

**IN THE MAHARASHTRA ADMINISTRATIVE TRIBUNAL
MUMBAI**

ORIGINAL APPLICATION NO.449 OF 2021

DISTRICT : THANE

Shri Prakash Ramchandra Khedekar.)
Age : 60 Yrs., Occu.: Retired as Junior)
Engineer from the office of Sub-Divisional)
Officer, Kharland Sub-Division, Pen,)
District : Raigad and residing at)
Chamunda Harmony, A-903, Kamothe,)
Sector – 18, Navi Mumbai,)
District : Thane.)...**Applicant**

Versus

1. The superintending Engineer &)
Project Director, Kharland)
Development Circle, Kopri, Thane.)
2. The Executive Engineer.)
Kharland Survey & Investigation)
Department, Pen, Dist.: Raigad.)...**Respondents**

Mr. Arvind V. Bandiwadekar, Advocate for Applicant.

Mrs. A.B. Kololgi, Presenting Officer for Respondents.

CORAM : SHRI A.P. KURHEKAR, MEMBER-J

DATE : 16.09.2021

JUDGMENT

1. The Applicant has filed the present Original Application for direction to the Respondents to release his retiral benefits with interest which are withheld since the date of his retirement without any legal

basis invoking jurisdiction of this Tribunal under Section 19 of Administrative Tribunals Act, 1985.

2. Shortly stated facts giving rise to this O.A. are as under :-

The Applicant stands retired as Junior Engineer w.e.f.30.11.2019. On the date of retirement, there was no initiation of D.E. or criminal prosecution against him. Despite this position, his leave encashment has been withheld and 50% gratuity has been also withheld. The GIS was paid belatedly. The original pension was granted upto November, 2020 and thereafter it was stopped. He made various representations with Respondents to release his retiral benefits, but in vain. It is on this background, the Applicant has filed the present O.A. for direction to the Respondents to release withheld retiral benefits with interest.

3. The Respondents have filed Affidavit-in-reply and comes with a defence that while Applicant was serving as Junior Engineer in the year 2011-2012, the Department has noticed several irregularities in the Project of Dighi Karlas Kharbhumi Yojana and excess payment of Rs.46,11,165/- was made to the Contractor. The Show Cause Notice dated 09.04.2019 was issued to the Applicant and six other co-delinquent. In reply, it is further averred that accordingly, the D.E. was initiated against the Applicant, and therefore, gratuity and leave encashment has been withheld.

4. Heard Shri A.V. Bandiwadekar, learned Advocate for the Applicant and Mrs. A.B. Kololgi, learned Presenting Officer for the Respondents.

5. During the course of hearing, the learned Advocate for the Applicant has pointed out that till date of retirement, and even thereafter, there was no initiation of D.E. against the Applicant and only Show Cause Notice dated 09.04.2019 was issued to which the Applicant has already submitted his reply. He maintained that since there was no initiation of D.E. or criminal prosecution against the Applicant on the

date of retirement, the impugned action of withholding 50% gratuity and leave encashment is bad in law.

6. On going through the reply filed by the Respondents, it was noticed that there was no such specific averment about the initiation of D.E. by issuance of charge-sheet under Rule 8 of Maharashtra Civil Services (Discipline and Appeal) Rules, 1979 (hereinafter referred to as 'Rules of 1979' for brevity). What was tendered along with Affidavit-in-reply was Show Cause Notice dated 09.04.2019 issued by Executive Engineer whereby explanation was called by the Applicant and others for excess payment of Rs.43,82,508/- and not charge-sheet.

7. Therefore, it was found necessary to see whether any D.E. was initiated against the Applicant on the date of his retirement. The Tribunal, therefore, passed order on 02.09.2021 directing Respondent No.2 to file Affidavit to make out clear as to whether charge-sheet in D.E. has been served along with other necessary details. The following was the order passed by the Tribunal.

“2. The Applicant stands retired on 30.11.2019 but his Gratuity and Leave Encashment is withheld, provisional Pension was paid upto December 2020. The Applicant therefore filed the present O.A. for grant of these retrial benefits with interest.

3. The issue is whether on the date of retirement Departmental Enquiry (D.E.) was initiated against the Applicant.

4. Shri A.V. Bandiwadekar, learned Advocate for the Applicant submits that till date there is no service of charge-sheet in D.E., and therefore, Gratuity and Leave Encashment cannot be withheld.

5. Whereas, Respondents have filed Affidavit-in-Reply stating that D.E. has been already initiated before the retirement of the Applicant. Respondents have not produced services of charge-sheet. Respondents have not produced any record of service of charge-sheet upon the Applicant showing the particular date of the service of charge-sheet. What is on record is undated draft charges which does not show as to whether really charge-sheet has been served upon the Applicant.

