IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

C. R.

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON
&
THE HONOURABLE MR. JUSTICE BABU MATHEW P.JOSEPH

FRIDAY, THE 26TH DAY OF JUNE 2015/5TH ASHADHA, 1937

WP(C).No. 29826 of 2009 (S)

AGAINST THE ORDER IN TA 80/2008 of CENTRAL ADMINISTRATIVE TRIBUNAL,ERNAKULAM BENCH DATED 10-07-2009

PETITIONERS:
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1. BHARAT SANCHAR NIGAM LIMITED,
CORPORATE OFFICE, STATESMAN HOUSE, BHARAKHAMBA ROAD
NEW DELHI, REP. BY ITS CHAIRMAN
AND MANAGING DIRECTOR.

2. THE CHIEF GENERAL MANAGER,
TELECOMMUNICATION, BHARAT SANCHAR NIGAM LIMITED
KERALA CIRCLE, THIRUVANANTHAPURAM.

3. THE GENERAL MANAGER,
TELECOMMUNICATION, BSNL, KOLLAM.

BY ADV. SRI.MATHEWS K.PHILIP,SC, BSNL

RESPONDENTS:
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1. BSNL PESONAL STAFF ASSOCIATION,
KERALA CIRCLE UNIT, REP. BY ITS CIRCLE TREASURER
SRI.M.T.SASIDHARA MENON.

2. BABY K., STENOGRAPHER,
O/O.THE DIVISIONAL ENGINEER(PHONE), BSNL, KUNDARA.

3. RAJAN G., STENOGRAPHER,
O/O.THE GENERAL MANAGER, TELECOM, BSNL
KOLLAM.

R1-3 BY ADV. SRI.SATHISH NINAN
R1-3 BY ADV. SRI.SANTHOSH MATHEW
R1-3 BY ADV. SRI.ARUN THOMAS
R1-3 BY ADV. SRI.JENNIS STEPHEN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 26-06-2015, ALONG WITH WPC. 30750/2009, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WP(C).No. 29826 of 2009 (S)

APPENDIX

PETITIONERS' EXTS

EXT.P1:- TRUE COPY OF THE TA 80/08 (WPC NO.25433 OF 2007)

EXT.P2:- TRUE COPY OF THE COUNTER AFFIDAVIT FILED BY THE RESPONDENTS IN TA 80/08 (WPC 25433/07)

EXT.P3:- TRUE COPY OF THE JUDGMENT IN TA 80/08.

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P. R. RAMACHANDRA MENON
&
BABU MATHEW P. JOSEPH, JJ.

W.P.(C) Nos.29826 & 30750 of 2009

Dated this the 26th day of June, 2015

C. R.

<u>JUDGMENT</u>

<u>P. R. Ramachandra Menon, J.</u>

Whether the benefit ordered to be given to the 'Executives' of the BSNL, as per Ext.P7 dated 23/08/2006 towards 'Professional Upgradation Allowance' is liable to be termed as a mere 'financial benefit' as envisaged under 'Condition No.6' of Ext.P5 ACP Scheme and is to be paid to the Stenographers Grade-III as well (who admittedly are not Executives)? Does it have any nexus or relevance to the status of the post and the nature of duties to be performed? Is it to be paid automatically, simply with reference to the enhanced scale of pay, without any regard to the status or privilege as applicable in the case of 'Executives', merely for the reason that the quantification exercise is stipulated to be effected “as 2% of the basic pay” ? These are the important questions to be answered in these writ petitions.

2. The verdict passed by the Tribunal, rejecting the claim mooted by the Employees' Association and the concerned workers is under challenge by the Association and workers in W.P.(C) No.30750 of 2009; whereas W.P.(C) No.29826 of 2009 has been preferred by the BSNL, in so far as the steps for recovery of the payment effected on mistake have been intercepted.

