

**Central Administrative Tribunal
Principal Bench, New Delhi**

O.A. No.3858/2016

Order reserved on 20th July 2017

Order pronounced on 31st July 2017

Hon'ble Mr. K.N. Shrivastava, Member (A)

A K Panda, aged 56 years
Group A (SAG)
s/o Mr. Adaita Charan Panda
r/o D-I/198, Chanakyapuri
New Delhi – 110 021
Presently
Economic Adviser, Department of Heavy Industry
Udyog Bhawan, New Delhi – 110 023

(Applicant in person)

..Applicant

Versus

1. Union of India
CEO, Niti Aayog, Sansad Marg, New Delhi – 110 001
2. DDO, Department of Heavy Industry,
M/o (HI&PE), Udyog Bhawan
New Delhi – 110 001

..Respondents
(Mr. Hanu Bhasker, Mr. Manuk Kaushik and Mr. Ramjan Khan, Advocates)

O R D E R

Through the medium of this O.A., filed under Section 19 of the Administrative Tribunals Act, 1985, the applicant has prayed for the following main reliefs:-

- “a) Quash the OM No. G 27011/02/2015-A/Cs – I dated 26.10.2015 (Annexure A-2) from respondent No.1 demanding recovery of money paid towards transport allowance.
- b) Order the respondent No.2 to refund Rs.10,000.00 recovered from my salary during the period of correspondence with respondent No.1 and keeping respondent No.2 informed all the time about my reluctance for recovery of money.

c) Restrain respondent no 2 from further recovery of money from salary;

d) Restrain Respondent no 1 from demanding recovery of money after several years on principle of equity, conscience and good governance as several persons have also retired and income tax paid on the money and money being spent for the purpose it is meant for.”

2. Brief facts of the case are as under:-

2.1 The applicant is a Group ‘A’ service officer belonging to Indian Economic Service (IES). After the implementation of 6th Central Pay Commission (CPC) recommendations, he was granted upgradation to Senior Administrative Grade (SAG) of IES in the Pay Band – 4 - `37400-67000 + Grade Pay of `10000/- on non-functional basis w.e.f. 19.11.2007 vide erstwhile Planning Commission (where he was then working) order dated 23.11.2009 (Annexure-I to the reply). The erstwhile Planning Commission is now called Niti Aayog.

2.2 The applicant continued to work in the erstwhile Planning Commission till he was relieved w.e.f. 27.05.2013 vide notification dated 21.05.2013 (Annexure –II to the reply) for taking up his assignment as Special Secretary to Government of Odisha in Planning & Coordination Department, on deputation basis, for a period of three years.

2.3 During his service in the Planning Commission, by virtue of his having Grade Pay of `10000, the applicant was drawing transport allowance @ `7000 + admissible DA thereon per month. The transport allowance apparently was being given to him as per the Department of Expenditure, Ministry of Finance O.M. dated 29.08.2008 (Annexure –VI to the reply). The Audit pointed out that 9 officers of the Planning

Commission, including the applicant, were drawing the transport allowance @ `7000/- + admissible DA per month and they having been upgraded to non-functional selection grade (NFSG) and granted Grade Pay of `10000/- in Pay Band – 4, were, in fact, not entitled for drawing the transport allowance at that rate and that they are entitled for the transport allowance @ `3200/- + DA thereon per month only. The Audit report, as exposited from Annexure –III letter dated 03.06.2015 of Director General of Audit (Central Expenditure), New Delhi addressed to the DDO, Niti Aayog (erstwhile called Planning Commission), reads as under:-

- “(i) As per condition contained in Para III of O.M. No.21 (2)/2008-E-II (B) Dated: 29th August, 2008, Officers drawing grade pay of `10,000 & `12000 and those in the HAG + Scale who are entitled to the use of official car in terms of O.M. No.20 (5) – E-II (A) / 93 dated 28.1.94 shall be given the option to avail themselves of the existing facility or to draw the Transport Allowance at the rate of `7000 plus dearness allowance thereon.
- (ii) In terms of Department of Expenditure OM No.20(5)/E II (A) 93 dated 28 Jan 1994. Only officers of the level of Joint Secretary and above are entitled to use of official car. Therefore only those officers of the level of JS and above and also drawing Grade Pay of `10,000/- and above can exercise the option to draw transport allowance @ `7000/- + DA thereon.

In view of the above, officers who have been granted Non-functional up gradation to the grade pay of `10,000/- in PB-IV are entitled to draw transport allowance @ `3200 + DA only.”

