

**CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI.**

**ORIGINAL APPLICATION No.717/2015
Dated this the 15th day of June, 2017**

CORAM:HON'BLE MS. B.BHAMATHI, MEMBER (A)

Shri. R.T. Diwate

Sub Divisional Engineer (Retd.)
O/o. General Manager, Telecom,
BSNL, Sanchar Sadan Town Center
CIDCO Aurangabad- 431003
Residing Plot No. 105,
Manik-Ratna Shreyanagar,
Aurangabad 431001.

....Applicant

(Applicant by Advocate Shri. G.B. Kamdi)

Versus

1. Bharat Sanchar Nigam Ltd.

Through Chairman & Managing Director,
Bharat Sanchar Bhawan H C Mathur, Lane
Janpath New Delhi 110001.

2. The Chief General Manager,

BSNL, Telecom Maharashtra Circle,
Admn Bldg. Juhu Road Santacruz (W),
Mumbai 400054.

3. The General Manager, Telecom

BSNL, Sanchar Sadan Town Centre
CIDCO Aurangabad 431003.

....Respondents

(Respondents by Advocate Shri. Jayant Chitnis)

Reserved on :- 20.04.2017.

Pronounced on :- 15.06.2017.

ORDER

PER:-HON'BLE MS.B. BHAMATHI, MEMBER (A)

This OA has been filed by the
applicant under Section 19 of the
Administrative Tribunals Act, 1985 seeking the
following reliefs:-

"(a). To allow the Original Application.

(b). This Hon'ble Tribunal may be pleased to call for record of the case and after going through its propriety and legality be pleased to direct to the respondent to pay the penal interest at the rate of 10% from the date of his retirement to the date of actual payments of leave encashment.

(c). To pass any other just and appropriate orders this Hon'ble Tribunal may deem fit, proper and necessary if the facts and circumstances of the case.

(d). The cost of this original application please be provided."

2. The applicant working with R-3 as Sub Divisional Engineer (SDE) was retired provisionally from service on superannuation w.e.f. 28.2.2013. He rendered unblemished service of 35 years and 2 months since 26.12.1977. However, a few days before his retirement, the applicant was suspended vide order dated 20.02.2013 which was served on the applicant on 25.02.2013. Hence, the respondents have issued order dated 28.02.2013 for retirement provisionally on superannuation. However, respondent had issued a suspension order but no charge memo for any inquiry was

served on the applicant and hence, he was not aware of any allegation against him.

2.1. Since, applicant's daughter's marriage was fixed and he was in need of financial help, he represented vide letter dated 11.03.2013 to the respondent to sanction leave encashment. Since no response was given by the respondents, he again represented vide reminder dated 04.05.2013. The applicant submitted reminders dated 06.07.2013 and 29.08.2013 but no action was taken by the respondent.

2.2. No charge memo was served till a period of more than 6 months passed after suspension. No pensionary benefit as well as leave encashment was paid. Hence, he approached this Tribunal by filing O.A. No.661/2013 to settle the pensionary benefits as well as leave encashment along with interest.

2.3. The respondents did not settle his claim for leave encashment. Hence, he again submitted reminders vide letter dated 06.03.2014 and 21.07.2014 which is subject matter of the present OA.

2.4. After a lapse of more than 18 months, the respondent served a charge memo dated

25.08.2014. However, no recovery of any loss was alleged against the applicant in the said charge memo. The inquiry was conducted and the same is pending for final order. Since, no recovery of any loss for BSNL or Govt. was mentioned in charge memo, the applicant again represented vide his representation dated 15.11.2014 submitting the factual position and also requested for settlement of his leave encashment. He again submitted a representation dated 25.06.2015 also stating that in the case of two other officers, even though there was a recovery of some amount from them as mentioned in charge memo and no vigilance clearance was given in their cases, the leave encashment had been paid to them. Hence, the respondent had given discriminatory treatment to the applicant.

2.5. The applicant further submits that since he pointed out the above discriminatory treatment, the leave encashment in his case was sanctioned by the respondent vide sanction memo dated 31.07.2015. The total amount of leave encashment sanctioned was Rs.6,76,619/-. After deduction of income tax, HBA interest and rent for quarter etc. an amount of Rs.3,57,770/-

was credited to the bank account of the applicant on 02.09.2015.

2.6. Further, during the course of the arguments in **O.A.No.661/2013** the learned counsel for the respondents submitted that the representation of the applicant have been considered for leave encashment and it was accordingly released. Hence, the Tribunal, accepting the submission, did not consider the issue of leave encashment and the order of this Tribunal in the said OA dated 07.10.2015 was passed directing the respondents to release service gratuity but with interest @ 9% per annum.

2.7. Since the respondent had held up the payment of Rs.6,76,619/- for a period of 2 years and 7 months without any reasons, the applicant demanded interest on the said amount vide letter dated 03.09.2015. But without considering the factual position, the respondent has rejected the claim of the applicant for interest vide impugned letter dated 26.09.2015.

2.8. It is submitted that Rule 39 of CCS Leave Rules, 1972, which is applicable to the

applicant, even after absorption in BSNL state that "where a Government servant retires on attending the normal age prescribed for retirement under the terms and conditions governing his service, the authority competent to grant leave shall suo moto, issue an order granting cash equivalent to leave salary for both earned leave and half pay leave, if any at the credit of the Government servant on the date of his retirement subject to a maximum of 300 days". According to the said Rules, (cash equivalent of leave salary), the applicant was entitled to be paid as soon as he retired from service. But, the payment of the leave encashment of the applicant was held up without any reasons.

2.9. Further, in view of the judgments of the Hon'ble Supreme Court and in view of the Rules, it was required on the part of the respondent to initiate the papers regarding retirement of an employee, two years prior to the date of superannuation, but the respondent did not take care to settle the pensionary benefit and leave encashment as early as possible but intentionally delayed the payment

and no reason is communicated for the same. Hence, respondent displayed bias against the applicant, and the amount is paid belatedly. Therefore, the applicant is entitled for interest.

2.10. The respondents have sanctioned the payment after 2 years and five months and credited to bank account again after one month. Thus, the respondent had taken a total period of 2 years and 7 months for payment of leave encashment for which applicant is entitled for interest on the delayed payment of leave encashment.

2.11. The applicant has placed reliance on the following judgments:-

*(i). In the case of **State of Kerala & Others vs. M. Padmanabhan Nair [(1985) 1 SCC 429]**, it has been held by the Hon'ble Supreme Court, that necessity for prompt payment of the retirement dues to a Government servant immediately after retirement cannot be over-emphasised and it would not be unreasonable to direct that the liability to pay penal interest on these dues at the current market rate should commence at the expiry of two months from the date of retirement. Hence, in view of the judgment of the Hon'ble Supreme, if the payment is made after two months from the date of retirement, penal interest at the current market rate would be justified.*

*(ii). The Hon'ble High Court of Delhi in the case of **No. WP (C) 1227/2012, Delhi Police Vs. Balvant***

Singh decided on 13.03.2012. The WP was filed by the original respondent against the order dated 19.05.2011 passed by the CAT, Principal Bench in **O.A.No.3933/2010**. The Tribunal by virtue of the impugned order directed as under:-

"Keeping in view the totality of facts and circumstances of this matter, the Tribunal is of the considered opinion that a simple interest at the rate of 9% per annum should be granted to the applicant on the delayed payment released on 23.04.2010, and 19.07.2010 from the date of retirement of the applicant i.e. from 01.09.2003 till the actual payment is made."

