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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL:JAIPUR BENCH:JAIPUR.

O.A.NO.2/94

Date of order: 2-1-1997.

O.P.Shrivastava

: Applicant

Versus

1. Union of India through the Secretary to the Government, Ministry of Home Affairs, Government of India, New Delhi.
2. State of Rajasthan through the Secretary to the Government, Department of Personnel, Rajasthan, Jaipur.

: Respondents

Mr. Ajay Fastogi, counsel for the applicant

Mr. U.D.Sharma, counsel for respondent No.1

Mr. B.N.Purshottam, counsel for respondent No.2

CORAM:

HON'BLE SHRI O.P.SHARMA, MEMBER (ADMINISTRATIVE)
HON'BLE SHRI FATAI PFAKASH, MEMBER (JUDICIAL)

O R D E R

PER HON'BLE SHRI FATAI PFAKASH: MEMBER (JUDICIAL)

In this original application filed by the applicant Shri O.P.Shrivastava under Section 19 of the Administrative Tribunal's Act, 1985 an important question of far-reaching implications has been raised. The question is "Whether Rule 6(2) of the All India Services (Death-cum-Retirement Benefits) Rules, 1958 (hereinafter referred to as the '1958 Rules') which relate to with-holding of gratuity or death-cum-retirement gratuity till the conclusion of the departmental disciplinary proceedings is ultravires of Articles 14 & 16 of the Constitution of India and is liable to be quashed and set-aside.

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2. The facts out of which this question has emerged are that the applicant who was initially a member of the Rajasthan Administrative Service and joined the cadre on 5th December, 1960, got Senior, Selection and Supertime Scale of the Rajasthan Administrative Service (for short 'R.A.S.'). On 15.3.1991 he was promoted to the Indian Administrative Service Cadre and was given seniority of the year 1982 as per the Indian Administrative Service (Appointment by Promotion) Regulations, 1955. On attaining the age of superannuation he retired from service on 28.2.1993.

3. It is the case of the applicant that in the year 1986 while he was in the Selection Scale of the R.A.S. and was posted as Administrator, Municipal Council, Ajmer he took various steps to check its evasion which was permissible under the provisions of the Municipal Act. May be this action of the applicant annoyed certain local political leaders and some subordinate officers working under him; that respondents proposed to hold an enquiry under Rule 8 of the All India Service (Disciplinary and Appeal) Rules, 1969 and he was served with a memorandum dated 23.5.1996 (Annex. A/3) alongwith a statement of allegations, interalia, on the grounds that he has mis-used his office while working as Administrator, Municipal Council, Ajmer in the year 1986-87 and that his action has resulted in causing a loss of lacs of rupees to the Council. He gave a detailed reply to the charge-sheet but before the disciplinary proceedings could be concluded, he retired from service at the age of superannuation on 28.2.1993.

4. It is the grievance of the applicant that after his retirement from service, the Government of Rajasthan,

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respondent No.2 took a decision for with-holding the gratuity and commutation to pension benefits of the applicant vide order dated 21.4.1993 (Annx.A/1). Further in the garb of the pendency of departmental proceedings against him, his Leave Encashment Salary/Pay was also with-held. He made a representation to the Secretary, Department of Personnel, Government of Rajasthan on 27.2.1993 and also to the Chief Secretary, Government of Rajasthan on 6.5.1993 (Annx.A/4). Feeling aggrieved and having heard nothing from the respondents the applicant has approached this Tribunal to claim the following reliefs:-

- i) That Rule 6(2) of the Rules of 1958 so far as it relates to with-holding of Gratuity or Death-cum-Retirement Gratuity till the conclusion of the disciplinary proceedings be declared violative of Articles 14 & 16 of the Constitution of India and it be quashed and set-aside.
- ii) By an appropriate order or direction; order dated 21.4.1993 (Annx.A/1) whereby the Gratuity of the applicant has been with-held; be declared to be bad and to this extent this order be quashed and set-aside with a further prayer to release the Gratuity of the applicant alongwith interest at the bank rate;
- iii) By issue of an appropriate order or direction; order dated 8.2.1993 whereby for the purpose of computation of pension; the deduction of Rs. 550/- 'Personal Pay' made be declared bad and the same be quashed and set-aside and the respondents be directed to include the 'Personal Pay' of the applicant Rs.550/- for computation of pension;
- iv) By an appropriate order or direction the respondents be directed to release the Leave Encashment Salary of the applicant which is due and payable to the applicant alongwith interest at the Bank Rate.

