IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION

APPELLATE SIDE

W.P.A. 25888 of 2016

Rabindra Nath Sen

-vs

Union of India & Ors.

For the Petitioners	: Mr. Pratik Dhar, Sr. Adv. Mr. Pappu Adhikari, Adv.
For DVC	: Mr. Jaydip Kar, Sr. Adv. Mr. Dinabandhu Dan, Adv. Mr. Dipankar Ghosh, Adv.
For NTPC Limited	: Mr. Piush Chaturvedi, Adv. Mr. Uttam Kumar Mandal, Adv.
For NSPCL	: Mr. Uttam Kumar Mandal, Adv. Ms. Maitree Roy, Adv.
For Union of India	: Mr.Bhudeb Chatterjee, Adv.
Hearing concluded on	: 24.04.2023
Judgment On	: 17.05.2023

Saugata Bhattacharyya, J.:

1. Petitioner was appointed as Chairman of Damodar Valley Corporation (hereinafter referred to as "DVC") vide order dated 9th June, 2011 issued by

the Director, Ministry of Power, Government of India. Based on such appointment the General Manager (HR) of National Thermal Power Corporation Limited (hereinafter referred to as "NTPC") issued an Office Order dated 10th June, 2011 thereby releasing the petitioner w.e.f. 10th June, 2011 to take over the assignment of Chairman, DVC. It was stipulated in both the orders dated 9th June, 2011 and 10th June, 2011 that the terms and conditions regulating appointment of the petitioner would be issued separately by the Ministry of Power after receipt of charge assumption report from him. The petitioner accordingly assumed charge of Chairman, DVC w.e.f. 10th June, 2011. Petitioner worked on deputation as Chairman, DVC for the period from 10th June, 2011 till 28th November, 2013 and was repatriated from DVC to NTPC and thereafter superannuated on 30th November, 2013.

2. The petitioner has approached this Court with the present writ petition claiming superannuation benefits as well as other benefits which were due to the petitioner in the form of pay, perks and allowances which he would have been paid had he not functioned as Chairman of DVC on deputation.

3. Mr. Pratik Dhar, learned senior advocate, representing the petitioner has also apprised this Court that in view of issuance of memo dated 27th March, 2018 by the undersecretary to the Government of India, Ministry of Power, it needs to be decided whether the NTPC is authorized to recover Rs.13,76,619/- from the petitioner due to release of superannuation benefits in favour of the petitioner on his retirement. The memo dated 27th March, 2018 also empowers the DVC to recover excess amount of Rs.8,41,690/- from the petitioner which according to the respondent authorities was paid in excess while he functioned as Chairman of DVC on deputation for the period from 10th June, 2011 to 28th November, 2013.

4. On hearing the learned advocates representing the parties it appears that the petitioner was paid canteen allowances, prof lit reimbursement, washing allowances and other allowances during his tenure as Chairman of DVC which according to the petitioner he is entitled to draw and the same is disputed chiefly by the DVC contending such allowances were not payable to the petitioner in view of settlement of terms and conditions of the deputation service of the petitioner in terms of the letter dated 3rd July, 2013 issued by the Section Officer, Ministry of Power, Government of India.

5. It has been contended on behalf of the petitioner by Mr. Dhar that since the petitioner was on deputation in DVC as Chairman the terms and conditions of service of the petitioner being the CEO of NTPC would govern the service rendered as Chairman in DVC during the period of deputation; therefore, petitioner should not be put to less advantageous situation upon denial of payment of aforesaid allowances while working in DVC. It has also been argued that service rendered in borrowing organization (DVC) does not sever the relationship of the petitioner with the lending organization (NTPC). In this regard reliance has been placed on Standard Terms and Conditions of Deputation which is applicable in the case of employees of NTPC who are sent on deputation to borrowing organizations. It has been argued that as per said Standard Terms and Conditions of Deputation of NTPC other perks and facilities which are payable to the employees of NTPC are payable to the petitioner while functioning as Chairman of DVC on deputation as such the proposed recovery of alleged excess drawn amount of Rs.8,41,690/- is unreasonable and impermissible.

6. It has further been contended that emoluments and salary were paid to the petitioner during his tenure in DVC on the fund being transmitted by NTPC to DVC for release of such service benefits; therefore, the right of the petitioner to receive aforesaid four allowances ought not to have been

curtailed taking into consideration the deputation service rendered by the petitioner in DVC as Chairman.

