

Ex. Si/Gd Dalel Singh vs Union Of India Through Its Secretary & ... on 3 April, 2025

Author: Navin Chawla

Bench: Navin Chawla

* IN THE HIGH COURT OF DELHI AT NEW DELHI
Reserved on: 15.01.2025
Pronounced on: 03.04.2025

+ W.P. (C) 9062/2022
EXSI/GD DALEL SINGH
Through: Mr.N.L. Bareja, Adv.Pe

versus

UNION OF INDIA THROUGH ITS SECRETARY & ORS.
.....Respondents
Through: Mr.Gaurav Sharma, SPC with
Mr.Jitendra Kumar Tripathi, GP
& Mr.Siddhartha Nagpal,
Mr.Sachin Singh, Advs for UOI
with Mr.Hemendra Singh, D.C.
Law, BSF.

CORAM:
HON'BLE MR. JUSTICE NAVIN CHAWLA
HON'BLE MS. JUSTICE SHALINDER KAUR

JUDGMENT

NAVIN CHAWLA, J.

1. By way of the present petition, the petitioner seeks the following reliefs: -

"a) Call for the records of the case;

b) Issue appropriate writ, order(s) or direction(s) in the nature of writ of mandamus, directing the respondents to;

i) consider the case of the petitioner for grant/release of the retiral benefits to include compassionate allowance (compensation pension) in terms of the provisions contemplated in Rule 41 read with Rule 39 of CCS (Pension) Rules, 1972,

ii) Grant/release of the amount of Gratuity accrued to the petitioner during course of his service under the Gratuity Act, 1972,

iii) Refund of the Subsistence Allowance amounting Rs.1,52,236/- paid to him from 8/01/2010 to 12/01/2012 duly recovered from his GPF; as also

iv) For grant/release of the leave encashment entitled to him for the leave saved by the petitioner during the course of the service.

c) Issue appropriate writ, order(s) or direction(s) thereby directing the respondents to pay appropriate compensation/damages towards the sufferings and mental agony undergone/suffered by the petitioner on account of the unjustified .acts on the part of the respondents by depriving him of his rights/entitlements to the retiral benefits.

d) Issue appropriate writ, order(s) or direction(s) to the respondents to pay costs of this petition to the petitioner for compelling him to approach this Hon'ble Court for indulgence to seek justice."

CASE OF THE PETITIONER:

2. It is the case of the petitioner that the petitioner was enrolled in the Border Security Force (in short, „BSF) on 11.07.1997. Upon completing his training at the Hazari Bagh (Jharkhand), the petitioner was posted to the 97th Battalion (in short, „Bn.), BSF. The petitioner served in the said Battalion from 1979 to 1986, after which he was selected for the deputation to the National Security Guard (in short, „NSG), where he served until 1991. Subsequently, the petitioner was reverted to the 97th Bn., BSF, and continued his service there until 1994. In 1994, the petitioner was posted to the 108 th Bn., BSF, where he served until his dismissal from service, effective from the afternoon of 12.01.2012, following his conviction in a criminal case.

3. It is the case of the petitioner that the petitioner served in the Force from 11.07.1977 to 12.01.2012, a period of approximately 34 years, with an unblemished record. The petitioner claims that through sheer hard work and sincerity, the petitioner earned due promotions and rose to the rank of Sub Inspector (GD) on merit.

4. It is the case of the petitioner that the petitioner was granted the benefits of the 3rd Modified Assured Career Progression (MACP) Scheme, which would not have been awarded if his service profile had not been „Excellent or „Very Good .

5. It is the case of the petitioner that the petitioner, while serving in the 108th Battalion of the BSF, proceeded on two month Earned Leave (EL), from 26.10.2009 to 24.12.2009, with an extension to 25.12.2009. Subsequently, the petitioner further extended his leave by one month.

6. It is the case of the petitioner that during his leave, the petitioner was falsely implicated in a case due to certain rivalries in his village. FIR No. 12 dated 08.01.2010, under Section 376 of the India Penal Code, 1816 (in short, „IPC) was registered against him at Police Station Kharkhoda, Sonapat, Haryana, based on a complaint by his neighbours. The petitioner was convicted on 02.05.2011, and sentenced to undergo Rigorous Imprisonment (RI) for ten years and to pay a fine of Rs.2,000; in

default of payment, the petitioner was to undergo simple imprisonment for six months. Aggrieved by the conviction and sentence, the petitioner filed an appeal in the High Court of Punjab and Haryana, Chandigarh, which is pending adjudication and final decision.

