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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) No.1659/2013

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12th December, 2013

K.R. SUBBANNA

..... Petitioner

Through: Mr. Chetan Lokur, Advocate.

Versus

DELHI KANNADA SENIOR SECONDARY SCHOOL AND ANR.

...Respondents

Through: Mr. Ginish Ananthmurthy,
Advocate for respondent No.1.
Ms. Zubeda Begum, Advocate with
Mr. Arjun Pant, Advocate and Ms.
Sana Ansari, Advocate for
respondent No.2.

CORAM:

HON'BLE MR. JUSTICE VALMIKI J.MEHTA

To be referred to the Reporter or not? **Yes**

VALMIKI J. MEHTA, J (ORAL)

1. By this writ petition, the petitioner, who took voluntary retirement from the respondent no.1/school w.e.f 5.7.2012, seeks setting aside of the memorandum/charge-sheet dated 1.1.2013 and all proceedings emanating therefrom. Petitioner accordingly argues that since charge-sheet has to be quashed, he should be paid all the terminal and retiral benefits which have been withheld by the respondent no.1/school and which were

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withheld on account of the departmental proceedings. I may note that the respondent no.1/school is an aided school i.e 95% of the finances are provided by the Government of NCT of Delhi through the respondent no.2/Director of Education.

2. Admitted facts are that before the petitioner took voluntary retirement w.e.f 5.7.2012, the managing committee of the respondent no.1/school as per its meeting dated 28.4.2012 had decided to commence disciplinary proceedings against the petitioner, however, charge-sheet was only issued subsequently on 1.1.2013 i.e after retirement of the petitioner. The issue before this Court is whether the respondent no.1/school can initiate proceedings against a teacher after retirement.

It is the undisputed position before me that employees of the respondent no.1/school including the petitioner are governed by the relevant CCS Pension Rules as also Central Civil Services Leave Rules in view of the order of the Director of Education dated 25.3.1991. We will therefore have to examine whether there are provisions in CCS Pension Rules and Central Civil Services Leave Rules which entitle the respondent no.1/school to initiate departmental proceedings after retirement of an employee and also as to whether these rules entitle withholding of terminal

benefits during pendency of departmental proceedings commenced after retirement.

3. At the outset, I may note that since the Pension Rules and Leave Encashment Rules being applicable to respondent no.1/school are the rules of the Central Government, the same obviously will have to be applied *mutatis mutandis* when the same are applied to employees/teachers of schools, i.e so far as certain language or certain requirements are concerned they cannot be applied on the basis of literal application and construction of the Pension and Leave Encashment Rules and the language will have to be read in a suitable altered manner on being applied to disciplinary proceedings which are conducted by the schools. I may also state that Delhi School Education Act and Rules, 1973 apply to employees of a school and therefore relevant CCS (Pension) Rules and the Leave Encashment Rules will have to be read with the relevant provisions of the Delhi School Education Act and Rules, 1973. The relevant provisions of Delhi School Education Act and Rules, 1973 are Rules 118 to 120 which provide for disciplinary proceedings and imposition of punishment.

4. On behalf of the petitioner, it is contended before me, that, there is no power in the respondent no.1-school to initiate disciplinary

proceedings after retirement of the petitioner and hence the memorandum of charges dated 1.1.2013 issued after retirement on 5.7.2012, needs to be quashed. It is also argued that once disciplinary proceedings cannot be initiated after retirement, petitioner will be entitled to all the terminal and retirement benefits as if no disciplinary proceedings are pending. It is also argued that entitlement to withhold the pension and gratuity in terms of Rule 9(1) of the Pension Rules is only after there is a final order of the disciplinary authority or a judgment of the Court is passed that the charged/guilty employee has caused pecuniary loss to the employer/organization. This aforesaid argument urged is qua the pension and gratuity payment. With respect to Leave Encashment Rules it is argued on the basis of Rule 39(3) of the Leave Encashment Rules that even assuming pension and gratuity cannot be paid as per the CCS Pension Rule 9, however, so far as leave encashment payment is concerned, the provision of Rule 39(3) is quite clearly different inasmuch as there is no provision for initiating proceedings after retirement and withholding/appropriation of leave encashment amounts payable can only be after a final order in disciplinary proceedings or there is a judgment passed by the Court. Reliance on behalf of the petitioner is placed upon the judgment of the Supreme Court in the case of *State of Jharkhand and*

Ors. Vs. Jitendra Kumar Srivastava and Anr. 2013 (10) SCALE 310 to argue that Supreme Court in this judgment has laid down the ratio that unless the departmental proceedings stand concluded or there is a judgment of the civil court by which the employee is held guilty of causing pecuniary loss, retirement benefits cannot be withheld by the school.