2.4 In view of the Audit report, it was found that an excess amount of `98496/- has been paid to the applicant towards the transport allowance. Accordingly, vide impugned Annexure A-I order dated 28.09.2016, issued by the Niti Aayog and addressed to the Department of Heavy Industry, Ministry of Heavy Industries & Public Enterprises, New Delhi, where the applicant is currently working as Economic Adviser, the Department of

Heavy Industry has been asked to recover the excess amount of `98496/- paid by the Niti Aayog to the applicant towards transport allowance.

3. The applicant in this O.A. has made the following important averments:-

- (i) Where the advancement to a highly 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.
- (ii) The Hon'ble Supreme Court in **State of Punjab & others v. Rafiq Masih (White Washer) & others**, [(2015) 4 SCC 334 has, *inter alia*, held as under:-

“(iii) 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.

xx xx xx

- (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.”
- (iii) The financial upgradation given to the applicant is not an upgradation simplicitor but a promotion at least for the purpose of transport allowance. In this connection, reliance is placed on the judgment of Hon'ble Supreme Court in **Bharat Sanchar Nigam Ltd. v. R.**

Shanthakumar Velusamy (Civil Appeal Nos.5286-87/2005)
decided on 06.09.2011.

4. Pursuant to the notice, the respondents entered appearance and filed their counter reply, in which they have broadly made the following averments:-

4.1 The Audit has correctly pointed out that as per condition 3 of O.M. dated 29.08.2008 (Annexure VI), officers drawing Grade Pays of `10000/- & `12000 and those in the HAG + scale, who are entitled to the use of official car in terms of Department of Personnel Training (DoPT) O.M. dated 28.01.1994, shall be given the option to avail themselves of the existing facility or to draw the transport allowance @ `7000/- + DA thereon per month.

4.2 The *ibid* O.M. further states that only officers of the level of Joint Secretary or above are entitled to use official car. Therefore, the officers, who have been granted non-functional upgradation to the Grade Pay of `10000/- in Pay Band – 4 and are not working as Joint Secretary, are entitled to transport allowance @ `3200/- + DA thereon only.

4.3 Consequent to the irregularity pointed out by the Audit, the respondents were obliged to seek refund of the excess payment made to the applicant towards the transport allowance and accordingly, the applicant has been asked to refund `98496/- paid in excess to him towards the transport allowance from 01.03.2012 to 31.05.2013.

5. The applicant has also filed a rejoinder to the reply filed on behalf of the respondents. By and large, he has reiterated the averments made in the

O.A. The applicant has specifically placed reliance on the judgment of Hon'ble Supreme Court in **State of Punjab & others v. Rafiq Masih (White Washer) & others** (supra) and the judgment of Hon'ble High Court of Delhi in **Union of India & another v. J S Sharma & others** (W.P. (C) No.5555/2013) decided on 04.09.2013.

6. I have considered the arguments of the applicant and learned counsel for respondents and have also perused the pleadings and documents annexed thereto.

7. From the records, it is quite apparent that not only in the Niti Aayog (erstwhile Planning Commission) as also in other Ministries of the Government, all the officers, who have been granted Grade Pay of `10000/- in Pay Band – 4 and above, were allowed to draw transport allowance @ 7000 + DA per month thereon in terms of Annexure VI O.M. dated 29.08.2008 of the Department of Expenditure. The Audit, however, pointed out that only officers in the Grade Pays of `10000/- & `12000/- and in HAG + scale, and who are otherwise entitled for official car, can draw transport allowance of `7000/- + DA in case they choose not to avail the facilities of official car. In the present case, the applicant has been granted non-functional upgradation to the Grade Pay of `10000/- in Pay Band – 4 in terms of DoPT O.M. dated 28.01.1994 (Annexure VI), but he was not placed in the post of Joint Secretary. It is well known that there is a process of empanelment involved for empanelling officers of various Services to the grade of Joint Secretary, *albeit* the Joint Secretary post also carries the Grade Pay of `10000/- in Pay Band – 4. The HAG + level officers of all Services are, however, entitled for official car, irrespective of

the fact whether they have been empanelled or not. Indisputably, the applicant had not been empanelled as Joint Secretary when he was granted the Grade Pay of `10000/- in Pay Band – 4. Thus, he was not entitled for transport allowance @ `7000/- + DA per month. He was only authorized to the transport allowance @ `3200/- + DA per month in accordance with Annexure VI O.M. dated 29.08.2008 of the Department of Expenditure. The Audit was well justified in pointing it out, which ultimately led to the Niti Aayog (erstwhile Planning Commission) – respondent No.1, seeking refund of `98496/- from the applicant.

