

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NO. 516 OF 2008

wednesday, this the 24th day of June, 2009.

CORAM:

**HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER
HON'BLE Ms.K.NOORJEHAN, ADMINISTRATIVE MEMBER**

A. Rajan,
Retired Motor Driver T II,
Central Marine Fisheries Research Institute,
Kochi – 682 018, residing at
Vaikkattuserry House, Maradu,
Kochi – 682 304.

... **Applicant**

(By Advocate Mr. M.R. Hariraj)

versus

1. Union of India, represented
by the Secretary,
Ministry of Agriculture,
Krishi Bhavan, New Delhi.
2. The Director General,
Indian Council of Agricultural Research,
Krishi Bhavan, New Delhi.
3. The Director,
Central Marine Fisheries Research Institute,
P.B. No.1603, Ernakulam North P.O.,
Kochi – 18.

... **Respondents**

(By Advocate Mr. TPM Ibrahim Khan, SCGSC (R1)
Advocate M/s. Varghese & Jacob (R2 & 3))

The application having been heard on 05.06.2009 the Tribunal on
...24.06.09... delivered the following:

ORDER

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER

The applicant in this case is aggrieved by recovery of a sum of
Rs. 77, 951/- from leave encashment due to him on alleged over payment
of salary, medical reimbursement and overtime allowances for the period
from 01/11/2006 to 30/04/2007. The reason for the alleged over payment



was that according to the respondents, the applicant was to retire by October 2006 itself whereas he had continued in service beyond that date.

2. Briefly, the facts of the case are as under:-

- a) The applicant was serving as a Casual Driver under the 3rd respondent from 1975 to 1980. Thereafter, he was appointed on regular basis as Supporting Staff Grade I. At the time of his regular appointment he had reflected his date of birth in Malayalam Era as "10.3.1112". The corresponding date as per Gregorian Calendar was not indicated by the applicant.
- b) The respondents appeared to have made a corresponding entry "27/10/1947" in the Attestation Form. However, in the Service Book the entry was 27/10/1946.
- c) As early as in 1994 when the applicant required a certificate, the respondents gave the same wherein his date of birth was indicated as 27/10/1946. Subsequently, the applicant reflected the same in his application form for loan from the Co-operative Society in 1997, 1998 as well as 2000.
- d) In 2001, when the applicant was to give his Self Appraisal before his promotion to a higher post, in the proforma, the respondents have indicated the date of birth of the applicant as 10/10/1947. Again, in the Identity Card issued by the respondent on 01/08/2006, the date of birth of the applicant has been indicated as 10/10/1947. The applicant was not issued with any letter of retirement in October 2006 and he was allowed to perform his duties as a Driver. Vide Annexure A7, the applicant was informed for the first time that he would be superannuating

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on the afternoon of 31/10/2007. He was accordingly advised to prefer necessary application in the prescribed proforma for his retirement benefits. On the applicant's furnishing the same, the respondents verified his service records and having found that the Service Book reflected the date of birth of the applicant as 1946, retired the applicant with effect from 31/10/2006 vide Annexure A8 Office Order date 23/05/2007. They had, vide Annexure A9 Order cancelled the earlier letter dated 28/02/2007 in which the date of retirement was reflected as 31/10/2007.

e) It was after retiring the applicant with a retrospective effect the respondents have, while disbursing the terminal benefits, retained a sum of Rs.77,951/- on account of alleged over payment of salary, medical reimbursement and overtime allowance. It appears that no opportunity was given to the applicant to explain his case. The applicant has therefore filed this O.A. praying for a declaration that the applicant is entitled to wages from 01/11/2006 to 23/05/2007 as also for medical reimbursement and overtime allowances drawn by him during that period. He has sought for a direction to the respondents to refund the amount of Rs.77,951/- with 18 % interest.



3. Respondents have contested the O.A. According to them, the applicant was under a legal obligation to seek a clarification from the Department on attaining age of superannuation in October 2006 about his retirement which he has not done. Ample evidences are there to show that the applicant was fully aware that he was to retire on completion of 60 years reckoned from 1946. As such, the respondents are well within their



right to recover the excess salary paid to the applicant. It has also been stated by the respondents that no specific orders are necessary for retirement on due date. On this score, they had quoted Government of India's Decision (3) below Rule 35 of CCS Pension Rules.