5. In order to appreciate the contentions urged on behalf of the petitioner let us reproduce the relevant rules, namely, Rules 9 and 69 of the CCS (Pension) Rules and Rule 39(3) of the Leave Encashment Rules and the same read as under:-

“Rule 9. Right of President to withhold or withdraw pension

¹[(1) The President reserves to himself the right of withholding a pension or gratuity, or both, either in full or in part, or withdrawing a pension 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 Government, if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement :

Footnote : 1. Substituted by G.I., Dept. of P. & P.W., Notification No. 7/14/90-P. & P.W. (F), dated the 23rd August, 1991, published as S.O. No. 2287 in the Gazette of India, dated the 7th September, 1991.

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 pensions shall not be reduced below the amount of rupees three hundred and seventy-five per mensem.]

(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 :
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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)	The departmental proceedings, if not instituted while the Government 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 an order of dismissal from service could be made in relation to the Government servant during his service.

(3) *omitted*

(4) In the case of 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 ²[[Rule 69](#)] shall be sanctioned.

(5) 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 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 the plaint is presented in the court.

Rule 69. Provisional pension where departmental or judicial proceedings may be pending

(1) (a) In respect of a Government servant referred to in sub-rule (4) of [Rule 9](#), the Accounts Officer shall authorize the provisional pension equal to the maximum pension which would have been admissible on the basis of qualifying service up to the date of retirement of the Government servant, or if he was under suspension on the date of

retirement up to the date immediately preceding the date on which he was placed under suspension.

(b) The provisional pension shall be authorized by the Accounts Officer during the period commencing from the date of retirement up to and including the date on 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 16 of the Central Civil Services (Classification, Control and Appeal) Rules, 1965, for imposing any of the penalties specified in Clauses (i), (ii) and (iv) of Rule 11 of the said rules, the payment of gratuity shall be authorized 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.

“Rule 39(3) 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.”

6. In my opinion, the language of sub-Rule (4) of Rule 9 of the Pension Rules read with Rule 69 makes it abundantly clear that the disciplinary proceedings can be initiated against an employee even after his

retirement. By application of these rules on departmental proceedings only commencing, provisional pension is payable and the gratuity amount can be withheld. There cannot be any other interpretation of Rule 9 read with Rule 69 inasmuch as once there is an entitlement to give only a provisional pension, implicit in the same is the entitlement not to pay regular pension. Once only provisional pension is paid, and regular pension can be withheld, it cannot be argued on behalf of the petitioner that complete pension has necessarily to be paid, and it cannot be withheld if disciplinary proceedings are initiated after retirement of an employee. To accept such an argument urged on behalf of the petitioner will negate the literal construction of Rules 9(4) and 69 of the Pension Rules and the legislative intention behind these provisions. Sub-Rule (4) of Rule 9 specifically talks of institution of the proceedings after retirement of an employee, and therefore it cannot be argued to the contrary that proceedings against an employee cannot be instituted after his retirement.

7. Once so far as pension is concerned, there is entitlement to institute proceedings after retirement of a person, and consequent right to withhold pension except paying provisional pension, I see no difficulty in interpreting Rule 9(1) that even the gratuity amount payable on retirement can be withheld when disciplinary proceedings are initiated against the

employee after retirement. In my opinion, sub-Rule (1) of Rule 9 has to be read into two parts. The first part pertains to entitlement and withholding and the second part pertains to recovering from pension and gratuity amounts the pecuniary loss caused after the findings of the departmental authorities or in the judicial proceedings. The expression ‘permanently or for a specific period’ as found in the first part of sub-Rule (1) of Rule 9 has to be read in context to give it a meaning that withholding is obviously only till the final order of departmental authorities or of a Court and if in the departmental proceedings an employee is held guilty of causing loss then there can be recovery by means of permanent withholding i.e non-payment of pension and gratuity, and, if there is no loss caused to the organization then in such a case pension and gratuity will have to be paid. There necessarily has to be a difference with respect to interpretation of the language as found in first part of sub-Rule (1) of Rule 9 with language in the second part of the said sub-Rule 9, otherwise the same will result in frustration of the categorical language of sub-Rule (4) of Rule 9 read with Rule 69 which entitles institution of disciplinary proceedings after retirement and payment only of provisional pension i.e there being an entitlement to withhold the normal pension on departmental proceedings commencing after retirement. Therefore, I reject both the

arguments urged on behalf of the petitioner that departmental proceedings cannot be initiated after retirement and also that if disciplinary proceedings are initiated, yet entitlement to withhold the terminal benefits of pension and gratuity can only arise after the final order of departmental authorities or final orders in the judicial proceedings. As already held above, withholding can take place on institution of disciplinary proceedings, though recovery or permanent non-payment of the complete pension and gratuity amounts can take place after passing of the final orders of the departmental authorities or by a civil court holding the employee guilty of causing pecuniary loss to the petitioner.

