CENTRAL ADMINISTRATIVE TRIBUNAL
HYDERABAD BENCH

OA/020/00652/2015

HYDERABAD, this the 25th day of November, 2020

(Reserved on 02.11.2020)

Hon'ble Mr. Ashish Kalia, Judl. Member
Hon'ble Mr. B.V. Sudhakar, Admn. Member

Bayana Geeta Srinivas S/o B. Krishna Rao,
Aged about 48 years, Occ : Rajbasha Adhikari,
O/o General Manager, Telecom District, BSNL,
Vijayawada, Krishna District. ...Applicant

(By Advocate : Dr.A.Raghu Kumar)

Vs.

1.The Union of India, rep by its Secretary,
Department of Telecommunications,
Ministry of Communications and Information Technology,
20 Ashoka Road, New Delhi 1.

2. The Bharat Sanchar Nigam Limited,
Rep by its Chairman cum Managing Director,
BSNL Coporate Office, Barakumba Road,
Statesman House, New Delhi 1.

3. The Chief General Manager,
Andhra Pradesh Telecom Circle (BSNL),
Door Sanchar Bhavan, Nampally Station Road,
Abids, Hyderabad-500001.

4. The General Manager Telecom District,
BSNL, BSNL Bhavan, Chuttugunta,
Vijayawada, Krishna District. ....Respondents

(By Advocate : Mrs.K.Rajitha, Sr.CGSC &
Mrs.T.Bala Jaya Sree, SC for BSNL)

ORDER
(As per Hon'ble Mr.B.V.Sudhakar, Administrative Member)

2. The OA is filed against the non fixation of pay based on the officiating pay drawn before regular promotion as Assistant Director (Official Language) and the consequent order of recovery issued by the respondents.

3. Brief facts of the case are that the applicant was promoted on local officiating basis as Asst. Director (OL) (now, designated as Raj Basha Adhikari) w.e.f. 15.5.2002 and worked up to 6.3.2011 with intermittent breaks. Applicant participated in the Limited Internal Competitive Exam and on being successful, was promoted to the post of Asst Director. The pay of the applicant consequent to promotion on a regular basis was fixed in terms of Fundamental Rule 22(I)(a)(3)(b)(1) and the same was justified by the letter dated 23.7.2012 (Annexure A-8). However, respondents revised the pay on 25.4.2015 by not protecting the officiating pay drawn by the applicant from 15.5.2002, by relying on letter of the 2nd respondent dated 19.2.2010 wherein it was clarified that the pay drawn in local officiating arrangement will not be protected under the Time Bound Promotion policy on regular promotion. Revision of pay has led to a proposed recovery of around Rs.8 lakhs from the pay of the applicant. Aggrieved, the OA is filed.

4. The contentions of the applicant are that the pay was correctly fixed on 7.3.2011 in terms of FR 22(I)(a)(3)(b)(1) and the re-fixation of pay on 25.4.2015 is against provisions of FR 22 (I) (3) read with Rule 9(21)(a)(iii).

The clarificatory order dated 19.2.2010 is against F.Rs, which indeed prevails over executive instructions. Revision of pay is against the initial order issued by the 4th respondents on 23.7.2012 justifying the pay fixation. Applicant has not committed any mistake to invite revision of pay. Recovery ordered is huge and the basic pay of the applicant would be reduced from Rs.31,880 to Rs.27,320.

At the admission stage, Tribunal has passed an order not to make any recovery as an interim measure, vide order dated 13.5.2015.