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5. The respondents have filed separate counters to the O.A. filed by the applicant. The stand of the Government of India i.e. respondent No.1 has been that by the impugned order dated 21.4.1993 (Annex.A/1); the payment of Gratuity of the applicant has not been with-held under Rule 6(1) of the Rules of 1958 but has been deferred till the conclusion of the departmental proceedings pending against him and issue of final orders in those proceedings as per the provisions of the Rule 6(2) of the said Rules. It has further been averred that deferment of payment of Gratuity by the said order under Rule 6(2) is perfectly proper, justified and legal and is not violative of the provisions of Articles 14 & 16 of the Constitution of India. It is denied that the provisions of Payment of Gratuity Act, 1972 are applicable in the case of the applicant. It has also been averred that Rule 6(1) of the Rules of 1958 has since been amended vide Clarificatory Amendment of the said rules by the All India Service (Death-cum-Retirement Benefits) Amendment Rules 1993 (Annex.R/1) which came into force w.e.f. 19.6.1993. By virtue of this amendment also the Central Government has reserved to itself the right of with-holding the pension as well as Gratuity and also for ordering recovery therefrom. The stand of the State of Rajasthan (respondent No.2) is that payment of Gratuity is subject to the conditions of the Service from where a member of the service retires. In case, the disciplinary proceedings result in dismissal or removal from service, the member of the service cannot be said to have retired and hence is not entitled to get any Death-cum-Retirement Gratuity as is evident from the provisions of Rule 5 read with Rule 19-C(1) of the Rules of 1958. It is also averred that Gratuity being a substantial amount any difference found may be recovered as per the provisions of

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Rule 19-C (1) of the Rules of 1958. Another stand is that Sections 13 & 14 of the Payment of Gratuity Act, 1972 relates to Protection of Gratuity from attachment in execution of any decree or order of any Civil Revenue or Criminal Court and that it is nowhere stated that the employer cannot recover his dues or with-hold the same for the time being during pendency of any disciplinary proceedings. It is denied that gratuity is an earned salary; but is a present from the employer in recognition of his services though regulated by the Rules of 1958 to take into account the personal pay while computing pension. Similarly, in relation to Leave Encashment of the applicant, it has been averred by the State of Rajasthan that it has been with-held in view of the provisions of Rule 20-B(5) of the All India Services (Leave) Rules, 1955 as there is a possibility of some money becoming recoverable from the applicant on the conclusion of the disciplinary proceedings pending against him. It is also denied that the impugned order dated 21.4.1993 is illegal, ultravires, arbitrary or violative of provisions of Articles 14 & 16 of the Constitution of India.

6. The applicant having not pressed relief (iii) in the O.A. relating to the deduction of 'Personal Pay' of Rs. 550=00 in computing pension of the applicant, we heard the learned counsel for the applicant Shri Ajay Fastogi and Shri U.D.Sharma for Respondent No.1 and Shri B.H.Purhit for respondent No.2 at great length on the remaining issues and have examined the record in great detail.

7. It has been vehemently argued by the learned counsel for the applicant that under Rule 6(1) of the 1958 Rules, the provision is merely to with-hold or withdraw 'pension'

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or any part of it whether permanently or for a specific period and it does not extend, nor include the amount of Gratuity payable to a member of the service on retirement. Another plea which has been pressed by the learned counsel for the applicant is that the applicant retired from service w.e.f. 28.2.1993 on attaining the age of superannuation, hence the notification dated 26.5.1993 (Annex. P/1) by which an amendment has been incorporated to the effect of adding Gratuity also alongwith pension in the opening portion of Sub-rule (1) of Rule 6 of the 1958 Rules; is not applicable to the applicant as it would be deemed to have come into force on the date of its publication in the Official Gazette. The argument is that the applicant having retired earlier than the publication of the notification, the respondents cannot be allowed to take its advantage to support the impugned order dated 21.4.1993 (Annexure A/1). The learned Counsel for the applicant has also drawn our attention to sub-rule (2) of Rule 6 of the 1958 Rules and has tried to impress that in any view of the matter the word 'Pension' used therein cannot be read to include 'Gratuity' also for purposes of recovery from the applicant in case the departmental proceedings results in imposing any pecuniary penalty also and is thus ultravires to the provisions of Articles 14 & 16 of the Constitution.