8. The judgment relied on behalf of the petitioner in the case of ***Jitendra Kumar Srivastava (supra)*** will not apply inasmuch as paras 14 and 15 of the said judgment make it clear that once there are no appropriate rules including statutory rules entitling withholding of terminal benefits, there cannot be withholding of terminal benefits if disciplinary proceedings are instituted after retirement, and, there cannot be withholding of terminal benefits only because of an executive instruction. In the present case once statutory rules being the pension rules and the leave rules hold the field there is a statutory entitlement to withhold the pension and gratuity and therefore the judgment in the case of ***Jitendra Kumar Srivastava (supra)*** ***W.P.(C) No.1659/2013***

relied upon by the petitioner cannot help the petitioner because in the present case withholding will be pursuant to the statutory rules and not because of administrative instructions. Paras 14 and 15 of the judgment of *Jitendra Kumar Srivastava's case (supra)* are relevant and the same read as under:-

“14. Article [300A](#) of the Constitution of India reads as under:

“300A 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.”

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 [300A](#) 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.

15. It hardly needs to be emphasized that the executive instructions are not having statutory character and, therefore, cannot be termed as "law" within the meaning of aforesaid Article [300A](#). On the basis of such a circular, which is not having force of law, the Appellant cannot withhold-even a part of pension or gratuity. As we noticed above, so far as statutory rules are concerned, there is no provision for withholding pension or gratuity in the given situation. Had there been any such provision in these rules, the position would have been different.” (underling added)

9. The issue so far as leave encashment amounts payable on retirement is concerned, the position however would be different, because

of the language of Rule 39(3) which is reproduced above. The language of Rule 39(3) does not provide that on institution of departmental proceedings the department can withhold leave encashment amounts after retirement of a person. By its very language, sub-Rule (3) of Rule 39 of the leave rules applies only when proceedings are instituted by issuing of a charge-sheet prior to the retirement of a person. Since in the present case charge-sheet has been issued on 1.1.2013 i.e after retirement of the petitioner on 5.7.2012, therefore, there is no continuation of disciplinary proceedings which are started before the retirement of the employee, and therefore so far as leave encashment amounts are concerned the same will have to be paid to the petitioner.

10(i). Before concluding, a detailed footnote is required to be added to this judgment. This footnote is required to remove certain confusion and ambiguity which prevails with respect to application of CCS Pension Rules and Leave Encashment Rules to all private schools, whether aided or unaided. The confusion which arises is because to private schools whether aided or unaided, it is the Payment of Gratuity Act, 1972 (hereinafter referred to as “1972 Act”) and the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (hereinafter referred to as “1952 Act”) which apply and payments of amounts towards pension,

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provident fund and gratuity are not under CCS Pension Rules and CCS Leave Rules. So far as 1972 Act is concerned, the same has been extended to schools by Notification of Director of Education dated 28.3.2013. In fact the notification of the Director of Education dated 28.3.2013 is a clarificatory notification because 1972 Act became applicable to the private schools by virtue of the Notification dated 3.4.1997 of the Ministry of Labour & Empowerment, extending applicability of the 1972 Act to all educational institutions including schools. Section 13A was introduced by the Parliament in the 1972 Act for validation of certain acts because there were doubts as to the date from which the notification dated 3.4.1997 became applicable. I have considered all these aspects in the judgment delivered by me in the case of ***Deepak Dua Vs. Director of Education and Anr.*** in W.P.(C) No. 7040/2011, decided on 10.04.2013. Therefore, it is the 1972 Act so far as the gratuity amount payable is concerned, which would apply to all private schools in Delhi, whether aided or unaided.