7. Attention of this Court has also been drawn to letter dated 27th August, 2015 issued by the member-secretary DVC addressed to NTPC whereby it was intimated to NTPC that alleged excess drawn amount which was paid to the petitioner needs to be recovered since DVC was facing adverse criticism from Ministry of Power and CVC due to non-recovery and steps were taken by the concerned authority of DVC to adjust the excess drawn amount from the pending bills of NTPC employees. Subsequently, on behalf of NTPC it was intimated vide letter dated 6th October, 2015 and also by subsequent letter dated 26th July, 2016 to the Ministry of Power as well as to the DVC that pay structure of the petitioner should have been as per pay structure of NTPC since the petitioner was on deputation and it has further been clarified by the NTPC that he may be permitted to continue to get perks and all allowances as applicable under IDA pay scale pattern as per pay revision of the executives in a total pay package being cafeteria approach. These two letters of NTPC dated 6th October, 2015 and 26th July, 2016 are heavily relied upon by the petitioner during the course of hearing and specific prayer has also been couched in the writ petition for giving credence to these two letters.

8. Reliance has also been placed on 'Annexure P-46' to the supplementary affidavit affirmed by the petitioner containing an order dated 10th November, 2020 issued by the under Secretary, Government of India, Ministry of Power wherein the proposal of DVC dated 16th November, 2016 and 11th April, 2017 regarding grant of perks and allowances under cafeteria approach in respect of full time Board members of DVC was approved. It is submitted on behalf of the petitioner that being the Chairman of DVC he was one of the ex-officio Board members of DVC, therefore, in order to resolve the issue involved in this writ petition such order dated 10th

November, 2020 of the Ministry of Power should be given effect to for extending the benefit of allowances under cafeteria approach.

9. It is further contended that it is true that petitioner furnished an undertaking dated 27th December, 2013 but on reading such undertaking it cannot be construed an undertaking simpliciter. Vide such undertaking dated 27th December, 2013 while the petitioner undertook that on intimation by DVC for recovery of excess pay and allowances if any paid to the petitioner the NTPC would make necessary adjustment from retirement dues payable to the petitioner for remitting the same to DVC. A caveat was attached therein to the extent of granting pay protection which petitioner enjoyed in NTPC before he was sent on deputation to DVC and request was made in the said undertaking for remittance of different contribution as applicable for deputation service. In this regard reliance has also been placed on behalf of the petitioner on the order of the Hon'ble Division Bench dated 28th November, 2018 passed on an intra-court appeal being FMA 1457 of 2017 preferred by the petitioner against the order of dismissal passed by the learned Single Judge on this writ petition. In the said order the Hon'ble Division Bench observed that in the second paragraph of the letter (undertaking) the appellant (petitioner) had made it clear that the last pay drawn by him in NTPC, from where he was sent on deputation, should be protected and he was ready to accept whatever was payable in terms of the present terms and conditions with the understanding that the balance would be paid at a later date.

10. Drawing attention to the affidavit affirmed on behalf of the Ministry of Power (MOP) Government of India it has been contended that recovery on allegation of excess amount drawn by the petitioner was proposed in a meeting held on 2nd February, 2018 under the chairmanship of Joint Secretary (MOP) with the officers of DVC and NTPC and it was resolved two separate amounts would be recovered from the petitioner, one by NTPC and

another by DVC based on a complaint dated 20th January, 2015 which was forwarded by CVC to the concerned authorities. According to the petitioner such complaint was not supplied to the petitioner and the decision was taken unilaterally by the Ministry of Power, Government of India without granting opportunity to the petitioner to deal with such complaint and make deliberation thereof.

11. The recovery proceeding initiated by the respondents from the service benefits released in favour of the petitioner is based on claim of Rs.8,41,690/- towards alleged excess payment made to the petitioner by releasing perks and allowances while serving on deputation in DVC and Rs.13,76,619/- which NTPC is to recover from the superannuation benefits as per direction of the Ministry of Power, Government of India.

12. While summarizing the points argued on behalf of the petitioner it has been submitted by Mr. Dhar that at the time of commencement of deputation service w.e.f. 10th June, 2011 petitioner was not made aware of the terms and conditions of his deputation service and subsequently by issuing letter dated 3rd July, 2013 perks and allowances under cafeteria approach which was payable while serving in NTPC cannot be curtailed by placing the petitioner in disadvantageous position.

13. Petitioner has relied upon following decisions in support of the case made out in the writ petition: -

i) (1981) 2 SCC 642 (P.C. Wadhwa vs. State of Haryana & Ors.), paragraphs 3, 4, 5 and 6;

ii) (1997) 8 SCC 372 (State of Punjab and Ors. Vs. Inder Singh & Ors.), paragraph 18;

14. DVC is represented by Mr. Jaydip Kar, learned senior advocate, who has made the stand of DVC clear before this Court by submitting that the case of DVC in connection with the proposed recovery to be made from the petitioner is confined to Rs.8,41,690/- which was paid towards perks and allowances to the petitioner during his deputation service specially for the period from 10th June, 2011 to May 2013.

