IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) No. 9987 of 2021

Union of India and others .... ***Petitioners***

Mr. P.K. Parhi
Deputy Solicitor General of India along with
Mr. D. Gochhayat, CGC

-versus-

Md. Ahmed Baig .... ***Opposite Party***

Mr. T.K. Mishra, Advocate

CORAM:
THE CHIEF JUSTICE
MR. JUSTICE S.K. SAHOO

JUDGMENT
22.02.2024

S.K. Sahoo, J.

1. The precise question of law which needs to be addressed in this writ petition is that whether excess payment made in favour an employee can be recovered from his leave encashment benefits after his retirement, especially when it is palpable that the excess payment was made by the authorities on an erroneous calculation or improper interpretation of rules and not because of any fault on the part of the employee.

2. The brief factual matrix, bereft of superfluous details, leading to the present writ petition is that the opposite party joined as a Mail Man (MTS) on 17.01.1984. The Department of Personnel and Training, Government of India vide its letter dated 19.05.2009 recommended for financial upgradation under a scheme named as 'Modified Assured Career Progression Scheme' (for short 'the MACP

scheme'). The opposite party was entitled to get the benefits of 3rd MACP upon completion of 30 years of service from his initial entry grade, i.e. 17.01.2014. However, he was erroneously granted 3rd MACP vide office order dated 21.04.2010. This discrepancy was pointed out by the internal audit report dated 03.04.2012. Subsequently, the opposite party retired from service on 31.07.2017, but his leave encashment benefits were withheld for recovery of excess amount paid to him under the 3rd MACP.

Being aggrieved by the aforesaid action of the authorities, the opposite party filed an Original Application before the Central Administrative Tribunal, Cuttack (hereafter 'the Tribunal') vide OA No.260/109/2018 seeking disbursement of the leave encashment benefit with 18% interest. Therein, it was submitted on behalf of the opposite party that under the Rule 39(2) of the Central Civil Services (Leave) Rules, 1972 (for short 'the Rules, 1972'), the competent authority was required to sanction the cash equivalent of the earned leave at the credit of the opposite party on the date of his retirement i.e. 31.7.2017 and under the Rule 39(3), the authority can withhold full or part of the cash equivalent of the earned leave if he would have retired while on suspension or if any disciplinary or criminal proceedings were pending against him. Thus, it was submitted on his behalf that since the opposite party was neither under suspension on the date of his retirement nor any disciplinary or criminal proceeding was pending against him, the decision to withhold such benefit payable to him is illegal and he is entitled for release of the leave encashment benefit with interest at the rate of 18%.

The petitioners filed their counter affidavit in the O.A. wherein it is stated that claim of the opposite party is not justified and tenable and therefore, the O.A. should be dismissed.

3. After hearing the arguments for both the sides, the learned Tribunal vide order dated 14.10.2020 held that no order was passed following due procedure of law on the basis of which such amount could have been recovered from the leave encashment entitlement of the opposite party. It also observed that the authorities remained silent and withheld the entire leave encashment benefit payable to the applicant and all of a sudden on 10.10.2018, an amount of Rs.3,88,548/- was released without any details about proposed recovery. Accordingly, while setting aside the recovery made by authorities, the learned Tribunal held as follows:-

> "8. In view of the discussions above, the delay in release of the leave encashment is entirely due to the decision of the respondents to withhold the leave encashment benefit in full, which is not sustainable in the eye of law. The applicant is, therefore, entitled for payment of interest for such delay in release of at least the part amount of Rs. 3,88,548/- which was required to be released on the date of retirement of the applicant on 31.7.2017. If the applicant did not receive the cheque released by letter dated 10.1.2018, the reason for not transferring such amount directly to the applicant's bank account or sending the cheque to the applicant by post has not been explained by the authorities.
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> 9. In view of the discussions above, the impugned order dated 7.2.2018 (Annexure-A/5 of OA) is quashed since it is not

sustainable under law and the respondents are directed to disburse the amount of Rs. 3,88,548/- to the applicant within two months from the date of receipt of a copy of this order along with interest on such amount from 1.8.2017 till the actual date of disbursement to the applicant at the rate of 9% per annum subject to condition that such interest paid to the applicant will be recovered in accordance with law from the officials who will be found responsible for wrongly withholding the leave encashment payable to the applicant in full in violation of the provisions of the rules. The respondents are further directed to pass a specific order regarding the balance amount of the leave encashment benefit to the applicant in accordance with the provisions of law and communicate a copy of such order to the applicant within three months from the date of receipt of a copy of this order and if the applicant is aggrieved by such order, he will have liberty to challenge it in accordance with law."

