CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH:
NEW DELHI

O.A. No.3791 of 2015

Orders reserved on : 30.10.2018

Orders pronounced on : 16.11.2018

Hon'ble Ms. Nita Chowdhury, Member (A)

Alok Saxena, Chief Engineer Retd.
Aged about 61 years,
s/o Sh. Jagdish Narain Saxena,
R/o A-302, Aabhas Apartments,
Sec-56, Gurgaon-122011.

....Applicant

(By Advocate : Shri Priyanka Bhardwaj for Shri M.K. Bhardwaj)

VERSUS

Union of India & Ors through :

1. The Secretary,
Govt. of India,
Ministry of Power,
Sharam Shakti Bhawan, Rafi Marg,
New Delhi.

2. Central Electricity Authority,
through its Chairman,
Govt. of India, Ministry of Power,
Sewa Bhawan, R.K. Puram
New Delhi.

.....Respondents

(By Advocate : Shri Satish Kumar)

O R D E R

Heard learned counsel for the parties and perused the material placed on record.

2. By filing this OA, the applicant is seeking the following reliefs:-

i) To quash and set aside the impugned order dated 11.09.2015 and declare the action of the respondents in reducing the Transport Allowance from Rs. 7000/- + DA to Rs.3200/- + DA as illegally arbitrary and unconstitutional and issue directions for restoring the Transport Allowances Rs.7000 with all consequential effects.

ii) To declare the OM dated 06.02.2014 as inapplicable in case of applicant or set aside the same being contrary to judgment of Hon'ble Supreme Court of India in case of Rafiq Masih.

iii) To declare the action of respondents in making recovery from the gratuity of applicant to the tune of Rs.3,48,32/- as illegal and arbitrary and issue appropriate directions for refunding the said gratuity amount with 12% interest to the applicant.

iv) To allow the OA with cost.

v) To pass any other further orders as this Hon'ble Tribunal may deem fit and proper in the facts and circumstances of the case."

3. The alleged impugned order dated 11.9.2015 (Annexure A-1) reads as follows:-

"Order

Shri Alok Saxena, Chief Engineer retired from Government service on 30.09.2014. While he was on the verge of retirement, it was noticed that excess payments were made to him during his service towards Transport Allowance. Accordingly, the excess payments were deducted from his Gratuity at the time of his retirement in consultation with Ministry of Power. Subsequently, Shri Alok Saxena submitted five representations dated 28.10.2014, 13.01.2015, 16.02.2015, 9.3.2015, 28.01.2015 and 25.05.2015. In these representations, Shri Saxena has adduced the following points:-

i) No notice was served on him in accordance with the DoP&T's OM dated 06.02.2014.

ii) Directions of the Hon'ble Supreme Court given in its order of 18.12.2014 have not been followed.

iii) The letter of the D/o Expenditure of 13.07.2014 has not been replied to.

iv) According to the Section 13 of the Gratuity Act, such recoveries cannot be made from gratuity.

v) He was given deemed promotion w.e.f. 01.02.2010 and hence he would be entitled to Transport Allowance (TA).

vi) Tax has already been paid in full against the amount of Transport Allowance which was given to him.

The matter has been considered consciously in consultation with Department of Personnel & Training (DoPT) & Ministry of Power (MOP) and the stand taken by Central Electricity Authority on the points adduced by Shri Alok Saxena is as follows:-

Points made by Shri Alok Saxena	Stand taken by Central Electricity Authority
No notice was served on him in accordance with the DoPT's OM dated 06/02/2014.	It is correct that no notice was served on Shri Saxena before he had retired since the general notice which was served by CEA to all the officers concerned was issued on 14/11/2014 by which time Shri Saxena had already retired. It may, however, be pointed out that Shri Saxena was well aware of the fact that the DoPT had advised CEA/MoP for effecting recovery in respect of all serving officers which was communicated to CEA by the Ministry of Power on 16/07/2014. A copy of this letter was also endorsed to Shri Saxena in his capacity as President of Power Engineers Association (PEA). In continuation of this communication MOP stated vide their communication dated 16.09.2014 & 19.11.2014 that even in the case of retired officers, the excess payment has to be recovered. This letter was issued by the MoP after consulting the

