

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No. 206 of 2004

Wednesday, this the 13th day of August, 2006

C O R A M:

**HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE MR. K B S RAJAN, JUDICIAL MEMBER**

K. Padmini, W/o. Late K. Gopalakrishnan,
Payappilli House, P.O. Ambalavattom,
Panamanna, Ottappalam, Palghat District ... **Applicant.**

(By Advocate Mr.T C Govindaswamy)

versus

1. Union of India represented by
The Secretary to the Govt. of India,
Ministry of Railways, New Delhi.
2. The Joint Director Establishment (D&A),
Railway Board, New Delhi.
3. The Divisional Railway manager,
Southern Railway, Palghat Division,
Palghat. ... **Respondents.**

(By Advocate Mr. Sumathi Dandapani)

ORDER
HON'BLE MR. K B S RAJAN, JUDICIAL MEMBER

The legal issues involved in this case are :

(a) Whether a show cause notice is essential before passing an order of forfeiture of entire pension on a proved charge of misappropriation of Government funds and consequent



conviction by Criminal Court?

(b) What kind of dues could be recovered or adjusted from the leave encashment which is withheld on the ground of pendency of disciplinary or other proceedings.

2. In this case, originally the OA was filed by the Railway Servant Shri K. Gopalakrishnan, and during the pendency of this OA, he having expired, the name of his wife, Mrs. K. Padmini was substituted in the place of the said K. Gopalakrishnan. However, for the purpose of this OA, the said Gopalakrishnan is reflected as the applicant in this order.

3. The facts as contained in the OA are as under:-

(a) The applicant, while functioning as Station Master at Pattambi Railway Station of Palghat Division was proceeded against under Section 409 of the Indian Penal Code and Section 13(1) and (2) of Prevention of Corruption Act vide CC 2/93 before the Hon'ble Special Judge (SPE/CBI) Ernakulam and the same ended in conviction of the applicant and sentence of 3 years of Rigourous Imprisonment vide Annexure A-2 judgment dated 11-12-1996. The applicant filed Crl. Appeal No. 12/97 before the Hon'ble High Court of Kerala and the Hon'ble High Court ordered stay of sentence.

(b) The applicant was also simultaneously proceeded against departmentally by way of charge sheet dated 16-07-1993.



Consequently, on his retirement on 31-12-1994, the applicant was paid only provisional pension. His Gratuity and leave encashment were withheld and not released due to pendency of the proceedings.

- (c) The said departmental proceedings ended in exoneration of the applicant vide Annexure A-3 order dated 15-03-2002 but with a rider that dropping of the proceedings is without prejudice to any action that may be taken against the applicant on account of his conviction by the Special Judge CBI Court/Ernakulam in CC No. 2/93.
- (d) The applicant prayed for release of terminal benefits as the departmental proceedings were dropped. But the same was not considered by the respondents.
- (e) Respondents had consulted the UPSC in regard to action to be taken in pursuance of the conviction, by the Criminal Court, of the applicant and the UPSC had suggested that the charges proved against the applicant constituting 'grave misconduct', ends of justice would be met if the entire pensionary benefits of the applicant are forfeited. UPSC's letter dated 24-10-2003 (Annexure A-7) refers.
- (f) On the advice of the UPSC, the impugned order dated 01-01-2004 had been passed. Notwithstanding the above order, payment of provisional pension was continued to be paid upto 31-10-2004, and the respondents seek to recover the amount of pension paid beyond 01-01-2004.

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(g) The applicant has challenged the above order dated 01-01-2004 on various grounds including that the same is vitiated by non-issue of show cause notice prior to passing of the order.

4. The applicant has claimed the following relief(s):-

- (a) to direct the respondents to continue to pay the pension .
- (b) to direct the respondents to release the leave encashment.

5. Respondents have resisted the OA. According to them, the order was passed by the President under the relevant rules and the same is fully valid and legal and that there is no rule which mandates issue of show cause before passing the said order. Leave encashment need not paid when there is cut in pension vide Board's letter No. F(E)111/77/LE-1/4 dated 12-08-1987 (Annexure R-1(a)). However, in the additional reply, the respondents have stated that the provisions of order dated 12-08-1987 not being applicable to the case of the applicant, he is entitled to release of leave encashment, but then, since there are amounts due to be paid by the applicant on account of overpayment of salary, electrical energy bill and shortage of station collection of Rs. 47,734 plus court attachment of Rs 21,360/- and over payment of pension from 01-01-2004 amounting to Rs 34,195/- the amount of Rs 40,400/- being the leave encashment had been adjusted against the aforesaid dues and the balance is due to be paid by the applicant/legal heir.

6. The applicant, during the pendency before the Hon'ble High Court of

appeal in the criminal case having expired on 09-12-2005, the appeal abated, vide Hon'ble High Court's order dated 30-03-2006. Thus, the order of conviction became final.

