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**CENTRAL ADMINISTRATIVE TRIBUNAL
CHANDIGARH BENCH**

O.A. No.060/00901/2014

Date of decision: 21.1.2016
Reserved On: 12.01.2016

...
CORAM: HON'BLE MR. SANJEEV KAUSHIK, MEMBER (J)
...

V.S. Bhargo S/o Late Sh. Ram Krishan, age 64 years, R/o House No.347, Sector 15, Panchkula (HR.).

...**APPLICANT**

BY ADVOCATE : Sh. K.B. Sharma vice Sh. D.R. Sharma.

VERSUS

1. U.T. Chandigarh Administration through its Secretary Labour, U.T. Secretariat, Sector-9, Chandigarh.
2. Deputy Commissioner-cum-Labour Commissioner, U.T., Estate Office Building, Sector-17, Chandigarh.

BY ADVOCATE: Sh. Arvind Moudgil.

...**RESPONDENTS**

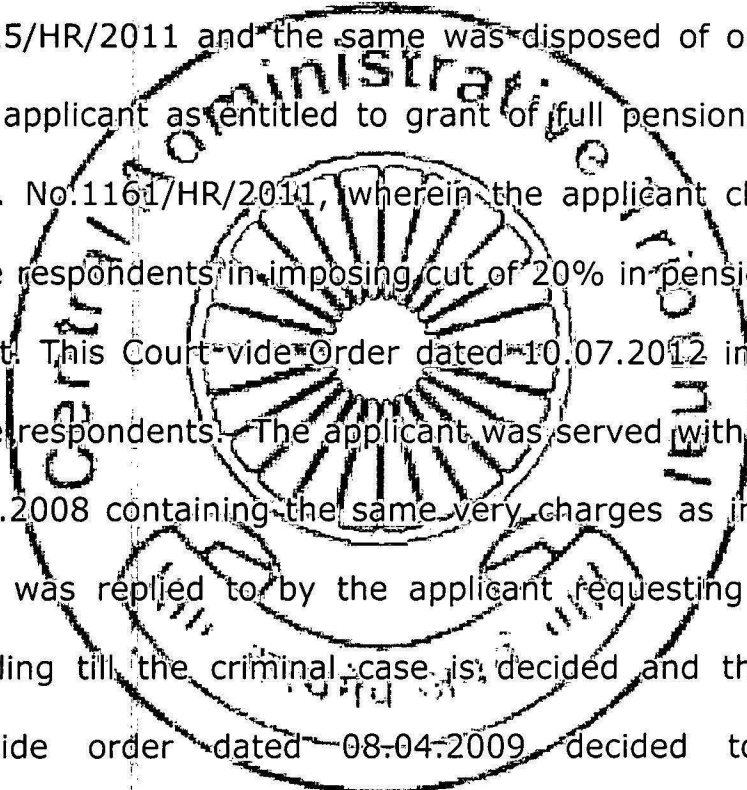
ORDER
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HON'BLE MR. SANJEEV KAUSHIK, MEMBER (J):-

1. Present O.A. has been filed seeking issuance of directions to the respondents to release the Gratuity of the applicant withheld by them pending appeal in a criminal case, with interest @18% p.a. till the actual payment is made.

2. Facts which led to filing of this OA are that the applicant joined respondent department as Steno Typist on 22.01.1973 and thereafter got promoted as Labour Inspector Grade-I. On attaining the age of superannuation, he retired on 31.10.2008 after rendering 35 years of service. While in service, an FIR No.RC/Chg/2007 was registered against the applicant on 31.11.2007 under Section 7 and 13 (2) read with Section 13(1) (d) of the Prevention of Corruption Act, 1988. The matter was tried by Special Judge CBI, Chandigarh and vide judgment dated 26.10.2010 the applicant was held guilty. Orders of the Special

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Judge CBI became subject matter of criminal appeal in CRM No.64596 of 2010 at the hands of the applicant before the Hon'ble High Court, which was admitted vide order dated 13.12.2010 suspending the sentence. It is the case of the applicant that on superannuation, the applicant was getting 90% provisional pension w.e.f. 01.11.2008 to 25.11.2010. Suddenly thereafter, the same was stopped and the applicant was served with a notice for reducing his provisional pension by putting 7% more cut and by releasing 80% of provisional pension vide order dated 26.06.2011. Against this order, the applicant filed O.A. No.1025/HR/2011 and the same was disposed of on 10.07.2012 holding the applicant as entitled to grant of full pension. In another case in O.A. No.1161/HR/2011, wherein the applicant challenged the action of the respondents in imposing cut of 20% in pension payable to the applicant. This Court vide Order dated 10.07.2012 invalidated the action of the respondents. The applicant was served with charge sheet dated 01.05.2008 containing the same very charges as in the criminal case, which was replied to by the applicant requesting to keep the matter pending till the criminal case is decided and the competent authority vide order dated 08-04-2009 decided to keep the departmental proceedings in abeyance. It was after conviction of the applicant that vide letter dated 31.5.2012, the respondents appointed the Inquiry Officer, which also became subject matter in O.A. No.637/HR/2012. It was disposed of on consensual basis that the inquiry proceedings will continue and outcome of the same will further be subject to final outcome of the appeal. Grievance in this OA is that pending departmental proceedings as well as criminal appeal, the respondents have illegally and arbitrarily withheld gratuity of the

