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**CENTRAL ADMINISTRATIVE TRIBUNAL
CHANDIGARH BENCH**

O.A.NO. 060/00450/2014 Date of order:- 27-04-2015

Coram: **Hon'ble Mr. Sanjeev Kaushik, Member (J)**
Hon'ble Mr. Uday Kumar Varma, Member (A).

Surjan Dass (Retired Chief Telephone Supervisor), son of Sh. Inder Ram, resident of House No.1286, Sector 10, Panchkula(Haryana).

.....Applicant.

(By Advocate :- Mr. Kasturi Lal)

Versus

1. Union of India through Secretary, Department of Telecommunication, New Delhi.

2. Bharat Sanchar Nigam Limited through its General Manager, Telephone District, Sector 34, Chandigarh-160022.

3. ADMN Office of General Manager, Telephone Department, Chandigarh, Sector 34, Chandigarh.

4. Brij Mohan, Additional General Manager (HR), Sector 34, Chandigarh,

5. R.S.Sharma, AGM(I.T.), BSNL Office of General Manager, Telephone Department, Chandigarh, Sector 34, Chandigarh.

...Respondents

(By Advocate : Mr. A.L.Vohra, for respondent no.1
Mr. K.K.Thakur, for respondents no.2 & 3).

ORDER

Hon'ble Mr. Uday Kumar Varma, Member (A):

By filing the present Original Application under Section 19 of the Administrative Tribunals Act, 1985, Applicant Surjan Dass has prayed that respondents be directed to release and pay the retiral benefits such as DCRG & leave encashment due to him on his superannuation along with interest @ 12% till its realization with further prayer that the departmental proceedings pending against him may be terminated being not sustainable in the eyes of law.

2. Facts in brief are that the applicant was appointed as Telephone Operator on 20.8.1974 under the Schedule Tribe category as the applicant belongs to Gadaria caste. In January, 1992, the applicant was promoted as Telephone Supervisor and in April, 2010, he was promoted as Telephone Supervisor. The applicant was granted the next higher grade of IDA pay-scale of Rs.8500-245-12450 vide memo dated 24.3.2011. After rendering more than 37 years of continuous service, the applicant retired as such on 30.7.2011 (31.7.2011 being Sunday). The applicant has stated that during his entire service career, no adverse remarks was ever communicated to him. On the basis of a telephonic complaint made by Shri Ajmer Singh, the applicant was issued a memorandum of charge-sheet

dated 29.7.2011 (which was delivered to him about two hours earlier to his superannuation on 30.7.2011. The applicant submitted his written reply to the said memorandum of charge-sheet on 12.8.2011. The respondents have released all other retiral benefits except DCRG and leave encashment. In this regard, the applicant made a detailed representation on 13.11.2013 to respondents for release of gratuity and leave encashment.

3. An Inquiry Officer was appointed to look into article of charge levelled against the applicant. The Inquiry Officer submitted his enquiry report by holding that "Shri Surjan Dass willfully secured employment as T.O. in 1974 as ST candidate by giving wrong information and continued to avail benefits of ST category in subsequent time-bound promotions which are not admissible to OBC candidate. Thus by his above willful act of securing employment under ST category by giving wrong information, the said Sh. Surjan Dass STS acted in a manner highly unbecoming of public servant & indulged in grave misconduct, deliberately thereby contravening Rules 5(4), (31) of BSNL CDA Rules, 2006". The applicant has relied upon the following judgments :-

- i) State of Jharkhand & Ors. versus Jitendra Kumar Srivastava & Ors. (Civil Appeal No.6770 of 2013) decided on 14.8.2013;

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ii) Krishan Kumar Rao versus Haryana Warehousing Corporation (CWP No.1549 of 1990) decided on 5.7.1990)(P&H High Court);

iii) Prafula Kumar Sahoo versus Union of India & Ors. (O.J.C.No.783) decided on 30.10.1991 (Orissa High Court(DB);

iv) Bidhi Chand versus Uttar Haryana Bijli Vitran Nigam & Ors. (CWP No.8565 of 2002) (P&H High Court);

v) Smt. Santosh Yadav versus State of Haryan (Civil Appeal No.7748 of 1996 (arising out of SLP No.12879 of 1990)

vi) Budh Ram & Ors. versus State of Haryana & Ors. (C.W.P. No.2799 of 2008) decided on 22.5.2009) (P&H High Court)(Full Bench).

