

**CENTRAL ADMINISTRATIVE TRIBUNAL
AMHEDABAD BENCH, AHMEDABAD**

Review Application Nos.03/2018 in OA No.459/2014
Dated the 1st day of February, 2021

Reserved on : 27.01.2021
Pronounced on : 01.02.2021

CORAM :

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

Shri Kantibhai Caudhary,
S/o. Velabhai Caudhary
Working as
Sub Divisional Engineer (Govt. of Gujarat)
Aged about 47 years,
190/1, Suryanarayan Society,
Sector-25, Gandhinagar – 382 020. ... Applicant

By Advocate Shri P H Pathak

V/s

- 11 Bharat Sanchar Nigam Ltd,
Notice to be served through
The Assistant Director General,
B.S.N.L.(Estt-I),Sanchar Bhavan,
New Delhi – 110 001.
- 2 Assistant General Manager,
Office of B.S.N.L.,
Gujarat Circle, Telephone Bhavan, C.G.Road,
Ahmedabad – 380 006. ... Respondents

By Advocate Ms R R Patel

ORDER

Per Hon'ble Shri J V Bhairavia, Member(J)

- 1 The present review application has been filed by the original applicant of OA 459/2014 (who is a group 'B' employee and still in service) seeking recall of order dated 24.07.2017 (decided by the earlier Division Bench – Both the Members of the said Bench have since retired from service),

dismissing the OA 459/2014 subject to directions stated therein (Annexure A).

- 2 It is noticed that following the clarification issued by the Corporate office of BSNL vide its office order dated 29.09.2014, the pay of the applicant which was fixed under FR 22(1)(a)(i) came to be re-fixed by the respondent no.2 vide order dated 30.10.2014 with effect from 11.10.2002. The applicant was requested to credit excess payment of arrears. Aggrieved by the said orders of revision of pay and recovery of excess payment, the applicant filed OA 459/2014 and prayed for quashing and setting aside the aforesaid orders issued by the respondents.

As noted hereinabove, the said OA of the applicant had finally been adjudicated alongwith identical OA i.e. OA 458/2014 as also OA 460/2014 by this Tribunal vide its order dated 24.07.2017. This Tribunal in para 34 observed as under:-

“34 The learned counsel for both the parties submit that all the three applicants are similarly situated persons in so far as their present claim and grievance are concerned, except the service particulars relating to (i) date of entry into service, (ii) date of grant of Lateral Advancement and (iii) date of promotion as SDE/T.E.S (Group-B) services. The claims of all the applicants are identical to each other. The grounds and contentions urged by these two applicants are also identical to that of the grounds and contention urged by the applicant in OA 458/2014; Ramjibhai Rafalia. The defence put forth by the respondents is similar to that of the one taken in OA 458/2014. Both Shri P H Pathak and Ms Roopal R Patel, Learned counsel for respective parties submitted that the order that would be passed in OA 458/2014 (Ramjibhai Rafalia) would be squarely applicable to these cases in view of the fact that the grounds and contentions urged by the applicant and the defence put-forth by the respondents are common.

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 overpayment upon re-fixation of their pay.*

36 *In our opinion, the case of these two applicants relating to the question “Whether the order of 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 05.11.2004 whereas in the case of applicants in OA 459/2014 and OA 460/2014 no such material was produced by the respondents. The applicants in OA 459/2014 and OA 460/2014 also have not taken any specific plea denying furnishing of such undertaking.*

It is further noticed that by not accepting the submission of the respondents, this Tribunal in para 38 of the order under review observed as under:-

“38In the case on hand the order of recovery with effect from 11.10.2002 and 31.07.2002. As such the contention of Ms Roopal Patel cannot be accepted in toto. There can be no recovery w.e.f. the date the pay was re-fixed. In other words, the respondents can effect recovery only with effect from 01.11.2009 and 01.08.2009 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 very 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, 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 liberty to recover the overpayment, but only with effect from 01.11.2009 and 01.02.2009 respectively in case of applicants in OA 459/2014 and OA 460/2014.

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

Aggrieved by aforesaid order the applicant in the present review application has prayed as under:-

- “(A) The Hon’ble Tribunal be pleased to recall the order dated 24.07.2017 in OA 458/2014 and direct the office to place the original application for hearing afresh in the interest of justice.
- (B) Pending admission and final disposal of the application, be pleased to suspend the implementation and operation of the order dated 24.07.2017 at Annexure A to this application.
- (C) Any other and further relief as this Hon’ble Tribunal deems fit and proper in the interest of justice be granted.”

3 Learned counsel Shri P H Pathak mainly submitted as under:-

3.1 This RA has been filed alongwith the RA No.20/2017 filed in OA 458/2014, the grounds and contentions stated in the said RA No.20/2017 has been reiterated since the grievance of the applicant herein is similar to that applicant in RA 20/2017.

3.2 This Tribunal failed to consider the submission of the applicant that the copy of the undertaking dated 05.07.2004 of applicant of OA 458/204 produced by the respondents with their additional affidavit dated 13.05.2017 has no relevancy with the pay fixation done by the respondents in the present case.

