

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH: ERNAKULAM.**

ORIGINAL APPLICATION NO.458 of 2013

DATED THIS THE DAY OF ¹⁷ SEPTEMBER, 2014

HON'BLE SHRI U.SARATHCHANDRAN MEMBER (J)

HON'BLE SHRI PRASANNA KUMAR PRADHAN MEMBER (A)

N.D.Gopi s/o late Damodaran,
Aged 59 years, Telecom Mechanic,
O/o SDE, Telephone Exchange,
Ravipuram, Kochi-682 016,
Residing at Nangapillil Thundiyal House,
Thycoodam, Vytila P.O.,
Kochi-682019.

.....Applicant

(By counsel Shri P.A.Kumaran)

v/s.

1. Bharat Sanchar Nigam Ltd,
Represented by its
Chairman cum Managing Director,
Sanchar Bhavan, New Delhi-110001.
2. Chief General Manager, Telecom,
Bharat Sanchar Nigam Ltd.,
Kerala Circle, Trivendrum-695001.
3. Principal General Manager Telecommunications,
Bharat Sanchar Nigam Ltd,
Ernakulam SSA, Ernakulam-682016.
4. Union of India,
Represented by the
Secretary to Government of India,
Department of Communications,
New Delhi-110001.



5. The Accounts Officer (Estt),
Office of the Principal General Manager,
Bharat Sanchar Nigam Ltd,
Ernakulam-682016.
6. The Controller of Communication Accounts,
Door Sanchar Bhavan,
Thiruvananthapuram-695001.

..... Respondents

(By counsel S/Shri Pradeep Krishna for R-1 to R-3 & R-5 and Sunil Jacob Jose, Sr. CGSC for RR-4 & R-6)

ORDER

HON'BLE SHRI PRASANNA KUMAR PRADHAN, MEMBER (A):

The applicant being aggrieved by the Revised Pay Fixation Memo No.ESTT/EQ/3537008/44 dated 05.01.2013 issued by the Accounts Officer (Estt), Office of the Principal General Manager, Bharat Sanchar Nigam Ltd, Ernakulam (Annexure-A-1) has filed this Original Application under Section 19 of the Administrative Tribunals Act, 1985, seeking the following reliefs;

- i. To declare that Annexure (A-1) Office Memorandum re-fixing the pay of the applicant to his detriment is illegal, arbitrary, unjust and unreasonable and that the same violates Articles 14 & 16 of the Constitution of India;
- ii. To quash Annexure (A-1) and to direct the respondents to restore the benefits of the original fixation of pay to the applicant with consequential benefits including the refund of the amount reduced from January 2013 onwards;
- iii. Such other relief as may be prayed for and this Tribunal may deem fit to grant.

The facts of the case in brief are as follows;

2. The applicant joined the service as Lineman in the year 1974. He was granted the higher grade of Sub Inspector of Phones, under the OTBP Scheme, on completion of 16 years of service w.e.f. 16.03.1990. Following



the 5th Central Pay Commission, he was drawing pay in the OTBP pay scale of Rs.3050-4590. While so, his pay was revised and placed in the pay scale of Rs.3200-854900 w.e.f. 10.10.1997 (Annexure-A-2). Subsequently, on completion of 26 years of service, the applicant was granted Grade III under BCR Scheme w.e.f. 01.07.2000 in the pay scale of Rs.4000-100-6000 (Annexure-A-3). Accordingly, the applicant's pay was fixed at Rs.4400 w.e.f. 01.03.2001 with the date of next increment being 01.03.2002 in accordance with FR 22(1)(a)(i) (Annexure-A-4). The applicant was thus drawing pay in the pay scale of Rs.4000-6000 as on 01.10.2000, when the Department of Telecom was converted into Bharat Sanchar Nigam Ltd., The applicant and other employees of the Department of Telecom were kept on deemed deputation to the Corporation. They were retrospectively absorbed into the 1st respondent-Corporation w.e.f. 01.10.2000 based on their option (Annexure-A-5). It was specifically mentioned in Annexure (A-5) that "*all other officers and staff will stand transferred along with their posts on existing terms and conditions as is where is basis, on deemed deputation, without deputation allowance w.e.f. 01.10.2000 to the Company*".