The Hon'ble High Court Delhi dismissed the WP and upheld the order of the Tribunal with reasons recorded in the said judgment dated 13.03.2012.

3. In the reply to the OA the respondents have denied, disputed and resisted the contentions and allegations of the applicant in the OA. It has been submitted that while deciding the **O.A.No.661/2013 (Supra)**, even though the prayer was made by the applicant for directing the respondents to release the amount of leave encashment alongwith 10% interest, the same was not considered by the Tribunal and the aid OA was allowed partly i.e. for release of service gratuity due and payable to the applicant as per rules alongwith 9% interest

from 01.03.2013 till 07.10.2015. Hence, if the applicant was aggrieved by the said order it was open to the applicant either to challenge the judgment and order dated 07.10.2015 or else to file a review application for raising his grievances suitably. Since, it has not been done, this OA is not maintainable and therefore, liable to be dismissed in toto.

3.1. There were departmental dues recoverable from the applicant and therefore, as per provisions contained in Rule 39 (3) of CCS (Pension) Rules, the payment of amount towards leave encashment was required to be withheld, for adjustment of departmental dues recoverable from the applicant and the same was withheld till the time a final quantum of recoverable amount and dues from the applicant could be ascertained. As soon as the final calculation sheet disclosing the net amount recoverable from the applicant was prepared, after adjustment of dues, the balance amount payable towards leave encashment was released and the same has been paid to the applicant accordingly.

3.2. During the pendency of **O.A.No.661/2013**

(Supra), the applicant had filed several representations requesting deduction of the amount of recovery, which was due against him from the amount which was payable to him by way of leave encashment to the applicant. Hence, R-3 exercised his discretion, so that, after deducting /adjusting the dues under recovery, the amount of leave encashment was released. The applicant duly accepted the same without any protest.

3.3. During the course of hearing in OA.661/2013 (Supra), the applicant ought to have made submission before this Tribunal that he is entitled for interest on leave encashment. Rather, the applicant remained silent. After hearing both the parties, this Tribunal at para-12 of its order dated 07.10.2015 observed as under:-

*"It was pointed out by the learned Advocate for the respondents that, during pendency of this OA, the respondents have considered the applicant's representation for releasing the amount of leave encashment **and the same was accordingly released.** It is also stated that, the provisional pension, as per rules, was sanctioned to the applicant and **he is getting it.** This being so, the present OA is restricted to the impugned order relating to withholding of amount of service gratuity to the applicant."*

3.4. In view of the above, the applicant himself gave up his claim as it is clear from the above findings recorded by this Tribunal and hence he cannot agitate and demand the interest on the alleged delayed payment of leave encashment.

3.5. The applicant retired on 28.02.2013. Well in advance of his retirement, the procedure for settlement of pension and pensionary benefits was initiated by the respondents. As per order dated 12.10.2012, approval was accorded by the competent authority for payment of leave encashment to the applicant in accordance with the instructions contained in Rule 39 of CCS (Leave) Rules. Not only this, vide letter dated 06.12.2012, the calculations as regards pension and DCRG payable to the applicant was completed in all respect by R-3 and the same was duly forwarded to the O/o Controller of Communication Accounts, Mumbai for taking necessary action. However, in view of order dated 20.02.2013, passed by the DA, the applicant was put under suspension. Hence, as

per order dated 28.02.2013, a provisional pension retirement on superannuation pension was granted to the applicant, with the condition that, as vigilance clearance is not granted by the vigilance cell, the applicant will be paid post retirement benefits as per extant rules till final retirement order is issued. There was another condition that, if any dues are lying as outstanding against the applicant, the same shall be recovered as per rules.

3.6. The applicant has engaged himself in a private business without seeking proper permission from the competent authority of BSNL and has also attended the Court hearings in **OA.No.661/2013** without taking leave or permission. The details of his involvement in various activities and the criminal cases pending against him have already been placed on record by the respondents while tendering their reply to **O.A.No.661/2013**.

3.7. Vide letter dated 30.03.2013, R-3 had made the applicant aware of the HBA interest lying as outstanding against him and had further requested the applicant to clear the

dues for settlement of his pension case. Even so by representation dated 06.07.2013, the applicant sought for release of the amount of leave encashment stating that there is no departmental recovery against him. However, later on, vide his representation dated 22.06.2013 and 28.06.2013, the applicant made a request that HBA interest may be recovered from his leave encashment and not to hold up provisional pension. But by another letter dated 22.06.2014 and 13.08.2014, the applicant expressed his inability to make the payment of outstanding amounts towards house rent recoverable from him on account of the occupancy of the departmental staff quarter beyond permissible time limits. However, by way of his representation dated 01.12.2014, the applicant intimated that he has paid the house rent charges upto 30.06.2013 and that the house rent recovery for the period from 01.07.2013 to 07.12.2014 may be recovered from the amount of leave encashment which is due and payable to him. Consequent upon the full and final vacation of staff quarter by the applicant on 08.12.2014, the final calculation sheet

disclosing the net amount of dues i.e. HBA loan interest plus house rent recovery recoverable from the applicant was prepared by R-3 and after adjustment/deduction of calculated dues, the balance amount of leave encashment was released to the applicant. The applicant did not protest and accepted the same. Hence, the applicant is not entitled to claim any interest on the payment made by the respondents towards leave encashment.

3.8. As per the provisions contained in Rule 71 and 72 of CCS (Pension) Rules, 1972, it shall be the duty of the Head of the Office (HOO) to ascertain and assess the government dues payable by a government servant due for retirement. After retirement, the assessed dues should be adjusted against the amount of retirement gratuity becoming payable. Hence, after adjustment of the dues, the payment was made. The applicant had initially denied the fact underlying the recovery of dues against him and therefore payment of leave encashment was required to be withheld and only after adjustment made upon final calculation of government dues, the same was released. There

remains no scope to say that the payment of leave encashment was delayed and therefore, there is no question of payment of interest thereon. In fact, even before his retirement the leave encashment was sanctioned well in advance. However, the attitude of the applicant himself has resulted in delay being caused in making the payment of leave encashment. Had it been the case that the applicant was sincere enough in refunding the HBA loan interest amount in proper time and had he paid the charges/dues towards house rent in time and that too without occupying the departmental staff quarter beyond permissible limits, it would have been possible for the respondents to make the payment of leave encashment at an earlier point of time or else as soon as possible after the retirement of applicant. The applicant himself has triggered the cause of action which ultimately resulted in the alleged delay in making the payment of leave encashment. Hence, he is not entitled for any interest on alleged delayed payment of leave encashment.

3.9. As per the provisions contained in

Rule 39 (3) of CCS (Pension) Rules, 1972, the amount of leave encashment can be withheld if in the view of the authority, there is a possibility of some money becoming recoverable from the employee. In the present case in hand, it was released upon adjustment of dues. Hence, there is no question of payment of interest on the leave encashment amount.

3.10. In the departmental inquiry, the charges levelled against the applicant stand proved. Hence, to that effect, punishment is also recommended/awarded.

3.11. In the CCS (Pension) Rules, 1972, there is no provision for payment of interest on delayed payment of leave encashment. The DOPT in their note dated 02.08.1999 has clarified that, there is no provision in the CCS (Leave) Rules, 1972 for payment of interest on leave encashment or for fixing responsibility. Moreover, encashment of leave is a benefit granted under leave rules and is not a pensionary benefit.

