

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A.520/2007

TUESDAY..... this the 14th day of OCTOBER, 2008

CORAM:

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER

**K.Radhakrishna Menon,
S/o the late A.G.Gopala Menon,
Postman, Elamakkara Post Office(Retired),
residing at Kadambanattu House,
Pazhanganadu, Kizhakkambalam P.O., Aluva. Applicant**

(By Advocate Shri O.V.Radhakrishnan, Sr. with Antony Mukkath)

Vs.

- 1. Chief Postmaster General, Kerala Circle,
Thiruvananthapuram.**
- 2. Senior Superintendent of Post Offices,
Ernakulam Division, Kochi -682 011.**
- 3. District Collector,
Ernakulam.**
- 4. Tahsildar (Revenue Recovery),
Kunnathunad Taluk, Taluk Office,
Perumbavoor.**
- 5. Deputy Tahsildar (Revenue Recovery),
Taluk Office, Kunnathunad,
Perumbavoor.**
- 6. Village Officer, Kizhakkambalam Village,
Kunnathunad, Perumbavoor. Respondents**

(By Advocate Mrs.Mini R.Menon, ACGSC(R.1&2)

(By Advocate Shri R.Premankar, GP(R.3-6)

**The application having been heard on 24.9.2008
the Tribunal on 14-10-08...delivered the following:**

ORDER

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER

**This is the second round of litigation. To have the hang of the brief
facts of the case as well as the decision in the previous round as given in**

order dated 22nd March, 2006 in OA No. 670/03 it is appropriate to reproduce the very order itself and the same is as under:-

"The applicant is aggrieved by Annexure A-1 letter dated 11.7.02 issued by the respondents demanding the refund of Rs.5063/- comprising of Rs.2458/-, Rs.1208/- and Rs.1397/-, as pay and allowances for the period from 1.1.96 to 31.5.97, cash equivalent of leave salary for 240 days of E.L. and retirement gratuity respectively received by him in excess due to wrong fixation of pay. He is also aggrieved by Annexure A-2 letter dated 22.7.2002, by which the Senior Accounts Officer/Pension, Postal Accounts, Thiruvananthapuram asked the 2nd respondent viz., CPMG, Kerala Circle, Trivandrum, to recover the excess paid amount of DCRG of Rs.1397/- from the applicant.

2. *The brief facts of the case are as under: -*

The applicant retired from service as a Postman on 31.5.97. He was drawing the pay in the scale of Rs.825-15-900-20-1200. His pensionary benefits were calculated and paid on the basis of the basic pay of Rs.1060/- which he was drawing at the time of retirement. Consequent upon the acceptance of the 5th Central Pay Commission's recommendations, the pay of the Postman was revised to Rs.2750-70-3800-75-4400 with two advanced increments w.e.f. 1.1.96. By the time the revised scale was granted to the employees, the applicant was retired and his retirement dues were settled in the pre-revised scale. Thereafter, the respondents have fixed the applicant's pay at Rs.3450/- in the revised scale granting him two advance increments and the difference of arrears of pay and allowances, cash equivalent of leave salary and retirement gratuity amounting to Rs. 5063/- were paid to him. However, later the DG (Posts) vide letter dated 10.6.99 clarified that, the grant of two advanced increments in the revised scale of Rs.2750-4400 for the cadre of Postman was applicable only at the initial start of Rs.2750/- and not at the subsequent stages. On the basis of this clarification, the over-payments made to Postman by way of giving two advance increments at stages other than the initial stage were sought to be recovered. The All India Postal Employees Union and others have challenged this action of the respondents in O.A.817/99, but the same was dismissed. Against the said order of this Tribunal the applicants filed O.P.No.12205/01 before the Hon'ble High Court of Kerala which was also dismissed with the following observations:

"We are of the view that the entire right of the petitioners is based on the Pay Commission Report. There is nothing to show in the report that two advance increments would be granted at every stage of fixation. Advance increments in a scale of pay is granted as a rule only when as a special dispensation the incumbents of a post or posts are required to be provided with a higher than the initial start in the prescribed scale of pay. This is what has been done in this case. Since we have found that the department has correctly applied the Pay Commission Report other contentions raised by the petitioners need not be gone

into. We, therefore, hold that the grant of two advance increments in the earlier revised scale of pay Rs.2750-4000 at every stage was never contemplated in the Pay Commission Report or the Rules of 1997. Intention was only to provide higher than the initial start in the prescribed scale of pay. It is so decided."

