

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.10.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE N.ATHINATHAN

W.P.No.36588 of 2016
W.M.P.No.31456 of 2016

1. The Chief General Manager,
National Centre for Next Generation,
Net Work Circle, BSNL CTS Compound,
Nethaji Nagar, New Delhi 110023.
2. The Chief Accounts Officer,
O/o. Chief General Manager,
National Centre for Next Generation,
Net Work Circle, BSNL CTS Compound,
Nethaji Nagar, New Delhi 110023.
3. The Additional General Manager,
Regional Centre for Electronic Switching,
4th Floor, Flower Bazaar,
Telephone Exchange, NSC Bose Road,
Chennai 600 001. ... Petitioners

versus

1. Mr.U.R.Rajagopalan,
Divisional Engineer (Retd.),
BSNL RCES, Chennai,
No.23, Ranji Nagar,
Madanadapuram, Porur, Chennai 600 116.
2. The Registrar,
Central Administrative Tribunal,
City Civil Court Buildings,
Chennai 600 104. .. Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorari, to call for the records of the 2nd respondent Tribunal, dated 05.01.2016 in O.A.No.470 of 2014 and quash the same.

For Petitioners

: Mr.S.Udayakumar

ORDER

(Order of the Court was made by S.MANIKUMAR, J.)

Challenge in this writ petition, is to the order, dated 05.01.2016, made in O.A.No.470 of 2014, by which, the Central Administrative Tribunal, Chennai, while quashing the pay fixation order of the Chief General Manager, National Centre for Next Generation, New Delhi, 1st respondent herein, issued in No.ND/NCES/10-77/PF/URR/193, dated 13.04.2009, directed the petitioners to issue a fresh pay fixation order, without withdrawing the benefit of two advance increments granted in 1990 and arrange to pay the balance retirement benefits to the 1st respondent, within a period of two months, from the date of passing of the order.

2. The 1st respondent is a retired Divisional Engineer, BSNL, RCES, Chennai. Consequent on his acquiring Engineering Degree, he had been granted two advance increments with effect from 1.5.1990. However, by order, dated 13.4.2009, the two advance increments were withdrawn, stating that it was an incorrect application of FR 35 and that the pay of the 1st respondent has been refixed, with effect from 01.05.1990. Against the said order, the 1st respondent has filed O.A.No.470 of 2014, before the Central Administrative Tribunal, Madras Bench.

3. Before the Tribunal, it was the contention of the 1st respondent that the petitioners ought to have taken note of the proceedings, dated 11.07.1990, which provided for grant of two advance increments, to those Junior Engineers, Junior Telecom Officers, Officers of TES Group 'B' and Officers of ITS in the Junior Time Scale and Senior Time Scale promoted from TES Group 'B' and acquired a degree in Engineering, in any one of the disciplines, from a recognised University or its equivalent qualification, while in service. The 1st respondent has further contended that his pay fixation had been done correctly, in terms of the policy in vogue, at the relevant time and therefore, the same cannot be withdrawn, retrospectively and that too, after several years and on the verge of his retirement.

4. Before the Tribunal, the petitioners have filed their reply, contending that the policy regarding grant of advance increments was changed, vide Official Memorandum, dated 31.01.1995 of the Ministry of Personnel, Public Grievances and Pensions and that the Ministry has decided to convert the existing increments based incentives, into one time lump sum incentive. Therefore, the 1st respondent was granted a lump sum of Rs.4,000/-, in lieu of two increments. The petitioners have further contended that the competent authority has rightly applied FR 35, after issuing notice to the 1st respondent, and passed order on 13.4.2009, refixing the pay of

the respondent, with effect from 01.05.1990. According to the petitioners, the policy change has been brought about, with a view to avoid anomalies, in pay fixation, between a senior and a junior employee.

