

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Date of Decision: 21st August, 2017**

+ **W.P.(C) 47/2017**

RAJENDRA SINGH Petitioner
Through: Mr.Ranvir Singh, Advocate.

versus

UNION OF INDIA & ORS Respondents
Through: Mr.Rakesh Kumar, CGSC for
R-1 & 4.
Mr.Suryakant Singla &
Ms.Shivani Lahoti, Advocates
for R-2 & 3.

+ **W.P.(C) 3558/2017**

CHAIRMAN AND MANAGING DIRECTOR BHARAT
SANCHAR NIGAM LIMITED AND ORS Petitioners
Through: Mr.Suryakant Singla &
Ms.Shivani Lahoti, Advocates

versus

RAJENDRA SINGH AND ORS Respondents
Through: Mr.Ranvir Singh, Advocate for
R-1.
Mr.Chiranjeev Kumar & Mr.
Mukesh Sachdeva, Advocates for
R-2 & 3.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MS. JUSTICE REKHA PALLI

VIPIN SANGHI, J (ORAL)

CM No.15588/2017 in W.P(5C) No.3558/2017

Exemption allowed subject to all just exceptions.

The application stands disposed of.

W.P.(C) 47/2017

W.P(C) 3558/2017 & CM No. 15587/2017

1. The aforesaid two writ petitions are against the same order passed by the Tribunal on 19.11.2016 in OA No.4042/2014. For the purposes of convenience, Rajendra Singh, the petitioner in W.P.(C) No. 47/2017 is being hereinafter referred to as petitioner while Chairman & Managing Director, BSNL, is being referred to as the Respondent. W.P.(C) No. 47/2017 has been preferred by the petitioner-Rajendra Singh, and he is respondent No.1 in W.P.(C) No.3558/2017, who is aggrieved by that part of the order whereby the Tribunal held that the respondent would not be entitled to deduct an amount of Rs.5 lakhs from petitioner's gratuity and has thereby permitted deduction of Rs.4,71,335/-, from his gratuity of Rs.10 lakhs. The respondent had deducted Rs.9,71,335/- on account of excess payment earlier made to the petitioner from the gratuity payable to him. On the other hand, the petitioner Chairman and Managing Director BSNL and Others are aggrieved by the same order inasmuch

as the Tribunal has directed the respondent to make payment of Rs. 5 lakhs to Rajendra Kumar from the withheld amount of Rs.9,71,335/-. The factual position is that the petitioner joined as Technician under the Department of Telecommunications (DOT) on 07.02.1978 in a Class-III post. On 12.12.1989, he was promoted as Junior Telecom Officer (JTO) after rendering 12 years service, he was placed in the higher grade of Rs7,500-250-12,000/- on 12.12.2001. He was promoted as an Assistant Engineer on 11.01.2002 which also has the nomenclature of Sub Divisional Engineer (SDE) which is a Group 'B' post carrying the pay scale of Rs.7500-250-12,000. On implementation of the pay revision w.e.f. 01.01.2007, his pay scale was fixed at Rs.24,900-50,500/-. He was granted the first upgradation under the MACP Scheme on 11.01.2011 to Rs.29,100-56,500/. During this period, the petitioner had been absorbed in the BSNL.

2. On 09.12.2014, i.e. just prior to his retirement, the petitioner's pension was fixed at Rs.24,415/- w.e.f. 01.03.2015 and his gratuity was also fixed at Rs.10 lakhs. The retirement orders of the petitioner were issued on 27.02.2015 and he was superannuated w.e.f. 28.02.2015. After the petitioner had superannuated, on 25.05.2015, the respondent-DOT claimed that while he was in service, an overpayment of pay and allowances to the tune of Rs.9,71,335/- had been made to him. This was stated to be on account of excess payment of pay and allowances to the tune of Rs.8,92,025/- and excess payment of leave encashment amount to the tune of Rs.79,310/-. The respondent claimed that the petitioner's pay had wrongly been fixed

w.e.f. 01.12.1997 in the higher scale than to which he was entitled and the said mistake continued over the years. The respondent also sought to withhold the further amount of Rs.10,000/- from the gratuity payable to the petitioner towards un-assessed dues.

