

**CENTRAL ADMINISTRATIVE TRIBUNAL
AHMEDABAD BENCH
Original Application No.340/2019**

Dated this the 18th day of February, 2021

**Reserved on : 27.01.2021
Pronounced on : 18.02.2021**

CORAM:

**Hon'ble Shri. Jayesh V. Bhairavia, Member (J)
Hon'ble Dr.A.K. Dubey, Member (A)**

Mr Altabhusen Vohara,
Son of Ismail Vohara,
Aged about 54,
Assistant General Manager,
Telephone Office, BSNL,
Dahod – 389151.

... Applicant

By Advocate Shri P H Pathak.

v/s

1 Union of India,
Notice to be served
Through The Secretary (DOT),
Ministry of Communication,
Department of Telecommunication,
Sanchar Bhavan, 20, Asoka Road,
New Delhi – 110 001.

2 Managing Director,
Bharat Sanchar Nigam Ltd,
BSNL Corporate Office,
New Delhi – 110 001.

3 Chief Account Officer (CA),
Office of Telecom District Manager,
Godhra – 389 001.

... Respondents

By Advocate : Shri H D Shukla – R-1
Shri Joy Mathew – R 2 & 3

ORDER

Per Shri Jayesh V Bhairavia, Member (J)

1 This application is filed by applicant under Section 19 of AT Act
challenging the impugned order dated 23.09.2019 issued by

respondent no.3 (Annexure A/1) whereby applicant has been informed that due to irregular extension of stepping up benefit granted to him, recovery of overpayment of pay and allowances paid will be effected from November 2019. Therefore, the applicant has sought following relief:

“(A) The Hon’ble Tribunal be pleased to declare the impugned decision of respondent no.3 at Annexure /1 dated 23.09.2019 as ex-facie illegal, unjust, arbitrary, violative of Art. 14 and 16 of the Constitution of India and be pleased to quash and set aside the same and direct the respondents not to recover any amount from the applicant .

(B) The Hon’ble Tribunal be pleased to declare that the applicant was granted the benefits of stepping up of pay with open eyes before a decade and therefore, it is not open to the respondents to recover any amount from the applicant and be pleased to direct the respondents to pay special cost and compensation to the applicant for the present litigation and mental tension and torture.

(C) The Hon’ble Tribunal be pleased to declare that respondents have no jurisdiction and power to alter the scale of pay granted to the applicant in year 2003 and be pleased to quash and set aside decision of respondents to adversely alter the scale of pay and consequentially recover the amount as per impugned order at Annexure A/1.

(D) Any other and further relief as the Hon’ble Tribunal deems fit and proper be granted in the interest of justice.”

2 The brief facts of the case are as under:-

- 2.1 The applicant was appointed as JTO, after he became eligible to be considered for promotion post, i.e SDE accordingly he was regularly promoted as Sub Divisional Engineer (SDE), Group ‘B’ Post.
- 2.2 The applicant came to know that one of his junior i.e. Mr R V Rafalia was drawing more pay. Therefore, he had demanded to step up his pay also on par with his junior. Accordingly by exercising power under the instructions stipulated in DoT letter dated 19.09.1996 the CGMT vide order dated 25.09.2007 (Annexure A/5), had conveyed his sanction of stepping up of applicant pay to Rs.13,675/- w.e.f. 10.03.2003 IDA scale of

Rs.11875-300-17275 (CDA scale of Rs.7500-250-12000) with date of next increment on 01.03.2004 on par with pay their junior R.V.Rafalia, Junagadh.

- 2.3 After applicant was granted stepping up of pay the respondent no.3 had issued show cause notice dated 24.12.2014 whereby the applicant was informed that as per CGMT letter dated 30.10.2014 the sanction of step up of pay on par with Shri R V Rafalia was withdrawn, accordingly his pay needs to be regularised and overpayment will be recovered from his salary. Further it has been stated in the said notice that as per letters dated 03.12.2014 and 24.12.2014 the applicant was put to notice for recovery of overpayment and directed to give their reply within ten days. (Annexure A/6).
- 2.4 Pursuant to the said show cause notice, the applicant had submitted his reply/representation dated 31.12.2014 (Ann. A/7), and requested to supply certain details and documents related to pay fixation and copies of clarifications issued by DOT and BSNL for fixation as per FR 22(1)(a)(i) during Lateral Advancement from JTO to the scale of SDE and thereafter for fixation on regular promotion during the period of 2002-2014. However, neither the said letter/representation was replied to by the respondents nor any documents were supplied to him.

But applicant received one more show cause notice dated 04.09.2019 asking him to submit explanation within seven days. The applicant had submitted a reply dated 11.09.2019 (Annexure A/9), and reiterated the request to supply him relevant documents. He also drew the attention of respondent no.3 to the hardship caused to him and stepping up of pay granted before 10 years. However, the respondents have

decided to step down the pay of the applicant vide the impugned order at (Annexure A/1).

It is also stated that initially the applicant had approached the Hon'ble High Court by way of filing SCA No.16585/2019 which came to be dismissed as withdrawn vide order dated 05.09.2019 (Ann A/10). Hence this OA.

- 2.5 It is submitted that the impugned decision of respondent no.3 is prima facie a case of non application of mind being arbitrary, illegal and unfair requires to be set aside. No recovery from the applicant be made in the light of law laid down in Rafiq Masih.
- 2.6 The applicant had never made any misrepresentation at the time of grant of stepping up of their pay.
- 2.7 The respondents had not given fair opportunity to the applicant of being heard before passing the impugned order.
- 2.8 It is submitted that the applicant had filed his reply/representation in response to show cause notice in the year 2014. Thereafter there was no response from the respondents and straightaway the impugned order was issued all of a sudden. Therefore the impugned decision suffers from violation of principles of natural justice. The impugned decision to recover such a huge amount from the applicant is ex-facie hard and harsh.

