

CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH

No. OA 1317 of 2013

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

SUKUMAR MAITI

VS

UNION OF INDIA & ORS.

For the applicant : Mr.S.K.Das, counsel

For the respondents : Mr.B.K.Roy, counsel

Order on : 12.5.16,

O R D E R

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

2. The applicant is aggrieved as long after superannuation from service, on 28.2.11, on account of pendency of a criminal case the Railway Authorities have released only Provident Fund amount, Leave Salary, GIS, but withheld the entire DCRG, commutation of pension, Composite Personal Grant and RELHS benefits invoking Rule 10 of Railway Servants (Pension) Rules, 1993.

3. The respondents in their reply have stated that in terms of Rule 9 (5)(a) & (b) of Railway Servants (Pension) Rules, 1993, departmental proceedings shall be deemed to be instituted on the date on which statement of charges were issued and judicial proceedings would be deemed to be instituted, in case of criminal proceedings, on the date on which the complaint or report of a Police Officer of which the Magistrate take cognizance, is made and in case of civil proceedings on the date the complaint is presented in the Court.

As per Rule 10(c) of Railway Servants (Pension) Rules no gratuity is payable until conclusion of departmental or judicial proceedings and issue of

final orders thereon. In terms of Rule 9(3) only provisional pension is payable to such a Railway servant. The respondents have emphatically admitted that following settlement dues have already been paid to the applicant :

- i) Provisional Pension from the date of his retirement @ Rs.11,625/- p.m.
- ii) CGIS - Rs.35,980/-
- iii) PF - Rs.6,92,054/-
- iv) Leave Salary - Rs.3,57,420/-

(excluding monthly pension) Total - Rs.10,85,454/-

Therefore inarguably and irrefutably, DCRG, Commutation of Pension etc. have been withheld.

However, they have also said that medical benefits under RELHS was extended to him. He was yet to avail and take benefits of the scheme as per extant procedures in terms of CPO Sl. No. 174/90. They have admitted that composite Personal Grant could not be processed as discrepancy was found in respondent of address declaration submitted by the applicant in Form No. 10 of Pension Booklet. Despite a chance to clarify the applicant did not avail of the chance. As such, withholding of DCRG, Commutation of Pension is an admitted fact.

4. Therefore the issue to be determined in the present OA is whether the dues were legally withheld. According to the applicant the dues would be more than Rs.10 lakhs and have been withheld since February, 2011.

5. The respondents have not disclosed in their reply whether conclusion of the proceedings would result in any award in favour of the Railways which would require the employee to compensate as a measure of penalty, to the Railways and whether the employee ever caused any loss to the Railways as such.

6. The applicant relied upon para 10(c) of Pension Rules which reads as under :

"No gratuity shall be paid to the railway servant until the conclusion of the departmental or judicial proceedings and issue of final orders thereon; provided that where departmental proceedings have been instituted under the provisions of the Railway Servants (Discipline and Appeal) Rules, 1968, for imposing any of the penalties specified in clauses (i), (ii), (iii) and (iv) of rule 6 of the said rules, the payment of gratuity shall be authorised to be paid to the railway servant."

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He vociferously submitted that since no departmental proceedings were initiated and no misconduct proved the Railways could not invoke the provisions to deny him full retiral benefits.

7. Further drawing my attention to Rule 9 of the Pension Rules ld. Counsel would submit that the right to withhold or withdraw a pension or gratuity or both, either in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the railways, vests with the President hedged by condition if "in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service." Therefore such withholding without any finding on misdemeanour was illegal, arbitrary, malafide and in contravention of the Pension Rules itself.

8. Ld. counsel further argued that the criminal cases related to his state of drunkenness, and in terms of Railways Act, 1989 the maximum punishment for an offence of nuisance in a state of intoxication would invite was a penalty of fine of Rs.100/- in case of conviction for the first offence and imprisonment of one month and a fine of Rs.250/- in case of conviction for second or subsequent offence. In terms of Section 146 obstructing Railway servant in duty would invite a penalty of maximum of Rs.1000/- or imprisonment of a term of six months. Therefore taking recourse to Rule 10 of Pension Rules in order to deprive the applicant of all his earned benefits (amounting to Rs.10 lakhs and odds) for an alleged conduct in a state of intoxication was not warranted. Further the recorded notes of discussions of informal meeting between the Administration and ERMU(C) held on 11.6.14 was placed in order to contend that the Administration had agreed to release the total settlement dues of the applicant way back on 4.2.11. It was contended that in terms of Gratuity Act such a recourse was not available.

