

CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH

No. OA 350/00928/2015

Present: Hon'ble Ms. Bidisha Banerjee, Judicial Member

PARTHA BHADURI

VS

UNION OF INDIA & ORS.

For the applicant : Mr.P.C.Das, counsel

For the respondents : Mr.M.K.Bandyopadhyay, counsel

Order on : 19.6.16.

O R D E R

This matter is taken up in the Single Bench in terms of Appendix VIII of Rule 154 of CAT Rules of Practice, as no complicated question of law is involved, and with the consent of both sides.

2. This application has been filed seeking the following reliefs :

- a) To pass an appropriate order directing upon the respondent authority to refund the amount of Rs.6,53,180/- which was deducted by the Divisional Personnel Officer, Eastern Railway, Howrah at the time of giving the terminal benefits in favour of the applicant vide office order dated 27.2.2015 being Annexure A/3 of this original application and which was deducted without issuing any show cause notice to the present applicant and no opportunity has been given and no reason has been assigned by the respondent authority in respect of such deduction from the retirement gratuity of the present applicant;
- b) To pass any appropriate order directing upon the respondent authority to refund the amount of Rs.6.53,180/- which was illegally deducted by the respondent authority from the retirement gratuity of the present applicant along with penal interest upon the railway authority which has to be paid in favour of the applicant till the date of actual payment.

3. Both the counsels were heard.

4. Shorn of unnecessary details, the applicant would seem aggrieved due to withholding/non-payment of Rs.6,53,180/- from his retiral benefits due to which on his retirement he was facing acute financial hardships.

5. The respondents have emphatically admitted the fact of "recovery", justifying the action in the following words :

"Sri Partha Bhaduri was Booking Supervisor/Chandannagar upto 26.11.2014. On being transferred from Chandannagar, the applicant joined Bally on 27.11.2014 as Booking Supervisor/Bally from where he retired on superannuation w.e.f. 28.2.2015.

While processing the settlement clearance from Commercial Department before his retirement, a report from Booking Supervisor /Chandannagar vide his letter No. DS/BS-II/CGR/03/15 dt. 7.2.2015 was received in which it was mentioned that Shri Partha Bhaduri Ex-Bookling Supervisor/Chandannagar did not hand over the following tickets :

Details of Missing Ticket	Amount	Remarks
70 colour Monthly Season Tickets x 525	Rs.36,750.00	150 Kms
Bauria Child Ordinary : 10482 10499 = 18 x 10	Rs.180.00	
Kolaghat Ordinary : 10275 10499 = 225 x 25	Rs.5625.00	
Kharagpur Child Ordinary : 4274 - 4299	Rs.625.00	Highest Distance
Furcutting Mail/Express : 0000-999 = 1000 x 304	Rs.3,64,000.00	
Raipur Mail/ Express : 0000-1199 = 1200 x 230	Rs.2,76,000.00	
TOTAL = Rs.6,23,180.00		

The said tickets were found to be entered in the stock book but no record of sale nor disposal was recorded. Since Shri Bhaduri did not make over the tickets to his reliever, he was liable for the loss towards the value of the journey involved vis-a-vis the tickets.

Based on the above, an amount of Rs.6,23,180/- is attributed to Sri Partha Bhaduri, ex-Booking Supervisor/ Bally for which the said amount has been held up from his settlement dues. In addition to that Rs.30,000/- was also been held up for future Commercial Debit as per normal procedure which is applied for all retiring Commercial Staff."

6. It is evident from the above that admittedly, after retirement the applicant was penalised with a recovery of Rs.6,23,180/- without any show

cause notice or proceedings. Therefore the question that arose for determination was whether the respondents were justified in withholding the retiral dues in such manner and whether such dues could be recovered from a pensioner.

7. Ld counsel for the applicant vociferously opposed the recovery citing the following decision of Hon'ble Supreme Court rendered in **State Of Jharkhand & Ors. -vs- Jitendra Kumar Srivastava & Anr. (Civil Appeal No. 6770 of 2013)**:

"7. It is an accepted position that gratuity and pension are not the bounties. An employee earns these benefits by dint of his long, continuous, faithful and un-blemished service. Conceptually it is so lucidly described in D.S. Nakara and Ors. Vs. Union of India ; (1983) 1 SCC 305 by Justice D.A. Desai, who spoke for the Bench, in his inimitable style, in the following words:

"The approach of the respondents raises a vital and none too easy of answer, question as to why pension is paid. And why was it required to be liberalised? Is the employer, which expression will include even the State, bound to pay pension? Is there any obligation on the employer to provide for the erstwhile employee even after the contract of employment has come to an end and the employee has ceased to render service?"