15. On behalf of DVC attention of this Court has been drawn to letters dated 6th October, 2015 and 26th July, 2016 issued on behalf of NTPC addressed to the Ministry of Power which reveals the response of NTPC in the matter of proposed recovery which according to DVC is required to be made from the petitioner to the extent of Rs.8,41,690/-. On perusal of these two letters it appears that the NTPC had requested the ministry for fixation of pay structure of the petitioner as per pay structure of NTPC. Therefore, NTPC at that juncture thought it fit to grant pay protection to the petitioner in the matter of releasing perks and other allowances under cafeteria approach. According to DVC albeit prayer has been couched in the writ petition to take decision in terms of these two recommendations made by NTPC as contained in letters dated 6th October, 2015 and 26th July, 2016 but entitlement of the petitioner to enjoy aforesaid benefits is impermissible in view of the fact that these two letters of NTPC are mere recommendations and same cannot be implemented on issuance of mandamus.

16. As per the contentions of DVC petitioner was appointed on deputation as Chairman of DVC vide order dated 9th June, 2011 and at that point of time terms and conditions of deputation service of the petitioner were not finalized and after assumption of charge by the petitioner on 10th June, 2011 vide letter dated 5th June, 2012 terms and conditions of service of the petitioner were first communicated to DVC by the Ministry of Power. On being made aware of such terms and conditions of deputation service petitioner made a representation dated 14th June, 2012 addressed to the

Joint Secretary(Th), Ministry of Power requesting to take up the issue with Department of Public Enterprises/ Department of Personnel and Training, Government of India and on treating the service of the petitioner in DVC on deputation grant pay protection considering the last pay drawn by the petitioner in NTPC which would include perks, allowances, PRP etc. It has been submitted on behalf of DVC that final terms and conditions of deputation service of petitioner in DVC as chairman were issued vide letter dated 3rd July, 2013 of the Section Officer of Ministry of Power, Government of India which is 'Annexure P-23' to the writ petition. In the said letter dated 3rd July, 2013 clause 1.8 provides that other allowances/perks are only permitted in Central Public Sector Enterprises (CPSEs) and DVC is not a CPSE, hence petitioner would not be entitled to any other allowances and perks. It has further been provided under clause 1.10 of the said letter that the petitioner would not be entitled to superannuation benefits as available to the officials of NTPC of his status.

17. Placing reliance on this letter dated 3rd July, 2013 containing terms and conditions of deputation service of the petitioner it has been urged on behalf of DVC that the said letter dated 3rd July, 2013 has not been assailed in the writ petition thereby the same has reached finality which cannot be reopened at this stage when petitioner has retired from service on 30th November, 2013.

18. Petitioner after issuance of the letter dated 3rd July, 2013 made representations dated 5th July, 2013 and 22nd July, 2013 addressed to the concerned authority of the Ministry of Power, Government of India requesting last pay of the petitioner in NTPC to be protected by sanctioning perks and allowances under cafeteria approach. According to DVC such request made by the petitioner for change of terms and conditions of service to the extent of protecting last pay by releasing perks and allowances was not accepted by the concerned authority of Ministry of Power, therefore,

DVC is required to follow the terms and conditions as contained in letter dated 3rd July, 2013. On receipt of final terms and conditions of deputation service of the petitioner DVC stopped releasing perks and allowances from the month of June 2013 till date he remained as Chairman, DVC i.e. 28th November, 2013. In this regard reliance has been placed on page 48 of the affidavit-in-opposition used on behalf of DVC wherefrom it transpires under four sub-categories under the heading Earnings (Drawn) namely canteen allowance, prof lit reimbursement, washing allowance and other allowances payments which were made till May 2013 were not made from the month of June 2013 and a detailed calculation has been furnished wherefrom it also appears that Rs.8,41,690/- was found to be overdrawn on account of payment of aforesaid four allowances for the period from June 2011 to May 2013. As per submissions of DVC this sum of Rs.8,41,690/- has been drawn by the petitioner in excess in view of finalization of terms and conditions of service of the petitioner in DVC as emanates from the letter dated 3rd July, 2013.

19. On the contention of the petitioner that he is entitled to get benefit of Standard Terms and Conditions of Deputation of NTPC is disputed by DVC on the score that such Standard Terms and Conditions of Deputation are applicable when an employee of DVC is sent on deputation to a borrowing organization. Petitioner is not an employee; he was working as Chief Executive Officer of NTPC and served on deputation in DVC as its chairman. Mr. Kar has argued that proposed initiation of recovery proceeding in consideration of payment of excess amount of Rs.8,41,690/- towards perks and allowances by DVC cannot be questioned by the petitioner in absence of challenge being thrown to the letter dated 3rd July, 2013 finalizing terms and conditions of deputation service of the petitioner. Permitting the petitioner to enjoy the benefits of perks and allowances while working on deputation as chairman of DVC thereby restraining DVC from recovery of Rs.8,41,690 from the petitioner would result in alteration of terms and conditions of service which may not come within the ambit of judicial review.

