

CENTRAL ADMINISTRATIVE TRIBUNAL,
ALLAHABAD BENCH, ALLAHABAD

This the 8th day of March, 2018.

ORIGINAL APPLICATION NO. 331/00405/2017

HON'BLE MR. JUSTICE DINESH GUPTA, MEMBER (J).

Surendra Pal Gupta aged about 61 years son of late Shri Anokhey Lal, retired Assistant Post Master, Budaun, HO under Superintendent of Post Offices, Budaun, r/o Daharpur Kalan Dataganj, Budaun-243635.

.....Applicant

Advocate: Sri S. K. Kushwaha

VERSUS

1. Union of India through Secretary, Ministry of Communications and I.T. Dak Bhawan, Sansad Marg, New Delhi.
2. Director Postal Accounts, U.P. Circle, Sector D, Aliganj, Lucknow.
3. Chief Accounts Officer (Division Branch) in the office of DPA, U.P. Circle, Lucknow.
4. Post Master General, Bareilly Region, Bareilly.
5. Superintendent of Post Offices, Budaun Division, Budaun.

..... Respondents

Advocate: Sri L. P. Tiwari

ORDER

The applicant has filed the present O.A. u/s 19 of the AT Act with the following reliefs: -

- a) The Hon'ble Tribunal may graciously be pleased to quash the impugned order dated 7.2.2016/2017 (Annexure A-1) impugned provisional pension Authority letter dated 7.2.2017 (Annexure A-2) and impugned letter of recovery of Rs. 86, 487/- (Annexure A-3) with further direction to the respondents to allow the pension on the basis of last pay certificate issued by the respondent No. 5 and further pay pension on revised rate after effect of 7th pay commission recommendation.
- b) The Hon'ble Tribunal may further graciously be pleased to direct the respondents to pay the arrears of difference of pension accrued after such correction of pension with 12% interest.
- c) To issue any other relief which this Hon'ble Tribunal may deem fit and proper under the circumstances of the case.
- d) To award the cost of the application to the applicant.

2. The brief facts emerging from the O.A. are that the applicant was initially appointed in Clerical Cadre on 21.11.1978. The applicant was considered for financial up-gradation under Biennial Cadre Review (In short BCR) w.e.f. 1.7.2005 on completion of 26 years of regular service.

2.1 On the introduction of Modified Assured Career Progression Scheme (in short MACP) w.e.f. 1.9.2008, applicant was given one financial up-gradation in Grade pay of Rs. 4600/- in the pay band Rs. 9300-34800/- w.e.f. 1.4.2011 on completion of 30 years of regular service vide memo dated 24.1.2011 (Annexure A-4).

2.2 The applicant had submitted application dated 1.2.2011 (Annexure A-5) to the Post Master Budaun, Head Office through Deputy Post Master, Dataganj and given option for fixation of pay and sought date of increment w.e.f. 1.7.2010.

2.3 The applicant was considered for promotion in LSG cadre w.e.f. 13.6.2011.

2.4 It is mentioned that on the basis of option given by the applicant, the respondents effected the fixation of pay and date of increment w.e.f. 1.7.2010 and applicant was getting basic pay @ Rs. 22330/- till June 2016 and after adding increment of Rs. 670/- basic pay for the month of July, 2016 was reckoned Rs.

23000/-

2.5 The applicant was suspended w.e.f. 26.7.2016 and continued till the date of retirement i.e. 31.7.2016. Due to suspension, the applicant was paid the basic pay Rs. 20,774/- (Rs. 23000-50% of 6 days pay i.e. Rs. 2,226 = Rs. 20774).

2.6 The applicant has drawn his pay till his retirement on the basis of his option effective w.e.f. 1.7.2010, as such on the basis of such factual position, Head Post Office had assessed and sent LPC to respondent No. 2 and 3 for sanction of provisional pension @ 11,500/-.

2.7 When the respondents have allowed less provisional pension (i.e. Rs. 11165/-) than the prescribed rate of pension, applicant had made a representation dated 3.2.2017 (Annexure A-8) to the respondent No. 2 and requested them to correct the calculation of last pay on the basis of option given by the applicant.

