

Reserved
(On 04.10.2018)

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH
ALLAHABAD

Dated: This the 12th day of October 2018

Original Application No. 330/00125 of 2016

Hon'ble Mr. Gokul Chandra Pati, Member – A

Hon'ble Mr. Rakesh Sagar Jain, Member – J

1. Kamta Prasad, S/o Late Govardhan Prasad, R/o Sa 2/415A-1A, Pandepur, District Varanasi.
2. Rajendra Prasad Dubey, S/o Arjun Dubey, R/o A9/94 Kayasth Tola Rajghat, District Varanasi.
3. Mohd. Sakur, S/o Chataru Miyan, R/o A17/114A-1A, Pathani Tola, District Varanasi.
4. Abdul Rasid Ansari, S/o Mohd Ismil Ansari, R/o Village & Post Ghauri, District Bhadohi.
5. Ram Chandra Lal, S/o Dev Narayan Lal, R/o S-8/329A-3, Khajuri, District Varanasi.
6. Gulab Ram, S/o Babulal, R/o C.K. 64/33 Herapura Jalpa Devi Road, District Varanasi.
7. Jiyut Singh, S/o Vasudev Singh, R/o 127 Janaki Nagar, Samane Ghat, Varanasi.
8. Lalta Prasad Verma, S/o Jai Nanadan, R/o C-33/215 C-2 Hari Nagar Chandua Satti, District Varanasi.
9. Vijay Narayain Singh, S/o Shiv Adhar Singh, R/o B36/43-39 Brahmanand Colony, Durgakund, District Varanasi.
10. Lalita Prasad, S/o Sumer Ram, R/o Village Bahadurpur Chaubepur, District Varanasi.
11. Onkar Nath Maurya, S/o Raghupati Maurya, R/o C-8/194-B-4, Khajuri, District Varanasi.
12. Garib Updhayay, S/o Raghuraj Updhayay, R/o Sa-2/43-A-1 Gayatri Nagar, District Varanasi.
13. Bhoolan Pandey, S/o Ramdhari Pandey, R/o Village Ekauna, Post Kanaila, District Azamgarh.
14. Raghavram, S/o Jai Ram, R/o Village Jamdih, Post Narayana, District Chandauli.

15. Antu Ram, S/o Jagannath Prasad, R/o Village Kaewarupur, Post Gorai, District Varanasi.
16. Ramraj Singh Yadav, S/o Ramdev Singh, R/o Nasirpur, Post Mahpur, District Gazipur.

. . . Applicants

By Adv: Shri Vinod Kumar

V E R S U S

1. The Chief General Manager, Telecom U.P. (E) Circle Hazratganj, Lucknow – 226001.
2. The General Manager, Telecom (B.S.N.L.) District Varanasi.
3. The Assistant General Manager (Admin) District – Varanasi.

. . . Respondents

By Adv: Shri K.K. Mishra

ORDER

By Hon'ble Mr. Gokul Chandra Pati, Member – A

The applicants have filed this OA jointly, which was allowed under Rule 4 (5) of the CAT (Procedure) Rules, 1987 vide order dated 27.01.2016. The applicants have prayed for the following reliefs in the OA:-

- “i. to issue an order or direction in the suitable nature directing the respondents department to extend the same monitory benefits in favour of the applicants after refunding the recovered salary from the gratuity and pensionary benefit of the applicants, like wise other similar situated employees namely Shri Maggu Prasad Tiwari and others of the department with stipulated period as to be specified by this Hon'ble Tribunal.*
- ii. to issue an order or direction in the suitable nature directing the respondent department to consider the pending representation of the applicants by passing the reasoned and speaking order thereon within stipulated period which may be specified by this Hon'ble Tribunal.*
- iii. issue any other suitable writ, order or direction which this Hon'ble Tribunal may deem fit and proper in the circumstances of the case.*
- iv. Award the cost of this original application to the applicant.”*