6. In contrast to it, the learned counsel for the respondents while supporting the issuance of the impugned order dated 21.4.1993 (Annex.A/1) has relied upon a judgment of Hon'ble the Supreme Court in the case of Jarnail Singh Vs. The Secretary, Ministry of Home Affairs and others, 1993(1)SLR 23. On the basis of this authority, it has been urged by the learned counsel for the respondents that the

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amendment made by the respondents vide its Notification dated 26.5.1993 (Annex. F-1) is merely a clarificatory amendment and that the word Pension has always been understood to include Gratuity; also except that when the term pension has been used in contradistinction to gratuity. The learned counsel has also supported this contention with another authority of Hon'ble the Supreme Court in the case of State of Orissa v. Kalicharan Mohapatra, (1995)31ATC 471. The learned counsel for the State Government has also endorsed the arguments advanced on behalf of the respondent No.1 the Union of India.

9. We have given anxious thought to the arguments advanced by the learned Counsel for the parties and have gone through the authorities relied upon by them.

10. Before we undertake to evaluate the arguments advanced on behalf of both the sides, it is necessary to reproduce the relevant portion of Rule 6 of the All India Service (Death -cum-Retirement Benefits)Rules, 1958, which runs as under:

"6. Recovery from Pension.-(1) The Central Government reserves to itself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specified period, and the right of ordering the recovery from pensioner of the whole or part of any pecuniary loss caused to the Central or a State Government, if the pensioner is found in a departmental or judicial proceedings to have been guilty of grave misconduct or to have caused pecuniary loss to the Central or a State Government by misconduct or negligence during his service, including service rendered on re-employment after retirement:

Provided that no such order shall be passed without consulting the Union Public Service Commission:

Provided further that-

(a) such departmental proceeding, if instituted while the pensioner was in service, whether before his retirement or during his re-employment, shall after the final retirement of the pensioner, be deemed to be a proceeding under this sub-rule and shall be continued and concluded by the authority by which it was commenced in the same manner as if the

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pensioner had continued in service;

(b)-(c) (Omitted)

Explanation.- For the purpose of this rule-

(a) a departmental proceeding shall be deemed to be instituted when the charges framed against the

pensioner are issued to him or, if he has been placed under suspension from an earlier date, on such date; and

(b) a judicial proceeding shall be deemed to be instituted-

(i) in the case of criminal proceedings, on the date on which a complaint is made or a charge-sheet is submitted, to the criminal court; and

(ii) in the case of a civil proceedings, on the date on which the plaint is presented or, as the case may be, an application is made, to a civil court.

(3) Where any departmental or judicial proceeding is instituted under sub-rule (1), or where a departmental proceeding is continued under clause (a) of the proviso thereto against an officer who has retired on attaining the age of compulsory retirement or otherwise, he shall be sanctioned by the Government which instituted such proceedings, during the period commencing from the date of his retirement to the date on which, upon conclusion of such proceeding, final orders are passed, a provisional pension not exceeding the maximum pension which would have been admissible on the basis of his qualifying service upto the date of retirement, or if he was under suspension on the date of retirement, upto the date immediately preceding the date on which he was placed under suspension; but no gratuity or death-cum-retirement gratuity shall be paid to him until the conclusion of such proceedings and the issue of final orders thereto:

Provided that where disciplinary proceeding has been instituted against a member of the Service before his retirement from service under Rule 10 of the All India Services (Discipline and

Appeal) Rules, 1969, for imposing any of the penalties specified in clauses (i), (ii) and (iv) of sub-rule (1) of Rule 6 of the said rules and continuing such proceeding under sub-rule (1) of this rule after his retirement from service, the payment of gratuity or death-cum-gratuity shall not be withheld.