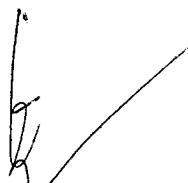
3. The applicant has not seriously disputed the fact that his pay was fixed wrongly in view of the order of the Tribunal in O.A.817/99 and that of the Hon'ble High Court of Kerala in O.P.12205/01. But in the present O.A., he contends that there is no provision either in the service rules or in the pension rules enabling the authority to recover the amount from the pension. He contends that, under Rule 70 of CCS(Pension) Rules, 1997, the pension once authorised after final assessment shall not be revised to the disadvantage of the government servant, unless such revision has become necessary on account of detection of a clerical error subsequently. Since it is not a case of any error the respondents cannot invoke with the aforesaid Rule 70. Under Rule 71(2) of the CCS(Pension) Rules, the Head of the Office can adjust the Government dues against the amount of retirement gratuity becoming payable to the Government servant. The above provision is also not applicable in the case of the applicant. The Rule 9 of the CCS(Pension) Rules also cannot be invoked as the same is applicable only in the case of departmental or judicial proceedings against the retired officials. In a nutshell, the argument of the Senior Counsel, Shri O.V. Radhakrishnan is that there is no enabling provisions in any rules to issue neither the Annexure A-1 letter dated 11.7.2002 demanding refund of the excess amount from the applicant nor the Annexure A-2 letter dated 22.7.2002 by the Senior Accounts Officer/Pension, to recover the amount. In support of this argument that the excess payment was made to the applicant due to a mistake wholly of the employer and the employee has not by any act claimed or represented for such erroneous excess payment, he has relied upon the following judgments:-

1. UOI Vs. Ramgopal Agarwal & Others (1998 (2) SCC 589
2. Nand Kishore Sharma & Ors. Vs. State of Bihar & Ors (1995 Supp (3) SCC 722
3. Sahib Ram Vs. State of Haryana & Ors. (1995 Supp(1) SCC 18
4. S.C Mandakki & Ors. Vs. Director of Health & Family Welfare Service & others (1996 (8) SCC 11)
5. Santhakumari Vs. State of Kerala (2005) (4) KLT 649.

4. Shri P.S.Biju, learned SCGSC appeared for the respondents. The respondents in their reply statement have stated that the Hon'ble High Court in O.P.No.12205/01(supra) has already held that the grant of two advance increments at every stage was never contemplated in the Pay Commission Report or the Pay Rules, 1997 and the intention was only to provide higher pay only at the initial start in the prescribed pay scale. Therefore, they contend that they are justified in re-fixing the pay and correcting the mistake. They have also submitted that the

re-payment now asked for from the applicant is not by invoking the Rules 70 or 71(2) of the CCS(Pension) Rules, 1972 but it was only a direction to repay the excess amount received which was legitimately not due to him. Learned counsel for the respondents submitted that even if there was no enabling provisions under the rules to recover the amount, there is nothing wrong in demanding the Applicant to repay the excess amount received by him. It is also expected of him to refund the amount in view of the clear findings of the Hon'ble High Court in O.P.No.12205/01(*supra*). Shri Biju has also submitted that the plea of the applicant that he is not required to repay the amount since he was not a party in that case cannot be appreciated because the above judgment is declaratory in nature.

5. We have heard the counsels on both sides. The amount in question is only Rs. 5063/- The applicant has not disputed the fact that he was not entitled to get the additional increments granted to him while refixing his pay on 1.1.96 on the recommendations of the 5th Central Pay Commission. Even if he wants to justify the two additional increments granted to him while fixing up his pay, in view of the judgment of the Hon'ble High Court in O.P.12205/01(*supra*), his justification will no longer be valid and it was expected of him to refund the amount as a responsible citizen. May be on a different context, the observation of the Apex Court before the insertion of Article 51-A on Fundamental Duties in the Constitution in Chandra Bhawan Boarding and Lodging, Bangalore Vs. State of Mysore and another (AIR 1970 SC 2042 is quite relevant when it said, "It is a fallacy to think that under our Constitution there are only rights and no duties". In our considered view there is no vested right for a retired Government employee to retain the excess amount paid to him by mistake on the ground that there are no enabling provisions for the respondents to recover it. It is true that under Rule 70 & 71 (2) of the CCS(Pension) Rules, 1972, the legislature in its wisdom has rightly thought of protecting the rights of the employee to receive pension regularly without any executive interference because the very livelihood of majority of the retired Government servants is dependent on the retirement benefits such as gratuity and monthly pension. The applicant being a pensioner, the department has asked him to refund the amount in convenient installments of Rs.200/- p.m. In the conspectus of the matter we do not like to interfere with the order of the respondents dated 11.7.2002 asking the applicant to refund Rs.5063/- which he has received in excess of his entitlement. As the applicant has not shown the willingness to repay the excess amount received by him and since there is no enabling provisions for the respondents to recover the money from his retirement benefits or from any other source, we do not find any worthwhile use for the Annexure A-1 letter dated 11.7.02 asking the Applicant to repay the amount. As regards the Annexure A-2 letter dated 22.7.02 by the Senior Accounts Officer (Pension) Postal Accounts to the Deputy Director of Accounts (Postal) Trivandrum to recover the excess amount from the applicant, we do not deny the right of the respondents to recover the amount by resorting to appropriate recovery proceedings, but not by way of any recovery from the pension.



