

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI

ORIGINAL APPLICATION Nos.265/2015 & 266/2015

Dated this Wednesday the 16th day of March, 2020

CORAM: Dr. BHAGWAN SAHAI, MEMBER (A)
RAVINDER KAUR, MEMBER (J)

Shri Tahilram Nanomal Rohira,
Age 71 years,
Retd. Income Tax Officer, Mumbai
R/at. Lal Sai Apaartment, 3rd Floor,
Flat No.7 Plot No.249,
Near Jhulelal Mandir,
Sant Kanwarram Road,
Ulhasnagar - 421 001.

... Applicant
in OA No.265/2015

Shri Amar Sabumal Dawani,
Aged 69 years,
Retd. Inspector of Income Tax, Mumbai
R/at. Flat No.301,
Sukhpaav Apartment,
Near Prem Nagar Tekdi,
Ulhasnagar - 421 001.

... Applicant
in OA No.266/2015

(By Advocate Shri Vicky Nagrani)

VERSUS

1. Union of India through
The Secretary,
Ministry of Finance,
Department of Revenue,
North Block,
New Delhi - 110 001.
2. The Chairman
Central Board of Direct Taxes,
North Block,
New Delhi - 110 001.

3. The Additional Commissioner of
Income Tax (HQ) (Vigilance)
Office of Chief Commissioner of
Income Tax, Room No.361,
Aaykar Bhavan, M.K. Road,
Mumbai - 400 020. ... **Respondents**

(By Advocate Shri R.R. Shetty)

ORDER

Per: Ravinder Kaur, Member (J)

These two Original Applications were heard together since the facts and the law involved in these two O.As are identical and the applicants have prayed for the similar reliefs. With the consent of learned counsel for the parties, we dispose of these OAs vide passing a common order by taking OA No.265/2015 as lead case.

2. The applicant in OA No.265/2015 has sought following reliefs under Section 19 of the Administrative Tribunals Act, 1985:

"8(a) This Hon'ble Tribunal may graciously be pleased to call for the records of the case from the respondents and after examining the same quash and set aside the impugned order dated 30.01.2015 with all consequential benefits.

(b) This Hon'ble Tribunal may further be pleased to direct the respondents provisional pension withheld so far by the department be paid to the applicant forthwith by holding that the applicant's case comes under Rule 69(1)(b) of CCS(Pension) Rule 1972.

(c) This Hon'ble Tribunal may further be pleased to direct the respondents to forthwith release the amount of leave encashment payable to the applicant alongwith interest @18% per annum w.e.f. 01.04.2003.

- (d) Costs of the application be provided for.*
(e) Any other and further order as this Hon'ble Tribunal deems fit in the nature and circumstances of the case be passed."

3. The applicant in OA No.266/2015 has sought following reliefs under Section 19 of the Administrative Tribunals Act, 1985:

"8(a) This Hon'ble Tribunal may graciously be pleased to call for the records of the case from the respondents and after examining the same quash and set aside the impugned order dated 27.08.2014 with all consequential benefits.

(b) This Hon'ble Tribunal may further be pleased to direct the respondents provisional pension withheld so far by the department be paid to the applicant forthwith by holding that the applicant's case comes under Rule 69(1)(b) of CCS(Pension) Rule 1972.

(c) This Hon'ble Tribunal may further be pleased to direct the respondents to forthwith release the amount of leave encashment payable to the applicant alongwith interest @18% per annum w.e.f. 01.07.2006.

(d) Costs of the application be provided for.

(e) Any other and further order as this Hon'ble Tribunal deems fit in the nature and circumstances of the case be passed."

4. On 25.01.2001, the applicant was working as ITO in Range-23, Mumbai when CBI registered a Special case No.81/2001 against him under Section 7, 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 for demanding and accepting Rs.10,000/- as illegal gratification. He was placed under suspension vide order dated 28.02.2001. The applicant was issued Memorandum of chargesheet dated 06.02.2003 (Annex A-2) on the basis of evidence collected by the CBI in the above noted criminal

case. All the documents and the witnesses cited in the disciplinary proceedings are identical to the documents and witnesses listed in the chargesheet filed in the CBI case.

4.1 The applicant retired on 31.03.2003 on superannuation. Vide order dated 01.04.2003 (Annex A-3), he was sanctioned provisional pension under Rule 69(1)(a)(b) of CCS(Pension) Rules, 1972 w.e.f. 01.04.2003 till conclusion of the disciplinary proceedings. However, his leave encashment was withheld by the respondents. The applicant made representation dated 05.09.2003 requesting for disbursement of his due leave encashment. Vide order dated 25.09.2003 (Annex A-4), he was communicated that CIT-I, Mumbai had ordered for withholding the payment of leave encashment, till such time the impending inquiry proceedings are not over.

4.2 The applicant made further representation dated 19.12.2003 (Annex A-5) to grant him the leave encashment as there was no allegation of any loss of revenue to the Government till date on account of the applicant. He relied upon Rule 9(2) of CCS(Pension) Rules, 1972 and Rule 39(3) of CCS(Leave)Rules, 1972 in his representation.

Despite the aforesaid representation, the leave encashment was not released to him.

4.3 The applicant was convicted in the Special Case No.81/2001 referred to above vide order dated 01.03.2011 by Special Judge, CBI and was sentenced to undergo RI for one year each under Section 7 and 13(2) read with 13(1)(d) of Prevention of Corruption Act, 1988. He was also imposed a fine of Rs.1000 for each offence. He filed criminal appeal No.284/2011 before Hon'ble High Court of Bombay. Vide order dated 18.04.2011 (Annex A-6), the Hon'ble High Court admitted the appeal and the applicant was ordered to be released on bail.