4. The applicant has filed his rejoinder reiterating his contentions as contained in the O.A. In the additional reply, the respondents have reiterated their points including Government of India's Decision (3) below Rule 35 of CCS Pension Rules.



5. Counsel for the applicant has submitted that the applicant acted bonafidly and in his Attestation Form, he has not indicated the conversion in the English calendar corresponding to his date of birth as recorded in Malayalam calendar. It was the Department which initially maintained that the date of birth of the applicant was 1946 but later on from 2001 onwards the date of birth of the applicant has been reflected by the respondents in various communications as 10/10/1947. The applicant has no reasons to disbelieve the correctness of his date of birth as given by the respondents in 2001 (Annexure A5) and 2006 (Annexure A6) as well as 2007 (Annexure A7). However, when the respondents realised their mistake and superannuated the applicant without any demur, he had quit the Department. However, the fact remains that he did perform his duties as a Driver during the period beyond 1st November, 2006 till 23rd May, 2007, as he was asked to work and as he has performed his duties during this period, he is legitimately entitled to the pay and allowances during that period. The applicant has relied upon the decision by the Apex Court reported in 2009 (3) 117, State of Bihar Vs. Pandey Jagdishwar Prasad.



He has invited the attention of the Tribunal to Paragraphs 22 & 24. The applicant has also relied upon 1993 (7) SLR 382, which also deals with an identical issue. In view of the fact that there has been no representation or misrepresentation by the applicant and he had performed the duties of a Driver, the Counsel for the applicant submitted that there is no question of any recovery from the terminal benefits on the ground of alleged excess payment.

6. Per contra, Senior Counsel for the respondents referred to the decision by the Apex Court in the case of Radha Kishun Vs. Union of India and others (1997 JT (4) SC 116) and stated that in that case, despite the fact that the appellant therein served for 3 years beyond the date of his superannuation, the Supreme Court rejected his claim for payment of salary during this period. The Senior Counsel also submitted that the above decision of the Apex Court has been reflected in the other decisions in 2009. The Apex Court in the later case did distinguish that case from the earlier case of Radha Kishun. As such the applicant is not entitled to any salary for the period of his work beyond the date of his superannuation.

7. Arguments were heard and documents perused. Admittedly, the applicant had given his date of birth only in Malayalam Era and it is the Department which had effected necessary conversion in the date of birth in the records. Though initially the respondents had indicated the date of birth as 1946 and made the same known to the applicant by way of Certificate (Annexure R2) and though the said date of birth was taken as the correct date of birth by the applicant vide his loan applications before the Co-operative Society, yet it is the very same respondents which at a later



part of time, had in clear cut term communicated the date of birth of the applicant as 10/10/1947 vide Annexure A5. Apart from the above, vide Annexure A6, the Identity Card issued to the applicant which is dated 01/08/2006, the date of birth of the applicant has been indicated as 10/10/1947. Hence the applicant relied upon the same and anticipated his date of superannuation as on 31/10/2007. And, true to his expectation, the respondents had made available necessary pension papers under a covering letter dated 28/02/2007 stating that the applicant would superannuate with effect from 31/10/2007. Thus by the Attestation Form or the Service Book or Proforma for Promotion (Annexure A5) or Identity Card (Annexure A6) or latest letter dated 28/02/2007 or all along, it was the Department which has indicated the date of birth and the applicant blindly believed the same. There was no occasion for the applicant to seek clarification relating to his date of birth since, right from 2001 consistently the respondents have given to understand that the applicant was superannuating in 2007 only.

8. The question for consideration is whether the case of the applicant is covered by the decision of the apex court in the case of Radha Kishun (supra) relied upon by the respondents, or State of Bihar vs Pandey Jagdishwar Prasad, relied upon by the applicant.

9. In *Radha Kishun v. Union of India*, (1997) 9 SCC 239 the order reads as under:

"ORDER

1. This is an astonishing and more shocking case. The petitioner who was, admittedly, to retire on 31-5-1991 remained in office till 31-5-1994 as if he was not to retire from service, enjoying all the benefits of service.