Otherwise, the respondents will have to write off the amount in terms of the existing orders of the M/o Finance, Government of India issued in this regard on the ground that the Applicant is no more in the Government service and recovery is, therefore, not possible. We, therefore, leave it to the respondents to take appropriate decision in the matter.

6. O.A. is accordingly disposed of. There is no order as to costs."

2. Taking advantage of the latitude given to the respondents, vide para 5 of this Tribunal's order extracted above, respondents have initiated action against the applicant for recovery of the alleged excess payment made to him during the course of his service by referring the matter to the Tahsildar under the Kerala Revenue Recovery Act vide Annexure A-7. The applicant has, through this OA challenged the same and has sought for the following relief (s):-

- a) To call for the records leading to Annexure A-7 demand Notice issued under Section 7 of the Kerala Revenue Recovery Act 1968 and to set aside the same.**
- b) To declare that the proceedings initiated against the applicant under Section 7 of the Kerala Revenue Recovery Act for recovery of the amounts due towards over payment of pay and allowances are illegal, ultra-vires and without authority of law.**
- c) To issue appropriate direction or order directing the respondents not to proceed against the applicant pursuant to Annexure A-7 Notice issued under Section 7 of the Kerala Revenue Recovery Act for the amount demanded therein;**
- d) To issue appropriate direction or order which this Hon'ble Court deems fit, just and proper in the circumstances of the case;**

3. At the time of issue of notice stay of further proceedings in the said impugned notice vide Annexure A-7 had been granted by the Tribunal. Respondents had filed their counter. The legality in the action of the respondents to recover the amount by invoking the provisions of Kerala

Revenue Recovery Act has been emphasized by the State Government as well as the respondents.

4. Senior counsel for the applicant argued that the alleged excess payment was not due to any statement or mis-statement of the applicant and hence, in accordance with the decision by the Apex Court in the case of Sahib Ram vs State of Haryana (1995) Supp 1 SCC 18 and other decisions, the respondents are precluded from effecting the recovery. The senior counsel has also relied upon various other decisions to contend that the Respondents cannot invoke the provisions of Kerala Revenue Recovery Act. It has also been contended that the pension rules do not reflect the so called excess payment as any government dues that could be recovered.

5. To a pointed question to the senior counsel as to whether the Tribunal could deal with a matter which has been initiated under the Kerala Revenue Recovery Act, the senior counsel stated that since the amount related to alleged excess payment of pay and allowances, the Tribunal has jurisdiction. Again, it has been stated that it is nobody's case that this Tribunal has no jurisdiction. In other words, according to the senior counsel, jurisdiction of this Tribunal could be there in view of the no-objection from the other side (i.e. impliedly by consent).

6. Counsel for the respondents submitted that the order of this Tribunal is clear that the respondents could initiate action for recovery of the excess payment made to the applicant. Hence, the proceedings are legal.

 **7. Arguments were heard and documents perused. Notwithstanding**

the fact that the respondents have not raised the issue of jurisdiction, the bounden duty of the Tribunal is to ensure that, this tribunal has jurisdiction to deal with the case. It has been held in the case of Moed. Hasnuddin v. State of Maharashtra, (1979) 2 SCC 572, as under:-

“25. Every tribunal of limited jurisdiction is not only entitled but bound to determine whether the matter in which it is asked to exercise its jurisdiction comes within the limits of its special jurisdiction and whether the jurisdiction of such tribunal is dependent on the existence of certain facts or circumstances. Its obvious duty is to see that these facts and circumstances exist to invest it with jurisdiction, and where a tribunal derives its jurisdiction from the statute that creates it and that statute also defines the conditions under which the tribunal can function, it goes without saying that before that tribunal assumes jurisdiction in a matter, it must be satisfied that the conditions requisite for its acquiring seisin of that matter have in fact arisen.” (emphasis supplied)

8. That the respondents have not raised the issue of jurisdiction would not mean that this Tribunal, when it lacks inherent jurisdiction to deal with a particular subject matter, by consent of parties could deal with the subject matter. In this regard Apex Court's decision in the following cases are relevant:-

(a) Waverly Jute Mills Co. Ltd. v. Raymon & Co. (India) (P) Ltd., (1963) 3 SCR 209 wherein it has been held, “it is well settled that consent cannot confer jurisdiction.