(3) Omitted.

11. It is now to be seen whether there is any force in the argument of the learned counsel for the applicant that the word Pension does not include the gratuity also under Rule 6(1) of the

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1958 Rules. It has been contended by the learned counsel for the applicant that the view taken by Hon'ble the Supreme Court in the case of Jarnail Singh has not been approved but has been distinguished by Hon'ble the Supreme Court in its later decision in the case of State of U.P. Vs. U.P. University Colleges Pensioners' Association, AIR 1994 S.C. 2311. In other words what the learned counsel for the applicant wants to emphasize is that even after the decision of Hon'ble the Supreme Court in the case of Jarnail Singh (supra) the word pension does not necessarily include gratuity also.

12. Although it is true that in the case of Jarnail Singh (supra) the term 'pension' was considered in the background of clause (O) of Sub-rule (1) of Rule 3 of C.C.S.(Pension) Rules, 1972; but it has emphatically been laid by Hon'ble the Supreme Court that the term pension has been substituted by the expression 'Pension or gratuity both' by way of amendment made in Rule 9(1) by the Central Civil Services (Pension) III Amendment Rules, 1991. It has also been made very clear by Hon'ble the Supreme Court that the amendment made in 1991 in the term pension falling under Rule 3(1)(O) of the C.C.S.(Pension) Rules, 1972 has been merely a clarificatory one. Hon'ble the Supreme Court after dealing with its decision in D.V.Kapoor Vs. Union of India and others, 1990(3) SLR 5 (SC) and F.R.Jesurathnam Vs. Union of India

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and others, 1990 (Supp) SCC 640 observed :-

"In our opinion, the definition of 'pension' in Rule 3(1)(o) quoted above negatives the appellant's contention and clearly indicates that the 1991 Amendment is merely clarificatory and makes explicit that which was clearly implicit prior to that Amendment by virtue of the definition of term 'pension' in Rule 3(1)(o). This clarification appears to have been made only to remove the doubt created by the decisions relied on by counsel for the appellant which are considered hereafter."

This judgment in the case of Jarnail Singh is a judgment consisting of three Hon'ble Judges of the Supreme Court. As against this, the learned counsel for the applicant places reliance upon the decision in State of U.P. Vs. U.P. Colleges Pensioners' Association (*supra*) of Hon'ble the Supreme Court which has been delivered by a bench consisting of Hon'ble two Judges of the Supreme Court. While considering the term 'pension' in the said decision, Hon'ble the Supreme Court in State of U.P. Vs. U.P. University Colleges Pensioners' Association case observed in para 15 as under:-

" 15. We, therefore, state that either because of what was stated in Jarnail Singh's case (1994 AIR SCW 936) or the way "pension" has been defined in the Constitution, it cannot be held that pension and gratuity are conceptually same, as stated in paragraph 9 of Jarnail Singh's case to which our attention is invited by Shri Jain. According to us, this Court took the view in question in Jarnail Singh because of the definition of the word "pension" in the concerned rule; otherwise, what was held in D.V.Kapoor (AIR 1990 SC 1923) and F.R.Jesuratnam (1990 (Supp) SCC 640) cases seem to be correct legal position."

13. From a perusal of the aforesaid two judgments of Hon'ble the Supreme Court in the case of Jarnail Singh & State of U.P., it is made out that

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in both the decisions the Hon'ble Judges have also considered its own decisions in the case of D.V.Kapoor (*supra*) and F.R.Jesuratnam (*supra*).

14. It is unquestionable that the law propounded by Hon'ble the Supreme Court is binding upon the subordinate courts by virtue of Article 141 of the Constitution of India but when there are two decisions of Hon'ble the Supreme Court itself on the same controversy distinguishing each others decision on a legal question, we have to fall back upon the law of interpretation and the principle of binding effect of the decisions of the larger bench. As observed earlier, the decision of Hon'ble the Supreme Court in the case of Jarnail Singh has been delivered by a bench consisting of three Hon'ble Judges of the Supreme Court whereas the decision in the case of State of U.P. has been delivered by a bench consisting of two Hon'ble Judges of Supreme Court. In view of the constitution of the bench disposing the aforesaid two decisions, we have no option but to follow the decision and ratio decidendi laid down by Hon'ble the Supreme Court in the case of Jarnail Singh (*supra*). In Jarnail Singh's case, the principle of law laid down has been that the term 'pension' includes gratuity and an amendment subsequently made in the year 1991 is merely a clarificatory one and does not negative the construction of the term 'pension' earlier also; being devoid of the concept of gratuity. This view of ours further finds support from a later decision of Hon'ble the Supreme Court in the case of State of Orissa Vs. Kali Charan Mohapatra (*supra*) decided on

