(12)

CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

Original Application No.568/2004
With
Original Application No.1207/2004

New Delhi, this the 8th day of **December**, **2004**

Hon'ble Mr. Justice V.S. Aggarwal, Chairman
Hon'ble Mr. S.K.Malhotra, Member (A)

O.A.NO.568/2004:

Sohan Lal
Ex. Deputy Director
Directorate of Co-ordination
Police Wireless
Ministry of Home Affairs
R/o C-4 B/39 Janak Puri
New Delhi – 110 058. ... Applicant

(By Advocate: Sh. A.K.Bhardwaj proxy of Shri M.K.Bhardwaj)

Versus

Union of India & Ors. through:

1. The Secretary
Govt. of India
Ministry of Home Affairs
North Block
New Delhi.

2. The Joint Secretary(PM)
Ministry of Home Affairs
North-Block, New Delhi.

3. Sh. Kamalesh Deka
Director Police Communications
DCPW, Ministry of Home Affairs
Block-9, CGO Complex
New Delhi.

4. Sh. MS Popli
Addl. Director
DCPW, Block-9
CGO Complex, New Delhi.

5. The Accounts Officer
Pay and Accounts Office
DCPW, Block-9
CGO Complex, New Delhi.

6. Sh. MK Tewari (IPS)
Deputy Director (Trg.)
BPR&D, Block No.11

CGO Complex, Lodhi Road
New Delhi. ... Respondents

(By Advocate: Sh. K.R.Sachdeva for Respondents 1-5)

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O R D E R (Common)

By Mr. Justice V.S.Aggarwal:

By this common order, we propose to dispose of the two applications, namely, OA No.568/2004 and OA No.1207/2004. Since they are between the same parties, therefore, they can conveniently be taken up and disposed of together.

2. Some of the relevant facts are that the applicant joined as Technical Assistant in the Office of CAO, Ministry of Defence in the year 1964. He applied for the post of Assistant Director (Cipher) in the Directorate of Coordination Police Wireless, Ministry of Home Affairs. He was selected by the Union Public Service Commission. The applicant contends that he belongs to **Turaiha community** which is recognized as a Scheduled Caste.

3. The applicant has been charge-sheeted under Rule 14 of Central Civil Services (Classification, Control and Appeal) Rules, 1965. Provisional pension has been sanctioned under Rule 69 of Central Civil Services (Pension) Rules, 1972 from 1.7.2002. The other retrial benefits have been withheld because of the pendency of the departmental proceedings.

4. In **OA 1207/2004,** the applicant seeks setting aside of the chargesheet issued by the respondents dated 28.6.2002 while in **OA 568/2004** he seeks a direction to the respondents to release his retrial benefits, i.e., Gratuity, Leave Encashment and Pension Commutation along with interest at the rate of 12 per cent per annum.

5. Some of the other facts alleged by the applicant are that in the year 1995, his brother, namely, Shri Rajinder Singh was a candidate in Gram Panchayat election against one Sh. Revati Prasad. In the said election, Shri Rajinder Singh was elected as Gram Pradhan. Shri Revati Prasad could not tolerate his defeat

and started making false complaints against his opponents as well as the applicant. He even filed an application under Section 12 (C) of Panchayat Rule Act before Sub Divisional Magistrate, Khurja. An order was passed against the brother of the applicant. However, on filing Revision Petition, the District Judge Buland Shahar had allowed the same and remitted the case back to the Sub Divisional Magistrate. The said petition filed by Sh. Revati Prasad was rejected on 3.5.2001. Shri Prasad had filed a false complaint against the applicant. The matter was referred to the Tehsildar, Shikarpur, Buland Shahar for verification. The certificate issued to the applicant that the certificate issued to him that he was a Scheduled Caste had never been cancelled and the same still holds good. The claim of the applicant is that till such time the certificate is not cancelled on the basis of which he joined the service and further that after an inordinate delay, the charge-sheet could not be served just a day before he was to superannuate.

6. The applicant further contends that his retrial benefits, i.e., Gratuity, Leave Encashment and Pension Commutation cannot be withheld. Hence, he has filed the present applications.