20. On absence of pleadings in the writ petition to challenge the letter dated 3rd July, 2013 following decisions have been relied upon on behalf of DVC -

i) (2003) 8 SCC 40 (V.K. Majotra vs. Union of India & Ors.), paragraph 8;

ii) (2011) 14 SCC 243 (State of Jammu & Kashmir & Ors. vs. Ajay Dogra), paragraph 10,15 and 18;

21. NTPC is represented by Mr. Piush Chaturvedi, learned advocate who upon placing reliance on the affidavit affirmed on behalf of NTPC submits that Rs.13,76,619/- has been released in favour of the petitioner towards superannuation benefits, leave salary contribution and provident fund. However, it has been submitted that in the event it is found by the Court that such amount has been paid in excess to the petitioner which he is not entitled to receive in view of letter dated 27th March, 2018 the same may be refunded to NTPC by the petitioner. Mr. Chaturvedi has relied upon the judgment of the Apex Court reported in (2016) 14 SCC 267 (High Court of Punjab & Haryana & Ors. vs. Jagdev Singh) in view of undertaking furnished by the petitioner on 27th December, 2013.

22. Since during course of hearing of the writ petition no stand was expressed on behalf of Union of India being the respondent no.1 and on behalf of respondent nos. 2 to 6 by passing order dated 20th July, 2022, this Court directed respondent nos. 2 and 3 to file a report in the form of affidavit explaining the reason behind taking such decision to recover the said sum of Rs.13,76,619/- from the superannuation benefits of the petitioner. It was also stated in the said order dated 20th July, 2022 that such order dated 27th March, 2018 issued by the Under-secretary to the Government of India was passed at the juncture when the writ petition was

dismissed by a coordinate Bench on 8th March, 2017 and an intra-court appeal against such dismissal order dated 8th March, 2017 being FMA 1457 of 2017 was pending before the Hon'ble Division Bench.

23. Pursuant to such direction dated 20th July, 2022 an affidavit was affirmed by one Dilip Kumar being Under-secretary to the Government of India, Ministry of Power (MOP) wherein it has been disclosed that a complaint dated 20th January, 2015 was made by Padamjit Singh being forwarded by CVC vide its office memo dated 2nd April, 2015 on alleged excess drawn amount by the petitioner being the ex-chairman of DVC and the report was sought from the Ministry of Power. It was also averred in the said affidavit that the ministry in consultation with CVO, DVC forwarded comments to the CVC vide office memo dated 22nd September, 2015 and dated 23rd March, 2016 wherein it was stated that Rs.20.55 lac had been paid in excess to the petitioner. According to the Ministry of Power, CVC vide its office memo dated 27th April, 2016 advised the ministry for speedy recovery of the aforesaid sum from the petitioner. In the process of recovering the aforesaid sum a meeting was conducted on 2nd February, 2018 under the aegis of Joint-secretary, (MOP) with the officers of DVC and NTPC and it was accordingly decided that a sum of Rs.22,18,309/- in total would be recovered from the petitioner out of which DVC would recover Rs.8,41,690/- and the NTPC would recover Rs.13,76,619/- from the petitioner. According to the learned advocate representing the Union of India as well as Ministry of Power the order dated 27th March, 2018 issued by the under Secretary to the Government of India is the outcome of such decision taken in the meeting dated 2nd February, 2018. According to the Ministry based on such decision and the order dated 27th March, 2018 DVC and NTPC need to recover the respective sums as indicated in the order dated 27th March, 2018.

24. Taking into consideration the submissions made on behalf of the respective parties and on perusal of the documents available on record it appears that petitioner was appointed in NTPC on 5th February, 1972 and prior to his transfer on deputation to DVC he was functioning as Chief Executive Officer (CEO) of NTPC. Vide order dated 9th June, 2011 petitioner was appointed as Chairman of DVC from the date of taking over charge for a period of 5 years or till date of his superannuation or until further orders whichever is earlier. Pursuant to the said order dated 9th June, 2011 appointing the petitioner on deputation as Chairman of DVC he was released w.e.f. 10th June, 2011 by the NTPC and assumed charge of the Chairman, DVC w.e.f. 10th June, 2011. Petitioner functioned as Chairman of DVC from 10th June, 2011 till 28th November, 2013 and was repatriated to NTPC and worked there for rest of the two days of his tenure i.e. 29th November, 2013 and 30th November, 2013 and thereafter superannuated from NTPC.