3. Coming to the sequence of events, pleadings and proceedings are as referred to, as given in W.P.(C) No.30750 of 2009, which is taken as the lead case. The first petitioner is an Association of the employees concerned, while the petitioners 2 and 3 are working as Stenographers. The employees concerned, pursuant to selection and appointment, joined the service of the Telecom Department years back and were continuing in above posts. Because of the bleak chance for getting promotion and the stagnation involved, the Union Government came up with a scheme to

boost up the morale of the employees, providing some measures of financial assistance. It was accordingly, that Ext.P5 Scheme was introduced as per order dated 09/08/1999, providing benefits to the extent as specified therein; also making it clear that, the employees will be given the benefit of upgradation (first and second respectively) on completion of 12 and 24 years. It was also stipulated that they could continue to draw the higher pay scale attached to the higher post, till they obtained regular promotion and once they got the regular promotion, they would be shifted to the regular channel. It was also made clear that, while granting the benefit of ACP, fixation should be effected in terms of the relevant provisions, particularly Rule 22A of the Fundamental Rules and that, once regular promotion was extended, no further benefit of refixation would be given in the concerned pay scale.

4. While so, pursuant to transformation of Telecom Department as a Company (BSNL) with effect from

01/10/2000, the employees came to be the employees of the Company by name BSNL without any adverse consequence as to the terms and conditions of service. However, the necessity to have restructuring of various cadres was felt extremely essential and accordingly, among the three different kinds of Stenographers which were in existence (i.e., Grade-I, Grade-II and Grade-III), the first two grades were merged together and renamed as 'Personal Assistant', whereas Grade-III was taken as a 'dying cadre'. It is stated that the workers represented by the first petitioner Association have obtained the benefit of first financial upgradation on completion of the 12 years and the eligible employees who have completed 24 years, have obtained the second financial upgradation as well.

5. While so, in the year 2005, the application of the ACP Scheme to the restructured cadre was thought about and pursuant to the decision taken by the Board of Directors of the Company, the same was ordered to be made applicable

to the employees of the BSNL as well. Ext.P6 is the order dated 12/09/2005, whereby it was ordered to be made applicable. As per Ext.P7 order dated 23/08/2006, the revision of the perks payable to the 'Executives' of the Company, which was pending consideration before the Board of Directors of the Company, was approved facilitating payment of various allowances mentioned therein, one among which is the '**Professional Upgradation Allowance'**.

6. 'Professional Upgradation Allowance' was ordered to be paid to the 'Executives' for purchasing Books/Journals, subject to production of proof by way of self certification and the extent of benefit payable to the 'Executives' was declared as '2%' of the basic salary. As per the very same order, various other allowances were also stipulated, such as Diet Allowance, Transport Allowance, Rural Duty Allowance, Entertainment Allowance, Furnishing Allowance wherever it is applicable and something more. Case of the petitioners is

that, pursuant to Ext.P7 order, they were given the benefits of Professional Upgradation Allowance from 2005 and were enjoying the same accordingly. All of a sudden, it was stopped in March, 2007; when the grievance was raised before the employer. Ext.P10 is a representation filed before the General Manager of the BSNL in this regard and since the same was not acted upon, the petitioners approached this Court by filing W.P.(C) No.13096 of 2007; more so, when they were aggrieved of the steps being taken by the BSNL/employer to have recovery of the payment effected wrongly.

7. The stand of the BSNL was that, the 'Professional Upgradation Allowance' ordered to be paid as per Ext.P7 was only to the 'Executives' and the petitioners, admittedly being not 'Executives', no amount could have been paid to them and hence, it was liable to be recovered. Ext.P11 is a copy of the interim order passed by this Court in W.P.(C) No.13096 of 2007, whereby the representation which was

pending consideration before the concerned respondent was directed to be considered, simultaneously intercepting the coercive proceedings in the meanwhile. Pursuant to the above interim order, the matter was considered and the claim of the petitioners was rejected by the BSNL as per Ext.P12 order dated 07/07/2007. Met with the situation, the petitioners sought for permission of the Court to withdraw the writ petition so as to enable them to challenge the subsequent proceedings as well; which was ordered as per Ext.P13 judgment.

