CENTRAL ADMINISTRATIVE TRIBUNAL

PATNA BENCH

CIRCUIT BENCH AT RANCHI

OA/051/00061/2017

Date of Order:-30-Nov-2018

C O R A M

HON'BLE MR. JAYESH V.BHAIRAVIA, MEMBER (JUDL.)
HON'BLE MR. B.V.SUDHAKAR, MEMBER (ADMN.)

.....

K.A.K.Lakra, son of Late Suleman Lakra, aged about 65 years, Superintendent (Retd.), Central Excise & Customs, Resident of Holding No.326, Flat No. A/2, New Layout, PO-Agrico, PS-Sitaramdera, Jamshedpur-831 009.

.....Applicant.

By Advocate:- Mr. K.K.Mishra.

Vs.

1. Union of India represented by Commissioner, Central Excise & Service Tax, Jamshedpur, Jharkhand.
2. Shri P.K.Katiyar, Commissioner, Central Excise & S.Tax, Bistupur, Jamshedpur.
3. Shri J.K.Lal, Additional Commissioner (P&V), Central Excise & S.Tax, Jamshedpur.
4. Shri Amit Kumar, Assistant Commissioner, Central Excise & S.Tax, Division-I, Bistupur, Jamshedpur.

.....Respondents.

By Advocate:- Mrs. M.Patra, JC to Mr.H.K.Mehta, Sr. Standing Counsel.

O R D E R (ORAL)

Per B.V.Sudhakar, Member (Admn.):-

2. The OA is filed against the show cause notice issued by the respondents and order of recovery vide order dt

11.4.2016 of the 4th Respondent for recovery of alleged wrong payment of gratuity amounting to Rs. 8,26,007/- and alleged wrong payment of commuted value of pension amounting to Rs.5,96,655/-.

3. The brief facts of the case are that the applicant was appointed as Inspector, Central Excise & Customs in the respondent organisation and was promoted to the cadre of Superintendent, Central Excise. The applicant retired on superannuation on 30.06.2012. A CBI case was registered against the applicant vide case No. RC 23(A)/89 on 23.8.1989. A sum of Rs.8,26,007/- towards gratuity and Rs.5,96,655/- towards commutation value of pension were paid to the applicant. Respondents vide lr dt 21.2.2014 have directed the applicant to deposit the entire gratuity amount and the applicant replied stating that recovery cannot be made from gratuity as per law. Thereafter on 23.03.2015 a show cause cum demand notice was issued to the applicant stating that the former has received amount of Rs.8,26,007/- towards DCRG against Rule 69(1)(a)&(b) of CCS (Pension) Rules, 1972, and an amount of Rs. 5,96,655/- as commuted value of pension in contravention of the provisions of Rule 4 of CCS (Commutation of Pension) Rules, 1981 and also final

pension in contravention of the provisions of Rule 69(1)(a)&(b) of CCS (Pension) Rules, 1972. As a criminal case was pending at the time of superannuation from service, Respondents stance is that the applicant is not eligible for gratuity and pension. On replying to the show cause notice by the applicant vide lr dt 19.5.2015, the 4th respondent ordered recovery of the gratuity amount and commutation value of pension vide order dt 11.4.2016. Against the recovery an appeal was made to the Chief Commissioner, Central Excise and Sales Tax, Patna but was rejected vide lr. dt 23.12.2016 of third Respondent. The applicant sought information under RTI from the respondents as to whether sanction of the President was taken before initiation of the proceedings against the applicant and also for issuance of the show cause notice. It was replied that no such sanction is available on record. Aggrieved over the order of recovery from gratuity and pension the present OA is filed.

