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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK

O.A.No.260/00556 of 2016

Cuttack, this the 23rd day of February, 2018

CORAM:

HON'BLE MR.S.K.PATTNAIK, MEMBER(JUDL.)

.....

Dr. Surendranath Pati, aged about 61 years, Son of Late Bhagawan Pati, Ex. Sr. Regional Director, Health & Family Welfare Department, presently residing at Plot No. 85, Sector-5, Niladri Vihar, Po. Sailashreevihar, Bhubaneswar-751021.

..... Applicant

For the Applicant :M/s. S.K.Ojha, S.K.Nayak
Advocates

-Versus-

1. Union of India represented through the Secretary to the Govt. of India, Health & Family Welfare Department (CHS Division), Nirman Bhawan, New Delhi-110011.
2. Director, National Vector Borne Disease Control Programme, Ministry of Health & Family Welfare, 22-Shamnath Marg, New Delhi-110054.
3. Sr. Regional Director, Regional Office for Health & Family Welfare, BJ-25, B.J.B.Nagar, Bhubaneswar-751014.

..... Respondents

For the Respondents : Mr.A.Pradhan,
Advocate

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ORDER

S.K.PATTNAIK, MEMBER (JUDL.):

The Applicant has filed this Original Application praying inter alia for the relief, in Column 8 of the OA, as under:

- "(i) To admit the OA and further be pleased to declare/direct that letter dated 07/12/2015 cannot stand on the way to release entire benefits as due and admissible to the applicant;
- (ii) To quash sanction order dated 19/05/2016 and direct the Respondent No.1&2 to accord sanction for Rs. 18, 61,500/- allowing the

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Respondent No.3 to release the balance withholding amount of Rs. 7, 85, 549/- with permissible interest;

(iii) And/or pass any other order/orders as deemed fit and proper."

2. This matter was admitted and notices were directed to be issued to the Respondents on 17/08/2016 giving the Respondents adequate time to file counter, if any. Thereafter, sufficient time being allowed, the Respondents have chosen not to file counter and on the other hand have prayed for further time to file counter which was opposed by the learned counsel for the applicant on the ground that as the applicant is a retired employee and the Respondents have illegally withheld the amount from his retirement dues, the matter may be heard ex parte. Accordingly, having heard the learned counsel for both sides and perusing the materials available on record, we dispose of the O.A. on merit.

3. It is borne out from the record that while the Applicant working as Senior Regional Director in Health and Family Welfare Department, retired from service on 31/12/2015. On 7th December, 2015, Government of India, Ministry of Health and Family Welfare, New Delhi vide letter dated 7th December, 2015 communicated forwarded the report of the Director General of Audit (Central Expenditure) dated 06/11/2015 relating to the illegality committed in the matter of payment of Transport Allowance to the extent as under:

"The Ministry of Finance Department of Expenditure through its office Memorandum prescribed (August 2008) the rates of Transport Allowance on the

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basis of recommendations given by the sixth Pay Commission. According to this rate of Transport Allowance to employees drawing grade pay of Rs. 5400/- and above was fixed as Rs. 3200 (plus DA thereon). Further as per para 3 of OM, Officers drawing grade pay of Rs. 10000 and Rs. 1200 and those in the HAG + Scale, who are entitled to the use of official car in terms OM of January, 1994 shall be given the option to avail themselves of existing facility or to draw the Transport Allowance at the rate of Rs. 7000 per month plus dearness allowance thereon. The OM of January, 1994 provided that officers of the level of Joint Secretary and above, who have been provided with the facility of staff car for commuting between office and residence on prescribed payment basis may be given an option either to avail themselves of the existing facility or to switch over to the payment of Transport Allowance as admissible under these order.

Test check of records of Doctors of Safdarjung Hospital (Hospital) drawing grade pay of Rs. 10000 and above disclosed that Transport Allowance at the rate of Rs. 7000 per month plus dearness thereon was being paid to them. During September 2008 to April, 2015 the Doctors had been paid transport allowance aggregating to Rs. 10.79 crore at these rates. We observed that since they were not equal to the level of Joint Secretary to the Government of India and were not entitled to the staff car facility and as such were entitled to payment of transport allowance at the rate of Rs. 3200 (plus DA) only. The incorrect interpretation of rules by the Hospital led to excess payment of Rs. 5.86 crore to the Doctors as detailed in the Annex.

Similar issues pertaining to the Doctors of CGHS was included in the CAG's Audit Report No. 18 of 2015. In this case the Ministry of Finance had clarified (December, 2014) that Doctors were not eligible for drawal of Transport Allowance @ Rs. 7000 per month in terms of the stated OM even though they may be drawing pay with grades pay of Rs. 1000 per month.