7. It is the case of the petitioner that the petitioner was arrested in the aforementioned criminal case on 10.01.2010, and remained in jail throughout the trial and after his conviction. He continued to serve his sentence in jail until his release, which was granted on account of his good behaviour and conduct, after completing approximately 6 years and 10 months of his sentence.

8. It is the case of the petitioner that upon receiving information regarding his arrest in the criminal case, the petitioner, vide Order dated 09.03.2010, was placed under suspension with effect from 08.01.2010. The suspension was subsequently extended through Orders dated 29.05.2010, 16.07.2010, and 06.10.2010. He was ultimately dismissed from service with effect from 12.01.2012. During the period of his suspension, he was granted and paid 50% of his pay and allowances as a subsistence allowance. In the dismissal order, the period of his absence/suspension from 08.01.2010 to 12.01.2012 was directed to be treated as Dies Non.

9. It is the case of the petitioner that following his release from jail, the petitioner having crossed the age of superannuation, personally approached his Unit (the 108 Bn., BSF) on 08.03.2018 and submitted an application for the release of payments towards his retiral/pensionary benefits.

10. In response to this application, the petitioner received a communication dated 20.03.2018, wherein he was informed as follows: -

a. An amount of Rs. 9,59,946/- was credited to his SBI Bank Account No. 30329130081 through CBS on 21.12.2013, after deducting Rs. 1,52,236/-, which represented 50% of the pay and allowances paid to him as a subsistence allowance for the period from 08.01.2010 to 12.01.2012. b. An amount of Rs. 2, 26,672/- towards arrears of the 3rd MACP (for the period from 01.01.2006 to 12.01.2009) was transferred to his SBI Bank Account No. 30329130081 on 28.09.2015. c. An amount of Rs. 25,417/- towards CGE GIS was credited to his SBI Bank Account No. 30329130081 on 27.08.2014 through CBS.

11. The petitioner challenges the deduction of the amount of Rs.1,52,236/-, paid to him as a subsistence allowance from 08.01.2010 to 12.01.2012, which he claims was recovered from him without due process of law, that is, without issuing a notice to the petitioner or giving him an opportunity to respond to the recovery. He claims that the petitioner, while under suspension, was entitled to receive a subsistence allowance under Fundamental Rule 53, as set out in the suspension orders. It is the case of the petitioner that the respondents' act of recovering Rs.1,52,236/- from the petitioner's General Provident Fund is wholly arbitrary, illegal, and is liable to be quashed by this Court, as there is no legal provision authorizing such recovery.

12. It is the case of the petitioner that the communication dated 20.03.2018 states that an amount of Rs.2,39,387/-, initially withdrawn for payment towards the petitioner's entitlement for leave

encashment, was subsequently deposited back into the government treasury, without notifying the petitioner or giving him an opportunity to respond, thereby violating the principles of the natural justice. The petitioner claims that the petitioner's claim to leave encashment is a claim of property, which cannot be denied by the respondents.

13. The petitioner got served on the respondents, a notice dated 28.05.2019/20.06.2019, followed by a reminder dated 12.09.2019, calling upon the respondents to consider his case for the grant/release of retiral/pensionary benefits or, alternatively, for the grant/release of a compassionate allowance under Rule 41 of the CCS (Pension) Rules, 1972.

14. In response to the legal notice, a reply dated 28.11.2019 was received by the petitioner, wherein the information provided earlier in the communication dated 20.03.2018 was reiterated. It stated that the petitioner is not entitled to gratuity in terms of Rule 24 of the CCS (Pension) Rules, 1972 as he has been removed from service and shall forfeit his past service. It was further stated that in terms of Rule 9 (1) of the CCS (Pension) Rules, 1972, a government servant who is dismissed/removed from service, from the date of such dismissal ceases to have any claim of leave to his credit. As far as the challenge of the petitioner to the recovery of subsistence allowance made from him, the respondents stated that as the period between 08.01.2010 to 12.01.2012 had been treated as Dies Non, the overpaid amount of Rs. 1,52,236/- has been recovered from his General Provident Fund account. For the claim of the petitioner for compassionate allowance, the respondents stated that the petitioner's claim for the same can be examined only on receipt of an application for the said purpose from him.