3 Per contra the respondents have filed their reply and denied the contention of the applicant. The standing counsel Shri Joy Mathew for the respondents submitted as under:-

- 3.1 The applicant while working as SDE sought for stepping up of his pay on par with his junior one Mr R V Rafalia. The said request of the applicant was accepted and vide order dated 25.09.2007 the competent authority has conveyed their sanction to step up the pay of the applicant on par with his junior. The

said order also stipulates the condition that the stepping up of the pay was subject to clarification received from BSNL office order No.1/2004-PAR(BSNL) dtd 18.03.2004 in connection with regulation of pay with reference to option exercised by these executive opting the IDA scale w.e.f. date of promotion subsequent to date of absorption i.e. 1.10.2000 and with reference to this office letter No. Fir Absorption G-B/2004-05 dated 02.04.04 as provided in para-4 of DOP & PW OM No. 4/18/87 P & PW(D) dtd 5.7.89.

- 3.2 Therefore, it is submitted by the respondents that the stepping up of pay of applicant on par with his junior was conditional and the said conditions have been made known to them at the time of grant of up gradation.
- 3.3 It is submitted that the extension of benefit of pay fixation under FR 22(1)(a)(i) granted to Shri R V Rafalia was withdrawn as stated in the order dated 29.09.2014 by the BSNL Corporate Office and accordingly vide order dated 30.10.2014 (Annexure R/2), the Assistant General Manager (Admin), BSNL Gujarat Circle, Ahmedabad had informed the O/o GMTD, including the o/o. BSNL, Junagadh that the Corporate Office vide its order dated 29.09.2014 clarified that the pay of Sh. R V Rafalia revised from the stage of Rs.13,675/- to the stage of Rs.13,375/- w.e.f. 10.03.2003 as pay of said Mr Rafalia was stepped down to 13,375/-, the claim of pay anomaly in respect of the SDEs does not stand and sanction issued for stepping up of pay are hereby withdrawn on the approval of competent authority. Since the sanction of stepping up of pay of Shri R V Rafalia was withdrawn and pursuant to it, the similar benefit of stepping up of pay granted to the present applicant was also liable to be withdrawn/stepped down. Accordingly, the pay of applicant was re-fixed by stepping down and the pay anomaly was removed. A notice was issued

for recovery of overpayment paid to applicant by the impugned order. Therefore, the action on the part of respondent is just and proper.

- 4 The learned counsel for applicant Shri P H Pathak submits that the issue involved in the present OA as also in OA 320/2018 are identical in nature. This Tribunal has granted interim relief in OA 320/2018 and restrained the respondents from recovering the excess amount from the applicant. It is submitted that applicant is senior to Sh. R V Rafalia and the applicant was granted benefit of higher pay/stepping up as per his own seniority, further the case of applicant is different than the case of Sh. R V Rafalia. It is also submitted that Sh. R V Rafalia and other identical SDEs have filed separate review applications before this Tribunal and same is pending. It is further submitted that the reply filed on behalf of the respondents is not by an authorised officer. In sum it is submitted that after grant of benefit of stepping up of pay the respondents cannot withdraw the same and is also not entitled to recover the excess payment.
- 5 No rejoinder has been filed by the applicant. At the same time counsel for the applicant submitted that since the issue involved is identical in both the cases, the matters in OA 320/2018, 340/2019 and CP-07/2020 were heard together and the arguments put forth are common and same may be considered.
- 6 The learned counsel Shri Joy Mathew submits that he has filed a common written submission in the present OA since the issue involved is identical to the issue in OA No.320/2018 and CP-07/20202.
- 7 It is averred that the counter reply/sur-rejoinder filed on behalf of respondents is by duly authorised officer of respondents. He denied the contentions of the applicant that the said officer of the respondents is not authorised to file affidavit. To substantiate the said submission the counsel for the respondents has placed reliance on the order dated

30.03.1990 passed by Principal Bench CAT in the case of Sh. D.P.Badola v/s Sh. Arvind Dave, Joint Secretary, (Personnel) (Annexure A).

- 7.1 Further, it is contended that in the case of Union of India v/s Bhanwar Lal Mundan, Civil Appeal No. 7292/2012 decided on 27.08.2013, (Annexure B), the Hon'ble Supreme Court of India dealt with an argument that when a long time has lapsed from the date of repatriation on promotion to the parent cadre, steps for re-fixation immediately prior to the superannuation of the respondent is neither permissible in law nor is it equitable; the Hon'ble Supreme Court negated the said contention and upheld the re-fixation of pay. It is submitted that the department had initiated proceedings for re-fix the pay and recovery of excess amount in the year 2014 which is much prior to their VRS. It is stated that applicant had applied for their VRS in the year 2018.
- 7.2 Learned counsel for the respondents by relying upon judgment passed by Hon'ble Apex Court in the case of State of Karnataka and Anr. v/s Mangalore University non-teaching employees association and ors reported in (2002) 3 SCC 302. (Annexure C)., submits that the Apex Court in the said judgment held that in all cases of violation of principles of natural justice, the Court exercising jurisdiction under Art. 226 of the Constitution of India need not necessarily interfere and set at naught the action taken. It is further submitted that this Tribunal in the case of Sh. R V Rafalia & in other OAs had considered the issue about withdrawal of higher pay and recovery of excess overpayment including the issue of violation of principles of natural justice. The counsel for respondent argued that the decision of the respondents to withdraw higher pay granted to the said Sh. R V Rafalia as also to recover the excess overpayment was upheld by this Tribunal and accordingly the pay of said Sh. Rafalia was re-fixed. Therefore, there is no reason why the same action

cannot be undertaken by the department in the case of applicant. As such, the respondent has correctly re-fixed the pay of the applicant and issued an order for recovery of over payment paid to them.

