

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No.180/00823/2019

Friday, this the 8th day of January 2021

C O R A M :

**HON'BLE Mr.P.MADHAVAN, JUDICIAL MEMBER
HON'BLE Mr.K.V.EAPEN, ADMINISTRATIVE MEMBER**

Xavier.A.A. (HR No.198808587),
JTO (Retired),
Attupuram House,
Cherukunnam, Assamannor P.O.,
Ernakulam Dist. - 683 549.

...Applicant

(By Advocate Mr.Vinay Kumar Varma)

v e r s u s

1. The BSNL (through Chairman & Managing Director),
Corporate Office, Bharat Sanchar Bhawan,
Harish Chander Mathur Lane,
Janpath, New Delhi – 110 001.
2. The Chief General Manager Maintenance,
Southern Telecom Region,
11 Link Road, Ganapathy Colony,
Guindy, Chennai – 695 033.
3. The Principal General Manager Maintenance STR,
Microwave Station Building, Deshabhimani Road,
Kaloor, Ernakulam – 682 017.
4. The Principal Controller of Communication Accounts,
Tamil Nadu Circle, No.60, Ethiraj Salai,
TNT Complex, Egmore, Chennai – 600 008. ...Respondents

**(By Advocates Mr.George Kuruvilla [R1-3]
& Mr.Thomas Mathew Nelloimoottil [R4])**

This application having been heard on 23rd December 2020, the
Tribunal on 8th January 2021 delivered the following :

ORDER

Per : Mr.K.V.EAPEN, ADMINISTRATIVE MEMBER

The applicant had filed this O.A on 14.11.2019 seeking certain reliefs against the impugned orders at Annexure A-1, Annexure A-2 and Annexure A-3 and praying for quashing the same. Subsequently, owing to the judgment of the Hon'ble High Court of Kerala in O.P (CAT) No.118/2019 and connected cases on 06.02.2020, the applicant at the time of final hearing has limited the reliefs sought to only the matters relating to recovery proposed in Annexures A-2 and A-3 and incidental costs etc. Relief against Annexure A-1 relating to the fixation of pay while implementing the pay revision orders with effect from 01.01.2007 was heard and decided by this Tribunal in favour of the respondents in R.A.No.30/2015 in O.A.No.1022/2012 and connected cases, vide order dated 22.08.2016 (produced by the respondents at Annexure R-3[a]). This order was later upheld by the Hon'ble High Court of Kerala in the aforementioned O.P (CAT) No.118/2019 and connected cases on 06.02.2020. The Hon'ble High Court of Kerala did not find any reason to interfere with the order of this Tribunal. The Hon'ble High Court found that : *“the question raised in the present litigation, is as to the fixation consequent to implementation of pay scale revision orders, which has to be in the scales applicable to the cadre wherein the incumbent holds substantive post or lien. The application of FR 22 (I)a(1) arises only after the fixation is carried out as per pay revision order, in so far as fixing the pay of the officiating JTOs in the higher scales.”*

2. The aforementioned orders produced by the respondents at Annexure R-3(a) (copy of the order dated 22.08.2016 in R.A.No.30/2015 in O.A.No.1022/2012 and connected cases) and Annexure R-3(b) (copy of the judgment in O.P (CAT) No.118/2019 and connected cases dated 06.02.2020) thus have settled the matter in relation to relief sought at Para 8 (i) and Para 8 (iii) of this O.A in favour of the respondents. Thus the only issue left to adjudicate is relating to Para 8 (ii), (iv) and (v) of the O.A which are as follows :

(1) Direct the respondents to refrain from effecting any recovery proposed in Annexure A-2 and Annexure A-3 or otherwise.

(2) Award costs incidental thereto.

(3) Pass such other orders or directions as deemed just and fit by this Hon'ble Tribunal.

3. In the matter relating to recovery, the applicant submits that Hon'ble Supreme Court in **State of Punjab v. Rafiq Masih (2015) 4 SCC 334** has declared the law succinctly that, when benefits have already been paid to an employee, for no fault of theirs and without any vitiating circumstances attributable to them, the same cannot be withdrawn merely because later on such grant is found to be irregular. The operative portion of the judgment at Para 12 is extracted below :

12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the

employer; in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law :

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

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

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

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

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

4. The applicant submits that the facts of the case fall squarely within the parameters of this declaration of law by the Hon'ble Supreme Court. Since he has been granted the impugned benefits of pay and allowances validly and under proper acknowledgment by the 2nd and 3rd respondents, without any fraud or misrepresentation on his part, he cannot now be prejudiced by an order to his detriment, especially considering the fact that he has retired on 31.07.2019 on attaining the age of superannuation. He has thus contested Annexure A-2 ordering recovery of Rs.1217980/- (due to pay and allowance of Rs.1080080/- plus leave encashment of Rs.137900/-) against the total amount of Rs.1747439/- due to him on account of DCRG and commutation of pension.