8. I do not agree with the contention of the applicant in paragraph 4.3.1 (iii) of the O.A. that since there was a process of selection involved in granting him the Grade Pay of `10000/- in Pay Band – 4, as such it is a regular promotion to a higher grade. As a matter of fact for granting any financial upgradation, be it on non-functional basis or through ACP/MACP, the ACR gradings of the officers concerned are considered by the DPC/Screening Committee and almost all the procedures, involved in the DPC process, are *de facto* followed before recommending the officers concerned for financial upgradation on non-functional basis or through ACP/MACP.

9. It is pertinent to note that the applicant has not indulged into any act of misrepresentation for claiming the higher amount of transport allowance, to which he was, in fact, not entitled. The Niti Aayog, in the case of the applicant, misinterpreting the provisions of O.M. dated 29.08.2008 of Department of Expenditure had allowed the applicant to draw higher

transport allowance of `7000/- + DA. In this view of the matter, no *mala fide* can be alleged against the respondents.

10. This issue of excess payment of transport allowance has been considered by Hon'ble High Court of Delhi in the case of **J S Sharma** (supra). The observations made by the Hon'ble High Court in paragraph 4 of the judgment dated 04.09.2013 are very relevant and are extracted below:-

“4. After hearing the parties in the proceedings before it, the Tribunal found that according to the OM No. 21(1)/97/E.II(B) dated 3rd October, 1997 as amended by OM dated 22nd February, 2002, only, those officers (at the level of Joint Secretary) who had been provided wpc 5555.13 Page 3 with the facility of staff car and who had the option to either avail of the facility or to switch over the payment of transport allowance were entitled to the allowance of rate of Rs.7,000/- per month + DA thereon. It observed that merely because the respondent officers were in the grade pay of Rs.10,000/- - by virtue of the non functional upgrade - they could not claim all the benefits or allowances entitled to Joint Secretary and above and that the said benefit of transport allowance was available only to those officers who are promoted to Joint Secretary grade on regular basis. It further observed that a perusal of the OM dated 24th April, 2009 would reveal that the upgrade and consequential grade pay of Rs.10,000/- would not bestow any right to the officers to claim promotion or deputation benefit and that the same is personal to the officer. Accordingly, it held that the Grade Pay Officers would not be entitled to the transport allowances.”

11. The judgment further analyzed the ratio of law laid down by Hon'ble Supreme Court in **Syed Abdul Qadir v. State of Bihar** (2009) 3 SCC 475 and **Chandi Prasad Uniyal & others v. State of Uttarakhand & others** (2012) 8 SCC 417. In **Chandi Prasad Uniyal**, the ratio of **Rafiq Masih (White Washer)** (supra) has also been discussed and analyzed. Paragraph of judgment in **J S Sharma** (supra), in this regard, is extracted below:-

"9. Furthermore, this court is of the opinion that the case of the grade pay officers falls in the exceptional category - which exception even the Chandi Prasad Uniyal case recognized the existence of - that would have the benefit of the ratio of Syed Abdul Qadir (supra):

"57. This Court, in a catena of decisions, has granted relief against recovery of excess payment of emoluments/allowances if (a) the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee, and (b) if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

"58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess..."

12. **J S Sharma**, the petitioner in the said W.P., had first approached this Tribunal in O.A. No.363/2012, in which identical issue was involved. For better appreciation, the issue involved before the Tribunal is extracted below:-

"Whether Group "A" officers who had been granted Grade Pay of Rs.10,000/- under Non- Functional Upgradation Scheme, were entitled for drawing the Transport Allowance at the enhanced rate of Rs.7,000/- + DA on par with Joint Secretary level officers in the Government of India, who are also in the Grade Pay of Rs.10,000/-."

The Tribunal finally vide order dated 05.02.2013 held that no recovery can be made towards the transport allowance already paid.

13. The Hon'ble High Court vide order dated 04.09.2013 has upheld the aforesaid order of the Tribunal and thus recovery of excess payment made towards transport allowance to the petitioner therein was not permitted.

14. In the present case also, I find that the applicant has not misrepresented any fact, nor was he in the knowledge that he was drawing transport allowance in excess of his entitlement, and hence I am of the view that his case is fully covered by the decision in **J S Sharma** (supra).

15. In the conspectus of discussions in the foregoing paragraphs, the O.A. is allowed. Impugned Annexure A-II order dated 26.10.2016 is quashed and set aside. Accordingly, the interim order dated 09.12.2016 passed by this Tribunal, whereby recovery was stayed, is made absolute.

No order as to costs.

(K.N. Shrivastava)
Member (A)

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