It is recommended that overpayment of transport allowance of Rs. 5.86 crore made by the Hospital to its Doctors may be recovered."

(emphasis added)

4. Thereafter, applicant submitted representation dated 08/02/2016 (Annexure-A/3) stating therein that as I have already retired from Govt. service as Sr. RD with effect from 31.12.2015 and if

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recovery of overpayment is made from my retiral benefits it will be a huge financial loss to me. The Regional Director (HFW) instructed the Director, NVBDCP, Delhi that as the applicant has already retired and all his retirement dues have been paid except unutilized leave encashment & CGEGIS the overpayment amount be recovered from the unutilised leave encashment to the extent as under:

- 1 *The amount of un utilized Leave Encashment due to Dr. Pati* *Rs. 18,61,500/-*
- 2 *Over payment of Transport Allowance from 29.10.2008 to 30.4.2013 during his tenure at CGHS, Bhubaneswar (as per due & drawn statement)* *Rs. 4,32,713/-*
- 3 *Overpayment of Transport Allowance from 01.05.2013 to 31.12.2015 during his tenure at this organisation (as per due & drawn statement.)* *Rs. 3, 52,836/-*

5. Accordingly, vide order dated 19th May, 2016 (Annexure-A/7) an amount of Rs. 10, 75, 951/- as Unutilized Leave Encashment was sanctioned in favour of the Applicant with a note that an amount of Rs. 7, 85, 549/- was withheld due to over payment of Transport Allowance as per audit objecton till clarification made by the Regional Director, ROH&FW, Bhubaneswar is received. Thereafter, by filing the present original application, the applicant has prayed to quash the audit report forwarded vide letter dated 07/12/2015 (Annexure-A/7).

6. I find that the audit has pointed out overpayment of transport allowance made to the Hospital Doctors to the tune of **Rs. 5.86 crore**. The applicant seeks to quash the said audit objection which in my

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considered view is not within the competency of the Tribunal because it is the primary functions of audit to see that provisions of law, rules and regulation are properly applied while incurring expenditure or collecting revenue. In order to regulate usage of money elaborate rules and regulations have been drawn by government. While audit notices systematic violation of law, rules and regulations by departmental officers, its paramount duty is to take effective actions to prevent its abuse and misuse of public funds. The C&AG is the head of the Indian Audit and Accounts Department. The office of the C&AG directs, controls and monitors the activities of the various offices of the department and is responsible for development of organisational objectives and policies, auditing standards and systems, laying down policies for management of man power and final approval of the Audit report. For carrying on these responsibilities, field formations exist for each specific areas of auditing and accounting. As noticed, the audit has objected payment of Transport Allowance to Doctors de hors the Rules to the extent of 5.86 crore. The applicant seeks to quash the said audit report thereby tries to legalize the illegality committed by the Department in the matter of over payment of Transport Allowances not only to the applicant but also to many other Doctors. Therefore, I do not see any justifiable reason to interfere in the report of the audit let alone quashing of the same.

7. Similarly I find that vide order dated 19th May, 2016 an amount of Rs. 10, 75, 951/- was sanctioned and paid to the applicant

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towards his unutilized Leave Encashment with specific condition that rest of the amount of Rs. 7, 85, 549 has been withheld towards excess payment of Transport Allowance till receipt of clarification sought vide letter dated 13.04.2016 which was in accordance with the audit objection. When the amount was kept as per the audit objection and as already held we find no reason to interfere in the audit objection and quashing of the sanction order dated 19/05/2016 would tantamount to granting the relief in an indirect manner which the applicant is not legally entitled. In view of the above, I am not inclined to interfere in the order dated 19th May, 2016.

8. Next limb of argument of the learned counsel for the applicant is that the DoP&T taking into consideration of the decision of the Hon'ble Apex Court in the case of *State of Punjab and Ors. vs Rafiq Masih reported in 2015 AIR SCW 501* imposed restriction from recovering the excess payment from retired employees. The applicant being a retired employee, the recovery from his unutilized leave encashment is not sustainable. I am not persuaded with the said argument as I find that the audit objected the payment of Transport Allowance to the Doctors including the Applicant, de hors the provisions when the applicant was very much in public service. Hon'ble Apex Court in the case of Rafiq Masih (supra) have not given any blank cheque to Govt. employees who draw excess T.A. ignoring the T.A. Rules. Here, the applicant has drawn excess T.A. contrary to departmental norms. Therefore, the DoP&T O.M. on which reliance

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has been placed by the Learned Counsel for the applicant has no application to the present case at all. Rather we find that the recovery is well justified in view of the decision of the Hon'ble Apex Court in the case of ***Chandi Prasad Uniyal and Ors. vs State of Uttarakhand and Ors. reported in AIR 2012 SC 2951*** wherein Their Lordships have emphatically observed that when the money does not belong to payer or payee, it becomes taxpayer's money. Relevant portion of Their Lordships given in para 16 is quoted below:

"16. We are concerned with the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness, collusion, favouritism etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment."