- 7.3 It is further contended that recently applicant no.5 in OA 320/18, on her own volition returned/repaid the entire amount which was paid in excess to her to the department. Therefore, though there were five applicant in the said OA, only three applicant have filed CP-07/20 in the present OA and raised the grievance that the respondent had not comply the directions issued by this Tribunal in its interim order dated 15.06.2018 whereby the respondents are restrained recovering any amount from the applicant . In fact, the respondent had not recovered any amount from the present applicant, it is also stated that separate reply has been filed in the CP. It is stated that at the time of grant of interim order in the favour of applicant the fact of demand of applicant to grant them stepping up pay on par with Sh. Rafalia was not made brought to the notice of this Tribunal and even otherwise it is undisputed fact that the applicant themselves submitted their representations and based on it the benefit of stepping up of the pay was granted on par with Sh. Rafalia subject to clarification issue by the competent authority.

In sum, it is submitted that the order passed by this Tribunal in the case of Sh. R V Rafalia & in other identical OA's are squarely applicable in the present case and hence applicant are not entitled to any relief.

- 8 Heard the parties and perused the materials on record.
- 9 In the present case as noticed hereinabove, undisputedly while applicant was working as JTO they were granted regular promotion to the post of SDE and accordingly their pay was fixed. However, one

Sh. R V Rafalia SDE, Junagadh junior to applicant , was granted higher pay, the applicant herein and other similarly placed SDEs had also claimed similar benefit of stepping up of their pay on par with Sh. Rafalia by filing their representation before the competent authority. It is also not in dispute that the respondents have considered the said representation of the applicant and the said benefit of higher pay by way of stepping up to the stage of Rs.13,675/- w.e.f. 10.03.2003 in the IDA scale of Rs.11875-300-17275 (CDA scale Rs.7500-250-12000) with DNI on 01.03.2004 on par with their junior Sh. R V Rafalia, SDE Junagadh vide order dated 17.03.2006 (Annexure A/4) was granted to the applicant .

Here it is apt to mention that the aforesaid order dated 17.03.2006 (Ann. A/4-SRJ/3), contained a condition that “**the extension of benefit of stepping up of pay was subject to clarification received from BSNL Office order No.1/2004-PAR(BSNL) dated 18.03.2004 in connection with regulation of pay with reference to option exercised by these executive opting the IDA scale w.e.f. date of promotion subsequent to date of absorption i.e. 1.10.2000 and also with reference to this office letter No. Fir “Absorption G-8/2004-05 dated 02.04.2004 as provided in para 4 of DOP & PW OM No.4/18/87 P & PW(D) dtd 05.07.1989”.** Therefore, in our considered view, undisputedly the stepping up of pay of the applicant was conditional as stated hereinabove.

- 10 It is further noticed that the respondents Corporate Office of BSNL vide its order dated 29.09.2014 (SRJ/4 “colly’), issued clarification and direction to the Chief General Manager, Gujarat Telecom Circle, Ahmedabad as under:-

“.....

2 “ it has been clarified by the Pers Branch that “*the intent and purport of EPP-2007 is to allow the executive an opportunity to exercise the option to get the benefit of up gradation under the old time bound scheme, if it becomes due prior to 0.0.2004 and in case he so desires. Having exercised such an option Sh. Rafalia cannot be governed by the old time bound upgradation scheme for this purpose any subsequent promotion. In fact, he is automatically governed by EPP-2007. Accordingly on his regular promotion as SDE(T) on 10.03.2003 in E-2*

scale, Sh. Rafalia may have to be granted the benefit of increment in E-2 scale in terms of Para II(V) of EPP-2007.”

3 Further, the ES Branch has also clarified that “the cases of those who have opted for the EPP have to be decided in accordance with the Executive Promotion Policy”.

4 You are, therefore, requested to take action accordingly to decide the case and recovery of overpayment if any may also be intimated to this office.”

Pursuant to aforesaid clarification/order dated 29.09.2014 the Chief General Manager, BSNL, Gujarat vide his order dated 30.10.2014 (Ann. SRJ/4 in OA 320/2018) directed the GM, BSNL, Junagadh **to re-fix** the pay of Sh. R V Rafalia at the stage of Rs.13,375 w.e.f. 10.03.2003 and over payment if any, may be recovered and revised pay fixation should be intimated to his office.

Accordingly, vide order dated 17.11.2014 the Office of GMTD, Junagadh intimated Sh. Rafalia that his pay fixation has been done in accordance with the clarification and direction issued by BSNL Corporate Office vide their letter dated 29.09.2014 and further the Circle Office Ahmedabad was directed to recover overpayment, at the same time Sh. Rafalia was also directed to credit excess payment of arrears.

It is noticed that the applicant herein who was granted extension of benefit of stepping up of pay on par with Sh. Rafalia have also been served with show cause notices in the month of December 2014 for recovery of excess payment on revision of pay due to stepping down their pay. In response to the said show cause notice, the applicant had submitted their reply/representations and sought certain documents based on which the impugned decision is taken and further requested not to effect any recovery.

