

**Central Administrative Tribunal
Principal Bench, New Delhi**

OA No.3405/2016

Hon'ble Ms. Praveen Mahajan, Member (A)

**Reserved on :12.09.2017
Pronounced on :13.12.2017**

Shri Mahesh Kumar Sharma
Aged 61 years
S/o Late Shri Jai Dev Sharma
R/o H.No.4, Maheshwari Apartments
Sector-14, Rohini, Delhi – 110 085.
[presently retired on the substantive post of A.E.(Civil)
From DDA. (Group-'B' Post)] ... Applicant

(By Advocate:Shri R.A.Sharma)

VERSUS

1. Delhi Development Authority
Through its Vice-Chairman
Vikas Sadan (B-Block), 1st Floor
Near I.N.A., New Delhi – 110 023.
2. Commissioner (Personnel)
D.D.A., Vikas Sadan (B-Block) , Gr. Floor
Near I.N.A., New Delhi – 110 023.
3. Chief Manager
IDBI Bank, Surya Kiran Building
GF-19, K.G.Marg
New Delhi – 110 001. ...Respondents

(By Advocate:Ms. Sriparna Chatterjee)

O R D E R

Hon'ble Ms. Praveen Mahajan, Member (A):

The current OA has been filed by the applicant seeking the following reliefs :-

- “(a) A direction to the respondents to produce or cause production of the records of the case for perusal of this Hon'ble Tribunal.
- (b) Quash and set aside order dated 9.11.2015 (Annexure A-1) and order dated 9.3.2016 (Annexure A-2).

- (c) A direction to the respondents to refund the amount of illegal recovery effected from the monthly pension of the month of Mar'2016 till date.
- (d) A further direction to the respondents not to effect, in future, any recovery from the monthly pension of the applicant and pay full pension per month.
- (e) A further direction to the respondents to revise w.e.f.1.1.2016 the pension of the applicant based on the 7th CPC's recommendations as approved by the Govt. of India and also adopted by the DDA and also pay arrears of the revised pension w.e.f.1.1.2016 till date and continue to pay revised pension in future also.
- (f) Pass any other order or orders as deemed fit in the facts and circumstances of this case in favour of the applicant.
- (g) Allow costs in favour of the applicant."

2. The facts of the case are that the applicant retired from the service of Delhi Development Authority on 31.05.2015 and was paid all his retiral dues i.e. the Gratuity, leave encashment and Pension Commutation in the usual course.

3. At the time of his retirement, the applicant was holding the post of Executive Engineer (Civil) on current duty charge basis since 27.05.2015.

4. The CBI had registered a case vide FIR No.RC-39(A) 03/DLI dated 11.07.2003 against the then Vice-Chairman (Shri Subhash Sharma)/DDA and some Junior Engineers/AEs of the DDA, including the applicant.

5. The prosecution sanction in respect of the applicant was accorded by the Vice-Chairman/DDA on 30.07.2005 and issued on 05.08.2005 (Annexure A-3). The applicant contends that he was called by the CBI Officer(s) to attend their office from time to time during investigations of the case. He states that he kept the higher officers informed of the same. Copies of a few letters written by the applicant, to his seniors, informing about his attending the CBI Office as well as court hearings are annexed at Annexure A-4.

6. In the meanwhile, the applicant was granted the 1st ACP benefit w.e.f. 09.08.1999 in the pay scale of the Assistant Engineer, 2nd ACP benefit after

24 years service w.e.f.10.01.2003 and 3rd MACP benefit in the (Pay band-3) pay scale of Rs.15600-39100 plus grade pay of Rs.7600/- after 30 years service w.e.f.10.01.2009.

7. The applicant states that the Respondents have wrongly alleged that he (applicant) concealed the fact of pending criminal proceedings from the department to gain undue advantage. The contention of the respondents stands belied by the fact that the respondents themselves granted prosecution sanction to the CBI in respect of the applicant on 30.07.2005. Hence, they cannot, now, disclaim the knowledge of the criminal proceedings pending against the applicant.

8. The learned Trial Judge convicted the applicant in the criminal case filed against him in FIR No.RC-39 (A) 03/DLI dated 11.07.2003 vide his order dated 10.12.2015 and order dated 17.12.2015. Against this order, the applicant filed an appeal in the Hon'ble Delhi High Court which was admitted on 20.01.2016. The sentence, awarded to the applicant by the Trial Judge, was suspended during the pendency of the said appeal. Copy of order dated 20.01.2016 of the Delhi High Court is annexed at Annexure A-7.