4.4 After about 2 years, the applicant was served with show cause notice dated 29.07.2013 issued by respondent No.1 whereby the President proposed to award the penalty of permanently withholding his full pension and gratuity under Rule 9 of the CCS(Pension) Rules, 1972, taking into account the gravity of the misconduct. He was given opportunity of making representation within 15 days on the proposed imposition of penalty. The applicant in his reply dated 26.08.2013 (Annex A-8) claiming that his case is

governed by Rule 69(1)(b) and not by Rule 9 of CCS(Pension) Rules, 1972.

4.5 The respondent No.1 sought UPSC advice. The applicant was issued show cause notice dated 14.03.2014 (Annex A-9) seeking his comments/representation on the advice of the UPSC. In response he made representation dated 04.04.2014 (Annex A-10) followed by another representation dated 21.07.2014 (Annex A-11). It is alleged by the applicant that respondent No.1 without considering the crucial point raised by him that his case does not fall under Rule 9 but is under Rule 69 of CCS(Pension) Rules, held him guilty of the charge vide order dated 30.01.2015 (Annex A-1) and imposed penalty of withholding of 100% of his monthly pension on permanent basis alongwith direction to forfeit the Gratuity admissible to the applicant.

5(i) The applicant as well as his counsel have contended that the impugned order dated 30.01.2015 is absolutely illegal and void.

(ii) Although the applicant was convicted by the Special Judge, CBI for the offences punishable under Sections 7, 13(2) read with 13(1)(d) of PC Act, his appeal has been admitted by the Hon'ble

High Court after finding substance in it and suspended his sentence while releasing him on bail.

(iii) The provisions of Rule 9 and Rule 69 of CCS(Pension) Rules, 1972 have not been appreciated by the respondents while imposing the punishment upon the applicant of withholding 100% of monthly pension on permanent basis alongwith forfeiture of the Gratuity admissible.

(iv) As per Rule 69(1)(b) the applicant is entitled for the provisional pension during pendency of both the disciplinary proceedings as well as judicial proceedings. It is stated that the judicial proceedings are still pending against him as though he has been held guilty by the Criminal Court and convicted under the Prevention of Corruption Act, however the conviction by itself will not make any difference as the appeal against the said order at the instance of the applicant is pending disposal before the Hon'ble High Court.

(v) The order dated 30.01.2015 (Annex A-1) has been issued by the respondents in violation of their own orders dated 01.04.2003 and 12.03.2014 whereby the applicant was sanctioned the

provisional pension till the conclusion of the disciplinary proceedings.

(vi) In view of Rule 69 of the Pension Rules, a delinquent employee is entitled to provisional pension from the date of retirement upto and including the date on which the final order that may be given by the competent authority after the conclusion of departmental or judicial proceedings.

(vii) An appeal is a continuation of original proceedings, therefore, since the appeal preferred by the applicant against the judgment/order of the Session Court has been admitted by the Hon'ble High Court, the judicial proceedings against the applicant are still pending and as such the provisions of Rule 69 are applicable to his case and not Rule 9. It is claimed that in the present case neither the departmental proceedings nor the judicial proceedings have been concluded so as to invoke sub Rule (1) of Rule 9 of the Pension Rules. Therefore, the impugned order has been passed in violation of Rule 69 of the Pension Rules.

(viii) With regard to the forfeiture of the Gratuity to which the applicant was entitled, it

is stated that in terms of Rule 69 (1)(c) the President had no power to forfeit it pending appeal before the Hon'ble High Court against the order of conviction and sentence passed by the Session Court.

6. In support of the claim of applicant, learned counsel has relied upon the following judgments:

- (i) *Akhtari Bi (Smt) Vs. State of M.P.*, 2001 (4) SCC 355
- (ii) *N.K. Suparna Vs. Union of India & Ors.*, Karnataka High Court, Writ Petition No.5938 of 2004 decided on 23.09.2004
- (iii) *Union of India and another Vs. Central Administrative Tribunal Chandigarh Bench and another*, 2010 SCC OnLine P&H 11819

7. With regard to leave encashment, the applicant's counsel has drawn our attention to Rule 39(3) of CCS(Leave) Rules, 1972 and has stated that the leave encashment can be withheld only in case of possibility of some money becoming recoverable from the Government servant on conclusion of the disciplinary or criminal proceedings pending against him at the time of his retirement. It is submitted that in the present case, the respondents have withheld the leave encashment without application of mind, without forming an opinion that there is possibility of some money being recoverable from him and in a mechanical manner, they have

withheld the said amount.

8. The applicant is not only entitled for release of leave encashment but also to interest for delayed payment in terms of the judgment of Delhi High Court in the case of Delhi Police Vs. Balwant Singh, W.P. (C) 1227/2012 decided on 13.03.2012 (Annex A-15)

9. The respondents in their reply and arguments of their counsel contend that -

(i) the disciplinary action has been taken against the applicant under Rule 9 which warrants withholding of all retiral dues including the leave encashment. Once an order is passed by the President under Rule 9 to withhold 100% pension, it is equivalent to complete forfeiture of his entire pension and therefore, his leave salary/gratuity also stand forfeited;

(ii) with regard to the conviction of the applicant under PC Act, the mere admission of appeal filed by him against the order of conviction and sentence is of no consequence, as it is only the sentence which has been suspended by the Hon'ble High Court and not the order of his conviction. Therefore, by following the due procedure provided in the CCS(Pension) Rules, 1972, penalty under rule 9 was imposed vide

impugned order dated 30.01.2015. As per Rule 9, if in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, it is within the rights of the President to withhold or withdraw pension. Since the applicant was convicted in judicial proceedings initiated against him by invoking Rule 9, by/under the orders of the President penalty of withholding of 100% of monthly pension otherwise admissible to the applicant on permanent basis has been imposed and the entire gratuity admissible to him was also ordered to be forfeited vide order dated 30.01.2015;