5. Before the Tribunal, the 1st respondent has relied on a decision made in O.A.No.390 of 1994, dated 13.09.1994, rendered in similar circumstances. It has also been argued that the 1st respondent had acquired Engineering qualification, before the new policy came into effect, and therefore, grant of advance increments, is in accordance with the terms of the policy, in vogue, at the time. He has further submitted that incentive already granted, should not be withdrawn retrospectively, by any subsequent change, in the policy. The 1st respondent has also contended that the new policy would be applicable only to those, who had acquired the additional qualification, after the issuance of the official memorandum. Reference has been made to G.I.,F.D.,No.752, C.S.R. dated 6th July, 1919, issued under FR 27.

6. Placing reliance on Rule 59(1)(b)(iii) of the CCS (Pension) Rules, the 1st respondent has submitted that the petitioners are authorised to verify the correctness of the emoluments for a period of 24 months only preceding the date of retirement of a government servant and therefore, action of the petitioners in withdrawing advance increments granted in the year 1990, for the purpose of calculation of pension, is violative of CCS (Pension) Rules.

7. Before the Tribunal, the petitioners have submitted that action taken was in accordance with relevant DOP&T instructions, contained in OM.No.1/2/89-Estt(Pay-I), dated 28th June, 1993 and 31st January, 1995, by which, all the Ministries and Departments were directed to convert the existing increment-based incentive already sanctioned to their employees into one-time lumpsum incentive, with immediate effect.

8. After careful consideration of the rival submissions and materials on record, the Central Administrative Tribunal, Madras Bench, vide order, dated 05.01.2016, ordered as follows:

"It is not in dispute that the applicant had been granted two advance increments as long back as 01.05.1990. It is equally undisputed that the DOP&T had directed all the Ministries and Departments to convert the existing advance increment-based incentive already sanctioned to their employees into a one-time lumpsum incentive with immediate effect by orders dated 28.6.93 and 31.1.95. The applicant's contention that they could only have prospective effect cannot be accepted, as the question of conversion of an existing advance increment into a lumpsum would not arise if the orders had only a

prospective effect. Yet, the relevant OMs said precisely this while stating as follows:

"All Ministries and Departments are requested to convert the existing increment-based incentive already sanctioned to their employees into one-time lumpsum incentive with immediate effect in phase-I".

As these orders have not been challenged, it is to be held that in the normal course, they would be applicable and binding on the applicant.

7. In view I of the above, the action of the respondents to convert the existing advance increments to a lumpsum one time grant would have been in order had it taken place soon after the issue of the relevant orders in 1993/1995 itself. However, the respondents failed to act for no fault of the applicant. The only issue that needs to be determined now is, therefore, whether the respondents had the authority to revise the pay of the applicant after such a long interval especially on the eve of the retirement of the applicant. We find force in the argument of the learned counsel for the applicant that the respondents can only look into the correctness of pay fixation for a period of 24 months preceding the date of retirement and not for any period prior to that date in terms of Rule 59 of the CCS (pension) Rules.

8. In view of the fact that the respondents had failed to act for as long as 14 years since the date of change of policy and the relevant pension rules prohibit revisiting the correctness of pay fixation relating to periods two years before the date of retirement, the action of the respondents in this regard is clearly without authority. In revisiting the pay of the applicant from 1990, the respondents have gone into the correctness of the pay fixation done 19 years before retirement which is vexatious and not permissible. If there is any over payment on account of an administrative lapse arising out of negligence or otherwise, the respondents are at liberty to fix responsibility for it and take action against the errant official concerned. It cannot be made good at the expense of a retiring employee in violation of the rules governing the settlement of retirement claims.

9. In view of the above, the applicant is entitled to the relief sought by him. The impugned order of pay fixation dated 13.4.2009 (Annexure A/IX) is quashed and set aside. The respondents are directed to issue a fresh pay fixation order without withdrawing the benefit of two advance increments granted in 1990 and arrange to pay the balance retirement benefits to the applicant accordingly, within a period of two months from the date of

receipt of a copy of this order.

10. The OA is allowed in the above terms. No order as to costs."

Heard the learned counsel for the petitioners and perused the materials available on record.