7. Arguments were heard and documents perused. The counsel for the applicant argued that there is an element of discretion to withhold full or part of pension and this discretion cannot be invoked by the President without issuing a show cause notice. For, the applicant could have convinced the President about his financial instability so that cut in pension could be part and not full. As regards leave encashment, the counsel argued that the same cannot be denied to the applicant. The applicant relied upon the decision of the Karnataka High Court in the case of N.K. Suparna vs UOI (2005) 3 SLJ 507 and the relevant paras of the said judgment read as under:-

7. Having heard the learned counsel for the parties, the point that arises for decision is whether the entitlement of the petitioner to receive provisional pension in terms of Rule 69 of the Rules is limited to the pendency of the proceedings before the original Court or that entitlement continues till the finality is reached by way of appeal to this Court or further appeal to the Supreme Court.

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 up to 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 up to and including the date on which the final order that maybe 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 proceeding. 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 proceeding. 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.

According to the counsel for the applicant, the above decision applies to the case of the applicant and therefore, the applicant was entitled to continuance of provisional pension /pension and other terminal benefits, without any truncation, since the appeal preferred by the applicant before the High Court in the criminal case was not decided and thus the ratio in the decision of the Hon'ble High Court in the case of Suparna (*supra*) applies. And assuming without accepting that the President has the power to pass the impugned order, the same should have been preceded by a show cause notice, as it involved an element of discretion to the President and the Applicant could have convinced that there is justification only in reducing the pension and not full stoppage.

8. Counsel for the respondents, however, submitted that there is no need to issue any show cause and in so far as leave encashment is concerned, the amount is adjusted against the dues payable by the applicant.

9. A look at the relevant rules on the subject would be appropriate at this juncture. Rule 9(1) of the Railway Services (Pension) Rules, 1993,

states as under:-

"9. Right of the President to withhold or withdraw pension:

(1) *The President reserves to himself the right of withholding or withdrawing a pension or gratuity or both, either in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the way, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave mis-conduct or negligence during the period of his service, including service rendered upon re-employment after retirement :*

Provided that the Union Public Service Commission shall be consulted before any final orders are passed."

10. As contended by the counsel for the respondents, there is no mention in the Rule about issue of show cause notice before passing order forfeiting the pension. But the contention of the applicant is that since there is an element of discretion available with the President, show cause is a must. The question is whether such a show cause is a pre-requisite when discretion is invoked. A show cause would be a pre-requisite if any right of an individual is proposed to be curtailed. In this regard, reference is invited to the observations of the Apex Court in the case of ***Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, (1975) 1 SCC 421*** wherein the Apex Court has held -

"This Court has repeatedly observed that whenever a man's rights are affected by decision taken under statutory powers, the Court would presume the existence of a duty to observe the rules of natural justice and



compliance with rules and regulations imposed by statute."

11. Thus, we have to now see whether any right of the applicant has been hampered in passing the impugned order. Admittedly the applicant had not been paid any final pension. What has been paid is only provisional pension. **Right to receive final pension has not been crystallized by the applicant.** Again, in the case of withholding of full or part of pension, discretion is vested with the authority to be exercised on the basis of the gravity of offence or misconduct and not on the basis of the financial position of the applicant and as such, there is no need to issue any show cause notice before invoking the powers under rule 9 of the Railway Services (Pension) Rules. Thirdly, had there been such a requirement, just as the said rule specifies that the Union Public Service Commission shall be consulted before any final orders are passed, there would have been such a pre-condition specified in the very rule itself. Such a stipulation is conspicuously missing in the Rule. Thus, the contention of the applicant that show cause notice is a must is untenable.

12. The core question is, as contended by the applicant, with the support of the decision of the Hon'ble High Court of Karnataka in the case of Suparna (*Supra*), is whether the impugned order can be legally held valid when no finality to the criminal proceedings has been reached. At the time when the impugned order had been passed, the criminal appeal preferred by the



applicant had been pending with the Hon'ble High Court. The Karnataka High Court has stated that in accordance with the provisions relating to provisional pensions, as contained in Rule 69(1) of the Pension Rules, provisional pension is payable from the time of retirement till "final orders are passed by the Competent Authority". The Karnataka High Court judgment clearly holds that appeal being a continuance of original proceedings, the Presidential Order under Rule 9(1) of the Pension Rules, cannot be passed before the judicial proceedings attained finality. In this case, the proceedings came to an end as on 03-03-2006 only when the appeal filed by the applicant, due to his demise on 09-12-2005, had abated. Hence, following the decision of the Karnataka High Court in the case of N.K. Suparna (Supra) it is to be held that the impugned order cannot be sustained.

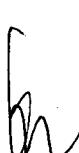
13. In so far as leave encashment is concerned, the relevant rule is available at 550(c) of the Leave Rules, which reads as under:-

"C. In case of a Railway servant retiring from service on attaining the age of retirement while under suspension or while disciplinary proceedings are pending against him at the time of retirement: The authority competent to grant leave may withhold whole or part of cash equivalent of L.A.P. in the case of a railway servant who retires from service on attaining the age of retirement while under suspension or while disciplinary or other proceedings are pending against him, if in the view of such an authority there is a possibility of some money recoverable from him on conclusion of proceedings against him. On conclusion of the proceedings he will become eligible to the amount withheld after adjustment of Railway dues if any."