It is further noticed that in the meantime, aggrieved by the order dated 17.11.2014 passed by the respondent regarding revision of pay and recovery of excess payment, said Sh. Rafalia had filed OA

458/2014 before this Tribunal and prayed for quashing and setting aside the same.

- 11 At this stage it is appropriate to mention that this Tribunal had occasion to consider the issue of validity, legality of the respondent's decision to withdrawal grant of higher pay to the SDEs and recovery of excess payments in the OA No.458/2014 of Sh. Rafalia & other identical OAs No. 459 and 460 of 2014, vide its common order dated 24.07.2017, this Tribunal upheld the decision of respondents to withdraw the said higher pay/stepping up of pay as also decision for recovery of excess payment by dismissing the said OAs. In our considered view, the observations and findings in Para-18 - 39 of the said common order dated 24.07.2017 are relevant as the controversy involved is identical and hence the same is reproduced for ready reference:-

“Para 18 - On perusal of the pleadings and documents annexed thereto and upon hearing the learned counsel of both the parties, the points that arise for our consideration are:

- (i) ***Whether the applicant under the Lateral Advancement Scheme having availed placement in higher pay scale of Rs.7500-250-12000 by the order dated 28.04.2003 with effect from 21.12.2002 and got his pay fixed under FR 22(1)(a)(i), is entitled to get his pay fixed once again under FR 22(1)(a)(i) on his promotion as SDE by the order dated 10.03.2003 and assumed higher duties and responsibilities of a superior post functionally.***
- (ii) ***Whether re-fixing his pay at the stage of Rs.13,375/- with effect from 10.03.2003 can be annulled on the ground of violation of principles of natural justice.***
- (iii) ***Whether the pay fixation under FR 22(1)(a)(i) at the time of promotion as SDE is as per the then existing policy.***
- (iv) ***Whether the order for recovery of over payment is bad in view of the judgment in view of judgment of Hon'ble Supreme Court in Rafiq Masih (White Washer) (supra)”***

“Para - 19. Point No. 1. To answer the above question No. 1, we may usefully refer to the judgment of the Hon'ble Supreme Court in the case of Union of India vs. Ashok Kumar Banerjee, (AIR 1998 SC 2102). The question that was articulated and determined by the Hon'ble Supreme Court in Ashok Kumar Banerjee (supra) is similar and identical to that of the question No. (i) articulated above. The facts in brief in Ashok Kumar Banerjee (supra), is that the respondent while working as Junior Engineer completed 15 years of service. He became entitled to be fitted in the higher scale of Assistant Engineer. He got his pay fixed by giving him the benefit of the increment as stated in FR 22(I)(a)(i). Thereafter, respondent was actually or functionally

*promoted as Assistant Engineer and he then wanted benefit of FR 22 (I)(a)(i) to be given to him once again as he had then assumed higher duties and responsibilities of a superior post functionally. Therefore, the question before the Hon'ble Supreme Court was whether the claim of **Shri Ashok Kumar Banerjee** (respondent) can be justified. The Hon'ble Supreme Court held that claim of Ashok Kumar Banerjee is not justified. It is worthy to refer to the relevant portion of the judgment, which reads as under:*

“6. In the present case, while working as Junior Engineer the respondent completed 15 years in the scale of Rs. 1640-2900 and he became entitled to be fitted in the scale of Rs. 2000-3500 of Assistant Engineers and got his pay fixed accordingly at Rs. 2600 by giving him the benefit of the increment as stated in FR 22(I)(a)(i) and as permitted by the second part of the OM. This was because, even though the O.M is dated 22.3.1991, it was Page 6/13 CENTRAL ADMINISTRATIVE TRIBUNAL (OA) Original Appl./458/2014 JUDGEMENT agreed that benefit of FR 22(I)(a)(i) would be given from 1.1.1991.

7. Thereafter, respondent was actually or functionally promoted as Assistant Engineer on 1.8.1991 and he then wanted benefit of FR 22(I)(a)(i) to be given to him once again as he had then assumed higher duties and responsibilities of a superior post functionally. Question is whether his claim is justified?

Quoting FR 22(I)(a)(i) at paras 8 and 9 the Hon'ble Supreme Court held as under:

8. In our view, the respondent having received the same benefit in advance, while working as Junior Engineer, and while not actually functioning as an Assistant Engineer, is not entitled to the same benefit of fresh fitment in the scale of Rs. 2000-3500 when he is, promoted on 1.8.1991 as Assistant Engineer. This is because as on 1.8.1991, he is not being fitted into the “time-scale of the higher post” as stated in the FR. That situation was already over when the OM was applied to him on his completion of 15 years. For the applicability of the FR 22 (I)(a)(i) it is not merely sufficient that the officer gets a promotion from one post to another involving higher duties and responsibilities but another condition must also be satisfied, namely, that he must be moving from a lower scale attached to the lower post to a higher scale attached to a higher post. If, as in this case, the benefit of the higher scale has already been given to him by virtue of the OM there is no possibility of applying this part of the FR which says:

“his initial pay in the time scale of higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued or rupees twenty five only, whichever is more.”

9. Further, the respondent is a junior officer in the category of Junior Engineers and he has already got the benefit of the FR on completion of 15 years. If he is to be given a second benefit on the basis of the same FR, then he would be getting more than his seniors, who might have got promoted earlier and might have got benefit of the FR 22(I)(a)(i) only once. Such an anomaly was not obviously intended by the FR.