4. The contentions of the applicant are that after one-and-half years of his retirement the letter dated 21.02.2014 was issued to the applicant to deposit the entire gratuity amount. The applicant further contends that dues payable at the time of his retirement were his property and as provided

under Article 300A of the Constitution the same cannot be taken away save by authority of law. The Rules 69, 71 & 73 of the Pension Rules cited in the show cause notice served on the applicant on 23.03.2015 have no application to the facts of his case. On appealing to the Chief Information Commissioner, the Additional Commissioner, Central Excise & Service Tax, who is 3rd respondent, informed the applicant on 23.12.2016 that the order of recovery was proper in the light of judgment of Hon'ble Supreme Court judgment in Chandi Prasad Uniyal & Ors. Vs. State of Uttarakhand & Ors. ((2012) 8 SCC 417) and as per OM dated 06.02.2014 of DOP&T. The applicant contends that the cited judgment of the Hon'ble Supreme Court and also the O.M. dated 06.02.2014 do not apply to his case. The applicant quotes Rule 9 of CCS (Pension) Rules, 1972, which specifies that there has to be Presidential sanction to order any recovery or withhold pension. The 4th respondent informed that no sanction of the President is available in the file for proceeding against the applicant vide letters dated 20.01.2017 and dated 23.03.2015 when queried under RTI. As per clause (2)(b)(i) of Rule 9 of the CCS (Pension) Rules, 1972, sanction of the President has to be sought. As the

respondents have not obtained the Presidential sanction, the action of issuing the show cause notice is thus, void and illegal, is the claim of the applicant. The applicant claims that the judgment of the Hon'ble Supreme Court in Chandi Prasad Uniyal (supra) was in respect of whether the over payment of amount due to wrong fixation of 5th & 6th pay scales of Teachers/Principals based on 5th Pay Commission's Report could be recovered from the recipients who are still serving as Teachers, when the revised pay scale/pay fixation was fixed on the basis of 5th Central pay scale, a condition was superimposed. Whereas, in the case of the applicant it is recovery from gratuity and pension, therefore, the above ratio of the Apex Court does not apply. The applicant further states that the retirement benefits were paid by the department suo-motu without imposing any condition and that the said amount was used for conducting the marriage of his daughter and for up-keep of his residential premises. Pension amount is the only source of livelihood of his family, is the other contention of the applicant. The applicant has also contended that the O.M. dated 06.02.2014 of the DOP&T does not hold good in the context of the decision of the Hon'ble Supreme Court in the case of State of Jharkhand

& Ors. Vs. Jitendra Kumar Srivastava & Anr. ((2013) 10 SCALE 310); D.V.Kapoor vs. Union of India & Ors. (AIR 1990 SC 1923 Para 13 – 15), held as under:-

> "13. In State of West Bengal vs. Haresh C.Banerjee and Ors. ((2006) 7 SCC 651), this Court recognized that even when, after the repeal of Article 19(1)(f) and Article 31(1) of the Constitution vide Constitution (44th Amendment) Act, 1978 w.e.f. 20th June, 1979, the right to property was no longer remained a fundamental right, it was still a Constitutional right, as provided in Article 300A of the Constitution.
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> Right to receive pension was treated as right to property
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> Retirement (Benefit) Rules 1971 which conferred the right upon the Governor to withhold or withdraw pension or any part thereof under certain circumstances and the said challenge was repelled by this Court.
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> Fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognized as a right in "property".
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> In short, the applicant claims that pension is a right to property and it has Constitutional protection under Article 300A

5. The Respondents contend that the pension was sanctioned in contravention of rule 69 (1) (b), and Rule 69

(1) (c) of CCS (Pension) rules , 1972 as a judicial proceeding was pending against the applicant. The judgment of the Honourable High Court of Bombay does not come to the rescue of the applicant as the present case pertains to the provisions of the CCS (Pension) Rules 1972. The Respondents quoted the Apex court judgment in Jarnail Singh where in it was observed there is nothing wrong in the order of the President in withholding of the Gratuity of an employee. The disbursement of pension and Gratuity was an error. The statutory provision of Rule 69 (1) (c) was invoked. The Honourable Supreme Court judgment in Chandi Prasad Uniyal (supra) which has to be read in totality, applies to the case of the applicant. OM dt 6.2.2014 of G.O.I states that recovery should be made in case of excess payment except in cases of extreme hardship and with the approval of Dept. Of Expenditure. The case of the applicant does not come under the exceptional category as per para 18 of the Honourable Supreme Court judgment in Chandi Prasad Uniyal. The Govt. dues stated in Rule 71 and 73 of CCS Pension Rules are indicative and include the amounts ordered for recovery from the applicant. The payments released to the applicant were by an error and that they are

treated as excess payments as the applicant is not eligible to receive the same. The applicant has never claimed that he has been in distress.

