

OPEN COURT

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH
ALLAHABAD

Dated: This the 15TH day of SEPTEMBER 2005.

Original Application No. 790 of 2002.

Hon'ble Mr. K.B.S. Rajan, Member (J)

Suresh Chandra Srivastava,
S/o late Sri Laxmi Narain Lal,
R/o 13/8, Nati Imli,
VARANASI.

.....Applicant

By Adv: Sri H.S. Srivastava

V E R S U S

1. Union of India though Secretary,
Ministry of Telecommunication,
Door Sanchar Bhawan,
NEW DELHI.
2. Chief General Manager, Telecom.
Bharat Sanchar Nigam Limited,
U.P. (East) Circle,
LUCKNOW.
3. The Chief Accounts Officer (DOT Cell),
Bharat Sanchar Nigam Limited,
U.P. (East) Circle,
LUCKNOW.
4. The General Manager Telecom District,
Bharat Sanchar Nigam Limited,
VARANASI.

.....Respondents

By Adv: Sri D.K. Dwivedi

O R D E R

The grievance of the applicant is that the respondents have illegally reverted him from Grade IV to Grade III with retrospective effect from 1994 and thereby reduced his last 10 months' average pay which has telescopically affected the applicant in

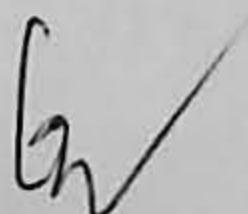
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respect of pension, commuted value of pension and other terminal benefits which are based upon the last 10 months' average pay. His grievance is aggravated when by order dated 20.11.2002 (Annexure RA 5) recovery was also sought to be effected to recover the alleged excess payment of pay and allowances.

2. Briefly stated, the applicant joined services of the department of telecom and on completion of 26 years of his service in the basic cadre, he was afforded the benefit of BCR Scheme and by a formal order was placed in the pay scale of Rs. 2000-3200 w.e.f. 1.1.1994 on adhoc basis. This pay scale was revised to Rs. 6500-10500 w.e.f 1.1.1996.

3. On 8.9.1999 the respondents had passed an order reverting the applicant to Grade III and when the applicant challenged the same in OA No. 1374 of 1999, the Tribunal by a common order dated 17.8.2000 passed the following orders:-

"In substance and basically the objections taken to petitioners promotion are that the department decided to protect all those, who were promoted and had to be reverted in terms of the orders of the Principal Bench of the Central Administrative Tribunal, New Delhi dated 7.7.1992. In the process the restriction of 10% was diluted. Now the interpretation of the department is that since prescribed limit of 10% would neither be relaxed/extended by the department nor by the Central Administrative Tribunal, the petitioners' promotion found to be wrongly made in order to remove the discrimination requires to be cancelled. The department admitted that the promotions granted to the petitioners vide office order dated 23.11.1998 was issued due to



misinterpretation of department instruction dated 16.6.1997 and 2.9.1998.

There are no statutory rules regulating the promotions. All these promotions were provided by executive orders. The department may have made a mistake by promoting ineligible persons namely those who were not senior to the petitioners in gradation list on account of their opting in restructured cadres. However, once the department decided to protect their promotion by creating supernumerary posts and consequently provided for promotions of all those who were senior to senior promoted persons, the Rule of 10% of the BRC scheme for promotions stood relaxed. It is well known principle of law that where there are no statutory rules governing the service conditions, executive orders can be issued and that such executives orders can be amended or modified by subsequent executive orders. The department at the time of protecting the promotions of those who were not found eligible by the Principal Bench of Central Administrative Tribunal, New Delhi in its order dated 7.7.1992 confirmed by Supreme Court on 9.9.1993 decided to protect their promotions by creating supernumerary posts and further decided to remove the discrimination by providing promotions to all those who were senior to such persons, exempted 10% limit of BCR Scheme in promotion. The respondents have not brought to the notice of the court any violation of the service rules in giving promotions to the petitioners except that the petitioners were promoted by way of mistake as they were above the 10% limit of BCR Scheme. The department, however, has not been able to justify the discrimination which was sought to be remedied by promoting the petitioners. It is admitted that some of the juniors were promoted and that the department has protected their reversion by creating supernumerary posts. The department should have realized that such a decision will necessarily cause discrimination to the seniors in the basic cadres and will call for a further remedial action.

The petitioners were promoted subject to their selection through the Departmental Promotion Committee, which was thereafter held approved promotions of all the petitioners. The merit as such has not been compromised in making such promotions.

