

IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.(C) NO.22572 of 2019

(Application under Articles-226 and 227 of the Constitution of India,
1950)

Krushna Chandra Mallick ***Petitioner***

-versus-

State of Orissa & Others ***Opposite Parties***

For Petitioner : ***Mr. L.K. Mohanty, Advocate.***

For Opposite Parties : ***Mr. S.K. Samal, ASC***

CORAM:

JUSTICE V. NARASINGH

सत्यमेव जयते

DATE OF HEARING :26.07.2022

DATE OF JUDGMENT :26.07.2022

V. Narasingh, J.

1. Petitioner is a retired Assistant Engineer and accused in a Vigilance Case is assailing non-release of retiral benefits, as per communication dtd. 06.11.2019 by the Government of Odisha in the Works Department at Annexure-4.

2. On a bare perusal of the impugned order at Annexure-4 it is seen that referring to the Vigilance Case No. 61 of 2016 dtd.

24.02.2016 registered under Section-13 (2) r/w 13(i)(e) of the P.C. Act which is admittedly pending, the authority took a stand that the retirement dues such as pension, commutation, gratuity and unutilized leave salary cannot be sanctioned as stated in the impugned communication (Annexure-4) extracted hereunder;

“ XXX XXX XXX

1. Final Pension can't be sanctioned pursuant to Rule-7 read with Rule-66 of O.C.S (Pension) Rules, 1992.
2. Gratuity can't be sanctioned pursuant to Rule-66 (2) of O.C.S (Pension) Rules, 1992.
3. Commutation can't be sanctioned pursuant to Rule-4 of O.C.S. (Commutation of Pension) Rules, 1992.
4. Un-utilized leave salary can't be sanctioned pursuant to F.D.O.M. No. 46545, dated 17.12.1991, and F.D.O.M. No. 7493, dated 26.03.2015. (Annexure-D/1)

The above retirement benefits can be sanctioned in favour of Shri Mallick after settlement of the vigilance case.

Yours faithfully,

Sd/-

Deputy Secretary to Government
Memo No.14976/ FE-II, dated 6.11.19 ”

सत्यमेव जयते

3. The undisputed facts which have a bearing on the point at issue are stated as under;

(i) The petitioner was appointed as a Junior Engineer (civil) on 04.09.1985 and he joined as such in Malkangiri on 06.09.1985. He was promoted as an Assistant Engineer on 23.09.2013.

(ii) During his incumbency as an Assistant Engineer (Civil) in the Office of Engineer-in-Chief (Civil), Odisha, Bhubaneswar (Opposite Party No.2) a vigilance raid was conducted in his house on the allegation of having assets disproportionate to

his known sources of income and Vigilance Case bearing No. V.G.R. Case No. 61 of 2016 was instituted.

(iii) It is stated that the same is still pending adjudication and in fact the investigation in the said case is still continuing and no charge-sheet has been filed till date. The petitioner on reaching the age of superannuation retired from his service on 31.03.2019. Thereafter, the petitioner was granted Provisional Pension and on 28.10.2019 vide Annexure-5 a Show Cause Notice was issued to the petitioner along with Memorandum of Charges proposing to hold an inquiry against him under Rule-7 (2)(b)(ii) of the O.C. S. (Pension) Rules, 1992 r/w Rule-15 of the O.C.S. (CC&A) Rules, 1962.

Pursuant to which, petitioner submitted the Show Cause on 19.11.2020, denying the allegation.

(iv) It is apt to note here that the petitioner made a representation for release of his pensionary dues and by the impugned communication dated 06.11.2019 at Annexure-4, the same was rejected as noted above and assailing the same the present Writ Petition has been filed.

4. Learned counsel for the Petitioner submits that admittedly there is no progress in the Departmental Proceeding even after the petitioner has submitted his show cause and it is on record that the Vigilance Case has not progressed inasmuch as no charge sheet has been filed till date. Hence, it is submitted with vehemence non-sanction of unutilized leave salary is ex-facie untenable.

5. The Office Memorandum basing upon which leave salary has been denied to the petitioner and which has been referred to in Para-4, of the order of rejection which is impugned herein is annexed to the counter and marked as Annexure-D/1. The relevant recitals of the said Office Memorandum germane for adjudication is extracted hereunder;

“After careful consideration Government have been pleased to clarify as follows:-

(i) If there is departmental/judicial proceeding pending against the Government Servant as on the date of retirement which in the opinion of the leave sanctioning authority will culminate in a recovery to be effected, such amount may be withheld from the leave salary.”

6. Learned counsel for the State submits that since admittedly Departmental Proceeding is pending against the Government Servant, the leave salary cannot be released in as much as the rule empowers the authority to withhold the same keeping the opinion of the leave sanctioning authority in mind that the ultimate punishment is likely to result in an order of recovery.

7. Learned counsel for the State submits that in the case at hand as there is likelihood of recovery from the petitioner the denial of leave salary cannot be agitated in the present Writ Petition.