9. Per contra, dispelling the claim, the respondents have used a supplementary reply wherein they have averred that the applicant was governed by Railway Servants (Pension) Rules and not under Payment of

Gratuity Act. Against the allegation that one Sri Chakraborty was allowed all the benefits despite pendency of criminal case, the respondents have very cunningly made astute statement that it was up to the concerned Disbursing Officer to extend the release of such benefits.

10. The ld. Counsel for the applicant repelling the arguments advanced by the respondents cited **WP 67793/14 (Sankar Singh Yadav -vs- State of U.P. & Ors. [2015 (4) ADJ 236])**, a decision rendered by Hon'ble Allahabad High Court on 24.5.14 where it referred to **State of U.P. & 3 Ors. -vs- Faini Singh**, that mere pendency of a judicial proceeding would not be a ground for withholding of retirement dues. Further, referring to **D.S. Nakara [1983 (1) SCC 305]** and other decisions the Hon'ble High Court, held as follows :

"8. It is also not the case of respondents that in the criminal case, there is any allegation of loss to the Government and there is recovery to be made from the petitioner, which is the only exception recognized by this Court in the above mentioned authorities where final pension etc. may not be paid and respondents may withhold the same.

9. For the reason stated therein, and in view of the above authorities, the writ petition is allowed and the impugned order dated 25.7.2014 is set aside. The respondents are directed to pay retiral benefits and final pension to petitioner forthwith within a period of two months from the date of production of a certified copy of this order."

(emphasis supplied)

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

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

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

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

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

organization or a statutory rule which entitles the government during the pendency of proceedings not to pay the terminal benefits etc to the employee.

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

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

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

12. In a decision rendered by the Principal Bench in O.A. 264/09, on 24.11.09, in a case where the respondents had argued that keeping in view of the provision of Section 69 of the CCS (Pension) Rules the retirement benefits such as Gratuity, Commutation of Pension/ regular pension would be released only on conclusion of judicial proceedings pending before the Hon'ble Metropolitan Magistrate and only upon receipt of vigilance clearance from the Competent Authority, while the learned counsel for the Applicant contended that under Rule 69 of the CCS (Pension) Rules, 1972, read with Rule 9 ibid, the pension related dues of the Applicant could be withheld only if the judicial proceedings related to matters in the discharge of his official duties,

The Bench held as under:

- (i) Action cannot be taken against the Applicant under Rule 9 of the CCS (Pension) Rules in view of the ratio laid down by the Hon'ble Supreme Court that the misconduct has to be in the discharge of public duty in office. In this matter, the criminal case against the Applicant has not been filed in the discharge of his duty in the office.
- (ii) In view of decision 23 under Rule 3 of the CCS (Conduct) Rules, 1964, conviction by a criminal Court would amount to misconduct. If the Applicant is convicted in the criminal case, which is pending against him, it would amount to misconduct.
- (iii) The Applicant would be covered under Rule 8 of CCS (Pension) Rules, which has been quoted in full in the preceding paragraph. Under this rule, the appointing authority has been given the authority to withhold or withdraw pension or a part

thereof, if the pensioner is convicted of a serious crime or is found guilty of grave misconduct. Sub-rule (2) of Rule 8 further elucidates that action will be taken against the pensioner in the light of the judgment of the Court relating to such conviction.

(iv) *Gratuity cannot be withheld under Rule 8 of CCS (Pension) Rules, 1972 unlike the provision in Rule 9 ibid. Otherwise also as per the provision in Section 4 of the Payment of Gratuity Act, 1972, gratuity cannot be withheld.*

It is clear, therefore, that pension can be withheld or withdrawn only after conviction in a serious crime and that too on the basis of the judgement of the Court relating to such conviction.

