IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10203 OF 2017

1. Bharat Sanchar Nigam Limited
Through the Chairman and Managing Director,
Bharat Sanchar Bhavan, H.C. Matur Lane,
Janpath, New Delhi – 110 001

2. The Chief General Manager,
Telecom, Maharashtra Telecom Circle,
BSNL Administrative Complex, Juhu Road
Santacruz (West), Mumbai – 400 054.

3. The General Manager Telecom,
Bharat Sanchar Nigam Limited,
Sanchar Sadan, Town Centre, CIDCO,
N-5, Aaurangabad, Petitioner Nos. 1 to 3,
Through
Prasad s/o Anantrao Deshmukh,
Sub Divisional Engineer (Legal),
Age : 46 years, Occ: Service. ...Petitioners
(Org. Respondents)

Versus

Ramesh s/o Tukaram Diwate,
Age : 64 years, Occu: Pensioner,
Sub Divisional Engineer (Retd.)
O/o. General Manager Telecom, BSNL,
Sanchar Sadan, Town Centre, CIDCO,
Aurangabad,
R/o. Plot No. 105, Manik-Ratna,
Shreynagar, Aurangabad. ...Respondent
(Org. Applicant)

Mr. S.C. Arora, Advocate for Petitioners
Mr. Mohasin Latif Khan Pathan, Advocate for
Respondent sole.

CORAM : S. V. GANGAPURWALA &
A. M. DHAVALE, JJ.

DATE : 3rd APRIL, 2019

ORAL JUDGMENT [PER S. V. GANGAPURWALA, J.]

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the parties and taken up for final disposal at admission stage.

2. The present respondent (Org. Applicant) had filed the Original Application bearing No. 717/2015 before the Central Administrative Tribunal, Mumbai Bench, Mumbai seeking interest on the delayed payment of the benefit of leave encashment. The Original Application is allowed. The present petitioners are directed to pay interest @ 9 % per annum simple interest from 01.03.3013 to 31.07.2015. The same is assailed in the present Writ Petition.

3. Mr. Arora, the learned Counsel for the petitioners submits that the departmental enquiry was pending against the respondent on the date of his retirement. The respondent was under suspension when he attained the age of superannuation. The departmental enquiry was concluded on 16.08.2016. The respondent was found guilty in the departmental proceedings and penalty was imposed upon him i.e. withholding 7% of pension for period of one year.

4. The learned Counsel submits that the benefit of leave encashment has been paid to the respondent on 2nd September, 2015. The respondent was occupying the Government accommodation till 08.12.2014. The respondent had given a letter to

the petitioner to deduct the amount payable towards the House Building Advance interest from the payment of leave encashment. The learned Counsel refers to Rule 39 (3) of the Central Civil Services Leave Rules. The learned Counsel further submits that the respondent had filed Original Application bearing No. 661/2013 claiming benefit of leave encashment, gratuity, pension along with interest. The respondent did not press the Original Application with regard to the benefit of leave encashment. In view of that, on account of principle of r*es-judicata,* the present Original Application is not maintainable. The Tribunal has committed an error in granting interest to the respondent.

5. The learned Counsel for the respondent submits that a misleading statement is made by the petitioner in the Original Application bearing No. 661/2013 that entire benefit has been paid to the respondent. The petitioner did not make it clear that the interest amount has been paid. In view of that, the Court did not proceed for granting the other reliefs. The respondent never withdrew his claim with regard to the interest on delayed payment of leave encashment. According to the learned Counsel, the principle of *res-judicata* would not apply. The learned Counsel further submits that as per Rule 72 of the Central Civil Services (Pension) Rules, 1972, the Government dues can only be recovered from the payment of gratuity and not from leave encashment. The expression 'Government dues' is

defined in Rule 71 (3) (a) of the Central Civil Services (Pension) Rules, 1972. The dues pertaining to Government accommodation are included in the expression 'Government dues'. In view of that, the petitioners could not have withheld the amount towards the leave encashment. The learned Counsel further submits that the letter relied by the petitioners dated 22.06.2013 written by the respondent would not be of any avail to the petitioner as the said letter was given only to the extent of House Building Advance interest, and moreover, the said letter cannot override the Rule, the rules will prevail. The respondent has paid the House Rent Allowance up to 30th June, 2013. The petitioners are liable to pay the benefit of leave encashment to the respondent within a period of two months from the date of retirement.

