

No. Fin (Pen)A(3)-1/09-Part-V-Loose  
Government of Himachal Pradesh  
Finance(Pension) Department

From

The Additional Chief Secretary (Finance) to the  
Government of Himachal Pradesh

To

1. All Administrative Secretaries to the  
Government of Himachal Pradesh.
2. All Heads of Departments  
Himachal Pradesh.

Dated Shimla-2, the 31<sup>st</sup> December, 2020

Subject: Clarification regarding payment of gratuity under the Payment of  
Gratuity of Act, 1972.

Sir,

1. I am directed to refer to the subject cited above and to say that references are being received in this department from various quarters seeking clarification with regard to payment of gratuity to the Govt. employees for combined service of both daily waged and regular service on the basis of pay last drawn by an employee at the time of retirement under the Payment of Gratuity Act, 1972, keeping in view orders passed by the Controlling Authorities-Cum-Labour Officers, Department of Labour and Employment, Himachal Pradesh. The matter in question was examined in Finance Department in consultation with the Law Department.
2. Basically, fundamental nature of the payment of Gratuity Act 1972 is a social welfare legislation, aimed to provide payment of gratuity to 'employees' engaged in factories, mines, oilfields, plantations, ports, railway companies, shops or other establishments.
3. The Section 2(e) of the Payment of Gratuity Act 1972, defines that "employee" means any person (other than an apprentice) who is employed for wages, whether the terms of such employment are express or implied, in any kind of work, manual or otherwise, in or in connection with the work of a factory, mine, oilfield, plantation, port, railway company, shop or other establishment to which this Act applies, 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.

4. Further, Section 2A of the Act defines the continuous service and Section 4 of Act, stipulates conditions and manner, in which, payment of gratuity will be paid to an employee under the said Act. The Section 4(1) of Payment of Gratuity Act 1972, clearly stipulates that for every completed year of service or part thereof in excess of six months, the employer shall pay gratuity to an employee at the rate of 'fifteen days' wages based on the rate of wages last drawn on termination of employment of an employee after he has rendered continuous service for not less than five years.

5. It is crystal clear from the provisions in Section 2(e) and Section 4(2) of the Payment of Gratuity Act, 1972, that the terminology last pay drawn, as find mention in the orders of the Controlling Authority-Cum-Labour Officer, Department of Labour and Employment, will apply to the wages last drawn by a person/employee in the capacity of a daily wager before date of regularization of his daily waged service.

6. Therefore, keeping in view the position of Section 2(e) and Section 4 of the Payment of Gratuity Act, 1972, wherever, the Controlling Authority-cum- Labour Officer, has passed order(s) to consider the last pay drawn by the applicant, in the capacity of a regular employee for the purpose of calculation of gratuity under this Act, is contrary to the statutory provision of the aforesaid Payment of Gratuity Act, 1972. Apart this, any decision, rendered by the Controlling Authority-cum-Labour Officer(s) to take last pay drawn by an employee at the time of retirement for calculation of gratuity for both daily waged and regular service is also contrary to the Hon'ble High Court, Himachal Pradesh, decision dated 9<sup>th</sup> May, 2007 in Lashkari Ram's case {(2008) ILLJ 137 HP, 2008 (1) ShimLC 245}

7. As you are aware that Govt. employees appointed on regular basis on or before 14.05.2003 are governed by the CCS(Pension)Rules, 1972 and they are entitled to gratuity under these Rules. Similarly, Govt. employees appointed on regular basis on or after 15.5.2003 are covered under the Contributory

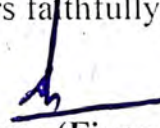


Pension Scheme now called New Pension System (NPS) and they are entitled to retirement gratuity /death gratuity in accordance with Govt. instructions contained in O.M. No. Fin (Pen) A (3)-1/96 dated 18<sup>th</sup> September, 2017.

8. Therefore, keeping in view the position of Act/Rules/Instructions, as referred to above, it is emphasized upon all concerned that in the cases, where, the Controlling Authority-cum-Labour Officer(s) or Joint Commissioner-cum-Appellate Authority, has passed order(s) to determine the gratuity of Govt. servant by taking into account both daily waged period and regular service of such Govt. servant, based on emoluments last drawn by him at the time of retirement, under the Payment of Gratuity Act, 1972, such orders may be agitated in higher appellate Court immediately by way of filing appeals in time bound manner.