7. Both the applications are being contested.

8. Respondents plead that after the chargesheet was served, the inquiry officer had been appointed. He had sought certain clarifications. The inquiry officer was told to proceed in this regard. The inquiry officer had directed the applicant to appear on 13.8.2003. The applicant submitted a representation stating that inquiry officer had worked under him and as such, he may be changed. Thereafter, another inquiry officer had been nominated.

However, in the meantime, he had been repatriated to his parent department. The nomination of another inquiry officer is presently under consideration. On merits of the matter, the contentions of the applicant have been refuted.

9. We have heard the parties' counsel and have seen the relevant record.

10. At the outset, it would be necessary to mention that at the initial stage while only chargesheet has been served, there is a limited scope for interference in the case:

11. In the case of **MANAGING DIRECTOR, MADRAS METROPOLITAN WATER SUPPLY AND SEWERAGE BOARD AND ANOTHER** v. **R. RAJAN AND OTHERS,** (1996) 1 SCC 338, the Supreme Court held that no interference was called for at an interlocutory stage of the disciplinary proceedings. The findings of the Supreme Court are:

> "7. As rightly held by the learned Single Judge and the Division Bench, no interference was called for at an interlocutory stage of the disciplinary proceedings. The enquiry was no doubt over but the competent authority was yet to decide whether the charges against the respondents are established either wholly or partly and what punishment, if any, is called for. At this stage of proceedings, it was wholly unnecessary to go into the question as to who is competent to impose which punishment upon the respondents. Such an exercise is purely academic at this stage of the disciplinary proceedings. So far as the learned Single Judge is concerned, he did not examine the regulations nor did he record any finding as to the powers of the General Manager, the Board or the Government, as the case may be. He merely directed that in view of the statement made by the learned counsel for the Board, the punishment of dismissal shall not be imposed upon the respondents even if the charges against them are established. When the respondents filed writ appeals, the Division Bench was also of the opinion that this was not the stage to interfere under Article 226 of the

> Constitution nor was it a stage at which one should speculate as to the punishment that may be imposed. But it appears that the Board insisted upon a decision on the question of power. It is because of the assertion on the part of the appellants (that the Managing Director has the power to impose the penalty of compulsory retirement) that the Division Bench examined the question of power on merits. The said assertion of the Managing Director that he has the power to impose the punishment of compulsory retirement probably created an impression in the mind of the Court that the Board has already decided to impose the said punishment upon the respondents and probably it is for the said reason that they examined the said question on merits. (In so far as the respondents are concerned, it was their refrain throughout that the Board had already decided to impose the punishment of dismissal/compulsory retirement upon them and that the enquiry and all the other proceedings were merely an eye-wash).

Same was the view expressed by the Supreme Court in the case of **STATE OF PUNJAB AND OTHERS** v. **AJIT SING,** (1997) 11 SCC 368 and in the case of **AIR INDIA LTD.** v. **M. YOGESHWAR RAJ,** 2000 SCC (L&S) 710.

12. Even in the case of **DISTRICT FOREST OFFICER** v. **R. RAJAMANICKAM AND ANOTHER,** 2000 SCC (L&S) 1100, the Supreme Court held that interference is not called for pertaining to the correctness of the charges. The findings are:

> "1..... Learned counsel appearing for the appellant urged that the kind of limited jurisdiction conferred upon the Tribunal, it was not open to the Administrative Tribunal to go into the correctness or otherwise of the charges leveled against the respondents and thereby quashed the charge-sheets issued against them. We find merit in the submission. In **Union of India** v. **Upendra singh** [(1994) 3 SCC 357] it was held thus: (SCC p.362, para 6)
>
> > "6. In the case of charges framed in a disciplinary inquiry the tribunal or court can interfere only if on the charges framed (read with imputation or particulars of the

> charges, if any) no misconduct or other irregularity alleged can be said to have been made out or the charges framed are contrary to any law. At this stage, the tribunal has no jurisdiction to go into the correctness or truth of the charges. The tribunal cannot take over the functions of the disciplinary authority. The truth or otherwise of the charges is a matter for the disciplinary authority to go into. Indeed, even after the conclusion of the disciplinary proceedings, if the matter comes to court or tribunal, they have no jurisdiction to look into the truth of the charges or into the correctness of the findings recorded by the disciplinary authority or the appellate authority as the case may be."
>
> 2. In view of the aforesaid decision we find that the Tribunal was not justified under law to interfere with the correctness of the charges leveled against the delinquent officer. We, therefore, set aside the order and judgment of the Tribunal under appeal....."

