

**Central Administrative Tribunal
Principal Bench**

OA No. 1420/2015

Order Reserved on: 02.05.2016
Order Pronounced on: 03.06.2016

**Hon'ble Dr. B.K. Sinha, Member (A)
Hon'ble Mrs. Jasmine Ahmed, Member (J)**

B.C. Kailay, Age 63
S/o Shri Kabul Ram,
R/o D-I/73, Bharti Nagar,
New Delhi-3
- Applicant

(By Advocate: Mr. Pratap C. Mishra)

VERSUS

Union of India through

1. The Secretary,
Department of Electronics & Information
Technology, Electronics Niketan,
6 CGO Complex, New Delhi

2. Director General,
National Informatics Centre,
Department of Electronics & Information
Technology
A-Block, CGO Complex, Lodhi Road,
New Delhi-110 003
-Respondents

(By Advocate: Ms. Bhaswanti Anukampa)

O R D E R

Dr. B.K. Sinha, Member (A):

The controversy involved in the instant Original Application is indeed short. The applicant, a Scientist-D in NIC, was found guilty of the offences punishable under Section 120B r/w Section 420, 467, 468 and 471 IPC and

Section 13(2) r/w 13(1)(d) of PC act and convicted by the Court of Special Judge, District and Sessions Court Delhi vide judgment dated 18.03.2015 in the case RC No. 2(a)/92/CC No.59/01 and by a subsequent order dated 21.03.2005, the said Hon'ble Court sentenced him for rigorous imprisonment with fine under Section 120B. The President being the appointing authority, in consideration of the judgments of the Ld. Special Judge dated 18.03.2015 and 21.03.2005, arrived at the conclusion that retention of the applicant in Government service was undesirable and ordered for his removal from service under Rule 19(i) of CCS (CCA) Rules 1965 with fine of Rs. 7,000/- vide order dated 20.02.2006. The applicant filed a Criminal Appeal No. 331/2005 before the Hon'ble High Court of Delhi whereby the sentence for imprisonment was suspended following which he was released on personal bond. The applicant was further placed under deemed suspension w.e.f. 21.03.2005 vide order dated 09.09.2005. The deemed suspension was extended on 08.08.2005. A show cause under Rule 19(1) of the CCS (CCA) Rules was issued to the applicant and was ordered to be removed from service and his explanation being considered not worthy of credence. The applicant moved this Tribunal vide OA No. 2289/2005 and the Tribunal quashed the deemed suspension order dated 09.09.2008 on the ground that deemed suspension

with retrospective effect was improper. The applicant filed another OA No. 689/2006 and the CAT vide its order 29.09.2006, directed the respondents to dispose of the review petition, if any, preferred by the applicant within a period of three months. The applicant submitted second review petition dated 07.12.2011 addressed to President of India seeking review of the order dated 20.02.2006 take back him in service or grant pension or grant compassionate allowance as per Rule 41 of CCS (Pension) Rules 1972. A compassionate allowance was ordered by the competent authority vide communication dated 06.03.2013. Subsequently the applicant was also granted cash equivalent of Leave Salary of Rs. 2,99,938/- for 235 days of Earned Leave under Rule 39(2) of CCS (Leave) Rules, 1972 and DOP&T OM NO. 14028/3/2008-Estt.(L) dated 25.09.2008, vide order dated 02.01.2013. The applicant is aggrieved with non implementation of the said order for leave encashment order.

2. The applicant has, therefore, prayed for the following reliefs:-

“(i) direct the respondents to implement order No.PF/108/NJIC/2012-Adm.I dated 2.1.2013 with consequential benefits and interest @18% per annum till the date of payment.

(ii) award Rs.20,000/- as cost of litigation of the present O.A.

(iii) or any other order or directions as deemed fit in the facts and circumstances of the case may be passed.”

