

CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH

No. OA 350/00610/2014

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

SWAPAN KR. ROY

VS

UNION OF INDIA & ORS.

For the applicant : Mr.S.Sen, counsel
Mr.D.K.Mukhopadhyay, counsel

For the respondents : Mr.B.L.Gangopadhyay, counsel

Order on : 26.4.11

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. Aggrieved by withholding of terminal benefits this application has been filed seeking the following reliefs :

- a) Order be passed directing the respondent authorities to immediately release and pay the applicant his retirement gratuity and leave salary amount and other terminal benefits as admissible under the law within a certain time frame;
- b) Order be passed directing the respondent authorities to pay delayed payment interest on the amount of his arrear pension of Rs.4,46,045 for the period from 10.4.08 till 4.1.11, on the amount of his P.F. money of Rs.2,02,993 for the period from 10.4.08 to 12.10.10, on the amounts of his retirement gratuity and leave salary for the period from 10.4.08 till the date of actual payment, @ 18% per annum on all the aforesaid amounts, within a certain time frame.

3. The impugned order is an order dated 14.7.14 whereby and whereunder the held up settlement dues has been shown as Rs.4,86,890 against a total liability against the applicant, shown as Rs.6,11,741 and the balance Rs.1,24,851 which could not be satisfied by withholding the settlement dues have been asked to be deposited within seven days. It has been urged by the ld. Counsel for the applicant that the applicant's prayer for voluntary retirement made vide application dated 16.10.2000 was accepted and he was allowed to

voluntarily retire from service w.e.f. 9.4.08. His pension payment order was issued after more than 2 years on 3.9.10 making a complete go by to the provisions as contained in the Pension Rules but his entire money being arrears of pension, retirement gratuity, leave salary etc. has been withheld without any show cause notice or proceedings. A DA proceeding that was initiated against him was dropped on 30.3.12 by the Disciplinary Authority, the Sr. DEN (Co-ordination), whereafter it was incumbent upon the authorities to release the payments expeditiously.

4. In the reply filed by the respondents the respondents have averred that the DRM on 6.12.07, in view of the applicant's application dated 16.10.07 seeking voluntary retirement, had advised the applicant to finalise all contractual works executed during his tenure as per list of works enclosed in the letter. The applicant submitted only 10 bills in two phases on 14.12.07 and 10.1.08 which was not complete. His request for voluntary retirement was not processed due to non-compliance of the instructions issued on 16.12.07 and thereafter on 11.4.08. The applicant filed OA 871/08 which was disposed of by this Tribunal with a direction to process the application for voluntary retirement and accordingly the General Manager passed a reasoned order dated 26.5.10 accepting voluntary retirement from a back date i.e. 9.4.08 the date when the mandatory period of notice for voluntary retirement was over. Thereafter the settlement case was processed. As the Disciplinary Proceeding was pending against the applicant provisional pension payment order dated 3.9.10 was issued and no DCRG was released in accordance with Rule 9 & 10 of RS (Pension) Rules, 1993. Provident Fund and GIS amount was released within six months from the date of order of the General Manager in view of Estt. Sr. No. 41/2000. No interest was payable on delayed payment of CGEGIS and leave salary encashment as those were not in the nature of retirement benefits. In terms of Railway Board's letter dated 7.8.89 competent authority was advised to withhold whole or part of cash equivalent to LAP if the employee was under suspension or proceedings were pending against him if in view of the said authority there was a possibility of some money becoming recoverable

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from the employee on conclusion of the proceedings. Since a major penalty charge memo was issued on 29/30.7.09 DCRG and leave salary encashment were withheld. After the proceedings were dropped on 26.12.13 the DCRG was calculated to the tune of Rs.2,75,374/-, leave salary of Rs.2,11,516 i.e. a total of Rs.4,86,890 but an amount of Rs.6,11,741 was outstanding against the employee on account of the dues depicted as follows :

Item	Amount	Authority
Over Payment of pay	5950	LPC
O.P. - PPEP	122	"
O.P. - DP	2975	"
O.P. - DA	4195	"
Store Debits	5,88,846	DRM (Engg) vide No. SV/CKP/AN/08- 09/Works/DPS/35/Spl/295 dt. 17.3.12
Elect. Charges	9653	DEE (G)/CKP's letter No. EL/G/CKP/Sett/SKR dt. 21.4.14
Total	Rs.6,11,741	Outstanding

Therefore a notice was issued to the applicant to deposit the balance amount of Rs.1,21,851.