The said decision has been upheld by a larger Bench of three Hon'ble Judges in the case of ***State of Punjab and Ors. vs Rafiq Masih reported in AIR 2015 SC 1267***. So, it has binding effect compared to the decision

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made in the case of ***State of Punjab and Ors. vs Rafiq Masih reported in 2015 AIR SCW 501***. Even in the decision rendered on 29.07.2016 in the case of ***High Court of Punjab & Haryana vs. Jagdev Singh reported in AIR 2016 SC 3523***, Their Lordships have observed that any payment found to have been made in excess would be required to be refunded.

9. Before parting with this case, I would like to draw the attention of the DoP&T to the letter No. F.No.18/03/2015-Estt. (Pay)- I dated 02.03.2016 regarding recovery of wrongful/excess payment made to Govt. servant. In this connection, it may be reiterated that the judgment rendered on 18.12.2014 by the Hon'ble Apex Court in the case of State of Punjab and Ors. Vs. Rafiq Masih (Whitewasher) and relied on in the circular by the DoP&T cannot override the earlier decision rendered by a co-ordinate Bench of the Hon'ble Apex Court on 17.08.2012 in the case of ***Chandi Prasad Uniyal and Ors. vs State of Uttarakhand and Ors. reported in AIR 2012 SC 2951*** in view of precedential value of earlier decision when two contrary views are available by two co-ordinate Benches. So long the decision rendered in the case of ***Chandi Prasad Uniyal and Ors. vs State of Uttarakhand and Ors.*** is not overruled by a larger Bench, the O.M. issued by the DoP&T dated 02.03.2016 based on the decision rendered in the case of State of Punjab and Ors. Vs. Rafiq Masih, in my considered opinion, needs further clarification. The DoP&T is to re-examine the legal impact of

sd/ Dr. B. N. Chauhan
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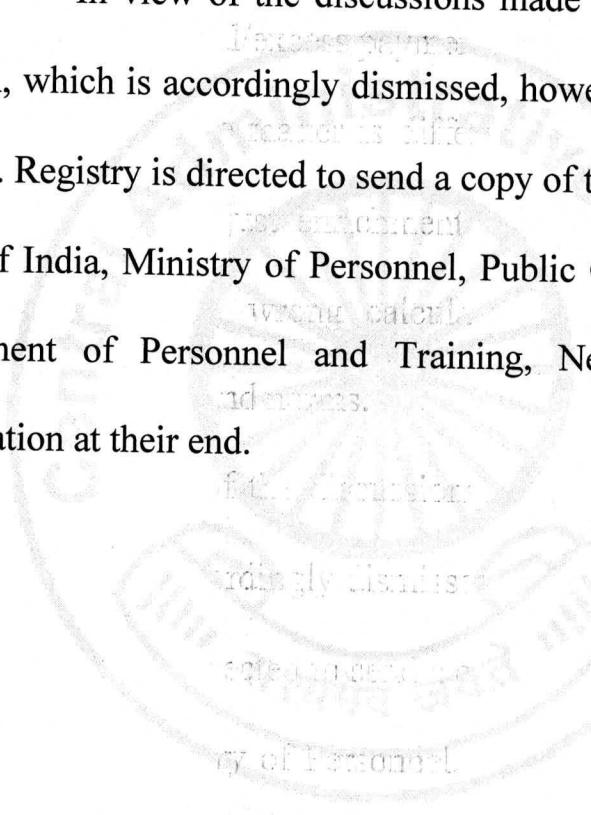
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both the decisions and issue the clarification/appropriate order in regard to recovery of wrongful/excess payments made to Govt. servants. In case of undue hardship, the matter is different but the government must be very careful about unjust enrichment in terms of crores of rupees of public money due to wrong calculation or incorrect application of governing guidelines and norms.

Issue the clarif

10. In view of the discussions made above, I find no merit in this OA, which is accordingly dismissed, however, without any order as to costs. Registry is directed to send a copy of this order to the Secretary, Govt. of India, Ministry of Personnel, Public Grievances and Pensions. Department of Personnel and Training, New Delhi for necessary examination at their end.


S.K.Pattnaik
(S.K.PATTNAIK)
MEMBER (JUDL.)

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