	D/o Pension & Pensioners Welfare and D/o Legal Affairs.
Directions of the Hon'ble Supreme Court given in its order of 18/12/201 have not been followed	While Shri Saxena retired on 30/09/2014 the orders of the Hon'ble Supreme Court are dated 18/12/2014 and the direction of the Court cannot be applied retrospectively. Moreover, there is no direction in the judgment to this effect.
The letter of the D/o Expenditure of 13/07/2014 has not been replied to.	The letter of D/o Expenditure dated 31/07/2014 merely forwarded a representation dated 15/07/2014 of the Power Engineering Association addressed to the DoPT for taking necessary action as per the extent rules. Such communication cannot be construed that the Department is considering and/or has not given any refusal about the admissibility of TA to officiating Chief Engineers.
According to the Section 13 of the Gratuity Act, such recoveries cannot be made from gratuity.	Regarding applicability of Section 13 of the payment of Gratuity act 1972, it is stated that this is not applicable to Government servants and it is applicable in relation to the attachment in execution of any decree or order or any civil, revenue or criminal court and not for recovery of Government dues. Section 71 of CCS (Pension) Rules, 1972 has been rightly invoked for recovery of Government dues from the gratuity. It may be pertinent to point out that Section 71 of the CCS (Pensions) Rules is quite explicit wherein it is mentioned that any outstanding dues as ascertained by the Head of Office shall be adjusted against the amount of retirement gratuity and the expression "dues" includes any kind of over-payment of pay and allowances.
He was given deemed promotion w.e.f.01/02/2010 and hence he	There are clear cut instructions of the Government that though a person may have been promoted retrospectively, financial benefits

should be entitled to Transport Allowance	can only accrue when the person takes over the charge of the post. Shri Saxena had assumed the charge of Chief Engineer only on 30.09.2014. Therefore, the contention of Shri Saxena that he should be allowed to avail full TA with 01/02/2010 cannot be agreed to.
Tax has already been paid in full against the amount of TA which was given to him.	Having paid taxes on excess transport allowance is not really an issue since Shri Saxena, while filing his tax returns for the subsequent years, could claim refund.

The stand of CEA on the points made in the representations of Shri Alok Saxena, Ex-Chief Engineer, is hereby conveyed to him.

This issues with the approval of Chairperson, CEA."

4. During the course of hearing, learned counsel for the applicant argued that the issue as raised in this OA had earlier came for adjudication before this Tribunal in OA NO.363/2012 and this Tribunal vide Order dated 5.2.2013 partly allowed the same with the following directions:-

"15. The Hon'ble Supreme Court in Syed Abdul Kadir's case (supra), held as follows:

"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. See: Sahib Ram v. State of Haryana 1995 SCC (L&S) 248; Shyam Babu Verma v. Union of India (1994) 2 SCC 521; Union of India v. M. Bhaskar, (1996) 4 SCC 416; V. Gangaram v. Director, (1997) 6 SCC 139; Col. B.J. Akkara (Retd.) v. Govt. of India, (2006) 11 SCC 709; Purshottam Lal Das v. State of Bihar, (2006) 11 SCC 492; Punjab Natinal Bank v. Manjeet Singh, (2006) 8 SCC 647; and Bihar SEB v. Bijay Bhadur, (2000) 10 SCC 99."
>
> 16. In view of the settled legal position on the aspect of recovery, the respondents cannot recover any amount on the ground of over payment towards Transport Allowance at the rate of Rs.7000/- per month plus DA thereon from the applicants.
>
> 17. Hence, in the circumstances and for the aforesaid reasons, the respondents are directed not to effect any recovery from the applicants in pursuance of the impugned OM/letter dated 23.09.2011 and 5.10.2011. Accordingly, the OA is partly allowed. No order as to costs."

4.1 Counsel further submitted that the aforesaid Order of this Tribunal was upheld by the Hon'ble Delhi High Court in Writ Petition (C) No.5555/2013 decided on 4.9.2013 in which the Hon'ble High Court noted the issue which was before this Tribunal as follows:-

> "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/-."