8. The petitioners filed W.P.(C) No.25433 of 2007, where a detailed counter affidavit was filed from the part of BSNL. Meanwhile, BSNL came to be included as a Government Institution under the Administrative Tribunals Act, pursuant to which, the writ petition was transferred to the CAT, Ernakulam Bench, where it was re-numbered as T.A. No.80 of 2008. After hearing both the sides, the Tribunal passed Ext.P16 order, holding that the applicants were not

entitled to have the benefit of Professional Upgradation Allowance and that stoppage of the benefit was well within the four walls of law. However, the recovery proceedings were intercepted, placing reliance on various judicial precedents in this regard. This made the petitioners to approach this Court by filing W.P.(C) No.30750 of 2009 challenging the order, whereby the claim was turned down. BSNL has also approached this Court against interference with the steps for recovery of the payments effected by mistake. Since common issues are involved, both these matters are taken together and heard in detail.

9. Mr.Rakesh Basant appearing on behalf of the petitioner/Association and the workers explained the circumstances under which the Scheme itself was introduced. Much reliance is sought to be placed on 'Condition No.6' of Ext.P5 Scheme. The learned lawyer points out that the proper test to be applied is not by considering whether the employees concerned are holding the posts as

'Executives' or not but whether the financial benefit is payable to them by virtue of 'Condition No.6' of the Scheme. Even otherwise, it is ordered to be paid with reference to the 'pay scale', as evident from Ext.P7 and as such, the reference made by the Tribunal to the status or functions of the post is of no consequence, submits the learned counsel. The learned counsel also adds that, while the respondents have stopped the payment of 'Professional Upgradation Allowance' as per Ext.P7, the other allowances such as, Diet Allowance, Transport Allowance etc. are still being paid to the employees/petitioners and as such, there is no rationale on the part of the BSNL in abruptly stopping the payment.

10. The above version is sought to be rebutted by the learned counsel for the BSNL, pointing out that the benefit intended to be paid is exclusively to the 'Executives' and the same is not liable to be paid to others who admittedly are not 'Executives'. The benefit claimed by the petitioners cannot be linked to 'Condition No.6' of Ext.P5 Scheme as the

purpose and intent of the Scheme is something else, which has been misconceived and misunderstood by the petitioners. It is also pointed out that the other allowances such as 'Diet Allowance and Transport Allowance' ordered to be paid as per Ext.P7 are still being paid to the petitioners, as they are payable to 'non-executives' as well, though at a lesser rate; as being done earlier. As such, this by itself cannot give any green card to the petitioners to claim the benefit of Professional Upgradation Allowance, submits the learned Standing Counsel.

11. While considering the crucial questions involved, a reading of 'Condition No.6' of Ext.P5 Scheme is very much essential and hence the same is extracted below:

> "6. Fulfilment of normal promotion norms (bench-mark, departmental examination, seniority-cum-fitness in the case of Group 'D' employees, etc.) for grant of financial upgradations, performance of such duties as are entrusted to the employees together with retention of old designations, financial upgradations as personal to the incumbent for the stated purposes and restriction of the ACP Scheme for financial and certain other benefits.

> (House Building Advance, allotment of Government accommodation, advances, etc.) only without conferring any privileges related to higher status (e.g. invitation to ceremonial functions, deputation to higher posts, etc.) shall be ensured for grant of benefits under the ACP Scheme."

The said Condition, while providing the grant of financial benefits, envisages granting of certain other benefits as well, as exemplified therein. It does not say that all the benefits which can be monitorily worked out, are to be satisfied in terms of money. The heart-burn of the petitioners started only after issuance of Ext.P7 and granting of benefits with reference to Ext.P7 for a period of two years. It is to be examined whether the claim of the petitioners as now moved before the Court is in deviation from Ext.P7 order passed by the BSNL.