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2. This special leave petition arises from the order of the Central Administrative Tribunal, Patna Bench, made on 26-11-1996 in OA No. 652 of 1995. The petitioner had joined the service in Telecommunications Department. Admittedly, his date of birth is 13-5-1933. On attaining the age of superannuation, he was to retire on 31-5-1991. Instead, he remained in service till 31-5-1994. When action was taken to recover the amounts paid to him for the period beyond the date he was to retire, viz., 31-5-1991 and to which he was not entitled, he filed OA in the Tribunal and the same has been dismissed. Thus, this special leave petition.

3. The learned counsel for the petitioner contends that since the petitioner has worked during the period, he is entitled to the payment of the pay and allowances from 1-6-1991 to 26-6-1994 and that he is also entitled to the payment of provisional pension, death-cum-retirement gratuity, leave encashment, commutation of pension amount, GPF money and the amount deposited under CGHS on the plea that he retired from service on 31-5-1994. We are aghast to notice the boidness with which it is claimed that he is entitled to all the benefits with effect from the abovesaid date when admittedly he was to retire on 31-5-1991. It would be an obvious case of ~~an~~ absolute irresponsibility on the part of the officer concerned in the establishment in the section concerned for not taking any action to have the petitioner retired from service on his attaining superannuation. It is true that the petitioner worked during that period, but when he is not to continue to be in service as per law, he has no right to claim the salary etc. It is not the case that he was re-employed in the public interest, after attaining superannuation. Under these circumstances, we do not find any illegality in the action taken by the authorities in refusing to grant the benefits.

4. It is then contended that the petitioner would have conveniently secured gainful employment elsewhere and having worked, he cannot be denied of the legitimate salary to which he is entitled. Though the argument is alluring, we cannot accept the contention and given legitimacy to the illegal action taken by the authorities. If the contention is given acceptance, it would be field day for manipulation with impunity and one would get away on the plea of equity and misplaced sympathy. It cannot and should not be given countenance.

5. Under those circumstances, we dismiss the

petition with a direction to the Government of India to take appropriate disciplinary action against all the persons concerned for their deliberate dereliction of duty in not ensuring the petitioner's retirement on his attaining the age of superannuation.

6. The Registry is directed to communicate this order to the Secretary, Telecommunications, Government of India. The Secretary is directed to ensure immediate action in the matter and submit the compliance report to the Registrar of this Court within three months from the date of the receipt of this order."

10. However, In the case of *State of Bihar Vs. Pandey Jagdishwar Prasad*, the Apex Court has held as under:-

22. As noted hereinafter, in the service book of the respondent, two dates of birth have been mentioned, which is not permissible. It cannot be conceived of that the authorities could not examine the possibility of two dates of birth to be entered in the service book of the respondent. They ought to have deleted the initial date of birth based on the matriculation certificate if the appellants were of the view that the affidavit sworn by the respondent was correct and the date of birth appearing in the matriculation certificate must be found to be incorrect, it is needless to say that the affidavit sworn by the respondent must be on the basis of documents produced by the respondent to show that the date of birth entered in the service book initially was incorrect. Instead, the appellant had not issued any notice of retirement of the respondent on 28-02-2002, which was the date for retirement of the respondent on his attaining superannuation i.e., on the basis of the date of birth shown in the matriculation certificate. On the other hand, the appellant allowed the respondent to work and got works from him and paid salary. Only for the first time, the appellant took note of two dates of birth after he had completed two years from the date of his actual date of retirement.

*28. Before parting with this order, we may refer to a decision of this Court strongly relied on by the learned counsel for the appellant, namely, *Radha Kishun Vs. Union of India*. Learned counsel for the appellant relying on this decision sought to argue that even if the respondent had worked after his due date of superannuation*




without having any objection from the appellant, the appellant was entitled to deduct the amount already received by the respondent from his retiral benefits. This case, in our view, is clearly distinguishable from the present case. In Radha Kishun case, there was no dispute as to the date of retirement of the appellant in that appeal, as there was no controversy in the date of birth of that appellant. There was only one date of birth mentioned, and he had not retired on the basis of his date of birth so entered. Therefore, he had wrongly extended his service beyond the date of his superannuation. But in the present case, there were two dates of birth recorded in the service book of the respondent. Therefore, there was a clear confusion in the mind of the respondent as to whether the appellant had accepted his corrected date of birth as entered in his service book when admittedly the authorities concerned did not serve any notice of retirement on the basis of the initial entry of date of birth in his service book.