10. *For the aforesaid reasons, the appeal is allowed and the order of the Tribunal is set aside and the OA is dismissed.”*

20. While applying the above to the facts and circumstances of the case on hand we note that by virtue of the Lateral Advancement Scheme dated 26.6.1990 (Annexure A/2) he was placed in the higher scale of Rs. 7500-250-12000 and his pay was fixed by giving him the benefit of FR 22 (I)(a)(i). Thereafter the applicant was actually or functionally promoted as SDE but the order dated 20.3.2003 in the very same pay scale of Rs. 7500-250-12000, vide Annexure A/5. Thus, while working as JTO he was drawing the pay scale of Rs. 7500-250-12000/- because of his placement under Lateral Advancement Scheme dated 26.6.1990, vide Annexure A/2. Under the similar/identical circumstances **in Ashok Kumar Banerjee (supra)** the Hon’ble Supreme Court categorically held that for the applicability of FR 22(I)(a)(i) it is not merely sufficient that the officer gets a promotion from one post to another involving higher duties and responsibilities **but another condition must also be satisfied, namely, that he must be moving from a lower scale attached to the lower post to a higher scale attached to a higher post.** In the case on hand it is an admitted fact that the applicant on his promotion as SDE did not move from a lower scale to a higher scale and the same is very much evident from the order dated 20.3.2003, vide Annexure A/5. While applying the facts and circumstances of the case **in Ashok Kumar Banerjee (supra)** and the findings of the Hon’ble Supreme Court, therefore we do not find any circumstantial flexibility or any additional fact. There we do not find any fault in the directions of the Corporate Office by its letter dated 29.9.2014. The argument of Shri P.H. Pathak runs counter to the ratio laid down by the Hon’ble Supreme Court in **Ashok Kumar Banerjee (supra)**.

21. We have carefully perused the Lateral Advancement Scheme dated 26.6.1990. The relevant clause is at para 2(V), which reads as under:

“On lateral placement in the scale of Rs. 2000-3500/- under this scheme, pay will be fixed under the provisions of FR.22.I(a)(i) subject to the condition that, on promotion to the TES Group ‘B’,, the official will continue to draw pay in the same scale without re-fixation.”

It is not the case of the applicant that the above clause in the Lateral Advancement Scheme dated 26.6.1990 either stands superseded or modified. The applicant is bound by the above clause as long as he admits the fact that on promotion as SDE he did not move from the lower post to a higher scale attached to the higher post. Therefore, we reiterate that the direction contained in Corporate Office letter dated 29.9.2014, vide Annexure A/1, does not call for any judicial interference. Accordingly, we answer the point No. 1 in the negative.

22. **Point No. (ii).** The other bone of contention of Shri P.H. Pathak is that the direction of the Corporate Office by its letter dated 29.9.2014 is in violation of principles of natural justice. We cannot afford to lose sight of the fact that pursuant to the direction contained in the Corporate Office letter dated 29.9.2014 by the letter bearing No. A-1/TBP Pay Fixation/Gr.A & B/464 dated 5.12.2014, vide Annexure A/10, the applicant was directed to show cause as to why the over payment of Rs. 1,31,148/- shall not be recovered on account of his pay being refixed at the stage of Rs. 13375/-. The applicant has replied to the said show cause notice. Before the direction was given effect to, the applicant was given ample opportunity to show cause as to why his pay shall not be refixed at the stage of Rs. 13,375/-. The direction is an internal

correspondence from one office to another office. Therefore, we hold that the principles of natural justice was strictly adhered to. The contention that no notice was issued is totally wrong and hence the impugned order cannot be interfered on the ground of principles of natural justice. Accordingly Point No. (ii), above is also answered in the negative.

23. Besides, the well settled position of law is that the concept of natural justice is not a fixed one. In this regard we may refer to the judgment of the Hon'ble Supreme Court in Haryana Financial Corporation and Another vs. Kailash Chandra Ahuja, (2008) 9 SCC 31, it is held therein as under:

*“It is settled law that principles of natural justice have to be complied with. One of the principles of natural justice is audi alteram partem (hear the other side). But it is equally well settled that the concept of “natural justice” is not a fixed one. It has many colours, shades, shapes and forms. Rules of natural justice are not embodied rules and they cannot be imprisoned within the straitjacket or a rigid formula. Even if hearing is not afforded to a person who is sought to be affected or penalized, **it can be argued that “notice would have served no purpose” or “hearing could not have made difference” or the person could not have offered any defence whatsoever.** The position earlier in English law was that non-compliance with natural justice rendered the decision null and void, and no further inquiry was necessary. The recent trend is of “prejudice”. **Even in those case where procedural requirements have not been complied with, the action has not been held ipso facto illegal unless it is shown that non-observance had prejudicially affected the applicant.:**”*

By applying the above to the facts and circumstances of the case at hand we are of the opinion that even if there was a show cause notice, the applicant could not have offered any defence whatsoever in view of the law laid down by the Hon'ble Supreme Court in **Ashok Kumar Banerjee (supra)**. Hence we reiterate our answer to point No. (ii) above.

24. **Point No. (iii)** Admittedly the applicant was promoted as SDE by the order dated 20.3.2003 pursuant to which his pay was fixed by the order dated 5.11.2004, vide Annexure A/6. As per the provisions of FR 22, the benefit of FR 22 (1)(a)(i) is not applicable in a case where the scales of pay are identical. The Hon'ble Supreme Court in Ashok Kumar Banerjee (supra) categorically held as under:

*“For the applicability of the FR 22 (1)(a)(i) it not merely sufficient that the officer gets a promotion from one post to another involving higher duties and responsibilities **but another condition must also be satisfied, namely, that he must be moving from a lower scale attached to the lower post to a higher scale attached to a higher post.**”*

25. It is the specific argument of Shri P.H. Pathak that the pay fixation under FR 22 (1)(a)(i) on promotion as SDE was done as per the then existing policy. The policy is FR 22 (1)(a)(i). The statutory rule of FR 22 (1)(a)(i) was not amended. Therefore, the question is whether an exercise could have been done by issuing any clarification contrary to the Rules. Such a question was considered by the Hon'ble Supreme Court time and again and it was held that statutory rules cannot be modified/altered by the instructions. It is not the case of the applicant that as on the date of fixing his pay under FR 22 (1)(a)(i) pursuant to his promotion as SDE, FR 22 (1)(a)(i) stood modified.