13. The Delhi High Court had also considered the said controversy and in the case of **THAN SINGH** v. **UNION OF INDIA & OTHERS**, 2003 (3) ATJ 42 held that chargesheet can be questioned only on the grounds that (1) it does not disclose any misconduct (2) there is non application of mind in issuing chargesheet (3) it is vague (4) it is based on stale allegations and (5) there are patent malafides. With this limited scope for interference, we revert back to the questions agitated at the Bar.

14. The learned counsel for the applicant urged that the inquiry could not be started after more than three decades of the applicant having served and that it has been served just a few days before he was to superannuate. He relied upon the fact that the **stale inquiry**, would prejudice the claim of the applicant. The question that **stale inquiry** after an inordinate delay cannot be

initiated, had been considered by the Apex Court **more often than once.**

15. The Supreme Court had considered this fact in the case of **STATE OF MADHYA PRADESH** v. **BANI SINGH AND ANOTHER,** 1990 (2) SLR 798 where there was a delay in initiation of the departmental proceedings. In that matter also, a delay of 12 years occurred to initiate the departmental proceedings. The Supreme Court deprecated the said practice of initiation of departmental proceedings after so many years. The findings of the Supreme Court are:

> "4. The appeal against the order dated 16.12.1987 has been filed on the ground that the Tribunal should not have quashed the proceedings merely on the ground of delay and laches and should have allowed the enquiry to go on to decide the matter on merits. We are unable to agree with this contention of the learned counsel. The irregularities which were the subject matter of the enquiry is said to have taken place between the years 1975-1977. It is not the case of the department that they were not aware of the said irregularities, if any, and came to know it only in 1987. According to them even in irregularities, and the investigations were going on since then. If that is so, it is unreasonable to think that they would have taken more than 12 years to initiate the disciplinary proceedings as stated by the Tribunal. There is no satisfactory explanation for the inordinate delay in issuing the charge memo and we are also of the view that it will be unfair to permit the departmental enquiry to be proceeded with at this stage. In any case, there are not grounds to interfere with the Tribunal's orders and accordingly we dismiss the appeal."

16. At this stage, it may be worthwhile to mention the case of **B.C.CHATURVEDI** v. **UNION OF INDIA AND OTHERS,** (1995) 6 SCC 749. In that case also, there was a delay in initiation of departmental proceedings. The matter was before the Central Bureau of Investigation. It had opined that the evidence was not

strong enough for successful prosecution, but recommended to take disciplinary action. In that backdrop, the Supreme Court held that the delay would not be fatal. The findings read:

> "11. The next question is whether the delay in initiating disciplinary proceedings is an unfair procedure depriving the livelihood of a public servant offending Article 14 or 21 of the Constitution. Each case depends upon its own facts. In a case of the type on hand, it is difficult to have evidence of disproportionate pecuniary resources or assets or property. The public servant, during his tenure, may not be known to be in possession of disproportionate assets or pecuniary resources. He may hold either himself or through somebody on his behalf, property or pecuniary resources. To connect the officer with the resources or assets is a tardious journey, as the Government has to do a lot to collect necessary material in this regard. In normal circumstances, an investigation would be undertaken by the police under the Code of Criminal Procedure, 1973 to collect and collate the entire evidence establishing the essential links between the public servant and the property or pecuniary resources. Snap of any link may prove fatal to the whole exercise. Care and dexterity are necessary. Delay thereby necessarily entails. Therefore, delay by itself is not fatal in this type of cases. It is seen that the C.B.I. had investigated and recommended that the evidence was not strong enough for successful prosecution of the appellant under Section 5(1)(e) of the Act. It had, however, recommended to take disciplinary action. No doubt, much time elapsed in taking necessary decisions at different levels. So, the delay by itself cannot be regarded to have violated Article 14 or 21 of the Constitution."