(iii) regarding the withholding of leave encashment, Rule 39(3) of CCS(Leave) Rules, 1972 provides for withholding of leave encashment in case of possibility of any sum becoming recoverable from a Government officer and therefore in the present case, leave encashment is withheld as a measure of final prudence;

(iv) the provisions of Rule 69(1)(b) for grant of provisional pension are only applicable till the date of conclusion of the departmental or judicial proceedings. In the present case after

the competent court of law convicted the applicant in the criminal proceedings in Special Case No.81/2001 vide order dated 04.02.2011, Rule 69 was no more applicable to his case and by following the due process of law in terms of CCS(Pension) Rules, 1972, the penalty order was issued to the applicant under Rule 9;

(v) mere admission of appeal against the conviction and sentence of the applicant, without staying the conviction, is of no consequence and therefore, the applicant is not entitled to grant of provisional pension thereafter in terms of Rule 69. Hence, the OA is devoid of merits and thus liable to be dismissed.

10. In support of their contentions, the respondents have relied the following judgments:-

- (i) *Kunwar Bahadur Vs. Union of India and Others*, reported in 1967 STPL 1064 Allahabad.
- (ii) *R.P. Sharma Vs. Municipal Corporation of Delhi, Delhi High Court*, CWP NO.1705/1999 decided on 26.05.2000.
- (iii) *State of U.P. vs. Mohammad Nooh*, reported in AIR 1958 SC 86.
- (iv) *K.C. Sareen Vs. CBI, Chandigarh*, reported in (2001) 6 SCC 584.
- (v) *Shri Om Parkash Narang Vs. Union of India and Others*, reported in (1990) 12 Administrative Tribunals Cases 365.

11. We have heard the learned counsels for the applicants and respondents at length and have carefully considered the facts, circumstances, law points and rival contentions in these cases. We have carefully examined the pleadings and annexes filed by the parties.

12. It is admitted case of the parties that a criminal case No.81/2001 was registered against the applicant under Sections 7 and 13(1)(d)r/w section 13(2) of the Prevention of Corruption Act, 1988 and he was prosecuted for these offences by the Special Judge, CBI. On the identical facts, the departmental proceedings were also initiated against the applicant vide chargesheet dated 06.02.2003. In the meantime, he retired from service on 31.03.2003 on superannuation. At that time both the departmental proceedings and criminal proceedings were pending against him. On account of his retirement, vide order dated 01.04.2003 (Annex A-3), he was sanctioned provisional pension under Rule 69(1)(a)(b) of CCS Pension Rules, 1972 till the conclusion of the disciplinary proceedings. The relevant order Annex A-3 is reproduced as under:-

"No. ZAO MUM/03-04/255

Date: 1/4/03

*Sub: Authorisation of provisional pension in respect of
Shri T.N. Rohira, ITO retired on superannuation
w.e.f. 31.3.2003 A.N.*

*Ref: i) Your Revised sanction order No.Addl CIT (HQ)
Pers/Prov.Pen/TNR/2003 and
ii) Letter No.Addl.CIT Pers/Pen/2003 dated
11.06.2003.*

Sir,

*In terms of Rule 69 1(a)(b) of CCS Pension rules 1972,
provisional pension of Rs.4548/- + Relief as revised by
government from time to time is hereby authorised for
payment to Shri T.N. Rohira, ITO w.e.f. 1.4.2003 till
conclusion of disciplinary proceedings, You are requested to
prefer the claim.*

Yours faithfully,

sd/-

*(Sr. Accounts Officer)
ZAO, CBDT, Mumbai"*

13. Rule 69 deals with provisional pension where departmental or judicial proceedings may be pending which reads as under:-

"69 Provisional pension where departmental or judicial proceedings may be pending

1(a) In respect of a Government servant referred to in sub-rule (4) of Rule 9, the Accounts Officer shall authorize the provisional pension equal to the maximum pension which would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant, or if he was under suspension on the date of retirement up to the date immediately preceding the date on which he was placed under suspension.

(b) The provisional pension shall be authorized by the Accounts Officer during the period commencing from the date of retirement up to and including the date on which,

after the conclusion of departmental or judicial proceedings, final orders are passed by the Competent Authority.

(c) No gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final orders thereon:

Provided that where departmental proceedings have been instituted under Rule 16 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, for imposing any of the penalties specified in Clauses (I), (ii) and (iv) of rule 11 of the said rules, the payment of gratuity shall be authorized to be paid to the Government servant.

(2) Payment of provisional pension made under sub-rule (1) shall be adjusted against final retirement benefits sanctioned to such Government servant upon conclusion of such proceedings but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld either permanently or for a specified period."

The provisions contained in Rule 69 are mandatory in nature. Under it, provisional pension can be granted to the Government servant from the date of retirement up to the date of conclusion of departmental or judicial proceedings by the order of competent authority.

As per Rule 69(1) (c), until the conclusion of departmental or judicial proceedings, the Government servant is not entitled to be paid gratuity.

14. In the present case, the departmental proceedings were initiated against the applicant on 06.02.2003 and as per the reply affidavit of

the respondents dated 11.04.2016, these are still pending. Though they have not explained as to how these proceedings are pending after retirement of the applicant and the Disciplinary Proceedings initiated under Rule 14 were converted to Proceedings under Rule 9.