6. Heard the learned counsel for the parties and perused the documents on record. The arguments were in consonance with the written submissions made.

7. As is evident from the order of recovery of the 4th Respondent vide order no C. No. II (39) 2 –Con /Misc./Div-I/2013/289 the recovery was ordered quoting the judgment of the Hon'ble Supreme Court in Chandi Prasad Uniyal & Ors. Vs. State of Uttarakhand & Ors; 2012 AIR SCW 4742, (2012) 8 SCC 417, wherein it was held that excess payment made to a Government employee by any department of the Government is recoverable in as much as it is tax payers' money which is paid in such a case and it is not the money belonging to any officer who makes the payment or to the department, which makes the payment. The respondents, as informed by the applicant, also took the ground that there can be no impediment in making recovery when there is a fraud or mis-representation in seeking payment from Government. As per O.M. dated 06.02.2014 of the DOP&T there is provision for recovery of wrongful/excess payment

made to Government servant. The amount ordered as per the Order portion at page 6 of the penalty order, is recovery of Rs 8,26,007 from Gratuity and a **further sum of Rs 5,96,655 towards commutation value of Gratuity**. Grounds were that since applicant was involved in a criminal case, he is not eligible to be granted the benefits cited. The payments were termed as irregular payments and hence the order quoted supra.

Primarily, the order referred to above calls for recovery from **commutation of Gratuity** instead of Pension and hence is vitiated. The order is thus incorrect which cannot be implemented. Nevertheless, the other grounds for imposing the recovery are also analysed hereunder to come to a final conclusion on the issue.

To begin with, the question that fell for consideration before this Tribunal was whether recovery can be made from the Gratuity of the Applicant who has retired from service.

A close study of the records indicate that the applicant was involved in a CBI case and that the Applicant was attending the CBI court while being in service with the permission of the superior authorities. Hence it establishes the fact that

the Respondents were aware of a criminal case was pending against the Applicant. Being aware of the same it was an error part of the Respondents in not proceeding against the Applicant while he was in service. Respondents fairly admit to this lapse. Besides, Respondents ordered for recovery after three and half years of retirement and nearly 27 years of filing the criminal case from Gratuity and pension. In regard to Gratuity the law is well settled . Section 13 of the Gratuity does not permit any recovery from Gratuity as expounded below:

> Section 13 of the Gratuity Act states that no **gratuity** payable under the **Act** shall be liable to attachment in execution of any decree or order of any civil, revenue or criminal court. It may also be noted that **Section 60**(1) (g) of the Code of Civil Procedure also protects gratuities of payable to pensioners of any employer from attachment.

In fact the observation of the Honourable High Court of Andhra Pradesh in D. Vimala vs Canara Bank, Mettuguda, on 23 June, 1997 reported in 1997 (6) ALT 62 in regard to deduction from the gratuity, wherein Honourable Supreme

Court observations find a mention, fully covers the present case in regard to Gratuity as under:

> "5. In the decision of the Supreme Court reported in Union of India v. J. C. Fund & Finance , it was observed by their Lordships that the Provident Fund **amount**, pensions and other compulsory deposits which are payable to an employee will retain their character until they reach the hands of such employee even if he has already retired from service. The earlier decisions of the Supreme Court reported in Union of India v. Radhah Kissen was also referred to by their Lordships in the above cited decision reported in Union of India v. J. C. Fund & Finance (supra) and it was observed that so long as the **amount** of provident fund dues, the nature of such dues is not altered till they are actually paid to the Government servant who is entitled to it on retirement or otherwise; that the Government is a trustee for such **amounts** due to the Government employee even after his retirement. The learned Counsel for the revision petitioner has also tried to rely upon another decision of the Supreme Court reported in Calcutta Dock Labour Board v.