3. The respondent also communicated that the pension of the petitioner had been wrongly fixed on account of wrong fixation of his pay w.e.f. 01.12.1997, consequently, his pension was recomputed at Rs.22,435 (instead of Rs.24,415 per month). Aggrieved by the reduction in the amount of pension due to him and adjustment of the aforesaid amounts from his gratuity, the petitioner preferred the aforesaid original application before the Tribunal. Before the Tribunal, there was no issue raised with regard to the fact that the petitioner's pay has been wrongly fixed w.e.f. 01.12.1997. The admitted position was that an excess amount of Rs.9,71,335/- has been made to the petitioner by the respondent due to wrong fixation of his pay on 01.12.1997. Consequently, so far as the re-fixation of pension was concerned, the Tribunal did not find any merit in the grievance of the petitioner. So far as the adjustments sought to be made to the tune of Rs.9,71,335/- from the amount of gratuity due to the petitioner is concerned, the Tribunal held that the petitioner was not responsible for the wrong fixation of the petitioner's pay on 01.12.1997. After taking note of the decision of the Supreme Court in **State of Punjab & Ors. Vs. Rafiq Masih (White Washer) etc., 2015 AIR (SC) 696**, the Tribunal directed as follows:-

“10. In the conspectus of the above discussions, I dispose of the O.A. with the direction to the respondents to refund a sum of Rs.5 lacs to the applicant from the gratuity amount of Rs.9,71,335/- adjusted by them towards excess payments to the applicant in respect of his pay & allowances and leave encashment. This shall be done within a period of three months the date of receipt of a copy of this order. It is, however, clarified that the applicant shall not be entitled for any interest on this amount of Rs.5 lacs. The pension of the applicant fixed vide Annexure A-3 PPO shall remain unaltered.”

4. The submission of learned counsel for the petitioner is that the recovery was sought to be made from the gratuity of the petitioner, which could not be made in law since the petitioner's services were not terminated and he had been allowed to retire. In this regard, reference has been made to **Jaswant Singh Gill vs. Bharat Coking Coal Ltd., 2007(1) SCC 663**, and the decision of this Court in **Dunlop India Limited vs. Union of India, 2003 (106) DLT 135**, wherein the Courts have examined Sections 4(6) and (7) of the Payment of Gratuity Act, 1972.

5. The further submission of learned counsel for the petitioner is that, in any event, in view of the decision in **Rafiq Masih (supra)**, no adjustment could have been made or amount recovered from him in respect of excess payment since the said recovery was purported to be made within one year of the petitioner's retirement.

6. On the other hand, the submission of learned counsel for the respondent is that the amount of Rs.10,000/- withheld from the gratuity has already been released to him. He further submits that the Tribunal had no jurisdiction to deal with the disputes arising under the Payment of Gratuity Act, since the said Act provides as statutory remedy under Section 7(4) of the said Act.

7. Learned counsel further submits that the Tribunal has exercised its discretion by directing release of a part of the gratuity amount. He further submits that the exercise of this discretion should not be interfered by this Court. At the same time, he submits that the respondent was entitled to adjust the entire amount of excess payment of Rs.9,71,335/-, since the petitioner is neither a Class-III nor a Class-IV employee. He in fact retired as a Class-II/Group 'B' Officer.

8. We may first deal with the submission of learned counsel for the respondent with regard to lack of jurisdiction of the Tribunal to deal with the disputes raised by the petitioner. We do not find any merit in the submission of learned counsel for the respondent for the reason that, in fact, there was no dispute with regard to the entitlement of the petitioner to gratuity of Rs.10 lakhs. The respondent itself passed the order dated 04.12.2014 fixing the petitioner's gratuity at Rs.10 lakhs. Even when the respondent passed the subsequent order dated 25.05.2015, the respondent did not state that the petitioner was not entitled to gratuity of Rs.10 lakhs. In fact by this order all that has been done is to make an adjustment from the