9. These instructions/ clarification may be brought to the notice of Subordinate offices for immediate compliance.


Yours faithfully,

  
Special Secretary (Finance) to the  
Government of Himachal Pradesh.

Endst. No. As above. Dated: Shimla-2, the 31/12/2020

Copy is forwarded to:

1. The Divisional Commissioner, Shimla, Mandi and Kangra at Dharamshala Himachal Pradesh for information and similar necessary action.
2. The Principal Accountant General (Audit) Himachal Pradesh Shimla-171003.
3. The Accountant General (A&E) Himachal Pradesh-171003.
4. The Registrar General, H. P. High Court, Shimla - 171001.
5. All Deputy Commissioners in Himachal Pradesh.
6. All the Controllers/ Joint Controllers/Deputy Controllers / Assistant Controllers/Section Officers of HPFAS cadre under the Administrative Control of T&A Organization in Himachal Pradesh.
7. All District Treasury Officers/Treasury Officers in Himachal Pradesh.
8. The Incharge, NIC, H.P. Secretariat, Shimla-2 with the request to upload this letter on the State Finance Department Website.

  
Special Secretary (Finance) to the  
Government of Himachal Pradesh.



# हिमाचल प्रदेश सरकार

From pre-page :)

## Government of Himachal Pradesh Law Department (Opinion)

"N-124/ante:- Examined in the Law Department. The AD has sought the opinion of this department on the following issues:-

- 1) Whether, for the payment of Gratuity under "Payment of Gratuity Act, 1972", last wages drawn before regularization should be taken as base for calculation or is to be calculated on the basis of last pay drawn before the superannuation of employee in view of the provision as contained in section 4(2) of the Payment of Gratuity Act, 1972?
- 2) Whether the judgment passed in Civil Appeal No. 1254/2018 titled as Netram Sahu Vs. State of Chhattisgarh and Anr., decided on 23-03-2018 by the Hon'ble Apex Court is judgment in rem or judgment in personam?
- 3) Whether, this judgment is applicable in the instant case or not.?

Perusal of the record would, inter alia, reveal that the aforesaid issues have arisen before the AD on account of the decision dated 08-05-2019 rendered by the Controlling Authority-cum-Labour Officer, Mandi Zone, Mandi in case No. 04/2018 titled Smt. Sewati Devi Vs. the Deputy Director of Horticulture, Mandi, whereby it has been concluded by the Authority that the total length of service of the claimant with the employer w.e.f. 01-01-1989 to 31-12-1999 was eleven years and she was thus entitled to the payment of gratuity only for 11 years daily wages services and last wages drawn for regular period was to be deemed as a base for calculating daily wage period as per the decision of the Hon'ble High Court passed in case titled HPSEB Vs. Balak Ram, 2007(3) SCC202 as well as in CWP No. 2307/2016 titled Principal Secretary Forest & Others Versus Amar Singh. Issues have also arisen on account of the decision dated 23-03-2018 rendered by the Hon'ble Apex Court in Civil Appeal No. 1254/2018 titled as Netram Sahu Vs. State of Chhattisgarh and Anr.

In the above backdrop and in the context of the issues raised above by the AD, it would be apt, in the first instance, to have a look at the fundamental of the scheme of things envisaged in the Payment of Gratuity Act, 1972. The Act ibid is in the nature of a social welfare legislation aimed at to provide for a scheme for the payment of gratuity to employees engaged in factories, mines, oilfields, plantations, ports, Railway Companies, shops or

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other establishments. The significance of this legislation lies in the acceptance of the principle of gratuity as a compulsory statutory retiral benefits. The Act accepts, in principle, compulsory payment of gratuity as a social security measure to the wage earning population in industries, factories and establishments. Thus, the main purpose and concept of gratuity is to help the workman after retirement, whether retirement is a result of the rules of superannuation or physical disablement or impairment of vital part of body.