15. The petitioner claims that he submitted an application dated 03.02.2020 for grant of compassionate allowance, however, a reply dated 20-21.04.2020 was received, again mechanically asking him to submit an application for the consideration of the said claim.

16. The petitioner has, therefore, approached this Court praying for a Grant of Compassionate Allowance, Gratuity, Subsistence Allowance recovered from his General Provident Fund, and the Leave Encashment amount from the respondents.

CASE OF THE RESPONDENTS:

17. The respondents, in the Counter Affidavit, reiterate that in terms of Rule 24 of the CCS (Pension) Rules, 1972 and Section 4 (6) (b) of the Payment of Gratuity Act, 1972, the petitioner, having been dismissed from the service, forfeits his past service and is, therefore, not entitled to any pensionary benefits, including gratuity.

18. The respondents state that in accordance with Rule 1 of the CCS (Leave) Rules, 1972 and the DoP&T letter dated 25.03.2013, the petitioner also ceases to have any claim to leave to his credit from the date of his dismissal from service.

19. As far as the claim for Compassionate Allowance under Rule 41 of the CCS (Pension) Rules, 1972 is concerned, the respondents claim that it is only in deserving cases and for special consideration,

that a sanction of Compassionate Allowance or gratuity or both can be made.

20. The respondents assert that in the present case, all dues admissible to the petitioner have been duly paid. SUBMISSIONS OF THE LEARNED COUNSEL FOR THE PETITIONER:

21. The learned counsel for the petitioner, placing reliance on the Judgment of this Court in Paras Ram (Ex-Sub/BSF) v. Union of India & Ors, 212 (2014) DLT 314 (DB), submits that merely because the petitioner has been dismissed from service on account of his conviction in a criminal case, the respondents cannot deny the grant of compassionate allowance to him. The claim of compassionate allowance under Rule 41 of the CCS (Pension) Rules, 1972 is to be considered based on the facts of each case, keeping the entire tenure of the officer in mind, and not confined to the incident which led to the dismissal of the officer from service.

22. He further submits that the claim of the petitioner for the grant of gratuity cannot be denied by invoking Rule 24 of the CCS (Pension) Rules, 1972. He submits that gratuity is not akin to a pension. In support of his submission, he places reliance on the Judgments of the Supreme Court in State of UP v. U.P. University Colleges Pensioners' Association, (1994) 2 SCC 729; FR Jesuratnam v. Union of India & Ors., 1990 (SUPP) SCC 640; and of this Court in Brig. A. L. Lalla (Retd.) v. Union of India, (Judgment dated 24.01.2000 in Civil Writ Petition No. 1630 of 1998).

23. He also relies on the Judgments of this Court in Ex Flg Officer Subhash Pandey v. Union of India & Ors. (Judgment dated 19.05.2008 in W.P.(C) No. 495/2008), and Kanwarpal Singh v. Union of India and Ors, 2010:DHC:5827-DB, to submit that leave encashment is a right to property in terms of Article 300A of the Constitution of India, and cannot be denied without the authority of law. He submits that the same cannot be forfeited by the respondents.

24. On the claim for the subsistence allowance recovered by the respondents, he submits that the petitioner had been paid the subsistence allowance in terms of Fundamental Rule 53. Even though the period of his suspension may be treated as Dies Non, the amount already paid cannot be recovered.

SUBMISSIONS OF THE LEARNED COUNSEL FOR THE RESPONDENTS:

25. The learned counsel for the respondents reiterates the submissions of the respondents as have been recorded hereinabove. ANALYSIS AND FINDINGS:

26. We have considered the submissions made by the learned counsels for the parties.

COMPASSIONATE ALLOWANCE:

27. As far as the claim for grant of Compassionate Allowance is concerned, Rule 41 of the CCS (Pension) Rules, 1972 reads as under:-

"41. Compassionate Allowance.- (1) A Government servant who is dismissed or removed from service shall forfeit his pension and gratuity:

Provided that the authority competent to dismiss or remove him from service may, if the case is deserving of special consideration, sanction a compassionate allowance not exceeding two - thirds of pension or gratuity or both which would have been admissible to him if he had retired on superannuation pension.