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20.9.1995 and relied upon by the learned counsel for the respondents. In this case the respondent Kali Charan Mohapatra was a member of the Indian Police Service who retired on 31.12.1990. A criminal case was launched against him in the Special Court, Cuttack under Section 13(2) read with Section 13(1) of the Prevention of Corruption Act for being in possession of assets disproportionate to his known sources of income. When the case was still pending, the appellant State of Orissa with-held the gratuity amount of the respondent Kali Charan and also did not sanction the pension finally. However, a provisional pension equal to 90% of his entitlement was sanctioned. Aggrieved, the respondent approached the Central Administrative Tribunal, Cuttack bench which directed the appellants to release final pension and gratuity to the respondent within 90 days of the judgment. On an appeal preferred by the State of Orissa, Hon'ble the Supreme Court after analysing the provisions of Rule (1)&(2) of Rule 6 of the A.I.S.(Death-cum-Retirement Gratuity Benefits) Rules, 1958 held :

" where a judicial proceeding is pending against a pensioner for grave misconduct, the Government is entitled to withhold gratuity amount and/or death-cum-retirement gratuity amount and is also entitled to sanction provisional pension for the period of pendency of the said proceedings. It is not necessary that a judicial proceeding should relate to the charge of causing pecuniary loss to the Central or State Government by misconduct or negligence during his service. Sub-rule (1) of Rule 6 specifies two grounds upon which action thereunder can be taken. One is where the pensioner is found guilty of grave misconduct and the other is where he is found to have caused pecuniary loss to the Central or State Government by misconduct and negligence during his service. Sub-rule (2)

provides for orders to be made during the pendency of such proceedings. It may also be mentioned that neither the All India Service (Death-cum-Retirement) Rules nor the Pensions Act, General Clauses Act or the Leave Rules (referred to in Rule 2(2) define the expression 'misconduct'. It would, therefore, be reasonable and permissible to understand the said expression in Rule 6 aforesaid in the manner defined in the Prevention of Corruption Act."

15. In the instant case exactly the same thing has happened. The applicant retired on 28.2.1993 on attaining the age of superannuation and the impugned order dated 21.4.1993 (Annex.A/1) withholding the gratuity and commutation of pension benefits of the applicant till further orders, was issued. It was after the issuance of this order dated 21.4.1993 that the Government of India, Ministry of Personnel and Public Grievances & Pensions vide notification dated 26.5.1993 (Annex. P/1) amended the opening portion of sub-rule (1) of Rule 6 of the 1958 Rules which earlier read as under:-

"The Central Government reserves to itself the right of withholding or withdrawing a pension or any part of it, whether permanently or for a specific period, and the right of ordering the recovery from pension."

by substituting it w.e.f. the date of its publication to henceforth read as under:-

"The Central Government reserves to itself the right of withholding 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."

It is urged by the learned counsel for the applicant that this amendment being of 26.5.1993 i.e. after the date of applicant's retirement

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viz., 28.2.1993; the rights vested in him by virtue of the unamended Rule 6(1) of the 1958 Rules cannot be jeopardised and hence this amendment cannot govern the rights of the applicant. It has also been vehemently argued by the learned counsel for the applicant that since the notification dated 26.5.1993 has been issued after the date of retirement of the applicant, Sub-rule(2) of Rule 6 of the 1958 Rules; which provides for withholding of gratuity also where a departmental proceeding is pending against a member of service; is ultravires the Constitution and arbitrary being in conflict with the un-amended Rule 6(1) of the 1958 Rules. We are unable to accede to this argument advanced by the learned counsel for the applicant. Our reasons are two fold. Firstly, that in view of the principle of law laid down by Hon'ble the Supreme Court in the case of Jarnail Singh, wherein after consideration of the definition of the term pension given under Article 366 (17) of the Constitution of India (which includes gratuity also) the subsequent amendment made in the term pension has been held merely a clarificatory one, as has been in the case of the applicant here where by amendment vide Notification dated 26.5.1993 the term pension has further been elaborated to include gratuity as well. This amendment in the instant case similarly is nothing but a clarificatory one and its effect cannot be negatived solely on the ground that it has been made operative prospectively. Secondly, whatever doubts have been in regard to the implications of