4. In the rejoinder filed by the applicant the contentions in the OA have been reiterated while denying and disputing the

contentions of the respondents in the reply to the OA. It is submitted that the contentions of the respondents about the non maintainability of the OA in view of the order passed by this Tribunal is not tenable since the respondents had submitted about the fact of release of payment towards leave encashment during the course of arguments. Hence, the Tribunal did not consider the issue of release of leave encashment and restricted the order to grant of service gratuity. Since, respondent has released the payment in the absence of any order from the Tribunal, hence the question of review application or appeal does not arise. A new cause of action has arisen where payment of leave encashment is released without interest.

4.1. When the applicant had filed the **O.A.No.661/2013 (Supra)** the payment of leave encashment was due and hence the prayer was made to release leave encashment with interest but during the course of argument and after completion of pleadings, the respondent submitted that the payment of leave encashment has been released. The applicant was not aware whether the amount of leave encashment included

interest or not. Therefore, a new cause of action arose when the respondent paid leave encashment but without interest. Hence, the contention of the respondent that no interest is payable, since the applicant had already given consent to recover the outstanding dues from leave encashment vide letter dated 22.06.2013, is not tenable. The respondent purposely and intentionally withheld the payment to harass the applicant. There was no proper and justifiable reason to withhold the payment without any directive of this Tribunal. The respondent released the amount without any directive of the Tribunal. This shows that the amount of leave encashment was withheld illegally and arbitrarily. The reference to Rules 39 (3) of CCS (Pension), Rules as quoted by the respondents is not applicable in the present case, since the Rule pertain to pension only.

4.2. The contention of the respondent that as soon as the final calculation sheet disclosing the net amount recoverable from the applicant was prepared after adjustment of dues and then balance amount was released is not

tenable. The calculation sheet of any payable or recoverable amount was to be prepared on or before issue of the retirement order. As the applicant retired on 28.02.2013, the preparation of calculation sheet thereafter does not arise. Hence, the contention of the respondent is not based on correct facts.

4.3. The contention of the respondent about several representations having been filed by the applicant during the pendency of **O.A.No.661/2013 (Supra)**, with request to deduct the amount of recovery from leave encashment is not correct, as the applicant had given the consent to recover the amount of HBA interest from the leave encashment vide letter dated 22.06.2013 and 28.06.2013. The applicant had given consent in response to their correspondences dated 30.03.2013 and 24.06.2013. Hence the question of several representations does not arise.

4.4. It is also denied that the applicant has accepted the said payment without any protest. As soon as the payment of leave encashment was received and credited to the Bank Account on 02.09.2015, the applicant

requested for payment of interest vide letter dated 03.09.2015 i.e. on the very next day.

4.5. It is also denied that the respondent had pointed out before this Tribunal during the course of hearing of **O.A.No.661/2013 (Supra)** that various representations given by the applicant seeking deduction of dues from leave encashment is not correct since no such submission was made by the learned counsel for the respondents whereas the submission stands as recorded by the Tribunal in para-12 of its order dated 07.10.2015 in the OA.

4.6. The contention of the respondent that the applicant did not point out the entitlement of interest is not a tenable argument, since the applicant was not aware about the sanction of leave encashment and no details were provided during the course of the arguments in **O.A.No.661/2013 (Supra)**. When the amount of leave encashment was credited to the bank account of the applicant on 02.09.2015, thereafter, on the very next day the applicant represented for interest since the cause of action arose when leave encashment was paid without interest. Hence, the contention of the

respondent is not tenable as a new cause of action had arisen. The Tribunal in **OA.No.661/2013 (Supra)** restricted the order of withholding of service gratuity based on the submission of the respondents at para-12 of the order dated 07.10.2015. Hence, the claim of the applicant for delayed payment of leave encashment is justified since the Tribunal did not consider the same in view of the submission of the respondent about the payment of leave encashment.

4.7. As regards the contention of the respondents that the settlement of pension and pensionary benefits was initiated as per order dated 12.10.2012 and approval was accorded by the competent authority for payment of leave encashment is not correct. The payment of leave encashment has been sanctioned vide order dated 31.07.2015. Letter dated 12.10.2012 showing the sanction before the retirement is not valid since it is signed by only AO and AGM (HR) and the signature of the other officers was not taken. Further, leave encashment cannot be sanctioned prior to the retirement since the employees can avail the leave at any time

before retirement.

4.8. As regards the contention of the respondents that applicant was engaged in private business, the same is not relevant to the present OA. The respondent had issued a charge memo on such allegations and applicant is defending the case as per BSNL CDA rules in another OA. The Tribunal also did not consider these facts while deciding the **O.A.No.661/2013 (Supra)** .

4.9. The contention of the respondents regarding recovery of HBA is not correct and hence not tenable as provided under rule 73 of CCS Pension Rules, 1972. As per said rule, the recovery other than Govt. accommodation can be effected from service gratuity and further there is provision to take steps for recovery of such outstanding dues, 2 years prior to retirement. The authority should have taken the necessary action 2 years prior to retirement and not after retirement. The applicant gave consent vide letter dated 22.06.2013 but the authority did not settle the payment of leave encashment. Rule 71 and 72 of CCS Pension Rules provides for recovery of Govt. dues. When the

provision is available in rules to deduct from gratuity the action of the respondent intimating dues after retirement and withholding the payment of leave encashment is illegal and violative of the provision of rules. Accordingly, while the reference to Rule 71 and 72 is correct but the respondent purposely avoided to refer the Rule 73, wherein it is specially stated that steps are to be taken to access the dues two years before the date on which a Govt. servant is due to retire on superannuation.

4.10. As regards the allegation of adamant/reluctant attitude of the applicant, the same is denied. It is denied that this attitude resulted into delay in making timely for payment of leave encashment. In fact that delay was deliberate and intentional.

4.11. The respondents have stated somewhere that Disciplinary and Criminal case is pending; somewhere it is submitted that departmental dues were pending, now it is stated that due to applicant, payment was delayed. The respondents did not decide the representation quoting some reason and hence the contentions of the

respondent is afterthought and not according to any provision of the rules.

4.12. There is no provision in CCS Leave Rules to recover any outstanding dues from the leave encashment. The payment of leave encashment of a Govt. servant while under suspension or while disciplinary or criminal proceeding can be withheld if in the view of competent authority, there is possibility of some money becoming recoverable from him on conclusion of the proceeding. There is no allegation of any misappropriation of Govt. money or no recoverable amount in charge memo and hence the withholding the amount of leave encashment for Govt. dues is not justified since there is a provision for such recovery in CCS Pension Rules.

4.13. The Disciplinary proceeding is a different matter and is not relevant to the present case. The disciplinary case is being defended as per provision of BSNL CDA Rules which is not yet finalized and such order cannot become final till statutory provisions are availed.

4.14. Even though there is no provision in

Pension Rule for payment of interest, but the interest is justified for delayed payment in view of various judgments and order of the various Courts/Tribunals.