14. The above rule is the only rule where adjustment of Railway dues if any is adjusted from the Leave Encashment. The condition is that there must be some disciplinary or other proceedings pending and in the opinion of the authority, there is a possibility of some money recoverable from him on conclusion of proceedings against him. Thus, what is contemplated as Railway Dues here is only that money which on conclusion of proceedings against the railway servant would become recoverable. It does not contemplate any money due otherwise. In the instant case, the departmental proceedings ended in complete exoneration of the applicant, vide Annexure A-3. Thus, there is no due from the applicant on account of disciplinary proceedings. In so far as the other proceedings contemplated in the rule are concerned, true, there has been a finding that a sum of Rs 5,850 had been misappropriated by the applicant. Though there has been no order to the effect that this amount should be recovered, since it is the Railway money, the same shall become payable by the applicant from out of the leave encashment, under the above provisions of Rule 550 of the Leave Rules.

15. The respondents have stated that there has been an excess payment of provisional pension as the applicant was not entitled to provisional pension from 01-01-2004 to 31-10-2004 and as per the respondents, even this amount is to be recovered from leave encashment. This view of the



respondents is erroneous. Of course, order dated 01-01-2004 certainly indicates the decision of the President that the entire pensionary benefits of the applicant be forfeited. But there has been no indication as to when from such decision would be pressed into service and forfeiture would take place. Had there been a specific mention that the order would take immediate effect ('forthwith', in other words), understandably the applicant is not entitled to any such provisional pension from 01-01-2004. But in the absence of such stipulation either in the very impugned order dated 01-01-2004 or any other orders, the effective date of forfeiture has to be taken from the date the respondents of their own stopped payment of provisional pension and the same is w.e.f. 01-11-2004 only. Generally, recovery from the provisional pension is not contemplated, vide rule 10(2) of the Railway Services (Pension) Rules. Thus, there is no provision in the Railway pension Rules for recovery or refund of the provisional pension already paid to a railway servant. Again, it is now settled that when any overpayment has been made and the same has not been as a result of any representation or misstatement of the employee, recovery of the same is not permissible, vide **Sahib Ram v. State of Haryana, 1995 Supp (1) SCC 18**, the Apex Court has held as under:-

"5. Admittedly the appellant does not possess the required educational qualifications. Under the circumstances the appellant would not be entitled to the relaxation. The Principal erred in granting him the relaxation. Since the date of relaxation the appellant had been paid his salary on the revised scale. However, 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."

16. The above dictum has been reinforced by the Apex Court in a subsequent decision in the case of **Bihar SEB v. Bijay Bhadur, (2000) 10 SCC 99**, wherein the Apex Court has stated :

"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."

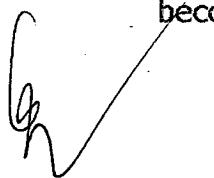
17. As regards amount due by way of court attachment, there has been no evidence in this regard, nor is it an admitted amount and as such, this too cannot be recovered. Nor can the respondents adjust the so called overpayment of salary etc., as the same cannot form part of that Railway due, that had arisen out of the conclusion of the Departmental proceedings or other proceedings. The station collection is also not an admitted amount. It is trite law that if any recovery is to be effected, the same shall not be effected, save, after due notice to the individual and where necessary, the department has to substantiate their claim, as for example, when the amount due is disputed by the railway servant. In the instant case, there does not seem to be any such pre-notice.



18. Thus, save Rs 5,850/- none of the other amounts stated to have been due from the applicant can be recovered or adjusted from out of the leave encashment. The respondents, are, therefore, liable to release the leave encashment after adjustment of the afore said Rs 5,850/- to the legal heir of the applicant.

19. The applicant feebly raised the issue of family pension to the legal heir. However, as the same is beyond the pleadings, the same is not considered in this OA. That would be based on the extant laws.

20. Thus, the **OA is allowed**. The impugned order dated 31-01-2004 is held as legally not sustainable and consequently, it is declared that the applicant was entitled to continuance of Provisional Pension till the date of his death i.e. 09-12-2005. As the provisional pension has been made available to the applicant only upto 31-10-2004, the respondents are liable to pay provisional pension to the applicant (now to the legal heir), for the period from 01-11-2004 to 09-12-2005. Also declared that the department cannot recover or adjust from out of the leave encashment any amount save the amount of Rs 5,850/- which is the proved amount as per the criminal court's order. The amount of leave encashment having been worked out at Rs 40,400/- deducting the aforesaid amount of Rs 5,850/- the balance 34,550/- becomes payable to the legal heir of the applicant. This amount, together



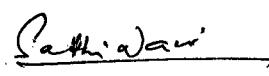
with the provisional pension for the period from 01-11-2004 till 09-12-2005 shall be paid within a period of three months from the date of communication of this order.

21. No order as to costs.

(Dated, the 13th day of September, 2006)



K B S RAJAN
JUDICIAL MEMBER



SATHI NAIR
VICE CHAIRMAN

cvr.