amount of gratuity of Rs.10 lakhs, to the tune of Rs.9,71,335/- which included overpayment of pay and allowances of Rs.8,92,025/- and leave encashment of Rs.79,310/-. Thus, the entitlement of the petitioner's gratuity was never questioned by the respondent. In our view, the real issue in the present case is with regard to the recovery sought to be made by the respondent with respect to overpayment of pay and allowances from the petitioner who was a retiring employee, it was not with regard to fixation of withholding of the petitioner's gratuity. This submission of the respondent, is therefore, rejected. The decisions relied upon by the petitioner in **Jaswant Singh Gill** and **Dunlop India Limited** (*supra*), in fact, are not applicable in the facts of the present case. Since no dispute with regard to the entitlement of the petitioner to gratuity of Rs. 10 lakhs, was ever raised. As noticed above, the dispute is only with regard to the recovery/adjustment of overpayment made to the petitioner during his service career.

9. The Tribunal has returned the finding that the petitioner was not responsible for wrong fixation of his pay and allowances from 01.12.1997. The mistake was found to be entirely attributable to the respondent. That being the position, the principles laid down in **Rafiq Masih** (*supra*) were squarely attracted in the facts of the present case. Though the petitioner did not retire either as a Class-III or Class-IV employee and, admittedly, retired as a Class-II Officer, the principle laid down in Para 12 (ii) of the **Rafiq Masih** was attracted in the facts of the present case. The same provides that "recovery by the employers would be impermissible in law; (ii)

recovery from retired employees or employees who are due to retire within one year from the order of recovery.” The same would also be recovered by clause (iii). Even as per the claim of the respondent, overpayments which are sought to be recovered/adjusted pertain to almost 18 years i.e. from 01.12.1997. Para 8 of the judgment of Supreme Court in **Rafiq Masih’s** case (supra) reads as follows:-

“8. The Hon’ble Apex Court in the case of recovery of excess payments made to government servants in Rafiq Masih’s case (supra) has laid down the following broad principles:-

“12. 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."

10. Learned Counsel for the petitioner has drawn our attention to the decision of the Supreme Court in **B.J. Akkara vs. Government of India**, 2006 (11) SCC 709 to submit that in similar circumstances the Supreme Court did not permit recovery being made even from Class-I/Group 'A' Officers. The said case pertains to Lieutenant General R.K. Upadhyay. The petitioner before the Supreme Court included Lieutenant General R.K. Upadhyay who had been made payments on basis of a circular dated 07.06.1999, which benefit was withdrawn vide circular dated 11.09.2001. Upon the said circular being challenged, the Supreme Court permitted recovery of excess amount paid only after the issuance of the circular dated 11.09.2001 which was challenged by the petitioners unsuccessfully. Thus till the issuance of the circular, no recovery was permitted to be made of the excess amount paid to the petitioners therein.

11. The Tribunal has sought to permit partial recovery by directing refund of Rs.5 lakhs out of the recovered amount of Rs.9,71,335/-. There is no basis for the same. Since the recovery pertain to amounts paid in excess w.e.f. 01.12.1997 i.e. nearly 18 years prior to the retirement of the petitioner, in our view, the said recovery was not justified. Therefore, the recovery/adjustment of the amount of Rs.8,92,025/- could not have been made from the petitioner which was amount paid to him towards wrong fixation of his pay and allowances w.e.f. 01.12.1997. However, the amount over paid to the petitioner towards leave encashment, in our view, could have been recovered from the petitioner. This is for the reason that the amount of leave encashment would be computed upon taking final account of the unavailed leave lying in petitioner's account at the time of his superannuation which happened only on 28.02.2015. Thus, the said recovery was of recent origin. Accordingly, we dispose of the present petition by modifying the direction issued by the Tribunal. We direct the respondent to refund the amount of Rs.8,92,025/- recovered from the petitioner towards pay and allowances. At the same time, we uphold the recovery of Rs.79,310/- from the amount payable to him. So far as re-fixation of the petitioner's pension is concerned, this Court had expressed the view on 09.01.2017 itself, that the Court was not inclined to interfere with the said re-fixation while issuing notice in the writ petition. Thus, the re-fixation of pension of the petitioner shall remain the same.

12. The petitions stand disposed of with the said observations.

VIPIN SANGHI, J

REKHA PALLI, J

AUGUST 21, 2017

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