5. By way of rejoinder affidavit the respondents have also contended that order in O.A. 661/13 resjudicata operates and will prevent the applicant from filing this OA for the same cause of action and reliefs prayed for in Clause 8(c) of OA No. 661/2013. Since the Tribunal restricted the adjudication in respect of gratuity only, the Tribunal effectively refused to entertain the issue of payment of leave encashment with interest. The applicant should have challenged the order passed by the Tribunal as the said order in respect of leave encashment has attained finality. The act of filing this O.A. is an abuse of process of law. The applicant failed to carry out the amendment in the earlier O.A. for which he did not seek any liberty before this Tribunal, nor any such concession was granted by the Tribunal.

6. On the issue of also judicata, the respondents have relied upon the following judgments:-

(i). *Har Swarup vs. The General Manager, Central Railway and Others* reported in 1975 SC 202: (1975) 3 SCC 621 delivered on 29.10.1974.

(ii). *K. Vidya Sagar vs. Strate of U.P. and Others* reported in AIR 2005 SC 2911: (2005) s5 SCC 581: JT 2005 (6) SC 20: (2005) 5 SCALE 346: (2005) CriLJ SC 4879 delivered on 12.07.2005.

(iii). *Ashok Kumar Srivastav vs. National Insurance Co. Ltd. & Others* reported in AIR 1998 SC 2046: (1998) 2 SCR 1199: (1998) 4 SCC 361: JT 1998 (3) SC 519: (1998) 3 SCALE 265 delivered on 27.04.1998.

(iv). *Lal Singh Ram Singh Rajpur vs. Assistant Executive Engineer* reported in AIR 2005 SC 2175: (2005) 11 SCC 204: JT 2005 (3) SC 461: (2005) 3 SCALE 295 delivered on 17.03.2005.

(v). *Gurbux Singh vs. Bhooralal* reported in AIR 1964 SC 1810: (1964) 7 SCR 831 delivered on 22.04.1964.

7. Disputing the contentions of the respondents that resjudicata operates, the applicant has filed affidavit in reply to the rejoinder and has relied upon the following judgments:-

(i). *Koshal Pal & Ors. vs. Mohan Lal & Ors* dated 26.11.1975 reported in AIR 1976 688, 1976 SCR (2) 827.

(ii). *Workmen of Cochin Port Trust vs. Board of Trustee of the Cochin* dated 5.5.1978, 1978 AIR 1283, 1978 SCR (3) 971.

(iii). *Allahabad High Court*

*judgment dated 29.06.1990 AIR 1991
All 255.*

8. Regarding applicant's right to be paid interest on account of delay, applicant has relied upon the following judgments:-

"(i) Ram Shanker Rastogi vs. Smt. Vinay Rastogi of reported in AIR 1991 ALL 255 (1991) DMC 204.

(ii). S.K. Dua v.s State of Harayana reported in 2008 AIR (SC) 1077.

(iii). Uma Agrawal vs. State of Utter Pradesh reported in 1999 AIR (SC) 1212.

(iv). S.K. Srivastava vs. Govt. of NCT of Delhi in WP (C) No.1186/2012.

(v). CAT, PB, New Delhi in OANo.1821/2013 Sh.Suraj Bhan Vs. Union of India delivered on 18.02.2014.

(vi). CAT, PB, New Delhi in OANo.3813/2012 Dr.Santosh Singh vs. Union of India delivered on 21.10.2013.

(vii). CAT, PB, New Delhi in OANo.1014/2011 Smt.Raman Manjal vs. Govt of NCT delivered on 19.07.2011.

(viii). CAT, PB, New Delhi in OANo.746/2009 Shr. Ram Pal Vs. Delhi Development Authority delivered on 27.10.2009."

9. The Tribunal has gone through the O.A. filed by applicant alongwith Annexures A-1 to A-16, rejoinder filed on behalf of the applicant alongwith Annexure A-17 and A-18 and

affidavit in reply to the rejoinder affidavit of respondents and the rulings relied upon.

10. The Tribunal has also gone through the Reply filed on behalf of respondents alongwith Annexure R-1 the rejoinder affidavit and the rulings relied upon.

11. The Tribunal has heard the learned counsel for the applicant and the learned counsel for the respondents and carefully considered the facts, circumstances, law points and rival contentions in the case.

12. The primary issue for consideration in this OA pertains to whether the circumstances as prevailing in the applicant's case warranted withholding of leave encashment in the light of Leave Rules. Secondly, if there was any delay in release of leave encashment. Thirdly, whether recovery of dues in applicant's case was governed by Leave Rules or Pension Rules. Fourthly, whether in the light of the order of Tribunal in OA No. 661/2013 resjudicata applies impacting the maintainability of the OA. Fifthly, whether the applicant was aware that delay was not admitted and interest was not being considered, during the pendency of

proceedings i.e. at the time of final hearing on 31.08.2015 in OA No. 661/2013.

13. Since, the matter pertains to leave encashment and leave encashment is not a pensionary benefit but a post retiral benefit, the provisions of Leave Rules in this connection requires to be examined first to see if Leave Rules provided for withholding leave encashment in applicant's circumstances.

14. Rule 39 (3) of CCS (Leave) Rules, 1972 provides as below:-

"39. Leave/Cash payment in lieu of leave beyond the date of retirement, compulsory retirement or quitting of service:

(1)

(a)

(b)

(c)

(d)

1[(2) (a)

(b)

(c)

*(3) The authority competent to grant leave may withhold whole or part of cash equivalent of earned leave in the case of a Government 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 Government dues**, if any."

15. On the issue of the release of leave encashment under Rule 39 (3) of CCS (Leave) Rules, 1972 to retiring employees the Ministry of Finance issued a circular dated 18.01.2011, which reads as follows:-

"2. On a reference made by the Department, the DOPT has clarified the scope of the said Rule 39(3) as-under:-

"Rule 39(3) of CCS (Leave) Rules, 1972 makes provision for withholding whole or part of the payment due on account of encashment of leave temporarily so that **if some money is to be recovered as a result of disciplinary/ criminal proceedings**, it could easily be adjustable against the amount due to the Govt. servant. **However, the final withholding of the amount as a measure of punishment would not be justified under the leave encashment rules as the various forms of punishment that could be given to an individual held guilty as a result of disciplinary proceedings are specified in the relevant rules and they do not cover this type of punishment. Further withholding of leave encashment should be resorted to only in those cases where there is a likelihood of some money becoming due, for instance, where the proceedings are on account of embezzlement of Govt. funds or loss of public money etc.** Each case should be examined at the time of retirement to see whether withholding of amount is necessary keeping in view the nature of

charges against the individual and the amount of possible recoveries from the individual should only be withheld and not necessarily the entire amount of encashment."

3. **It is clear from the provisions of Rule 39(3) of CCS(Leave) Rules, 1972 as further clarified by DoPT, that leave encashment should not be withheld in respect of a retiring employee because of pendency of a departmential proceeding etc. as a matter of course.** The charges against the officer should be carefully considered before deciding whether withholding of the amount of leave encashment due to the employee is necessary keeping in view the nature of charges against the individual. Such charges should refer to or imply a specific loss to the public money because of embezzlement or other acts of misconduct of the officer. Further, where it is proposed to withhold the leave encashment at the time of retirement till the pending proceedings are finalized, the amount of leave encashment to be withheld should not exceed the amount of possible recoveries from the charged retiring officer on finalization of the proceedings.