5. Respondents Nos.2, 3 & 4 *per contra* state in their reply statement that the applicant was promoted as AD (OL) on officiating basis on 14.5.2002 with intermittent breaks till he was promoted on a regular basis on 7.3.2011. The pay of the applicant during officiating spells was fixed based on FR 22 (I)(a)(i) and as per the 2nd PRC orders effective from 1.1.2007 vide letter dated 5.3.2009 as well as keeping in view clarification dated 28.9.2011 of the Non Executive Promotion Policy (NEPP). OM dated 6.11.1965 of G.O.I., Ministry of Finance does not protect officiating pay of a Government servant holding a higher officiating post. On regular promotion w.e.f. 7.3.2011, pay of the applicant was to be fixed based on the substantive pay of Rs.8500, in accordance with 2nd PRC guidelines, instead, it was erroneously fixed considering the officiating pay of Rs.10,850 drawn as on 31.12.2006. Hence, the pay had to be re-fixed and recovery ordered. There is no provision for protection of officiating pay in the existing rules and as per orders issued by the Corporate Office after the 2nd PRC. The letters dated 19.2.2010, 5.11.2014 and clarifications No. 4 & 9 of R-2 are in order. FR 22(I)(a)(3) applies to a Govt. servant when he is transferred to a

lower post at his request read with Rule 15 of the said rules. FRSR apply only when there is a fixed amount of increment involved and not in respect of latest IDA scales with minimum and maximum limits and with increment @ 3%.

Respondents filed MA 612 of 2019 on 30.7.2019 to vacate the interim order of this Tribunal dated 13.5.2015 stopping recovery from the pay of the applicant.

6. Heard both the counsel and perused the pleadings on record.

7. I. The dispute is in regard to fixation of the pay of the applicant w.e.f. 1.1.2007, with the applicant claiming that the fixation should be based on the officiating pay drawn as on 31.12.2006 for working in the post of AD (OL) on officiating basis, whereas respondents state that it has to be based on the substantive pay drawn by the applicant in the substantive post held by him. Applicant relied heavily on FR provisions/ Rule 9 (21) (a) (3) and the respondents took the line that the pay fixation was effected on 2nd PRC recommendations and in furtherance of NEPP scheme.

II. Based on the 2nd PRC (Pay revision committee), the IDA pay scales of the employees of the respondents organisation were revised w.e.f. 1.1.2007 in pursuance of the Presidential directive dated 27.2.2009 and the same were communicated by the respondents vide letter dated 5.3.2009. Pay scales of the employees of the respondents organisation are revised periodically with reference to the recommendations of the PRC. Till the 3rd PRC is held the scales recommended continue. The applicable clauses

of the letter dated 5.3.2009 issued based on 2nd PRC recommendation, to the case in dispute, are as follows

> *"2 **Fitment method**:*
>
> *(i) A uniform fitment benefit @ 30%, on basic pay plus DA @ 68 .8 % as on 1.1.2007 would be provided to all executives. The aggregate amount would be rounded off to the next ten rupees and pay fixed in the revised pay scale.*
>
> *xxxx*
>
> *3. **Increment**:*
>
> *The Annual Increment will be at the rate of 3 % of the revised basic pay and the same will be rounded off to the next multiple of rupees ten.*
>
> *xxxx*
>
> *13 **General**:*
>
> *(ii) Any excess payment, if any, be made as a result of incorrect fixation of pay in the revised scales and in calculation of arrears or detected in the light of discrepancies noticed subsequently shall be recovered either by adjustment against future payment due to Executive concerned or otherwise . An undertaking as per Annexure –II for this purpose will be taken from Executive before making payment of arrears."*

The revision of pay scales is done keeping in view the financial health, business growth, employee demands, market potential etc of any business enterprise. In case of public sector organisations, the initiative to revise IDA (Industrial Dearness Allowance) pay scales is taken by the Department of Public Enterprises and thereafter, it is communicated to the respective Ministries, who will in turn circulate to the public sector units under their aegis. The recommendations are to be examined and adopted by the respective Board of the concerned public sector organization in tune with the Organizational interests and aspirations of the employees. In the instant case, based on the Dept. of Public Enterprise OM dated 26.11.2008 in regard to revision of pay scales, Dept. of Telecom under Ministry of

Communications & Information Technology issued a Presidential Directive dated 27.2.2009, which was adopted by the respondents organisation (BSNL) on 5.3.2009. Later, the 3rd PRC has been approved by the cabinet on 19.07.2017. In essence, it would mean that the revision of pay scales recommended by a Pay Revision Committee is essentially in the domain of policy making, requiring initiation by the Dept. of Public Enterprise for getting the PRC recommendations accepted by the Cabinet or by a Presidential directive, which are communicated to the Public Sector units for examination and accepting them as deemed fit. To sum up, pay revision is an elaborate exercise involving a policy decision.