5. The applicant has also relied on the Government of India O.M.F.No.18/03/2015-Estt.(Pay-I) dated 02.03.2016 issued by DoP&T based on the Rafiq Masih judgment cited supra which is to be followed by all Government entities. He has submitted that his case is squarely covered under the stipulations laid down in Para 12 (ii) and (iii) of the Rafiq Masih's judgment, which lays down that recovery of excess payment made from employees who are retired or due to retire within one year from the date of recovery and from employees in whose case the excess payment has been made for a period in excess of five years, before the order of recovery is issued, is bad in law. Further, he has submitted during final hearing that his case falls outside the ambit of the ratio of the decision of the Hon'ble Supreme Court in **High Court of Punjab & Haryana v. Jagdev Singh (2016) 14 SCC 267**, since no undertaking was furnished by him 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 or refunded. Therefore, the respondents are estopped from now claiming that he was put on notice of the fact that any future re-fixation or revision of pay may warrant an adjustment of the excess payment, if any, made. He has also submitted a circular issued by the BSNL Corporate Office vide No.1-06/2016 PAT(BSNL) dated 01.05.2019 relating to the implementation of Hon'ble Supreme Court judgment on recovery of excess/wrongful payment and need for ensuring 100% error free pay fixation method and post audit of pay fixation. This circular states that wherever any excess payment has been made on account of fraud, misrepresentation, collusion, favoritism, negligence, carelessness etc., roles of those responsible for overpayments in

such cases, and the employees who benefitted from such actions should be identified and disciplinary/criminal action should be considered in appropriate cases. It has also stated that while examining proposals for waiver of recovery, it has been observed that cases are reviewed on the verge of retirement of an employee or after a number of years thereby making it difficult for BSNL to recover the excess payments from them. The applicant submits that there is no circular of the BSNL for recovery from gratuity and commutation as done in Annexure A-2. In addition, the applicant has submitted copies of a series of judgments by C.A.T., Principal Bench in O.A.No.3893/2016 dated 08.05.2018 and O.A.No.3187/2015 dated 04.05.2018, Hon'ble High Court of Kerala judgment in O.P (CAT) No.10/2018 dated 17.01.2018 which have interfered in the recovery by authorities of the excess payment made to employees either in part or in whole, if no mistake was made by the employee or if there was sufficient distance of time or if respondent departments had made a faulty interpretation of circulars.

6. *Per contra*, the respondents have submitted in their reply statement that the contention of the applicant that recovery is bad as his case falls squarely within the parameters of the law declared by the Hon'ble Supreme Court in Rafiq Masih (supra) is without any merits. The respondents submit that the applicant is a Group B employee and thus does not fall within the parameters laid down in the said case, which makes recovery impermissible. Further, the wrong fixation and excess payment of salary commenced in the year 2009 and the order for rectification of the

wrong fixation and recovery of overpayments was initiated as early as in 2012 (11.10.2012) vide Annexure R-3 (f) ie., within three years. Further, all the officiating JTOs including the applicant at the time of revision of their pay had given a clear and mandatory undertaking to the effect that any payment found to have been made in excess would be liable to be adjusted or refunded. In such an event, Rafiq Masih cited supra has no application at all, as held by the Hon'ble Supreme Court in the subsequent decision in Jagdev Singh cited supra. The above position has also been considered by this Tribunal in O.A.No.306/2013 and connected cases while considering the question of recovery of excess payments in the case of similarly situated persons (produced as Annexure R-3[g]) where this Tribunal had upheld recovery of amount paid in view of the law laid down in Jagdev Singh cited supra.

7. The respondents submit that when this O.A came up for admission hearing in November 2019, since it was submitted by the respondents opposing the stay of recovery that in view of the undertaking given by the applicant Rafiq Masih case (supra) has no application, a direction was issued by this Tribunal to produce the said undertaking of the applicant by the next posting date, failing which there would be a stay of the recovery ordered in Annexure A-2 and Annexure A-3. The respondents submit that they could not trace out and produce the undertaking by the next posting date on 03.12.2019. Accordingly, an interim order not to recover the amount covered by Annexure A-2 was issued on 03.12.2019 by this Tribunal. The respondents submit that this undertaking is still missing.