4. **All cases where the -leave encashment has already been withheld but where the proceedings at the time of retirement have not been finalized so far should be reviewed in the light of the above clarification and where there is no justification for withholding the same, the amount should be released immediately."**

16. The Article of charges levelled against the applicant as per the charge memo reads as follows:-

"Article-1

Whereas, Shri R. T. Diwate while working as S.D.E., Aurangabad, during

the period April 2006 to Feb. 2013 accepted the work of Honorary Consultant of M/s. Unique Finance without taking any permission from Competent Authority of BSNL & further signed various cheques as a authorized signatory of M/s. Unique finance and engaged with this private company for carrying out a private trade/money lending/business in violation of Rule 5(36) & Rule 17(1)(a) of BSNL CDA Rules, 2006.

Thus by the above said act while working as a BSNL employee, Shri R. T. Diwate, the then SDE (CSC), Chikhalthana, Aurangabad, violated Rule 5 (36), Rule 5 (25) and Rule 17(1)(a) of BSNL CDA Rules 2006, inter alia failed to maintain absolute integrity, devotion to duty, acted in a manner unbecoming of a public servant and further lowered the image of the Company in the eyes of public, thereby contravened provisions of Rule 4(1), (a), (b), (c) and (e) of BSNL, CDA Rules, 2006.

Article-II

Whereas, Shri R. T. Diwate while working as S.D.E., Aurangabad during the period April 2006 to Feb. 2013 was convicted in four cases and remained under conviction for nearly 11= months in one case and for 19 months in another case. Shri R. T. Diwate failed to intimate to the department about his police complaints, court cases and conviction in time in violation of Government of India instructions M.H.A. O.M. No.25/70/49Ests., dated the 26th December, 1949.

Thus by the aforesaid act, Shri D. T. Diwate, the then SDE, Aurangabad, has violated Govt. Of India instructions M.H.A. O.M. No. 25/70/49-Ests. Dated the 26th December, 1949, inter alia failed to maintain absolute integrity, devotion to duty and acted in a manner unbecoming of a public servant, thereby contravened provisions of Rule 4(1), (a), (b) & (c) of BSNL CDA

Rules, 2006.

Article-III

Whereas, Shri R. T. Diwate, while working as S.D.E., Aurangabad, during the period April 2006 to Feb. 2013 misused his official mobile phone for carrying out private business through his son Shri Sumit R. Diwate in violation of Rule 5(22) of BSNL CDA Rules, 2006, by which misusing of any amenity provided by BSNL is a misconduct.

Thus by the aforesaid act, Shri R. T. Diwate, the then SDE, Aurangabad has violated Rule 5(22) of BSNL CDA Rules 2006, inter alia, failed to maintain absolute integrity, devotion to duty and acted in a manner unbecoming by a public servant, thereby contravened provisions of Rule 4 (1), (a), (b) & (c) of BSNL CDA Rules, 2006.

Article-IV

Whereas, Shri R. T. Diwate, while working as S.D.E., during the period April 2006 to Feb. 2013 attended various court cases without taking permission/ intimation from department & without availing any type of leave in violation of Rule 5(6) & 5 (18) of BSNL CDA Rules, 2006.

Thus by the aforesaid act, Shri R. T. Diwate, the then SDE, Aurangabad, has violated Rule 5(6) & 5(18) of BSNL CDA Rules 2006, inter alia, failed to maintained absolute integrity, devotion to duty and acted in a manner unbecoming of a public servant, thereby contravened provisions of Rule 4(1), (a) (b) & (c) of BSNL CDA Rules, 2006."

17. It is obvious from a perusal of the above two charges that the charges, in fact do not relate to causing any pecuniary loss to

BSNL on account of the alleged misconduct on the part of the applicant in keeping contact with private investment companies and indulging in trading, to gain benefit therefrom. This being so, in view of the provisions of Leave Rules it was not in fact necessary to withhold the payment of leave encashment to the applicant till conclusion of the pending disciplinary proceeding. There is no legal force in the contention of the respondents to justify the withholding of the leave encashment of the applicant.

18. It is true that leave encashment cannot be sanctioned prior to retirement, although it could be processed for release since the employee can avail leave at any time before retirement. Hence, Leave Rules provides that leave encashment is to be released within a maximum period of 2 months following retirement. In a situation where there was no requirement under law for withholding leave encashment as applicant was not covered by Rule 39 (3) of the CCS (Leave) Rules, it was illegal and arbitrary on the part of the respondents to have withheld the leave encashment. This was

done in a mechanical way and without application of mind to the clear and unambiguous provision of Rule 39(3) read with the OM of 2011. In view of the above, in applicant's case the leave encashment became due at the time of retirement itself and even not till 02 months after retirement. The respondents failed to adhere to the Rules.

19. As regards recovery of dues, Rule 71, 72 and 73 of the CCS (Pension) Rules provides for recovery of Govt dues before retirement and when and from where it is to be recovered. Rule 73 specifically provides that the recovery other than Govt. accommodation can be effected from service gratuity and further there is provision to take steps for recovery of such outstanding dues, 2 years prior to retirement.

20. Specifically, the procedure in respect of recovery of HBA is that the employee is intimated well before retirement about outstanding dues on completion of HBA recoveries of principal amount in monthly installment till the last salary payable at the time of retirement. The interest amount is calculated and the employee is directed to pay

a lumpsum amount well before retirement, in one go. On that basis 'no dues certificate' is issued before retirement. This was not done in applicant's case, even though respondents' claim that applicant's case was processed well in advance of retirement. That being so, they knew the outstanding dues on HBA and still failed to recover the amount before retirement as laid down in the Rules. This mistake/omission on the part of respondents led to a situation where, in violation of Rules, outstanding dues pertaining to HBA were left to become recoverable after retirement in the absence of timely settlement of HBA dues before retirement. There was undue delay on the part of respondents. It also led to an unwarranted situation where, the recovery of HBA related dues got wrongly linked to leave encashment, which (not gratuity) was the first pay out possible, even where Leave Rules did not envisage such a linking up. In fact, any such outstanding amount on HBA was recoverable from gratuity, which was also withheld in applicant's case, as per Pension Rules. It was not to be recovered from leave encashment,

which is governed by Leave Rules and in applicant's circumstances, very specifically governed by Rule 39(3) of the Leave Rules. The respondents' wrong actions as regards HBA related recovery led to undue holding up of leave encashment with inordinate delay. The applicant had to bear the brunt of the wrong and illegal action on the part of respondents.

21. As regards, recovery of rent the laid down procedure is that the amount is recovered from monthly salary till retirement during occupation. If the employee opts to continue in occupation of the government accommodation upto a laid down period, as per Rules, beyond retirement, then the amount involved for the said opted/ permissible period is also recovered from the employee as one lump sum advance deposit before retirement. In this case, also the question of recovery on account of rentals after retirement would not have arisen had the Rules/ procedures, as laid down, been followed by respondents. The second continuing wrong i.e. on rent, as a result of this mistake and omission, again led to a wrong linking up of recovery of rentals with leave

encashment after retirement as was done in the case of HBA dues. The applicant had to bear the brunt of this wrong also merely in the absence of due and timely notification/ action for recovery by respondents before applicant's retirement, even though respondents' claim that all assessment/ calculations were ready on records before retirement.

22. Hence, it is evident that had the respondents complied with Rules/ procedures/ DoPT instructions/ time frame for settlement of dues, the question of delay/ withholding of leave encashment would not have arisen even if a disciplinary proceeding was contemplated. The applicant would also not have occupied the quarter beyond the permissible limit since he had not received his dues that he was entitled to on account of leave encashment at the time of retirement. Hence, it was respondent's fault that they acted in violation of the rules by illegally withholding of leave encashment. The delay was caused by the respondents themselves.