9. On 09.03.2016, DDA issued a letter to Chief Manager, IDBI Bank, K.G. Marg Branch, New Delhi, asking the bank not to release, till further orders, payment of Dearness Allowance in the monthly pension being paid to the applicant. They also directed the bank not to release any increased/revised pension due to the (then) forthcoming 7th Central Pay Commission (Annexure A-2). The applicant represented against this to the respondent-DDA on 25.04.2016 seeking withdrawal of their order dated 09.11.2015 (Annexure A-1). He also served a legal notice dated 28.06.2016 and gave reminders dated 15.07.2016 and 04.08.2016 (Annexure A-9 and Annexure A-10). The applicant points out, that the bank, on instructions from the respondents, has started paying him reduced pension from March, 2016

onwards. The pension which was being paid to the applicant w.e.f. 01.06.2015 per month, for a sum of Rs.32,438/-, has now been reduced to a sum of Rs.11250/- w.e.f. March, 2016 (Annexure A-11).

10. The applicant has relied upon the judgment in the case of **State of Punjab & Ors. Vs. Rafiq Masiah** 2015(2) SLJ 151 that no recovery can be made from a retired government employee of any excess amount, even if paid by the employer erroneously. The applicant states that he has never furnished any incorrect information which may have led the DDA to commit any mistake in releasing the retiral benefits to the applicant. Also, there was never any possibility of any money being recoverable from the applicant, arising after the conclusion of the criminal proceedings. Therefore, the leave encashment was rightly paid to the applicant by the DDA. Hence, the demand made by the DDA asking the applicant to refund the retiral dues recovered from the applicant is unfair and bad in law. Aggrieved of the same, he has filed the present OA.

11. In the counter, the respondents state that the Vigilance Department (Civil) inadvertently forwarded a Vigilance Clearance Report in respect of the applicant, hence, the retiral benefits were wrongly & inadvertently released to the applicant. When it came to their notice that CBI had registered FIR No.RC39(A)/03/DLI dated 11.07.2003 and the prosecution sanction was issued by department on 05.08.2005, they tried to rectify their mistake. Even the Hon'ble Trial Court convicted the applicant in the aforesaid case vide orders dated 17.12.2015. Now, the DDA has also processed the case of the applicant for action under DDA Conduct Disciplinary & Appeal Regulations, 1999.

12. In view of the aforesaid circumstances, the applicant was called upon to refund the amount of gratuity and leave encashment within 07 days vide departments letter dated 09.11.2015. He was also informed that the pension

was also being revised and released on provisional basis as per the provisions of Rule 69 of CCA (Pension) Rules, 1972.

13. On 09.03.2016, the concerned bank was informed about the decision of the competent authority to make recovery of part pension by stoppage of DA. The respondents state that as per the provisions of Rule 69 of CCS (Pension) Rules, 1972 and Rule 39 of CCS (Leave) Rules, 1972, the gratuity and leave encashment are not payable until the conclusion of the departmental and judicial proceedings and issuance of final decision thereon. Since the applicant concealed the fact of such pending criminal proceedings from the department, the demand raised by DDA is in conformity with the rules. The judgment referred to by the applicant has no applicability in the facts & circumstances of the present case. Had the pendency of the criminal case been mentioned in the Vigilance Clearance Report (VCR), or brought to notice by the applicant, the retiral benefits would not have been released to him and pension would also have been released on provisional basis as per rules. Quoting CCS (Pension) Rules they submitted that the demand raised by department was duly supported by the relevant rules. Rule 73 (7) of the CCS Pension Rules states that:-

“Recovery of Government dues from pensioner’s relief permissible – The Ministry of Finance has clarified in their U.O. No.718-EV (A), dated the 7th February, 1978, that the Pensioner’s Relief is not covered by the Pension Act and there may be no objection to the recovery of Government dues from the Pensioner’s Relief without the consent of the pensioner.

As per the provisions of Rule 69 of the CCS Pension Rules, 1972 and Rule 39 of the CCS (Leave) Rules 1972 gratuity and leave encashment are not payable until conclusion of the departmental & judicial proceeding and final decision is taken thereon.