9. Material on record discloses that consequent on his acquiring an Engineering Degree, the petitioner had been granted two advance increments, with effect from 1.5.1990 and his pay has been fixed, in terms of the policy in vogue, at the relevant time. Ministry of Personnel, Public Grievances and Pensions, New Delhi, has issued an Official Memorandum, dated 31.01.1995, to convert the existing increments, into a one time lump sum incentive. Accordingly, the 1st respondent has been paid a lump sum of Rs.4,000/-, in lieu of two increments. After nearly 19 years and just 15 days before the retirement, pay has been refixed, vide order, dated 13.04.2009, with effect from 01.05.1990.

10. Thus, it could be seen that incentive increment granted in the year 1990, is sought to be revised, on the basis of OM.No.1/2/89-Estt(Pay-I), dated 28th June, 1993 and 31st January, 1995, at the fag end of the service of the 1st respondent, in 2009, giving retrospective effect, from 01.05.1990. After considering the material on record, the Central Administrative Tribunal, Madras Bench, has observed that revision of pay, ought to have been done, long ago.

11. Referring to Rule 59(1)(b)(iii) of the CCS (Pension) Rules, the Tribunal has observed that the petitioners are authorised to verify the correctness of the emoluments for a period of 24 months only, preceding the date of retirement of a government servant and therefore, action of the petitioners in withdrawing the advance increments granted in the year 1990, for the purpose of calculation of pension is violative of CCS (Pension) Rules. At this juncture, this Court deems it fit to consider Rule 59(1)(b)(iii) of the CCS (Pension) Rules, which is extracted,

"(iii) Calculation of average emoluments. - For the purpose of calculation of average emoluments, the Head of Office shall verify from the Service Book the correctness of the emoluments drawn or to be drawn during the last ten months of service. In order to ensure that the emoluments during the last ten months of service, have been correctly shown in' the Service Book, the Head of Office may 'verify the correctness of emoluments for the period of twenty four months only preceding the date of retirement of a Government servant, and not for any period prior to that date."

12. Though the policy has been changed in the year 1995, for nearly 14 years, the petitioners have not re-visited fixation of pay. By observing that even if there was any over payment on account of administrative lapse, arising out of negligence or otherwise, the petitioners can only fix responsibility for it and by granting liberty to take action against the errant official concerned, the Tribunal quashed the order, dated 13.04.2009, refixing the pay of the 1st respondent. Consequently, the Tribunal has also directed the writ petitioners to issue a fresh pay fixation order without withdrawing the benefit of two advance increments granted in the year 1990 and also directed them to pay the balance retirement benefits to the 1st respondent, within a period of two months, from the date of passing of the order in the Original Application.

13. Inviting the attention of this Court to Paragraph 14 of the judgment in Chandi Prasad Uniyal and others v. State of Uttarakhand and others reported in 2012 (8) SCC 417, Mr.S.Udayakumar, learned counsel for the petitioners contended that the excess payment made to the 1st respondent is above Rs.1 Lakh. Being the "taxpayers' money", he submitted that the money paid, without any authority of law, can always be recovered, barring few exceptions of extreme hardships. Paragraph 14 of the abovesaid judgment is extracted hereunder:

"14. We are concerned with the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness, collusion, favouritism etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment."

14. Attention of this Court was also invited to a decision of the Hon'ble Apex Court in State of Punjab v. Rafiq Masih (White Washer) reported in 2015 (4) SCC 334, wherein, after considering a catena of decisions, the Hon'ble Apex

Court has carved out certain exceptions, where recovery would be impermissible, in law. Paragraph 12 is extracted hereunder:

"It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

15. Arguments have been advanced on the aspect of erroneous fixation and recovery. Submission is placed on record. Re-fixation has been done, vide order, dated 13.04.2009, after nearly 19 years, giving retrospective effect from 01.05.1990, the date of grant of increments. Refixation has been done, after 14 years, from the date of change of policy of the Government. If re-fixation done, is sustained, then consequently, recovery would follow. In such circumstances, one may have to examine, as to whether, the 1st respondent would fall within any of the enumerated exceptions.