3. In the year 2002, the Central Dearness Allowance pay scales were replaced with Industrial Dearness Allowance pay scale retrospectively from 01.10.2000 vide letter No.1-34/Estt-2002 dated 07.08.2002 (Annexure-A-6). Based on the said letter dated 07.08.2002 point to point fixation was given to the applicant. Accordingly applicant's pay was fixed at Rs.6020/- on the IDA scale 5,700-160-8,100. At the same time the pay of one Mr. V.V.Asokan who is junior to the applicant was fixed at Rs.6,370/-. The pay of Shri V.V.Asokan

was further fixed at Rs.6820/- on his being granted Grade III under the BCR Scheme. Both the applicant and Shri V.V.Asokan were granted promotion as Telecom Mechanic w.e.f. 20.02.2002 and their pay re-fixed at Rs.7105/- and Rs.7290/- respectively. In these circumstances the applicant filed OA No.619/2012 before this Tribunal seeking stepping up of his pay at par with Shri V.V.Asokan.

4. During the pendency of the Original Application the respondents have issued (Annexure-A-1) Office Memorandum re-fixing the pay of the applicant to his detriment, that too without notice. Annexure-A-1 refers to DOT OM No.I-I (I)/06/PAT dated 17.12.2008 endorsed by BSNL Corporate Office Circular No.32 dated 27.09.2012 (Annexure-A-7 & Annexure-A-8). Annexure-A-7 has been issued in supersession of OM No.I-I(I)/06-PAT dated 12.09.2006 issued by the 4th respondent (Annexure-A-9). Applicant has submitted that fixation in the case of the applicant was done much prior to the issuance of Annexure-A-9 Office Memorandum and hence its supersession does not automatically warrant a re-fixation to the detriment of the applicant. Aggrieved by the unexpected reversal, the applicant submitted a representation to the 5th respondent requesting that no action be taken pursuant to Annexure-A-1 Office Memorandum (Annexure-A-10). The pay of the applicant has been reduced consequent on the implementation of Annexure-A-1 Office Memorandum, the alleged overpayment on account of the re-fixation is Rs.1,98,336/-. The applicant submits that the contention of the respondents that the option as per the FR is not available to him is incorrect in view of the

specific recital in Annexure-A-5 and hence the re-fixation done in his case is illegal, arbitrary, unjust and unreasonable. Further, it is impermissible to effect a revision of pay and consequential recovery beyond the general period of limitation of 3 years.

5. The whole justification for the issuance of Annexure-A-1 Office Memorandum re-fixing the pay of the applicant is Annexure-A-7 Office Memorandum which superseded Annexure-A-9 Office Memorandum. But Annexure-A-9 Office Memorandum was not there when the fixation was done in the case of the applicant. As such its supersession does not automatically warrant the applicant of Annexure-A-7 Office Memorandum and a re-fixation in the case of the applicant.

6. According to the respondents, the option as per the FR is not available to those absorbed to the BSNL as clarified by Annexure-A-7 Office Memorandum and hence the re-fixation is justified in the case of the applicant. The applicant submits that what the respondents say is contrary to the specific recital in Annexure-A-5 which says "*all other officers and staff will stand transferred along with their posts on existing terms and conditions as is where is basis, on deemed deputation, without deputation allowance w.e.f. 01.10.2000 to the Company*". Annexure-A-5 still holds good as it has never been superseded by a similar Office Memorandum in a similar process. Hence he is entitled to the relief sought for.

7. The respondent Nos.1, 2, 3 and 5 in their reply statement submitted that revised pay fixation as per Annexure-A-1 memo dated 05.01.2013 issued

by the 5th respondent is in order vide Annexure-A-8 circular dated 27.09.2012 which is corollary of Annexure-A-1 order dated 17.012.2008. The applicant's pay was fixed at Rs.4400/- w.e.f. 01.03.2001. The pay was re-fixed at Rs.6020/- on 01.10.2000 on conversion of CDA scale to IDA in the scale of pay of Rs.5700-160-8100. He was promoted to LM-BCR on 01.07.2000 in the scale of 4000-100-6000 to Rs.4200/- with option fixation facility as on the date of next increment in the lower scale which was available under FR at that time and thus fixed at Rs.6820/- on the date of next increment i.e. on 01.03.2001, in the corresponding IDA scale of Rs.5700-160-8100. This option facility was withdrawn by DOT vide Annexure-A-8 following Annexure-A-7 order as stated above. This decision of DOT was also based on the clarification of Department of Public Enterprises that "the option of fixing the pay from the next increment date available under FR 22 will not be available for the employees of BSNL since their status changed on 01.10.2000".

