

**CENTRAL ADMINISTRATIVE TRIBUNAL
JODHPUR BENCH, JODHPUR**

Original Application No.290/00437/2016

RESERVED ON: 26.10.2018

Jodhpur, this the 1st November, 2018

CORAM

Hon'ble Smt Hina P. Shah, Judicial Member

Prakash Chandra Bothra S/o Shri Chintamandas, aged about 64 years, R/o Dhani Bazar, Barmer-344001.

.....Applicant

By applicant himself.

Versus

1. Union of India, through the Secretary, Ministry of Communication, Department of Post, Government of India, New Delhi-110001.
2. Superintendent of Post Offices, Churu Division, Churu-331001.

.....Respondents

By Advocate : Mr. K.S. Yadav.

ORDER

The present Original Application has been filed U/s 19 of the Administrative Tribunals Act, 1985 seeking following reliefs:

- (i) In view of the facts and grounds enumerated above, it is most respectfully prayed that the order dated 30.06.2016 passed by the respondents, rejecting the representation of the applicant regarding correct payment of monthly pension may kindly be quashed and the Original Application may be allowed in terms of the prayer made. The respondents may be directed to calculate correct pension as well as other retirement benefits as per law and make the payment of the same with interest at the rate of 12% for the period of delay.

(ii) Any other appropriate writ, order or direction, which may be considered just and proper in the facts and circumstances of the case, may be issued in favour of the applicant.

2. The brief facts of the case, as averred by the applicant, are that the applicant joined service as Postal Assistant in the year 1972 and retired on superannuation w.e.f. 31.07.2012 from the post of BCRPA in Postal Department, Churu-Rajasthan. The applicant filed representation dated 27.06.2013 (Annex. A/1) to respondent No. 2 seeking correction in his pension on the ground that effect of minor penalty of stoppage of his increments ended with his retirement and as per rules, the minor penalty cannot adversely affect the penalty. The respondent No. 2 vide letter dated 02.12.2015 (Annex. A/2) informed the applicant that his pension has been decided by the Director Postal (Accounts) Jaipur, therefore, he may contact Jaipur Office in the matter. The applicant filed representation dated 01.01.2016 (Annex. A/3) to the Director Postal (Accounts) Jaipur for correction of his pension. The Director Postal (Accounts) Jaipur vide order dated 30.06.2016 (Annex. A/4) rejected the request of the applicant and informed that the pension has been calculated on the basis of last pay drawn as on 31.07.2012, i.e. the date of retirement which is correct. The applicant obtained copy of his pay slips for pay drawn in last ten months of his service through RTI from SPO Churu. Applicant is aggrieved that on the basis of these pay slips

of pay drawn by him, his pension should have been fixed at Rs 11,110/- instead of 10,070/-. Hence, he filed the present OA.

3. In reply, the respondents stated that the applicant was paid excess monthly pay & allowances when he resumed his duties in Churu Division on 24.09.2009 on account of wrong fixation. His pension papers and documents were sent to the Director Accounts (Postal) Jaipur for pension but AAO (Pension), DA (P) Jaipur found that pay of the applicant has wrongly been fixed. Resultantly, the applicant was being paid Rs 22,810/- pay for the last eight months period i.e. from October, 2011 to May, 2012. The applicant should have been paid Rs 19550/- from October, 2011 to May, 2012 and Rs 19550/- & Rs 20,140/- for the month of June, 2012 and July, 2012 respectively. Therefore, the last pay drawn by the applicant was determined as Rs 20,140/- by AAO (Pension), DA (P) Jaipur. The respondents annexed Annex. R/1 & R/2 dated 27.08.2012 showing correct fixation of pay of the applicant. Respondents further stated that the pension is determined on the basis of 50% of average pay of last ten months or 50% of last pay drawn, whichever is beneficial. Accordingly, the pension of the applicant has been fixed at Rs 10,070/- (50% of last pay drawn) instead of Rs 9,805/-. It has further been averred that the controversy involved in the instant case has already been decided by this Tribunal and applicant is well aware of the same.

