

CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH

...

OA No.290/00015/2016 IN

Pronounced on : 07.11.2019
(Reserved on : 23.10.2019)

...

CORAM: HON'BLE SMT. HINA P. SHAH, MEMBER (J)
HON'BLE SMT. ARCHANA NIGAM, MEMBER (A)

...

Liyakat Khan s/o Late Shri Jaffar Khan, aged 61 years, r/o Tabuto Ka Bass,
 Ishakiya Senior Secondary School, Jodhpur.

...APPLICANT

BY ADVOCATE : Mr. K.K. Shah.

VERSUS

1. Union of India, through the General Manager, North Western Railway, Malviya Nagar, Near Jawahar Circle, Jaipur.
2. The Divisional Railway Manager, North Western Railway, Jodhpur.
3. The Senior Divisional Personnel Officer, North Western Railway, Jodhpur.
4. The Senior Divisional Mechanical Engineer (P), North Western Railway, Jodhpur.

RESPONDENTS

BY ADVOCATE: Mr. Vinay Chhipa, for R1 to R4.

ORDER

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Hon'ble Smt. Archana Nigam, Member (A):-

1. The present Original Application (O.A.) has been filed by the applicant under Section 19 of the Administrative Tribunals Act, 1985,

wherein the applicant is seeking the relief that the OA may be allowed with costs and the impugned order dated 14.05.2015 may be quashed and set aside and with a direction to the respondents to pay the entire retiral benefits including the payment of gratuity.

2. The present OA has been made against the order No.641E/EIIC/Mechanical/Loco Pilot/Liyakat Khan/2015 dated 14.05.2015 (Annexure A1).

3. The brief facts of the present case as narrated by the applicant are that the applicant was first appointed in the Railways on 02.04.1988 and after about 27 years of service, he retired on 31.05.2015. The applicant was promoted as Loco Pilot (Shunter) Grade-II vide order dated 13.01.2006. Subsequently, he was promoted as Loco Pilot (Shunter) Grade-I vide order dated 18.04.2006, but this promotion was recorded with effect from 29.07.2005. Thereafter, he appeared in the written test and was declared successful and was promoted to the post of Loco Pilot (Goods-II) vide order dated 07.12.2006.

4. The applicant resumed the duties of Loco Pilot (Goods-II) on 10.02.2007. The applicant was asked to appear for Inspection, which was carried out from 29.03.2007 to 25.04.2007, but the result was not communicated to him. The applicant made a representation on 16.03.2010 (Annexure A2) to respondent no.4 for issuing him the eligibility certificate for operating goods train. After receipt of Annexure A2, respondent no.4 issued a charge sheet of SF-5 on 29.03.2010 alleging that the applicant was not having enough knowledge of various activities and also he sleeps while operating the train. After inquiry, an inquiry report was submitted by the IO on 07.02.2011 (Annexure A3).

5. The applicant was awarded punishment and in that he was reverted permanently to the lowest post of scale 5200-20200+2400 from the scale of Rs.9300-34800+4200 vide order dated 05.08.2011. The applicant has preferred an appeal against the punishment order dated 28.02.2012 and also the reversion against the appellate order was rejected vide order dated 20.06.2013. After permanent reversion of the applicant and vide impugned order dated 14.05.2015 (Annexure A1), his fixation of pay was revised after more than five and half years on the ground that it has been done wrongly. On the day of retirement of the applicant i.e. 31.05.2015, the respondent issued an order for withholding of Rs.6,00,000/- from the payment. As per particulars of pension after commutation of pension of Rs.3,62,732/-, the applicant was made entitled for gratuity of Rs.4,40,095/-, PF of Rs.59,903/- and CGEGIS-1980 of Rs.18,628/-, making gross payment of Rs.8,81,358/-. Out of this amount Rs.11,900/- was recovered as RELHS contribution (One month basic pay) of Rs.11,900/- and misc. recoveries of Rs.4,28,195/-, thus, a total recovery of Rs.4,40,095/- was made which was the amount of gratuity shown in the particulars of pension. Thus, the entire gratuity was withheld by the respondents.

6. It is further stated that on receipt of impugned order, the applicant made a representation on 23.05.2015 and brought out the law laid down by the Hon'ble Supreme Court in the case of State of Punjab Vs. Rafiq Masih (2015 AIR SCW 501). It laid down in the said judgment that no recovery should be made from the employees belonging to Class-III and Class-IV (Group C & D service). The applicant is a Group C employee. It is also held that if any excess payment will be made for a period of more than five years than no recovery should be made. In case of the applicant the recovery which was made on 22.09.2009 has been directed to be

revised on 14.05.2015. The applicant submitted that he has submitted an application under RTI Act on 31.08.2015 (Annexure A6). Vide letter dated 06.10.2015 (Annexure A7), respondent no.3 submitted that the information in which it was mentioned that after issuance of order dated 14.05.2015, the department directed to withhold Rs.6,00,000/- however the gratuity of the applicant was Rs.4,40,095/-. Hence the OA.