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applicant therefore, they may be directed to release the same with interest.

3. Upon notice, the respondents have filed a detailed written statement wherein they have submitted that since the applicant had already been convicted by the Court of law and his appeal is pending before the Hon'ble High Court, hence the departmental proceedings have been initiated and in terms of 2.2(c)(ii) Punjab Civil Service Rules, Gratuity can be withheld.

4. We have learned counsel for the parties.

5. Sh. K. B. Sharma, learned counsel for the applicant submitted that since the applicant had already retired on attaining the age of superannuation in the year 2008, the respondents cannot endlessly withheld gratuity pending the above two proceedings and hence, the respondents may be directed to release it. To buttress his claim, he placed reliance on judgment dated 14.08.2013 in case of **State of Jharkhand & Ors. v. Jitendera Kumar Srivastava & Anr., Civil Appeal No.6770 of 2013 (arising out of Special Leave Petition (Civil) No.1427 of 2009)** reported as 2013 Vol.4 SCT 429.

6. Per contra, Sh. Arvind Moudgil, learned counsel for the respondents submitted that in terms of Rule formation, the applicant is not entitled to release of gratuity pending criminal/departmental proceedings.

7. We have given our thoughtful consideration to the entire matter. Issue qua release of gratuity pending criminal/departmental proceedings has already been considered and put to rest in the case of Krishan **Sarup Sharma Vs. UOI & Others.** in O.A. No.000112/2015 decided on 19.01.2016, wherein after considering the rules formation i.e. 2.2 2.2(c)(ii) PCS Rules and law on the subject, it has been held that

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pending departmental or judicial proceedings gratuity or death-cum-retiral benefits can be withheld. This view is based upon the full bench judgment of the Hon'ble High Court in the case of **Punjab State Civil Supply Corporation Another Vs. Pyare Lal**, LPA No.113/2012 (O&M) decided on 09.11.2012.

8. Relevant paras of Order dated 19.01.2016 in case of Krishan Sarup Sharma (Supra) are reproduced below for ready reference:

"10. From the conjunctive perusal of the pleadings two substantial questions of law arise for our consideration, viz.,
i) whether a criminal appeal is a continuing cause of action;
and

ii) whether the department can withhold the retiral benefits in terms of Punjab Civil Services Rules or not?

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13. Now dealing with 2nd poser whether the department can withhold the retiral benefits in terms of Punjab Civil Services Rules. To answer the above poser, rule 2.2 (c) (1) & 8.21 (aa) of the Punjab Civil Services Rules are to be reproduced below as the same are applicable to the employees working under Chandigarh Administration:

Rule 2.2(c) (i) of PGS Rules: (Pension & Gratuity)

"2.2 (c) (1) Where any departmental or judicial proceeding is instituted under clause (b) of rule 2.2 or where a departmental proceeding is continued under clause (i) of the proviso thereto against an officer who has retired on attaining the age of compulsory retirement or otherwise, he shall be paid during the period commencing from the date of his retirement to the date on which, upon conclusion of such proceedings, final orders are passed, a provisional pension not exceeding the maximum pension which would have been admissible on the basis of his qualifying service up to the date of retirement or if he was under suspension on the date of retirement up to date immediately proceeding to 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 of final orders thereon.** The gratuity, if allowed to be drawn by the competent authority on the conclusion of the proceedings will be deemed to have fallen due on the date of issue of final orders by the competent authority.

[Provided that where Departmental proceedings have been instituted under rule 10 of the Punjab Civil Services (Punishment & Appeal) Rules 1970 for imposing any of the penalties specified in clauses (i), (ii) and (iv) of rule 5 of the said rules, the payment of

gratuity or death-cum-retirement gratuity, as the case may be, shall not be withheld.]”

