Central Administrative Tribunal
Principal Bench

OA No.3187/2015

Order Reserved on 07.03.2018

Pronounced on 04.05.2018

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

Shri Guru Sharan Srivastava
Age:61 Years 01 Month
S/o Late Shri B.D. Srivastava
Ex. SDE(PLG) O/o CGM NTP BSNL, New Delhi
R/o : F-105, Sec-27, NOIDA(UP)

.... Applicant

(By Advocate: Mr. Ranvir Singh)

Versus

Union of India through its

1. Secretary
   Department of Telecommunications
   Sanchar Bhawan, 20 Ashoka Road,
   New Delhi

2. Chairman-Cum- Managing Director
   Bharat Sanchar Nigam Limited
   Bharat Sanchar Bhawan,
   Janpath, New Delhi

3. The CGM-NTP
   Bharat Sanchar Nigam Limited
   551, Kidwai Bhawan, Janpath,
   New Delhi

4. General Manager (Finance)
   O/o CGM-NTP CIRCLE
   110 BSNL Corporate Office
   Bharat Sanchar Bhawan, Janpath
   New Delhi

5. Accounts Officer (Cash)
   O/O CGM BSNL-NTP CIRCLE, BSNL

Eastern Court Complex, Janpath
New Delhi

6. Dy. Controller Comm. Accounts (Pen)
O/o Controller of Comm. Accounts
Department of Telecommunications
DTO Building, Prasad Nagar,
New Delhi ... Respondents

(By Advocate: Mr. C. Bheemana for R-1 and R-6
Mr.Abhay Guta for R-2to R-5)

O R D E R

This Original Application (OA) has been filed by the applicant under Section 19 of the Administrative Tribunals Act, 1985, praying for the following reliefs:

> *"i) Quash and set aside the order as issued by the respondents through their letters bearing No. CGM/NTP/AO (Cash)/Pension/GS Srivastava dated 10.10.2014 (Annexure A-9), NTP/AO Cash/ Shri Guru Sharan Srivastava, SDE/112 dated 14.10.2014 (AnnexureA-10) and No. 2-4/PC-18254/DCRG-18668/2014/Pen dated 27.10.2014 (Annexure A-12) ordering and effecting the recovery of an amount of Rs.2.70,439/- from out of the applicant's DCRG becoming due to him after his retirement on superannuation on 30.06.2014;*
>
> *ii) Order the refund of the unlawfully recovered amount of Rs.2.70,439/- to the applicant alongwith 18% compoundable interest from the date of recovery till the date the recovered amount is actually refunded;"*

2. The factual matrix of the case, as noticed from the facts, is as under:

2.1 The applicant through a competitive examination for the post of Junior Telecom Officer (JTO) held in the year 1992 against the vacancy for the year 1991, was selected to the post of JTO and absorbed vide Department of Telecommunications (DoT) letter

No.34-41/94-R&E/22 dated 23.02.1995. After the formation of Bharat Sanchar Nigam Limited (BSNL), he was absorbed in the same capacity of JTO in BSNL w.e.f. 01.10.2000. At the time of his absorption in the BSNL, he was in CDA pay scale. Since BSNL was switching over to IDA pay scales, the applicant's pay fixation in the IDA pay scale was required to be done. As on 01.10.2000, the applicant's CDA pay scale was Rs.6500-10500 and his basic pay was Rs.17,300/-. As per the Scheme, his pay in the IDA pay scale of Rs.9850-14600 was to be fixed at Rs.10,850/- with four increments. However, due to the office mistake, his basic pay in the CDA pay scale of Rs.6500-10500 was taken as Rs.7500/- instead of Rs.7300/- and accordingly his pay in the IDA pay scale was fixed at Rs.11,100/- with five increments.

2.2 At the time of his pay fixation in the IDA pay scale, the applicant although being in the substantive grade of Assistant Engineer (E), was officiating as Sub Divisional Engineer (SDE) and thus was entitled for minimum of the scale of the higher pay scale of Rs.11875-300-17275 of the SDE post. However, in terms of the BSNL circular dated 24.05.2013 (p.109-110), the officiating pay should not have been considered for granting increments.