And the Hon'ble Delhi High Court further observed as under:-

> "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 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.
>
> 5. Nevertheless, relying upon the ratio of *Syed Abdul Kadir v. State of Bihar*, (2009) 3 SCC 475 the Tribunal directed that the recovery of the money may not be made since the travel allowance was being paid by the Government on its own and is not because of any misrepresentation or fraud played by the applicants.
>
> 6. Learned counsel for the petitioners contended that the recovery was sought since the officers had benefited by payments being made to them under a bona fide mistake and they ought to return the same in fairness. He submitted that the monies so paid to them were not their legal entitlement and that the government was justified in seeking its return. Learned counsel also submitted that the Grade Pay Officers were permitted allowance of Rs. 3,200/- and hence the recovery from those who were paid excess was sought only after deducting Rs.3200/-. He relied upon the judgment in *Chandi Prasad Uniyal and Others v. State of*

Uttarakhand And Ors., 2012 8 SCC 417, to submit that that reliance ought to not be placed on the judgement of Syed Abdul Qadir case.

7. *Chandi Prasad Uniyal* was a case of restitution under Section 72 of the Contract Act, 1872, whereby recovery of amount paid in excess without any authority of law and payments so received by the recipient party was allowed to be recovered lest it amount to unjust enrichment. It was held that:

> "14. We may point out that in Syed Abdul Qadir case such a direction was given keeping in view of the peculiar facts and circumstances of that case since the beneficiaries had either retired or were on the verge of retirement and so as to avoid any hardship to them.
>
> 15. We are not convinced that this Court in various judgments referred to hereinbefore has laid down any proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or on the verge of retirement or were occupying lower posts in the administrative hierarchy."

8. This court notices that the case, however, was with relation to wrong/irregular pay fixation whereas in the present case the pay had already been fixed and the monies were paid to the Grade Pay Officers without any misrepresentation on fraud played by them. This court further notices that the case further involved a specific service condition that read "*In the condition of irregular / wrong pay fixation, the institution shall be responsible for recovery of the amount received in excess from the salary/pension*". The Supreme Court had held that the said condition bound the parties therein. However, no such condition has been pleaded or relied on in the present case.

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. See Sahib Ram v. State of Haryana [1995 Supp (1) SCC 18 : 1995 SCC (L&S) 248] , Shyam Babu Verma v. Union of India [(1994) 2 SCC 521 : 1994 SCC (L&S) 683 : (1994) 27 ATC 121], Union of India v. M. Bhaskar [(1996) 4 SCC 416 : 1996 SCC (L&S) 967] , V. Gangaram v. Director [(1997) 6 SCC 139 : 1997 SCC (L&S) 1652] , Col. B.J. Akkara (Retd.) v. Govt. of India [(2006) 11 SCC 709 : (2007) 1 SCC (L&S) 529] , Purshottam Lal Das v. State of Bihar [(2006) 11 SCC 492 : (2007) 1 SCC (L&S) 508], Punjab National Bank v. Manjeet Singh [(2006) 8 SCC 647 : (2007) 1 SCC (L&S) 16] and Bihar SEB v. Bijay Bhadur [(2000) 10 SCC 99 : 2000 SCC (L&S) 394]."

10. Having considered the arguments and the facts of the case and the ratio of Syed Abdul Kadir case, this Court finds no reason to interfere with the impugned order. The petition is without merit and is accordingly dismissed."

4.2. Counsel also submitted that Coordinate Bench of this Tribunal in OA No.497/2015 – ***Dileep Kumar Jain and others vs. Union of India and others*** vide Order dated

1.8.2017 by placing reliance of the aforesaid decision in ***J.S. Sharma*** (supra) held as follows:-

> 13. In the present case also, I find that the applicants have not misrepresented any fact, nor they were in the knowledge that they were drawing transport allowance in excess of their entitlement, and hence I am of the view that their case is fully covered by the judgment in **J S Sharma** (supra).
>
> 14. In the conspectus of discussions in the foregoing paragraphs, the O.A. is allowed. Impugned Annexure A-1 order dated 31.12.2014 and A-1B order dated 28.02.2014 are quashed and set aside. Accordingly, the interim order dated 05.02.2015 passed by this Tribunal, whereby recovery was stayed, is made absolute."