5. In his rejoinder the applicant specifically denied non-compliance of the alleged instructions made vide letter dated 6.12.07 and 11.4.08 or that leave salary encashment was not in the nature of retirement benefits or that Estt. Srl. No. 41/2000 was applicable to him. He has also further strongly denied that any amount was outstanding against him or that there was any kind of overpayment. He even denied and disputed the Store debit of Rs.5,88,846 which according to the applicant were an afterthought and imaginary.

6. During the course of arguments Id. Counsel for the applicant strenuously urged that under no circumstances the respondents could straightway make recoveries in the manner they have done without initiating any proceedings for ascertaining the loss sustained by the Railways, the culpability of the applicant in regard to such alleged loss, apportionment of his

share in such loss and without observing the extant rules and circulars government the field.

7. Accordingly the question that fell for consideration was whether the respondents could straightway realise the alleged liabilities from the payable pensionary benefits of an employee without taking recourse to any show cause notice or proceedings and whether such dues could be recovered from a pensioner. The following legal position could be discerned :

(i) In **State of Punjab & Os. Etc. -vs- Rafiq Masih (White Washer) etc.** rendered by Hon'ble Supreme Court of India in Civil Appeal No. 11527 of 2014 (Arising out of SLP(C) No. 11684 of 2012) the Hon'ble Apex Court was considering the following :

"The long and short of the matter is, that all the private respondents were beneficiaries of a mistake committed by the employer, and on account of the said unintentional mistake, employees were in receipt of monetary benefits, beyond their dues."

The Hon'ble Apex Court based on its earlier decisions rendered in **Sahib Ram -vs- State of Haryana [1995 Supp (1) SCC 18], Shyam Babu Verma -vs- UOI & Os. [(1994) 2 SCC 521], UOI & Ors. -vs- M.Bhaskar [1996 (4) SCC 416], V. Gangaram v. Regional Joint Director and Ors [(1997) 6 SCC 139], Col. B.J. Akkara (Retd. -vs- Govt. of India [(2006) 11 SCC 709], Bihar SEB -vs- Bijay Bahadur [(2000) 10 SCC 99], etc.** summarized the following few situations, wherein recoveries by the employers, would be impermissible in law:

- (i) **Recovery from employees belonging to Class III and Class IV service (or Group 'C' and Group 'D' service).**
- (ii) **Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.**
- (iii) **Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.**

- (iv) *Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.*
- (v) *In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."*
- (ii) In **State of West Bengal -vs- Asis Das Gupta [2013 (5) CHN (CAL) 440]** while upholding the decision of the Tribunal, Hon'ble High Court was considering justifiability of the following:

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

The Hon'ble Court held as follows :

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

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

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

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

judgment of Jitendra Kumar Srivastava (supra) Supreme Court has held as under:-

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

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

(iii) The only reason because of which government can withhold and appropriate terminal benefits etc is if there is a rule of the organization or a statutory rule which entitles the government during the pendency of proceedings not to pay the terminal benefits etc to the employee.

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

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

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

(iv) Ld. Counsel for the applicant relied upon a decision rendered by the Ernakulam Bench of CAT in **OA 884/10** wherein it was held that the respondents ought to have finalised the issue in regard to loss within three months from the date of superannuation.