2.3 For the aforementioned two reasons, the applicant's pay fixation in the IDA pay scale was done at a higher level to which he was not entitled.

2.4 As the applicant retired from service on 30.06.2014, he was entitled to receive leave encashment amount of Rs.7,61,140/- and gratuity amount of Rs. ten lakhs. The respondents detected the mistake of his pay fixation of the applicant's pay in the IDA scale at a higher level at the time of calculating his retiral benefits. Consequently, vide Annexure A-12 order dated 27.10.2014, *inter alia,* ordered for recovery of the excess payment of Rs.2,70,439/- from the gratuity amount of Rs. ten lakhs payable to the applicant and released the balance amount of Rs.7,29.561/- to him. The respondents have also vide impugned Annexure A-9 order dated 10.10.2014 worked out the amount to be recovered towards leave encashment as Rs.16,960/- and vide impugned Annexure A-10 order dated 14.10.2014 towards wrong fixation of the pay of the applicant at a higher level in the IDA pay scale.

2.5 Aggrieved by the impugned Annexure A-9, A-10 and A-12 orders, the applicant has filed the present OA, seeking the reliefs as indicated in para-1 supra.

3. The respondents have filed their reply, to which a rejoinder has been filed by the applicant.

4. The case was taken up for hearing the arguments of the learned counsel for the parties on 07.03.2018. Arguments of Shri Ranvir Singh, learned counsel for the applicant, Shri C.

Bheemanna, learned counsel for respondents 1&6 and that of Shri Abhay Gupta, learned counsel for respondents 2-5 were heard.

5. The main contention of Shri Ranvir Singh, learned counsel for the applicant was that no recovery can be made from the gratuity of an employee except those prescribed under Section 4 (6) of the Gratuity Act, as held by the Hon'ble Apex Court in the case of **Y.K. Singla v. Punjab National Bank**, [(2013) 3 SCC 472]. The learned counsel drew my attention to Section 4 (6) of the Gratuity Act, which reads as under:

> *"4. **Payment of Gratuity—***
>
> *xxx xxx xxx xxx*
>
> *(6) Notwithstanding anything contained in sub- section (1), -*
>
> *(a) the gratuity of an employee, whose services have been terminated for any act, wilful omission or negligence causing any damage or loss to, or destruction of, property belonging to the employer, shall be forfeited to the extent of the damage or loss so caused;"*

5.1 He further argued that the Gratuity Act has been placed at a higher pedestal in comparison to the other Acts. In this regard he drew my attention to Section 14 of the Act, which is extracted below:

> *"14. Act to override other enactments, etc. – The provisions of this Act or any rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument or contract having effect by virtue of any enactment other than this Act."*

5.2 He submitted that the Hon'ble Apex Court has also observed in its judgment in **Y.K. Singla** (supra) that Section 14 of the Gratuity Act leaves no doubt that the superior status has been vested in the provisions of the Gratuity Act, vis-a-vis any other enactment (including any other instrument or contract) inconsistent therewith. He thus argued that the action of the respondents in deducting the alleged excess payment from the gratuity of the applicant was in contravention of the provisions of the Gratuity Act. Shri Ranvir Singh also placed reliance on the judgment of the Hon'ble Apex Court in **Jaswant Singh Gill v. Bharat Coking Coal Ltd.**, [(2007) 1 SCC 663], to buttress his argument that no recovery could have been made from the gratuity payable to the applicant.

5.3 The learned counsel further argued that the applicant is entitled for the relief in terms of the judgment of the Hon'ble Apex Court in **State of Punjab and others v. Rafiq Masih (Whitewasher)**, [(2014) 8 SCC 883], based on which the Department of Personnel and Training (DoPT) have issued Annexure A-16 OM dated 02.03.2016, which are to be followed by all the Government entities.