3. The applicant has adopted the ground that leave encashment is a part of terminal benefits and is a property in accordance with law declared by the Hon'ble Supreme Court and that leave encashment, pension and gratuity cannot be forfeited in violation of due process of law as provided under Article 300A of the Constitution. In the second instance, the respondents have been directed pension and gratuity in spite of orders of the termination. That puts quietus to this case as once gratuity has been granted, there is no case to withhold leave encashment.

4. The respondents have filed a counter affidavit rebutting the averments. The respondents have primarily stated that admittedly some of the pensionary benefits had been released to the applicant, the applicant was inadvertently granted leave encashment vide order dated 02.01.2013. On the consideration that wife of the applicant was employed in Government service and she was entitled to medical and other allowances, the applicant had fraudulently obtained the order dated 02.01.2013 for leave encashment in suppression of this fact and as soon as the same was brought to light, the order was rescinded

as none can be permitted to take advantage of the fraud committed by him. The respondents further submitted that the act involves correction of the mistake and the property rights can be revoked in defence of the same.

5. The applicant has filed the rejoinder application rebutting the arguments raised in the counter affidavit. The applicant further submits in the rejoinder application that sanction of leave encashment vide order dated 02.01.2013 is a conscious decision of the applicant and cannot be recalled inadvertently.

6. We have considered the pleadings of rival parties as also the documents adduced and the citations relied upon on either side and have patiently heard the arguments advanced by the learned counsels for the parties.

7. The twin issues that arise for our consideration are as under:-

- (a) *Whether it is correct for the applicant to invoke property rights in support of his case?***
- (b) *What reliefs, if any, can be granted to the applicant?***

8. In consideration of the first issue, it is to be noted that the fundamental principle governing the leave rules is contained in Rule 7 which provides as under:-

“7. Right to leave:

(1) Leave cannot be claimed as of right.

(2) When the exigencies of public service so require, leave of any kind may be refused or revoked by the authority competent to grant it, but it shall not be open to that authority to alter the kind of leave due and applied for except at the written request of the Government servant.”

9. Rule 9 of the CCS (Leave) Rules provides as under:-

“9. Effect of dismissal, removal or resignation on leave at credit:

(1) Except as provided in Rule 39 and this rule, any claim to leave to the credit of a Government servant, who is dismissed or removed or who resigns from Government service, ceases from the date of such dismissal or removal or resignation.

(2) Where a Government servant applies for another post under the Government of India but outside his parent office or department and if such application is forwarded through proper channel and the applicant is required to resign his post before taking up the new one, such resignation shall not result in the lapse of the leave to his credit.

(3) A Government servant, who is dismissed or removed from service and is reinstated on appeal or revision, shall be entitled to count for leave his service prior to dismissal or removal, as the case may be.

(4) A Government servant, who having retired on compensation or invalid pension or gratuity is re-employed and allowed to count his past service for pension, shall be entitled to count his former service towards leave.”

10. Rule 39(6)(a)(i) of the Leave Rules states as follows:-

“39. (6)(a)(i) where the services of a Government servant are terminated by notice or by payment of pay and allowances in lieu of notice or otherwise in accordance with the terms and conditions of his appointment, he may be granted, suo motu, by the authority competent to grant leave, cash equivalent in respect of both earned leave and half pay leave at his credit on the date on which he ceases to be in service subject to a maximum of 300 days and the cash equivalent payable shall be the same as in sub-rule (2) of rule 39.”

11. The above provisions clarify that it is within the competence of the respondents to withhold leave in whole or part. Leave encashment is paid to the employee as a matter of good measure on part of the government. However, the claim to leave ceases with the dismissal/removal from service of the employee. In case of dismissal, the service of the employee becomes zero. Hence, no claim arising from the service, including leave encashment cannot be raised as a matter of right. However, it is for the Government to consider the circumstances and may release such part of the encashment or whole of it as per its discretion. In the instant case, the applicant has been sanctioned compassionate allowance and along with certain other benefits as represented in a tabular form below:-