23. The question of the applicant having to make any representation to release of leave encashment should not have arisen. As per law,

denial of leave encashment due at the time of retirement resulted in situation where the applicant had to stake his claim by way of so many representations, which happened since denial placed him in a situation not warranted under law.

24. The leave encashment was finally sanctioned on 31.07.2015 but credited to applicant's bank account only (without interest) on 02.09.2015 although leave encashment was due at the time of retirement itself. Although, Rules provides for a maximum period of two months by which time leave encashment is to be released, in the present case, the HBA and rental dues, not having been settled and recovered before retirement as per Rules, leave encashment became due on the date of retirement itself as per Rule 39(3) of Leave Rules. The suspension or contemplation of proceeding cast no shadow on release of leave encashment since no pecuniary loss to BSNL was indicated in the Charge Memo. Hence, the delay started from the next date after the date of retirement i.e. 01.03.2013.

25. The question then is upto when the

delay persisted for which reference to the submissions regarding OA No. 661/2013 is required. The prayer in OA.No.661/2013 is as follows:-

"(A) The Original Application may please be allowed.

(B) By order or direction the respondents may please be directed to quashed and set aside the impugned letter dated 07.02.2013 and letter dated 28.02.2013.

*(C) By order or direction the respondents may pleased be directed to **pay amount of gratuity, pension, leave encashment** and other mandatory pensionary benefits to the applicant **with 10% interest thereon for delayed payment.***

(D) Any other justifiable order or direction in favour of the applicant be granted in the interest of justice."

26. It is evident from record that during the pendency of OA No. 661/2013 respondents issued the sanction order on 31.07.2015 a copy of which was endorsed to applicant. Hence, applicant cannot deny that he was aware at that time that the order dated 31.07.2015 contained no mention of interest, which means that delay was not admitted. Hence, he knew that only part of his prayer regarding leave encashment at Clause 8(C) above was considered and sanctioned in the order dated 31.07.2015. After oral

arguments, OA No. 661/2013 was reserved for orders on the same day i.e. 31.08.2015.

27. It was with reference to the said sanction order dated 31.07.2015, of which applicant was aware that the respondents submitted to the Tribunal in OA No. 661/2013 that his leave encashment was settled, without revealing that it has been settled on their terms, and not on the terms sought for by applicant in the prayer clause, as interest was not considered, since delay was not admitted. No doubt, it was also for the applicant to have stated before the Tribunal that his grievance persists due to non-consideration of interest, since he was in receipt of the order dated 31.07.2015 and since in his view there was delay.

28. Further, Para 12 of the order in OA No. 661/2013, shows that the Tribunal recorded that releases have been made and that the applicant has got it. Since no affidavit was filed, the legal presumption is that the para 12 of the order was based on the oral submission of the respondents before the Tribunal. That being so, it was a factually

incorrect and categorically wrong averment made by respondents in the oral arguments (after completion of pleadings) that the amount has been released without mentioning that interest is not payable. This misled the Tribunal to believe the oral statement, in the absence of any protest by applicant also, that order of 31.07.2015 has been completely implemented i.e. the leave encashment and interest amount has been released and the amount has been accepted by applicant to his satisfaction and, that, therefore, no grievance persists as regards leave encashment/ interest.

29. The fact, as earlier stated, was to the contrary. The amount of leave encashment above was credited to the bank account of applicant on 02.09.2015 after oral hearing concluded on 31.08.2015 and the OA was reserved for orders on that date and two months' after the sanction order dated 31.07.2015 was passed. No explanation is available as to why they waited for release after 31.07.2015 and how the amount got credited on 02.09.2015 two days after oral hearing and contrary to submission in oral hearing. The respondents did

not come with clean hands.

30. There was not only false averment of respondents about release, involving suppressio veri, suggestio falsi. There was also no averment about non consideration and non-admission of interest on delay. This was coupled with a loud silence on the part of the applicant also. This preempted and prevented the Tribunal from adjudicating the matter fully, on merits, regarding both delay in payment of leave encashment and payment of interest due to that delay. The full information, which both the applicant and respondents knew, was not made known to the Tribunal. The respondents made wrong oral submission regarding release nor did they inform the Tribunal that interest is not being paid and that only leave encashment is sanctioned, since delay is not admitted. The applicant also failed to inform that he was aware of the order dated 31.07.2015 wherein interest on delay has not been considered in the light of his prayer at Clause 8(C) of OA and also that no amount of leave encashment has been released till 31.08.2015.

31. It must, however, be made clear that since applicant was going to be adversely affected by the Tribunal deciding to adjudicate only the issue of gratuity and not leave encashment to the disadvantage of applicant on the basis of respondents oral submissions in that OA, it was incumbent on the applicant to have resisted the oral submission of respondents and recorded his protest that no money on leave encashment has been released and that there was delay and hence the interest issue needs to be adjudicated. He did not. The applicant, therefore, cannot get the benefit of payment of interest on account of delay beyond 31.07.2015 when the sanction order was issued for leave encashment, without the interest part. No representation was submitted to respondents by applicant for not having addressed the delay/ interest part after 31.07.2015 before final hearing on 31.08.2015.

32. Hence, there is force in respondent's contention that the entire response of applicant after 31.07.2015 till 02.09.2015 was one of acceptance, without demur and protest. Had applicant protested against the order of

31.07.2015 or expressed his persisting grievances before the Tribunal at the time of oral arguments, the Tribunal would have had the opportunity to adjudicate the issue of interest on leave encashment, along with gratuity and interest on delayed payment of gratuity in OA No. 661/2013, and applicant would not have found the need to file a separate i.e. present OA.

33. The above findings partly answers the question as to whether resjudicata applies or not and whether this OA is maintainable or not. In this regard, as stated the applicant did not protest or make any oral submissions resisting the oral submissions of respondents in OA No. 661/2013 that the order dated 31.07.2015 settles his grievances partially and not fully. In such a situation, the normal course of action would have been for the applicant to seek amendment to the relief clause and pleadings, by challenging the order dated 31.07.2015, in which situation, the hearing would not have been treated as concluded and OA would have been adjourned for further pleadings/ hearing. However, the respondents cannot escape from the

fact that primarily, their wrong/ non-transparent/ partial submissions resulted in para 12 of the order in OA, even if applicant did not lodge the protest at the time of hearing, leave alone not protesting after 31.07.2015/ before 31.08.2015. Hence, for the Tribunal's purpose, the submission of the respondents that releases have been made, meant that both leave encashment amount and interest amount has been released and therefore there was nothing left for adjudication in respect of leave encashment as per Para 8(c) of the Relief Clause.