It is submitted that the said undertaking is related to pay fixation under FR 22 (1)(a)(i), i.e. order dated 28.04.2003 and it relates to pay fixation as per clause (V) of the Presidential order. This Tribunal while passing the final order lost sight of the submission that the respondents had not stated that the applicant had submitted his undertaking with reference to up gradation. It is stated that Clause (V) of the Presidential order is totally different from fixation of pay granted to the applicant. Therefore, no reliance can be placed on such document. However, this Tribunal has relied upon the same and accepted the justification of the respondents for re-fixation of pay and recovery of excess payment. This has caused grave injustice to the applicant.

- 3.3 It is further submitted that this Tribunal has not dealt with the submission of the applicant that the respondents failed to follow the principles of natural justice since the applicant was not granted any opportunity of hearing by the respondents before issuance of order of re-fixation of pay and the recovery of excess payment.
- 3.3 It is also contended that the Tribunal failed to consider averments stated in ground 'C' of the OA wherein the applicant had relied upon judgment of Hon'ble Supreme Court passed in the case of Divisional Superintendent, Eastern Railway, Dinapur and Ors v/s L.M. Kashri & Ors reported in 1974 II LLJ 372-B and the judgment passed by Division Bench of the Hon'ble High Court of Gujarat in SCA 5072/91 decided on 14.07.1993, and other judgments referred in ground D, E and F, and stated that it is well settled principle of law that where civil consequences arise, the administration is duty bound to follow the principles of natural justice and fair play even in case of mistakes. It is submitted by the counsel for applicant Mr Pathak that the respondents have neither denied the said averment of the applicant in their reply nor produced any records with respect to due opportunity granted

to applicant before issuance of impugned order as per the principles of natural justice. The said submission though argued, was lost sight of by this Tribunal while passing the final order in the OA. Therefore, the order requires to be recalled.

- 3.4 Further, it is submitted that this Tribunal at the time of hearing of the OA was fully convinced and was in favour of the applicant that in the eye of law the principles of natural justice was not followed. However, in the final order by relying on irrelevant judgments and without giving due opportunity to the counsel for the applicant, decided the said issue against the applicant. It is submitted that the Tribunal had lost sight of important points argued by the advocate of the applicant.
- 3.5 Additionally it is also submitted that in para 27 of the order under review, the Tribunal did not consider the case of Rafiq Masih, though the same was relied upon by the applicant and lengthy submission was offered on the point of its applicability. But at the same time, in the said para of the order, referred to the judgment passed by the Hon'ble Supreme Court in the case of Jagdevsingh and erroneously relied upon the said judgment without verifying the facts of the applicant.
- 3.6 Further it is submitted that in para-22/23 of the order under review, this Tribunal referred to the judgment of Hon'ble Apex Court in case of Haryana Financial Corporation & Ors v/s Kailashchandra Ahuja reported in (2008) 9 SCC 31, although the said judgment is based on totally different facts. However, without giving an opportunity to the advocate of the applicant to ponder over the said judgment, the order was passed.
- 3.7 It is submitted that though a request was made by the advocate to stay the operation of the order, however the same was not transcribed in the order. Lastly, the learned counsel for the applicant Shri P H Pathak has referred to the grounds stated in the RA in support of his aforesaid submissions and prayed that the order dated 24.07.2017 passed by this Tribunal be recalled.

4 Per contra, the standing counsel Ms R R Patel appeared on behalf of respondents and opposed the submissions of the applicant on the ground that applicant has suppressed material facts particularly the one that the very applicant aggrieved by the order passed by this Tribunal in OA 458/2014 (which is under review) had approached the Hon'ble High Court by filing SCA 17462/2017. The present respondents had filed their reply in the said SCA and opposed the contention of the applicant. The applicant filed his rejoinder in the said petition. Thereafter the applicant had urged the Hon'ble High Court to permit him to withdraw the petition with a view to make out the application into a review application. Accordingly vide order dated 09.11.2017, Division Bench of Hon'ble High Court disposed of the said petition as withdrawn with a further observation that

“it would be open to the applicant to seek appropriate relief from the appropriate forum qua amount already recovered with interest. In such eventuality it would be open to resist such claim by the department.”

Thereafter, the applicant has filed the present Review application. However in this RA the applicant has not disclosed the above fact about withdrawal of the said SCA. Therefore, applicant has not come with clean hands before this Tribunal. On the sole ground of suppression of material fact, the RA requires to be dismissed, she argued. She mainly made following submissions:-

- 4.1 That this Tribunal had granted ample opportunity to counsel for both the parties and after considering the material on record and the submissions of the counsel for parties, passed the final order dated 24.07.2017.
- 4.2 That this Tribunal in its order had considered the grievance of the applicant about violation of principles of natural justice in the case of recovery of excess payment and the relevancy of undertaking submitted by the applicant. The Tribunal has considered the judgments passed in Rafiq Masih case. This Tribunal has recorded cogent reason for its conclusion. In fact,

aggrieved by the order passed by this Tribunal applicant has filed Writ Petition before the Hon'ble High Court wherein no interim relief was granted in favour of the applicant and after filing rejoinder to the reply filed by respondents, applicant has sought permission to withdraw the said SCA.