4. On notice, respondent no.1 has filed short reply wherein they have stated that the applicant is facing disciplinary proceedings on the charge of securing employment as Telephone Operator in 1974 on the basis of a false S.T. certificate and also availing benefits of subsequent promotions on the basis of S.T.certificate.

5. Respondents no.2 to 5 have also filed a detailed written statement wherein they have also stated that the applicant secured employment as ST candidate by giving wrong information. The Inquiry Officer has also proved the charges levelled against the applicant in its enquiry report. There is no procedural lapse or irregularity in holding of enquiry against the applicant as the applicant was given full opportunity to defend himself. They have also relied upon the

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judgment passed by the Hon'ble Apex Court in the case of **Secretary to Government, Home Department** versus **Srivaikundathan** (1998(9) S.C.C. Page 553) wherein the Hon'ble Court has held that unless the finding of the Enquiry Officer is perverse or based on no evidence, scope of judicial review is very limited. They have also relied upon the following judgments :-

- i) Government of A.P. & Ors. versus Mohd. Nasrullah Khan (2006(2) S.C.C. Page 373);
- ii) Union of India & Another versus Ashok Kacker (1995 Supp.(1) S.C.C. Page 180);
- iii) Government, Prohibition & Excise Department versus L.Srinivasan (1996 S.C.C.(3) Page 157);
- iv) State of Punjab versus Chaman Lal Goyal (1995(2) S.C.C. Page 570);
- v) B.C.Chaturvedi versus Union of India & Ors. (1995(6) S.C.C. Page 749);
- vi) Secretary to Government Prohibition & Excise Department versus L.Srinivasan (1996(3) S.C.C. Page 157);
- vii) State Bank of Patiala versus S.K.Sharma (1996(3) S.C.C. Page 364);
- viii) Secretary to Government versus K.Munniappan (1997(4) S.C.C. Page 255);
- ix) State of Andhra Pradesh versus N.Radhakishan (1998(4) S.C.C. Page 154);
- x) Additional General Manager, Human Resource, Bhel Ltd. Versus Suresh Ramkrishna Burde (2007(4) Mh.L.J. 1);
- xi) R.Vishwaanatha Pillai versus State of Kerala & Ors. (2004(2) S.C.C. Page 105);

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xii) Regional Manager Central Bank of India versus Madhulika Guruprasad Dahir & Ors. (2008(10) Scale Page 431);

xiii) Union of India & Ors. versus M.Bhaskaran & Ors. (1995 Suppl. 4 S.C.C. Page 100);

xiv) Union of India versus Dattatraya Namdeo Mendhekar & Ors. (2008(2) Mh.L.J. Page 720).

They have thus prayed for dismissal of the OA.

6. Applicant has filed a rejoinder by generally reiterating the averments made in the OA.

7. We have given our thoughtful consideration to the entire matter and perused the pleadings available on record with the able assistance of the learned counsel for the parties.

8. The issue for consideration, in order to adjudicate in this matter is:

a) whether notwithstanding the rule position, specifically Rule 69(c) regarding withholding of gratuity, the same can be released to the applicant in view of the contention of the applicant that numerous judicial pronouncements have treated gratuity (and also pension) as 'property' and not as 'bounty' ?

b) Given the fact that the enquiry has been completed and the enquiry report has held the applicant guilty of deliberately concealing the fact that he did not belong to scheduled tribe, and further assuming that the disciplinary authority decides to punish him, can the proviso under

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Rule 69 (c) ~~can~~ be invoked and gratuity released to the applicant?

c) Is withholding of gratuity permissible under the rules where the employee has been found guilty of grave misconduct? In other words is withholding of gratuity a possible punishment under the rules?

The applicant has relied upon a judgment passed by the 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 :-

"8. 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".

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However, we find that there is major difference between the facts of the case before the Hon'ble Apex Court and the case before us. In the case before the Hon'ble Apex Court, the fact was that under Rule 43 & 43(b) of the Bihar Pension Rules, there is no provision for withholding pension during the pendency of the departmental or criminal proceedings as the same was withheld by invoking an administrative order issued by the Finance department of Government of Bihar. The judgment in Para 5 of the order quoting High court mentions as follows:-

"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".