8. In regard to assessment of any loss of Railways and apportionment thereof, the following provisions in Financial Rules were noticed :

"1102. Report of Losses -Any defalcation or loss of cash, stores or other property belonging to Government should be reported immediately it is discovered to the head of the division or department as the case may be, and in serious cases to the General Manager also, copies of the reports being sent simultaneously to the Financial Adviser and Chief Accounts Officer who will forward a copy to the Chief Auditor. If any irregularity or loss is detected by, or is brought to the notice of the Accounts Officer in the first instance, it will be his duty to apprise immediately the administrative authority concerned of the facts of the case and ask for a proper investigation ; the Accounts Officer will send a copy of his communication on the subject to the Chief Auditor. If, however, the irregularity or loss is discovered by, or is brought to the notice of the administrative authority in

the first instance, that authority should immediately report the matter to the Accounts Officer, who will forward a copy of the report to the Chief Auditor. Petty cases, that is cases involving losses not exceeding Rs. 500 each need not be reported to the Financial Adviser and Chief Accounts Officer nor by him to the Chief Auditor unless there are important features which require detailed investigation and consideration. Every important case involving loss of cash, stores, or property, whether caused as a result of frauds perpetrated or negligence shown by the railway servants, or caused purely by accidents such as fire, etc., should be brought to the notice of the Railway Board by the General Manager through a preliminary report (to be followed by a detailed report see Para 1103) within six weeks from the date of detection of the loss and a copy of the report endorsed to the Chief Auditor simultaneously through the Financial Adviser and Chief Accounts Officer. When the loss involved does not exceed Rs. 50,000 the case need not be reported to the Railway Board unless it represents unusual features or reveals serious defects in procedure.

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

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

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

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

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

9. No scrap of paper was used to indicate the manner in which the aforesaid provisions under the extant rules were followed in regard to reporting of loss, lodging an FIR, ascertainment of loss, apportionment of loss, the culpability of the applicant in the loss.

10. Rule 9 of Railway Servants (Pension) Rules envisage the following :

Right of the President to withhold or withdraw pension.

(1) The President reserves to himself the right of withholding or withdrawing a pension or gratuity, or both, either in full or in part, whether permanently or for a specified period, and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Railway, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of his service, including service rendered upon re-employment after retirement;

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

Provided further that where a part of pension is withheld or withdrawn, the amount of such pension shall not be reduced below the amount of **rupees three thousand five hundred per mensem**

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

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

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

(b) if not institute while the railway servant was in service, whether before his retirement or during his re-employment-

(i) shall not be instituted save with the sanction of the President;

(ii) shall not be in respect of any event which took place more than four years before such institution; and

(iii) shall be conducted by such authority and in such place as the President may direct and in accordance with the procedure applicable to departmental proceedings in which and order in relation to the railway servant during his service.

(3) In the case of a railway servant who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under sub-rule (2), a provisional pension as provided in rule 10 shall be sanctioned.

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

(5) For the purpose of this rule -

(a) departmental proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the railway servant

or pensioner, or if the railway servant has been placed under suspension from an earlier date, on such date; and

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

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

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

The payment of retiral benefits of a Railway employee is inarguably and indubitably governed by Railway Services (Pension) rules. The rules explicitly without any ambiguity mandate that "the right of withholding or withdrawing pension or gratuity, or both, either in full or in part" and of ordering recovery "is vested with the President hedged by a condition spelt out in unambiguous words "if in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence". In the instant case evidently no proceedings were drawn up against the employee and no final order has been passed in a departmental or judicial proceeding holding the employee guilty of any "grave misconduct" or "negligence" during the period of service.

11. Having failed to decipher any materials to justify recovery from retiral dues/pensionary benefits without any proceeding under Rule 9, without taking recourse to Railway Commercial/Financial Rules *ibid*, I would hold that the authorities had misdirected themselves in realising the entire loss from the payable retirement dues of the employee, particularly when they could not recover their dues from a pensioner in view of **Rafiq Masih** (*supra*) as also in view of Rule 9 of Pension Rules as enumerated hereinabove. The recovery from retiral dues without proceedings and in violation of statutory rules could not be countenanced.

12. Accordingly the OA is allowed with a direction upon the authorities to release the withheld dues within two months from the date of a communication of this order with an interest @ 8% per annum. No order is passed as to costs.

13. The respondents would however, have the liberty to act in accordance with law.

(BIDISHA BANERJEE)
MEMBER (J)

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