2. The brief facts of the case as narrated in the OA are that the applicants were working under the respondents department in Biennial Cadre Review (in short BCR) Grade III as permanent employee, who were later-on promoted in Grade IV BCR under 10% quota and worked between 01.07.1992 to 31.12.1996. Thereafter, they were reverted from

the promoted post, vide memo dated 23.09.1999 (Annexure A-1) to Grade III. The reversion was made in compliance of the letter dated 16.09.1999 issued from the office of Chief General Manager Telecom (E) UP Circle, Lucknow. In pursuance of the reversion order the respondents started recovery of the amount / salary of the promoted post from the applicants' gratuity and pensionary benefit after their retirement. Similarly situated aggrieved employees filed OA before this Tribunal claiming that no reversion can be made by the respondents and as such recovery cannot be made from their gratuity and pensionary benefits. This Tribunal allowed the OA filed by Magghu Prasad Tiwari (Dead) and Anr. Vs Union of India & Ors by quashing the illegal reversion order as well as recovery order, which were initiated by the respondents against the employees with further direction to refund the recovered to the concerned employees. Thereafter, the respondents filed Writ Petition before Hon'ble High Court, challenging the order of this Tribunal but the said Writ Petition was dismissed. The respondents again challenged the order of this Tribunal as well as order of Hon'ble High Court before Hon'ble Apex Court in SLP No. 4511/2007 which was converted into Civil Appeal No. 7946 of 2013 by the Hon'ble Supreme Court and this Civil Appeal was disposed of alongwith other Civil Appeal with similar facts by the order dated 01.10.2013 (Annexure A-2) dismissing the SLPs filed by the respondents by upholding the quashing of reversion order as well as the order of recovery of excess amount paid as per the order of Hon'ble High Court and the Tribunal.

3. Thereafter, it is stated in the OA that the applicants submitted a detailed representation before the respondents, whereby seeking the same benefit in view of the judgment dated 01.10.2013 passed by the Hon'ble Supreme Court in Civil Appeal No. 7946 of 2013. But till date the respondents have not considered the said representations.

4. The respondents have filed counter affidavit (in short CA), in which it is stated that the applicants have never raised their grievances in respect of reversion till superannuation and 17 years have passed after the issuance of cancellation order dated 16/23.09.1999, as such this OA is highly time barred. The applicants were wrongly promoted as BCR Grade IV due to misinterpretation of the instructions issued by the

Department of Telecommunication, Government of India, New Delhi. The applicants never sought for any legal remedy by approaching the competent Court of law. It is further stated in the CA that since the present applicants were not a party in Civil Appeal No. 7946 of 2013, they have no claim for any benefit in terms of the said judgment dated 01.10.2013 passed by the Hon'ble Supreme Court in Civil Appeal No. 7946 of 2013. Since the judgment and order dated 01.10.2013 of Hon'ble Supreme Court in the case of Magghu Prasad Tiwari (supra) is applicable only for the persons who were parties in the respective cases, the claim and contention of the applicants of this OA cannot be accepted on the ground that they were also similarly situated person, as they were not party in previous case before Hon'ble Supreme Court on 01.10.2013. It is further stated in the CA that the applicants were sleeping over the matter for a period of about 13 years and never challenged their reversion orders.

5. The applicants have filed the Rejoinder Affidavit (in short RA) in which they have reiterated almost the same stand as stated in the OA. It was further submitted that since the issue relates to the policy matter which is applicable to all similarly placed employees. It is stated that by means of the common order dated 16/23.09.1999, the respondents reverted the employees who were promoted to BCR Grade IV and as such all the concerned employees in all over India were affected and that no individual order of reversion were served upon the employees. They were affected by the common order of the respondents. It is stated that the order of this Tribunal as well as order of Hon'ble High Court have already been confirmed by the Hon'ble Supreme Court, but the respondents are denying the similar benefit to the applicants who are similarly situated employees.