Section 2(e) of the Act ibid defines employee as... "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. Thus, section 2 of the Act clearly defines the class of person(s)/employee(s) to whom the benefits under the scheme of the Payment of Gratuity Act, 1972 are required to be extended. Section 2A of the Act defines the continuous service whereas section 4 provides for the manner in which payment of Gratuity is to be made to a person/employee.

In the above discussed main scheme of the Act, lets now advert to the first issue raised by the AD. In the considered opinion of this department, it is amply clear from the definition as contained in section 2(e) and discussed hereinabove, that the terminology last pay drawn as find mention in section 4(2) applies to the last pay drawn by a person/employee in the capacity of a daily wager i.e. prior to regularization of his services. It is clearly provided in section 2(e) that the vires of the Act do not apply in the case of a 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. Since, the applicant in the case referred to by the AD, held a post under the State Government at the time of her retirement; therefore, it was not proper on the part of the Controlling Authority to take into consideration the last pay drawn by the applicant, in the capacity of a regular employee for the purpose of calculation of gratuity under the provisions of the Gratuity Act. It is worthwhile to mention here that the decision rendered by the Controlling Authority in the case referred to by the AD is also contrary to the case of Lashkari Ram decided by the HHC wherein it was, interalia, held that the gratuity for the daily wage period was to be calculated as

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per the Payment of Gratuity Act, 1972 and for regular period it was to be calculated as per the provisions of the CCS(Pension)Rules, 1972. The decision rendered in the case of Lashkari Ram thus appears to be well in consonance with the intention, objectives and sprit of the Payment of Gratuity Act, 1972.

As far the issues No 2 & 3 are concerned, in this regard, it may be mentioned here that, amongst other, the decision rendered in the case of Netram Sahu Vs. State of Chhattisgarh and Anr., decided on 23-03-2018, recently fell for consideration of the Hon'ble Apex Court in case Dhansai Sahu Vs. State of Chhattisgarh & Ors.[ Arising out of SLP (Civil) No.4790 of 2019], in which case the following moot question has been found to be involved by the Hon'ble Apex Court:-

**"whether the service rendered as dail-wager before being regularized and given the status of a regular Government servant, can be reckoned, so as to invoke the provisions of the Payment of Gratuity Act, 1972 after the age of superannuation and retirement as State Government Employee."**

After due deliberation, the Hon'ble Apex Court vide order dated 21-01-2020, has found it appropriate to refer the above issue/moot question to be considered by a larger Bench of three judges. The question, therefore, whether the judgment passed in Civil Appeal No. 1254/2018 titled as Netram Sahu Vs. State of Chhattisgarh and Anr., decided on 23-03-2018 by the Hon'ble Apex Court is judgment in rem or judgment in personam, has lost significance until and unless the whole issue is finally adjudicated by the larger Bench in the case of Dhansai Sahu Vs. State of Chhattisgarh & Ors.

Thus, in view of the aforementioned and in the context of the queries raised by the AD, this department is of the considered opinion that since, the applicant in the case referred to by the AD, i.e. case No 04/2018 titled Smt. Sewati Devi Vs the Deputy Director of Horticulture, Mandi, decided by the Controlling Authority-cum-Labour Officer, Mandi Zone, Mandi on 08-05-2019, held a post under the State Government, at the time of her retirement; therefore, it was not proper on the part of the Controlling Authority, moreso in view of the provision contained in section 2(e) of the Act ibid, to take into consideration the last pay drawn by her, in the capacity of a regular employee for the purpose of calculation of gratuity under the provisions of the Gratuity Act. In the considered opinion of this department, this case is a fit one to be assailed further. Not only this, but also all such cases, where the Controlling Authority has taken both daily wage service as well as regular service of an employee into consideration for determining the gratuity under the

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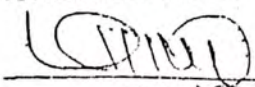


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provisions of the Payment of Gratuity Act, 1972, need to be agitated further more so in view of the observations made by the Hon'ble Apex Court in the case of Dhansai supra. In view of the aforesaid, the AD is advised to act accordingly in the matter.

This has approval of the Legal Remembrancer.

  
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JLR-cum-Jt. Secy. (Law-O) to the  
Government of Himachal Pradesh.

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