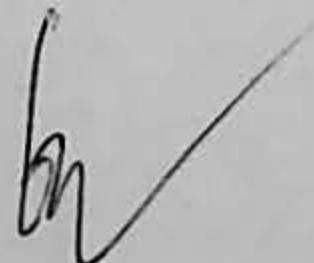
The Court further find that the equity also supports the petitioners. Almost all the petitioners except a few have retired. It would be unjust and inequitable to withdraw the benefits drawn by the petitioners much before their retirement from their death-cum-retiral gratuity. The fact that they have been given benefit of promotion retrospectively and have actually worked about one year also does not take away the equity which has come into play after the petitioners have retired.

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It has been held by the Hon'ble Supreme Court in State of Orissa Vs. Adwait Charan Mohanty, 1995 Supp (1) SCC 470: 1995 SCC (L&S) 522: Union of India v. Sita Ram Dheer, 1994 SCC (L&S) 1445; Nand Kishore Sharma v. State of Bihar, 1995 Supp (3) SCC 722 : 1996 SCC (L&S) 124; State of Karnatake v. Mangalore University Non-Teaching employees' Assn., (2002) 3 SCC 302 : AIR 2002 SC 1223 that if any additional payment, has been made to the employees for no fault of theirs they should not be penalized for that.

Both the writ petitions are consequently allowed. I find that the orders dated 6/12.9.2002 and the orders dated 5/16.9.2002 in Writ Petition No.48717 of 2002 and the orders dated 20.11.2002 and 10.9.2002 in writ petition No.18265 of 2003 reverting the petitioners to Grade III posts can not be sustained, and are accordingly quashed. The respondents are restrained from giving effect to these orders and to recover any benefits drawn by the petitioners."

4. In wake of the aforesaid order the applicant was issued a show cause notice dated 16.2.2001 which was replied by him on 15.5.2001. Thereafter, the applicant had superannuated w.e.f. 30.11.2001. As the pay slip for the month of November 2001 would reflect, the basic pay of the applicant was Rs. 7700/- and the average monthly pay was also the same amount. Under the existing procedure the average of 10 months pay counts for the purpose of working out the monthly pension, gratuity as well as leave encashment etc. However, the applicant could find from the Pension Payment Order issued to him that his average pay was taken as Rs. 7250/- instead of Rs. 7700/-. This had resulted in depletion of the monthly pension by a minimum of Rs. 225/- plus corresponding dearness relief. In addition, there has been a sizable reduction in the quantum of

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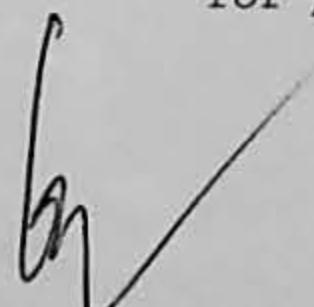
gratuity and leave encashment. As such the applicant had moved this OA.

5. Subsequent to the filing of the OA, the respondents had also issued an order of reversion coupled with recovery of certain amounts vide order dated 20.11.2002. As such, on application by the applicant, by order dated 12.2.2004 certain amendments in the OA were permitted and the same were incorporated.

6. The respondents have contested the OA. their main contention being summarized in paragraph 3 and 7 (2) of the counter the same are extracted below:-

"That, the contents of para 1 of the original application are not admitted. The action involved in the original application is neither illegal nor arbitrary. Reduction in rate of pension is sure when the pay fixation is found wrong and reduced. The gratuity and other benefits also may be varied whenever it is found that pay fixation was wrong. Pay fixation can be varied whenever it is found that fixation done is wrong and such correction in pay fixation, if attracts gratuity or pension, it is not actionable. Whenever it is found that an employee was promoted wrongly and at any stage such wrong and illegal promotion may be canceled and consequently the pension and gratuity shall automatically be affected and therefore contents of para 1 of the original application are not admitted.

As per records of the department the applicant was not found to be eligible for promotion to Grade-IV at Circle Level on the basis of his inter-se-seniority in Grade-III (which depends on the seniority in L.S.G.) before issue of the instructions dated 13.12.1995 and, as such, the applicant could not be promoted in Grade-IV (10%) of BCR Scheme prior to 13.12.1995 even after issue of the instructions dated 13.12.1995. The applicant was not found to be eligible for promotion to Grade-IV on the basis of

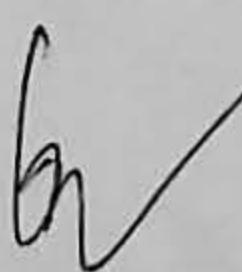
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his seniority in the basic grade till the crucial date 1.1.1995 within the prescribed limit of 10%."