15. So far judicial proceedings are concerned, the applicant was convicted vide order dated 01.03.2011 and sentenced to undergo rigorous imprisonment for a period of one year each u/s 7 & 13(2) r/w 13(1)(d) of the PC Act 1988 and was also imposed a fine of Rs.1000/- for each offence. Admittedly, the applicant challenged the aforesaid order by filing appeal before the Hon'ble High Court of Bombay vide Appeal No.284/2011 which was admitted vide order dated 18.04.2011 and operation of order on sentence was suspended. Thereafter the applicant was served with show cause notice dated 29.07.2013 (Annex A-7) by order/in the name of President to the following effect:-

“F.No.C-14011/17/2013-282
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes
New Delhi

Dated:29th July, 2013.

MEMORANDUM

WHEREAS Shri T.N. Rohira, ITO (Retd.) has been convicted on a criminal charge of acceptance of illegal gratification of Rs.10,000/-, by Special Judge for CBI Cases, Greater Bombay vide order dated 01.03.2011 in Special Case No.81 of 2001 and has been sentenced to undergo rigorous imprisonment for a period of one years each u/s 7 & 13(2) r/w 13(1)(d) of the Prevention of Corruption Act 1988 and was also imposed a fine of Rs.1,000/- for each offence.

AND WHEREAS the President proposes to award the penalty of permanently withholding full pension and gratuity on the said Shri T.N. Rohira, under Rule 9 of the CCS(Pension) Rules, 1972 taking into account the gravity of the misconduct.

NOW, THEREFORE, Shri T.N. Rohira, ITO(Retd), is hereby given an opportunity of making representation on the proposed imposition of penalty. Any representation which he may wish to make against the proposed action will be considered by the Disciplinary Authority before proceeding further in the matter. Such a representation, if any, should be made in writing and submitted so as to reach the undersigned not later than 15 days from the date of receipt of this memorandum by Shri T.N. Rohira (Retd.)

The receipt of this memorandum should be acknowledged.

(By order and in the name of the President)"

The above show cause notice finds a mention that the applicant was convicted on the criminal charge by the Special Judge CBI and sentenced to imprisonment. The applicant submitted his representation dated 26.08.1993 in response to the aforesaid show cause notice specifically bringing to the notice of the competent authority that he had filed an appeal before the Hon'ble Bombay High Court against the order of his conviction and sentence, which is admitted

and he is granted bail i.e. the sentence is suspended vide order dated 18.04.2011. He also annexed a copy of that order alongwith the representation. Therein he claimed that his case is covered under Rule 69 of the CCS(Pension) Rules, 1972 and not under Rule 9 as proposed in the show cause notice. However, thereafter the applicant was again issued another Office Memorandum dated 14.03.2014 alongwith the UPSC advice dated 14.02.2014 and sought his comments.

16. We have perused the UPSC Advice dated 14.02.2014, therein they considered the representation of the applicant. The Commission took into consideration the judgment/order of the Special Court whereby the applicant has been convicted under Sections 7 and 13(1)(d) r/w Section 13(2) of the Prevention of Corruption Act, 1988 and sentenced to rigorous imprisonment and fine. It also took note of the fact that the appeal of the applicant against the conviction in sentence order is pending before the High court. However, it observed that in view of the DoPT instructions No.371/23/92-ADV III dated 04.03.1994, the conviction of a person by a criminal court shall remain in force until and

unless it is reversed or set aside by competent Court in appeal. The relevant portion of this instruction quoted in the UPSC Advice is reproduced as below:-

"When a person is convicted by a Criminal Court, the same shall remain in force until and unless it is reversed or set aside by a competent court in appeal. The mere filing of an appeal and/or stay of the execution of the sentence do not take away the effect of conviction, unless the appeal is allowed and the conviction is set aside by the appellate court. In the case of Om Prakash Narang Vs. Union of India and Ors. (1990)12 ATC 365, the full Bench of CAT held that during pendency of appeal in a criminal case, only the sentence is suspended and not the conviction itself. In view of this, the competent disciplinary authority may proceed with the institution/completion of disciplinary proceedings, including imposition of the penalty as prescribed in the relevant disciplinary rule. On the basis of conviction imposed on a public servant by a criminal court notwithstanding the fact that a higher court on an appeal filed by the public servant concerned, may order suspension of the "sentence" passed by the trial Court till the final disposal of the appeal.

The UPSC on the basis of above noted instructions came to the conclusion that there was no force in the applicant's plea that the disciplinary action initiated against him should be pending only on account of his appeal having been admitted by the Hon'ble High Court or due to his release on grant of bail. With regard to the plea of the applicant that he is entitled to provisional pension under Rule 69 mandatorily during the pendency of departmental or judicial proceedings, the Commission observed in para 3.5

of its advice that Rule 9(2) authorises continuation and conclusion of departmental proceedings which were commenced on the Government servant while he was in service. Rule 9(4) authorises payment of provisional pension as provided in Rule 69 to a Government servant against whom departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub rule 2. It is observed that the UPSC in its advice has mentioned that Rule 69(a) provides that the authorization of provisional pension is for the period commencing from the date of retirement of the Government servant upto the passing of the final order by the competent authority on the completion of the departmental or judicial proceedings. Whereas Rule 69(1)(a) to the contrary reads as under:-

69(1)(a) In respect of a Government servant referred to in sub-rule (4) of Rule 9, the Accounts Officer shall authorize the provisional pension equal to the maximum pension which would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant, or if he was under suspension on the date of retirement up to the date immediately preceding the date on which he was placed under suspension."