5.4 The learned counsel also placed reliance on the judgment of the Hon'ble Supreme Court in the case of **Dunlop India Ltd. v. Union of India**, [2004 (3) SLR 272], wherein it has been held as under:

> *"5. In my view Section 4(6) does not apply as it is not in dispute that the respondent had resigned on 1st June, 1998 and the resignation had been accepted. Since the services of the respondent No. 4 had not been terminated which is the sine-qua-non of the applicability of Section 4(6), clause (6) of Section 4 cannot apply in the present case."*

6. Shri Abhay Gupta, learned counsel for respondents 2-5 stated that recovery towards the excess payment from the applicant has been made under the CCS (Pension) Rules, 1972 and not under the Gratuity Act. He further submitted that the Hon'ble Apex Court in the case of **Chandi Prasad Uniyal and others v. State of Uttarakhand and others**, [(2012) 8 SCC 417] has observed that excess payment of public money can be recovered from the concerned Government employee. In this regard, he drew my attention to the following portion of the judgment:

> *"14. We are concerned with the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness, collusion, favouritism etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment."*

7. Shri C. Bheemana, learned counsel for respondents 1&6 argued that the Gratuity Act is not applicable to the present case. In this regard he drew my attention to Section 2 (E) of the Gratuity Act, which reads as under:

> *"(e) "employee" means any person (other than an apprentice) employed on wages, [4] [***] in any establishment, factory, mine, oilfield, plantation, port, railway company or shop to do any skilled, semi-skilled, or unskilled, manual, supervisory, technical or clerical work, whether the terms of such employment are express or implied, [5] [and whether or not such person is employed in a managerial or administrative capacity, but does not include any such person who holds a post under the Central Government or a State Government and is governed by any other Act or by any rules providing for payment of gratuity]."*

7. Shri Bheemana vehemently argued that the recovery has been effected in terms of the CCS (Pension) Rules, 1972. He drew my attention to Rule-71 of the CCS (Pension) Rules, regarding recovery/adjustment of Government dues, which is reproduced below:

> ***"71. Recovery and adjustment of Government dues***
>
> *(1) It shall be the duty of the Head of Office to ascertain and assess Government dues payable by a Government servant due for retirement.*
>
> *(2) The Government dues as ascertained and assessed by the Head of Office which remain outstanding till the date of retirement of the Government servant, shall be adjusted against the amount of the [1][retirement gratuity] becoming payable.*
>
> *(3) The expression `Government dues' includes -*
>
> *(a) dues pertaining to Government accommodation including arrears of licence fee * [as well as damages for the occupation of the Government accommodation beyond the permissible period after the date of retirement of the allottee)] if any ;*
>
> *(b) dues other than those pertaining to Government accommodation, namely, balance of house building or conveyance or any other advance, overpayment*

of pay and allowances or leave salary and arrears of income tax deductible at source under the Income Tax Act, 1961 (43 of 1961).”

7.1 He further argued that even the Hon’ble Apex Court judgment in **Rafiq Masih** (supra) would not come in the way of recovery. In this regard he drew my attention to para-9 of the judgment, which is reproduced below:

“*7. Having examined a number of judgments rendered by this Court, we are of the view, that orders passed by the employer seeking recovery of monetary benefits wrongly extended to employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recover. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.”*

7.2 He further argued that the aforementioned portion of the judgment of the Hon’ble Apex Court read with Rule-71 of CCS (Pension) Rules, 1972 provides for recovery of the excess payment.

8. Replying to the submissions made by the learned counsel for the respondents, Shri Ranvir Singh, learned counsel for the applicant submitted that in an identical case of **Rajendra Singh v. Union of India & Ors.**, [W.P. (C) No.47/2017, decided on 21.08.2017), the Hon’ble High Court of Delhi has held that recovery made from the petitioner therein towards pay and allowances is not

justified and directed to refund the amount recovered from the petitioner. He further argued that the petitioner therein Shri Rajendra Singh was also an employee of BSNL and that the Hon'ble High Court of Delhi in its judgment, has discussed the judgments of Hon'ble Apex Court in **Jaswant Singh Gill** (supra), **Dunlop India Ltd.** (supra), **Rafiq Maish** (supra) and **B.S. Akkara v. Govt. of India**, [(2006) 11 SCC 709]. He particularly drew my attention to para-11 of the judgment, which is reproduced below:

> "*11. The Tribunal has sought to permit partial recovery by directing refund of Rs.5 lakhs out of the recovered amount of Rs.9,71,335/-. There is no basis for the same. Since the recovery pertain to amounts paid in excess w.e.f. 01.12.1997 i.e. nearly 18 years prior to the retirement of the petitioner, in our view, the said recovery was not justified. Therefore, the recovery/adjustment of the amount of Rs.8,92,025/- could not have been made from the petitioner which was amount paid to him towards wrong fixation of his pay and allowances w.e.f. 01.12.1997. However, the amount over paid to the petitioner towards leave encashment, in our view, could have been recovered from the petitioner. This is for the reason that the amount of leave encashment would be computed upon taking final account of the unavailed leave lying in petitioner*"*s account at the time of his superannuation which happened only on 28.02.2015. Thus, the said recovery was of recent origin. Accordingly, we dispose of the present petition by modifying the direction issued by the Tribunal. We direct the respondent to refund the amount of Rs.8,92,025/- recovered from the petitioner towards pay and allowances. At the same time, we uphold the recovery of Rs.79,310/- from the amount payable to him. So far as re-fixation of the petitioner*"*s pension is concerned, this Court had expressed the view on 09.01.2017 itself, that the Court was not inclined to interfere with the said re-fixation while issuing notice in the writ petition. Thus, the re-fixation of pension of the petitioner shall remain the same."*

9. I have considered the arguments of the learned counsel for the parties and have also perused the pleadings and documents annexed thereto. It is not in dispute that the applicant's pay fixation in the IDA pay scale in the year 2010 was done erroneously

at a higher level and while doing so instated of granting him four increments, he was granted five increments. The applicant was holding the charge of SDE at that point of time for which he was granted increment considering his basic pay as Rs.11,875/-, i.e., minimum of the pay scale of SDE and thus contributing to the miscalculation. The applicant, however, had not indulged into any act of misrepresentation to secure higher monetary benefits. The pay fixation in the IDA pay scale was done in 2009 and the applicant retired on 30.06.2014. The learned counsel for the respondents have argued that the recovery has been ordered under Rule 71 of the CCS (Pension) Rules, 1975. Rule 71 (3) stipulates the Government dues that could be recovered. Broadly these dues are;

i) dues pertaining to the Government accommodation, including arrears of licence fee,

ii) balance of House Building Advance, Conveyance Allowance,

iii) overpayment of pay and allowances, overpayment of salary etc.

10. In view of this express provision under the CCS (Pension) Rules, the contention of the learned counsel for the applicant regarding embargo provided under the Gratuity Act against recovery from the Gratuity, does not hold good since the recovery has been ordered under the provisions of Pension Rules and not under the

Gratuity Rules. All the contesting parties have attempted to derive strength from the judgment of the Hon'ble Apex Court in **Rafiq Masih** (supra). This judgment has been rendered by the Hon'ble Apex Court after its judgment in **Chandi Prasad Uniyal** (supra). The Hon'ble High Court of Delhi in **Rajendra Singh** (supra), in which identical dispute between the BSNL and one of its employees has been adjudicated, has analysed various judgments of the Hon'ble Apex Court relied upon by the contesting parties and has finally held that no recovery can be made towards excess payment of pay and allowances. The Court, however, had observed that the excess payment towards leave encashment could be recovered. Looking at the similarity of the present case with that of **Rajendra Singh** (supra), I am of the opinion that the relief granted by the Hon'ble High Court of Delhi to the petitioner therein should also be extended to the applicant in the present case.

11. In the conspectus of the discussions in the foregoing paras, this OA is allowed in the following terms:

i) No recovery shall be made from the applicant towards any excess payment of pay and allowances. The amount of Rs.2,70,439/- recovered from the applicant is directed to be refunded back to him. This shall be done within a period of two months from the date of receipt of a certified copy of this order.

ii) The recovery of Rs.16,960/- towards excess payment on account of leave encashment is upheld.

12. There shall be no order as to costs.

(K.N. Shrivastava)
Member (A)

'San.'