14. Respondents further state that as per Rule 73(7) recovery of government dues from pensioner’s relief is permissible. Accordingly, after approval of Commissioner (P) the concerned bank i.e. IDBI has stopped the

payment of DA which is in accordance with the Pension Rules. The applicant who was aware of his ineligibility for the benefits received by him, is not innocent, since he sent letters to the Department without mentioning that a criminal case was pending against him. In the circumstances, the respondents pray that the OA filed by the applicant, be dismissed.

15. In his rejoinder, the applicant has stated that the respondents have admitted, in categorical terms, that the vigilance clearance report had been forwarded by the vigilance department due to which the retiral benefits were released to the applicant. An FIR dated 11.07.2003 was registered by the CBI and prosecution sanction was issued by the department on 05.08.2005, so the deptt. knew about the proceedings against him. The applicant further states that he is not aware of any departmental action being contemplated against him.

16. He has invited reference to Rules 71 & 73 of the CCS (Pension) Rules 1972 (extract of Annexure A-14) which state as under :

"71. Recovery and adjustment of Government dues

- (1) It shall be the duty of the Head of Office to ascertain and assess Government dues payable by a Government servant due for retirement.
- (2) The Government dues as ascertained and assessed by the Head of Office which remain outstanding till the date of retirement of the Government servant, shall be adjusted against the amount of the ¹[retirement gratuity] becoming payable.
- (3) The expression 'Government dues' includes -
 - (a) dues pertaining to Government accommodation including arrears of licence fee * [as well as damages for the occupation of the Government accommodation beyond the permissible period after the date of retirement of the allottee]] if any ;
 - (b) dues other than those pertaining to Government accommodation, namely, balance of house building or conveyance or any other advance, overpayment of pay and allowances or leave salary and arrears of income tax deductible at source under the Income Tax Act, 1961 (43 of

1961).

73. Adjustment and recovery of dues other than dues pertaining to Government accommodation

- (1) For the dues other than the dues pertaining to occupation of Government accommodation as referred to in Clause (b) of sub-rule (3) of Rule 71, the Head of Office shall take steps to assess the dues ^[one year] before the date on which a Government servant is due to retire on superannuation ; or on the date on which he proceeds on leave preparatory to retirement, whichever is earlier.
- (2) The assessment of Government dues referred to in sub-rule (1) shall be completed by the Head of Office eight months prior to the date of the retirement of the Government servant.
- (3) The dues as assessed under sub-rule (2) including those dues which come to notice subsequently and which remain outstanding till the date of retirement of the Government servant, shall be adjusted against the amount of ¹[retirement gratuity] becoming payable to the Government servant on his retirement."

17. The applicant contends that vide OM No.20/16/1998-P & PW (F) dated 11.07.2013, gratuity can be withheld only for outstanding license fee or any ongoing disciplinary proceedings. In the case of the applicant none of the above conditions was existing on the date of his superannuation. As regards leave encashment amount released to the applicant, Rule 39 (3) of the CCS (Leave) Rules, 1972 is relevant which provides that :-

"39 (3)The authority competent to grant leave may withhold whole or part of cash equivalent of earned leave in the case of a Govt. servant who retires from service on attaining the age of retirement while under suspension or while disciplinary or criminal proceedings are pending against him, 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. He will become eligible to the amount so withheld after adjustment of Govt. dues, if any."

18. He submits that since the respondents failed to show the possibility of some money becoming recoverable from him on the conclusion of the pending criminal proceedings. Hence, on the date of his retirement on 31.05.2015, leave encashment, was correctly released by the respondents to the applicant. Thus, contentions of the Respondents in their counter reply

are an afterthought, having no merit, whatsoever, and the department has rightly released the retiral benefits to the applicant.

19. The applicant has placed reliance on several judgments in this regard, namely :-

1. State of Jharkhand and others Vs. Jitendra Kumar Srivastava and Another (2013) 12 SCC 210.
2. Vijendra Kunwar Vs. Union of India & Anr OA No.330/00600 of 2014 decided on 11.11.2016.
3. D.P.Sinha Vs. Union of India and others (1991) 16 Administrative Tribunals cases 70. OA No.216 of 1989 decided on 27th September, 1990.
4. G.Gnanayutham Vs. UOI and Another [1988] 6 Administrative Tribunals Cases 117

20. During the course of the arguments, the learned counsel for the applicant has relied upon the judgment of the Hon'ble High Court of Allahabad in the case of **Raghuvir Singh Vs. State of U.P. & Others** wherein it has been held that "for mere pendency of criminal case, pensionary benefits cannot be withheld at all and employee is entitled for full pension, gratuity etc."

