

Central Administrative Tribunal
Principal Bench

OA No.3027/2016

Reserved on: 14.03.2017
Pronounced on: 20.03.2017

Hon'ble Mrs. Jasmine Ahmed, Member (J)

Inder Dutt Sharma (Aged about 61 years)
s/o (Late) Sh. Mahesh Dutt Sharma,
R/o Flat No.143, Pokcet-1,
DDA SFS Flats, Sector-6,
Dwarka, New Delhi – 110 075.
[Presently: Retired as AE(E/M)/DDA]

...Applicant

(By Advocate: Sh. R.A. Sharma)

Versus

1. Delhi Development Authority,
Through its Vice-Chairman,
Vikas Sadan (B-Block),
1st Floor, Near I.N.A.,
New Delhi-110023.

2. Commissioner (Personnel),
DDA, Vikas Sadan (B-Block),
Ground Floor, near I.N.A.,
New Delhi – 110 023. ...Respondents

(By Advocate: Sh. M.S. Reen)

ORDER

The applicant has filed this Original Application under Section 19 of the Administrative Tribunals Act, 1985 praying for the following relief(s):-

- “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 dt.28.9.2015 (Ann.A-1), Show Cause Notice dt.2.3.2016 (Ann.A-2) and order dt.28.7.2016 (Ann.A-3);

- c) A direction to the respondents to count the past service rendered by the applicant from 23.07.1984 to 24.5.1986 prior to the interruption period also as qualifying service for the grant of 2nd higher pay scale, 2nd ACP benefit and 3rd MACP benefit and pay to the applicant all consequential benefits of pay and allowances and pensionary benefits arising therefrom;
- d) A direction the respondents to release and refund in favour of the applicant, the amount of gratuity and pension commutation, which were illegal withheld by the respondents at the time of applicant's retirement on superannuation, and further direction to the respondents not to effect any recovery from the above amounts;
- e) A direction to the respondents to pay 20% simple interest per annum to the applicant on the amounts withheld from 1.6.2015 till the date when these are refunded/paid to the applicant;
- f) Pass any other order or orders as deemed fit in the facts and circumstances of this case in favour of the applicant; and
- g) Allow the O.A. with costs in favour of the applicant."

2. The brief factual matrix of the case is that the applicant was appointed as a Junior Engineer (E/M) on 04.07.1984 in the respondent-department and joined as such on 23.07.1984. But, due to some acute condition of his old aged ailing father and other compelling family circumstances, the applicant was mentally disturbed and, therefore, he submitted his resignation dated 21.05.1986 to the respondents through proper channel. The applicant also deposited one month's salary in lieu of one month notice period and was accordingly relieved from the afternoon of 24.05.1986 by the then Executive Engineer

(E1.)/E1.Div.III/DDA vide order dated 28.05.1986 stating therein that his relieving was subject to the formal acceptance of his resignation by the competent authority. Therefore, the applicant was not paid any terminal benefits whatsoever on his relieving by the EE(E)/ED-III/DDA. It is contended by the counsel for the applicant that as there was some improvement in his family circumstances, the applicant sent a letter dated 12.08.1986 to the respondents requesting them to treat the resignation submitted by him as withdrawn with immediate effect and allow him to join his duties again. Counsel for the applicant also states that till the time the applicant submitted an application for withdrawal of his resignation before expiry of stipulated period of 90 days, the resignation submitted by the applicant on 12.08.1986 was not accepted by that time. When nothing was heard by the applicant, he sent further representations dated 20.10.1986, 12.02.1987 and 10.03.1987 to the respondents reiterating his request for withdrawal of resignation and permitting him to resume his duties. Ultimately, as contended by the counsel for the applicant, the respondents issued a letter dated 06.04.1987 conveying acceptance of his request for withdrawal of resignation and asking him to join his duties. Consequently, the applicant resumed his duties as JE

(E/M) by submitting joining report dated 08.04.1987 in the concerned branch of DDA. Subsequently, he was posted in Divn.No. VIII/DDA vide office order dated 28.04.1987.