Sandhya Mitra 1985 I CLR 229 in which the question that arose for consideration is whether the **gratuity amount** due to an employee is liable for **attach**ment. After referring to the relevant provisions of the Payment of **Gratuity** Act, 1972 and also the provisions of Section 60(1) (proviso) (g), C.P.C., it is observed by their Lordships that Section 13 of the Payment of **Gratuity** Act gives total immunity to **gratuity** from **attach**ment. In the case concerned in that decision, the **gratuity amount** was payable to workman employee under the Calcutta Dock Labour Board and such **amount** was sought to be **attached** in the execution proceedings taken against the widow and son of the deceased employee after his death for rearranging the **amount** due under a decree passed against the employee. It is, therefore, clear from the observations made by their Lordships in the above cited decision of the Supreme Court that even in a case where the **attach**ment of the **gratuity amount** is sought in the execution proceedings launched against the legal representatives of the deceased employee to whom the **gratuity amount** was payable, such **gratuity**

amount is not liable for **attach**ment. As already stated above, these decisions of the Supreme Court were evidently not brought to the notice of the Kerala High Court when the matter was argued in the above said matter relating to the decision reported in Satyavathy v. Bhargavi (supra).gratuity."

Further, Hon'ble High Court , Bombay observation reported in 2002 LLR 266 (Bom. HC), makes it clear that – "Mere pendency of criminal case shall not disentitle an employee from receiving gratuity." Similarly, another judgment of Hon'ble Supreme Court in the case of Uttar Pradesh State Transport Corpn. Vs. Shivaji; reported in 2007 LLR (SN) 221 (SC) ruled that – "Forfeiture of gratuity order passed after retirement, would not be justified."

Therefore, the recovery of gratuity by the respondents is illegal since it violates the provision of the Gratuity Act and the cited judgment of the Honourable High Courts of Andhra Pradesh and Bombay.

The second question that need to be considered whether OM dt 06.02.2014 is applicable to the present case !

The office memorandum dt 06.02.2014, was issued in pursuance of the judgment of the Honourable Supreme Court in Chandi Prasad Uniyal cited directing Ministries to take corrective steps in all cases where excess payments on account of wrong pay fixation, grant of scale without due approvals, promotions without following the procedure, or in excess of entitlements etc come to notice. Cases where excess payments were made by fraud, collusion, favouritism, negligence or carelessness etc the official responsible for doing so and the those who benefitted from such actions should be proceeded against.

In the instant case there is no fraud nor misrepresentation, collusion etc on part of the applicant. The Respondents have on their own have released the Gratuity and Pension when the applicant superannuated. They were due payments and not excess payments. Therefore, the O.M cited does not apply to the present case.

The other question which is relevant is whether Presidential sanction was sought before proceeding against the Applicant!

The Applicant has retired as a Group B Gazetted officer and therefore has to be proceeded against only after obtaining Sanction of the Honourable President. In terms of clause 2.3 letter No F.No. C-11016/5/2010-Ad.V, dt 10.3.2010. Government of India, Ministry of Finance, Department of Revenue, Central Board of Excise & Customs , from which department the applicant retired, Presidential sanction is a must. The cited clause states as under:

> "2.3 Where disciplinary proceedings for minor/ major penalty were not initiated prior to the date of retirement: Rule 9 (2)(b) of CCS (Pension) Rules, 1972 provides as below: The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement, or during his re-employment,- (i) shall not be instituted save with the sanction of the President, (ii) shall not be in respect of any event which took place more than four years before such institution, and (iii) shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service. From the foregoing, it is clear that for instituting any proceeding against a retired Government servant , a reference is required to be made to the Board for seeking the

sanction of the President for initiation of the proceedings under Rule 9 of CCS (Pension) Rules, 1972. While making such reference to the Board , it is incumbent upon the concerned authorities to ensure that the event in respect of which the proceedings are proposed to be instituted took place within 4 years from the date of institution of the proceedings. Since the Board also requires a minimum of 2 months' time to process the case, it is necessary that the authorities keep the same in mind while sending the proposal for initiation of the proceedings. Further to ensure that no time is lost in seeking further details and clarifications, it is necessary that the reference is sent through a self contained note and accompanied with all relevant documents such as authenticated copies of (i) documents and oral evidence relied upon to make out a prima facie case of grave misconduct (ii) preliminary inquiry report, if any (iii) preliminary explanation of the retired officer (iv) draft article of charge and statement of imputation of misconduct and (v) advice of CVC/CVO wherever required. These documents are necessary to enable the President to form an opinion whether a case for institution of the proceedings under Rule 9 of CCS(Pension) Rules, 1972 is made out . Further action to conduct the inquiry may be taken as per the instructions contained in the Sanction Order relating to the conduct of the inquiry."

The 4th Respondent confirmed that there is no such sanction on record vide his letters dated 20.1.2017 and 9.2.2017.

Therefore on this ground too the action of the Respondents is against rules and the instruction of their own department quoted. Honourable Supreme Court has come down heavily on the aspect of non observance rules as under:

The Hon'ble Supreme Court observation in **T.Kannan and ors vs S.K. Nayyar (1991) 1 SCC 544** held that "*Action in respect of matters covered by rules should be regulated by rules*". Again in **Seighal's case (1992) (1) supp 1 SCC 304** the Hon'ble Supreme Court has stated that "*Wanton or deliberate deviation in implementation of rules should be curbed and snubbed.*" In another judgment reported in (2007) 7 SCJ 353 the Hon'ble Apex court held " *the court cannot de hors rules*"

Being on the subject, it is also to be examined whether the Honourable Supreme Court judgment in Chandi Prasad Uniyal is applicable to the present case.

The judgment of the Hon'ble Supreme Court in Chandi Prasad Uniyal (supra) was in respect of whether the over payment of amount due to wrong fixation of 5th & 6th pay scales of Teachers/Principals based on 5th Pay Commission's Report could be recovered from the recipients who are still serving as Teachers, when the revised pay scale/pay fixation

was fixed on the basis of 5th Central pay scale, a condition was superimposed. The case of the applicant is recovery from gratuity and pension , therefore, the above ratio of the Apex Court does not apply.

As stated by the Respondents the judgment has to be applied in totality and accordingly if we look at para 13 , it supports the contention of the applicant , tilting the balance of convenience towards the applicant.

> "13. Later , a three judge bench in Syed Abdul Quadir case (supra) after referring to Shyam Babu Verma , Col. B.J. Akkara (retd) etc. restrained the department from recovery of excess amount paid, but held as follows:
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> > "Undoubtedly, the excess amount that has been paid to the appellants teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter affidavit, admitted that it was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence

> and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellants-teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship the appellants-teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellants-teachers should be made."

The applicant retired from service and he did not misrepresent facts. It was negligence on part of the Respondents in not taking action against the applicant in time. For the mistake of the Respondents penalising the applicant after a couple of decades without following rules is unfair to say the least. Defacto, the judgment cited by the Respondents is in favour of the applicant.

Further the Respondents quoted rules, 69,71,73 of CCS Pension Rules, 1972 in support of their decision. We intend to elaborate their applicability to the case so that a fair view can be taken.

Rule 71 speaks of dues pertaining to Govt. Accommodation including license fee, penal rent, balance of House building

advance, conveyance, overpayment of pay and allowances or leave salary and income tax arrears.

Rule 73 applies to dues other than Govt. Accommodation and in this regard the rule prescribes that the Head of the office should assess the dues one year before the date of retirement or on the date on which the employee goes on leave preparatory to retirement. Dues which come to the notice subsequently and remain outstanding as on the date of retirement shall be adjusted against retirement gratuity.