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the term 'pension' employed under Rule 6(1) and 6(2) of the 1958 Rules further stand removed by the latest view expressed by Hon'ble the Supreme Court in the case of State of Orissa Vs. Mali Charan (Supra). Another argument advanced by the learned counsel for the applicant on the basis of the provisions of Payment of Gratuity Act, 1972 need not detain us any more as the said Act provides for a scheme for the payment of gratuity to employees engaged in Factories, Mines, Oilfield, Plantation, Port Railway Companies, Shops or other establishments and for matters connected therewith or incidental thereto and not to the members of All India Service, to which the applicant belonged.

16. Accordingly, we are of the firm view that the term 'pension' used in Rule 6(1) of the 1958 Rules and was construed always to mean /include gratuity also before its clarificatory amendment issued by the Government of India vide its Notification dated 26.5.1993 (Annex. F/1) and that this amendment has been in consonance with the provisions contained in Rule 6(2) of the 1958 Rules whereby in cases of departmental proceedings for major penalty the Central Government has been empowered to with-hold not only pension but gratuity also. It cannot, therefore, be said that Rule 6(2) of the All India Service (Death-cum-Retirement Benefits) Rules, 1958 is illegal, arbitrary, ultravires the provisions of Articles 14 & 16 of the Constitution of India. Our answer, therefore, to the question raised in this application is in the negative.

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17. The only other issue which remains now to be determined in this OA is regarding with-holding of Leave Encashment by the respondents. In this regard, it is sufficient to reproduce the relevant portion of Rule 20-B(5) of the I.A.S.(Leave) Rules, 1955 which runs as under:-

"20B(5) In the case of a member of the service who retires from service on attaining the age of superannuation while under suspension or while disciplinary or criminal proceedings are pending against him, the authority competent to grant leave may withhold whole or part of cash equivalent of leave salary in respect of earned leave, 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 the amount so withheld shall be paid after adjustment of Government dues, if any."

From the perusal of the above provision, it is clear that it is within the competence of the respondents Government to withhold whole or part of cash equivalent to leave salary in respect of earned leave, if in the view of such authority there is a possibility of some money becoming recoverable from him on completion of the proceedings against the applicant. The argument of the learned counsel for the applicant that since no specific amount has been quantified about the loss which may have been caused by the applicant while holding the post of Administrator, Municipal Council, Ajmer in the disputed period and which cannot also be quantified before the conclusion of the departmental proceedings; withholding of the

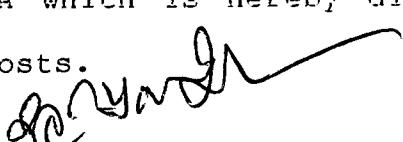
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leave encashment of the applicant is illegal, does not impress us. The reason is that as is evident from Sub Rule (5) of Rule 20B of the A.I.S. (Leave) Rules, 1955 exact quantification is not required before ordering withholding of the cash equivalent to Leave Salary if in the view of the authority competent to grant leave there is a possibility of some money becoming recoverable from the applicant. This possibility cannot be ruled out in the instant case as well, since the disciplinary proceedings had been initiated by the competent authority before the retirement of the applicant on the basis of material available before it. The action of the respondents in this regard withholding the cash equivalent to leave salary in respect of earned leave of the applicant, therefore, cannot be faulted.

18. For all the aforesaid reasons, we are of the considered opinion that there is no merit in this OA which is hereby dismissed with no order as to costs.


(RATAN PRAKASH)

MEMBER (J)


(O.P. SHARMA)

MEMBER (A)