3. Counsel for the applicant contends that on recommendations of the DPC, the applicant was granted higher pay scale of RS.2000-3500 [revised to Rs.6500-10500 in 5th CPC] vide order dated 14.12.1999 w.e.f. 23.07.1999 (after 15 years of service from the date of joining the DDA as JE (E/M)]. He also states that on the recommendations of the DPC, a corrigendum was, however, issued whereby the above higher pay scale of Rs.6500-10500 (revised) was granted w.e.f. 24.06.2000 whereas it should have been granted w.e.f. 05.06.2000 i.e. from the date of completion of 15 years service after excluding the period of interruption from 25.05.1986 to 07.04.1987 i.e. 10 months and 14 days. It is also contended by the applicant's counsel that the respondents, while issuing the corrigendum, applicant's date of initial joining in DDA was erroneously taken as 10.08.1984 instead of actual date of joining being 23.07.1984. Thereafter, the applicant was promoted to the post of Assistant Engineer (E/M) on 14.01.2008. Counsel for the applicant also states that on the recommendations of the DPC, the applicant was granted 2nd ACP benefit (under 5th CPC) in the pay scale of

Rs.10000-15200 w.e.f. 23.07.2008 vide order dated 16.03.2009. He further submits that again on the recommendations of the Senior Level Screening Committee, the applicant was granted the 3rd MACP benefit (PB-3) in the pay scale of Rs.15600-39100 with GP of Rs.7600/- vide order dated 01.12.2014, and the applicant thereafter retired on 31.05.2015 from the post of Assistant Engineer (E/M) on attaining the age of superannuation.

4. Counsel for the applicant vehemently argued that to the applicant's utter surprise and mental shock, the respondents after retirement of the applicant withheld his retiral dues without any rhyme and reason. Being aggrieved, the applicant submitted representations dated 09.06.2015, 01.07.2015 and 13.08.2015 to the respondents requesting therein to release the pensionary benefits to him, which were illegally withheld by the respondents, with a further request of condonation of interruption period. The above request of the applicant for condonation of interruption period from 25.05.1986 to 07.04.1987 was rejected by the respondents vide letter dated 28.09.2015. The applicant thereafter made yet another representation dated 15.10.2015 to the Vice Chairman of the respondent organization reiterating his above request. Counsel for the applicant vehemently argues

that instead of releasing the withheld retiral dues of the applicant, the respondents served upon him a Show Cause Notice [hereinafter referred to as SCN] on 02.03.2016 after a lapse of more than nine months, requiring the applicant to show cause as to why he did not bring the mistakes committed by the department in granting the ACP/MACP benefits by counting the pasts service before joining the duty by him on 08.04.1987 after acceptance of his resignation withdrawal letter.

5. Pursuant to the SCN, contends the counsel for the applicant, the applicant submitted a detailed reply on 21.03.2016 to the respondents requesting them to withdraw the said SCN and to release the withheld pensionary/retiral dues as he was facing financial hardship. The applicant also sent reminders to the respondents vide letters dated 11.07.2016 and 25.07.2016 for releasing his withheld retiral dues. Counsel for the applicant states that the respondents in a most arbitrary, discriminatory and in an illegal manner rejected the representations of the applicant vide order dated 28.07.2016. He further states that from a reliable source the applicant has come to know that the respondents would be revising his pay and allowances from the dates of grant of 2nd higher pay, 2nd ACP and 3rd MACP benefits to

his great disadvantage till the date of his retirement and would be recovering the alleged excess amount, if any paid to him, from his withheld retiral dues which act of the respondents would cause a huge financial loss to the applicant for no fault on his part.

6. Counsel for the applicant states that as per Rule 26 (6) of the CCS (Pension) Rules, 1972 [hereinafter referred to as Pension Rules], acceptance of applicant's request for withdrawal of resignation and allowing him to resume his duties as JE(E/M) vide order dated 06.04.1987 shall be deemed to have condoned the interruption period in service. For the sake of better clarity, Rule 26(6) of the Rules *ibid* is reproduced hereunder:-

“26(6) When an order is passed by the Appointing Authority allowing a person to withdraw his resignation and to resume duty, the order shall be deemed to include the condonation of interruption in service but the period of interruption shall not count as qualifying service.”

Counsel for the applicant also places reliance on Rule 28 (a) of the Pension Rules, which provides as under:-

“(a) In the absence of a specific indication to the contrary in the Service Book, an interruption between two spells of civil service rendered by a Government servant under Government including civil service rendered and paid out of Defence Services Estimates or Railway Estimates shall be treated as automatically condoned and the pre-interruption service treated as qualifying service.”