25. In considering the entitlement of the petitioner to receive allowances under cafeteria approach being IDA pattern while working as Chairman of DVC this Court needs to strike a balance in between the submissions made by Mr. Kar, representing DVC that letter dated 3rd July, 2013 needs to be considered by which according to DVC terms and conditions of deputation service of the petitioner were finalized *qua* right of the petitioner to get the benefit of pay protection without ignoring the fact that he was on deputation service being Chairman of DVC and prior to assuming charge as Chairman of DVC he was enjoying allowances under cafeteria approach. Question has also arisen for adjudication whether by permitting the petitioner to serve as Chairman of DVC on deputation, he can be put to less advantageous position in terms of payment of allowances under cafeteria approach which has been denied by the Ministry of Power on the strength of final settlement of terms and conditions of deputation service of petitioner vide letter dated 3rd July, 2013.

26. The crux of submissions made on behalf of DVC is absence of challenge to the said letter dated 3rd July, 2013 issued by the ministry fixing terms and conditions of the service of the petitioner as well as letters of NTPC dated 6th October, 2015 and 26th July, 2017 which are mere recommendations for granting pay protection to the petitioner which cannot be implemented by issuance of mandamus. It is also contended on behalf of the respondents specially DVC that at the time of appointing the petitioner on deputation as Chairman of DVC terms and conditions of service of the petitioner were not finalized and it was stipulated in the order dated 9th June, 2011 that terms and conditions regulating appointment of the petitioner would be issued later on.

27. At the same time question would also arise whether right of the petitioner to enjoy perks and allowances under cafeteria approach can be denied by fixing terms and conditions of deputation service after resumption of charge being Chairman of DVC by the petitioner vide letter dated 3rd July, 2013. In order to find out answer to this principal issue as involved in this writ petition this Court is required to find out nature of service rendered by the petitioner in DVC on deputation. In this regard reliance is placed on the judgment of the Apex Court reported in **(2012) 7 SCC 757 (Ashok Kumar Ratilal Patel vs. Union of India & Another)** wherein in paragraphs 13, 14 and 15 the Apex Court has succinctly decided the difference between transfer on deputation and appointment on deputation. For better understanding of the issue paragraph 13 is quoted below -

> *"13. Ordinarily transfers on deputations are made as against equivalent post from one cadre to another, one department to another, one organisation to another, or one Government to another; in such case a deputationist has no legal right in the post. Such deputationist has no right to be absorbed in the post*

> *to which he is deputed. In such case, deputation does not result into recruitment, as no recruitment in its true import and significance takes place as the person continues to be a member of the parent service."*

(emphasis supplied)

28. In the present case since petitioner was appointed on deputation on 10th June, 2011 being Chairman of DVC and subsequently repatriated to the lending organization which is NTPC on 28th November, 2013 the appointment of the petitioner as chairman by no stretch of imagination can be treated as appointment on deputation; it is transfer on deputation. In the case of transfer on deputation the law has been enunciated in **Ashok Kumar Ratilal Patel** (Supra) that the deputation does not result into recruitment, since no recruitment in its true import and significance takes place as the person continues to be a member of the parent service. On treating the petitioner's appointment in DVC as transfer on deputation applying the law laid down in **Ashok Kumar Ratilal Patel** (Supra) it can be inferred that petitioner even during his deputation service in DVC needs to be treated as member of his parent service.

29. Unfortunately, while settling the terms and conditions of the deputation service of the petitioner vide letter dated 3rd July, 2013 the Ministry of Power did not take the same into consideration and incorporated clauses 1.8, 1.10 and 2 which runs infra:-

> *"1.8. Other allowances/perks: It is only permitted in CPSEs and DVC is not a CPSE, hence he will not be entitled for any other allowances and perks."*
>
> *1.10. Superannuation Benefits: He will not be entitled to the superannuation benefits as available to the officials of NTPC Ltd. of his status.*

> *2. The above mentioned terms and conditions would be applicable till he remains on deputation with DVC. On reversion from deputation, he will be governed by the relevant rules laid down for the All India Services officers."*

30. It has been stated in clause 1.8 of the letter dated 3rd July, 2013 that other allowances/perks are only permitted in CPSEs and DVC is not CPSE and such finding of the ministry as contained in clause 1.8 went against the petitioner in enjoying allowances under cafeteria approach. Considering the law laid down in **Ashok Kumar Ratilal Patel** (Supra) it appears that ministry has treated the petitioner being chairman of DVC working on substantive basis without considering the fact that at the material point of time the petitioner was serving on transfer on deputation therefore the terms and conditions of service of DVC were not applicable in case of the petitioner. It goes to the root of the matter in adjudicating the right of the petitioner to enjoy allowances under cafeteria approach albeit he was in deputation service on transfer being the Chairman of DVC but such engagement of the petitioner ought not be treated as substantive engagement in DVC; rather he remained as member of the lending organization which in the present case is NTPC. Applying the ratio relating to transfer on deputation as decided in **Ashok Kumar Ratilal Patel** (Supra) it appears that incorporation of clauses 1.8, 1.10 and 2 by the ministry while finalizing the terms and conditions of service of the petitioner is erroneous.