17. In cases where there is controversy pertaining to the embezzlement and fabrication of false records and if they are detected after sometime, the Supreme Court held that the same should not be profiled. To that effect, we refer the decision in the case of **SECRETARY TO GOVERNMENT, PROHIBITION & EXCISE DEPARTMENT** v. **L. SRINIVASAN,** 1996 (1) ATJ 617, where the Supreme Court held:

> "The Tribunal had set aside the departmental enquiry and quashed the charge on the ground of delay in initiation of disciplinary proceedings. In the nature of the charges, it would take long time to detect embezzlement and fabrication of false records which should be done in secrecy. It is not necessary to go into the merits and record any finding on the charge leveled against the charged officer since any finding recorded by this Court would gravely prejudice the case of the parties at the enquiry and also at the trial. Therefore, we desist from expressing any conclusion on merit or recording any of the contentions raised by the counsel on either side. Suffice it to state that the Administrative Tribunal has committed grossest error in its exercise of the judicial review. The member of the Administrative Tribunal appear (sic) to have no knowledge of the jurisprudence of the service law and exercised power as if he is an appellate forum de hors the limitation of judicial review. This is one such instance where a member had exceeded his power of judicial review in quashing the suspension order and charges even at the threshold. We are coming across frequently such orders putting heavy pressure on this Court to examine each case in detail. It is high time that it is remedied."

18. In the case entitled **STATE OF ANDHRA PRADESH** v. **N. RADHAKISHAN,** JT 1998 (3) SC 123, the Supreme Court held that if delay is unexplained, prejudice would be caused and if it explained, it will not be a ground to quash the proceedings. The Supreme Court findings are:

> "If the delay is unexplained prejudice to the delinquent employee is writ large on the face of it. It could also be seen as to how much the disciplinary authority is serious in pursuing the charges against its employee. It is the basic principle of administrative justice that an officer entrusted with a particular job has to perform his duties honestly, efficiently and in accordance with the rules. If he deviates from this path he is to suffer a penalty prescribed. Normally, disciplinary proceedings should be allowed to take its course as per relevant rules but then delay defeats justice. Delay causes prejudice to the charged officer unless it can be shown that he is to blame for the delay or where there is proper explanation for the delay in conducting

> the disciplinary proceedings. Ultimately, the Court is to balance these two diverse considerations."

From the aforesaid, conclusions can easily be drawn that departmental proceedings should be initiated at the earliest. However, it depends upon the facts and circumstances of each case as to whether any prejudice is caused to the applicant and whether the delay is explained or not. If the fact comes to the notice of the authorities lately, only from that point of time the delay should ordinarily be counted.

19. It is true that the applicant joined service in the year 1964. But as is being admitted at either end, the respondents received the complaint from one Shri Revati Prasad in the month of January, 2001 stating that the applicant was appointed in the Central Government on the basis of a false Scheduled Caste certificate. Respondents plead that on receipt of the complaint, the applicant was directed to submit a photocopy of the Scheduled Caste certificate for verification. The vigilance cell of the Ministry of Home Affairs had also forwarded the same. The applicant submitted the photocopy of the Scheduled Caste Certificate after six months. It was sent for verification. The report of the District Magistrate indicated that applicant belongs to **Dheemar Caste,** which comes under Other Backward Classes and not to **Turaiha community** as claimed by the applicant when he joined service as a member of the Scheduled Caste. The Scheduled Caste certificate of the applicant was again submitted to the District Magistrate for verification. The District Magistrate had informed that after receipt, two certificates have been issued to the applicant - one for Scheduled Caste and another for Other Backward Classes for

verification. So far as the Scheduled Caste certificate dated 16.6.1964 was concerned, there was no mention of file number and that efforts had been made to trace out the old records and the correspondence continued in this regard. Respondents contend that it was established that applicant belongs to **Dheemar Caste** and not to **Turaiha community** and that he had submitted the false certificate.