7. In the preliminary reply to the prayer on interim relief filed on behalf of the respondents it has been stated that the applicant sought relief to quash and set aside the impugned order dated 14.05.2015 (Annexure A1) and further sought relief to direct the respondents to pay the entire retiral benefits including the payment of gratuity. In the interim relief prayer clause, the applicant has also sought relief to direct the respondents to release the amount of gratuity of Rs.4,40,095/- at the earliest. It is further stated that during the service tenure, the applicant's service record was not satisfactory and he was awarded as many as 38 penalties; He was also habitual to remain absent without permission for large spells on a number of occasions. The total period of absence without pay and leave without pay is 845 days and applicant retired with -3.5 day LAP+4 LHAP balance at the time of retirement and an amount of Rs.1647/- also recovered for the same. However, in the applicant's case same was not done due to which the applicant was granted annual increments before the actual date when it became due and as increments were not granted on the actual due date and same were granted prior to actual date, therefore, due to wrong fixation of pay, the overpayment of pay and allowances were made to the applicant.

8. It is further stated that the service record of the applicant was scrutinized prior to his retirement and at that time this fact came in the

knowledge of the answering respondents that pay of the applicant was not fixed in accordance with law and therefore, prior to applicant's retirement, the answering respondents issued letter dated 14.05.2015 (Annexure A1) regarding re-fixation of applicant's pay and there is nothing illegality or ambiguity in the same. As per the due and drawn statement, a sum of Rs.5,60,132/- has been paid excess to the applicant upto 01.04.2015 on account of overpayment of pay and allowances. From the perusal of the particular of pensioner (Annexure A4), it is evident that at the time of applicant's retirement, a sum of Rs.8,81,358/- (Commutation of Pension Rs.3,62,732/-, Retirement Gratuity Rs.4,40,095/-, PF Rs.59,903/- and CGEGIS Rs.18,628/-) was to be paid to the applicant. As per re-fixation of applicant's pay and due and drawn statement, a sum of Rs.5,60,132/- has been paid in excess to the applicant on account of overpayment of pay and allowances and as only a sum of Rs.4,40,095/- was to be paid in lieu of retirement gratuity, therefore, answering respondents have made adjustment of aforesaid due amount from the applicant's retirement gratuity.

9. It is also further stated that a sum of Rs.11,900/- has been deducted from the applicant's retirement gratuity (Rs.4,40,095/-) in lieu of RELHS Contribution and only a sum of Rs.4,28,195/- has been adjusted by the Railway Department in lieu of aforesaid due amount to the tune of Rs.5,60,132/-, the applicant has allegedly specifically prayed in interim relief for making payment of Rs.4,40,095/- in lieu of retirement gratuity. It is also stated that the prayer which has been sought by the applicant in interim relief is also one of the final relief of OA and as per the ratio decided by the Hon'ble Apex Court in catena of judicial verdicts, the Court cannot grant any final relief while granting interim relief in favour of the litigant. The similar ratio has been decided by the Hon'ble Supreme Court

in the case of Sec., UPSC & Anr. Vs. S. Krishna Chaitanya (AIR 2011 SC 3101). The amount which was paid in excess on account of overpayment of pay and allowances to the applicant to public exchequer and the answering respondents have the right to recover the same from the applicant. Therefore, it is well settled proposition of law that interim relief cannot be granted until or unless the litigant who have approached to this Court will satisfy the Court that his rights will be prejudiced if the interim relief cannot be granted in his favour. Therefore no case is made out in favour of the applicant to grant any interim relief.

10. Learned counsel for the respondents have also filed reply to the OA on behalf of the respondents wherein it has been stated that the applicant has failed to point out or show any illegality or ambiguity in the order / letter dated 14.05.2015 (Annexure A1). During the service tenure, the applicant's service record was not satisfactory and he was awarded as many as 38 penalties; He was also habitual to remain unauthorized absent for large spells on a number of occasions. The total period of absence without pay and leave is 845 days and the applicant retired with -3.5 day LAP+4 LHAP balance and an amount of Rs.1647/- also recovered for the same. From 10.09.1999 to 31.12.2000 the applicant remained on LWOP/AWOP for 135 days, from 01.01.2001 to 28.02.2002, the applicant remained on LWOP/AWOP for 67 days, from 01.03.2002 to 30.04.2003 the applicant remained on LWOP/AWOP for 70 days, from 01.05.2003 to 31.05.2004 the applicant remained on LWOP/AWOP for 59 days and from 01.06.2004 to 31.07.2005 the applicant remained on LWOP/AWOP for 86 days. Due to the aforesaid reasons the applicant's annual increments were to be deferred while counting the period of LWOP/AWOP and excluding the same from total service length prior to granting annual increments. Vide letter dated 14.05.2015 (Annexure A1) regarding