8. Mr. S.K. Patra, learned counsel appearing for the Opposite Party No.3-Accountant General relying upon the counter

filed, submits that there is no cause of action against the Office of the Accountant General and they have only acted as per the advised received from the Pension Sanctioning Authority and stated that the Writ Petition is liable to be dismissed vis-à-vis the said Opposite party.

9. Learned counsel for the petitioner relies on the judgment of the Apex Court in the case of ***Union of India Vs. K.V. Jankiraman*** reported in ***AIR 1991 SC 2010*** and also the judgment of this Court in the case of ***Brajasundar Patnaik vs. Government of Orissa and others*** reported in ***2008 (1) OLR 384*** to fortify his stand that even in the face of applicability of memorandum, the action of the authority withholding leave salary is illegal and outcome of gross non-application of mind.

10. In Paragraph-6 of the Apex Court's judgment in the case of Jankiraman (supra), it has been clearly enunciated that it is only when a 'charge memo' in a Departmental Proceeding or a Charge Sheet is filed in a Criminal Proceeding, it can be said that Departmental Proceeding/ Criminal Proceeding is initiated against the employees.

11. In the case of Brajasundar Patnaik (supra), this Court held in the context of payment of gratuity such withholding is permissible only when on the date of retirement of a Government servant, Departmental or Judicial Proceeding is pending against him.

12. In paragraph-8 of the said judgment, this Court held thus;

“A cumulative reading of both the sub-rules quoted above shows that the same may apply only when on the date of retirement of a Government Servant, departmental or judicial proceedings are pending against him, but this rule would not apply where no departmental or judicial proceedings are pending on the date of retirement against the Government servant. In the instant matter, it is admitted by the opposite parties that neither departmental proceeding nor any judicial proceeding was pending against the petitioner on the date of retirement. The judicial proceeding has started pursuant to the raid conducted in the house of the petitioner after his retirement and a first information report was lodged on the basis of the documents recovered from the house of the petitioner. Therefore, Sub-rules (1) and (2) of Rule 66 of the Orissa Civil Services (Pension) Rules, 1992 would not be applicable in the case of the petitioner.”

13. The stand taken by the authorities is to be examined on the touch stone of the judgment referred to above.

14. As noted, while denying the leave salary, the authorities have relied on the Office Memorandum dtd. 26.03.2015. On close scrutiny it can be seen that it clearly states that if there is

departmental/judicial proceeding pending against the Government servant as on the date of the retirement then the power has been vested in the Sanctioning Authority to withhold whole or part of cash equivalent to unutilized leave salary.

15. The undisputed facts in the case at hand as noted hereinabove is that the petitioner superannuated on 31.03.2019 and the Show Cause along with Memorandum of Charges were issued to him on 28.10.2019.

16. Thus, admittedly on the date of retirement i.e., 31.03.2019 the Departmental Proceeding or Judicial Proceeding as clearly enunciated in the case of K.V. Jankiraman (Supra) was not pending against the petitioner.

17. Hence, the conditions precedent for application of the Office Memorandum to withhold the unutilized leave salary ex-facie does not exist. And, therefore, it is held that **the petitioner is entitled to such unutilized leave salary.**

18. As regards other pensionary benefits, so far as grant of pension is concerned, the authorities have relied on Rules-7 and 66 of the OCS (Pension) Rules-1992.

Rule-7- Right of Government to withhold or withdraw pension.

(1) The Government reserve to themselves 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 found guilty of grave misconduct or negligence in duty during the period of his service including service rendered on re-employment after retirement.

Provided that the Orissa Public Service Commission shall be consulted before the final orders are passed.

Provided further that when a part of pension is withheld/withdrawn, the amount of such pension shall not be reduced below the amount of minimum limit.

2.(a) Such 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 a proceeding 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;

Provided that when the departmental proceedings are instituted by an authority, subordinate to Government that authority shall submit a report recording its finding to the Government.

(b) Such departmental proceedings as referred to in Sub-rule (1) 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 Government;

(ii) Shall not be in respect of any event which took place more than four years before such instruction and

(iii) Shall be conducted by such authority and in such place as the Government 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 xx xx xx.

66. Grant of provisional pension where departmental or judicial proceeding is pending-

(1) Where departmental or judicial proceedings are pending in respect of Government servant on the date of his retirement, referred to in, he shall be paid a provisional pension not exceeding 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; (Emphasis supplied)

(2) No gratuity shall be paid to the Government servant until the conclusion of the Departmental or judicial proceedings and issue of final order thereon.

19. Rule -7 deals with Right of Government to withhold or withdraw pension. Grant of provisional pension where departmental or judicial proceeding is pending is prescribed vide Rule 66(1) of the OCS (Pension) Rules, 1992.