31. Combined reading of clauses 1.10 and 2 of the letter dated 3rd July, 2013 exposes preposterousness of the terms and conditions of the deputation service of the petitioner. If ministry of power, DVC and NTPC are allowed to give effect to these two clauses namely 1.10 or 2 the petitioner will be subjected to gross injustice since he has accepted to be appointed as Chairman of DVC on deputation. As it has been discussed in preceding

paragraphs that in view of repatriation of the petitioner from DVC to NTPC on 28th November, 2013 the service rendered by the petitioner as the Chairman of DVC should be considered as transfer on deputation; therefore the right of the petitioner to receive superannuation benefits cannot be curtailed by incorporating clause 1.10 in the letter dated 3rd July, 2013 since he continued to be a member of the lending organization (NTPC). It is equally surprising how by incorporation of clause 2 in the said letter dated 3rd July, 2013 on reversion from deputation it was decided that the petitioner would be governed by the rules applicable for All India Services officers. On repatriated from DVC to NTPC the authority of NTPC has rightly released the superannuation benefits to the petitioner by treating the petitioner as an officer of NTPC. This Court being the court of equity in order to subserve complete justice upon appreciation of the facts involved in this writ petition in the context of said letter dated 3rd July, 2013 fixing terms and conditions of deputation service of the petitioner should pass an appropriate direction which should not be based on such preposterous letter dated 3rd July, 2013.

32. On reading of the said letter dated 3rd July, 2013 of the Ministry of Power discloses that there is absurdity so far as finalization of terms and conditions of service of the petitioner is concerned. Clause 2 as contained in the said letter which provides on reversion from deputation petitioner would be governed by relevant rules laid down for the All India Services officers. The basis of incorporation of aforesaid clause 2 is not discernible since prior to assumption of charge being Chairman of DVC on deputation petitioner was never the member of All India Services officers, therefore question of applicability of rules for All India Services officers cannot arise. It further appears that the decision of the Ministry of Power as contained in order dated 27th March, 2018 relating to recovery of two separate sums from the petitioner one by DVC another by NTPC is the outcome of the letter dated 3rd July, 2013. In view of the discussion with regard to invalidity of the letter dated 3rd July, 2013 as made in the preceding paragraphs equitable

consideration should not permit the respondent authorities to take steps based on letter dated 3rd July, 2013 and the order dated 27th March, 2018 both issued by Ministry of Power. It ought not to be ignored by this Court that if this erroneous decision relating to fixation of terms and conditions of the service of the petitioner is given effect to the petitioner after his superannuation on 30th November, 2013 would be compelled to refund the said two sums as indicated in the order dated 27th March, 2018.

33. Taking cue from the submissions made on behalf of DVC whether the invalidity of the letter dated 3rd July, 2013 and order dated 27th March, 2018 deciding to recover said two sums from the petitioner after retirement can be brushed aside on the specious plea that the letter dated 3rd July, 2013 has not been challenged in the present writ petition; while answering this technical point the Court has found that one of the grounds taken under Ground No. (v) in the writ petition is against incorrect interpretation of the terms and conditions of deputation service from NTPC to DVC. The petitioner has also prayed for payments which were payable to the petitioner in tune with pay, perks and allowances of NTPC. The test which is required to be conducted in order to examine the point taken by DVC that there is no express challenge being thrown to letter dated 3rd July, 2013, is whether the issue is pleaded in the petition or not.

34. In this regard reliance is placed on **AIR 2005 SC 3165 (Ishwar Dutt vs. Land Acquisition Collector and another)** paragraph 34 and 35; it has been decided by the Apex Court that the issue has to be pleaded before the Court in order to get adjudication on such issue.

35. V.K. Majotra (Supra) as relied upon on behalf of DVC to highlight the letter dated 3rd July, 2013 containing terms and conditions of deputation service of the petitioner which according to DVC has not been specifically

challenged in the writ petition. Therefore, in absence of challenge it would be improper to decide on such fixation of terms and conditions of service and to interfere with recovery of alleged excess drawn amount by the petitioner from his terminal benefits which does not hold much water since in V.K. Majotra (supra) writ courts were advised to decide the petition on the points raised therein in the context of failure to question the various relevant provisions of the statute which were under consideration before the Court. The method which was adopted by the High Court in the matter of appointing Vice Chairman was dehors the relevant provisions of the statute when there was no specific challenge thrown to such provisions was found by the Apex Court which is impermissible since parties were taken by surprise on consideration of such issue by the High Court.