20. These facts indicate that the facts on the basis of which the departmental inquiry is being initiated came to light only recently, i.e., sometime before the chargesheet was served. It cannot, therefore, be taken that in the peculiar facts, there is an inordinate delay which may prompt this Tribunal to invoke the principle that **stale claims** could not be the basis of a departmental action. When only recently the facts had come to light, the said plea must be **rejected.**

21. Another **limb of the argument** advanced was that the **inquiry could not be started just before the applicant was superannuating.** Learned counsel for the applicant strongly relied upon the decision of the **Bombay High Court(D.B.)** in the case of **ANIL VASNATRAO SHIRPURKAR** v. **STATE OF MAHARASHTRA AND OTHERS**, 2003(3) SLR 228. In the cited case, **Anil Vasnatrao Shirpurkar** was appointed in 1994. Proceedings were initiated against him for not belonging to alleged caste after seven years of service. The services of the applicant had been terminated. The Bombay High Court had held that since the proceedings had not been initiated within a reasonable time, i.e., two years when he was on probation, the impugned order was quashed.

22. We would have followed the decision of the Bombay High Court but for the decision of the Supreme Court in the case of **R. VISHWANATHA PILLAI** v. **STATE OF KERALA & ORS.**, 2004(2) AISLJ 1, it cannot be. In the cited case before the Supreme Court, the appellant had been appointed being a member of the Scheduled Caste. He was promoted to Indian Police Service and had put in 27 years of service. On complaint, his status was investigated by a Special Committee and Scrutiny Committee, who found that he did not belong to Scheduled Caste community. His services were terminated. The Supreme Court held that since he had been appointed by a false certificate, the said appointment was void ab initio and further that his termination was not due to any misconduct but because he did not belong to Scheduled Caste and full opportunity had been given to the applicant. In this regard, therefore, the appeal had been rejected. The Supreme Court held:

> "14. This apart, the appellant obtained the appointment in the service on the basis that he belonged to a Scheduled Caste community. When it was found by the Scrutiny Committee that he did not belong to the Scheduled Caste community, then the very basis of his appointment was taken away. His appointment was no appointment in the eyes of law. He cannot claim a right to the post as he had usurped the post meant for a reserved candidate by playing a fraud and producing a false caste certificate. Unless the appellant can lay a claim to the post on the basis of his appointment he cannot claim the constitutional guarantee given under the Article 311 of the Constitution. As he had obtained the appointment on the basis of a false caste certificate he cannot be considered to be a person who holds a post within the meaning of Article 311 of the Constitution of India. Finding recorded by the Scrutiny Committee that the appellant got the appointment on the basis of false caste certificate has become final. The position, therefore, is that the appellant has usurped the post should have gone to a member of the Scheduled Caste. In view of the finding recorded

> by the Scrutiny Committee and upheld upto this Court he has disqualified himself to hold the post. Appointment was void from its inception. It cannot be said that the said void appointment would enable the appellant to claim that he was holding a civil post within the meaning of Article 311 of the Constitution of India. As appellant had obtained the appointment by playing a fraud he cannot be allowed to take advantage of his own fraud in entering the service and claim that he was holder of the post entitled to be dealt with in terms of Article 311 of the Constitution of India or the Rules framed thereunder. Where an appointment is no appointment in law, in service and in such a situation Article 311 of the Constitution is not attracted at all."

23. Therefore, it is obvious that the principle so much thought of by the learned counsel that proceedings cannot be initiated, must be rejected because it goes with the facts and circumstances of each case. If the applicant had obtained the service by pressing fraud and once the fraud comes to the notice, necessarily the said principle that there is an inordinate delay and due care and caution should have been taken within two years, cannot be pressed into service.

24. We are conscious of the fact that Supreme Court in the case of **R. Vishwanatha Pillai (supra)** was concerned where Article 311 of the Constitution had not been followed but following the basic principle to which we have referred to above, it held that where the appointment is obtained by virtue of fraud, the appointment order would be in nullity.