S.No.	File No.	Date	Particulars
1.	7(494)-14/1424-27	26/02/2014	PPO No. 331951400031

2.	7(494)-14/1355-57	10/02/2014	Authority for Gratuity for Rs.168795/-
3.	7(494)-14/1358-60	10/02/2014	Commutation of Pension Order for Rs. 177657/-
4.	Diary No. W03319514050006	02/07/2014	Revision of Pension order as per sixth pay commission
5.	No.PF/108/NIC/2013-Adm.I	05/05/2015	CGEGIS Order for an amount of Rs.68664/-

Therefore, when leave allowance was released to the applicant, the Government was acting within its rights.

12. Now we take up the issue of inclusion of encashment of leave under Article 300A as a part of the constitutional rights structure. It is an admitted position that Article 300A is not a fundamental right and it does not enable a party to challenge the validity of a law under Article 32, on ground of contravention of Article 300A. Nevertheless, the Court should so interpret a statue, if possible, that it may not have the effect of depriving a person of his property without authority of law. (**Misra & Co. v. Hindustan Aeronautics**, AIR 1986 Ori 20). Deprivation of property may take place in various ways, such as destruction (**Chiranjit Lal v. Union of India**, (1950) SCR 869) or confiscation (**Ananda v. State of Orissa** (1955) 2 SCR 919) or revocation of a proprietary right granted by a private proprietor (**Virendra v. State of UP** (1955) 1 SCR 415) or

seizure of goods (**Bishamber v. State of UP** AIR 1982 SC 33) or immovable property (**Virendra v. State of UP** (supra) from the possession of an individual (**Bishamber v. State of UP** (supra). There is also a ‘deprivation’ where a municipal authority, under statutory power, pulls down dangerous premises (**Nathubhai v. Municipal Corp.** AIR 1959 Bom 332). However, term ‘deprivation’ is to be distinguished from ‘restriction’ of the rights following from ownership, which falls short of dispossessing of the owner from those rights (**State of Bombay v. Bhanji**, (1955) 1 SCR 777). There is no deprivation – (a) where the State simply refuses to recognize a contract to which it is not a party. [**Ananda v. State of Orissa** (supra)]; (b) where an educational institution is temporarily deprived of its right to manage its property to secure compliance with the provisions of a statute enacted to control the system of education [**Katra Education Society v. State of UP** AIR 1967 SC 1307] ; and (c) where the right in question is not an absolute right but a defeasible one (**Vadia v. State of Saurashtra**, AIR 1967 SC 346), e.g., the right to hold an office is terminated by the abolition of the post (**Ramanathan v. State of Kerala**), or where a grant of property is subject to a condition and for the violation of that condition the grant is revoked. (**Manchegowda v. State of Karnataka**, AIR 1984 SC 1151). The Hon’ble

Supreme Court has held in **Rabindra Kumar v. Forest Officer**, AIR 1955 Manipur 49 that even if a person has obtained the property unlawfully, he cannot be deprived of the said property without authority of law and any such deprivation would be void. The Hon'ble Supreme Court has further ruled in **Vajrapuri v. New Theatres** (1959) 2 MLJ 469 that since the right to receive pension under the Service Rules for service rendered amounts to deprivation of property, subsequent reduction of pension would be 'deprivation' within the purview of Article 300A.

13. We also take note of the representation of the applicant dated 06.09.2012 requesting the respondents to release encashment leave under Rule 39(6)(a)(i) of CCS (Leave) Rules) 1972. As per the provisions of this Rule, where the services of a Government servant are terminated by notice or by payment of pay and allowances in lieu of notice, or otherwise in accordance with the terms and conditions of his appointment, he may be granted, suo motu, by the authority competent to grant leave, cash equivalent in respect of earned leave at his credit on the date on which he ceases to be in service subject to a maximum of [300 days (including the number of days for which encashment has been allowed along with Leave Travel Concession while in service)]. The respondents have