4.3 Counsel also submitted that the said Coordinate Bench by placing reliance on the Order passed in the aforesaid OA 497/2015 also extended the same benefits in OA No.1882/2015 vide Order dated 28.9.2018.

5. Counsel for the respondents also placed reliance on the judgment of the Division Bench of this Tribunal in OA No.4062/2013 decided on 13.5.2014 on the same issue in which the said Division Bench had also an occasion to consider the judgment delivered by the Hon'ble Delhi High Court in the case of ***J.S. Sharma*** (supra), and observed as under:-

> "9. The respondents have also cited the judgment of the Hon'ble Supreme Court in Chandi Prasad Uniyal and others Vs. State of Uttarakhand and others, (2012) 8 SCC 417 in which the Court has held that in case of irregular/wrong pay fixation, the institution in which the appellants were working would be responsible for recovery of the amount received in excess from the salary/pension. Similarly our attention was drawn to

OM dated 6.02.2014 issued by the DoP&T based on this judgment of the Hon'ble Supreme Court. The respondents also relied on the judgment of the Hon'ble High Court of Delhi in Union of India and anr. Vs. JS Sharma and ors, WP © No.5555/2013 in which the Court again reiterated the principle enunciated by the Hon'ble Supreme Court in Chandi Prasad Uniyal (supra). Respondents also referred to the judgment of this Tribunal in J.S. Sharma Vs. Director General Works in OA 363/2012 in which the question of transport allowance at the rate of Rs.7000/- per month had been raised. The Tribunal held as follows:

> "13. The OM dated 23.04.2009 (Annexure A3) under which the applicants got the non-functional upgradation and the consequential Grade Pay of Rs.10000/- itself clearly reveals that the upgradation would not bestow any right to the officers to claim promotion or deputation benefits and that the same is personal to the officer. In view of the same, the contention of the applicants that they are entitled for the Transport Allowances at the rate of Rs.7000/- per month plus DA thereon is untenable and cannot be accepted."

10. After going through the relevant records and arguments of both sides as also the judgments cited, it is clear that there is no error committed by the respondents in not allowing Rs.7000/- per month to the applicants. The 1994 circular made a specific provision for the officers of the rank of Joint Secretaries and above, which is not applicable to other officials just on the ground that they draw the same Grade Pay. Therefore, the respondents had to issue a clarification in 2013 also. The Honble Supreme Court in Chandi Prasad Uniyal (supra) has also held that recoveries can be made in such circumstances and, therefore, the order dated 24.10.2013 directing recovery of transport allowance paid in excess is valid in law.

11. In view of above, we are not inclined to interfere in this matter. The OA is dismissed. No costs."

6. However, counsel for the applicant has placed on record of this case, the Order passed by the Hon'ble Delhi High Court in Writ Petition (Civil) No.3445/2014 (***Radhacharan Shakiya (Director/SE) and others vs. Union of India and***

others), which was filed against the aforesaid Order of the Division Bench of this Tribunal in the issue, and the Hon'ble High Court vide Order dated 3.9.2014 observed as under:-