(2) The competent authority shall, either on its own or after taking into consideration the representation of the Government servant, if any, examine whether any compassionate allowance is to be granted and take a decision in this regard in accordance with the proviso to sub-rule (1) not later than three months after the date of issue of the order imposing the penalty of dismissal or removal from service.

(3) The competent authority shall consider,-

a) each case of dismissal and removal from service on its merit to decide whether the case deserves of special consideration for sanction of a compassionate allowance and, if so, the quantum thereof.

b) the actual misconduct which occasioned the penalty of dismissal or removal from service and the kind of service rendered by the Government servant.

c) in exceptional circumstances, factors like family members dependent on the Government servant along with other relevant factors.

(4) Where an order imposing the penalty of dismissal or removal from service was issued before the date of commencement of these rules and the competent authority, at that time, did not examine or decide whether or not any compassionate allowance was to be granted in that case, that authority shall take a decision in this regard not later than six months from the date of commencement of these rules. (5) No compassionate allowance shall be sanctioned after the expiry of the aforesaid period of six months, to a Government servant on whom a penalty of dismissal or removal from service was imposed before the date of commencement of these rules.

(6) A compassionate allowance sanctioned under the proviso to sub-rule (1) shall not be less than the amount of minimum pension under rule."

28. A reading of the above Rule would show that even in case of dismissal or removal from service, the Competent Authority may, if the case is deemed deserving of special consideration, sanction a compassionate allowance to the dismissed or removed employee.

29. In Paras Ram (supra), this Court has held that the Competent Authority must, therefore, apply its mind to the facts of the „case as they exist on the date when an application is made by the

employee seeking the grant of compassionate allowance; the facts cannot be circumscribed to the charges leading to the punishment that may have been meted out to such an employee; the consideration cannot be constrained by a re-appraisal of the final punishment meted out in the disciplinary proceedings, but should encompass all circumstances prior to and after the punishment; and that the entire service record of such an employee needs to be assessed by the Competent Authority.

30. In the present case, though no decision of the Competent Authority of the respondents denying the grant of compassionate allowance to the petitioner has been placed on record by the respondents, it has been contended that the petitioner is not entitled to the grant of compassionate allowance only because he has been convicted in the criminal case referred hereinabove, and because of which he has been dismissed from service. This, in our view, would not be a due compliance with the mandate of Rule 41 of the CCS (Pension) Rules, 1972.

GRATUITY:

31. This now brings us to the petitioner's claim for the gratuity. As noted hereinabove, the learned counsel for the respondents has contended that in terms of Rule 24 of the CCS (Pension) Rules, 1972 read with Section 4 (6) (b) of the Payment of Gratuity Act, 1972, the petitioner's gratuity amount has been forfeited due to his dismissal from service. We do not find any merit in the said submission.

32. As far as Rule 24 of the CCS (Pension) Rules, 1972 is concerned, it provides for the forfeiture of past service for the purposes of „Pension . Rule 24 reads as under:

"24. Forfeiture of service on dismissal or removal Dismissal or removal of a Government servant from a service or post entails forfeiture of his past service."

33. Rule 24 falls in Chapter III of the CCS (Pension) Rules, 1972, which contains provisions for determination of the "Qualifying Service" for claim of pension. Though, Rule 3(1) (o) of the CCS (Pension) Rules, 1972, defines "Pension" as including gratuity except when the term pension is used in contra-distinction to gratuity in the Rules, in UP University Colleges Pensioners' Association (Supra), the Supreme Court emphasised that it cannot be stated that pension and gratuity are conceptually same. It held as under:-