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What is a pension? What are the goals of pension? What public interest or purpose, if any, it seeks to serve? If it does seek to serve some public purpose, is it thwarted by such artificial division of retirement pre and post a certain date? We need seek answer to these and incidental questions so as to render just justice between parties to this petition.

The antiquated notion of pension being a bounty a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and, therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in Deoki Nandan Prasad v. State of Bihar and Ors. [1971] Su. S.C.R. 634 wherein this Court authoritatively ruled that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by the rules and a Government servant coming within those rules is entitled to claim pension. It was further held that the grant of pension does not depend upon any one's discretion. It is only for the purpose of quantifying the amount having regard to service and other allied matters that it may be necessary for the authority to pass an order to that effect but the right to receive pension flows to the officer not because of any such order but by virtue of the rules. This view was reaffirmed in State of Punjab and Anr. V. Iqbal Singh (1976) ILLJ 377 SC".

8. It is thus hard earned benefit which accrues to an employee and is in the nature of "property". This right to property cannot be taken away

without the due process of law as per the provisions of Article 300 A of the Constitution of India."

8. The following decisions were also noted :

- (i) In **State of Punjab & Os. Etc. -vs- Rafiq Masih (White Washer) etc.** rendered by Hon'ble Supreme Court of India in Civil Appeal No. 11527 of 2014 (Arising out of SLP(C) No. 11684 of 2012) the Hon'ble Apex Court based on its earlier decisions rendered in **Sahib Ram -vs- State of Haryana [1995 Supp (1) SCC 18]**, **Shyam Babu Verma -vs- UOI & Os. [(1994) 2 SCC 521]**, **UOI & Ors. -vs- M.Bhaskar [1996 (4) SCC 416]**, **V. Gangaram v. Regional Joint Director and Ors [(1997) 6 SCC 139]**, **Col. B.J. Akkara (Retd. -vs- Govt. of India [(2006) 11 SCC 709]**, **Bihar SEB -vs- Bijay Bahadur [(2000) 10 SCC 99]**, etc. summarized 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."*

(emphasis supplied)

- (ii) In **State of West Bengal -vs- Asis Das Gupta [2013 (5) CHN (CAL) 440]** while upholding the decision of the Tribunal, Hon'ble High Court was considering justifiability of the following:

"After retirement his pay has been revised and refixed in order to recover overdrawal of pay from pensionary benefit - Rule 140(1) - Whether any excess payment can be recovered from retired Government Servant?"

The Hon'ble Court held as follows :

"The learned Tribunal passed the impugned order upon placing reliance on a three-Judge Bench judgment of the Supreme Court in the case of Shyam Babu Verma & Ors. -vs- UOI & Ors. (supra) which has been consistently followed by the Supreme Court in the subsequent decisions including the decisions cited on behalf of the petitioners herein. The aforesaid three-Judge Bench judgment in the case of Shyam Babu Verma & Ors. -vs- UOI & Ors. (supra) is operative and binding till today since the said decision has not yet been overruled by the Supreme Court in any subsequent decision. The learned Tribunal, therefore, committed no error by allowing the prayer of the applicant namely, the respondent herein, upon placing reliance on the aforesaid decision of the Supreme Court in the case of Shyam Babu Verma & Ors. -vs- UOI & Ors. (supra).

For the reasons discussed hereinabove, we do not find any merit in the present writ petition. Therefore, we affirm the decision of the learned Tribunal and dismiss this writ petition without awarding any costs."

- (iii) In a decision rendered by Hon'ble High Court at Delhi in WP(C) No. 6633/2011 in **O.P.Nasa & Anr. -vs- Delhi Urban Shelter Improvement Board** in regard to withholding of terminal benefits it was held as follows :

"3. So far as the second relief is concerned, the same is fully covered by the recent judgment of the Supreme Court in the case of State of Jharkhand & Ors. Vs. Jitendra Kumar Srivastava & Anr. in Civil Appeal No. 6770/2013 decided on 14.8.2013. In the aforesaid judgment of Jitendra Kumar Srivastava (supra) Supreme Court has held as under:-

(i) Terminal benefits whether they be pension or gratuity or leave encashment are in the nature of 'property'.