9. *In the case of the Applicant, there is a criminal case pending against him in the Court of Law. However, so far there has been no decision in the case pending against the Applicant. In the light of the above, it would be amply clear that only on the basis of the case pending against the Applicant, pension cannot be withheld under Rule 8 of CCS (Pension) Rules, 1972. It has to abide by the final decision in the criminal case against the Applicant. Gratuity cannot, in any case, be withheld or withdrawn under the provisions of Rule 8 ibid.*

10. *In the light of the analysis as above, the OA succeeds. The Respondents are directed to release the regular pension, commuted amount of pension and gratuity to the Applicant with 8 per cent simple interest per annum from the date the payment was due, within eight weeks from the receipt of a copy of this order. The Respondents, however, would be free to take action against the Applicant subject to the provisions of Rule 8 of CCS (Pension) Rules, 1972, as discussed above. No costs.*

13. GO (Ms) No. 124 of Personnel and Administrative Reforms (Per.N) Department in regard to "Involvement of Public Servants in criminal misconduct – Initiation of departmental and criminal action simultaneously" – clarifies as under:

"2. The Government have examined the above matter and have decided that the following procedure shall be adopted in such cases.

(i) *When a criminal case is filed solely on a criminal offence committed by the Government servant which is in no way connected with the discharge of his official duties there is no need to pursue departmental action except placing the Government servant under suspensions as contemplated under Tamil Nadu Civil Services (Classification, Control and Appeal) Rules. The ultimate departmental action can be initiated against the delinquent officer after the result of the criminal case pending against him is disposed of by the Court of Law.*

(ii) *When both departmental as well as criminal action is initiated for the offences of the kind referred to in para 1 above in regard to departmental action, charges may be framed against him for the lapses committed by him and final orders may be passed after obtaining the required registers/records/documents from the court*

irrespective of the fact whether he is acquitted or not. Thus the departmental action will be confined to the irregularities or lapses committed by the accused officer with reference to the administrative aspect."

14. Further the following would be noted:

(i) The Hon'ble Apex Court in **D.S. Nakara & Others vs. Union of India**

(supra) made the following observations on right to pension:

"The antiquated notion of pension being a bounty or a gratuitous payment depending upon the sweet will or grace of the employer not claimable as a right and therefore, no right to pension can be enforced through Court has been swept under the carpet by the decision of the Constitution Bench in *Deoki Nandan Prasad v. State of Bihar & Ors.* (1) wherein this Court authoritatively rules that pension is a right and the payment of it does not depend upon the discretion of the Government but is governed by rules and a Government servant coming within those rules is entitled to claim pension".

In the said decision, the scope of Rules 8(5)9 of CCS (Pension) Rules was inquired into by the Hon'ble Apex Court. D.V. Kapoor was Assistant grade IV of the Indian Foreign Service in Indian High Commission in London. On the expiry of his tenure in London, he could not return to India immediately due to the illness of his wife. Disciplinary proceedings were initiated against D.V. Kapoor for unauthorized absence. The inquiry officer held that D.V. Kapoor's absence was not willful. During the course of the inquiry, the Charged officer had retired from service. The President, in consultation with the Union Public Service Commission, decided to withhold the entire pension and gratuity permanently. The Hon'ble Apex Supreme Court observed thus:-

Rule 8(5), explanation (b) defines 'grave misconduct' thus:-

"The expression 'grave misconduct' includes the communication or disclosure of any secret official code or password or any sketch, plan, model, article, note, document or information, such as is mentioned in Section 5 of the Official Secrets Act, 1923 (19 of 1923) (which was obtained while holding office under the Government) so as to prejudicially affect the interests of the general public or the security of the State."

In one of the decisions of the Government as compiled by Swamy's Pension Compilation, 1987 Edition, it is stated that:-

"Pensions are not in the nature of reward but there is a binding obligation on Government which can be claimed as a right. Their forfeiture is only on resignation, removal or dismissal from service. After a pension is sanctioned its continuance depends on future good conduct, but it cannot be stopped or reduced for other reasons."