Rule 69 (1) (c) states that no gratuity shall be paid to the Govt. Servant until the conclusion of the department or judicial proceedings and issue of final orders thereon.

Rule 71 and 73 stated do not apply as they refer to Govt. dues and the amount ordered for recovery from the applicant is not a Govt. due. In regard to rule 69 quoted, the respondents themselves released the Gratuity on superannuation of the applicant though they was a case in the CBI court and which the Respondents were aware. The Pension and Gratuity were amounts due to the applicant and hence interpreting them as excess payments does not hold water. In fact, Section 13 of Gratuity act does not permit recovery from Gratuity and also as per the legal principles

set by the superior judicial forums cited in paras supra. Pension is a property and recovery from the same has to be as per due process of law and rules on the subject. Moreover, the Respondents did not take the sanction of the Honorourble President to proceed against the applicant. Claiming that they are indicative would not do as application of a rule has to be specific. Therefore the rules quoted have no application to the case.

Honourable Allahabad High court has cited the Honourable Supreme Court judgments while dealing with a pension issue confirming that pension is a property in Praveen Kumar Agarwal S/O Late ... vs State Of U.P. Thru Prin. Secy. ... on 20 November, 2010 in 556 of 2009 as under :

> "29. In the case reported in (1971) 2 SCC 330: Deokinandan Prasad. Vs. The State of Bihar and others, their lordship held that **right** to receive **pension** is property under Article 31 (1) and by a mere executive order the State had no powers to withhold the same. Hon'ble Supreme Court observed as under:
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> 34. In the case reported in (1987) 2 SCC 179: State of Uttar Pradesh. Vs. Brahm Datt Sharma and another,

while reiterating the aforesaid well settled proposition of law with regard to **pension**, Hon'ble Supreme Court observed that **pension** is **right** of property earned by Government servant on his rendering satisfactory service to the State. These principles have been reiterated in the case reported in 1992 Supple SCC 664: (AIR 1992 SC 767) All India Reserve Bank Retired Officers Association and others. Vs. Union f India and another.

In addition article 300 A of the constitution states that

> **“**. Persons not to be deprived of property save by authority of law.- No person shall be deprived of his property save by authority of law. ”

Pension being defined as a property by honourable Supreme Court, it cannot be deprived unless the process of law is followed which is not the case in the present OA. The action of the Respondents is not as per law and rule. The primary step of taking sanction of President to proceed against the applicant and thereafter initiating rule 9 was not followed.

It is not out of place to state that the case against the applicant was instituted on 23.8.1989 and the order of

recovery is on 11.4.2016 ie 27 years after the case was instituted thereby violating the rule quoted in above paras. Moreover, the applicant has used the Gratuity for conducting the marriage of his daughter and to repair his house. The source of livelihood is pension. These are realities which a pensioner faces and cannot be glossed over. Respondents claiming that the applicant is not in any hardship is only presumption. By stating so, we do not mean that the applicant cannot be proceeded against for any acts of misconduct or misdemeanour. The Respondents have every right to proceed but following the proper rules and the law on the subject.

Thus, based on the observation of the superior judicial forum and the rules discussed, the action of the Respondents is arbitrary, contrary to rules, unreasonable and illegal. Hence the orders of the Assistant Commissioner of Central Excise & Service Tax dated 11.04.2016 (Annexure-3) and that of the appellate authority are quashed. The OA fully succeeds. Thus based on rules and the legal principles discussed the Respondents are directed to consider as under:

i) There shall be no recovery from Gratuity or from the pension of the Applicant

ii) It is open to the respondents to proceed against the applicant under relevant disciplinary rules to recover any amount from the pension of the applicant, if required, after obtaining proper sanction from the competent authority by strictly following extant rules and regulations.

iii) No order to costs.

Sd/-
(B.V.Sudhakar)
Member (Admn.)

Sd/-
(Jayesh V.Bhairavia)
Member(Judl.)

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