6. We have heard learned counsels for both the parties and perused the pleadings on record. Learned counsel for the applicant stressed on the point that the applicants are entitled for the benefit of the order of Hon'ble Supreme Court dated 01.10.2013 in the case of Magghu Prasad Tiwari (supra) annexed as Annexure No. A-2 to the OA. Learned counsel for the respondents on the other hand submitted that, as explained in the CA, the applicants were not the parties in the Civil Appeal / SLP before

Hon'ble Supreme Court. Hence, order dated 01.10.2013 which has been implemented in respect of the petitioners / employees who were parties in that case, will not be applicable for the applicants who are not entitled for such benefits (vide para 13 and 14 of the CA). Learned counsel for the respondents submitted copy of two judgments in support of his case which are as under:-

- i. Union of India and others vs. Chaman Rana – (2018) 5 SCC 798
- ii. State of Uttar Pradesh and others vs. Arvind Kumar Srivastava – (2015) 1 SCC 347

Learned counsel for the applicants also submitted copy of the judgment of Hon'ble Supreme Court in the case of K.C. Sharma & Ors vs. Union of India and others reported in 1998 (1) AISLJ 54.

7. The BCR Scheme of BSNL was examined by Hon'ble Apex Court in the case of Bharat Sanchar Nigam Ltd vs R. Santhakumar Velusamy & Ors in the Civil Appeal Nos. 3405, 4542, 4543, 4544, 4545 and 4546 of 2006 (indiankanoon.org/doc/1694375) and it was held to be a Scheme for upgradation. It was held as under:-

“4..... By letter dated 7.5.1993, the telecom department clarified that there were no sanctioned posts in regard to 10% BCR and the number of posts depend upon the number of BCR officials available; and that therefore no local officiating arrangement could be made if an official in the 10% BCR retired before the next review.

5. By circular dated 13.12.1995, the government formulated the procedure regarding promotion to Grade IV. Under the said procedure, promotions to Grade IV were to be based on seniority in the basic grade from among the officers in Grade III subject to fitness determined in the usual manner of OTBP. By a clarificatory Circular dated 1.3.1996, the government issued a clarification that promotion to Grade IV would be given from among officials in Grade III on the basis of their seniority in the basic grade, subject to fulfillment of other conditions and that normal rules of reservation would apply to promotions in Grade IV.

6. The circular of the telecom department dated 1.3.1996 applying rules of reservations to promotions to Grade IV under BCR was challenged by the All India Non SC/ST Telecom Employees Association on the ground that principles of reservation would not apply for upgradation of existing posts which did not carry any change in duties and responsibilities. The Central Administrative Tribunal, Ahmedabad Bench by its order dated 11.4.1997 (OA No.623/1996 - All India Non-Schedule Caste/Schedule Tribe Telecom Employees Association v. Union of India) held that the department could not apply reservation rules while upgrading the posts under the BCR scheme and directed the department to take appropriate

action for effecting promotions to the upgraded posts without applying the reservation roster. The writ petition (SCA No.7576 of 1997) filed by the government challenging the said order of the Tribunal (Ahmedabad Bench) was dismissed by the Gujarat High Court by order dated 24.3.1999. In view of the said decision, the Government issued an order dated 8.9.1999 directing that a Review DPC be held and all ineligible officers wrongly promoted to Grade IV by application of reservation roster as per office order dated 1.3.1996, should be reverted back and all eligible officers should be placed in Grade IV and their pay should be fixed notionally. As a consequence of the said Circular dated 8.9.1999, the contesting respondents were reverted from Grade IV to Grade III.

21. On a careful analysis of the principles relating to promotion and upgradation in the light of the aforesaid decisions, the following principles emerge :

(i) Promotion is an advancement in rank or grade or both and is a step towards advancement to higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both - that is advancement to a higher position and advancement to a higher pay scale - are described by the common term 'promotion', does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay-scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay-scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simplicitor can be said to be a promotion in its wider sense that is advancement to a higher pay scale.

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation, can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simplicitor. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation. A

(v) Where the process is an upgradation simplicitor, there is no need to apply rules of reservation. But where the upgradation involves selection process and is therefore a promotion, rules of reservation will apply.

(v) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation.

22. In this case, the BCR scheme did not involve creation of additional posts but merely restructured the existing posts as a result of which 10% of the posts in Grade III were placed in a higher grade (Grade IV) to give relief against stagnation. This is evident from the terms of the BCR scheme and the clarification contained in the letter dated 7.5.1993 that no posts were sanctioned, as far as 10% BCR was concerned.