"13. Before we express our views on the aforesaid matter, we would deal with the submission of Shri Jain that gratuity has to be taken as a part of pension, to support which contention our attention has been invited to this Court's judgment in Jarnail Singh case [(1993) 1 SCC 47 : 1993 SCC (L&S) 119 : (1993) 23 ATC 642] . Perusal of that judgment shows that gratuity was taken to be a part of pension because of the definition of "pension" as given in clause (o) of sub-rule (i) of Rule 3 of Central Civil Services (Pension) Rules, 1972. It is because of this definition that the case of D.V. Kapoor v. Union of India [(1990) 4 SCC 314 : 1990 SCC (L&S) 696 : (1990) 14 ATC 906] in which it had been held that gratuity was not a part of pension, was not

followed, as the Bench which decided that case had not been referred to the aforesaid definition of pension. Similar observation was made in Jarnail Singh case [(1993) 1 SCC 47 : 1993 SCC (L&S) 119 : (1993) 23 ATC 642] regarding F.R. Jesuratnam v. Union of India [1990 Supp SCC 640 : 1990 SCC (L&S) 370 : (1991) 16 ATC 540] wherein also gratuity was not regarded as part of pension without noting the abovenoted definition.

14. To buttress his aforesaid submission, Shri Jain also refers to clause (17) of Article 366 of the Constitution which has defined pension to include gratuity. Merely because what has been stated in clause (17) it cannot be held that gratuity has to be taken always and for all purposes as part of pension, because this definition apparently has enlarged the meaning of the word "pension"

by stating that this would include gratuity. It is well known that legislature very often wants to give enlarged meaning to a particular word and this is done by stating that the defined word would include some named related subjects also.

15. We, therefore, state that either because of what was stated in Jarnail Singh case [(1993) 1 SCC 47 : 1993 SCC (L&S) 119 : (1993) 23 ATC 642] or the way "pension"

has been defined in the Constitution, it cannot be held that pension and gratuity are conceptually same, as stated in paragraph 9 of Jarnail Singh case [(1993) 1 SCC 47 : 1993 SCC (L&S) 119 : (1993) 23 ATC 642] to which our attention is invited by Shri Jain.

According to us, this Court took the view in question in Jarnail Singh because of the definition of the word "pension" in the concerned rule; otherwise, what was held in D.V. Kapoor [(1990) 4 SCC 314 : 1990 SCC (L&S) 696 : (1990) 14 ATC 906] and F.R. Jesuratnam [1990 Supp SCC 640 :

1990 SCC (L&S) 370 : (1991) 16 ATC 540] cases seem to be correct legal position."

34. In F.R. Jesuratnan (supra), the Supreme Court had held that the gratuity is no longer a bounty, but is a matter of right of the employee and it can, therefore, no longer be regarded as a provision in the discretion of the president as provided in the pension regulations.

35. In Brig. A.L. Lalla (supra), following the above judgment, a learned Single Judge of this Court held that an order passed by the Disciplinary Authority forfeiting five years past service for purposes of pension, therefore, would not result in forfeiture of five years service for computation of gratuity, and that the gratuity shall be paid on full service rendered by the employee.

36. Therefore, forfeiture of service for pension, would not result in an automatic forfeiture of service for purposes of „Gratuity as well.

37. As far as reliance of the learned counsel for the respondents on Section 4(6) of the Payment of the Gratuity Act, 1972 is concerned;

we again do not find any merit in the same. Section 4(6) of the Payment of the Gratuity Act, 1972 reads as under:-

" 4. Payment of Gratuity.--

xxxxx (6) Notwithstanding anything contained in sub-section (1),--

(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused.

(b) the gratuity payable to an employee 5[may be wholly or partially forfeited]--

(i) if the services of such employee have been terminated for his riotous or disorderly conduct or any other act violence on his part, or

(ii) if the services of such employee have been terminated for any act which constitutes an offence involving moral turpitude, provided that such offence is committed by him in the course of his employment."

38. In the present case, from the above narration of facts, it would be evident that the incident, for which the petitioner was convicted, took place when he was on leave. Section 4(6) of the Payment of the Gratuity Act, 1972, would, therefore, not be attracted to the case of the petitioner, as the offence was not committed by him „in the course of his employment . The other conditions entitling forfeiture of „Gratuity also do not arise in the facts of the present case.

39. We, therefore, hold that the denial of gratuity to the petitioner cannot be sustained and accordingly, we direct the respondents to release the gratuity amount due to the petitioner, to him, within a period of eight weeks from today, along with interest at the rate of 6% per annum.