29. It should also be kept in mind that the respondent might have expected that the second date of birth shown in the service book was accepted by the authorities for that reason he was allowed to continue in his service and was paid salary. In the absence of any proof that the respondent had manipulated his date of birth by entering a second date at a later stage, and that he had any mala fide intentions to continue his service, beyond his date of retirement, we are of the view that the decision in Radha Kishun Vs. Union of India would not be applicable in the facts of the present case."

11. The distinction between the above two cases has been brought out by the Apex Court in Para 28 of the judgment reported in 2009 (3) SCC 117. The distinction is on the ground that there have been two date of birth in the case of State of Bihar Vs. Pandey Jagdishwar Prasad whereas in the case of Radha Kishun, there was no doubt as to the date of retirement of Shri Radha Kishun. Radha Kishun's case contained one and only one date of birth whereas State of Bihar's case contained two date of birth. In the

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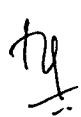
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instant case also the entry as per the respondents relating to the date of birth would be taken as two, one in the Service Book and the other in the Attestation Form. As such the case of the applicant tilts more towards the later case of the Supreme Court reported in 2009 Vol.3 SCC 117 and as such, the said decision does support the case of the respondent.

12. It is the admitted fact that the applicant had performed his duties beyond 01/11/2006 to 23/05/2007. There is no dispute about this fact. Once the respondents have extracted work from the applicant within their ostensible authority, logically necessary wages have to be paid. There are a number of cases when an individual not authorized to perform his duties had been so asked by the authorities and when the authorities had refused payment of wages for the duty performed, the court intervened and directed payment. Likewise, when due to the mistake on the part of the department when excess payment had been made, the department is not permitted to recover the excess payment. Such cases are as under:-

(a) **Selvaraj v. Lt. Governor of Island, Port Blair, (1998) 4 SCC 291,**
The Apex Court in this case has held as under:-

3. It is not in dispute that the appellant looked after the duties of Secretary (Scouts) from the date of the order and his salary was to be drawn against the post of Secretary (Scouts) under GFR 77. Still he was not paid the said salary for the work done by him as Secretary (Scouts). It is of course true that the appellant was not regularly promoted to the said post. It is also true as stated in the counter-affidavit of Deputy Resident Commissioner, Andaman & Nicobar Administration that the appellant was regularly posted in the pay scale of Rs 1200-2040 and he was asked to look after the duties of Secretary (Scouts) as per the order aforesaid. It is also true that had this arrangement not been done, he would have to be transferred to the interior islands where the post of PST was available, but the appellant was keen to stay in Port Blair as averred in the said counter. However, in our view, these averments in the counter will not change the real

position. Fact remains that the appellant has worked on the higher post though temporarily and in an officiating capacity pursuant to the aforesaid order and his salary was to be drawn during that time against the post of Secretary (Scouts). It is also not in dispute that the salary attached to the post of Secretary (Scouts) was in the pay scale of 1640-2900. Consequently, on the principle of quantum meruit the respondents authorities should have paid the appellant as per the emoluments available in the aforesaid higher pay scale during the time he actually worked on the said post of Secretary (Scouts) though in an officiating capacity and not as a regular promotee. This limited relief is required to be given to the appellant only on this ground.

- (b) **Jaswant Singh v. Punjab Poultry Field Staff Assn., (2002) 1 SCC 261**, The Apex Court in this case has held as under:-

" Therefore, while the appellant's promotion to the post of Chick Sexer cannot be upheld, given the fact that the appellant had discharged the duties of a Chick Sexer, he was at least entitled to the pay and other allowances attributable to that post during the period he carried out such duties.

13. As regards the legal position relating to recovery, the following decisions of the Apex Court would be appropriate for reference:-

- (a) **Sahib Ram v. State of Haryana, 1995 Supp (1) SCC**

18: "...it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the appellant."