23. In this case, the BCR scheme dated 16.10.1990 provided that the persons who had completed 26 years of service would be screened by a duly constituted Review Committee to assess the performance and suitability for advancement. The screening was for the limited purpose of finding out whether the service record of the employee contained any adverse entries or whether the employee had suffered punishment. The screening process did not involve consideration of comparative merit nor involve any selection. The 10% posts were upgraded strictly by seniority subject to screening. This is evident from the terms of BCR scheme and the Circular dated 13.12.1995 which provided that the promotions to Grade IV were to be based on seniority in the basic grade from among the officers in Grade III, subject to fitness determined as per OTBP manner, that is screening to ascertain whether there are any adverse comments or punishment against the employee concerned.

24. To sum up, the BCR scheme was an upgradation scheme to give relief against stagnation. It did not involve creation of any new posts. It did not involve advancement to a higher post. It did not involve any process of selection for conferment of the benefit of higher pay-scale. The upgradation was given to the senior most 10% of BCR scale employees in Grade III strictly as per seniority. BCR scheme as per circular dated 16.10.1990 was thus a scheme for upgradation simplicitor without involving any creation of additional posts or any process of selection for extending the benefit. Such a scheme of upgradation did not invite the rules of reservation.

25. We accordingly allow these appeals, set aside the orders of the High Court and the Tribunal and dismiss the Original Applications challenging the order of the telecom department dated 8.9.1999."

8. Thus the order dated 8.6.1999 of the Department of Telecommunication was held to be legally valid. In this OA, the applicants were promoted under BCR Scheme initially and in pursuance of the order dated 8.6.1999, the applicants were reverted by the order dated 23.9.1999 (Annexure No. 1 to the OA) which has not been challenged in this OA.

The applicants are aggrieved since the excess payment made to them due to their promotion/upgradation under BCR Scheme, was recovered from their retirement benefits, which has been challenged in this OA, citing the case of a similarly situated employees in the case of Magghu Prasad Tiwari & others vide the judgment of Hon'ble Apex Court dated 1.10.2013 (Annexure A-2 to the OA). Hence, the question before us in this case, is whether the applicants are entitled for the benefit in accordance with the order of Hon'ble Apex Court dated 1.10.2013 in the case of Magghu Prasad Tiwari (supra).

9. The case of the applicants is that they have moved the representation to the respondents after order of Hon'ble Supreme Court dated 01.10.2013 and it is stated in para 4.9 of the OA that copy of such representation was enclosed at Annexure No. A-3. However, no such representation was found to have been enclosed at Annexure No. A-3. It is also stated that by the respondents, in para 12 of the CA, that the applicants have not enclosed copy of representation at Annexure A-3. Since copy of such representation has not been enclosed, we are unable to know when and how such representation, as claimed by the applicants in the OA, was filed before respondents.

10. The question to be decided is whether the applicants are entitled for the same benefit, which was granted by this Tribunal and confirmed by the Hon'ble Supreme Court vide order dated 01.10.2013 in the case of Magghu Prasad Tiwari (supra). In the case of Magghu Prasad Tiwari (supra), the applicants had challenged the reversion order mainly on the ground that their juniors had been allowed the benefit of promotional / up-graded pay scale. No such claim has been made in this case and the reversion order dated 23.06.1999 is not impugned in this OA. Hence, factually this OA is distinguishable from the above cited case.

11. In the judgment of Hon'ble Supreme Court in the case of Arvind Kumar Srivastava (supra) cited by learned counsel for the respondents, the question of delay in moving appropriate forum for the similar relief, as ordered by the Tribunal / Court in other similarly situated cases was examined by the Hon'ble Supreme Court with reference to the different case laws and finally held as under:-

“22. The legal principles which emerge from the reading of the aforesaid judgments, cited both by the appellants as well as the respondents, can be summed up as under:

- 22.1. Normal rule is that when a particular set of employees is given relief by the Court, all other identically situated persons need to be treated alike by extending that benefit. Not doing so would amount to discrimination and would be violative of Article 14 of the Constitution of India. This principle needs to be applied in service matters more emphatically as the service jurisprudence evolved by this Court from time to time postulates that all similarly situated persons should be treated similarly. Therefore, the normal rule would be that merely because other similarly situated persons did not approach the Court earlier, they are not to be treated differently.**
- 22.2. However, this principle is subject to well recognized exceptions in the form of laches and delays as well as acquiescence. Those persons who did not challenge the wrongful action in their cases and acquiesced into the same and woke up after long delay only because of the reason that their counterparts who had approached the Court earlier in time succeeded in their efforts, then such employees cannot claim that the benefit of the judgment rendered in the case of similarly situated persons be extended to them. They would be treated as fence-sitters and laches and delays, and/or the acquiescence, would be a valid ground to dismiss their claim.**
- 22.3. However, this exception may not apply in those cases where the judgment pronounced by the Court was judgment in rem with intention to give benefit to all similarly situated persons, whether they approached the Court or not. With such a pronouncement the obligation is cast upon the authorities to itself extend the benefit thereof to all similarly situated person. Such a situation can occur when the subject matter of the decision touches upon the policy matters, like scheme of regularisation and the like (see K.C. Sharma & Ors. v. Union of India (supra). On the other hand, if the judgment of the Court was in personam holding that benefit of the said judgment shall accrue to the parties before the Court and such an intention is stated expressly in the judgment or it can be impliedly found out from the tenor and language of the judgment, those who want to get the benefit of the said judgment extended to them shall have to satisfy that their petition does not suffer from either laches and delays or acquiescence.”**

12. Applying the ratio of the case of Arvind Kumar Srivastava (supra) to the present OA, it is seen that no action was taken by the applicants to challenge the order of reversion issued in the year 1999 and also after issue of favourable order passed by the Hon'ble High Court in the year 2011 in the case of Magghu Prasad Tiwari (supra) to move authorities. Even after the decision of Hon'ble Supreme Court dated 01.10.2013, the date on which representation was made, has not been informed by the applicants and copy of such representation has not been furnished with the OA. Hence, applying the ratio of the judgment of Hon'ble Supreme Court, we are of the view that the applicants have not taken action in time in respect of their grievances in time even after the orders of Hon'ble High Court passed in the year 2011 in the case of Magghu

Prasad Tiwari (supra). Leaned counsel for the respondents also cited the judgment in the case of Union of India and others vs. Chaman Rana reported in (2018) 5 SCC 798. In this case also the question of delay was involved and the order of Hon'ble High Court directing Government to consider retrospective promotion in respect of a belated cause of action, was set aside by the Hon'ble Supreme Court.

13. Learned counsel for the applicants cited the case of K.C. Sharma & Ors. (supra). In this case the retrospective amendments of Rule 2544 of Indian Railway Establishment Code regarding reduction of the running allowances, was disputed. The OA was dismissed on the ground of delay without extending benefit granted in similarly situated cases. Hon'ble Supreme Court held that it was a fit case in which delay should have been condoned. Since the issue was reduction of running allowance resulting in reduction of pay, it can be considered to be a recurring cause of action, for which delay condonation is to be considered. The facts of the present case are clearly distinguishable, since in this case dispute was the order of reversion affected in the year 1999, which was not challenged by the applicants in time, even after favourable order of Hon'ble High Court in the year 2011 as explained earlier.

14. In view of the above, we are of the considered view that the OA suffers from the defects being filed at a belated stage. On merit also, the applicants have no case, since the reversion of the applicants vide order dated 23.06.1999 is in accordance with the order dated 08.06.1999 of Government of India which was upheld by Hon'ble Apex Court in the case of R. Santhakumar Velusamy & Ors (supra) as discussed in para 7 of this order. Hence, the recovery cannot be said to be without any justification. It is also seen that the applicants have not cited any rule under which the excess payment made to them on account of promotion / up-gradation, which was found to be not admissible, cannot be recovered from the post retiral benefits.

15. In view of the above, we do not find any merit in the OA, which is dismissed. There is no order as to costs.

(Rakesh Sagar Jain)
Member (J)

(Gokul Chandra Pati)
Member (A)