(ii) Such terminal benefits etc can only be withheld and appropriated by the government after the decision of the departmental authorities or a judgment of a court of law i.e during the pendency of departmental proceedings and court proceedings, the government cannot withhold and appropriate the terminal benefits etc which are payable to employees.

(iii) The only reason because of which government can withhold and appropriate terminal benefits etc is if there is a rule of the organization or a statutory rule which entitles the government during

the pendency of proceedings not to pay the terminal benefits etc to the employee.

4. It is the common case of the parties that the respondent no.1/employer is governed by CCS (Pension) Rules. As per Rule 9 of the said CCS(Pension) Rules, and which is similar to Rule 43(b) of the Bihar Pension Rules which the Supreme Court has dealt with in the case of Jitendra Kumar Srivastava (supra), the employer cannot withhold or appropriate terminal benefits etc. unless a final order is passed in the departmental proceedings or by the court before whom the complaint is pending.

5. Since in the present case the departmental proceedings are not concluded and no final Court order has been passed, the ratio of Jitendra Kumar Srivastava (supra) will be squarely applicable.

6. In view of the above, the writ petition is allowed and the respondent is directed to pay terminal benefits, leave encashment amount and other amounts which would have become payable to the petitioner on his retirement."

In view of the legal position enumerated hereinabove I strongly feel that withholding in the manner it was done i.e. without proceedings was not legally permissible.

9. In regard to detection of any loss of Railways its assessment and due apportionment, the following provisions in Commercial Manual were noticed :

"1102. Report of Losses -Any defalcation or loss of cash, stores or other property belonging to Government should be reported immediately it is discovered to the head of the division or department as the case may be, and in serious cases to the General Manager also, copies of the reports being sent simultaneously to the Financial Adviser and Chief Accounts Officer who will forward a copy to the Chief Auditor. If any irregularity or loss is detected by, or is brought to the notice of the Accounts Officer in the first instance, it will be his duty to apprise immediately the administrative authority concerned of the facts of the case and ask for a proper investigation ; the Accounts Officer will send a copy of his communication on the subject to the Chief Auditor. If, however, the irregularity or loss is discovered by, or is brought to the notice of the administrative authority in the first instance, that authority should immediately report the matter to the Accounts Officer, who will forward a copy of the report to the Chief Auditor. Petty cases, that is cases involving losses not exceeding Rs. 500 each need not be reported to the Financial Adviser and Chief Accounts Officer nor by him to the Chief Auditor unless there are important features which require detailed investigation and consideration. Every important case involving loss of cash, stores, or property, whether caused as a result of frauds perpetrated or negligence shown by the railway servants, or caused purely by accidents such as fire, etc., should be brought to the notice of the Railway Board by the General Manager through a preliminary report (to be followed by a detailed report see Para 1103) within six weeks from the date of detection of the loss and a copy of the report endorsed to the Chief Auditor simultaneously through the Financial Adviser and Chief Accounts Officer. When the loss involved does not exceed Rs. 50,000 the case need not be reported to the Railway Board unless it represents unusual features or reveals serious defects in procedure.

The preliminary report, which should be based on the facts and first-hand information available, should bring out-

- (i) the nature of the loss,
- (ii) whether the matter has been reported to Civil/GR Police/RPF and Departmental Enquiry Committee;
- (iii) amount involved, actual or approximate;
- (iv) steps taken to plug the loop holes, if any; and
- (v) the name of the staff apparently responsible.

1103. General Manager's detailed report should clearly bring out-

- (a) the amount involved and recovered,
- (b) the modus-operandi of the fraud,
- (c) the nature of checks which ought to have been exercised under any rule or order and which were omitted, thereby facilitating the fraud.
- (d) whether the procedure in force is ineffective in preventing such frauds and, if so, what modification are suggested therein,
- (e) disciplinary action taken against the party at fault and the adequacy or otherwise of such action,
- (f) whether the Financial Adviser and Chief Accounts Officer agrees to the reports submitted. In the case of his disagreement with the administration on any aspect of the case such disagreement should be reported verbatim to the Railway Board.

The detailed report should be accompanied by Police Report and the findings along with a copy of the proceedings of the Departmental Enquiry committee in all cases involving more than Rs. 50,000 and should contain comments of the railway Administration on all points brought out by the enquiring officer(s). The proceedings of the Enquiry Committee need not, however, be sent to Railway Board where the losses do not exceed Rs. 50,000 but instead these cases, on finalisation, be put up for review by a committee of two Deputy heads of Departments (including a Deputy Chief Accounts Officer) and the Board furnished with (i) the main gist of the recommendations of the Enquiry Committee, (ii) special features brought to light in the report of enquiry and (iii) the result of review indicating, inter-alia, the detail of action taken by the railway administration.