Due to wrong fixation, recovery of excess payment of Rs 9,40,619/- is being made against the applicant. The applicant challenged the same in OA No. 367/2012 before this Tribunal and the same was dismissed vide order dated 26.04.2013. Against order dated 26.04.2013, the applicant filed review application No. 11/2013, which has also been dismissed by this Tribunal. The applicant challenged the said orders passed by this Tribunal in D.B.C.W.P. No. 6387/2015 before Hon'ble Rajasthan High Court at Jodhpur, which is pending consideration. The applicant impugned the order dated 13.06.2016 (Annex. A/4) passed by the Asstt. Accounts Officer (Pension) O/o Director Accounts (Postal) Jaipur but he did not implead him as party. Thus, the respondents prayed that instant OA may be dismissed.

4. The applicant filed rejoinder annexing copy of judgment dated 06.04.2017 passed in D.B.C.W.P. No. 6387/2015 by Hon'ble Rajasthan High Court at Jodhpur whereby order dated 26.04.2013 and 10.07.2013 passed in OA No. 367/2013 & RA No. 11/2013 passed by this Tribunal have been quashed and set aside. The applicant averred that since recovery has been held as illegal by the Hon'ble Court, therefore, now there is no ground to take plea of recovery from the salary/pay paid for the last ten for calculation of provisional pension and other retirement benefits, including

gratuity and leave encashment. He thus averred that now his pension payable will be Rs 11,750/- p.m.

5. Applicant argued his case himself and submitted that he superannuated on 31.07.2018 and as per pay slip annexed at page 21 (Annex. A/5), the average of last ten months pay is Rs 22,217/-. He contended that since Hon'ble High Court quashed and set aside the order dated 26.04.2013 and 10.07.2013 passed by this Tribunal in OA No. 367/2013 & RA No. 11/2013 and held the recovery to be illegal, his pension should be fixed at 50% of Rs 22,217/-, i.e. Rs 11110/- as per rules. However, the respondents are disbursing him pension @ Rs 10,070/-, which is illegal and respondents may be directed to correct the pension in pursuance of order dated 06.04.2017 passed by the Hon'ble High Court in D.B.C.W.P. No. 6387/2015 and order dated 30.06.2016 (Annex. A/4) may be quashed and set aside.

6. On the other hand, learned counsel for the respondents submitted that the pay of the applicant was wrongly fixed and his pensionary benefits based on this wrong fixation and thus excess payment of salary as well as retiral benefit has been made to the applicant. Accordingly, recovery of excess payment has been ordered against the applicant, which is upheld by this Tribunal. However, vide order dated 06.04.2017, Hon'ble Rajasthan High Court has set aside the recovery of excess payment. He

contended that the Hon'ble High Court has only set aside the recovery of excess payment made to the applicant, on account of wrong fixation, in view of law laid down in Rafiq Masih's case but no order against the fixation of pay has been passed by the Hon'ble High Court. The respondents have taken into account correct salary which should have been disbursed to the applicant as per rules, for fixing the pension of the applicant. The salary slips annexed by the applicant at Annex. A/5 includes the excess payment of pay made to the applicant which was corrected later on. He further contended that the applicant has challenged the order dated 30.06.2016 passed from the office of Director of Accounts (Postal), Jaipur but the applicant has not impleaded it as party-respondent. He thus prayed that OA may be dismissed.

7. I have considered the arguments advanced by both the parties and also perused the record.

8. Admittedly, the applicant challenged the order recovering excess payment of salary made to him by the respondents in this Tribunal by filing OA No. 367/2012 and this Tribunal upheld the recovery. However, order of this Tribunal was challenged in Hon'ble High Court in DBCWP No. 6387/2015 and the order of this Tribunal has been quashed and set aside. Perusal of order dated 06.04.2017 passed by the Hon'ble High Court makes it clear that Hon'ble Court while considering the judgments passed by

Hon'ble Apex Court in Chandi Prasad Uniyal & Ors Vs. State of Uttarakhand & Ors, (2012) 8 SCC 417 and State of Punjab & Ors. Vs. Rafiq Masih (White Washer) & Ors., (2015) 4 SCC 334 opined that the Rafiq Masih (supra) is a good law. Hence, Hon'ble High Court while quashing and setting aside orders of this Tribunal passed in OA No. 367/2012 and RA No. 11/2013, held the recovery orders as illegal and directed the respondents to refund the amount recovered from the petitioner alongwith interest @ 6% per annum. The relevant paragraph of the aforesaid judgment is reproduced below:

9. After hearing the learned counsel for the parties and perusing the record of the case as well as the precedent law cited, we are of the opinion that Rafiq Masih (supra) is a good law holding the field at this juncture, and therefore, there is no reason why proposition (iii) laid down in para 18 of the judgment in Rafiq Masih (supra), should not be applied in the present case. It is an admitted position that the petitioner was served with the recovery order two months prior to his retirement and thus, the respondents cannot escape the law laid down in Rafiq Masih (supra).