In the present case, however, Rule 69 (c) of CCS (Pension Rules) explicitly provides that the gratuity during the pendency of the departmental enquiry can be withheld. The same provision is quoted as below :-

"69. Provisional pension where departmental or judicial proceedings may be pending

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(1) (a) In respect of a Government servant referred to in sub-rule (4) of Rule 9, the Accounts Officer shall authorize the provisional pension equal to the maximum pension which would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant, or if he was under suspension on the date of retirement up to the date immediately preceding the date on which he was placed under suspension.

(b) The provisional pension shall be authorized 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.

(c) No gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final orders thereon :

¹Provided that where departmental proceedings have been instituted under Rule 16 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, for imposing any of the penalties specified in Clauses (i), (ii) and (iv) of Rule 11 of the said rules, the payment of gratuity shall be authorized to be paid to the Government servant.

(2) Payment of provisional pension made under sub-rule (1) shall be adjusted against final retirement benefits sanctioned to such Government servant upon conclusion of such proceedings but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld either permanently or for a specified period."

The issue raised in (a) in para gets settled in the light of the above provision namely Rule 69 (c) that there does exist a provision in the statute to withhold the gratuity of a retired employee. The ratio enunciated in State of Jharkhand & Ors. vs. Jitendra Kumar Srivastava

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(supra) is not applicable to this case as the same would have applied to the instant case, if the rules were silent about withholding gratuity of a retired employee.

9. The next question then comes up, as has been raised in (b) of Para 8 is, whether this case is covered under the proviso of Rule 69(c). Since in the instant case, while the enquiry has been completed, the punishment has not been imposed or even the show cause notice indicating the nature and quantum of punishment proposed to be imposed, has not been issued so far. Therefore, we are not in a position to pre-judge as to what is likely to be nature of punishment that the disciplinary authority proposes to impose on the applicant and, therefore, in view of this uncertainty, it may not be appropriate to apply this proviso.

10. Coming to the third issue i.e. (c) framed in Para 8 above, we find that the Rule 9 of the CCS(Pension) Rules provides as follows:-

9. Right of President to withhold or withdraw pension

[(1) The President reserves to himself the right of withholding a pension or gratuity, or both, either in full or in part, or withdrawing a pension 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 Government, if, in any departmental or judicial proceedings, the pensioner is

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found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement :

Here again there is a specific provision that gratuity can be withheld if the pensioner is found guilty of grave misconduct or negligence during the period of service. We are not suggesting that the gratuity of the applicant shall be withheld after the enquiry is over and he is found guilty. What we are holding is that there exists a provision in the rules that empower the competent authority to withhold the gratuity if the retiree is found guilty of grave misconduct under Rule 9 as quoted above. So, hypothetically if the retiree's gratuity is eventually withheld as a punishment in the departmental proceedings it can not be held illegal for want of relevant rule position. Therefore, the issue raised in (c) in Para 8 also gets settled.

11. In view of the above discussion, we find that the impugned order in so far as it relates to withholding of gratuity is legally sustainable and does not suffer from the infirmity of being in violation of the relevant rules.

12. A perusal of the impugned order reveals that the decision is of withholding only gratuity and CVP. There is no decision to withhold the amount of leave encashment. There does not exist any specific rule that permits withholding of leave encashment. In this case there is no charge of causing any pecuniary loss to the government

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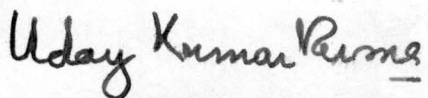
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that may in some way justify withholding the leave encashment. Given this fact, we feel that withholding of leave encashment is not justified in absence of any specific provision to the effect.

13. In view of the above discussion, we direct the respondents to release the amount of leave encashment to the applicant. The claim of interest on delayed payment, however, is not allowed. Further, we are not inclined to direct the respondents to release the amount of gratuity as this withholding does not amount to any illegality or violation of rules.

14. We further direct the respondents to conclude the departmental proceedings expeditiously and pass the final order at the most within next three months of the receipt of a certified copy of this order so that the claim of the applicant to release the withheld gratuity amount is finally resolved.

15. There will be no orders with regard to costs.


(UDAY KUMAR VARMA)
MEMBER (A).


(SANJEEV KAUSHIK)
MEMBER (J)

Dated:- April 27, 2015.

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