25. Pertaining to the contention of the applicant that departmental proceedings cannot be initiated few days before he was to superannuate, it becomes unnecessary for us to dwell into some of the decisions of this Tribunal because of the plain

language of Rule 9(2)(a) of the CCS (Pension) Rules, 1972. It reads as under:

> "(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."

26. The plain language speaks in itself that if departmental proceedings are instituted while the Government servant in service, it can continue after he superannuates. The proceedings would be deemed to be under Rule 9.

27. When the language is plain and the meaning is clear, it becomes unnecessary to dwell into Law Lexicon but we can certainly take advantage of referring to the decision of the Supreme Court in the case of **D.V.KAPOOR** v. **UNION OF INDIA AND OTHERS**, AIR 1990 SC 1923. A similar argument had been advanced and the Supreme Court rejected the same holding:

> "2. ... . We find no substance in the contention. Rule 9(2) of the Rules provided that the departmental proceedings 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 has continued in service. Therefore, merely because the appellant was allowed to retire the

> Government is not lacking jurisdiction or power to continue the proceedings already initiated to the logical conclusion thereto. The disciplinary proceedings initiated under the Conduct Rules must be deemed to be proceedings under the rules and shall be continued and concluded by the authorities by which the proceedings have been commenced in the same manner as if the Government servant had continued in service. The only inhibition thereafter is as provided in the proviso namely "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". That has been done in this case and the President passed the impugned order. Accordingly we hold that the proceedings are valid in law and they are not abated consequent to voluntary retirement of the appellant and the order was passed by the competent authority, i.e., the President of India."

28. It was still urged that without cancelling the Scheduled Caste certificate, the departmental inquiry could not be initiated. In support of his plea, the learned counsel relied upon the decision of the Madras High Court in the case of **SMT. SAJOJA** v. **SENIOR REG. MANAGER (E.I.) FOOD CORP. OF INDIA, CHENNAI & ANR.**, 2003(3) ATJ (Madras) 58. In the cited case, the facts were that on the basis of the community certificate issued by the Tehsildar, the applicant before the Madras High Court had applied for employment. Her name was in the waiting list. She was given offer of appointment subject to the production of community certificate. The respondents had written to the Collector who had not replied. While the matter stood thus, a Writ Petition was filed in the Madras High Court. It was allowed holding that appointment should be given but it was further observed that question of validity of certificate has already been raised. It was directed that it should be considered by the appropriate State Level Committee in accordance with law and ultimately if it is found

invalid, the appointment letter can be cancelled. The logic and reasoning arrived at was that since the community certificate had already been issued, insisting upon production of another one was not called for. That is not the question before us and therefore, the cited decision is clearly distinguishable.

29. The learned counsel in that event relied upon the decision of the Jaipur Bench of this Tribunal in **CHUNNI LAL** v. **THE UNION OF INDIA & OTHERS**, 2000 (3) ATJ 305. In the cited case, **Chunni Lal** had submitted a Scheduled Caste (Koli Caste) certificate issued by the Tehsildar. The Railway Board had issued instructions that employees are eligible to get the benefit of Scheduled Caste and Scheduled Tribe reservation from the date the caste certificate is submitted in the department. In the service record of Shri Chunni Lal his gotra "Mahawar" had been mentioned as caste but in the medical certificate, he had signed as Chunni Lal Biloniya. There was an apparent contradiction in different documents. In the peculiar facts of that case, the application was allowed and the caste certificate issued to the applicant was held to be valid. This was for the added reason that on inquiry, it was informed that record of the relevant period was not available. Similarly, the Karnataka High Court in the case of **G. SATHYA MURTHY** v. **DIRECTOR, I.T.I. BANGALORE & ORS.,** 2003 (2) ATJ 160 had concluded that it is the competent authority who can examine the genuineness of the certificate issued.

30. As has to be noticed hereinafter, the position herein is different. Though original record could not be traced, as has been admitted in the counter reply, but the reply of the District Magistrate clearly indicates that the applicant had described

himself belonging to **Turaiha community**, while, in fact, he belonged to the other community (**Dheemar Caste**), which falls in the category of Other Backward Classes. The answer is obvious and this prompted the respondents to take up the matter by initiating the departmental proceedings that the certificate produced at the relevant time was not genuine. Consequently, at this stage at the threshold, we find little ground to interfere.