In the aforesaid backdrop, the following facts could be noticed -

- (i) no established procedure was followed before penalizing the applicant.
- (ii) The applicant retired on 28.2.15 and the dues were raised thereafter.
- (iii) It is not apparent as to when the loss was actually detected. However, dues have been raised, pertaining to an alleged misconduct of 2014 against which no proceedings were ever initiated.
- (iv) The procedure envisaged in 1102, 1103 (supra) was also not followed.
- (v) The applicant was never allowed to show cause prior to depriving of him of his retiral dues, such deprivation amounted to civil

consequences and pecuniary damages caused without complying with the principles of natural justice.

- (vi) The Railway rules mandate holding of a preliminary enquiry to ascertain and assess the loss and to fix liability upon the erring employee, whereas nothing of the sort was done.
- (vii) The recovery was not against an admitted debit which could be directly recovered from the retiral dues.
- (viii) The Railway rules also mandate initiation of criminal action as well as departmental enquiry against the alleged employee where loss suffered by Railways was more than Rs.50,00/-. Nothing has been brought on record to satisfy with reasons as to why the same could not be initiated in regard to a case where alleged loss was more than Rs.50,000/-.
- (ix) No document would be forthcoming from which it could be deciphered that the applicant was found guilty of causing the loss. There is no explicit finding that the applicant is the culprit.
- (x) In view of specific rule operating in the field to frame a person with the charge of shortage of stock or loss or defalcation which has not been followed in the case at hand, I am of the considered opinion that such recovery on account of alleged loss was improper.

10. Furthermore, in case of a retired employee disciplinary action can be initiated only with the sanction of President that too in regard to a misconduct committed within 4 years immediately preceding the retirement. A penalty of withholding or withdrawing pension or gratuity in full or in part of any pecuniary loss caused to the Railway can only be inflicted by the President if in a judicial or criminal proceeding the pensioner is found guilty of a grave misconduct or negligence during his service. Railway Pension Rules expressly debar initiation of proceeding against a retired employee save and except with sanction of the President. The Rule 9 of Railway Services (Pension) Rules read as follows :

"Right of the President to withhold or withdraw pension.

(1) The President reserves to himself the right of with holding or withdrawing a pension or gratuity, or both, either 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 Railway, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement;

Provided that the Union Public Service Commission shall be consulted before any final orders are passed.

Provided further that where a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below the amount of **rupees three thousand five hundred** per mensem. **(Authority: Railway Board's letter No. 2011/F (E) III/1(1)9 dated 23.09.13)**

(2) The departmental proceedings referred to in sub-rule (1) -

(a) if instituted while the railway servant was in service whether before his retirement or during his re-employment, shall after the final retirement of the railway servant, be deemed to be proceeding under this rule and shall be continued and concluded by the authority by which they commenced in the same manner as if the railway servant had continued in service.

Provided that where the departmental proceedings are instituted by an authority subordinate to the President, that authority shall submit a report recording its findings to the President;

(b) if not institute while the railway 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 and order in relation to the railway servant during his service.

(3) In the case of a railway 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 10 shall be sanctioned.

(4) Where the President decides not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one third of the pension admissible on the date of retirement of a railway servant.

(5) For the purpose of this rule -

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the railway servant or pensioner, or if the railway servant has been placed under suspension from an earlier date, on such date; and

(b) judicial proceedings shall be deemed to be instituted-

(xi) in the case of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognisance, is made; and

(ii) in the case of civil proceedings, on the date the plaint is presented in the Court.

11. In the present case recovery has been made from the payable retiral dues of pension and gratuity of a retired railway employee after his retirement, giving a complete go bye to the relevant service rules as enumerated hereinabove. Since, action against a retired employee would be governed by Pension Rules, what is not expressly permitted under the Rule 9 of Pension Rules cannot be allowed to be undertaken in the garb of exercise of power under any other provision contravening Rule 9. The withheld amount therefore should be refunded.

12. Further, the retiral dues being erroneously withheld, I am of the considered opinion that the disbursement of recovered amount should be visited with penalty of payment of interest.

13. In such view of the matter the respondents would release the recovered sum within one month from the date of communication of this order with interest @ 8% p.a..

14. No order is passed as to costs.

(BIDISHA BANERJEE)
MEMBER (J)

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