4.3 It is submitted that in the present RA there is no ground on the point of question of law or any apparent error on the face of the record. Therefore, this Review Application is not maintainable.

5 Heard the learned counsel for the parties and perused the material on record.

6 The scope for a review application is clearly defined in various orders of the Hon'ble Supreme Court. The Hon'ble Supreme Court in the case of *State of West Bengal & others v. Kamal Sengupta and another (2008) 2 SCC (L&S) 735* has held that the Tribunal can exercise the powers of a Civil Court in relation to matters enumerated in clauses (a) to (i) of sub-section (3) of Section 22 of the Administrative Tribunals Act including the power of reviewing its decision. By referring to the power of a Civil Court to review its judgment/decision under Section 114 CPC read with Order 47 Rule 1 CPC, the Hon'ble Supreme Court laid down the principles subject to which the Tribunal can exercise the power of review. At para 28 of the said judgment the Hon'ble Supreme Court culled out the principles which are as under:

“(i) The power of the Tribunal to review its order/decision under Section 22(3)(f) of the Act is akin/analogous to the power of a Civil Court under Section 114 read with Order 47 Rule 1 CPC.

(ii) The Tribunal can review its decision on either of the grounds enumerated in Order 47 Rule 1 and not otherwise.

(iii) The expression “any other sufficient reason” appearing in Order 47 Rule 1 has to be interpreted in the light of other specified grounds.

(iv) An error which is not self-evident and which can be discovered by a long process of reasoning, cannot be

treated as an error apparent on the face of record justifying exercise of power under Section 22(3)(f).

- (v) *An erroneous order/decision cannot be corrected in the guise of exercise of power of review.*
- (vi) *A decision/order cannot be reviewed under Section 22(3)(f) on the basis of subsequent decision/judgment of a coordinate or larger Bench of the Tribunal or of a superior Court.*
- (vii) *While considering an application for review, the tribunal must confine its adjudication with reference to material which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.*
- (viii) *Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the Court/Tribunal earlier.”*

7 The Hon’ble Supreme Court in an another judgment in the case of *Union of India v/s Tarit Ranjan Das 2004 SCC (L&S) 160* while dealing with the order passed in Review Application at paragraph 13 observed as under:

“The Tribunal passed the impugned order by reviewing the earlier order. A bare reading of the two orders shows that the order in review application was in complete variation and disregard of the earlier order and the strong as well as sound reason contained therein whereby the original application was rejected. The scope for review is rather limited and it is not permissible for the forum hearing the review application to act as an appellate authority in respect of the original order by a fresh and rehearing of the matter to facilitate a change of opinion on merits. The Tribunal seems to have transgressed its jurisdiction in dealing with review petition as if it was hearing original application. This aspect has also not been noticed by the High Court.”

- 8 Bearing in mind the above principles laid down by the Hon’ble Supreme Court, existence of an error on the face of the record is *sine qua non* for review of an order. It is not permissible for the forum to act as an Appellate Authority in respect of the original order by a fresh re-hearing of the matter to facilitate a change of opinion on merits.
- 9 In the present case, it is noticed that the ground raised by the applicant in his OA and the submissions/arguments of the counsel for both the

parties have been referred by this Tribunal in its order dated 24.07.2017; in para18, this Tribunal has observed as under:

“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)”

10 In the present RA the main grievance raised by the applicant that this Tribunal has not considered his submissions on the point of violation of principles of natural justice in re-fixation of pay and recovery of excess amount in the case of applicant. It is also the grievance of the applicant that the judgment passed in Rafiq Masih (White Washer) has not been considered. In this regard it is required to mention that answering to points/questions stated in para-18 of the order which is referred hereinabove, this Tribunal by recording cogent reasons, including the reason about relevancy of the undertaking submitted by the applicant if any, before the respondents and by considering the judgment relied upon by the counsel for applicant finally recorded its findings with regard to adherence of principles of natural justice and restricted the recovery of overpayment for certain period as stated in concluding para no.36, 37, 38 & 39 of the order under review (has referred the same in para 2 above).

11 It can be seen from the above factual matrix that it cannot be said that submissions of the applicant (who is a group ‘B’ employee and still in

service) in support of the prayer sought in the OA were not considered by the Tribunal.

In our considered view the ground and submission of the applicant in the present Review Application is in nature of appeal against the judgment of this Bench. This Tribunal cannot sit in appeal on its own judgment. Therefore, the ground stated by the applicant in this Review Application is not tenable to exercise the power of review.

- 12 Thus, in view of above discussion and in light of the law laid down by Hon'ble Apex Court in the case of *State of West Bengal & others v. Kamal Sengupta and another* and also in the case of *Union of India v/s Tarit Ranjan Das* (supra), the applicant has failed to point out any error much less an error apparent on the face of record justifying the exercise of power under sub-clause (f) of sub-section (3) of Section 22 of the Administrative Tribunals Act, 1985. The review application deserves to be dismissed and accordingly, the same is dismissed.

(Dr A K Dubey)
Member(A)

(Jayesh V Bhairavia)
Member(J)

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