31. In that event, it had been contended that the order by which commuted pension is withheld, is illegal. However, **Rule 4 of CCS (Commutation of Pension) Rules, 1981** provides the answer that the person against whom the departmental proceedings are pending, even under Rule 9 of the Pension Rules, he is only entitled to commute fraction of his provisional pension authorized under Rule 69 of the said Rules during pendency of the departmental proceedings. The rule reads:

> "4. **Restriction on commutation of pension**
>
> No Government servant against whom departmental or judicial proceedings as referred to in Rule 9 of the Pension Rules, have been instituted before the date of his retirement, or the pensioner against whom such proceedings are instituted after the date of his retirement, shall be eligible to commute a fraction of his provisional pension authorized under Rule 69 of the Pension Rules or the pension, as the case may be, during the pendency of such proceedings."

Keeping in view the same, the applicant indeed cannot insist on the commutation of pension because provisionally he is being paid the pension.

32. So far as the payment of **Gratuity** is concerned, our attention is being drawn to Sub Rule (1) (c) of Rule 69 of the CCS

(Pension) Rules, 1972 which provides that no gratuity is to be paid until the conclusion of departmental or judicial proceedings and issue of final orders thereon. **Under Rule 3(1)(o) of the CCS (Pension) Rules, `pension'** includes **`gratuity'** except when the term pension is used in contradistinction to gratuity, but does not include dearness relief.

33. Learned counsel for the applicant relied upon the decision in the case of **D.V.KAPOOR** v. **UNION OF INDIA AND OTHERS,** AIR 1990 SC 1923, wherein the Supreme Court held:

> "7. Rule 9 of the rules empowers the President only to withhold or withdraw pension permanently or for a specified period in whole or in part or to order recovery of pecuniary loss caused to the State in whole or in part subject to minimum. The employee's right to pension is a statutory right. The measure of deprivation, therefore, must be correlative to or commensurate with the gravity of the grave misconduct or irregularity as it offends the right to assistance at the evening of his life as assured under Art.41 of the Constitution. The impugned order discloses that the President withheld on permanent basis the payment of gratuity in addition to pension. The right to gratuity is also a statutory right. The appellant was not charged with nor was given an opportunity that his gratuity would be withheld as a measure of punishment. No provision of law has been brought to our notice under which, the President is empowered to withhold gratuity as well, after his retirement as a measure of punishment. Therefore, the order to withhold the gratuity as a measure of penalty is obviously illegal and is devoid of jurisdiction."

Perusal of the findings clearly show that the Supreme Court held that gratuity cannot be withheld by way of penalty after retirement. Though learned counsel for the respondents insisted and referred to Rule 69(1) (c) to which we have referred to above but keeping in view the binding nature of the findings of the Supreme Court, we

find that it will not be appropriate to withhold the same and it should be paid on furnishing a surety bond of the like amount.

34. The last dispute is pertaining to the **Leave Encashment** under **Sub Rule (3) of Rule 39 of Central Civil Services (Leave) Rules, 1972**. It reads as under:

> "[(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.]

35. This provides the authority to withhold whole or part of cash equivalent of the Earned Leave of a person who has retired while disciplinary or criminal proceedings are pending but the rider is that there should be a possibility of some money becoming recoverable from him on conclusion of the proceedings. In the present case, there is a little possibility keeping in view the nature of charge that has been framed and served. The applicant has served the department for those years and he has to be paid and leave has to be en-cashed. This plea of the respondents, therefore, must fail.

36. For these reasons, we dismiss the OA on all counts, except that:

(a) The applicant should be paid the **Leave Encashment** due in accordance with law and the rules.

(b) He should be paid **Gratuity** due on his furnishing a surety bond of the like amount that in case the amount becomes refundable, he would do so.

(S.K.Malhotra)
Member (A)

(V.S.Aggarwal)
Chairman

/NSN/