16. In such circumstances, the 1st respondent would fall within the purview of Clauses (ii) and (iii) of Paragraph 12 of the judgment in *State of Punjab v. Rafiq Masih (White Washer)* reported in 2015 (4) SCC 334. It is pertinent to note that the Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, Government of India, New Delhi, vide proceedings in F.No.18/03/2015-Estt. (Pay-I), dated 02.03.2016, has also issued instructions, to deal with the issue of wrongful/excess payments made to government servants, in accordance with the decision made in *State of Punjab v. Rafiq Masih (White Washer)* reported in 2015

(4) SCC 334. Proceedings, dated 02.03.2016, are extracted hereunder:

F.No.18/03/2015-Estt. (Pay-I)
Government of India
Ministry of Personnel, Public Grievances & Pensions
Department of Personnel & Training

New Delhi, the 2nd March, 2016

OFFICE MEMORANDUM

Sub: Recovery of wrongful / excess payments made to Government servants.

The undersigned is directed to refer to this Department's OM No.18/26/2011-Estt (Pay-I) dated 6th February, 2014 wherein certain instructions have been issued to deal with the issue of recovery of wrongful / excess payments made to Government servants in view of the law declared by Courts, particularly, in the case of Chandi Prasad Uniyal And Ors. vs. State of Uttarakhand And Ors., 2012 AIR SCW 4742, (2012) 8 SCC 417. Para 3(iv) of the OM inter-alia provides that recovery should be made in all cases of overpayment barring few exceptions of extreme hardships.

2. The issue has subsequently come up for consideration before the Hon'ble Supreme Court in the case of State of Punjab & Ors vs Rafiq Masih (White Washer) etc in C.A.No.11527 of 2014 (Arising out of SLP(C) No.11684 of 2012) wherein Hon'ble Court on 18.12.2014 decided a bunch of cases in which monetary benefits were given to employees in excess of their entitlement due to unintentional mistakes committed by the concerned competent authorities, in determining the emoluments payable to them, and the employees were not guilty of furnishing any incorrect information / misrepresentation / fraud, which had led the concerned competent authorities to commit the mistake of making the higher payment to the employees. The employees were as innocent as their employers in the wrongful determination of their inflated emoluments. The Hon'ble Supreme Court in its judgment dated 18 th December, 2014 ibid has, inter-alia, observed as under:

"7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of

monetary benefits wrongly extended to employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court."

"10. In view of the afore-stated constitutional mandate, equity and good conscience, in the matter of livelihood of the people of this country, has to be the basis of all governmental actions. An action of the State, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent, that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer, to recover the amount. Or in other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligations of the State, to citizens of this country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 14 of the Constitution of India."

3. The issue that was required to be adjudicated by the Hon'ble Supreme Court was whether all the private respondents, against whom an order-of recovery (of the excess amount) has been made, should be exempted in law, from the reimbursement of the same to the employer. For the applicability of the instant order, and the conclusions recorded by them thereafter, the ingredients depicted in paras 2&3 of the judgment are essentially indispensable.

4. The Hon'ble Supreme Court while observing that it is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement has summarized the following few situations, wherein recoveries by the employers would be impermissible in law:-

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.

5. The matter has, consequently, been examined in consultation with the Department of Expenditure and the Department of Legal Affairs. The Ministries / Departments are advised to deal with the issue of wrongful / excess payments made to Government servants in accordance with above decision of the Hon'ble Supreme Court in CA.No.11527 of 2014 (arising out of SLP (C) No.11684 of 2012) in State of Punjab and others etc vs Rafiq Masih (White Washer) etc. However, wherever the waiver of recovery in the above-mentioned situations is considered, the same may be allowed with the express approval of Department of Expenditure in terms of this Department's OM No.18/26/2011-Estt (Pay-I) dated 6th February, 2014.

