled to benefit of gratuity under the Gratuity Act. The Court held as under:

> "13. A careful reading of the aforesaid definition makes it clear that consciously, the Parliament has used the word 'any kind of work, manual or otherwise'. Therefore, the definition of 'employee' as amended, includes the teaching staff of educational institutions. The said benefit is given from 3rd April, 1997, the day on which the notification was issued by the Central Government by clause (c) of sub-section (3) of Section 1 of the Act, making the Act applicable to educational institutions. Therefore, the aforesaid judgment rendered by the Apex Court in the context of definition of Section 2(e) prior to amendment has no application to the case arising after substitution of new definition of employee under Section 2 (e) of the Act. Therefore, in view of express words used in the amended definition of 'employee' under Section 2 (e) of the Act, where the words 'in any kind of work, manual or otherwise, in or in connection with the establishment to which the Act applies', are used, the teachers working in educational institutions are now entitled to the benefit of payment of gratuity under the Act."

Thus, in the absence of any provision of gratuity in the State Act, the gratuity is payable to the teachers under the Gratuity Act. Since the right of payment of gratuity has been created under the Statute, the remedy provided under the Statute alone has to be exercised. Therefore, in the case of non-payment of gratuity, an employee of an educational institute including teaching and non-teaching staff is to avail remedy from the dispute redressal mechanism established under the Gratuity Act.

However, the Gratuity Act was enacted for payment of gratuity to industrial workers. Such enactment is, thus, appears to have been enacted in terms of powers conferred on Parliament in List I of 7th Schedule. Since the issue; whether the gratuity payable to teaching and non-teaching staff of educational institutions, has since been covered as part of the Gratuity Act, therefore, the legislative competence of the State to legislate on the issue of

gratuity is not free from difficulty. Since the said question has not been debated at length nor it was one of the questions referred for the opinion of the larger Bench, we leave the said question to be decided at an appropriate stage, if need so arises.

The argument that the payment of gratuity is a granted to a teacher under the contract in terms of the service conditions will not empower Educational Tribunal to exercise jurisdiction in the matters pertaining to gratuity. Since the service contract has not provided any mechanism for settlement of disputes regarding payment of gratuity, the aggrieved person would have the remedy either to invoke the jurisdiction of the Civil Court or to avail the remedy provided under the Statute. The remedy before the Civil Court was found to be not expeditious by Supreme Court and may not be available in view of the right created under the Statute, therefore, till such time appropriate provision is created in the State Statute, if permissible in law, the aggrieved Members of teaching and non-teaching staff in respect of payment of gratuity have to avail the remedy under the Payment of Gratuity Act alone. The provisions of such Central Statute cannot be said to be abrogated or modified in any manner by the State Government in exercise of its executive powers while publishing notifications dated 28.05.2008 and 07.05.2013.

In view of the above discussion, we concluded as under:

(i) That an Educational Tribunal constituted in terms of the direction of the Supreme Court in T.M.A.Pai Foundation's case (supra), will not have the jurisdiction to decide issue of payment of gratuity, as the same is payable to the teaching and non-teaching staff in terms of the Payment of Gratuity Act, 1972.

(ii) In respect of second question, the notification of the State Government constituting Educational Tribunal will include all service disputes arising out of an order passed by the Management, as appealable to the Educational Tribunal. Such right to appeal is not arising in view of the judgment in T.M.A.Pai Foundation's case (supra), but in exercise of the executive powers of the State.

(iii) The State Government shall consider appropriate amendments in the Haryana School Education Act, 1995 in the light of statement made by Mr. Poonia before this Court expeditiously.

(iv) Since the controversy regarding the Forum for adjudication of disputes relating to payment of gratuity has been settled now, it shall be open to the aggrieved persons to seek redressal under the Payment of Gratuity Act, 1972 in accordance with law, if the same is availed within two months from today. The payment deposited by the petitioners shall be subject to the decision of the Authority under the Payment of Gratuity Act.

Since the questions of law have been answered, the matter be placed before the learned Single Bench for appropriate decision.

(HEMANT GUPTA)
JUDGE

27.11.2013
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(FATEH DEEP SINGH)
JUDGE