Thus it appears that either the provision/Rule 69(1)(a) has been wrongly mentioned in the UPSC advice or it has been misread. As per the

opinion of UPSC, institution, continuation and finalisation of departmental proceedings are not in any way barred or subject to the finalisation of judicial proceedings. It opined that the authorisation of payment of provisional pension would end on the completion of departmental proceedings. The judicial proceedings have already been concluded with the delivery of judgment of the Special Court in Special Case No.81/2001 convicting the applicant and sentencing him to RI and fine. It also made reference to the appeal preferred by the applicant against the order of conviction and sentence and the same being admitted by the Hon'ble High Court. However, in view of the UPSC, the right of the Disciplinary Authority to conclude the departmental proceedings instituted against the applicant under the provisions of Rule 9(1) is not circumscribed in any manner pending finalisation of the criminal appeal.

17. In paras 3.7 and 4, the UPSC has given the following advice:-

"3.7 The Commission conclude that in view of the aforesaid, it is clear that the CO has been found guilty of grave misconduct for demanding and accepting a bribe and this guilt has been proved beyond reasonable doubt in view of the conviction by the Special Court of Greater Bombay and that this sentence has not been set aside as yet by the

higher court.

4. In the light of their findings as discussed above and after taking into account all other aspects relevant to the case, the Commission note that the charges established against the CO, constitute grave misconduct on his part and consider that the ends of justice would be met in this case if the penalty of withholding of 100% (hundred percent) of the monthly pension otherwise admissible to the CO. Shri T.N. Rohira is imposed on him on a permanent basis and further the entire gratuity admissible to him should also be forfeited. They advise accordingly."

18. While relying upon the UPSC advice, the Disciplinary Authority made the following order vide paras 8.1, 8.2 and 9, which read as under:-

"8.1 The advice of the UPSC recommending the 'the penalty of withholding of 100% (hundred percent) of the monthly pension otherwise admissible to the CO, Shri T.N. Rohira be imposed on him on a permanent basis and further the (eligible) gratuity admissible to him should also be forfeited, is found acceptable as the same is based on facts and cogent reasoning.

8.2 After taking into consideration all the facts relevant to the case including the conviction order against the CO dated 14.02.2011 passed by the Special Judge for CBI cases, Gr. Bombay, the various submissions made by the CO and the advice of the UPSC in the matter, it is found to be a fit case for invocation of Rule 9 of CCS(Pension) rules, 1972 against the CO to withhold 100% of his monthly pension on permanent basis and to forfeit the entire gratuity admissible to him, as the CO is found guilty of 'grave misconduct'.

9. NOW THEREFORE, the DA orders "withholding of 100% (hundred percent) of the monthly pension otherwise admissible to the CO, Shri T.N. Rohira, ITO (Retd), on a permanent basis and further the entire gratuity admissible to him should also be forfeited" by invoking the provisions of Rule 9 of CCS(Pension) Rules, 1972."

19. Rule 9(4) speaks of judicial or departmental proceedings which are initiated against the Government servant subsequent to his

retirement. It also speaks of departmental proceedings which are initiated during his service and on his retirement are converted to departmental proceedings under Rule 9(2)(a).

Rule 9(2) and Rule 9(4) reads as under:-

"9(2)(a) The departmental proceedings referred to in sub-rule (1), if instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service :

Provided that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President.

(b) The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement, or during his re-employment, -

(i) shall not be instituted save with the sanction of the President,

(ii) shall not be in respect of any event which took place more than four years before such institution, and

(iii) shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service.

(3) Deleted

(4) In the case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as provided in Rule 69 shall be sanctioned. "

So far Rule 69(1)(a) is concerned, it is applicable to the Government servant who is governed by Rule 9(4). If the departmental or judicial proceedings are initiated against the Government Servant after his retirement on superannuation or otherwise, his case for provisional pension is required to be dealt with in accordance with Rule 69(1)(a). At the same time a Government servant against whom departmental proceedings were initiated during his service tenure and on his retirement, these proceedings are continued under sub Rule (2) of Rule 9, he is entitled to provisional pension under Rule 69(1)(a), however subject to fulfillment of conditions laid down in Rule 69(1)(b). Rule 69(1)(b) clearly mentions that the provisional pension shall be authorised during the period commencing from the date of retirement upto the conclusion of departmental or judicial proceedings. However, in the present case, it is observed that the applicant was granted provisional pension under Rule 69 1(a) (b) vide order dated 01.04.2003 and in a casual manner it is mentioned therein that the provisional pension was granted till conclusion

of the departmental proceedings. There is not even a whisper of the pending judicial proceedings against the applicant as till that date the criminal case was still pending trial and had not been concluded at that level. This order itself is thus contrary to the rules.

20. Rule 9(4) does not deal with the Government servant against whom apart from the departmental, judicial proceedings are also pending when he retires. It also speaks of disciplinary proceedings instituted during the service of the Government employee and are still pending when he retires. It is these disciplinary proceedings which are converted to proceedings under Rule 9 on the retirement of the Government servant and are covered under Rule 9(2)(a). Such Government servant is governed by Rule 69(1)(b) for the purposes of provisional pension.

21. No doubt in the present case both the departmental and judicial proceedings were initiated against the applicant during the tenure of his service. On his retirement, the departmental proceedings were deemed to be converted as proceedings under Rule 9(2)(a). Had

it been the case of the respondents that the applicant was only facing departmental proceedings during the tenure of his service which were converted to the proceedings under Rule 9(2)(a), the situation would have been different and the provisions of Rule 69(1)(a) would have been squarely applicable. However, in the present case, apart from the departmental proceedings, the applicant was also facing judicial proceedings which too were initiated during his service tenure. The contention of the respondents that the judicial proceedings came to an end with the pronouncement of judgment of conviction and sentence of the applicant by the Special Court in CBI case No.81/2001 under Section 7 and 13(1)(d) r/w section 13(2) of the Prevention of Corruption Act, 1988 vide judgment/order dated 01.03.2004 has to be dealt with in the light of the other provisions of Rule 69. Rule 69(1) (b) reads as follows:-

"69(b) The provisional pension shall be authorized by the Accounts Officer during the period commencing from the date of retirement up to and including the date on which, after the conclusion of departmental or judicial proceedings, final orders are passed by the Competent Authority."