36. Similarly in Ajay Dogra (Supra) as relied upon on behalf of DVC the Apex Court was considering whether it was open to the High Court to ignore the statutory prescription relating to criteria and standard of physical conditions in the matter of recruitment when advertisement has been published pursuant to such statutory prescription. Since the relevant rules prescribing physical conditions were not under challenge, it was decided that the issue was beyond pleadings albeit the same was decided by the High Court ignoring the ambit of such pleadings. But in the present case at my hand the situation is completely different. Court is considering whether deputation service of the petitioner on transfer for a period of 2 years 6 months approximately could deny petitioner’s right to enjoy allowances and perks under cafeteria approach which petitioner was receiving while serving as CEO of NTPC and after his repatriation from DVC no adverse case has been made by NTPC that such perks and allowances would not be payable to the petitioner. Whether transfer of petitioner on deputation for a short period in order to render service as chairman of DVC can take away the right of the petitioner to enjoy such perks and allowances which he was enjoying in DVC?

37. It also needs to be taken into consideration that the final order for recovery was issued by the Ministry of Power on 27th March, 2018 after filing of the writ petition on 11th November 2016 when the writ petition stood dismissed by the order of a coordinate Bench dated 8th March, 2017 and the intra-court appeal of the petitioner being FMA No. 1457 of 2017 was not decided by the Hon'ble Division Bench. Vide order dated 28th November, 2018 passed on the intra-court appeal being FMA No. 1457 of 2017 the writ petition stood revived and the Hon'ble Division Bench by setting aside the order of the coordinate Bench dated 8th March, 2017 remitted the writ petition to the single Bench for fresh consideration. Therefore, at the time of instituting the writ petition petitioner had no occasion to challenge the final order of recovery issued by Ministry of Power dated 27th March, 2018. The letter dated 3rd July, 2013 issued by the Section Officer, Ministry of Power is a part of record being "Annexure P-23" of the writ petition and after receipt of the same the petitioner vide representations dated 5th July, 2013, 22nd July, 2013 and 24th May, 2016 approached the concerned respondents to modify the terms and conditions of his deputation service in order to protect his last pay and other benefits which he was enjoying while working as Chief Executive Officer (CEO) of NTPC prior to commencement of deputation service in DVC. Even Additional Secretary, NTPC vide letter dated 19th August, 2013 addressed to Director (Thermal), Ministry of Power, Government of India with copy to DVC indicated certain shortcomings with regard to fixation of terms and conditions of deputation service of the petitioner and it was stated therein that the option which was offered to others who were on deputation from NTPC to DVC as per Standard Terms and Conditions for electing pay of parent organization with deputation allowances or the pay of the post of appointment on deputation was not given to the petitioner. By other letters dated 2nd December, 2014, 6th October, 2015 and 26th July, 2016 NTPC has repeatedly requested the Ministry of Power as well as DVC to give pay protection to the petitioner which he was enjoying in NTPC prior to commencement of deputation

service in DVC. It appears in view of nature of service rendered by the petitioner in DVC he conspicuously opposed fixation of terms and conditions of service of the petitioner based on letter dated 3rd July, 2013 and the final effect of the letter dated 3rd July, 2013 was given vide order dated 27th March, 2018 during pendency of the legal proceedings before this Court. These aforesaid facts have been narrated in the writ petition with prayer to release benefits which includes allowances and perks under cafeteria approach. Therefore, adjudication on the right of the petitioner to get the benefits of perks and allowances under cafeteria approach while working in DVC on deputation on appraisal of letter dated 3rd July, 2013 would not lead to a situation where DVC would be taken aback by such consideration at the time of disposal of the writ petition.

38. This Court is also required to advert to the undertaking dated 27th December, 2013 furnished by the petitioner. In view of the order of the Hon'ble Division Bench dated 28th November, 2018 it need not to be dilated further since it has been observed therein that the 2nd paragraph of the undertaking dated 27th December, 2013 made it clear that the last pay drawn by him at NTPC, from where he was sent on deputation, should be protected and he was ready to accept whatever was payable in terms of the present terms and conditions with the understanding that the balance would be paid at the later date. Therefore, it is pellucid that the undertaking dated 27th December, 2013 is not an undertaking simpliciter but it is a conditional one. Performance as per the said undertaking depends upon conditions attached to the said undertaking including entitlement of the petitioner to get pay protection as well as perks and allowances under cafeteria approach while functioning as chairman in DVC on deputation. Since this Court has already held upon placing reliance on the ratio decided in **Ashok Kumar Ratilal Patel** (Supra) that the petitioner being transferred on deputation for a limited period in DVC to function as chairman, the petitioner continues to be a member of the parent service (lending organization). Once entitlement of the petitioner to receive perks and

allowances under cafeteria approach while functioning in DVC as chairman is decided the undertaking dated 27th December, 2013 cannot act as a fetter in extending such benefit in favour of the petitioner considering the interpretation subscribed by the Hon'ble High Division Bench in the order dated 28th November, 2018.