2.8 The respondent No. 2 and 3 vide impugned order dated 7.2.2017 informed that the case of the applicant was re-examined regarding fixation of pension and found no irregularity. Respondents have stated in the impugned order that applicant's option has not been available on record as such benefit of increment on 1.7.2010 is not admissible to the applicant. Hence, provisional pension has been fixed @ Rs. 50% of Rs. 58,600/- after implementation of 7th Pay Commission Report.

2.9 The respondent No. 3 has issued impugned provisional pension Authority dated 7.2.2017 by which the applicant was allowed to draw the provisional pension @ 29300/- in place of revised rate of provisional pension @ 30,200/-. As such, applicant is getting Rs. 900/- less pension per month.

2.10 Respondent No. 5 vide letter dated 11.3.2017 (Annexure A-3) informed the applicant that over payment of Rs. 86487/- as pay and allowances was made to the applicant w.e.f. 1.7.2010 to 31.7.2016, which is to be recovered from the applicant. As such he asked the applicant to deposit the aforesaid due amount.

2.11 The applicant has represented on 23.3.2017 (Annexure A-9) to the respondents personally against the illegal recovery. The applicant has stated in his representation that applicant was allowed 3rd MACP on completion of 30 years of service w.e.f. 1.4.2010 in which applicant had given option for fixation w.e.f. 1.7.2010 vide application dated 1.2.2011 by registered post RL No. 185. The applicant had retired on 31.7.2010 and till his retirement, he was getting correct pay but after retirement, on wrong premises and beyond the record reduced the pay and issued the provision pension on reduced pay.

2.12 It is stated that applicant is entitled to get the provisional pension @ Rs. 30200/- per month on the basis of last pay certificate but in utter disregard of law of natural justice, pay of the applicant has been reduced by deducting one increment w.e.f. 1.7.2010.

3. Notices were issued to the respondents who in turn filed the counter reply through which it is stated that applicant had joined service on 21.11.1978 on the post of Postal Assistant and retired on 31.7.2016. On completion of 30 years of service, the 3rd financial up-gradation was given to the applicant w.e.f. 1.4.2010. Since the applicant did not give any option for the fixation of pay (from the date of promotion or from the date of next increment) on promotion to the post Master Budaun, HO within stipulated time, pay of the applicant was fixed by the date of promotion w.e.f. 1.4.2010. After that due to clerical mistake, the next increment was given to the applicant on 1.7.2010 while as per departmental rule, there should be gap of six months between two increments. The above irregularity came in the light when the AE was received from DPA, Lucknow vide letter dated 7.2.2017 and in compliance of the said letter dated 7.2.2017 of DPC, pay of the applicant was regularized and rectified from 1.7.2010 and excess payment of Rs. 86487/- was found to be recovered from the applicant. Therefore, the applicant was asked to deposit excess amount but the applicant did not deposit payment of Rs. 86,487/- and filed the present O.A.

4. Rejoinder reply is filed by the applicant through which he has reiterated the facts as stated in the O.A. and denied the contents of counter reply.

5. Heard learned counsel for applicant Sri S.K. Kushwaha and learned counsel for respondents Sri L.P. Tiwari and perused the pleadings available on record.

6. From perusal of record, it is clear that applicant on grant of 3rd Financial up-gradation w.e.f. 1.4.2010 given one increment and again on 1.7.2010, he was given one more increment. As per applicant's contention, chart of increments are given as under: -

March 2010
Basic Pay Rs. 17740

April 2010
Basic Pay Rs. 18680
After option w.e.f. 1.7.2010
July 2010
Basic pay Rs. 19240