7. Counsel for the applicant further states that the present case is not a case of unauthorized absence on the

part of the applicant during the interruption period and if the two provisions, referred to above, are read together, the question of interruption period for the purpose of pension and pensionary benefits should have been considered *suo motu* by the respondents themselves. Counsel for the applicant also states that there was no contrary entry in the service book of the applicant, therefore, the interruption period between two spells of applicant's service i.e. prior to his relieving w.e.f. 26.07.1984 to 24.05.1986 and after resuming his duty as JE (E/M) w.e.f. 08.04.1987 to 31.05.2015 i.e. the date of his retirement on superannuation, shall be treated qualifying service for the purpose of pension and pensionary benefits. But on the contrary, the respondents have failed to act as a model employer and have put the applicant in great financial hardship by withholding great portion of his legitimate retiral dues without any lawful authority. Counsel for the applicant strongly urges that the respondents never stated that the services rendered by the applicant prior to the date of his relieving i.e. 24.05.1986 would not count as qualifying service, hence, the SCN dated 02.03.2016 issued to the applicant is nothing but an afterthought to harass the applicant which cannot be sustained in the eyes of law. He further states that the 2nd higher pay, 2nd ACP and 3rd

MACP benefits were granted to the applicant by the competent authority on the recommendations of the duly constituted DPCs/Senior Level Screening Committee after due application of mind and thorough appreciation of facts of the case. He also states that in getting the 2nd higher pay, 2nd ACP and 3rd MACP benefits on completion of requisite length of service, no misrepresentation, fraud, undue pressure or coercion is attributable on part of the applicant. Instead, the above benefits have been granted to him after constituting proper DPCs and on recommendations made by the said DPCs. He also contends that as per the provisions of Rule 73 (1) & (2) of the Pensions Rules, the respondents should have ascertained and assessed the government dues (i.e. overpayment of pay and allowance, if any, made to the applicant) recoverable from the applicant two years before the due date of his retirement i.e. 31.05.2015, and assessment of the said dues, if any, recoverable from the applicant should have been completed by the respondents eight months prior to the date of his retirement. Counsel for the applicant also states that on the contrary the respondents, for the first time, issued SCN to the applicant on 02.03.2016 asking him to show cause as to why the excess payment made to him years back should not be

recovered from him. In this regard, counsel for the applicant relies upon a recent decision of the Hon'ble Apex Court in *State of Punjab & Ors. Etc. vs. Rafiq Masih (White Washer) Etc.* [2015 (2) SLJ 151] wherein it has been held as under:-

“12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summaries the following few situations, wherein recoveries by the employers, would be impermissible in law:

- (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).*
- (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.*
- (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.*
- (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.*
- (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.”*

8. Counsel for the applicant states that the applicant's case is squarely covered by the above decision of the Hon'ble Supreme Court, especially by para 12(ii), (iii) and (v), and by virtue of which the respondents are estopped

from effecting any recovery from the retiral dues of the applicant. Hence, the applicant is entitled to the reliefs, as prayed for in the instant OA.

9. Per contra, counsel for the respondents has taken a preliminary objection of limitation stating that the applicant made representation on 09.06.2015 i.e. after his retirement on 31.05.2015. He also contends that the said representation was made by the applicant for regularization of the intervening period from the date of his resignation and permission to withdraw the said resignation. He also states that the matter relates to the period of 5/1986 to 4/1987 and, hence, the representation of the applicant is highly belated as it is made after a gap of more than 28 years. Hence, he states that the representation of the applicant amounts to revival of the cause to get cause of action in favour of an individual to institute litigation. Counsel for the respondents states that the applicant submitted his resignation on 21.05.1986 with immediate effect and also expressed willingness to pay one month's salary in lieu of one month notice period and accordingly his resignation was accepted and he was relieved on 24.05.1986. But, as the applicant submitted an application for withdrawal of his resignation within ninety days, hence, his resignation was accepted to be withdrawn

and he resumed his duties w.e.f. 08.04.1987. Counsel for the respondents contended that the period from 25.05.1986 to 07.04.1987 has to be treated as break in service and this fact was informed to the applicant. He further states that as per the records, the applicant never represented till his retirement raising this issue, hence, the instant OA is against the principle of estoppel and also barred by time. In this regard, counsel for the respondents relied upon the decision of the Hon'ble Supreme Court in the case of *Union of India Vs. M.K. Sarkar* [2010 (2) SCC 58] wherein it has been held that when a belated representation in regard to a stale or dead issue/dispute is considered and decided in compliance of the directions of the Courts/Tribunals to do so, the date for such decision cannot be considered as furnishing a cause of action for revival of the dead or stale issue. Hence, the applicant's representation cannot be decided being a stale issue.

10. Heard the rival contentions of the parties, perused the pleadings, documents and decisions relied upon by the counsel for the parties.