10. In light of the aforesaid discussion, the writ petition is allowed. The impugned order dated 26.04.2013 passed by the Central Administrative Tribunal, Jodhpur Bench, Jodhpur as well as the order dated 10.07.2013 passed in review application No. 11/2013 are quashed and set aside. The order memo No. SP/Con/2012-13 dated 24.07.2012-13 dated 24.07.2012, which is the recovery order is declared illegal and thus, the same is also quashed and set aside. The respondents are directed to refund the amount recovered from the petitioner alongwith interest @ 6% per annum, till actual payment is made.

It is amply clear from the aforesaid order that only recovery of excess payment made to the applicant has been set aside as in

Rafiq Masih's case, the Hon'ble Apex Court laid down the parameters of factual situations, wherein employees, who are beneficiaries of wrongful monetary gains at the hands of the employer, may not be compelled to refund the same.

9. In the present case, the contention of the applicant is that since recovery has been held to be illegal, therefore, wrong pay fixation based on which he is beneficiary of wrongful monetary gains at the hands of the employer may be upheld to be continued. In my considered view, if respondents have paid excess salary by way of wrong fixation, the Hon'ble High Court Court has only stated that employee must not be compelled to refund the same in view of Rafiq Masih's case (supra) and accordingly, the Hon'ble High Court set aside such recovery. However, the respondents have not been restrained to correct their mistake and therefore, the applicant is entitled to pension based on such correct fixation of pay although respondents cannot recover the amount paid in excess in view of law laid down by the Hon'ble Apex Court.

10. The main plea of the applicant in the present OA is that he has obtained pay slips of last ten months by way of RTI and based on these pay slips he is entitled for Rs 11,110/- per month as pension (Ground 5/B). However, in rejoinder, the applicant avers that he is entitled for Rs 11,750/- as pension considering the last

pay drawn for the month of July, 2012 and the pension payable will be 50% of Rs 23500/-, i.e. Rs 11750/- per month. The respondents averred that the applicant has been paid salary more than his entitlement for last ten months which has been corrected later on. Recovery of the said excess payment has been set aside by the Hon'ble High Court. In view of these arguments, one thing is clear that recovery based on wrong pay fixation corrected later on, has been set aside by the Hon'ble High Court. Nowhere, the Hon'ble High Court has interfered with the pay fixed by the respondents. Hence, the applicant's claim for pension based on the pay drawn by him earlier but later on corrected, as found to be more than his entitlement cannot be sustained in eyes of law.

11. Furthermore, the applicant has sought the relief that respondents may be directed to calculate the correct pension as well as retiral benefits as per law and make the payment of the same with interest @ 12% p.a. for the period of delay and order dated 30.06.2016 (Annex. A/4) passed by the respondents may be quashed. The respondents have come up with the correct Provisional Pension Authority No. 28 (Annex. R/1) and correct fixation of pay of the applicant (Annex. R/2) alongwith the reply. The applicant filed rejoinder and nowhere in his rejoinder, factually rebutted or challenged the correct pay fixed by the respondents. He, however, reiterated that his pension should be fixed as per pay drawn by him earlier in view of order dated

06.04.2017 passed by the Hon'ble High Court. In my considered view, although respondents cannot recover the excess payment made to the applicant but respondents are justified in fixing the pension of the applicant based on such corrected pay fixation as per applicant's actual entitlement. Furthermore, the applicant challenged the order dated 30.06.2016 (Annex. A/4) which has been issued by the office of Director of Accounts (Postal), Jaipur but he has not impleaded him as party-respondent. Therefore, in my view, OA also suffers from vice of non-joinder of necessary parties.

12. In view of discussions made hereinabove, no relief can be granted to the applicant. Accordingly, OA is dismissed. No costs.

**[Hina P. Shah]
Judicial Member**

Ss/-