12. On going through the contents of Ext.P7 order, it is evident that it has been issued by the BSNL with reference to the subject "Grant of Perks to **Executive Employees** in BSNL". The opening paragraph itself shows that the issue of revision of perks for the 'Executive employees' of the BSNL

was under consideration; that the matter was considered by the Board of Directors of the BSNL who have conferred the approval for granting the benefits with effect from 01/01/2005, till further orders were passed as stated therein. It is by virtue of the order passed by the Board of Directors of the BSNL as above, that 'Professional Upgradation Allowance' came to be granted for the first time, which benefit admittedly was not being enjoyed by the petitioners at any point of time earlier. The circumstance under which the said allowance is to be paid, is very much relevant so as to have an effective analysis. Relevant portion of Ext.P7 order is extracted below:

> "PROFESSIONAL UPGRADATION ALLOWANCE: Two percent of one month basic pay per month shall be paid as Professional Upgradation Allowance for purchasing books, journals etc., on self certification basis to all Executives of the company. The reimbursement of expenses on News Papers and Magazines where applicable, shall continue in addition."

From the above, it is very clear that three conditions are to be satisfied for granting the benefit of 'Professional

Upgradation Allowance' as follows:

i) the first one is that it is payable only to the 'Executives' of the Company.

ii) the second one is that it is given for a specific purpose; i.e. purchasing Books/Journals etc. and,

iii) the third one is that 'self certification' is necessary to satisfy the Department, to prove effective utilization of the amount to be provided under this head.

It is true, that the extent of allowance is specified with reference to '2%' of one month's basic pay; which only denotes the quantification process, which could have been worked out by the Department even by some other mode. It is only for convenience, that quantification has been sought to be effected with reference to a given percentage of the basic salary, so as to have uniformity, clarity and transparency throughout. As mentioned above, the 'purpose' of granting the 'Professional Upgradation Allowance' is very relevant. It is <u>for purchasing Books/Journals</u> etc. and purchase of such Books/Journals has necessarily to be confirmed/substantiated by giving 'self certification'. In other words, the amount that is paid as 'Professional Upgradation Allowance' can never be diverted by the beneficiaries merely treating the same as a 'financial benefit' and utilize the same for some other purpose. It has to be ensured that the allowance is utilized only for purchase of Books/Journals and if there is any diversion, it may give rise to a 'misconduct' and is liable to be proceeded against.

13. Another aspect to be considered is with respect to the types of Books/Journals which could be purchased by the employees; especially when the word “etc.” is added in the enabling clause/provision. Applying the principles of ejusdem generis, the Books or Journals which are intended to be purchased are of such nature, <u>so as to provide intellectual upliftment of the employees concerned</u>, and make them equipped with the requisite extent of skill/professional competence attached to the post in

question. This is evident from the last sentence of the very same clause, which says that "***The reimbursement of expenses on Newspapers and Magazines where applicable, shall continue in addition***." This means, 'Newspapers' and 'Magazines' are not included in the term Books/Journals etc. and hence the allowance cannot be utilized for purchasing Newspapers or Magazines. In other words, cost price of the materials for improving the general knowledge or level of understanding shall only be eligible to be reimbursed. It is also evident that reimbursement was being effected by the employer BSNL in respect of Newspapers and Magazines, wherever applicable, and introduction of the 'Professional Upgradation Allowance' comes up for the first time, in addition to Newspaper/ Magazine Allowance, to meet the particular objective, i.e., to purchase Books/Journals which are having relevance to upgrade the intellectual level of the persons concerned, with reference to the Executive nature of the post. This being the position, the version of the petitioners that the said allowance is liable to be treated as mere financial benefit is not liable to be accepted.