(ii) I have clarified this aspect with respect to 1972 Act being applicable to private aided schools in the judgment delivered by me in the case of ***Lt. Col. (Retd.) Mr. S.S. Dubey Vs. The Director of Education and Ors.*** in W.P.(C) No. 110/2008 decided on 07.11.2013. Para 8 of the said judgment reads as under:

“8. I must also at this stage put an important conclusion on record as I find that Director of Education is unnecessarily causing confusion. This confusion is created by the first para of the circular dated 30.4.2004 because it seems to suggest application of both the payment of Gratuity Act, 1972 as also the CCS(Pension) Rules to the same educational institution. There are three types of schools in Delhi: private unaided schools, private aided schools and government schools. To employees of government schools only CCS(Pension) Rules will apply for grant of gratuity and not the Payment of Gratuity Act, 1972, and which Act applies to private unaided schools for grant of gratuity by such schools to its employees as to such private unaided schools CCS (Pension) Rules will not apply. As regards aided private schools either CCS (Pension) Rules will apply for grant of gratuity or Payment of Gratuity Act, 1972 but both CCS (Pension) Rules and 1972 Act cannot apply at the same time otherwise gratuity will be paid twice over. In my opinion, since the aided schools are not government schools, though they may be financed by the Government of NCT of Delhi through the Director of Education, yet as they continued to remain private schools, therefore, they will be governed by the Payment of Gratuity Act, 1972 and not CCS (Pension) Rules.”

(iii) So far as provident fund & pension are concerned, there is a statute being the 1952 Act. In terms of clause (b) of sub-Section (3) of Section 1 of this Act, Government has power to issue notification to extend the applicability of the 1952 Act to various institutions from time to time . In pursuance of this power, Central Government has issued the following notification on 19.02.1982 extending the applicability of the 1952 Act to schools:

“ S.O.986.- In exercise of the powers conferred by clause (b) of sub-section(3) Section 1 of the Employees’ Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), the Central Government hereby specifies the following classes of establishments in each of which twenty or more persons are employed, as establishments to which the said Act shall apply, namely:-

- (i) any University;
- (ii) any college, whether or not affiliated to a University;
- (iii) any school, whether or not recognized or aided by the Central or a State Government;
- (iv) any scientific institution;
- (v) any institution in which research in respect of any matter is carried on;
- (vi) any other institution in which the activity of imparting knowledge or training is systematically carried on.”

(iv) Accordingly, it is the 1952 Act which will apply so far as all private schools in Delhi are concerned on the aspect of amounts which are payable towards provident fund. Once 1952 Act applies, the pension scheme provided therein will also apply to all private schools in Delhi, whether aided or unaided.

11. Accordingly, it cannot be disputed and it is accordingly held that so far as private schools in Delhi are concerned, whether aided or unaided, with respect to payments of gratuity amount, the 1972 Act will

apply and with respect to provident fund and pension amount, it is the 1952 Act which will apply.

12. The issue then arises is why are the CCS Pension Rules and CCS Leave Encashment Rules being applied for deciding the present case. This is because so far as the determination of the amounts and those aspects which are subject matter of the 1972 Act and the 1952 Act are concerned, the provisions as contained in the said Acts will apply, however, with respect to procedure for conduct of departmental enquiry and procedure as also, with respect to withholding of pension or gratuity or leave encashments, since 1972 Act and 1952 Act are silent, by virtue of the notification of the Director of Education dated 25.03.1991, the procedure so far as disciplinary proceedings are concerned, it is the procedural rules as specified in the CCS Pension Rules and the Central Leave Encashment Rules will apply, and which have to be read with Rules 118 to 120 of the Delhi Schools Education Rules, 1973. What I mean to say is that wherever there are substantive provisions found in the 1972 Act or in the 1952 Act those substantive provisions will govern, whether with respect to the calculation of the amounts or other aspects which are subject matter of the respective provisions, however, where the two Statutes are silent so far as procedural aspects are concerned, the same would be

governed by the procedural provisions contained in the CCS Pension Rules and CCS Leave Encashment Rules.

I also at this stage reject the argument urged on behalf of the petitioner that the departmental proceedings in the present case emanating out of the charge-sheet dated 1.1.2013 will not entitle any monetary consequences upon the petitioner entitling withholding of terminal benefits, inasmuch as, monetary consequences of reduction of monetary benefits to the employees such as the petitioner is very much envisaged under Rules 117(a)(iii) and 117(b)(i) of the Delhi Schools Education Rules, 1973 which provide for reduction in rank and recovery from pay for pecuniary loss caused to the school.

13. In view of the above, writ petition is dismissed so far as it claims the reliefs of quashing of the memorandum/charge-sheet dated 1.1.2013 and for payment of complete pension and gratuity benefits however so far as leave encashment amounts are concerned, the same will be paid to the petitioner without prejudice to the rights of the respondent no.1/school to recover the same or in any manner to appropriate the same if in any departmental proceedings or judicial proceedings petitioner is found to be guilty of causing pecuniary loss to the respondent no.1. Writ

petition is accordingly partly allowed, leaving the parties to bear their own costs. The amounts which are now due and payable to the petitioner under different heads whether of pension or leave encashment, the same will be determined and paid within a period of two months from today.

DECEMBER 12, 2013
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VALMIKI J. MEHTA, J.