III. The pay of the applicant as per 2nd PRC, had to be fixed as per clause 2 (i) of the letter dated 5.3.2009 cited supra, circulating the policy decision to revise the pay scales. Instead of doing so, respondents have fixed the pay of the applicant based on the officiating pay drawn in the post of AD (OL) as on 31.12.2006. Therefore, the fixation of pay of the applicant as on 1.1.2007 was against the policy decision of the respondents organisation. In regard to pay revision consequent to the acceptance of the recommendations of the Pay revision committee (PRC) by the Cabinet Committee or by a Presidential directive, the role of the Tribunal is limited in regard to grant of a particular scale other than what has been provided for in the policy document. The prescription of the pay scale and how it is to be fixed has been dealt by the expert body namely the Pay Revision Committee. Tribunal cannot tinker with the same and If done, it would lead to a cascading effect encouraging others to litigate on issues of similar nature lacking realistic basis to agitate before a legal fora. Moreover, any

relief granted going beyond the recommendations of the PRC would have a profound impact on the finances of the respondents organization since it would attract multifarious litigation. By stating the above, are reiterating the directions of the Hon'ble Supreme Court in the following cases:

a. Union of India v. Dineshan K.K.,(2008) 1 SCC 586, wherein the Apex Court has held as under:

> *It has been observed that equation of posts and equation of pay structure being complex matters are generally left to the executive and expert bodies like the Pay Commission, etc.*

b. State of Bihar v. Bihar Veterinary Assn.,(2008) 11 SCC 60, at page 64 :

> *13. If the courts start disturbing the recommendations of the pay scale in a particular class of service then it is likely to have cascading effect on all related services which may result into multifarious litigation. The Fitment Committee has undertaken the exercise and recommended the wholesale revision of the pay scale in the State of Bihar and if one class of service is to be picked up and granted higher pay scale as is available in the Central Government then the whole balance will be disturbed and other services are likely to be affected and it will result in complex situation in the State and may lead to ruination of the finances of the State.*

In the case on hand, the new pay scale as per the 2nd PRC has to be granted based on the substantive pay scale held by the applicant in terms of the fitment formula as laid down in clause 2 (i) of the Office Order dated 5.3.2009 of the respondents. Granting pay scale as sought by the applicant based on officiating pay drawn as AD (OL) would thus be contrary to the Hon'ble Supreme Court directions as at above, since 2nd PRC has not provided for such a provision.

IV. In addition, as was made explicit in the paras supra, revision of scales and grant of the same is a policy matter wherein the Tribunal has little leeway to intervene, unless the policy is itself irrational, malafide, discriminative and offends Article 14 of the Constitution of India. Any intervention has to be based on valid legal principles. The pay revision and fixation as per the policy of the respondents has not been demonstrated as irrational, discriminative or malafide or any legal principle has been professed seeking legally justifiable intervention. The Tribunal, therefore, should not enter into the uncharted ocean of public policy, which is the exclusive domain of the respondents. We are supported by the observations the Hon'ble Supreme Court, as under, in holding as we did, as at above.

a. *CSIR v. Ramesh Chandra Agrawal, wherein the Hon'ble Apex Court stated:-*

> *33. Indisputably, a policy decision is not beyond the pale of judicial review. But, the court must invalidate a policy on some legal principles. It can do so, inter alia, on the premise that it is wholly irrational and not otherwise.*

b. Apex Court in the case of BALCO Employees' Union (Regd.) v. Union of India, (2002) 2 SCC 333, held as under:-

> *The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State. This Court, in no uncertain terms, has sounded a note of caution by indicating that policy decision is in the domain of the executive authority of the State and the Court should not embark on the unchartered ocean of public policy and should not question the efficacy or otherwise of such policy so long the same*

does not offend any provision of the statute or the Constitution of India.