As per the above noted provision, a Government servant is entitled to provisional pension from

the date of retirement upto and including the date on which after the conclusion of departmental or judicial proceedings, final orders are issued by the competent authority.

22. Learned counsel for the applicant has claimed that since he has challenged the order of conviction and sentenced before the Hon'ble High Court vide appeal No.284/2011 and appeal has already been admitted, the judicial proceedings have still not attained finality and are still pending against him, irrespective of the fact that only order on sentence has been suspended and not the conviction. Under Rule 69(1)(b), the applicant is still entitled to the provisional pension therefore the impugned order of the respondents under Rule 9 is illegal and is liable to be set aside.

23. We have gone through the judgments relied upon by the learned counsel for the respondents.

(i) Though we fully agree with the judgment in the case of Kunwar Bahadur (supra), however the same is not applicable to the facts and circumstances of the present case.

(ii) Although we respectfully agree with the judgments of the Hon'ble Apex Court in the case

of R.P. Sharma (supra), Mohammad Nooh (supra), and Shri Om Parkash Narang (supra), however the same are not applicable to the facts and circumstances of the present case as none of these judgments dealt with the provisions of Rule 9 and Rule 69 of Pension Rules, 1972.

(iii) The judgment in the case of K.C. Sareen (supra) has no bearing upon the present case as though it dealt with the issue of suspension of sentence and conviction under Section 389(1) Cr. PC, it has not dealt with the issue as to whether the judicial proceedings against whom appeal is pending attained finality

24. Learned counsel for respondents has failed to quote any judgment, relevant to the case under consideration.

25. Learned counsel for the applicant has brought to our notice the judgments cited above in para 6 in support of his claim that pendency of appeal is continuation of the judicial proceedings.

(i) Learned counsel for the applicant has relied upon the judgment of Hon'ble Apex Court in the case of Akhtari Bi(Smt) (supra) which made observation in para 5 of the judgment to the

following effect:

'Appeal being a statutory right, the trial court's verdict does not attain finality during pendency of appeal and for that purpose, his trial is deemed to be continuing despite conviction.'

(ii) The Hon'ble Karnataka High court in the case of N.K. Suparna (supra) dealt facts and circumstances identical to the present case. The Petitioner therein was serving as Accounts Officer in Telecom Department. During his service tenure, he was trapped in a criminal case and was prosecuted by the Special CBI Court, Bangalore in CC No.127/1994. The Special Court after trial convicted the Petitioner and sentenced him to undergo RI for 3 years on each count by its judgment and order dated 31.12.2001. The Petitioner challenged that judgment and order in criminal appeal No.78/2002 before the Hon'ble Karnataka High Court which was admitted and pending. The sentence was suspended during the pendency of appeal. After conviction of the Petitioner by the CBI Court, the President of India invoking his power under Rule 9(1) of the Rules, forfeited the pension and gratuity payable to the petitioner. The said action of the President of India was questioned

by the Petitioner vide OA No.486/2003 in CAT Bangalore Bench. The Tribunal dismissed the OA holding that it is within the power of the President of India under Rule 9(1) of the Rules to forfeit the pension and gratuity payable to the Petitioner. The said order of the Tribunal was challenged by the applicant before the Hon'ble High Court vide Writ Petition No.5938/2004. The Hon'ble High Court allowed the Writ Petition while making relevant observations in paras 8 and 9 thereof which are reproduced as under:

8. In order to answer this point, it would be beneficial to first notice the provisions of Rule 69 of the Rules itself. Clause (b) of Sub-rule (1) of Rule 69 reads as follows:-

"69(1)(b):-The provisional pension shall be authorised by the accounts officer during the period commencing from the date of retirement upto and including the date on which, after the conclusion of departmental or judicial proceedings, final orders are passed by the competent authority."

The provision of Clause (b) is quite clear, plain, unambiguous and does not admit more than one meaning. Clause (b) in unmistakable terms directs that a delinquent employee will be entitled to provisional pension from the date of retirement upto and including the date on which the final order that may be made by the competent authority, after the conclusion of the departmental or judicial proceedings. The key words for our purpose are 'after the conclusion of departmental or judicial proceedings'. The interpretation suggested by the learned CGSC for the department is not acceptable to us for more than one reason. It is well settled that the appeal is a continuation of the original proceedings. Since the petitioner being aggrieved by the judgment and order of the CBI Court has preferred appeal to this Court and the same is pending, we

have to necessarily hold that the proceedings are pending. Undoubtedly, the pendency of the appeal in this Court is a judicial proceedings. It also needs to be noticed that the final order envisaged under Rule 9(1) of the Rules in terms of Clause (b) of Sub-rule (1) of Rule 69 of the Rules is required to be passed by the President of India only after the conclusion of the departmental or judicial proceedings. In the instant case, since the judicial proceedings, we mean the launching of the prosecution against the petitioner have not been concluded so far in terms of finality, the President of India invoking the power conferred upon him under sub-rule (1) of Rule 9 would not arise. Therefore, the impugned order passed by the President of India in the purported exercise of power under Rule 9(1) of the Rules should be condemned as one without authority of law inasmuch as the necessary condition to invoke that power did not exist as on the date of the impugned order nor does it exist as on today also.