Impugning the aforesaid order dated 14.10.2020 of the learned Tribunal, the petitioners approached this Court filing this writ petition.

SUBMISSIONS:

4. Mr. P.K. Parhi, Deputy Solicitor General of India argued that in the matter of delayed payment of leave encashment, there is no provision under CCS (Leave) Rules for payment of interest or for fixing responsibility. Moreover, encashment of leave is a benefit granted under the leave rules and not a pensionary benefit and as such no responsibility can be fixed on anyone. He further argued that the impugned order passed by the learned Tribunal is not sustainable in the eye of law and therefore should be set aside.

Mr. T.K. Mishra, Advocate appearing for the opposite party, on the other hand, supported the impugned order and submitted that the opposite party has retired from service since 31.07.2017 and there is no infirmity in the impugned order. He placed reliance in the case of **State of Punjab and others -Vrs.- Rafiq Masih (White washer) and others reported in (2015) 4 Supreme Court Cases 334** and urged that the writ petition should be dismissed.

5. As it appears, as per the order dated 05.01.2024, the learned counsel for the petitioners handed over a demand draft of Rs.3,88,348/- towards leave encashment to the learned counsel for the opposite party on 17.01.2024. The only question remained to be considered as to whether the opposite party is entitled to interest on delayed payment of the amount as held by the learned Tribunal.

Whether the petitioners could have recovered excess payment made to the opposite party from his leave encashment benefit?:

6. It is pertinent on our part to examine whether the opposite party could have been deprived of his leave encashment benefits for the recovery of excess payments. The relevant provision, under which leave encashment benefit can be withheld, is Rule 39(3) of the Rules, 1972, which is reproduced below:

> "The authority competent to grant leave may withhold whole or part of cash equivalent of earned leave in the case of a Government servant who retires from service on attaining the age of retirement while under suspension or while disciplinary or criminal proceedings are pending against him, if in the view of such authority there is a possibility of some money becoming recoverable from him on conclusion of the

proceedings against him on conclusion of the proceedings, he will become eligible to the amount so withheld after adjustment of Government dues, if any."

From a bare perusal of the above provision, it is apparent that the competent authority is authorized to withhold either whole or a part of cash equivalent of earned leave of a Government servant who retires from service while under suspension or while disciplinary or criminal proceedings are pending against him. The following are the pre-conditions, upon fulfillment of which the competent authority can proceed to withhold the leave encashment benefit of an employee, *viz.,*

i. the employee must have retired while he was under suspension; or
ii. either a disciplinary or criminal proceeding was pending against him when he superannuated.

7. In the instant case, the writ petitioners have failed to produce any material to show that the opposite party was under suspension or he was facing any disciplinary or criminal proceeding as on 31.07.2017, i.e. on the date of his retirement. Therefore, none of the above pre-conditions is satisfied which could have empowered the authorities to withhold the encashment of earned leaves by the opposite party. Further, the petitioners have not produced any order by the virtue of which recovery of the excess amount wrongly sanctioned to the opposite party towards 3rd MACP benefit was done. The Hon'ble Supreme Court in the case of **State of Jharkhand -Vrs.- Jitendra Kumar Srivastava reported in (2013) 12 Supreme Court Cases 210** has categorically held that withholding or

taking away a part of the leave encashment without the statutory mandate cannot be upheld and observed as follows:-

> "16. The fact remains that there is an imprimatur to the legal principle that the right to receive pension is recognised as a right in "property". Article 300-A of the Constitution of India reads as under:
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> "**300-A.** 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."
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> Once we proceed on that premise, the answer to the question posed by us in the beginning of this judgment becomes too obvious. A person cannot be deprived of this pension without the authority of law, which is the constitutional mandate enshrined in Article 300-A of the Constitution. It follows that attempt of the appellant to take away a part of pension or gratuity or even leave encashment without any statutory provision and under the umbrage of administrative instruction cannot be countenanced."