applicant's re-fixation of pay, it is ex-facie clear that the answering respondents have rightly made re-fixation of applicant's pay while excluding the period of LWOP/AWOP from total countable service length and there is nothing illegality or ambiguity in the same.

11. It is further stated that prior to applicant's retirement, the answering respondents have issued letter dated 14.05.2015 (Annexure A1) regarding re-fixation of applicant's pay and excess payment which was paid to the applicant in lieu of pay and allowances has rightly been recovered from the applicant. As per due drawn statement, a sum of Rs.5,60,132/- has been paid excess to the applicant upto 01.04.2015 on account of overpayment of pay and allowances. From perusal of particulars of Pensioner (Annexure A4), it is ex-facie clear that at the time of applicant's retirement, a sum of Rs.8,81,358/- (Commutation of Pension Rs.3,62,732/-, retirement gratuity Rs.4,40,095/-, PF Rs.59,903/- and CGEGIS Rs.18,628/-) was to be paid to the applicant. As per re-fixation of applicant's pay and due drawn statements, a sum of Rs.5,60,132/- has been paid in excess to the applicant on account of overpayment of pay and allowances and as only a sum of Rs.4,40,095/- was to be paid in lieu of retirement gratuity, therefore, answering respondents have made adjustment of aforesaid due amount from the applicant's retirement gratuity. It is also stated that a sum of Rs.11,900/- has been adjusted in lieu of RELHS Contribution from the applicant's retirement gratuity (medical facility taken by the applicant) and till date only a sum of Rs.4,28,195/- has been adjusted in lieu of aforesaid recovery and same has rightly been recovered as per the rules in vogue and there is no illegality or ambiguity. It is also added that till date a sum of Rs.1,33,584/- still due to the Railways from the applicant.

12. It is also further stated that in the year 2014, the applicant was working as Senior Assistant Loco Pilot and he was not operating train independently and posted as an assistant only. In the confidential report, the column of technical abilities remained unfilled and only it is mentioned that work is satisfactory. Confidential report is not a proof that applicant was operating Goods Train independently. Therefore, the applicant has no legal ground to sustain the OA and the OA itself deserves to be dismissed.

13. We have heard Shri K.K. Shah, learned counsel for the applicant and Shri Vinay Chhipa, learned counsel for R1 to R4 and perused the pleadings available on record.

14. Learned counsel for the applicant drew our attention to letter dated 14.05.2015 (Annexure A1) issued by the Assistant Personal officer NWR, Jodhpur which has provided the details of the review of the excess payments made since 2001 upto 2014 and the recoveries proposed to be effected on this basis. Learned counsel relied upon the judgment of the Hon'ble Supreme Court in the case of State of Punjab & Ors. Vs. Rafiq Masih etc. in Civil Appeal No. 11527 of 2014, decided on 18.12.2014. He made out the case that the railways were required to issue a show cause notice as per the judgment Rafiq Masih (supra); however, this has not been done in his case. Learned counsel for the applicant also drew our attention to the fact that the recovery was made by the department just 15 days prior to the retirement of the applicant i.e. 31.05.2015.

15. Per contra, the learned counsel for the respondents drew our attention to the fact that during the service tenure, the applicant's service record was not satisfactory and he was awarded as many as 38 penalties; He was also habitual of being unauthorized absent for large spells on a number of occasions. The total period of absence without pay and leave

without pay is 845 days and applicant retired with -3.5 day LAP+4 LHAP balance at the time of retirement and an amount of Rs.1647/- also recovered for the same.

16. Learned counsel for the respondents vehemently argued the correctness of the recoveries made by the respondent department in view of the service record of the applicant as available. Upon query, the learned counsel for the respondents has submitted across the bar a copy of Railway Services (Pension) Rules, 1993 (which was taken on record). He drew our attention to the provisions under Rule 15 of RSP Rules, 1993 which provides for recovery and adjustment of Govt. or railway dues from pensionary benefits.