11. The issue in short involved here is as to whether the respondents are justified in withholding the retiral dues of the applicant at the time of his retirement on

superannuation and to effect any recovery from the above retiral dues that also without issuing any SCN before withholding the aforesaid retiral dues?

12. From the entire facts scenario of the case, it is undisputed that the applicant tendered his resignation due to some problems of his own and within the prescribed period of 90 days, he requested for withdrawal of his resignation which was ultimately accepted by the competent authority of the respondents and permitted the applicant to resume his duties. It is also not disputed that the applicant was granted 2nd higher pay, 2nd ACP and 3rd MCP benefits on completion of requisite length of service every time on recommendations of the DPC duly constituted for the purpose after following due procedure, application of mind and thorough consideration of the facts of his case. It is also found that in grant of the above benefits, the applicant was having neither any role to play nor he had played any fraud, undue pressure or coercion over the respondents nor concealed any material facts to get the above benefits in his favour. Rather all the benefits narrated above were granted to the applicant on completion of requisite length of service by following due procedure in that regard. It is also seen that under Rule 26(6) of the Pension Rules it has been

provided that in case when an employee is allowed to withdraw his resignation and permitted to resume duty, the order shall be deemed to include the condonation of interruption period in service but the period of interruption shall not count as qualifying service. Hence, a bare reading of this provision clearly shows that the interruption period shall be deemed to have been condoned by the respondent as the word used here in relation to condonation of interruption period is 'shall'. Hence, when the respondents have accepted the request of the applicant for withdrawal of his resignation and permitted him to resume duty as per provision 26(6) of the Pension Rules, I am of the view that the interruption period is deemed to have been condoned which will not be counted as qualifying service as it is neither a case of unauthorized absence of the applicant nor there is any contradictory indication in his service book as provided under Rule 28(a) of the Pension Rules. It is also undisputed that the applicant has performed official duties after resuming the job with unblemished record as retired on 31.05.2015 after attaining the age of superannuation. But, the respondents, without adhering to Rule 73 (1) & (2) of the Pension Rules and even without issuing SCN to the applicant before retirement, have withheld his retiral dues, which act of the respondents is violative of principles of

natural justice. It is also seen that the SCN was issued on 02.03.2016 that too after the applicant submitted his representations for releasing the withheld retiral dues, which is an afterthought and to cover their own lacunae and wrongs and the said act of the respondents has caused harassment and financial hardship to the applicant. I am also of the view that had the respondents adhered to Rule 73(1) & (2) of the Pension Rules and started to ascertain/assess the dues, if any, recoverable from the applicant well before two years of his retirement and completed the same eight months prior to his retirement, the applicant would have settled the issue and would not have faced any hardship after his retirement. It is the settled principle of law that whenever civil consequences attract the employee concerned, the respondents are duty bound to issue SCN before effecting recovery, and failure of which is a blatant lapse on the part of the respondents and violative of principles of natural justice. The case of the applicant is squarely and completely covered by the decision of Hon'ble Supreme Court in *State of Punjab & Ors. Etc. vs. Rafiq Masih (White Washer) Etc.* (supra)[para 12(ii) (iii) and (v)] as the applicant is a retired employee and the excess payment whatever has been made to him has been made much before five years. It will also be

iniquitous or harsh or arbitrary if any recovery is made from the applicant, who is a retired employee that too without giving any SCN. Counsel for the applicant also handed over a decision of Mumbai Bench of this Tribunal in the case of *Saramma John Mathai vs. Union of India & Ors.* [OA No.147 of 2013 decided on 29.06.2015] wherein also the Tribunal taking into consideration the ratio laid down by the Hon'ble Supreme Court in *State of Punjab & Ors. Etc. vs. Rafiq Masih (White Washer) Etc.* (supra) held that no recovery can be effected.

13. Hence, in the conspectus of the facts and circumstances, principles already laid down in regard to violation of principles of natural justice and also the judgment passed by the Hon'ble Supreme Court in *State of Punjab & Ors. Etc. vs. Rafiq Masih (White Washer) Etc.* (supra), I find merit in the OA and the same is allowed and the impugned orders are quashed and set aside. The respondents are directed to release the pensionary benefits of the applicant i.e. gratuity and commutation of pension which has been withheld by them after the applicant's retirement by taking into account the service rendered by the applicant from 23.07.1984 to 24.05.1986 i.e. prior to giving resignation as qualifying service, with consequential

benefits, within a period of three months from the date of receipt of certified copy of this order. No costs.

(Jasmine Ahmed)
Member (J)

/AhujA/