8. As per rules on promotion, the pay can be fixed either on the date of promotion or on the date of next increment by giving option. Though the applicant and Shri V.V.Asokan got promotion as Telecom Mechanic w.e.f. 20.02.2002 Shri V.V.Asokan opted to have his pay fixed at Rs.7290 whereas the applicant Shri N.D.Gopi has not opted for such option fixation and hence his pay was fixed at Rs.7105/- on the date of promotion. It is submitted that the order issued superseding an earlier order, will naturally prevail over older one and hence the pay was revised based on the latest order. The same is applicable to all similarly situated cases. All cases were scrutinized and revised pay fixation memos were issued wherever necessary and over paid

salary also were recovered from the retired officials and in case of serving employees, the amounts are being recovered in installments. The DOT was the controlling authority which decides the terms and conditions including the manner of pay fixation at the time of conversion from Government Department to a PSU i.e., BSNL and BSNL have to abide the same. Hence the pay fixation as per Annexure-A-1 is in order and a sum of Rs.1,98,336/-, which is the overpaid amount to the applicant is to be recovered from the applicant. Hence the respondents submitted that the Original Application should be dismissed.

9. Applicant filed a rejoinder to the reply statement of the respondents and contending that the fixation of pay of the applicant was done way back in 2000 and 2001. The memo, circular, order etc., referred by the respondents came into existence only 8 to 12 years thereafter. Even a statutory rule cannot be amended retrospectively so as to take away the vested right of an individual crystallized under the said statutory rule. Annexure-A-1 is not at all in the nature of a notice offering a pre-decisional hearing, but it is the nature of a decision being communicated. The applicant reiterates his plea regarding violation of principles of natural justice. The fixation in his case was done much prior to the issuance of Annexure-A-9 Office Memorandum and hence its supersession does not automatically warrant a re-fixation to his detriment. The fixation in the case of the applicant was not done on the basis of Annexure-A-9 which came into existence only on 12.09.2006. Hence, he prayed for granting the relief prayed for.



10. Heard the learned Counsel for the parties. The learned Counsel for the applicant reiterated the facts highlighted in the OA and the rejoinder and submitted that the applicants' pay was fixed much earlier to the circular issued by the DoT in 2006. Therefore, supersession of this order has no bearing on his pay scale. Re-fixation of his pay by the respondents suo motu after 12 years and without giving an opportunity to represent against the same is clearly in violation of the principles of natural justice. Hence the re-fixation of pay and consequential reduction in pension as well as recovery of the amount drawn in excess is clearly illegal and needs to be set aside. He also mentioned about the issue of parity in pay with his junior but the same issue is subject matter of another OA.

10. Learned Counsel for the respondents on the other hand said that the initial pay fixation of the applicant was under the wrong assumption that the applicant who was DoT employee is entitled to avail the benefit of FR 22 for fixation of his pay. But he became absorbed as BSNL employee and also availed IDA Scale in place of CDA scale. The principle governing the IDA pay scale should have been applied in their case. Somehow there was a mistake in fixation of pay of applicant as well similarly placed employees at that point of time. Subsequently, the matter was re-examined by DoT and a fresh circular was issued in 2008, based on which BSNL issued further order in 2012. The re-fixation of the pay scale has been done in respect of the applicant as well as other employees in so far as what is admissible to them and there is nothing irregular in such an action of the respondents. Based on the re-

A handwritten signature in black ink, appearing to be a stylized 'S' or a similar character, is positioned below the text.

his pension has been fixed and excess amount drawn is to be recovered from his leave salary. Therefore, there is no infirmity or irregularity in the action taken by the respondents and the OA is liable to be dismissed.