Since the same could not be traced out in the case of the applicant, the BSNL constituted a three member committee consisting of DGM (TR), CAO (Planning) and CAO (C&A) to inquire into the matter of the missing undertaking and to file a report. The committee filed a report on 29.01.2020 (produced at Annexure R-3[h]) after calling for explanation from the concerned officers, who are supposed to be the custodian of such documents. As per this report, undertakings were collected in 2010 as a pre-requisite for disbursement of pay arrears of 2nd PRC from among all executives of the SSA as per a general instruction from BSNL Corporate Office, New Delhi. It is reported to have been collected by AO (P&A) and kept in bundles instead of pasting it in the service books. Even now, only one bundle has been traced out. Moreover, the undertakings were collected in the year 2010 and the officers occupying the post of AO (P&A) have since been changed many times. Unfortunately either in the handing over memo or in any other charge report the undertaking file has not been mentioned. The committee has stated that over a period of ten years, it has been neglected to be kept intact. The committee has also observed that the applicant Shri.A.A.Xavier has filed many cases in CAT/Hon'ble High Court of Kerala regarding regularization of JTO and pay fixation from TTA to JTO. These cases were directly dealt by legal/HR section of the Kerala Circle Office. The committee also considers it as a reasonable and probable assumption that the undertaking may be available in any of these court case files in which Shri.A.A.Xavier was one of the applicants.

8. In effect, in their reply statement, the respondents have submitted that the non tracing of the undertaking in the case cannot be construed as “no undertaking given by the applicant” especially when the applicant did not have a case in the O.A that he has not given any undertaking as provided in Annexure A-7 pay revision order. Further, the respondents submit that no such case has ever been pleaded at any point of time by any of the similarly situated litigant officials who are more than 300 in number, either before the Tribunal or before the Hon'ble High Court. The respondents also have produce Annexure R-3(i) which is an undertaking dated 27.05.2015 given by the applicant, at the time of fixation of pay on merger of 78.2% IDA in the old scale of pay agreeing for recovery of excess amount if any found later on. This undertaking specifically states that the applicant will have no objection for whatsoever reason in the event of recovery of arrears being paid to him consequent on the fixation of pay after merging 78.2% IDA with the old scale of Rs.9850-250-14600/- with effect from 01.01.2007 from pay and allowances in future. Thus, the respondents claimed that they are well within their rights in undertaking the recovery.

9. We have heard learned counsel for the applicant Shri.Vinay Kumar Varma and learned counsel for the Respondent Nos.1-3 Shri.George Kuruvilla. In addition, reply is filed by the Respondent No.4, the Principal Controller of Communication Accounts, Tamil Nadu Circle, which indicates that the office of the Respondent No.4, being the pension sanctioning authority, has no role regarding overpayment of pay and allowances and issue of show cause notice for recovery of payment of pay and allowances.

10. The case of the respondents is that the applicant is not covered under the stipulation laid down in Para 12 (ii) and (iii) of Rafiq Masih's case cited supra. They have submitted that the wrong fixation of pay and excess payment of salary commenced in the year 2009 while implementing the pay revision based on Annexure A-7 Executive Pay Revision order dated 05.03.2009. On noticing the erroneous fixation, Annexure R-3(f) order for rectification of the wrong fixation and recovery of overpayments was ordered in the year 2012 itself. This could not be enforced due to pending litigations till the High Court finally settling the issue by Annexure R-3(b) order in February, 2020. Thus, though the applicant retired only in July 2019 the recovery proceedings were initiated way back in 2012. Hence, Para 12 (ii) of Rafiq Masih's case cited supra has no application. Further, Para 12 (iii) too has also no application as recovery was initiated within three years of the commencement of the excess payment. After examination of the documents and circumstances we accept the contention of the respondents relating to the non-application of Rafiq Masih's case cited supra to the case of the applicant. We hold that the criteria prescribed by Paras 12 (ii) and 12 (iii) of Rafiq Masih's case do not apply to the case of the applicant in as much as the order of rectification of fixation and recovery of over payment was initiated and ordered within three years of pay revision order in 2012 and much before his retirement. Due to pending litigation in various fora the same could not be actually effected. Thus, the criteria mentioned in Para 12 (ii) and (iii) of Rafiq Masih cited supra do not apply in this matter.

11. As we have concluded that criteria as mentioned in Paras 12 (ii) and 12 (iii) of Rafiq Masih cited supra do not apply, the other issue to be adjudicated ie., relating to the question of lack of availability of the undertaking purported to have been submitted at the time of revision of pay by the applicant has to be viewed only in this context. Jagdev Singh's case cited supra has in Para 11 only held that the principle enunciated in proposition Para 12 (ii) in Rafiq Masih cannot apply to a situation such as was in the case under consideration therein, where 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. In this matter, the Hon'ble Supreme Court only observed that since the officer furnished an undertaking while opting for the revised pay scale, he is bound by the undertaking. In this O.A., however, we have already held that Para 12 (ii) does not apply at all. Further, the respondents have claimed that the applicant had submitted an undertaking which is now not traceable, whereas the applicant took a plea only at the time of hearing that he had not done so. We have already noted that though the contention of the applicant during the final hearing was that he had not furnished any undertaking at the time of revision of pay, it does not seem to have been pleaded as such by him in the O.A.