20. Learned counsel for the state relies on Rule-7 2 (b) read with Rule 66 of the Pension Rules and submits that on a plain reading of the said rules the action of the authority cannot be faulted

21. The very opening sentences of Rule-66 of the Pension Rules, the emphasis has been laid as to clarify the date on which departmental or judicial proceeding is stated to be pending to empower the state authorities to grant Provisional Pension, coupled with Rule-7, which clothes the Administrative authority with the power to withhold the pension.

22. On a plain reading of Rule-66, it is clear that the Departmental or Judicial Proceeding must be pending in respect of Government servant on the date of his retirement so as to grant him

provisional pension. In the case at hand, admittedly, on the date of retirement, no judicial proceeding is pending for that matter even as on date the judicial proceeding cannot be said to be pending applying the analogy in the case of K.V. Jankiraman (Supra) as admittedly no charge sheet has been filed in the criminal (Vig.) case at hand and the departmental proceeding was instituted after the retirement.

23. Hence, there was no pendency of any proceeding on the date of his retirement as envisaged under rule-66 to bring the petitioner's pension within the mischief of Rule-66 read with Rule-7 conferring the power on the Government to withhold pension.

24. In the case of Brajasunder Pattnaik (supra), this Court on an analysis of Rule-66 (1) and (2) of the Pension Rule has come to the categorical finding in Para-8 thereof that when neither a departmental proceeding nor any judicial proceeding is pending against a pensioner on the date of his retirement Rule-66 (1) and (2) do not come into play.

25. This Court is in respectful agreement with the stated view.

26. Hence, this Court does not find any rhyme and reasons for non-grant and release of pension by the authorities, relying on the rules which do not ex-facie apply to the fact situation.

27. **As such the petitioner is entitled to pension as due and admissible.**

28. On a plain reading of OCS (Pension) Rule-1992, Rule-66(2) thereof, the gratuity cannot be sanctioned in the factual matrix of the case at hand, when the petitioner is facing a Departmental Proceeding. And, as such action of the authority denying gratuity cannot be faulted.

29. While denying commutation of pension, the authorities in the rejection order stated as under.

“ XXX XXX XXX

1. Final Pension can't be sanctioned pursuant to Rule-7 read with Rule-66 of O.C.S (Pension) rules, 1992.
 2. Gratuity can't be sanctioned pursuant to Rule-66 (2) of O.C.S (Pension) Rules, 1992.
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- The above retirement benefits can be sanction in favour of Shri Mallick after settlement of the vigilance case.

स्वास्तिनव नमो Yours faithfully,
Sd/-

Deputy Secretary to Government
Memo No.14976/ FE-II, dated 6.11.19. ”

30. For convenience of ready reference Rule-4 of the OCS (Commutation of Pension) Rule, 1992 is extracted hereunder;

“4. Restriction for Provisional Commutation-

No Government servant against whom departmental or judicial proceedings as referred to in Rule 7 of Orissa Civil Services (Pension) Rules, 1992 have been instituted before the date of his retirement, or the pensioner against whom such proceedings are instituted after the date of his retirement, as the case may be, shall be eligible to commute a fraction of his provisional

pension authorized under Rule 66 of Orissa Civil Services (Pension) Rules, 1992 during the pendency of such proceedings.

31. The said rule refers to Rule-7 of the OCS Rules (Pension) rule-1992 which had already been extracted hereinabove.

32. From very language of Rule-4 which has been referred to in the communication denying commutation, it is clear that the rule takes within its fold, pendency of Departmental Proceeding instituted before the date of the retirement or pensioner against whom such proceeding is instituted after the date of the retirement.

33. Admittedly, in the case at hand, the departmental proceeding has been instituted within the time frame as provided under rule-7(b) of Orissa Pension Rule and on bare perusal of Rule-4 of the Commutation of Pension rules, 1992, it can be seen that the rule clearly deal with pensioners against whom such proceedings are instituted and on a plain reading of said Rule-4, **this Court does not find any infirmity in denial of commutation by the impugned communication.**

34. Hence, on a conspectus of materials on record, this Court directs the authority to grant pension and unutilized leave salary, as due and admissible to the petitioner within a period of three months from the date of receipt/production the copy of this Order.

35. So far as non-grant of gratuity and commutation of pension, this Court upholds the rejection by the authority.

36. While parting with the brief, it is noticed that the departmental proceeding in question is instituted on 28.10.2019 with issuance of a show cause and it is submitted at the Bar that the petitioner has submitted his reply. Yet, there is no progress.

37. Taking into account that the petitioner has retired since 2019 and more than two (2) years has elapsed in the meanwhile and there is no progress, this Court directs the authorities to conclude the Departmental Proceeding within a period of eight months from the date of receipt/production of the certified copy of this Order. Needless to say that, the petitioner shall cooperate for disposal of such Departmental Proceeding.

38. The Writ Petition is disposed of accordingly.

39. No costs.

(V.Narasingh)
Judge

*Orissa High Court, Cuttack,
Dated the 26th of July, 2022/Balaram*