6. With the assistance of the learned Counsel for the respective parties, we have gone through the Judgment delivered by the Tribunal and also the Rules.

7. Rule 39 (3) of Central Civil Services (Leave) Rules, 1972 reads thus -

> **39. Leave/Cash payment in lieu of leave beyond the date of retirement, compulsory retirement or quitting of service -**
>
> (1).......
>
> (2).......

> (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.

8. Perusal of the said Rule, it is clear that that petitioners can withhold the amount towards leave encashment if in the opinion of the department, the recovery is due from the delinquent/employee. The respondent was under suspension on the date of his retirement and the departmental enquiry was in progress. The departmental enquiry eventually completed on 16.08.2016 and minor punishment was imposed upon the respondent. In the departmental enquiry, certainly, there were no charges by virtue of which recovery could have been claimed by the petitioner/department.

9. However, it would be seen that the respondent was occupying the Government accommodation given to him up to 8th December, 2014 and he had not paid the House Rent Allowance after June, 2013. The respondent on 22.06.2013 had given in writing

to the department that the House Building Advance interest may be recovered from the payment of leave encashment. The respondent was liable to pay interest on the House Building Advance received by him, so also was liable to pay House Rent Allowance for occupying the Government accommodation even after the date of his superannuation and up to the date, he vacated the premises. The respondent vacated the premises on 8th December, 2014. Admittedly, did not pay the House Rent Allowance for one and half year. The same was to be recovered by the petitioner.

10. The reliance placed by the learned Counsel for the respondent on the provisions of Rule 71 (3) (a) of the Central Civil Services (Pension) Rules, 1972 could have been of help to the respondent had the respondent paid the House Rent Allowance. On one hand, the respondent issues a letter to deduct the amount recoverable by the petitioner from the amount which he is to receive on account of benefit of leave encashment and on another hand, places reliance on Rule 71 of the Central Civil Services Pension Rules to say that the said amount could have been deducted only from the gratuity. It is not disputed by the respondent that the amount from the gratuity is not deducted and the amount of gratuity is paid along with the interest as per the orders of the Tribunal.

11. The respondent cannot approbate and reprobate. On one hand petitioner gives letter to the department saying that the recovery to be made by the petitioners from the respondent should be adjusted from the amount payable towards leave encashment and on other hand, comes with the plea that if any recovery is to be made, the same should be deducted only from the amount of gratuity. Such a plea would not be maintainable.

12. The Tribunal has failed to consider the said aspect of the matter in its correct perspective. The petitioner certainly would not be entitled for any interest on the amount of leave encashment up to the date of December, 2014.

13. It can be seen that the payment towards the leave encashment has been made on 2nd September, 2015. When the respondent vacated the premises on 8th December, 2014, then immediately, the petitioners should have made the payment to the respondent towards the amount of leave encashment. The same has not been made immediately. In view of that, we hold that the respondent would be entitled for the interest on the delayed payment of leave encashment from 1st January, 2015 to 30th August, 2015 @ 9 % per annum.

14. In light of the above, the order of Tribunal is modified to the extent that the petitioners shall pay interest on the amount of leave

encashment payable after deducting the amount recoverable by it i.e. amount of Rs. 3,47,000/- @ 9 % per annum. The said payment of interest shall be made within a period of three months from today.

15. The Rule is accordingly made partly absolute. No costs.

[A. M. DHAVALE]
JUDGE

[S. V. GANGAPURWALA]
JUDGE

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