8. It is no more *res integra* that the government cannot be allowed to recover excess payment of emoluments/allowances if the said payment was made by the employer by applying a wrong principle for calculating the pay or on the basis of erroneous interpretation of the rules. The above position has been clarified by the Hon'ble Highest Court in the case of **Syed Abdul Qadir -Vrs.- State of Bihar reported in (2009) 3 Supreme Court Cases 475** in the following words:

"57. This Court, in a catena of decisions, has granted relief against recovery of excess payment of emoluments/allowances if (a) the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee, and (b) if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, 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.

59. Undoubtedly, the excess amount that has been paid to the appellant 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 bonafide 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 appellant 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 to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made."

In the case of **Rafiq Masih** (supra), it is held as follows:-

"In view of the conclusions extracted hereinabove, it will be our endeavour, to lay down the parameters of fact situations, wherein employees, who are beneficiaries of wrongful monetary gains at the hands of the employer, may not be compelled to refund the same. In our considered view, the instant benefit cannot extend to an employee merely on account of the fact, that he was not an accessory to the mistake committed by the employer; or merely because the employee did not furnish any factually incorrect information, on the basis whereof the employer committed the mistake of paying the employee more than what was rightfully due to him; or for that matter, merely because the excessive payment was made to the employee, in absence of any fraud or misrepresentation at the behest of the employee."

Having regard for the aforesaid precedents, we are of the considered opinion that the petitioners-authorities erred in deducting the excess payment made to the opposite party from the leave encashment benefits and thus, the action of the authorities cannot be countenanced and the same is invalidated.

Whether the opposite party is entitled to get interest on the withheld amount?:

9. As far as payment of interest on the withheld amount is concerned, Mr. T.K. Mishra, learned counsel argued that as the opposite party was deprived of his benefit of leave encashment for years together, that too without following the mandate of law or passing any order in accordance with the Rules, thus the learned Tribunal was justified in awarding interest on the withheld amount.

In the case of **Vijay L. Mehrotra -Vrs.- State of U.P. reported in (2001) 9 Supreme Court Cases 687**, the Hon'ble Supreme Court held as follows:

> "3. In case of an employee retiring after having rendered service, it is expected that all the payment of the retiral benefits should be paid on the date of retirement or soon thereafter if for some unforeseen circumstances the payments could not be made on the date of retirement.
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> 4. In this case, there is absolutely no reason or justification for not making the payments for months together. We, therefore, direct the respondent to pay to the appellant within 12 weeks from today simple interest at the rate of 18 per cent with effect from the date of her retirement, i.e., 31-8-1997 till the date of payments."

10. As already discussed above, the petitioners were not authorized to withhold or to deduct any amount from the credit which was outstanding in favour of the opposite party on the date of his retirement, i.e. 31.07.2017 for encashment of his earned leaves. Also, the petitioners are at fault in not passing an order in

accordance with law for effectuating the said deduction. As a corollary, this Court finds the action of the petitioners to be perverse and unwarranted. When the payment was delayed due to the fault of the petitioner authorities, the opposite party cannot be made to suffer. The order passed by the learned Tribunal directing the petitioners to disburse the amount of Rs. 3,88,548/- to the applicant along with interest on such amount from 1.8.2017 till the actual date of disbursement to the applicant at the rate of 9% per annum, is quite justified. Since payment of Rs.3,88,348/- has already been made by way of demand draft, the interest has to be paid to the opposite party by the petitioners as per the impugned order of the learned Tribunal.

11. In view of the foregoing discussions, we find no illegality or perversity in the impugned order of the learned Tribunal and therefore, the writ petition being devoid of merits, stands dismissed. No costs.

(S.K. Sahoo)
Judge

Chakradhari Sharan Singh, C.J.: I agree.

(Chakradhari Sharan Singh)
Chief Justice

Orissa High Court, Cuttack
The 22nd February, 2024/PKSahoo