At this juncture, it is worthy to refer to the judgment of the Hon'ble Supreme Court in the case of Uttaranchal Jal Sansthan vs. Laxmi Devi & Ors., (2009) 7 SCC 205, at para 31 the Honble Supreme Court held as under:-

“Reliance has been placed on a purported Circular issued by the Uttaranchal Public Works Department dated 21.3.2002, assuming that the same can be taken into consideration, is in our opinion wholly irrelevant. Apart from the fact that such a contention had not been raised by the respondents before the High Court, we fail to understand how a mere circular letter which has no force of law shall prevail over the statutory rules.”

Therefore, we hold that the policy relating to pay fixation is FR 22 and that even if there was a clarification/memorandum, the same has no force and it cannot prevail over the statutory Rule. Hence we decline to agree with the argument of Shri Pathak. Accordingly, point No. 3 is answered in the negative.

26. The contention of Shri P.H. Pathak that the respondents having granted the benefit of FR 22 (1)(a)(i) cannot withdraw the same is also not tenable. An incorrect benefit given erroneously by the department by misreading of the service rules, cannot be a ground to claim erroneous benefit by perpetrating infringement of statutory service rules. The applicant cannot be permitted to contend before the Tribunal that the provisions of FR 22 should not be adhered to. In support of this, we may refer to the judgment of the Hon'ble Supreme Court in **Indian Council of Agricultural Research and Another vs. T.K. Suryanarayan and Ors., (1997) 6 SCC 766**, wherein it is held as under:

“Even it is some cases, erroneous promotions had been given contrary to the service rules and consequently such employees have been allowed to enjoy the fruits of improper promotion, an employee cannot base his claim in law courts for promotion contrary to the statutory service rules. Incorrect promotion either given erroneously by the department by misreading of the service rules or such promotion given pursuant to judicial orders contrary to service rules cannot be a ground to claim erroneous promotion by perpetrating infringement of statutory service rules. In a court of law, the respondents cannot be permitted to contend that the service rules should not be adhered to because in some cases erroneous promotion had been given. The statutory service rules must be applied strictly.”

In view of the above dictum of the Honble Supreme Court in Indian Council of Agricultural Research and Another vs. T.K. Suryanarayan and Ors. (supra) it is necessary for the respondents to apply FR 22 (1)(a)(i) strictly. Therefore, on this ground also we uphold the direction of the Corporate Office dated 29.9.2014.

27. **Point No. (iv)** The next question to be determined is as to whether the over payment made pursuant to the re-fixation at the stage of Rs. 13,375/- can be sustained or not. To substantiate the argument that no recovery can be effected, Shri P.H. Pathak, relied upon the case of Rafiq Masih (White Washer) (supra) whereas Ms. R.R. Patel placed reliance upon the case of Jagdev Singh (supra). We have carefully gone through the judgment in Jagdev Singh (supra). The judgment in Jagdev Singh (supra) is subsequent to Rafiq Masih (supra) and in fact the Hon'ble Supreme Court in Jagdev Singh (supra) referred to its earlier judgment in Rafiq Masih (supra). Referring to the fact that Jagdev Singh had given an undertaking, the Hon'ble Supreme Court held that the judgment

in **Rafiq Masih (supra)** has no application. We may refer to relevant portion of the judgment in **Jagdev Singh (supra)** as under:

“8.From the record of the proceedings, it is evident that when the Respondent opted for the revised pay scale, he furnished an undertaking to the effect that he would be liable to refund any excess payment made to him. In the counter affidavit which has been filed by the Respondent in these proceedings, this position has been specifically admitted. Subsequently, when the rules were revised and notified on 7 May 2003 it was found that a payment in excess had been made to the respondent. On 18 February 2004, the excess payment was sought to be recovered in terms of the undertaking.

9. The submission of the respondent, which found favour with the High Court, was that a payment which has been made in excess cannot be recovered from an employee who has retired from the service of the state. This, in our view, will have no application to a situation such as the present where an undertaking was specifically furnished by the officer at the time when his pay was initially revised accepting that any payment found to have been made in excess would be liable to be adjusted. While opting for the benefit of the revised pay scale, the Respondent was clearly on notice of the fact that a future re-fixation or revision may warrant an adjustment of the excess payment, if any, made.

10.

11. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking.”

28. In view of the above judgment of the Hon’ble Supreme Court in Jagdev Singh (supra) it is necessary for us to ascertain the fact whether applicant had given any undertaking at the time of fixing his pay under FR 22(I)(a)(i) on his promotion as SDE by the order dated 20.3.2003, vide Annexure A/5. We have perused the order of promotion dated 20.3.2003, vide Annexure A/5. Certain terms and conditions were attached to the said order of promotion, vide Annexure A/5. Condition No. 8 of the promotion order dated 20.3.2003 is as under:

“8. A declaration for any excess paid in inadvertently by the BSNL on this promotion prospects will be re-paid should also be exercised.”