July 2011
Basic Pay Rs. 19820

July 2012
Basic Pay Rs. 20420

July 2013
Basic Pay Rs. 21040

July 2014
Basic Pay Rs. 21680

July 2015
Basic Pay Rs. 22330
Month of retirement
July 2016
Basic Pay Rs. 23000

7. The counsel for applicant submitted that it is false to say by the respondents that applicant has not given any option. The applicant has tried to drew my attention towards Annexure No. 5 by which he has sent the option for fixation of his pay after grant of MACP from 1.7.2010. This letter was sent by the applicant on 1.2.2011 through registered post. The counsel further submitted that applicant was granted MACP vide order dated 24.1.2011 w.e.f. 1.4.2011 and immediately after receiving the order dated 24.1.2011, the applicant has sent his option vide letter dated 1.2.2011. Hence ground taken by the respondent for rejecting the representation of the applicant in absence of option granting increment w.e.f. 1.4.2010 is wrong. Counsel further submitted that the applicant should have objected the receipt of increased pay in April, 2010 is also wrong as the order for grant of MACP was passed on 24.1.2011 and applicant received arrears of pay only after fixation of his pay under 3rd MACP. Hence there is no question of raising any objection in April, 2010. So far as recovery of excess amount from the applicant is concerned, the same cannot be recovered from the applicant as the applicant has already been retired. The contention of the applicant that as per contention of the respondents his pay was wrongly fixed in 2010, which is more than five years back, as such the same cannot be recovered from the applicant. In this regard, applicant has placed reliance of the judgment of Hon'ble Apex Court in the case of State of Punjab and others Vs. Rafiq Masiq (Civil Appeal No. 11527 of 2014 decided on 18th December, 2014).

8. Learned counsel for applicant has also placed reliance of a judgment of Hon'ble High Court of Allahabad Bench in the case of State of U.P. and others Vs. Bhim Sen Sharma and another reported in 2017 (4) ADJ 768 (DB)(LB). In this case, the alleged one increment was wrongly granted to the applicant in 1979 and pension of claimant (respondent No. 1) was sought to be fixed by rectifying said mistake after almost 19 years and more. Hon'ble High Court dismissed the writ petition and allowed the cost of Rs. 5000/-. The relevant portion of judgment is reproduced below:-

"9. However, we do not find ourselves in agreement with aforesaid submission. Whenever any action prejudicial to interest of a Government servant is taken, Competent Authority must exercise its power within a reasonable time and it cannot be appreciated that such power should be exercised after decades and that too after retirement of Government servant. In the present case, impugned order has been passed after almost 6 years from the date of retirement.

10. It is well established that when a power is there and there is no period

prescribed under law, power should be exercised reasonably and within a reasonable period also and not after a very long time or at any time. In these facts and circumstances, we are of the view that if there is any error in pay fixation etc., Competent Authority is entitled to rectify mistake within a period of three years. We further provide that in case such a mistake is detected after three years in that case instead of taking action against the person who is benefited with such wrong fixation, Competent Authority must take action against the person who caused such mistake and is responsible and recover loss suffered by department."

9. Respondents have reiterated the facts as stated in the counter reply and further submitted that pay of the applicant was fixed on 1.4.2010 in view of grant of MACP and was wrongly given increment on 1.7.2010 which was legally not correct. The said mistake was came in the light when the Audit Enquiry was received from DPA, Lucknow vide letter dated 7.2.2017 and thereafter applicant's pay was regularized and rectified from 1.7.2010 and excess payment of Rs. 86487/- was found to be recovered from the applicant and the applicant was asked to deposit the excess amount paid to him. Counsel further submitted that the applicant has failed to give any option for fixation of his pay after grant of MACP and in the absence of such option, pay of the applicant was fixed on 1.4.2010. However, he was wrongly given increment on 1.7.2010 which resulted wrong fixation of pay of the applicant. Counsel further submitted that due to clerical mistake, next increment was given to the applicant on 1.7.2010 whereas as per departmental rules, there should be a gap of six months between two increments. Hence respondents have rightly re-fixed the pay of the applicant and refixed the pension of the applicant and applicant was asked to deposit the wrongly paid excess amount.

10. The Court is unable to accept the contentions raised by the learned counsel for respondents.

11. From the pleadings of the parties, two questions arose before this Tribunal. First in regard to wrong fixation of pay at the time of grant of MACP and subsequently wrong fixation of pension. Second in regard to recovery of amount of Rs. 86,487/-.