LEAVE ENCASHMENT:

40. As far as claim of the petitioner for the amount due towards Leave Encashment to his credit is concerned, this Court, in Ex Flg Officer Subhash Pandey (Supra), has held that the amount due by way of leave encashment is a right of property in terms of Article 300A of the Constitution of India and, therefore, the employee would not become disentitled to the same only because he/she has been dismissed from service.

41. In Kanwar Pal Singh (supra), this Court reiterated the above position in law, as under:-

"5. Learned counsel for the petitioner has drawn our attention to the judgment dated 11th September, 2002 of the Division Bench of this court in WP(C)No.3545/2002 titled LAC R Bhaskaran vs. Union of India and Others wherein this court on a detailed consideration of the applicable rules, regulations and circulars has held as follows:-

"21. The Central Government having adopted a scheme for grant of leave encashment, if leave is not availed of by an employee, in our opinion, the same would be paid to a personnel, despite the fact that he was dismissed from Government service. Once a provision is made for payment of certain amount by way of leave encashment, it becomes akin to a right of property in terms of Article 300A of the Constitution of India. Such a right can neither be taken away nor curtailed by reason of a mere circular. We, therefore, are of the opinion that the petitioner herein will be entitled to leave encashment."

6. Placing reliance on this finding by a pronouncement, learned counsel for the petitioner has placed before us copy of an order dated 19th May, 2008 passed in WP(C)No.495/2008 titled Subhash Pandey vs. Union of India wherein this court issued a writ of mandamus directing the respondents to pay leave encashment amount to the petitioner who was serving as an Air Force officer and had been dismissed from service. It is, therefore, evident that the denial of leave encashment as well as opposition to the writ petition has no legal basis at all and is completely unjustified. In view of the above, we direct as follows:-

(i) The respondents are directed to pay the leave encashment benefit permissible to the petitioner within a period of six weeks from the date of communication of this order.

(ii) In case the matter is delayed, the petitioner would be entitled to simple interest @ 8% per annum on the said amount with effect from today."

42. In view of the above, merely because the petitioner has been dismissed from service, he would not lose his right to claim the amount for the leave encashment standing to his credit as the same had already become due to him prior to his dismissal.

43. Accordingly, we direct the respondents to release the amount due to the petitioner towards his leave encashment claim till the date of his being suspended, within a period of eight weeks from today, along with interest at the rate of 6% per annum. SUBSISTENCE ALLOWANCE:

44. Coming now to the claim of the petitioner to the refund of the suspension amount that has been recovered from the General Provident Fund amount owed to the petitioner, we again find merit in the claim.

45. Under Fundamental Rule 53, a Government Servant under suspension is entitled to receive a subsistence allowance during the period of his suspension.

46. Though the order dismissing the petitioner from service treats the period of his suspension as Dies Non, this does not affect the subsistence allowance paid to him during the period of his suspension while the disciplinary proceedings were pending against him. The respondents have not cited any provision that permits the respondents to recover the amount of the subsistence allowance already paid to the petitioner. In fact, Fundamental Rule 52 clearly states that the pay and allowance of a Government servant, who is dismissed or removed from service, ceases from the date of such dismissal or removal. The effect of treating the period of petitioner's suspension as Dies Non can only mean that the period of his suspension will not be counted as a qualifying service for pension or other benefits. It cannot result in a claim for recovery of the subsistence allowance.

47. Accordingly, we direct that the amount recovered from the petitioner towards subsistence allowance is liable to be refunded to the petitioner within a period of eight weeks from today, along with interest at the rate of 6% per annum.

DIRECTIONS:

48. In view of the above, we allow the present petition with the following directions:-

- a) The petitioner may submit a fresh request for the grant of Companionate Allowance to the respondents within a period of four weeks from today. Upon receipt of the said application, the respondents shall pass a speaking order thereon within a period of eight weeks. In case the petitioner is held entitled to grant of Companionate Allowance, the same shall be released to the petitioner within a period of four weeks thereafter.
- b) The respondents shall pay the petitioner the amount due towards gratuity, leave encashment, and the amount recovered as subsistence allowance within a period of eight weeks from today, along with interest at the rate of 6% per annum.
- c) The respondents shall pay costs of Rs.25, 000/- to the petitioner.

NAVIN CHAWLA, J SHALINDER KAUR, J APRIL 03, 2025/SG/RV/DG Click here to check corrigendum, if any