11. We have carefully considered the facts of the case and also submission made by the parties. We are not dealing with the issue of pay parity claimed by the applicant vis-à-vis his junior since this issue is the subject matter in another OA filed by the applicant before this Tribunal. The issue in this particular case is whether the initial fixation of pay of the applicant when he got promotion while in DoT prior to 1.10.2000 and application of FR 22 when he became BSNL employee w.e.f. 1.10.2000 is correct or not. The applicant has referred to the initial terms and conditions of transfer of the service of employees when BSNL was formed. Para 4 of Office Memorandum dated 30.9.2000 relating to setting up of BSNL, transfer of staff reads as follows:

- iv. Officers and staff belonging to various Central Secretariat Services (mentioned in Annexure A) providing services to officers/units being transferred to the company will stand transferred along with their posts, on as is where is basis, on deemed deputation, without deputation allowance, w.e.f. 1.10.2000 to the Company on existing terms and conditions of service. Further order in the matter would be decided by DoT in consultation with DoPT which is the cadre controlling authority of CSS.
- v. Officers and staff shall continue to be subject to all rules and regulations as are applicable to Government servants, including the CCS (CCA) Rules till such time as they are absorbed finally by the Company after they exercise their options. Their pay scales, salaries and allowances will continue to be governed by existing rules, regulations and orders.

12. It would be evident from the said OM that initially the employees were transferred on deemed deputation on their existing terms and conditions of service. It was also stipulated that all rules and regulations as are applicable to the Government servants will be applicable to them till such time as they are absorbed finally by the Company after they exercise their options. Subsequently, the IDA pay scale was introduced by BSNL in replacement of CDA pay scales w.e.f. 1.10.2000. The order introducing the IDA pay scales specifies vide para 'd' and 'f' is as follows:

- d. The normal date of annual increment will remain un-changed. The employee whose pay is fixed in IDA scale, as above, will continue to draw annual increment on the normal date he would of drawn increment had he continued in the CDA pay scale, if otherwise due/admissible.
- (f) The employees who have been promoted to the higher posts after 1.10.2000 will be fixed in the corresponding IDA pay scale from the date of promotion under the normal rules relating to the fixation of pay on promotion with reference to their pay in the IDA pay scale of pre-promoted post. However, those who are promoted to the higher post on 1.10.2000, will first be fixed in the IDA pay scale corresponding to the CDA pay scale of pre-promoted post as per formula at (a) above and then will be fixed in the IDA pay scale of the promoted post corresponding to the CDA pay scales of promoted post, under normal pay-fixation rules on promotion under FR.

13. The above order makes it very clear that fixation of pay in the IDA pay scale should have been from the date of promotion. The issue therefore remains as to what will happen in the case of employees who got promotion prior to 1.10.2000 but opted to get fixation after drawing their increment in terms of FR 22. As per the provisions governing the IDA pay scale, it would be from the date of promotion. Initially, the DoT, apparently were under the presumption that since they got promotion prior to 1.10.2000 and opted



fixation under FR 22, the re-fixation of pay should be done after the due date of increment as per their option. In fact the DoT issued clarification in 2006 to that effect which was with reference to queries received by them from various CCA offices. However, when the matter was consulted with the Department of Public Enterprises which is the Nodal Ministry of PSUs, it was informed that once a person becomes a PSU employee, the principle applicable to PSUs has to be followed in his case. Therefore the Department of Public Enterprises clarified to the DoT that option for fixation of pay to the promoted scale from the next increment date available under FR 22 will not be available to employees of BSNL, since their status changed on 1.10.2000 and their pay will have to be fixed on their date of promotion as per these existing rules prior to 1.10.2000 and no re-fixation can be allowed on the next increment date which is falling after 1.10.2000. As a result of this clarification the DoT issued fresh order dated 17.12.2008 clarifying the methodology of pay fixation in respect of absorbed officials of BSNL who were promoted prior to 1.10.2000 but opted under FR²²(I)(a)(i) for fixation of their pay in the promoted scale on the date of their next increment in the lower grade which falls after 1.10.2000. In spite of these clarifications, the BSNL did not issue appropriate circular on the method of pay fixation in the IDA scale until 2012, though BSNL ought to have issued the clarification immediately thereafter in 2008 and take action for re-fixation of pay of such employees in furtherance to that order. Only when the pension papers of some employees were sent to DoT, this anomaly was noted and BSNL was asked to issue the circular corresponding to the OM



dated 17.12.2008. The pay of the employees was re-fixed accordingly by DoT and the pension fixed.