- (b) **Bihar SEB v. Bijay Bhadur, (2000) 10 SCC 99** : "We do record our concurrence with the observations of this Court in Sahib Ram case 1 and come to a conclusion that since payments have been made without any representation or a misrepresentation, the appellant Board could not possibly be granted any liberty to deduct or

recover the excess amount paid by way of increments at an earlier point of time."

(c) **Col. B.J. Akkara (Retd.) v. Govt. of India, (2006) 11 SCC,709.** wherein the Apex Court has held as under:-

"27. The last question to be considered is whether relief should be granted against the recovery of the excess payments made on account of the wrong interpretation/ understanding of the circular dated 7-6-1999. This Court has consistently granted relief against recovery of excess wrong payment of emoluments/allowances from an employee, if the following conditions are fulfilled (vide Sahib Ram v. State of Haryana , Shyam Babu Verma v. Union of India , Union of India v. M. Bhaskar and V. Gangaram v. Regional Jt. Director):

(a) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee.

(b) Such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

28. Such relief, restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery."




(d) *Purshottam Lal Das v. State of Bihar*, (2006) 11 SCC 492 : In this case, reaffirming the decision in *Sahib Ram* (supra), the Supreme Court has held as under:-

"We do record our concurrence with the observations of this Court in Sahib Ram case and come to a conclusion that since payments have been made without any representation or a misrepresentation, the appellant Board could not possibly be granted any liberty to deduct or recover the excess amount paid by way of increments at an earlier point of time. The act or acts on the part of the appellant Board cannot under any circumstances be said to be in consonance with equity, good conscience and justice."

(e) in a very latest case of *Paras Nath Singh vs State of Bihar* (CA 2671 of 2009, decided on 21st April, 2009, the apex court had occasion to consider recovery of over payment of Rs 1,01,529.50 from an employee which had been stated to have been warranted due to cancellation of his promotion. And the individual in that case had also given an undertaking for such recovery. However, the Apex Court has in that case held as under:-

"Having considered the fact that the appellant was only a Class IV employee in the State of Bihar and almost an illiterate person and did not know the implications of giving such undertaking and in the absence of any fraud and misrepresentation attributed to the appellant and the amount being not so excessive, in particular Rs 1,01,529.50, out of which certain amount has already been recovered from the salary of the appellant by the State Authorities, we are of the view that a lenient view should be taken and the amount already paid by the State Authorities to the appellant shall not be recovered."

14. In the case of the applicant in the instant case, he had retired as a Driver and could be compared to the appellant in the above case. The amount involved is also Rs 77,951/- only. Principles of Natural justice had not been followed while withholding the leave encashment. Rule relating to withholding of leave encashment does not provide for such a withholding. It talks of withholding only when certain disciplinary action against the individual could entail recovery of the amount on the conclusion of such enquiry. That is not the case here. In any event, the case is fully covered

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by the decision of the Apex Court in the case reported in 2009(3) SCC 117.

15. The ratio in the case Sahib Ram (supra) as affirmed by the Apex Court in the case of Purushottamlal Dass and that in the case of Pandey Jagdishwar Prasad (supra) squarely apply in this case. In view of the same the O.A. succeeds. It is declared that the applicant continued beyond 60 years of age was not on account of any fraud played by him but on the basis of his date of birth having been reflected as 10/10/1947 by the Department itself. The respondents are not justified in having effected the recovery. The applicant is entitled to salary for the period he worked beyond 31/10/2006 and also for the medical reimbursement and overtime allowances during that period. Respondents are directed to refund the amount of Rs.77,951/- to the applicant. However, if the pension has been fixed without taking into account the period of service beyond 31-10-2006, the same be not disturbed. The peculiar circumstances of the case clearly goes to show that none (both the administration and the applicant) can be held responsible for the inadvertent error committed in wrongly displaying the date of birth of the applicant. As such the applicant's claim for payment of interest is rejected. Under the above circumstances there shall be no order as to costs.

Dated, the 24th June, 2009.


K.NOORJEHAN
ADMINISTRATIVE MEMBER

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Dr. K.B.S.RAJAN
JUDICIAL MEMBER