In fulfilment of the above condition the applicant had given an undertaking dated 5.7.2004 and only thereafter his pay was fixed by the order dated 5.11.2004, vide Annexure A/6. The undertaking dated 5.7.2004 is produced by the respondents through their affidavit dated 30.5.2017 presented on 8.6.2017. It reads as under:

“I, R.V. Rafalia (Name) staff No. 110880 presently working as SDE (Designation) in the office of Bhesan hereby given the undertaking voluntarily that I have opted my fixation as per clause 5 of presidential order. I understand that a reference has already made in BSNL HQ seeking clarification on the subject in the meantime while a request to revise my pay fixation as per provisional basis. I further give promotes

considering the clause 5 of Presidential order on provisional basis. I further give undertaking that such benefit will be on provisional basis and pensionary benefit will be regulated basis on regular pay only and this subject to the out come of the reference made to BSNL HQ and over payment if any shall be recovered by BSNL/DOT from me on the concurrence of aforesaid event.”

Date: 5.7.2004
Place : Bhesan

Sd/-
(R.V. Rafalia)SDOT BHSN.”

29. Condition No. 8 of the promotion order as SDE dated 20.3.2003, vide Annexure A/5, read with the aforesaid undertaking dated 5.7.2004 demonstrate that the applicant whose pay was fixed by giving the benefit of FR 22(I)(a)(i) was clearly put on notice that any payment found to have been made in excess would be required to be refunded. He had furnished the undertaking dated 5.7.2004 while opting for the fixation of pay pursuant to his promotion dated 20.3.2003 as SDE. He is bound by the undertaking. Therefore, we are in agreement with the submission of Ms.R.R. Patel and decline to interfere with the direction of the Corporate Office to recover the excess payment. Accordingly Point No. (iii) is also answered in the negative.

30. For the foregoing, we hold that the applicant is not entitled for any of the relief sought by him. The OA deserves to be dismissed. Accordingly the same is dismissed. Interim order granted on 11.12.2014 stands vacated. There shall be no order as to costs.

Para 31.....

Para 32.....

Para 33.....

Para 34.....

35. In view of the submissions of the learned counsel for both the parties, these two OAs (OA 459/2014 & OA 460/2014) are also disposed of in terms of our findings in OA 458/2014 holding that they are not entitled for any of the reliefs sought by them subject to the following observations relating to recovery of the overpayment upon re-fixation of their pay.

36. In our opinion, the case of these two applicant relating to the question **“whether the order for recovery of overpayment is bad in view of the judgment of the Hon’ble Supreme Court in Rafiq Masih (White Washer) (supra)”** takes a slight deviation for the reason that in OA 458/2014 (Ramjibhai Rafalia) the respondents have produced cogent material to substantiate the fact that at the time of granting the benefit under FR 22(1)(a)(i) he had given an undertaking dated 5.11.2004 whereas in the case of the applicant in OA 459/2014 and OA 460/2014 no such material was produced by the respondents. The applicant in OA 459/2014 and OA 460/2014 also had not taken any specific plea denying furnishing of such undertaking.

37. Ms. Roopal R. Patel argued that the case of these two applicant **does** not fall in any one of the 5 situations mentioned in Rafiq Masih (White Washer) (supra). The situation mentioned therein are as under:

“(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." (emphasis supplied).*

38. By placing emphasis upon the situation mentioned at Sr.No. (iii) above Ms. Roopal R. Patel argued that the respondents are entitled to recover the overpayment made consequent upon refixation of pay of these two applicant respectively with effect from 11.10.2002 and 31.7.2002. We are not prepared to accept this submission in toto. What is mentioned by the Hon'ble Supreme Court at item No. (iii) of the above situations is that no recovery can be made when excess payment has been made for a period in excess of five years, before the order of recovery is issued. In the case on hand the order for recovery is with effect from 11.10.2002 and 31.7.2002. As such the contention of Ms. Roopal R. Patel cannot be accepted in toto. There can be no recovery with effect from the date the pay was re-fixed. In other words, the respondents can effect recovery only with effect from 1.11.2009 and 1.8.2009 respectively. The recovery for the remaining period is hit in view of the situation No. (iii) **in Rafiq Masih (White Washer) (supra)**. However, it is made clear that in view of the fact that there is no specific plea from either of the parties as to the undertaking, the respondents are directed to verify whether the applicant in OA 459/2014 and OA 460/2014 had given any undertaking and in the process if found that they had given undertaking, then, the respondents are at their liberty to make recovery of the overpayment made. On the other hand, if there is no undertaking, then also, they are at their liberty to recover the over payment, but only with effect from 1.11.2009 and 1.8.2009 respectively in case of the applicant in OA 459/2014 and 460/2014.

39. For the foregoing, OA No. 459/2014 and OA 460/2014 are also dismissed subject to the above observations relating to recovery towards overpayment. *There shall be no order as to costs."*

13 Being aggrieved by the aforesaid order dated 24.07.2017 said Sh. Rafalia applicant of OA No. 458 of 2014 had approached the Hon'ble High Court by way of filing SCA No. 17462/2017. The said SCA came to be disposed of as withdrawn vide order dated 09.11.2017 by the Hon'ble High Court, wherein liberty was granted to the applicant to seek appropriate relief from appropriate forum qua amount already recovered with interest with further observation that in such eventuality it would be open to resist such claim by the department. Pursuant to the said

judgment, Sh. Rafalia had filed a Review Application No.20/2017 before this Tribunal. The said review application has also been dismissed by this Tribunal vide order dated 01.02.2021 along with other RAs filed by similarly placed SDEs. Accordingly the decision of respondent to re-fix/step down the pay and recovery of over payment has been upheld.