21. He cited the judgment of Hon'ble Apex Court in the case of **State of Jharkhand and others Vs. Jitendra Kumar Srivastava and another** (2013) 12 Supreme Court Cases 210 wherein their lordships were pleased to observe that pension and gratuity are not bounty but property and such earned benefit cannot be taken away without complying with due process of law. He also placed reliance on the judgment of **D.P.Sinha Vs. Union of India and Others**, (1991)16 Administrative Tribunals cases 70., Patna Bench. OA No.216 of 1989 dated 27.09.1990, holding that "Rule 39(2)(a) makes it obligatory on the part of the authority competent to grant leave, to suo motu issue an order, granting encashment amount. Under Rule 39 (3) he may withhold the said amount only when disciplinary proceedings are

pending against the employee and in the view of that authority, there is a possibility of some money becoming recoverable from the official on conclusion of the proceedings against him.

22. Further, in **G.Gnanayutham vs UOI & another**, the Tribunal noted that Rule 9(1) of the Pension Rules which confers the power on the President to withhold pension, does not talk of gratuity.

In view of the afore mentioned facts and supporting citations, the learned counsel Sh. Sharma prayed for the reliefs claimed in the O.A.

23. These contentions of the applicant were strongly opposed by the learned counsel for the respondents Ms. Sriparna Chatterjee. Going over the facts of the case, the learned counsel argued that the action of the respondents is strictly in conformity with the Rules. Drawing attention to Rule-9(4) of the CCS Pension Rules, she vehemently argued that whenever any judicial proceedings are pending against a retired government employee, only 'provisional' pension can be paid to him. The language of the said proviso mandates such an action, leaving no room for any deviation or discretion. The respondents have merely carried out their responsibility, as per law. She further submitted that even the Trial Court has found the applicant guilty of the charges framed against him vide their orders dated 9.11.2015 and 9.3.2016. The action of the respondents of sanctioning provisional pension to the applicant, therefore, is on a sound legal footing. The impugned orders dated 9.11.2015 and 9.3.2016 have been issued to rectify the inadvertent error committed by the respondents, by wrongly granting vigilance clearance to the applicant at the time of his superannuation, whereby all retiral benefits were released to him.

24. I have carefully gone through the facts of the case and given my careful consideration to the rival contentions of both the parties.

25. The undisputed facts of the case are that when the applicant retired on 31.5.2015, there was a criminal case pending against him filed in FIR No. RC-39(A) 03/DLI dated 11.07.2003. However, the respondents released all the retiral dues to the applicant, on the plea (now taken by them) that vigilance clearance was granted to him, inadvertently. Be that as it may, on conviction of the applicant by the Trial Court vide its orders dated 17.12.2015, the respondents issued the impugned orders dated 9.11.2015 and 9.3.2016, under challenge in the present OA.

26. At this juncture, it would be appropriate to go through the Rules governing stoppage/reduction of pension of retiral officers. **Rule-9(4) states that "in the case of Government servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as provided in Rule 69 shall be sanctioned."** The word used here is **shall** and not **may**. Thus, it is clear that under the circumstances, as per the rules, the respondents, could have only sanctioned provisional pension. When the Trial Judge convicted the applicant vide judgment dated 10.12.2015 and order dated 17.12.2015, the respondents issued the impugned orders to cover their tracks. However, the said orders have been issued without following the prescribed procedure under the rules. On having erred gravely on this account, the respondents have issued the impugned orders without following the prescribed procedure under the rules.

27. As per **Pension Rule-9**, after superannuation, only President can withhold or withdraw pension. Para-2(b) of Rule-9 stipulates that:-

"The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement, or during his re-employment.-

- (i) shall not be instituted save with the sanction of the President,
- (ii) shall not be in respect of any event which took place more than four years before such institution, and
- (iii) shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service."

In view of this clear violation of the procedure specified under the Rules, I am left with no option but to quash the impugned orders dated 9.11.2015 and 09.3.2016.

28. It is made clear that this order does not in any way preclude the respondents from proceeding against the applicant, but the same has to be done within the ambit of law and as per the rules and guidelines governing the subject. O.A. is allowed. No costs.

(Praveen Mahajan)
Member (A)

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