9. This takes us to the next question whether the President of India is justified in forfeiting the gratuity payable to the petitioner? In terms of Clause (c) of Sub-rule (1) of Rule 69 of the Rules, the petitioner is not entitled to be paid gratuity inasmuch as judicial proceedings are pending and the petitioner has been convicted and sentenced by the original Court. However, we hasten to add that the President of India ought to have awaited the result of the appeal pending before this Court or in the event of further appeal to the Apex Court till the result of such appeal before passing final order in exercise of the power conferred upon him in Sub-rule (1) of Rule 9 of the Rules. Without awaiting for the finality of the proceedings, the President of India has issued the order forfeiting the gratuity also. The only thing he could have done under the circumstances is that he ought to have deferred the payment of gratuity. We clarify this position and direct accordingly.

(iii) The applicant has further relied upon the judgment of Punjab & Haryana High Court in the case of Union of India and Another Vs. CAT, Chandigarh Bench, Chandigarh and another (supra). In this case, the Hon'ble High Court dealt with the issue of release of provisional pension to the applicant

- respondent No.2 (therein) which was being withheld. The facts of this case are also identical to that of the present case. Relying upon the case of N.K. Suparna (supra) and Akhtari Bi(Smt) (supra), the High Court gave its findings vide paras 10 and 11 which read as under:-

"10 With utmost respect we are in agreement with the view of the Division Bench of Karnataka High Court in N.K. Suparna's case (supra). We are also in agreement with the view taken by the Tribunal that the proceedings in appeal is continuation of the original proceedings and until and unless the appeal is decided, pendency of such proceedings in appeal would be deemed to be pending and Rule 69(1)(b) would continue to apply. For the aforesaid purpose the Tribunal has rightly placed reliance on the judgment of Hon'ble the Supreme Court rendered in the case of Smt. Akhtari Bi(supra).

11. We are also in agreement with the view taken by the Division Bench in N.K. Suparna's case (supra) with regard to payment of gratuity under sub-rule (1) of Rule 9 of the Rules. The President should have awaited finality of the proceedings and should not have forfeited the gratuity. At best he could have deferred the payment of gratuity."

26. We have given thoughtful consideration to the provisions of Rule 9 and Rule 69 of CCS(Pension) Rules, 1972 and the judgments cited by learned counsel for the applicant referred to above. Rule 69 (1)(a) and (1)(b) have already been interpreted in para 12. The provisions of Rule 69 are absolutely clear and ambiguous. Clause (b) of Rule 69(1) specifically directs that the charged officer/delinquent officer will

be entitled to provisional pension from the date of retirement upto and including the date on which the final order that may be made by the Competent Authority, after the conclusion of the departmental or judicial proceedings. The key words for interpretation are 'after the conclusion of departmental or judicial proceedings'.

27. Learned counsel for the respondents has argued vehemently that these words appearing in clause (b) of Rule 69(1) would be applicable only to the original proceedings and once the applicant has been convicted by the trial court under PC Act, the President was within its jurisdiction to pass an order under Rule 9 withholding the pension and gratuity of the applicant. It is submitted that the proceedings pending before the Hon'ble High Court in the form of appeal preferred by the applicant against the order of conviction and sentenced cannot be treated as continuation of the judicial proceedings qua the action to be taken under Rule 9 by the Competent Authority. However, the interpretation given by learned counsel for the respondents is not acceptable as

in view of the judgments of various High Courts in the case of N.K. Suparna(supra) and UOI Vs. CAT Chandigarh Bench (supra), it is settled proposition of law that the appeal is a continuation of the original proceedings.

28. Even if we look at the relevant provisions of the Criminal Procedure Code 1973, it leads to only one inference that the appeal is nothing but continuation of the judicial proceedings which though culminated before the trial court but appeal is preferred against the order given by the trial court, either by the prosecution in case of acquittal or by the convict in the case of conviction.

29. In chapter 35 of Cr. PC 1973, section 374 deals with appeal from convictions. As per Section 374(2) *any person who is convicted on a trial by a Sessions Judge or Additional Sessions Judge or on a trial held by any other Court in which a sentence of imprisonment for more than 7 years has been passed, he may appeal to the Hon'ble High Court.* It is observed that if the trial court, whether it is the court of Metropolitan Magistrate or Sessions Court, convicts the accused, he has right to prefer appeal before the Court of Sessions or before the concerned Hon'ble High Court as the

case may be within stipulated period as prescribed. However, if he chooses not to file any appeal to challenge the order of conviction and sentence, the order of trial court attains finality on expiry of period of limitation. If the appeal is preferred after the expiry of the period of appeal, the Appellate Authority may condone the delay and admit the appeal. Where the convict prefers appeal before the Appellate Authority and it is admitted, irrespective of the fact operation of order of conviction and sentence is stayed or not, the judicial proceedings continue to be pending till the disposal of the appeal. It can in no circumstances be prejudged that the appeal will be dismissed only. The appeal is thus continuation of judicial proceedings which will come to an end only with the disposal of appeal whether pending before the Sessions Court or before the Hon'ble High Court or even further appeal to the Hon'ble Apex Court.

30. This view further is fortified by Section 386 which deals with the powers of the appellate court. The relevant portion of Section 386 Cr. PC is extracted as below:-

386. *Power of the Appellate Court.* After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor if he appears, and in case of an appeal under section 377 or section 378, the accused, if he appears, the Appellate Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may-

(a).....

(b) in an appeal from a conviction-

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re- tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or

(ii) alter the finding, maintaining the sentence, or

(iii) with or without altering the finding, alter the nature or the extent, or the nature and extent, of the sentence, but not so as to enhance the Same;"

As per the above noted provision, it is crystal clear that the order of conviction or acquittal passed by the trial court may be reversed in the appeal and this is also one of the reasons that the appeal is treated as a continuation of the judicial proceedings.