> "3. At the very outset learned counsel for the petitioners submits that the challenge to orders dated 24.10.2013 to the extent it withdraws the Transport Allowance, is not being pressed. He, however, submits that as far as the recovery of the amount of Travelling Allowance paid for the period that the petitioners actually received it, it should not be insisted upon. In support learned counsel relied upon the judgment of this court in W.P. (C) No.5555/2013 ?Union of India and Anr. Vs. J.S. Sharma and Ors.? Decided on 04.09.2013.
>
> 4. Counsel for the respondents do not dispute that the issue which the Court is called upon to determine viz. refund of the Transport Allowance in terms of the office memorandum dated 24.04.2009 in respect of DoPT employees, is no longer res integra. The issue is squarely covered by the judgment of this court in WP (C) 5555/2013 (U.O.I. Vs. JS Sharma). In that case, this Court after noticing the previous rulings of the Supreme Court protected the pay and Travelling Allowance disbursed to the employees/petitioners who approached the court in the following terms:-
>
> > ?8. This court notices that the case, however, was with relation to wrong / irregular pay fixation whereas in the present case the pay had already been fixed and the monies were paid to the Grade Pay Officers without any misrepresentation on fraud played by them. This court further notices that the case further involved a specific service condition that read ?In the condition of irregular / wrong pay fixation, the institution shall be responsible for recovery of the amount received in excess from the salary/pension?. The Supreme Court had held that the said condition bound the parties therein. However, no such condition has been pleaded or relied on in the present case.
> >
> > 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. See Sahib Ram v. State of Haryana [1995 Supp (1) SCC 18 : 1995 SCC (LandS) 248] , Shyam Babu Verma v. Union of India [(1994) 2 SCC 521 : 1994 SCC (LandS) 683 : (1994) 27 ATC 121] , Union of India v. M. Bhaskar [(1996) 4 SCC 416 : 1996 SCC (LandS) 967] , V. Gangaram v. Director [(1997) 6 SCC 139 : 1997 SCC (LandS) 1652] , Col. B.J. Akkara (Retd.) v. Govt. of India [(2006) 11 SCC 709: (2007) 1 SCC (LandS) 529] , Purshottam Lal Das v. State of Bihar [(2006) 11 SCC 492 : (2007) 1 SCC (LandS) 508] , Punjab National Bank v. Manjeet Singh [(2006) 8 SCC 647 : (2007) 1 SCC (LandS) 16] and Bihar SEB v. Bijay Bhadur [(2000) 10 SCC 99 : 2000 SCC (LandS) 394].?

10. Having considered the arguments and the facts of the case and the ratio of Syed Abdul Kadir case, this Court finds no reason to interfere with the impugned order. The petition is without merit and is accordingly dismissed?.

5. In view of the above position, and in view of the submissions made by the learned counsel for the petitioners, similar direction is issued. The respondents shall not recover the Travelling Allowance paid to the petitioners till the issuance of the impugned order. The writ petition succeeds partly and is allowed in the above terms."

7. However, it is pertinent to mention here that this Bench had also an occasion to deal with the same issue as involved in this case in OA 3885/2016 and this Bench vide Order dated 1.10.2018 in the said OA observed as under:-

"7. It is further relevant to note the contents of the impugned order dated 10.8.2016 which reads as under:-

"Please referred to your note vide F.No.50-1/2009-10/C&A/CGHS dated 05/08/2016 regarding payment of DCRG Bill in respect of Dr. Shashi Vashistha, Ex-Consultant retired on 31/08/2016 regarding payment of DCRG vide file No. 1760 dated 21/08/2015 to DDO CGHS HQ with the remarks that ***"the Recovery of excess paid transport allowance may be done as per para No.7.1 Report No.18 of 2015 of C&AG placed in parliament during July 2015.***" but DDO CGHS HQ had submitted DCRG Bill vide Bill No. NP/CGHS/C&A/495/08/2015 without recovery of overpaid transport allowance, the bill in original was returned on 03/09/2015 with the same remarks i.e. "Excess TPT may be recovered from the Gratuity.

Inspite of repeated instructions/remarks issued by this office, DDO, CGHS (HQ) has not made recovery of excess payment. After lapse of approximately One year, the DDO CGHS (HQ) had resubmitted the DCRG Bill in respect of above retiree vide Bill No. 240 of 08/2016 without making the recovery of overpaid transport allowance with note vide F.No.50-1/2009-10/C&A/CGHS dated 05/08/2016 along with Prime Minister Office Note dated 01/08/2016.

This office has finalized the said DCRG Bill after retrenchment of overpaid transport allowance amounting to Rs.519139/- and remaining admissible DCRG amounting to Rs.4,80,861/- released to retiree on 09/08/2016."