Rule 8.21 of PCS Rules (Leave Encashment)

"8.21(a) Leave at the credit of a Government employee in his leave account shall lapse on the date of his retirement: Provided that the Government employee;-

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(aa) Notwithstanding anything contained in sub-rule (a) the authority competent to grant leave may withhold whole or part of cash equivalent of earned leave in the case of Government employee who retires from service on superannuation while under suspension or while **disciplinary or criminal proceedings are pending against him, if in the opinion of such authority, there is a possibility of some money becoming recoverable from him on conclusion of the proceedings against him** and on conclusion of the proceedings, he will become eligible to the amount so withheld after adjustment of Government dues, if any." (Emphasis Supplied)

14. Perusal of the above makes it clear that pending departmental or judicial proceedings the employer is well within their right to withhold the retiral benefits i.e. gratuity or DCRG and leave encashment. What is permissible is that pending above proceedings applicant is held to be entitled for provisional pension @100%. These aspects of the matter have been considered by the Hon'ble jurisdictional High Court in the case of **Harbhajan Singh Riar v. State of Punjab and others**, 2009 (8) SLR 99 and by the two Full Benches of the Hon'ble jurisdictional High Court in the case of **B.S. Gupta v. Uttar Haryana Bijli Vitran Nigam Limited and others**, 2006 (8) SLR 690 and earlier to that in the case of **Dr. Ishar Singh v. State of Punjab & another**, 1993 (3) PLR 999. There was a conflicting view by the various Benches of the Hon'ble jurisdictional High Court and ultimately the matter was referred to the Full Bench in the case of **Punjab State Civil Supplies Corpn. Limited and others** (supra) wherein the Full Bench while approving the judgment in the case of **Harbhajan Singh Riar** (supra), which was based upon an earlier Full Bench decision in the case of **Dr. Ishar Singh** (supra), held that pending proceedings in terms of Rule 8.21 (aa) of Punjab Civil Services Volume-II, the department can withhold/postpone payment of leave encashment, but it has to release 100% provisional pension, pending above proceedings. Rule 2.2 (1) also talks of withholding of gratuity or death-cum-retirement gratuity pending departmental or judicial proceedings. Therefore, the poser no. (ii) is also answered in the affirmative by holding that pending departmental or judicial proceedings gratuity or death-cum-retirement gratuity. With regard to withholding of the amount of leave encashment, the department has to record a specific finding of possibility of some money becoming recoverable from him on conclusion of the proceedings against him.

15. The learned counsel for the applicant has also relied upon a judgment of Hon'ble Apex Court in the case of State of Jharkhand & Ors. versus Jitendra Kumar Srivastava & Another 2013(12) S.C.C. Page 210, wherein in paras 8 & 14, it has been held as follows :-

"It is an accepted position that gratuity and pension are not bounties. An employee earns these benefits by dint of his long, continuous, faithful and unblemished service. Conceptually it is so lucidly described in D.S.Nakara v. Union of India by D.A. Desai, J. who spoke for the Bench, in his inimitable style, in the following words: SCCpp.319-20, paras 18-20).

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14. The right to receive pension was recognized as a right to property by the Constitution Bench judgment of this Court in Deokinandan Prasad v. State of Bihar, as is apparent from the following discussion: (SCC pp.342-43 paras 27-33).

The Court has further held in para 17 as follows:-

"17. It hardly needs to be emphasized that the executive instructions are not having statutory character and, therefore, cannot be termed as 'law' within the meaning of the aforesaid Article 300-A. On the basis of such a circular, which is not having force of law, the appellant cannot withhold even a part of pension or gratuity. As we noticed above, so far as statutory Rules are concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these Rules, the position would have been different."

However, the Court finds a major difference between the facts in the case of J.K. Srivastava & Another (supra) and case before us. In that case the facts were that under Rule 43 & 43(b) of the Bihar Pension Rules, there was no provision for withholding of pension during the pendency of the departmental or criminal proceedings and same was passing an administrative order issued by the Finance department of Government of Bihar. The judgment in Para 5 of the order quoting High Court states as under:-

"To sum up the answers for the two questions are as follows:-

(i) Under Rules 43(a) and 43(b) of the Bihar Pension Rules, there is no power for the Government to withhold gratuity and pension during the pendency of the departmental proceeding or criminal proceeding. It does not give any power to withhold leave encashment at any stage either prior to the proceeding or after conclusion of the proceeding.

(ii) The circular, issued by the Finance Department, referring to the withholding of the leave encashment would not apply to the present facts of the case as it has no sanctity of law".