6. Learned P.O. submits that except Affidavit-in-Reply and documents along with she has no other instruction to find out whether D.E. was really initiated and the date of initiation of D.E.

7. In view of above, Respondent No.2 — Executive Engineer is directed to file Affidavit to explain whether charge-sheet in D.E. has been served along with details of the date of charge-sheet as well as its services on the Applicant.

8. Executive Engineer should further explain why provisional Pension is not paid from December 2020.”

8. Today, Respondent No.2 accordingly filed Affidavit of Shri Suresh H. Sawant, Executive Engineer. Para Nos.2 and 2(i) are material which are as under :-

“2. With reference to point 7 raised by Hon’ble Tribunal, I say that, Respondent 2 have only acknowledgement of letter issued to petitioner dated 9.04.2019, with regard to excess payment of 46.83 lakh. Copy of acknowledgement is annexed herewith and marked as **Exhibit-R-1**. Office record of Respondent 1 does not have any other details of the date of charge sheet as well as its services on the applicant other than this acknowledgement.

(i) Further Petitioner submitted his say by his later dated 24.04.2019. A copy of say of petitioner dated 24.04.2019 is annexed herewith and marked as **Exhibit R-2**. Accordingly Respondent 2 forwarded the proposal to Respondent no 1 for further procedures by letter dated 12.07.2019. A copy of letter dated 12.07.2019 is annexed herewith and marked as **Exhibit R-3**. This letter of Respondent No.1 says that statements of charges were issued to petitioner and others and accordingly received say. Respondent submits that this is only record with respect to the statement of charges to petitioner, that is before retirement of petitioner.”

9. Thus, it is explicit that till date, there is no initiation of D.E. by service of charge-sheet upon the Applicant in the eye of law. The departmental proceeding shall be deemed to be instituted from the date on which the statement of charges is issued to the Government servant. In the present case, what is served upon the Applicant is Show Cause Notice dated 09.04.2019 to which the Applicant has already submitted his reply. In-so-far as charge-sheet is concerned, the Respondents have placed on record draft of proposed charge-sheet, which are at Page Nos.43 to 46 of Paper Book. Obviously, it is the draft of proposed charge-sheet and not final charge-sheet. It appears that only correspondence was going on in between the concerned authorities for the issuance of charge-sheet but till date, no charge-sheet is served upon

the Applicant so as to construe that D.E. has been initiated under the provisions of 'Rules of 1979'. The Respondents failed to initiate the D.E. before his retirement due to sheer laxity and negligence.

10. As stated above, the Applicant stands retired on 30.11.2019. His entire leave encashment has been withheld. Only 50% gratuity is paid. Provisional pension was initially granted upto December, 2020 only. It culminates from the record that on the date of retirement of the Applicant i.e. on 30.11.2019, there was no initiation of D.E. against the Applicant as explicit from the Affidavit filed by Executive Engineer today. Therefore, the question arises whether gratuity and leave encashment can be withheld and the answer is in emphatic negative.

11. At this juncture, it would be apposite to reproduce Rule 27 and Rule 130 of Maharashtra Civil Services (Pension) Rules, 1982 holding the field, which are as follows :-

“27. Right of Government to withhold or withdraw pension.-

- (1) [Appointing Authority may], by order in writing, withhold or withdraw a pension or any part of it, whether permanently or for a specified period, and also order the recovery from such pension, the whole or part of any pecuniary loss caused to Government, 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 Maharashtra Public Service Commission shall be consulted before any final orders are passed in respect of officers holding posts within their purview.:

Provided further that where a part of pension is withheld or withdrawn, the amount of remaining pension shall not be reduced below the minimum fixed by Government.

- 2(a) The departmental proceedings referred to in sub-rule (1), if Instituted while the Government servant was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Government Servant, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Government servant had continued in service.

- (b) The departmental proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his reemployment, -
- (i) shall not be instituted save with the sanction of (Appointing Authority),
 - (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 at such place as the Government may direct and in accordance with the procedure applicable to the departmental proceedings in which an order of dismissal from service could be made in relation to the Government servant during his service.
- (3) No judicial proceedings, if not instituted while the Government servant was in service, whether before his retirement or during his reemployment, shall be instituted in respect of a cause of action which arose or in respect of an event which took place, more than four years before such institution.
- (4) In the case of a Government 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 130 shall be sanctioned.
- (5) Where Government decided not to withhold or withdrawn pension but orders recovery of pecuniary loss from pension, the recovery shall not, subject to the provision of sub-rule (1) of this rule, ordinarily be made at the rate exceeding one-third of the pension admissible on the date of retirement of a Government servant.
- (6) 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 Government servant or pensioner, or if the Government 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 cognizance is made, and
 - (ii) in the case of civil proceedings, on the date of presenting the plaint in the Court.”