11. So far as first question is concerned, as per applicant's contention, third MACP was granted to the applicant vide order dated 24.1.2011 w.e.f. 1.4.2011. The applicant immediately moved an option on 1.2.2011. The contention of the respondents that applicant has failed to give any option appears to be incorrect as the applicant has annexed proof of sending option by registered post along with this O.A. As far as second contention of the respondents that applicant should have objected when he received the increased pay from April, 2010 is concerned, this is also appears to be incorrect as the order of MACP was passed on 24.1.2011 and the applicant was not aware about fixation of his in the month of April, 2010. As such raising of any protest at that time was unwarranted. It is also not disputed that applicant's pay was fixed from 1.4.2010 and he was granted next increment on 1.7.2010. As per respondent's contention, there should be a gap of six months between two increments but neither in the impugned order nor in anywhere in the order of any authority, this question was raised that applicant was given increment within six months. It is also not disputed that pay of the applicant was fixed on 1.4.2010. He received the same along with increment from time to time till the date of retirement i.e. July 2016. The pay of the applicant was fixed on 1.4.2010 i.e. for more than 6 years ago from the date of retirement and in view of observation and instances illustrated by the Hon'ble Apex Court in the case of State of Punjab and others Vs. Rafiq Mashi Civil Appeal no. 11527 of 2014 (decided on 18th December, 2014), the recovery on certain amounts is impermissible where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred above, the Apex Court as a ready reference, summarize the few situations wherein recoveries by the employees would be impermissible in law. The third situation is that the recovery from employees when the excess payment has been made for a period in excess of five years before the order of recovery is issued. The applicant's case so far as wrong fixation is concerned is squarely covered by this situation as observed by the Hon'ble Apex Court in the case of State of Punjab Vs. Rafiq Mashi.

12. The learned counsel for applicant has also placed reliance of the judgment of State of U.P. and others Vs. Bhim Sen Sharma and another (supra) and the facts of this case is also squarely covered by the case of applicant in the present O.A. In that case, the alleged one increment was wrongly granted to the applicant in 1979

and pension of applicant was sought to be fixed by rectifying said mistake after almost 19 years and more and court while allowing the Writ Petition clearly held that after a lapse of a subsequent time, the respondents action for withdrawing the same and refix the pay is against the provision as well as against the natural principle of law. The Court also go on to held further that if any mistake has been committed in pay fixation much prior to the retirement of the applicant, neither any salary paid by mistake to the applicant could have been recovered nor pension of the applicant could have been reduced. Thus, in view of the above observation, so far as question No. 1 is concerned, the respondents after six years of granting of increment to the applicant, whether wrongly or rightly, cannot refix the pay of the applicant since the applicant has already retired in 2016 and increment was granted to the applicant in 2010. As far as ground taken by the respondents that no option was given by the applicant, the court has clearly held that such option was given by the applicant within time and as such ground taken by the respondents is against the factual aspects.

13. So far as the second question is concerned, the principle laid down by the Hon'ble Apex Court in the case of State of Punjab vs. Rafiq Mashi (supra) squarely covers the situation of the present case. In this case, applicant was retired in 2016 and pay of the applicant was fixed on 1.4.2010. The respondents have never informed the applicant before his retirement that his pay was wrongly fixed and now they have asked the applicant to deposit Rs. 86487/- as excess amount. In the case of Rafiq Mashi, while dealing with such type of situation, the Hon'ble Apex Court held that recovery of excess amount would be impermissible from the retired employees. Further, the Apex Court has also held that recovery from employees is also impermissible when the excess amount has been made for a period in excess of five years before the recovery order is issued. The court did not allow the recovery of excess payment. The court was of the opinion that it would be injurious and arbitrary for an employer to require an employee to refund the excess amount. In view of the aforesaid judgment of the Hon'ble Apex Court, the O.A. is allowed. Orders dated 7.2.2016/2017 (Annexure A-1), order dated 7.2.2017 (Annexure A-2) and order dated 11.3.2017 (Annexure A-3) are quashed and the respondents are directed to re-examine the case of the applicant for the purpose of fixation of his pay treating the fixation of applicant rightly done in 2010 and thereafter by calculating his last pay, fix his pension accordingly. So far recovery of Rs. 86487/- is concerned, no recovery can be made from the applicant. In case any recovery is made, the same shall be refunded to the applicant with 9% interest thereon. No order as to costs.

(Justice Dinesh Gupta)

Member (J)

HLS/-