6. In so far as persons serving in the Indian Audit and Accounts Department are concerned, these orders are issued with the concurrence of the Comptroller and Auditor General of India.

7. Hindi version will follow.

sd/-
(A.K.Jain)
Deputy Secretary to the Government of India

17. Pursuant to the above proceedings issued by the Ministry of Personnel, Public Grievances and Pensions, Department of Personnel and Training, Government of India, New Delhi, the Bharat Sanchar Nigam Ltd., has issued a circular, dated 09.09.2016, as follows:

BHARAT SANCHAR NIGAM LTD

(A Government of India Enterprises)

CORPORATE OFFICE

PAT SECTION

Bharat Sanchar Bhawan

H.C.Mathur Lane, New Delhi-01.

No.1-06/2016-PAT (BSNL)

Dated the 09.09.2016

To

All Heads of the Telecom Circles/Telecom Districts/Regions/

Projects/Telecom Stores/Telecom Factories & Other

Administrative Offices,

Bharat Sanchar Nigam Limited

Sub: Guidelines regarding recovery of excess/wrongful payments made to employees of BSNL.

Sir,

I am directed to refer to OM.No.18/03/2015-Estt (Pay-1), dated 02.03.2016 (copy enclosed), Department of Personnel & Training, Government of India, wherein, instruction has been issued for waiver of recovery of excess/wrongful payments, pursuant to the decision, dated 18.12.2014 of the Hon'ble Supreme Court in the case of State of

Punjab & Ors vs Rafiq Masih (White Washer) etc in C.A.No.11527 of 2014 (Arising out of SLP(C) No.11684 of 2012).

2. The matter of waiver of recovery of excess/wrongful payments, in the context of employee of BSNL has been examined in consultation with DoT. DoT has advised that wherever waiver recovery is considered necessary in the light of the above mentioned decision of the Hon'ble Supreme Court of India, the same may be sent to DoT giving full details of the case and the expenditure involved, for seeking express approval of Department of Expenditure for waiver for recovery after examining the individual cases on the basis of DOP&T OM, dated 06.02.2014.

3. In view of the above instruction of DoT in the matter, it is requested that wherever waiver recovery is considered necessary in the light of the decision of the Hon'ble Supreme Court, the proposal may be sent to DoT through the concerned cadre controlling branch in BSNL Corporate Office giving full justification and expenditure involved along with recommendation of HOC and IFA.

Yours faithfully,

Sd/-

(S.P.Bhatt)

Asstt. General Manager (Estt.)

18. Concurring with the reasons, assigned by the Central Administrative Tribunal, Madras Bench, in O.A.No.470 of 2014, dated 05.01.2016 and having regard to the judgment of the Hon'ble Apex Court in State of Punjab v. Rafiq Masih (White Washer) reported in 2015 (4) SCC 334, this Court is not inclined to interfere with the order of the Tribunal.

19. In view of the above, the Writ Petition is dismissed and the petitioners are directed to comply with the order of the Tribunal, dated 05.01.2016, within a period of eight weeks, from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petition is also closed.

Sd/-

Asst.Registrar (CS V)

/true copy/

Sub Asst. Registrar

skm

To

1. The Registrar,
Central Administrative Tribunal,
City Civil Court Building,
Chennai.

2. The Chief General Manager,
National Centre for Next Generation,
Net Work Circle, BSNL CTS Compound,
Nethaji Nagar, New Delhi 110023.

3. The Chief Accounts Officer,
O/o. Chief General Manager,
National Centre for Next Generation,
Net Work Circle, BSNL CTS Compound,
Nethaji Nagar, New Delhi 110023.

4. The Additional General Manager,
Regional Centre for Electronic Switching,
4th Floor, Flower Bazaar,
Telephone Exchange, NSC Bose Road,
Chennai 600 001.

1 cc to Ms.S Udayakumar, Advocate, Sr. 59313

W.P.No.36588 of 2016

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