V. Further, the applicant was only working in the post of AD(OL) on an officiating basis without any lien against the said post. Nevertheless, applicant states that that various provisions under FR 22(I)(a)(3) deal with conditions when a Government servant has held previously a post substantively or in officiation in the same post or a permanent or a temporary post then his initial pay shall not except in cases of reversion to parent cadre governed by proviso 1(3) be less than the pay which may be classed as pay by the President under Rule 9 (21) (a) (iii) which he drew on the last occasion and he shall count the period during which he drew that pay on a regular basis on such last occasion and any previous occasions for increment in the stage of the time scale equivalent to that pay. The FR as expounded by the applicant would not come to his rescue, in view of the law laid down by the Hon'ble Apex to not to tinker with the pay scales fixed by expert bodies. For understanding the application of FR 22 (I) (a) (3), we extract the main provision as under:

FR 22 (I) (a) (3): When appointment to the new post is made on his own request under sub-rule (a} of Rule 15 of the said rules, and if the maximum pay in the time-scale of that post is lower than his pay in respect of the old post held regularly, he shall draw that maximum as his initial Pay.

Thus, as can be seen from above, the cited rule deals with posting the applicant to a new post on his own request whereas the issue being dealt in the dispute on hand is about the validity of considering the officiating pay drawn as AD (OL) to fix the revised pay in terms of the 2nd PRC recommendations. Therefore, the proviso of appointment to a new post on

applicant's own request is not fulfilled to bank on the cited rule for extending its application to the case on hand, and for that matter, even accepting the contention made by the applicant by relying on other sub-clauses of FR 22(I)(a)(3), though not admitted, it will not be of any assistance because of the legal principles referred to supra.

VI. The FRs relied upon by the applicant, though repetitive to state but for the sake of emphasis, we have no hesitation to state that they would not come to the rescue of the applicant since the law laid down by the Hon'ble Apex Court is that the pay scales recommended by PRC and pay scale fixation as per policy of the respondents organisation should not be interfered with. Therefore, when the law is clear about upholding the PRC recommendations and related policy matters, the FRs banked upon by the applicant in the OA, which we have gone through carefully, would not be of any bankable relevance to the issue. Moreover, Hon'ble Supreme Court in dealing with the application of Fundamental Rule FR 22 (I) (a) (3) has observed in ***Comptroller & Auditor General of India & Others v. Farid Sattar*** on 7 April, 2000 , that the terms and conditions in respect of an issue adjudicated upon have also to be considered before coming to a decision in applying FRs, as under:

> *Learned counsel for the appellants urged that the Tribunal fell in error in applying F.R.22 (1) (a) (3) in the present case.*
>
> *Xxx*
>
> *Fundamental Rule 22(I)(a)(3) is applicable where an employee is transferred to a new post on his own request under sub-rule (a) of Rule 15, and further in such a transfer no reversion is involved. In such a transfer to a new post if the maximum pay in the time-scale of the transferred post is lower than the pay in respect of the old post held regularly, he is required to draw that maximum as his initial pay.*

Xxx

It is not the case here. Here. what we find is that the respondent on his own volition sought transfer on certain terms and conditions accepted by him. The terms and conditions of unilateral transfer are very clear and there is no ambiguity in it. The terms and conditions provided that the respondent on transfer would be appointed to a post which is lower to the post which he was occupying prior to his transfer and he was also required to tender technical resignation from the post which he was holding with a view to join the lower post as a direct recruit and was to rank junior to junior most employee in the cadre of Accountant. He was further required to forego any benefit of passing any departmental examination while working in the higher post. In such a situation, the pay of the respondent had to be fixed with reference to the lower pay scale and not with reference to the pay drawn by him in the higher post since he was to be considered as a direct recruit in the lower post.

Under the terms and conditions of the transfer, the pay which the respondent was drawing on higher post was not required to be protected when he joined the lower post of Accountant."