34. However, the Tribunal concluded that there was delay in payment of gratuity and directed to payment of gratuity along with interest. It can be presumed that if there was delay in payment of gratuity, delay was mutatis mutandis applicable to leave encashment also. If interest was directed to be paid on gratuity, mutatis mutandis interest was payable on leave encashment. Such presumption could have been held valid and legal, if there was no suppressio veri or suggestio falsi by respondents or if applicant had contradicted

the oral submissions to the extent factually appropriate. Having barred/ prevented the Tribunal from adjudicating the issue of leave encashment on merits in totality, even though factually, delay may have been a common factor to both gratuity and leave encashment, the benefit of resjudicata cannot be invoked by respondents since the greater burden/responsibility, in not allowing the issue of leave encashment to get fully adjudicated in OA No. 661/2013, rested on the respondents. That the Tribunal adjudicated the issue of delay in leave encashment can be considered "implied" is only in the mind of respondents. In the Tribunal's mind, only the issue of gratuity was adjudicated. Also even if it was inferred that delay, mutatis mutandis applied to leave encashment, it happened inspite of respondents, and not because of respondents. The credit of an implied adjudication cannot go to respondents and respondents cannot take any advantage of operation of principle of resjudicata. Moreover, the question of delay in granting is covered by Pension Rules and delay in encashment is governed by Leave Rules. Since

respondents by wrong submissions got leave encashment included from adjudication, the Leave Rules never got discussed in the order in OA No. 661/2013.

35. In view of the above observations, there is no legal force in the contentions of respondents that resjudicata applies. The respondents cannot take advantage of an "implied" decision regarding delay and interest having prevented a possible adjudication by misleading the Tribunal. In fact, it has been brought to the notice of the Tribunal, by the learned counsel for applicant that the order in OA is yet to be complied with and a contempt petition has been filed. It is also interesting to note that respondents did not challenge the order in OA No. 661/2015 before the Appellate Court since 2015 even as adjudication on the issue of resjudicata through this OA is pending. Effectively, it can be considered to be a wait and watch to see if the principle of mutatis mutandis is applied in the reverse i.e. from leave encashment to gratuity. The issue of interest having remained to be adjudicated, this OA is maintainable.

36. The Tribunal, however, hastens to add that at the same time, the applicant has to pay the price in this OA for his silence before the Tribunal and for not pointing out to the Tribunal at the time of oral hearing that the respondents were making a wrong statement that all releases as prayed for have been made and that the interest amount prayed for has, in fact, not been considered along with sanction of leave encashment. Hence, the present OA, although maintainable, is a legal luxury, not to mention the unnecessary costs to the public exchequer, which a protest or resistance from his side before the Tribunal in OA No. 661 of 2013 could have overcome and the OA would have fully adjudicated, notwithstanding the *suppresio veri* and *suggestio falsi* by respondents. Hence, payment of interest on account of delay can only be from 01.03.2013 to 31.07.2015 and not beyond 31.07.2015, since applicant was also partly responsible for not allowing the issues relating to delay on leave encashment getting adjudicated and allowing the matter to spill over for adjudication in a fresh/ present OA.

37. In view of the above discussions, the rulings case laws relied by respondents on the issue of resjudicata and extracted at para 6 of this order are completely distinguishable, since in none of the above case laws relied upon by respondents was the Court prevented from adjudicating the relief prayed for in this or any other possible manner. There was no issue of non transparency by the party claiming resjudicata in the said cases. There was no issue of suppression veri and suggestio falsi, submissions not backed by affidavit by the parties claiming resjudicata in the said cases.

38. On the issue of resjudicata, on the other hand, the applicant has rightly relied upon relevant judgments, notwithstanding his own omission, as per the Tribunal's findings highlighted earlier.

39. The judgment of the Hon'ble Supreme Court in **Koshal pal & Ors. V/s Mohan lal & Ors. (Supra)** certainly repels a case for resjudicata. The Court held that the question of resjudicata has got to be decided with reference to the final decision in the earlier litigation. The matter must be "finally heard

and decided". It has been established in the present OA that the earlier OA could not be finally heard and therefore not finally decided, for which both respondents and applicant were responsible and for which the greater responsibility, however, lay on the respondents.

39(a). The applicant has also rightly relied on the judgment of the Apex Court in case of **Workmen of Cochin Port Trust Vs Board of Trustee of the Cochin (Supra)**. The Court held that resjudicata is involved

"if by any judgment or order any matter in issue has been directly and explicitly decided the decision operates as res-judicata and bars the trial of an identical issue in a subsequent proceeding between the same parties. The principle of res-judicata also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication; then also the principle of res-judicata on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to-avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided."

40. The question is whether in this OA "it can be inferred that all the matters agitated

in the said petition were either explicitly or implicitly decided." It is true that the finding of delay in gratuity would have mutatis mutandis been applicable to delay in leave encashment, hence, there was an implied finding that there was delay in leave encashment. But the advantage of implied resjudicata cannot go in favour of respondents because they did not come with clean hands, and prevented the Tribunal from adjudicating leave encashment, after hearing fully and then deciding on merits.

41. The applicant has relied upon the judgment of the Hon'ble Supreme Court in case of **Ram Shankar Rastogi vs Smt. Vinay Rastogi decided on 29.06.1990 AIR 1991 All 255**. In this case, contrary to the facts and circumstances in the first legal proceeding and if there was a change, in the subsequent proceeding, there resjudicata cannot operate. Given the Tribunal's findings, the release of leave encashment alone without interest after hearing on 31.07.2015, as if delay issue has been decided by respondents and then denying payment of interest, amounts to change in

circumstances, as a fresh development giving rise to fresh cause of action in this OA arose, rendering this OA maintainable as resjudicata has been overcome.

42. On the issue of applicant's entitlement to interest, the applicant has relied upon the judgment of Hon'ble Supreme Court in case of ***Dr. Uma Agarwal vs State Of U.P. & Another on 22.03.1999***, it was held that in case where a retired Government servant claims interest for delayed payment, the court can certainly keep in mind the time schedule prescribed in the rules/instructions apart from other relevant factors applicable to each case. The respondents claim, in this OA, that applicant's pension papers were processed well in advance, is not backed by bonafide action. If that was so, the dues pertaining to interest on HBA and rentals being known to respondents would have been settled by recovery one time deposits from applicant before retirement as required under Leave Rules read with Pension Rules and not kept as a post retirement decision, and mixed up the issue of leave encashment with the evolving contemplation for

initiating disciplinary proceeding etc a situation not warranted under Section 39(3). In this case there has been a clear example of department delay till 31.07.2015, which is not excusable or fit to be condoned.

43. The applicant has relied upon the judgment of Hon'ble Supreme Court in case of **S.K. Dua V/S State Of Haryana & Anr. Decided on 1/9/2008,** it was held that interest can be claimed if there are no provision of law for it, under part III of Constitution under Article 14, 19 & 21. If there are Administrative Instructions, Guidelines or Norms prescribed for the purpose, the appellant may claim benefit of interest on that basis. But even in absence Statutory Rules, Administrative Instructions or Guidelines, an employee can claim interest under Part III of the Constitution relying on Articles 14, 19 and 21 of the Constitution. Hence, the impugned order dated 26.09.2015 holding that Leave Rules do not permit payment of interest on leave encashment for delay if incorrect and illegal.

44. Applicant has relied upon the judgment in case of **Government Of Nct Of Delhi vs Sk**

Srivastava decided on 29.02.2012 in W.P. (C) 1186/2012 by the Hon'ble High Court of Delhi upholding the order of the CAT Principle Bench ND in **OA No. 1821/2013 decided on 18.02.2014**. In the above case, the leave encashment amount, according to the learned counsel for the petitioner, had been withheld because the respondent was under suspension at the time of his retirement. Relying on Rule 39 (3) of the CCS (Leave) Rules, 1972, the Court dismissing the Writ Petition held that :-

"whereunder the said leave encashment had been withheld..... there is no order of the competent authority withholding the leave encashment amount which was due to the respondent nor was there any finding of the said competent authority as to whether there was a possibility of some money becoming recoverable from the respondent on the conclusion of the proceedings against him.