14. From the facts and circumstances, it is clearly evident that the initial pay fixation of the applicants was not done correctly, may be due to a wrong assumption both by BSNL and the DoT. However, this was subsequently corrected and a fresh order was issued by DoT in 2008, based on which a circular was issued by BSNL in 2012. No doubt, the DoT should have issued the initial circular in 2006, or guidelines in the matter even prior to that after consulting the Nodel Ministry, Department of Public Enterprises and BSNL on their part should have issued necessary circular immediately after DoT issued the OM in 2008. However, the delayed action on their part cannot entitle the applicants to get the benefit of wrong pay fixation.

15. On the issue of rectification of mistake and recovery of pay, the Hon'ble Apex Court in Civil Appeal No.8973 of 2013 – U.T. Chandigarh & Ors. Vs. Gurcharan Singh & Anr. (AISLJ 2014(2) SC 301) held that mistake can be rectified. In the said case, the respondent was re-employed as clerk on quota for ex-servicemen – Pay fixed – After some years accounts found mistake in fixing his pay – Re-appointed in 1992 but comprehensive orders of 1986 not considered and he was given benefit of past Army service of increments in fixing his pay – On realising the mistake Government ordered recovery of over payments – Held mistake can be rectified – Appeal disposed of. The order of the Apex Court dated 01.11.2013 mentioned vide paras 11 and 12 as under:



"11. In view of the forestated position, in our opinion, the Tribunal was absolutely right in coming to the conclusion that the pay fixation under the order dated 13th October, 1998 was correct because a mistake was committed in the earlier pay fixation under the order dated 2nd September, 1992.

12. Though a submission had been made on behalf of the respondent that no amount should be recovered from the salary paid to the respondent, the said submission can not be accepted because if any amount had been paid due to mistake, the mistake must be rectified and the amount so paid in pursuance of the mistake must be recovered. It might also happen that the employer might have to pay some amount to the respondent as a result of some mistake and in such an event, even the appellant might have to pay to the respondent. Be that as it may, upon settlement of the account, whatever amount has to be paid to the respondent employee or to the appellant employer shall be paid and the account shall be adjusted accordingly."

16. On the issue of recovery, the learned Apex Court in Civil Appeal No.5899 of 2012 in SLP © No. 30858/2011 between Chandi Prasad Uniyal & Ors. Vs. State of Uttarakhand & Ors. held as under:

Para 16 : *We are concerned with the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness, collusion, favouritism, etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/ received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the pay to repay the money, otherwise it would amount to unjust enrichment."*



17. From the facts mentioned earlier, it is evident that there was wrong presumption on the part of the DoT and also the BSNL on the procedure of fixing pay of the persons whose status changed from that of a Government servant to a public sector employee. They ought to have consulted the nodal ministry in the matter and issued circular/guidelines since it is a matter of policy and its applicability for all such employees coming under that category. Apparently, due to the wrong presumption, the respondents had fixed the pay of the applicants who got promotion prior to their transfer on deputation to BSNL in a manner which was not correct. This should be considered as a bonafide mistake and therefore, requires to be rectified. It is true that this mistake should have been detected much earlier and also rectified. Nevertheless, the steps taken for rectifying the mistake and fixing the pay of the applicant in a correct manner cannot be termed as irregular or arbitrary on account of belated action.

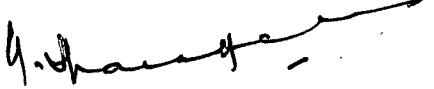
18. After considering the facts of the case and the submissions made by the parties and keeping in view the judgment of the Apex Court cited above, we are of the view that the action taken by the respondents to rectify the mistake committed earlier while fixing the pay after the employees became part of BSNL is perfectly in order. Consequently, the recovery of excess amount drawn can also not be faulted at. Therefore, considering the matter in its totality, we are of the view that the applicants have failed to establish a

case calling for interference by this Tribunal. Therefore, we hold that the OA lacks merit and is liable to be dismissed.

19. Accordingly, the OA is dismissed. No order as to costs.



(P.K. PRADHAN)
MEMBER (A)



(U. SARATHCHANDRAN)
MEMBER (J)

Pmj.+ psp.