31. Section 391 of the Cr. PC deals with the powers of the appellate court for taking further evidence in the matter. Section 391 sub clause 1 reads as under:-

391. *Appellate Court may take further evidence or direct it to be taken.-(1)In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.*

From the above provisions also it is clear that the Appellate Court can issue direction in an appropriate cases for recording of further evidence so as to arrive at a just and fair decision in the appeal.

32. All the above noted provisions of the Cr. PC clearly lead only to one inference and conclusion that the appeal is continuation of the judicial proceedings and till the appeal is disposed off, judicial proceedings remain pending.

33. Hence in the light of the judgments referred to above and the relevant provisions of Cr PC, we have no hesitation to hold that the judicial proceedings which resulted in conviction of the applicant before the Special Judge CBI vide order dated 01.03.2011 are yet not concluded and have not attained finality due to pendency of appeal before the Hon'ble High Court.

34. The respondents have not explained as to what would be the consequences if the applicant earns acquittal in the appeal. The contention of the learned counsel for the respondents that the Hon'ble High Court has only stayed the order on

sentence and not the conviction is of no consequences as it does not mean that the Hon'ble High Court will only examine the issue as to whether the sentence awarded to the applicant was proportionate or not. Since the applicant has challenged both the order on conviction and sentenced before the Hon'ble High Court, therefore the subject matter in the appeal is not only the order on sentence but the judgment of conviction as well.

35. The perusal of the impugned penalty order dated 30.01.2015 clearly shows that the Competent Authority has not dealt with the submissions of the applicant in his representation dated 04.04.2014 in response to the show cause notice dated 14.03.2014 and did not give any clear finding thereon. To the contrary, it is observed that the penalty order is based only on the UPSC advice.

36. Since in the present case the judicial proceedings as mentioned in Rule 69 (1)(b) of the Rules have not attained finality, the power conferred under sub Rule 1 of Rule 9 could not have been invoked. Thus the impugned order dated 30.01.2015 has been issued without authority of

law.

37. So far the forfeiture of gratuity is concerned, Rule 69(1)(c) clearly provides that the Government servant shall not be paid the gratuity until the conclusion of departmental or judicial proceedings and issue a final order thereon. Therefore in view of the fact that the judicial proceedings are still pending against the applicant, the release of gratuity should have been deferred instead of forfeiting it.

38. Vide para 8(c), the applicant has sought direction to the respondents to release the amount of leave encashment payable to him alongwith interest @18% p.a. w.e.f. 01.04.2003. Learned counsel for the applicant has argued that as per Rule 39(3) of Leave Rules, 1972, the leave encashment can be withheld only in case of possibility of some money becoming recoverable from the Government servant on conclusion of the disciplinary or the criminal proceedings pending against him at the time of his retirement. The respondents have not applied their mind and without forming an opinion that there is possibility of some money being recoverable from the applicant, in a stereo type manner they have

withheld the leave encashment amount. In support of his contention, the applicant has relied upon the judgment of Balwant Singh (supra) of Delhi High Court.

39. The respondents contend that since the disciplinary action has been taken against the applicant under Rule 9 which warrants withholding of all retiral dues, it includes the leave encashment also. It is submitted that since the President has passed order under Rule 9 to withhold 100% pension of the applicant, it is equivalent to complete forfeiture of his entire service and therefore, his leave salary and gratuity also stand forfeited.

40. We have carefully gone through the relevant provision as enshrined in Rule 39(3) of Leave Rules, 1972. The relevant portion of this Rule is produced as under:-

"39(3) The authority competent to grant leave may withhold whole or part of cash equivalent of earned leave in the case of a Government servant who retires from service on attaining the age of retirement while under suspension or while disciplinary or criminal proceedings are pending against him, if in the view of such authority there is a possibility of some money becoming recoverable from him on conclusion of the proceedings against him. On conclusion of the proceedings, he will become eligible to the amount so withheld after adjustment of Government dues, if any.

41. As per sub rule 39(3), the Competent Authority is empowered to withhold whole or part of the leave encashment in the case of a Government servant who retires from the service on superannuation while under suspension or while disciplinary or criminal proceedings are pending against him provided the competent authority is of the view that there is possibility of some money becoming recoverable from the Government servant on conclusion of the proceedings against him. It further provides that on conclusion of the departmental or judicial proceedings, the Government servant will become eligible to the amount so withheld after adjustment of Government dues, if any. Hence, bare perusal of this provision shows that to withhold the whole or part of the leave encashment, it is pre-requisite that the Competent Authority on forming an opinion that there is possibility of some money becoming recoverable from the Government servant on the conclusion of the proceedings against him. The contention of the learned counsel for the respondents that since the Competent Authority has imposed penalty of withholding of 100% of

his monthly pension on permanent basis alongwith forfeiture of Gratuity, the leave salary also stands forfeited, has no force as there is no order on record whereby the leave encashment/leave salary has been forfeited by the specific order of the competent authority forming a view that there is possibility of some money becoming recoverable from the applicant on the conclusion of the proceedings pending against him.

42. In view of the above discussion, We hereby quash and set aside the impugned order dated 30.01.2015 in OA No.265/2015 and impugned order dated 27.08.2014 in OA No.266/2015.

43. So far the relief claimed vide para 8(c) is concerned, the applicants are at liberty to approach the concerned respondent authority vide detailed representation for release of leave encashment amount, within a period of four weeks from the date of receipt of certified copy of this order. The Competent Authority is directed to consider the said representation on its own merits in accordance with rules, regulation and law within a period of eight weeks thereafter and within two week thereafter, the order so

passed be communicated to the applicants.

44. With the above observations/directions, the Original Applications stand disposed of. No order as to costs.

(Ravinder Kaur)
Member (J)

(Dr. Bhagwan Sahai)
Member (A)

ma.

JD
19/03/2010