7. The applicant had filed his rejoinder reiterating his stand.

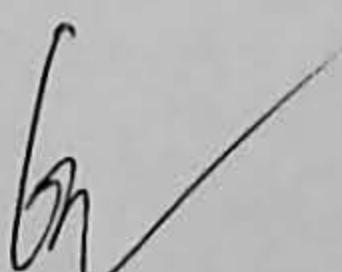
8. Arguments were advanced and documents perused. The applicants submitted that an identical case in respect of certain officials who originally belonged to Telecom services but have been posted in BSNL was considered by the Hon'ble Allahabad High Court in Civil Misc. Writ Petition 48717 of 2002 and the same had been decided vide order dated 22.8.2005. In that case the petitioners were considered and promoted by order issued in the year 1998 in the pay scale of Rs. 6500-10500 and the petitioners were thereafter discharging their duties. However, by order dated 20.4.1999 these promotions were cancelled and the petitioners therein moved this Tribunal in OA No. 1228 of 1998, which was allowed by judgment dated 17.8.2000 (it is pertinent to mention that it is in the same judgment of the Tribunal that the applicants OA was also considered and decided as stated above). As the department had reverted the petitioners in the said Writ Petition, the same was agitated as being arbitrary. The Hon'ble Allahabad High Court held as under:

"For the reasons stated above, all these OAs are allowed. The impugned orders dated 14.7.1999, 20.7.1999 & 16.8.1999 (Annexure A1, A2 & A3) in OA No. 1005/99, impugned order dated 20.7.1999 in



OA No. 912/99, impugned orders dated 14.7.1999, 2.8.1999 & 11.8.1999 (Annexures A1 to A4) in OA No.1027/99, impugned order dated 14.7.99, 20.7.99, 29.7.99 and 2.8.99 in OA No.1072/99, impugned orders dated 14.7.99, 20.7.99 & 31.8.99 in OA 1095/99, impugned orders dated 14.7.99, 20.7.99 & 3.8.99 In OA No.1226/99, impugned order dated 17.9.99 in OA No.1227/99, impugned order dated 8.9.99 in OA 1228/99, impugned orders dated 14.7.99, 20.7.99 & 4.10.99 in OA1281/99, impugned order dated 16.9.99 in OA1374/99, impugned orders dated 14.7.99, 20.7.99 & 22.9.99 in OA No.1383/99, impugned orders dated 14.7.99, 20.7.99 and 17.9.99 in OA No.1384/99, impugned orders dated 8.9.99, 16.9.99 and 20.9.99 in OA No.1273/99 to the original applications are being quashed. However, it is left open to the respondents to pass a fresh order in accordance with law after affording adequate opportunity of hearing to the applicant. During the pendency of these applications if any recovery has been made from the applicants, they will be entitled to get the amount back within a period of three months from the date of receipt of copy of this order. There will be no orders as to costs."

9. The counsel for the respondents reiterated his stand as contained in the counter affidavits which are extracted in one of the preceding paragraphs. He has not denied the fact that the applicant in this OA and the petitioners in the Civil Writ Petition were similarly situated except that the petitioners before the High Court were working in BSNL while the applicants were working in Telecom. As such without any hesitation or reservation it can be safely stated that the judgment of Hon'ble Allahabad High Court decided on 22.8.2005 in Civil Misc. Writ Petition No. 48717 of 2002 applied in all the four squares and the benefit as available to the petitioners before the Hon'ble High Court are equally available to the applicant herein.

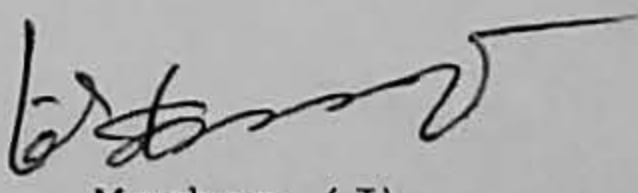
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10. In view of the above, the OA is allowed. The order reverting the applicant to Grade III post is quashed and set aside. The respondents are restrained from giving effect to this order and to recovery any benefit drawn by the petitioners. They are also directed to:-

- a. Work out the pension applicable to the applicant with his average 10 months' pay as Rs. 7700/- and pay the difference of pension from the date of retirement till date and also continue to pay the pension so worked out.
- b. Recalculate the extent of gratuity and leave encasement applicable to the applicant taking into account his average monthly pay at Rs. 7700/- and pay the difference arising out of the same.
- c. Refund the amount if any already recovered in pursuance of the order of reversion.

11. The above exercise shall be completed within a period of four months from the date of communication of this order.

12. No costs.


Member (J)

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