14 At this stage, we also take note of order passed by this Tribunal in another identical OA No. 222 of 2017 decided on 17.07.2017 in the case of Dipesh Jayantilal Parikh VS. BSNL & Ors., wherein the applicant being Senior to said Sh. Rafalia had represented to respondents to step up his pay on par with said Sh. Rafalia. In that process, the pay of applicant also came to be re-fixed at Rs. 13675 /- and the same was revised from time to time and he was drawing his pay accordingly. Subsequently, in light of clarification issued vide order dated 29.09.2014 by the Corporate Office of the respondent he was served with revised pay fixation memo and calculation sheet for overpayment with a direction to repay the said over payment vide order dated 30.03.2017. Aggrieved by said order the applicant had filed the aforesaid OA No. 222 of 2017. This Tribunal taking into consideration the order dated 24.07.2017 passed in OA 458 of 2014 (R V Rafalia's Case), held that we are of the opinion that even if had there been a show cause notice, the applicant could not have offered any defence whatsoever in view of the facts that the pay of the said Sh. R V Rafalia came to be stepped down from Rs.13,675/- to Rs.13,375/-. Accordingly, this tribunal vide order dated 17.08.2017 dismissed the said OA. We also take notice that the RA 27/2017 filed in this OA was also dismissed vide order dated 01.02.2021.

15 In the present case undisputedly, as noted herein above on representation of the applicant, the respondents had granted benefit of stepping of pay on par with their junior Sh. Rafalia with unequivocal condition that the said benefit of stepping up of pay is subject to clarification issued from the Corporate Office. The applicant herein had accepted the said conditional order of their stepping up of pay voluntarily and without any

objection. Under the circumstances it can be seen that the applicant were made known and put to notice from the beginning that their stepping up of pay is absolutely conditional. Thereafter, as noticed herein above the competent authority issued clarification dated 29.09.2014 and decided that the benefit of grant of higher pay to the said Sh. Rafalia is not in consonance with the provisions of FR 22(1)(a)(i) as also in the case of similar benefit extended on par to other SDEs which admittedly includes the present applicant . The decision of respondents to withdraw/step down the pay of Sh. Rafalia and recovery of excess payment has been affirmed by this Tribunal. Therefore, the very basis on which the pay of applicant came to be stepped up stands extinguished.

It is also important to mention that this Tribunal in its order dated 17.08.2017 in OA 222/2017 by considering the orders/directions contained in BSNL's clarification dated 29.09.2014 and taking into consideration the demand from the applicant who are senior to said Sh. Rafalia for stepping up of their pay in para 14 it is observed that *“.....besides the overpayment was not on account of mistake committed by the respondent. Admittedly, there is a demand from the applicant to step up his pay on par with the said Sh. R V Rafalia. The demand was met, but subject to a condition which is in the nature of a condition subsequent, whereas in the case of Rafiq Masih (supra), the monetary benefits were consequent upon a mistake committed by the competent authority. Therefore, in our opinion the case of the applicant does not fall under any one of the condition mentioned in Rafiq Masih (supra) and thus the same will be of no help to the applicant.”*

- 16 In our considered view the order passed by this Tribunal in the case of Sh. R V Rafalia (supra), as also order passed in OA 222 of 2017 & RA 27/2017 in the case of Dipesh Jayantilal Parikh v/s. BSNL & Ors. (Supra), is squarely applicable to the facts and circumstances of the present case, we are inclined to follow the same judgment/orders.

- 17 Thus, the submission of the applicant that he is senior to Sh. Rafalia and he was entitled to receive higher pay and accordingly his pay was stepped up, further it is also contended that his case is different than that of Sh. Rafalia, in our view, is found to be contrary to the material on record and said submission is not tenable. The issue relates to violation of principles of natural justice also decided by the Tribunal in aforesaid identical cases by taking into consideration the law laid down by Hon'ble Apex Court in the case of Haryana Financial Corporation & Anr v/s Kailash Chandra Ahuja (supra), and by considering the judgments passed by Hon'ble Apex Court in the case of Rafiq Masih (White Washer) (supra) and Jagdev Singh (supra) on the issue of recovery of excess payment. The said finding is also applicable to the facts and circumstances of the present case. Therefore, the submission of applicant that his pay was arbitrarily and illegally stepped down and refixed, as also illegally issued an order for recovery by respondents is also not acceptable.
- 18 In light of aforesaid judgment/orders passed by the Tribunal in identical cases and discussion hereinabove, we are of the considered view that the impugned decision re-fixation of the pay of the applicant by stepping down the pay and recovery of overpayment cannot be said to be suffering from any infirmities.
- 19 In view of aforesaid factual matrix and in light of orders passed by this Tribunal in identical OAs filed by similarly placed SDEs, the applicant is not entitled for any of the relief sought by them in this OA. Accordingly, the OA is dismissed. Interim relief granted vide order dated 23.10.2019 stands vacated. However, at this stage it would be appropriate to mention here that since the request for VRS of applicant has been accepted by the respondents; they are directed to settle all the

retiral dues as payable to applicant within three months from the date of receipt of copy of this order. Ordered accordingly. No costs.

(Dr A K Dubey)
Member(A)

(Jayesh V Bhairavia)
Member(J)

abp

After pronouncement of the judgment, learned counsel for the applicant Shri P H Pathak submits that interim relief granted earlier by this Tribunal be continued for another two weeks. In our view the said request is not acceptable since we have dismissed the main OA and vacated the interim relief granted by this Tribunal. Hence the request is rejected.

(Dr A K Dubey)
Member(A)

(Jayesh V Bhairavia)
Member(J)

abp