3. Consequently, the Tribunal is right in coming to the conclusion that the leave encashment amount ought not to have been withheld. It is in these circumstances that the Tribunal has directed that the leave encashment amount along with other amounts, which were due to the respondent, ought to be paid to the respondent along with interest at the GPF rate."

It is trite that an administrative instruction issued by the Govt. though supplements the rules if rules are silent on an aspect of the matter. However, when the rules do not stipulate as to the methodology in the present case of interest on commuted value of pension, insurance and leave encashment, the law declared by the

Apex Court, which holds the field, overrides any administrative instructions and law does not allow through an administrative order to overturn the judicial decision or its effect except by a due process of law, i.e., framing of the rules, as held by the Full Bench of this Tribunal at Mumbai Bench in of this Tribunal in R. Jambukeswaran and others v. Union of India and others, 2004 (2) ATJ CAT 1."

45. In this connection, the respondents may contend that the order dated 28.02.2015 was sufficient, in this respect to withhold leave encashment, being retiral dues, along with gratuity and other pension benefits. The impugned order reads as follows:-

"In accordance with AGM (Admn), O/o. GMTD Aurangabad Lt No AGM(A)/E-3/GOG/Gr-B/Corr/2012-13/3 Dated at Aurangabad the 28/02/2013, Sheri R.T. Diwate SDE Project Vijay (FM), who is already under suspension as per letter No:- VIG/MH/2010, is hereby retired provisionally from BSNL services on 28/02/2013 A/N on attaining the age of superannuation:-

Sr No	Name of the Officer	Design.	HRMS No.	Name of SSA	Date of birth	Date of superannuation
1	Shri R T Diwate	SDE	197702894	Aurangabad	07/02/53	28-02-20123

1. As the vigilance clearance of the Executive has not been granted by the vigilance branch Circle Office BSNL, he will be paid post-retirement benefit as per extant rules till final retirement order is issued.
2. Government/BSNL dues, if any, outstanding against the Executive may be recovered.
3. This is issued with the approval of competent authority."

No specific order for justifying withholding of leave encashment was issued as per Leave Rules and all dues/ payments were included in post retirement benefits, which is at variance with the Rules. Charge Memo was also issued only on 25.08.2014 and the impugned order denying interest was issued only on 26.09.2015. This is the first order regarding leave encashment issue issued more than 2 years after retirement.

46. In this case of **Dr. Santokh Singh (Retired) vs Union Of India (Supra) wherein** the CAT, Principal Bench, New Delhi answered this question taking note of respondents' arguments that the leave encashment is included within the term of retiral benefits and that there is no provision under the CCS (Leave) Rules for payment of interest or for fixing the responsibility for late payment of the same, held that:-

"encashment of leave is in lieu of non-utilization of the leave that has accrued to the employee concerned. Therefore, it is not governed by the CCS (Pension) Rules, 1972. In this regard, the provision in the Leave Rules is as follows:-

39. Leave/Cash payment in lieu of leave beyond the date of retirement, compulsory retirement or quitting of service.

No leave shall be granted to a Government servant beyond the date of his retirement, or the date of his final cessation of duties.....

(a) where a Government servant retires on attaining the normal age prescribed for retirement under the terms and conditions governing his service, **the authority competent to grant leave shall, suo motu, issue an order granting cash equivalent of leave salary for both earned leave and half pay leave, if any,** at the credit of the Government servant on the date of his retirement subject to a maximum of 300 days;

(b) The cash equivalent of leave salary under Clause (a) shall be calculated as follows and shall be payable in one lumpsum as a one time settlement.....

47. The Tribunal further held that:-

"the term pension as defined under Rule 3(1)(o) of the CCS (Pension) Rules, 1972 includes gratuity except when the term is used in contradistinction to gratuity but does not include dearness relief. The order of the Honble Supreme Court in the matter of Vijay L. Mehrotra versus State of U.P. (supra) is in respect the post retiral dues and does not cover other kind of dues. Yet a distinction has to be made between the pensionary and post retiral dues while the former is bound by the definition under Rule 3(1)(o) of the Pension Rules, the post retiral dues cover all that become payable due to retirement which will include other payables besides pension including the leave encashment and the CGEGIS. Hence, under the Scheme no interest is paid thereafter. Even if the course were to attract payment of interest in absence of clear provision to that effect, the respondents would be hard put to make the payment. However, the question that arises here is that can a retired government employee wait indefinitely for the payment to be made. The payment

of interest is to be provided in respect of pension and DCRG only to ensure that there is a responsibility cast upon the respondents organization. Here no such responsibility is cast upon the respondents. As such, the position may be that the payment will get delayed. Though the Hon'ble Supreme Court has not discussed this in respect of leave encashment and CGEGIS, therefore, the thinking of the Honble Court is not found emerging on this point. At the same time, from paragraph 4 of the order, it appears that 18% interest has been directed to be paid to the concerned employee. I pause here to ask myself as to whether the respondents have right to delay payment of dues in respect to CGEGIS and leave encashment as a matter of right and privilege and that what is the course open to the Courts/Tribunals to compel payment and/or compensation on delayed payment except to order of payment of interest thereon. I also take a note of the fact that though the dues under consideration do not get covered under the Pension Rules, 1972, they become payable on account of a common incident that being the retirement of the Government employee. It would not, hence, be fair or advisable to view the two groups of payment as separate in isolation or as separate entities. Therefore, I would like to be guided by the directives of the Honble Supreme Court in payment of interest.

7. From the circumstances of the case, it is quite clear that the government has not drawn up any proceedings against the applicant and in absence of such proceedings, the payment of retiral dues, which became due to the applicant have been paid to him."

48. The applicant has relied upon the judgment in case of **Smt. Raman Munjal vs Govt. Of Nct decided on 19.07.2011**, the CAT, Principal Bench, New Delhi in OA No. 1014/2011

relying on the case of **Vijay L. Mehrotra (supra)**, the Tribunal granted interest on terminal benefits, including leave encashment on account of delay.

49. The applicant has relied upon the judgment in case of **Shri Ram Pal vs Delhi Development Authority decided on 27.10.2009, the CAT, Principal Bench, New Delhi** held as follows:-

"On a careful consideration of the cases, referred to above, it is clear that even in the absence of rules/administrative instructions, interest is payable on the delayed payment of retiral dues. The underlying reason seems to be that such delay curtails deprivation of beneficial enjoyment of the amount so delayed, which is sought to be compensated by way of interest."

50. It emerges from the said citations that even in the absence provisions for payment of interest, if delay on the part of respondents is established and to the extent the employee caused/ did not cause or contribute to delay, interest is payable. The settled laws and catena decision relied upon by applicant when applied to applicant's case means that applicant is certainly entitled to payment of interest on delayed payment of leave

encashment, but only from 01.03.2013 to 31.07.2015. For the period beyond 31.07.2015 applicant cannot claim interest in view of our findings in the foregoing paras.

51. Keeping all facts, circumstances and law points in view, the respondents are directed to pay penal interest @ the rate of 9% simple interest from 01.03.2013 to 31.07.2015. The prayer Clause 8(c) is only partially allowed, even as the impugned order is liable to be set aside.

52. Accordingly, OA is partly allowed. No costs.

(Ms.B.Bhamathi)
Member (A)

srp