(b) Sushil Kumar Mehta v. Gobind Ram Bohra, (1990) 1 SCC 193, wherein the Apex Court has held as under:-

If the court inherently lacks jurisdiction consent cannot confer jurisdiction. Where certain statutory rights in a welfare legislation are created, the doctrine of waiver also does not apply to a case of decree where the court inherently lacks jurisdiction.

(c) Raghunath Rai Bareja v. Punjab National Bank, (2007) 2 SCC 230, wherein also it has been held, “It is well settled in law that consent cannot confer jurisdiction.”

9. The next question is whether pay and allowances and recovery

thereof being a subject matter of this Tribunal's jurisdiction, whether the case could be covered. True, the amount involved is recovery of excess payment of pay and allowances. But once the applicant has retired and this Tribunal has held that it is for the respondents to recover the amount due by resorting to 'appropriate recovery proceedings' and the respondents invoke the provisions of Kerala Land Revenue Act, this Tribunal cannot assume jurisdiction to quash the notice issued by the authorities under the said Act for, the said Act has provisions of appeal etc. In this regard reliance could be placed in respect of a case where the allotment of government accommodation was issued during the career of a government servant but action for eviction had been taken under the Provisions of Public Premises (Eviction of Unauthorised Occupants) Act, 1971. The Apex Court in that case, i.e. Union of India v. Rasila Ram, (2001) 10 SCC 623, held as under:-

"The aforesaid appeals are directed against the order of the Full Bench of the Central Administrative Tribunal in a batch of applications before it recording a finding that an order passed by the competent authority under the Public Premises (Eviction of Unauthorised Occupants) Act, 1971 for eviction would also come within the purview and jurisdiction of the Administrative Tribunal constituted under the Administrative Tribunals Act, 1985. The Tribunal by the impugned order has construed the expression "service matter" defined in Section 3(q) of the Administrative Tribunal Act and because of the expression "any other matter whatsoever" occurring in sub-clause (v) thereof, it has come to the conclusion that the eviction of unauthorised occupants from government quarters would tantamount to a service matter, and therefore the Tribunal retains jurisdiction over the same, in view of the overriding effect given to the Act by virtue of Section 33 of the said Act."

2. The Public Premises (Eviction of Unauthorised Occupants) Act, 1971 (hereinafter referred to as "the Eviction Act") was enacted for eviction of unauthorised occupants from public premises. To attract the said provisions, it must be held that the premises was a public premises, as defined under the said Act, and the occupants must be held unauthorised occupants, as defined under the said Act. Once a government servant is held to be in occupation of a public premises as an unauthorised occupant within the meaning of the Eviction Act, and appropriate orders are passed thereunder, the remedy to such occupants lies, as provided under the said Act. By no stretch of imagination the

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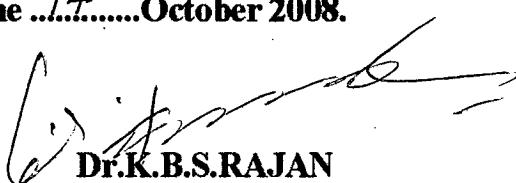
expression "any other matter" in Section 13(q)(v) of the Administrative Act would confer jurisdiction on the Tribunal to go into the legality of the order passed by the competent authority under the provisions of the Public Premises (Eviction of Unauthorised Occupants) Act, 1971. In this view of the matter, the impugned assumption of jurisdiction by the Tribunal over an order passed by the competent authority under the Eviction Act must be held to be invalid and without jurisdiction. This order of the Tribunal accordingly stands set aside. The appeals are accordingly allowed.

10. In view of the above, in my considered opinion, this Tribunal has no jurisdiction to decide the legality or otherwise of the action of the respondents taken under the provisions of Kerala Land Revenue Act. The forum to agitate is elsewhere.

11. Hence, this OA is dismissed due to want of jurisdiction. The interim order is vacated.

12. No cost.

Dated the^{14th}.....October 2008.



Dr.K.B.S.RAJAN
JUDICIAL MEMBER