For the foregoing reasons, we are of the view that the pay of the respondent, as fixed earlier, was correctly re-fixed by Memorandum dated 8.11. 1994. We, therefore, find that the judgment and order of the tribunal is not sustainable in law and the same deserves to be set aside. We order accordingly.

On applying the said principle to the case of the applicant, it is clear that as per the 2nd PRC circulated vide letter dated 5.3.2009, pay has to be fixed in the corresponding revised pay scale of the substantive post, since there is no provision in the PRC to fix pay in the corresponding new pay scale based on officiating pay. The applicant was officiating in the higher post of AD (OL) and his pay as per relevant rule has to be fixed in the officiating post after allowing one notional increment. Besides, in respect of Time Bound Promotion granted under NEPP, which is again a policy decision of the respondents organisation, it was clarified vide letter dated 19.2.2010 that the pay drawn in local officiating arrangement will not be protected under the Time Bound Promotion Policy. Applicant claims that the clarification is untenable since it is against the FRs relied upon by him. FRs being statutory would prevail over executive instructions. However, the FRs

relied upon by the applicant would not be able to back his claim as legal principles stipulated by the Hon'ble Apex Court stated supra in respect of PRC Recommendations and policy decisions would reign supreme. Hence, in this context, the revision of the pay of the applicant as per PRC taken by the respondents is proper and needs to be upheld.

VII. Going a step further, we observe that the respondents have admitted that they have made a mistake in fixing the pay of the applicant after the 2nd PRC on 1.1.2007, by considering the officiating pay as on 31.12.2006 in the higher post of AD (OL) instead of taking the substantive pay in the lower post held by the applicant in a substantive capacity. It was a bonafide mistake and it can be corrected as held by the Hon'ble Supreme Court in ***VSNL v. Ajit Kumar Kar, (2008) 11 SCC 591***,

> ***"46.*** *It is well settled that a bona fide mistake does not confer any right on any party and it can be corrected."*

The bonafide mistake committed by the respondents in fixing a higher pay deviating from the 2nd PRC recommendations would not confer any right on the applicant to urge for a higher pay to which he is not entitled.

VIII. Before we part, we must observe that by allowing the relief sought, we would be infringing the doctrine of unjust enrichment. We find that the applicant has been enriched by the wrong fixation in a higher pay scale for which he is not legally entitled as per 2nd PRC recommendations communicated vide letter dated 5.3.2009. This undue benefit has been extended at the expense of the public exchequer, since the respondents organisation is a public sector organisation. Despite being informed by the

respondents that it was a mistake to grant higher pay, applicant resisted in regard to recovery by approaching the Tribunal and due to an interim order passed on 13.5.2015 the amount to be recovered remains with the applicant. In view of the facts that have come forth with the filing of the reply statements and the application of the relevant law to the case under dispute we find that the amount in question has been unjustly held by the applicant. Thus in the circumstances described as per the principle of unjust enrichment, restoration of the amount to the respondents unjustly received by the applicant is justified. We take support of the Hon'ble Apex Court observation in ***Mahabir Kishore & Ors vs. State Of Madhya Pradesh*** on 31 July, 1989 Equivalent citations: 1990 AIR 313, 1989 SCR (3) 596 , as under, in stating the above:

> *"The principle of unjust enrichment requires: first, that the defendant has been 'enriched' by the receipt of a "benefit"; secondly, that this enrichment is "at the expense of the plaintiff"; and thirdly, that the retention of the enrichment be unjust. This justifies restitution."*

IX. Therefore, in view of the aforesaid circumstances we find the decision of the respondents to refix the pay of the applicant vide 4th respondent letter dated 25.4.2015 to be in order. Hence, finding no merit in the OA, we dismiss it with no order as to costs. The interim order issued on 13.5.2015 stands vacated.

(B.V.SUDHAKAR)
ADMINISTRATIVE MEMBER

(ASHISH KALIA)
JUDICIAL MEMBER

evr