“130. Provisional pension where departmental or judicial proceedings may be pending.

- (1) (a) In respect of a Gazetted or Non-gazetted Government servant referred to in sub-rule (4) of rule 27, the Head of Office shall authorise the provisional pension equal to the maximum pension which would have been admissible on the basis of qualifying service upto the date of retirement of the Government servant, or if he was under suspension on the date of retirement upto the date immediately preceding the date on which he was placed under suspension.
 - (b) The provisional pension shall be authorised by the Head of Office for a period of six months during the period commencing from the date of retirement unless the period is extended by the Audit Officer and such provisional pension shall be continued upto and including the date of which, after the conclusion of departmental or judicial proceedings, final orders are passed by the competent authority.
 - (c) No gratuity shall be paid to the Government 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 Rule 10 of the Maharashtra Civil Services (Discipline & Appeal) Rules, 1979, for Imposing any of the minor penalties specified in sub-clauses (i), (ii) and (iv) of clause (1) of Rule 5 of the said rules, the payment of gratuity shall be authorised to be paid to the Government Servant].
- (2) Payment of provisional pension made under sub-rule (1) shall be adjusted against final retirement benefits sanctioned to such government servant upon conclusion of such proceedings but no recovery shall be made where the pension finally sanctioned is less than the provisional pension or the pension is reduced or withheld either permanently or for a specified period.”

12. Thus, in terms of Rule 27 as quoted above, even if the DE is not initiated during the tenure of service of the Government servant, later it can be initiated subject to compliance of rigor of Rule 27(2)(b)(i)(ii) of 'Rules of 1982'. In that event, if pensioner is found guilty for grave misconduct or negligence during the period of his service, then the Government is empowered to withhold or withdraw or pension or any part of it permanently or for a specific period as it deems fit. However, in the present case, admittedly, no D.E. was initiated before retirement of the Applicant, so as to have bearing of Rule 27(2)(a) of 'Pension Rules of 1982'.

13. In this context, it would be useful to refer the decision of Hon'ble High Court in ***The Chairman/Secretary of Institute of Shri Acharya Ratna Deshbhushan Shikshan Prasarak Mandal Versus Bhujgonda B. Patil : 2003 (3) Mah.L.J. 602***. In that case, the D.E. was initiated during the service but was continued after retirement of the Respondent. In this authority, the Hon'ble High Court highlighted the scope, ambit as well as limitation of Rule 27 of 'Rules of 1982'. Para No.13 of the Judgment is important, which is as follows :-

“13. All these provisions, read together, would apparently disclose that the departmental proceedings spoken of in Rule 27 of the Pension Rules are wholly and solely in relation to the issues pertaining to the payment of pension. Those proceedings do not relate to disciplinary inquiry which can otherwise be initiated against the employee for any misconduct on his part and continued till the employee attains the age of superannuation. Undoubtedly Sub - rule (1) refers to an event wherein the pensioner is found guilty of grave misconduct or negligence during the period of his service or during his re - employment in any departmental proceedings. However, it does not specify to be the departmental proceedings for disciplinary action with the intention to impose punishment if the employee is found guilty, but it speaks of misconduct or negligence having been established and nothing beyond that. Being so, the proceedings spoken of in Rule 27 of the Pension Rules are those proceedings conducted specifically with the intention of deciding the issue pertaining to payment of pension on the employee attaining the age of superannuation, even though those proceedings might have been commenced as disciplinary proceedings while the employee was yet to attain the age of superannuation. The fact that the proceedings are continued after retirement only with the intention to take appropriate decision in relation to the payment of pension must be made known to the employee immediately after he attains the age of superannuation and, in the absence thereof the disciplinary proceedings continued for imposing punishment without reference to the intention to deal with the issue of payment of pension alone cannot be considered as the proceedings within the meaning of said expression under Rule 27 of the Pension Rules.”

14. Thus, the conspectus of these decision is that the D.E. is permissible even if instituted after retirement of the Government servant but it should satisfy the rigor of Rule 27(2)(b) of 'Pension Rules of 1982' and where on conclusion, the Government servant (pensioner) found

guilty, then the Government is empowered to withdraw or withhold the pension. In other words, it is only in the event of positive finding in D.E, the pension can be withdrawn or withheld.