12. We note that the report of the three member committee indicates that undertakings were collected from all the officers as a prerequisite for disbursement of pay arrears and were kept in bundles instead of pasting it in the service books. The respondents have submitted that inspite of their best

efforts only one bundle could be traced out in their search though it was supposed to have been kept in the AO(P&A) Section. Their submission is that non tracing of the undertakings cannot be construed as “no undertaking given by the applicant” especially when the applicant did not have a case in the O.A that he has not given any undertaking as provided in the Annexure A-7 pay revision order. They have also pointed out that no such case has been pleaded at any point of time by any of the similarly situated litigant officials who are more than 300 in number. On the other hand, Annexure R-3(i) is the undertaking given by the applicant in 2015 at the time of fixation of pay on merger of 78.2% IDA in the old scale of pay, agreeing for recovery of excess amount if any found later on.

13. In the facts and circumstances of this case, we hold that the non tracing of the undertaking given by the applicant subsequent to Annexure A-7 pay revision order does not fatally harm the process of recovery since we have already squarely found that Para 12 (ii) of the criteria in Rafiq Masih does not apply. The applicant had also submitted a similar undertaking in 2015 at the time of fixation of pay on merger of 78.2% IDA in the old scale of pay. It seems to us that his argument that no undertaking was given was an afterthought after the query by this Tribunal at the time of admission hearing did not result in the production of a copy of the undertaking. We also find that the order for recovery was made well within the time prescribed and does not fall in the face of the relevant criteria cited in Rafiq Masih's case cited supra.

14. We, therefore, do not find merit in the reliefs sought by the applicant. The O.A is accordingly dismissed. The respondents are accordingly allowed to recover the total amount of Rs.1217980/- (due to over payment of pay and allowances of Rs.1080080/- plus leave encashment of Rs.137900/-) from the applicant as per Annexure A-2. The interim order on stay of recovery for payments effected is vacated. There shall be no order as to costs.

(Dated this the 8th day of January 2021)

K.V.EAPEN
ADMINISTRATIVE MEMBER

P.MADHAVAN
JUDICIAL MEMBER

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List of Annexures in O.A.No.180/00823/2019

- 1. Annexure A-1** – A copy of the Pay Fixation Order bearing No.PGMM STR ENK/33-S/2861/XAA/PEN/19 dated 30.09.2019 issued from the office of the 3rd respondent.
- 2. Annexure A-2** – A copy of the Order bearing No.PGMM STRENK/33/S-2861/2019-20/XAA/PEN/20-1 issued from the office of the 3rd respondent. (undated)
- 3. Annexure A-3** – A copy of the Order bearing No.PGMM STRENK/33/S-2861/XAA/PEN/21 dated 02.11.2019 issued from the office of the 3rd respondent.
- 4. Annexure A-4** – A copy of the Promotion Order bearing No.GM/STR/ENK/33/M-2211/2014-15/64 dated 08.08.2014 issued from the office of the 3rd respondent.
- 5. Annexure A-5** – A copy of the Pay Fixation Memo No.Estt/Pay Revsn-2007/2014-15 dated 21.04.2014 issued from the office of the 3rd respondent.
- 6. Annexure A-6** – A copy of the representation dated 16.08.2014 submitted by the applicant to the 2nd respondent.
- 7. Annexure A-7** – A copy of the Office Order No.1-50/2008-PAT (BSNL) dated 05.03.2009 issued by the 1st respondent.
- 8. Annexure A-8** – A copy of the Pay Fixation Memo No.33/GM STR ENK/PAY FIX dated 08.05.2015 issued from the office of the 3rd respondent.
- 9. Annexure A9** – A copy of the representation dated 29.10.2019 submitted by the applicant to the 3rd respondent.
- 10. Annexure R-3(a)** – A copy of the order dated 22.08.2016 in R.A.No.30/2015 in O.A.No.1022/2012 and connected cases.
- 11. Annexure R-3(b)** – A copy of the judgment dated 06.02.2020 of the High Court in O.P (CAT) No.118/2019 and connected cases.
- 12. Annexure R-3(c)** – A copy of the order dated 18.09.2019 of the office of the CGM Kerala Circle.
- 13. Annexure R-3(d)** – A copy of the Clarification dated 16.03.2009 of the Kerala Circle.
- 14. Annexure R-3(e)** – A copy of the Pay Revision Order for Non-Executives of BSNL dated 07.05.2010.

15. Annexure R-3(f) – A copy of the order dated 11.10.2012 of the CGM Kerala Circle.

16. Annexure R-3(g) – A copy of the order in O.A.No.306/2013 & connected cases of the CAT Ernakulam.

17. Annexure R-3(h) – A copy of the committee report dated 29.01.2020.

18. Annexure R-3(i) – A copy of the undertaking dated 27.05.2015 given by the applicant.