5. It is seen that the President has reserved to himself the right to withhold pension in whole or in part thereof whether "permanently or for a specified period or he can recover from pension of the whole" or part of any pecuniary loss caused by the Government employee to the Government subject to the minimum. The condition precedent is that in any departmental enquiry or the judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service of the original or on re-

employment. The condition precedent thereto is that there should be a finding that the delinquent is guilty of grave misconduct or negligence in the discharge of public duty in office, as defined in Rule 8(5), explanation (b) which is an inclusive definition, i.e. the scope is wide of mark dependent on the facts or circumstances in a given case. Myriad situation may arise depending on the ingenuity with which misconduct or irregularity was committed.

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6. As seen the exercise of power by the President is hedged with a condition precedent that a finding should be recorded either in departmental enquiry or judicial proceedings that the pensioner committed grave misconduct or negligence in the discharge of his duty while in office, subject of the charge. In the absence of such a finding the President is without authority of law to impose penalty of withholding pension as a measure of punishment either in whole or in part permanently or for a specified period, or to order recovery of the pecuniary loss in whole or in part from the pension of the employee, subject to minimum of Rs. 60.

7. Rule 9 of the rules empowers the President only to withhold or withdraw pension permanently or for a specified period in whole or in part or to order recovery of pecuniary loss caused to the State in whole or in part subject to minimum. The employee's right to pension is a statutory right. The measure of deprivation therefore, must be correlative to or commensurate with the gravity of the grave misconduct or irregularity as it offends the right to assistance at the evening of his life as assured under Art. 41 of the Constitution. The impugned order discloses that the President withheld on permanent basis the payment of gratuity in addition to pension. The right to gratuity is also a statutory right. The appellant was not charged with nor was given an opportunity that his gratuity would be withheld as a measure of punishment. No provision of law has been brought to our notice under which, the President is empowered to withhold gratuity as well, after his retirement as a measure of punishment. Therefore, the order to withhold the gratuity as a measure of penalty is obviously illegal and is devoid of jurisdiction.

8. In view of the above facts and law that there is no finding that appellant did commit grave misconduct as charged for, the exercise of the power is clearly illegal and in excess of jurisdiction as the condition precedent, grave misconduct was not proved. Accordingly the appeal is allowed and the impugned order dated November 24, 1981 is quashed but in the circumstances parties are directed to bear their own costs. The ratio in the judgement is that grave misconduct should be in the discharge of public duty in office. The criminal case against the Applicant herein would not come within the ambit of grave misconduct in the discharge of public duty in office. (emphasis supplied)

(iii) Sub-section 1 of Section 4 of the Payment of Gratuity Act, 1972 would read thus:

4. Payment of gratuity (1) Gratuity shall be payable to an employee on the termination of his employment after he has rendered continuous service for not less than five years on his superannuation, or on his retirement or resignation, or on his death or disablement due to accident or disease. The Sub-Section 6 is the non obstante section:

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(6) Notwithstanding anything contained in sub-section (1), - the gratuity of an employee, whose services have been terminated for any act, willful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;

The gratuity payable to an employee [may be wholly or partially forfeited].

15. Per contra Ld. Counsel for the respondent would vociferously submit that the authorities had the right to withhold the dues in order to avoid being implicated in Court cases.

16. What transpired from the enumerations hereinabove is that inarguably and indubitably the retiral dues of a pensioner could not be forfeited without a conviction in a criminal case or a final order in a departmental proceedings and no such benefits could be withhold unless the proceedings came "within the ambit of grave misconduct in discharge of public duty in office". No such recording or final order could be noticed in the case at hand. Moreover, Commutation of Pension, Composite Personal Grant and RELHS could not be withheld invoking Rule 10 supra.

17. The respondents have failed to clarify in what manner the applicant had incurred any liability to compensate the Railways for any loss caused due to his alleged misconduct (drunkenness etc.) and the reason why Rule 9 of Pension Rules was required to be given a complete go bye. The respondents have therefore miserably failed to justify withholding of the dues. For such reasons, I would hold that withholding of the settlement dues of the applicant in the manner it has been withheld was not justified.

18. Accordingly the respondents would disburse the entire withheld dues to the applicant within two months from the date of receipt of the copy of this order with interest on the arrears @ 8% per annum from the date the dues accrued to the Government servant. No costs.

B. Banerjee
(BIDISHA BANERJEE)
MEMBER (J)

In