15. As regard gratuity, the Rule 130(c) says “no gratuity shall be paid to the Government servant until the conclusion of the departmental or judicial proceedings and issue of final orders thereon.” Here, the legislature has not used the word “pensioner” and has specifically used the word “Government Servant”, which is significant in the present context. This leads to suggest that Rule 130(c) is applicable where the enquiry is initiated before retirement and continued after the retirement. The learned P.O. could not point out any other provision which provides for withholding gratuity where charge-sheet is issued after retirement. Whereas, we have specific provision in the form of Rule 27, which provides for withholding pension where any D.E. either instituted before retirement or even after retirement, subject to limitations mentioned in Rule 27(2)(b) of ‘Rules of 1982’, in case pensioner is found guilty of conclusion of D.E. However, pertinently, there is no such provision in Rules for withholding the gratuity where charge-sheet is issued after retirement. Once the Government servant stands retired, right to receive pension and gratuity accrues to him and such right cannot be kept in abeyance on the speculation or possibility of initiation of D.E. in future. All that permissible is to withhold pension, if found guilty in D.E, if initiated fulfilling embargo mention in Rule 27(2)(b) of ‘Pension Rules 1982’. In case, the D.E. is instituted after retirement, then the scope of such D.E. and its outcome cannot go beyond the scope of Rule 27 as adverted to above and highlighted in the Judgment of Hon’ble High Court referred to above. This being so, the initiation of D.E. after retirement will not empower the Government to withhold pension or gratuity in absence of Rule to that effect. Whereas, the Rules discussed above, only provides that withholding of pension, if found guilty in D.E.

16. At this juncture, it would be also apposite to refer G.R. dated 06.10.1988 whereby the Government of Maharashtra had acknowledged the liability to pay gratuity where no D.E. is initiated till the date of retirement. In the said G.R, the Government had reiterated the provisions of Rule 27 of Maharashtra Civil Services (Pension) Rules, 1982. The contents of G.R. are as under :-

“सेवानिवृत्त झालेल्या कर्मचा-यांचे निवृत्ती वेतन इत्यादि फायदे देण्याच्या बाबतीत शिस्तभंग विषयक प्राधिका-याकडून वित्त विभाग शासकन परिपत्रक क्रमांक.सेनिवे-४, दिनांक २५ मार्च १९९१ नुसार कार्यवाही होत नाही असे शासनाच्या निर्देशनास आले आहे. त्यामुळे अशा प्रकरणामध्ये सेवानिवृत्त कर्मचा-याचे महाराष्ट्र प्रशासकीय न्यायाधिकरण तसेच लोकआयुक्तांकडे निवृत्ती वेतन इत्यादि फायदे न मिळालेबाबत तक्रारी येतात. सदर प्रकरणामध्ये वित्त विभाग शासन निर्णय क्रमांकसेनिवे-१०९४/१५५/सेवा-४, दिनांक २४ एप्रिल १९९५ अन्वये शासनाला व्याजाचा खर्च विनाकारण करावा लागतो. तेव्हा सर्व शिस्तभंग विषयक प्राधिका-यांना पुन्हा निर्देशित करण्यात येते की, वित्त विभाग शासन परिपत्रक क्रमांक.सेनिवे-४, दिनांक २५ मार्च १९९१ नुसार सेवानिवृत्त होणा-या शासकीय कर्मचा-याचे बाबतीत त्याच्या सेवानिवृत्तीपुर्वी महाराष्ट्र नागरी सेवा निवृत्ती वेतन नियम १९८२ मधील नियम २७ (६) नुसार विभागीय चौकशीची कार्यवाही सुरु करण्यात आली नसेल म्हणजेच आरोपपत्र देण्यात आले नसेल किंवा आधीच्या तारखेपासून निलंबनाधीन ठेवण्यात आले नसेल तर सेवानिवृत्तीचा दिनांकाला त्याचेविरुद्ध विभागीय चौकशी प्रलंबित आहे असे म्हणता येत नाही व त्यामुळे अशा कर्मचा-यांना सेवानिवृत्ती विषयक सर्व फायदे वेळेवर अदा करणे अपेक्षित आहे.”

17. It is really a matter of regret that despite the aforesaid legal position, the Respondents have withheld leave encashment and 50% gratuity without legal justification since admittedly, on the date of retirement or even till date, there is no initiation of D.E. against the Applicant. Needless to mention that gratuity or leave encashment are not bounty and cannot be withheld on premises or stipulation that in future Department would initiate the departmental proceedings against a Government servant.

18. The totality of aforesaid discussion leads me to sum-up that the act of Respondents to withhold leave encashment and 50% gratuity is totally unsustainable in law. The Respondents are also under obligation to grant regular pension, subject to outcome of D.E, if initiated later and permissible in law. Hence, the following order.

ORDER

(A) The Original Application is allowed.

- (B) The Respondents are directed to release the remaining gratuity and leave encashment within a month from today.
- (C) The Respondents are also directed to grant regular pension within a month from today.
- (D) The Respondents are free to initiate D.E. as may be permissible under Rule 27 of 'Pension Rules 1982'.
- (E) The Applicant may seek his redressal of grievance of interest independently.
- (F) No order as to costs.

Sd/-

(A.P. KURHEKAR)
Member-J

Mumbai

Date : 16.09.2021

Dictation taken by :

S.K. Wamanse.

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