14. The issue can be approached in different angle as well. As mentioned already, the type of Books/Journals intended to be purchased, on self certification, as envisaged in the clause, is with a specific intent. It is of course open for the BSNL to get particulars of the Books/Journals which the employees want to purchase for the intellectual upliftment (making use of the 'Professional Upgradation Allowance') and the Books/Journals worth 2% of the basic pay (or such other extent as payable) could be directly purchased and supplied by the BSNL/employer. If the books are directly purchased by the BSNL and supplied them to the employees, the same will never amount to granting of any financial benefit, but will remain as a privilege. This being the position, what is actually contemplated by granting the 'Professional Upgradation Allowance' is virtually a privilege

to the 'Executives', to the extent as specified in Ext.P7 with the specific objective of intellectual upgradation and nothing more.

15. It is quite evident that all the other allowances as dealt with under paragraphs 2, 3, 4, 5 and 6 etc. in Ext.P7 are payable only to the 'Executives' and the non-executives do not come within the purview of Ext.P7 order. It may be true, that some other allowances as mentioned in Ext.P7 might have been payable to the non-executives as well, by virtue of the conditions of service. But the fact remains that the rate differs and as such, the contention of the petitioners that they are still getting 'Diet Allowance' and 'Transport Allowance', even after stoppage of the 'Professional Upgradation Allowance' does not come to their rescue. It is pertinent to note that payment of 'Professional Upgradation Allowance' for meeting the desired objective was considered as necessary by the Board of Directors of the Company/BSNL and it was accordingly, that the same was introduced for the

first time as per Ext.P7. In other words, it does not automatically flow from 'Condition No.6' of Ext.P5 Scheme.

16. The petitioners no more continue as the employees of the Telecom Department. They are not Government employees, but employees of the 'BSNL', which is a Company incorporated under the relevant provisions of the Companies Act, 1956. It is always open for the Company to evolve Schemes and find out the ways and means as to the benefits payable to the employees in view of the better organizational interest, so as to promote the affairs of the Company in terms of the Memorandum and Articles of Association, promoting industrial peace and harmony; in turn boosting up the level of productivity. The orders issued by the Government as such may not be applicable to the employees of the Company; unless they are adopted by the Board of Directors of the Company with or without modifications. Care has to be taken only to see that no benefit which was being enjoyed by the employees of the

erstwhile Department is prejudicially affected after formation of the Company/BSNL. Since 'Professional Upgradation Allowance' was not envisaged while issuing Ext.P5 Scheme, particularly under 'Condition No.6' (the same having been introduced for the first time by the Board of Directors of the Company/BSNL as per Ext.P7), the petitioners cannot be heard to say that they are entitled to the said benefit by virtue of 'Condition No.6' of Ext.P5. The issue has been correctly approached and appreciated by the Tribunal as evident from Ext.P16 order, which is well within the four walls of law and not assailable under any circumstances. As it stands so, no interference is possible in W.P.(C) No.30750 of 2009.

17. Coming to the reliefs sought for by the BSNL in W.P.(C) No.29826 of 2009 (challenging the order passed by the Tribunal intercepting the recovery proceedings to recover the payment effected wrongly), the legal question has been made clear by the Apex Court in a recent judgment in **State**

of Punjab v. Rafiq Masih [(2015) 4 SCC 334]. As per the said verdict, it has been made clear that, when there is no fault on the part of the employees concerned, no recovery is possible in respect of 'Group-C and D' employees. The employees involved in the present case being of 'Group-C and D' cadre, no recovery is possible under any circumstances, by virtue of the law declared by the Apex Court. As such, the challenge raised by the BSNL against the verdict passed by the Tribunal in W.P.(C) No.29826 of 2009 fails.

Interference is declined in both the writ petitions and they are dismissed accordingly.

Sd/-
P. R. RAMACHANDRA MENON
JUDGE

Sd/-
BABU MATHEW P. JOSEPH
JUDGE

kns/-

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P.A. To Judge