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16. In the case in hand, as discussed above rule 2.2 (1) clearly talks of withholding of gratuity or dearness-cum-retirement gratuity pending departmental or judicial proceedings. Thus the issue gets settled in the light of the above provision namely Rule 2.2 (1) that there does exist a provision in the statute to withhold the gratuity of a retired employee. The ratio laid down in the case of Jitendra Kumar Srivastava (supra) would not be applicable to this case and is clearly distinguishable.

17. In the light of the above, now we proceed to examine the facts of the present case. An FIR no.08 dated 07.05.2008 was registered against the applicant under the provisions of Prevention of Corruption Act, 1988. He was acquitted by the Special Judge, CBI vide its judgment dated 26.02.2014 on merits, against which a criminal appeal at the hands of the CBI is pending adjudication before the Hon'ble High Court where the leave has been granted. Perusal of the judgment passed by the Special Judge, CBI, particularly para-46, which is reproduced hereunder, makes it clear that the prosecution has failed to bring the evidence to substantiate the allegations levelled against the applicant for holding him guilty.

"46. As an off-shot of above-said discussion and from the evidence led by the prosecution, it is found that the prosecution has miserably failed to bring home the charge levelled against the accused by way of placing reliable, probable and worthy of credence evidence to prove the demand, acceptance, and recovery of the amount. Therefore, the accused is hereby acquitted of the charges under sections 7 and 13 (2) of the Prevention of Corruption Act, framed against him. His bail-bonds stands discharged. After compliance, the file be consigned to record room."

It is true that under Section 389 of the Cr. PC appeal is a continuing cause of action and in a criminal appeal filed at the hands of the CBI the Hon'ble High Court has already granted leave, meaning thereby that the High Court found substance in appeal while admitting it, but we cannot escape to notice here that the Special Judge, CBI had already acquitted the applicant on merits and mere pendency of appeal will not shadow the acquittal of applicant from the criminal charges levelled against him, for example if in a given case an employee is convicted by the trial court against which he filed appeal and while admitting the appeal he was released on bail and sentence was suspended then it can be said that until his conviction is set aside in appeal he continues to be a convict. In another case where an employee has been acquitted by the court of law on merits then mere filing of appeal will not be taken as that he will continue to be a convict despite being acquitted till the appeal is decided by the Hon'ble High Court. An accused is presumed to be innocent till he / she is convicted of the charge. His/her innocence is further strengthened by the acquittal recorded by the Trial Court. In the present case applicant comes under the latter category because the respondents have not returned any finding in departmental proceedings for any misconduct on his part, the retiral benefits were withheld only on

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ground of pendency of appeal. In absence of any finding by the competent authority whether his act comes within the definition of misconduct or there is a financial/pecuniary loss caused to the Government, which has already been quantified then the amount of leave encashment cannot be withheld. Our view also stands approved by the decision of the Hon'ble Supreme Court in the case of **D.V. Kapoor v. Union of India and Ors.**, JT 1990 (3) SC 403 wherein it was held that unless the pensioner is found guilty of misconduct in a departmental or a judicial proceeding, any part of his pension cannot be withheld.

18. A co-ordinate Division Bench of this Tribunal considered the issue in O.A.No. 060/00450/2014 - **Surjan Dass Vs. Union of India & Others**, decided on 27.4.2015 in which retiral benefits like DCRG and leave encashment of the applicant had been withheld on ground of pendency of departmental proceedings. After scanning through the rule and legal position on the issue, the Bench held that gratuity and commuted value of pension could be withheld as there was a specific decision to withhold the same. However, the Bench held that there was no decision to withhold leave encashment and withholding of leave encashment was not justified in absence of any decision or provision to that effect.

19. In the case in hand, in terms of rule 8.21 of the PCS rules, the competent authority is well within its power and authority to withhold whole or part of cash equivalent of earned leave in the case of government employee who retires from service on superannuation while under suspension or while disciplinary or criminal proceedings are pending against him. However, there is a caveat before such a action is to be taken by the authority. The rules indicates that the competent authority has to form an opinion that "there is a possibility of some money becoming recoverable from him on conclusion of the proceedings against him" and on conclusion of the proceedings, he will become eligible to the amount so withheld after adjustment of government dues, if any. The documentation available on record and pleadings do not show that the competent authority has formed an opinion that there is possibility of some money becoming recoverable from the applicant. In the absence of such a decision it would not be proper for the respondents to withhold the leave encashment due to the applicant as such action would amount to arbitrariness on their part."

9. Accordingly, the present OA is dismissed being devoid of merit.

No order as to costs.

(SANJEEV KAUSHIK)
MEMBER (J)

Date: 21.1.2016
Place: Chandigarh.

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