39. Same analogy would apply while dealing with argument of NTPC made by Mr. Piush Chaturvedi, learned advocate. Mr. Chaturvedi though has made fair submission that NTPC would follow the decision to be taken by this Court while adjudicating the issue involved in this writ petition but at the same time could not resist his temptation to rely on Jagdev Singh(supra). But in view of the discussions made by this Court above on the undertaking dated 27th December, 2013 it can safely be concluded that ratio decided in Jagdev Singh (Supra) will not be a bar in releasing perks and allowances under cafeteria approach to the petitioner in view of nature of undertaking furnished by the petitioner and the subsequent interpretation on such undertaking subscribed by the Hon'ble Division Bench in the order dated 28th November, 2018.

40. By order dated 27th March, 2018 Ministry of Power also decided to recover Rs.13,76,619/- from the petitioner through NTPC. The basis of such recovery to the tune of Rs.13,76,619/- has not been spelt out in the order dated 27th March, 2018. Affidavit affirmed on behalf of the Ministry of Power disclosed that there was a CVC intervention based on a complaint dated 20th January, 2015 regarding overdrawal of salary and allowances. This Court is at a loss whether decision can be taken by the employer to recover an amount as stated in order dated 27th March, 2018 of the Ministry of Power from the superannuation benefits of the petitioner unilaterally without granting the petitioner opportunity to make deliberation on such issue of overdrawal. It has already been discussed above that there is absurdity in the letter dated 3rd July, 2013 in view of incorporation of clauses 1.10 and 2

therein by which it was provided on repatriation of the petitioner he would be governed by the relevant rules laid down for All India Services officers. Petitioner never was a member of All India Services cadre and after repatriation he worked as an officer of NTPC till his superannuation on 30th November, 2013. Therefore, service of the petitioner at the time of superannuation was governed by rules applicable in case of officers of NTPC which is a CPSE. The authorities of NTPC rightly released superannuation benefits in favour of the petitioner after his retirement on application of extant rules prevalent at the material point of time governing the service of officers to NTPC. Therefore, the decision of the Ministry of Power to recover Rs.13,76,619/- by issuing order dated 27th March, 2018 is ex-facie illegal which depicts non-application of mind.

41. Furthermore, the Court is considering entitlement of the petitioner to receive perks and allowances under cafeteria approach which was admissible to him when he was in lending organization (NTPC) while working in the borrowing organization (DVC) on being deputed on transfer for a period of 2 years 6 months approximately and after his repatriation to lending organization (NTPC) whether the right of the petitioner to enjoy superannuation benefits which he could have enjoyed had he not been sent on deputation to DVC, can be curtailed or not. Taking note of the nature of controversy involved in this writ petition this Court being court of equity relies upon the judgment of the Apex Court reported in **(2013) 5 SCC 427 (Rajasthan State Industrial Development and Investment Corporation vs. Subhash Sindhi Cooperative Housing Society, Jaipur and Others)** ; in paragraphs 24 and 26 it has been succinctly held that while dealing with a writ petition, the Court must exercise discretion, taking into consideration a wide variety of circumstances, inter alia, the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ. The writ is equitable in nature and thus, its issuance is governed by equitable principles. Refusal of relief must be for reasons which would lead to injustice. The prime consideration for issuance of the writ is,

whether or not substantial justice will be promoted. Thus it is evident that a writ is not issued merely as is legal to do so. The Court must exercise its discretion after examining pros and cons of the case. Similarly, in the judgment of the Apex Court reported in **(2002) 1 SCC 100 (Roshan Deen vs. Preeti Lal)**; in paragraph 12 it has been held that the High Court under Article 226 and 227 of the Constitution is to advance justice and not to thwart it. The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The look out of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law the High Court is not expected to erase such justice in the name of correcting the error of law.

42. In above conspectus, the letter dated 3rd July, 2013 fixing terms and conditions of deputation service of the petitioner and order dated 27th March, 2018, both issued by Ministry of Power, Government of India, stand set-aside. Since NTPC has already paid Rs.13,76,619/- to the petitioner after his superannuation, NTPC is permanently restrained from recovering the said amount from the petitioner. The respondent authorities are also directed to release allowances to the petitioner which were not paid for the period from June, 2013 till the last date of petitioner's deputation service in DVC within a period of four weeks from the date of communication of this order.

43. Since in terms of the order of the Hon'ble Division Bench dated 28th November, 2018, Rs.8,41,690/- is lying deposited with the Registrar General, High Court at Calcutta, the Registrar General is directed to liquidate the fixed deposit account and pay the said amount to the petitioner along with accrued interest within a period of 4 weeks from the date of communication of this order.

44. With the aforesaid directions the writ petition stands allowed and disposed of. There shall be no order as to costs.

45. Urgent photostat certified copy of this order, if applied for, shall be supplied to the parties expeditiously.

(Saugata Bhattacharyya, J.)