passed the sanctioned order dated 02.01.2013, which reads as under:-

“In terms of the Rule 39(2) of CCS (Leave) Rules, 1972 , and DOP&T OM NO. 14028/3/2008-Estt. (L) dated 25/09/2008 in supersession of all earlier orders on the subject, sanction of Competent Authority is hereby conveyed to the payment of cash equivalent of Leave Salary of Rs. 2,99,938/- (Rupees Two Lakhs Ninety Nine Thousands Nine Hundred Thirty Eight only) for 235 days of Earned Leave for taking into account for leave encashment to Shri B.C. Kailay, Ex-Scientist-D, Emp. Code No: 108, NIC-Hqrs., New Delhi who has removed from services w.e.f. 20.02.2006 vide Notification No. PF/108/NIC/P&E-I dated 28.04.2006.

2. It is certified that Shri B.C. Kailay is having 235 days of Earned Leave in credit in his leave account up to 20.02.2006 and payment will be made to him as per the CCS (Leave) Rules, 1972.
3. The expenditure incurred will be debitible to the Head “2071, Pension and other Retirement Benefits-01, Civil-115, Leave Encashment Benefits”.

14. The order of revocation dated 15.01.2013 reads as under:-

“In terms of the Rule 9(1) of CCS Leave Rules: Except as provided in Rule 39 and this Rule, any claim to leave to the credit of a Government Servant, who is dismissed or removed or who resigns from Government service, ceases from the date of such dismissal or removal or resignation.

Therefore, Sh. B.C. Kailay, Ex-Scientist-D, Emp. Code-108 is not eligible for the payment of Earned Leave Encashment and Office Order No. PF/108/NIC/2012-Adm.I dated 01.01.2013 stands cancelled.”

It is significant to note that the ground given is not one of concealing vital information but simply Rule 9(1) of Leave Rules provides that the claim to leave ceases from the date of such dismissal or removal or resignation.

15. In consideration of the facts mentioned above, it clearly emerges that the pension is a constitutional right and is governed under Article 300A and also that leave encashment is not a right under Rule 9(1) of CCS (Leave) Rules and is only given as a matter of special dispensation on the part of the Government. We have also stated that earned leave encashment under Rule 39 of Leave Rules can be withheld in full or in part depending upon the nature of misconduct. We cannot construe that such encashment will fall within the categories governed by Article 300A. It is distinguishable for pension and gratuity which have been linked to right to life. (**D.S. Nakara v. Union of India** (1983)1 SCC 305). Here it is part of emoluments governed under Rule 33 of CCS (Pension) Rules, 1972. Moreover, a Government has the right to correct the mistake wherever it is detected.

16. However, the question remains here that whether it was a bonafide mistake on the part of the respondents. We have taken note of the submissions of the orders applying

for leave encashment and granting leave encashment. The applicant has made a simple submission for grant of leave encashment without mentioning the service of his wife. This is also otherwise available with the Government and the applicant cannot be held guilty of concealment. The duties of due care and caution were upon the respondent before issue of the order. Having once defaulted in this duty, the applicant cannot invoke concealment or cancellation of the order of leave encashment.

17. We are also swayed by the fact that the applicant has been granted a number of concessions, including pension @ 50%, gratuity, order of commutation of pension, revision of pension and CGEIS. Having once granted these benefits on the same information and conditions, we find that there would be a little justification in cancelling the order of leave encashment. The applicant had failed to show otherwise any other tangible ground on which the order has been revoked. We are also to remark that though leave encashment does not fall within Article 300A, it becomes superior but a normal claim, once the order has been issued.

18. In view of the above consideration, in exercise of equity jurisdiction, we allow the OA by quashing order dated 15.01.2013 and direct the respondents to release

leave encashment as per the sanction order dated 02.01.2013 within a period of three months of production of certified copy of this order. No costs.

(Jasmine Ahmed)
Member (J)

(Dr. B.K. Sinha)
Member (A)

/1g/