17. Learned counsel for the respondents has also produced a copy of written submissions in which it has been stated that:

"3. At the time of applicant's retirement a sum of Rs.4,40,095/- was to be paid to the applicant in lieu of retirement gratuity. In lieu of overpayment of pay and allowances and leave salary, the Railway Department has only recovered a sum of Rs.4,28,195/- from applicant's retirement gratuity and Rs.11,900/- adjusted from applicant's retirement gratuity in lieu of contribution towards Railway Employees Liberalized Health Scheme (RELHS).

- (A) Retirement Gratuity : Rs.4,40,095/-
- (B) Amount recovered in lieu of overpayment of pay and allowances and leave salary from retirement gratuity is Rs.4,28,195/-
- (C) Amount adjusted in lieu of Contribution towards RELHS from retirement gratuity Rs.11,900/-.
- (D) Total (Rs.4,28,195 + 11,900/-).

18. The respondents have also relied upon a catena of judgments as below:-

(1) WP (C) No.3583/2007 (Sh. Jagdish Prasad & Ors. Vs. University of Delhi & Ors.) decided on 15.04.2015 by the Hon'ble High Court of Delhi.

(2) In the case of Mukan Singh Rajpurohit Vs. State of Rajasthan through the Secretary, Finance Department, Secretariat, Jaipur & Ors. in SB Civil Writ Petition No.5553/2014, decided on 12.04.2017 reported 2017 (4) WLN 233 (Raj.)

(3) In the case of UOI & Ors. Vs. Roshan lal Agarwal & Anr. In DB Civil WP No.8892/2017, decided on 06.11.2017 by the Hon'ble High Court of Judicature for Rajasthan at Jodhpur.

(4) In the case of Gyanchand & Ors. Vs. UOI & Ors. in OA No.200/00297/2014, decided on 14.08.2015 by the C.A.T. Jabalpur Bench.

(5) In the case of Sunil Kumar Vs. UOI & Ors. in OA No.863/2016, decided on 02.05.2019 by the C.A.T. Jabalpur Bench.

19. We have perused the pleadings as available on record and heard the arguments put forward by both the learned counsels. To adjudicate on the issue as above we have also perused the various judgments relied upon by both the learned counsels.

20. Admittedly, excess payment has been made to the applicant on account of overpayment of pay and allowances and overpayment of leave salary etc from the retirement gratuity of the applicant. In lieu of overpayment of pay and allowances and leave salary i.e. Rs.5,61,779/-, railway department has only recovered a sum of Rs.4,28,195/- from the applicant's retirement gratuity. By way of relief, the applicant seeks issuance of appropriate orders for quashing the impugned order dated 14.05.2015 (Annexure A1) and directions to the respondents to release the amount of gratuity of Rs.4,45,095/- as the applicant has retired on superannuation.

21. Admittedly, the applicant was aware that he was being paid in excess of monthly salary and allowances as due to him and this fact has not been controverted by the learned counsel for the applicant. The Hon'ble Supreme Court, in the case of State of Punjab & Ors. Vs. Rafiq Masih (White Washer) etc. in Para 11 of the judgment has referred the decision made in Syed Qadir Vs. State of Bihar, reported in 2009 (3) SCC page 475 and reproduced para 58 of said judgment, in which the Hon'ble

Supreme Court has categorically held that “if it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess”.

22. To adjudicate on the issue as above, we have perused the various a catena of judgments of the Hon’ble Apex Court, Hon’ble High Courts and Coordinate Benches of the Tribunal. The judgment of the Hon’ble Apex Court in the Rafiq Masih’s case has been discussed at some length in the order in OA No.297/2014 (Gyanchand & Ors. Vs. UOI & Ors) decided on 14.08.2015 by the C.A.T. Jabalpur Bench, the relevant extract is as below:

“6. No doubt, in para 18(i) of the judgment in the matters of Rafiq Masih (supra) the Hon’ble Supreme Court has held that recovery from employees belonging to Class-III and Class-IV service cannot be made, however, this para would have to be read with para 13 which states that the wrongful payments if detected within five years can always be recovered by the employer. Para 18 of the said judgment reads as under:-

(18) It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

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

23. It has been a common thread in all the judicial pronouncements including Rafiq Masih (supra) that recovery can be made if the employee had knowledge that the payment received was in excess of what was due

or wrongly paid. Therefore, following the directions of Rafiq Masih (supra) and other judgments we are of the considered view that the recovery made in this case as per the correct fixation of pay cannot be iniquitous. We do not deem it necessary to interfere in the action taken by the respondents.

24. Accordingly, the O.A. is dismissed as stated above. No order as to costs.

(ARCHANA NIGAM)
MEMBER (A)

(HINA P. SHAH)
MEMBER (J)

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