From the above, it is clear that the said recovery had been made due to the observations of the CAG in its report No.18/2015.

8. So far as the contention of the applicant that the said recovery is not permissible in view of the judgment of the Apex Court in Rafiq Masih (supra) and DoP&T's OM dated 2.3.2016 is concerned, in the said judgment the Apex Court held as follows:-

> "12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:
>
> (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
>
> (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
>
> (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.
>
> (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
>
> (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."

However, the aforesaid clauses are not relevant in the facts and circumstances of the present case, as the recovery which has been done from the DCRG of the applicant is based on the report of CAG, which is mandatory in nature and the said recovery is not made only from the applicant but also from other similarly situated doctors and as such there is no discrimination and arbitrariness in the action of the respondents. Further as per the provisions of Rule 70 of the CCS (Pension) Rules, 1972 which reads as under:-

> **"70. Revision of pension after authorization**
>
> (1) Subject to the provisions of Rules 8 and 9 pension once authorized after final assessment shall not be revised to the disadvantage of the Government servant,

unless such revision becomes necessary on account of detection of a clerical error subsequently :

Provided that no revision of pension to the disadvantage of the pensioner shall be ordered by the Head of Office without the concurrence of the Department of Personnel and Administrative Reforms if the clerical error is detected after a period of two years from the date of authorization of pension.

(2) For the purpose of sub-rule (1), the retired Government servant concerned shall be served with a notice by the Head of Office requiring him to refund the excess payment of pension within a period of two months from the date of receipt of notice by him.

(3) In case the Government servant fails to comply with the notice, the Head of Office shall, by order in writing, direct that such excess payment, shall be adjusted in instalments by short payments of pension in future, in one or more instalments, as the Head of Office may direct."

9. In the case of ***High Court of Punjab and Haryana and others vs. Jagdev Singh*** in Civil Appeal No.3500/2006 decided on 29.7.2016, the Hon'ble Apex Court held as follows:-

"9 The submission of the Respondent, which found favour with the High Court, was that a payment which has been made in excess cannot be recovered from an employee who has retired from the service of the state. This, in our view, will have no application to a situation such as the present where an undertaking was specifically furnished by the officer at the time when his pay was initially revised accepting that any payment found to have been made in excess would be liable to be adjusted. While opting for the benefit of the revised pay scale, the Respondent was clearly on notice of the fact that a future re-fixation or revision may warrant an adjustment of the excess payment, if any, made.

10 In State of Punjab & Ors etc. vs. Rafiq Masih (White Washer) etc., (2015) 4 SCC 334, this Court held that while it is not possible to postulate all situations of hardship where payments have mistakenly been made by an employer, in the following situations, a recovery by the employer would be impermissible in law:

"(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

> (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.
>
> (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
>
> (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." (emphasis supplied).
>
> 11 The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking.
>
> 12 For these reasons, the judgment of the High Court which set aside the action for recovery is unsustainable. However, we are of the view that the recovery should be made in reasonable instalments. We direct that the recovery be made in equated monthly instalments spread over a period of two years.
>
> 13 The judgment of the High Court is accordingly set aside. The Civil Appeal shall stand allowed in the above terms. There shall be no order as to costs."
>
> 10. From the above amply clear that in view of the judgment of the Hon'ble Supreme Court in the case of ***Jagdiv Singh*** (Supra), the said recovery is permissible and hence, the grounds taken by the applicant have no force in law.
>
> 11. In view of the above and for the foregoing reasons, the present is liable to be dismissed and the same is accordingly dismissed. There shall be no order as to costs."

8. In view of the above facts and circumstances, this Court does not find any merit in the prayer that the impugned order dated 11.9.2015 be set aside. The OM dated 6.2.2014 which has been sought to be challenged is found to be in accordance with the provisions of CCS (Pension) Rules and revision of pension has been done as per the said provisions. Further in

view of the judgment of the Hon'ble Supreme Court in Jagdev Singh's case (supra), this Court does not find any merit in this case. Accordingly, the present OA is dismissed. There shall be no order as to costs.

(Nita Chowdhury)
Member (A)

/ravi/