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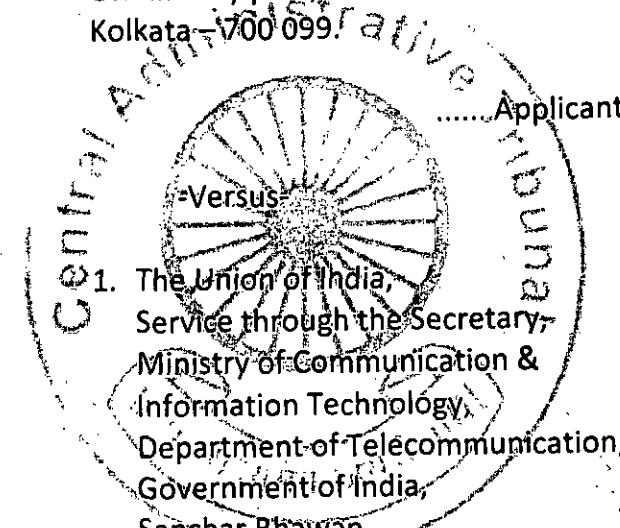
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CENTRAL ADMINISTRATIVE TRIBUNAL
KOLKATA BENCH
KOLKATA

No.O A /350/109/2015
M.A./350/634/2018
M.A./350/186/2018

Coram : Hon'ble Mrs. Bidisha Banerjee, Judicial Member
Hon'ble Dr.(Ms) Nandita Chatterjee, Administrative Member

Pijush Kanti Bagchi,
Son of Late Harendra Prasad Bagchi,
Retired Sub Divisional Engineer,
Calcutta Telephone District,
Bharat Sanchar Nigam Limited,
Residing at Plot No. 34, East Santoshpur
Co-operative Housing Society Limited,
Off E.M. By pass,
Kolkata - 700 099.



1. The Union of India,
Service through the Secretary,
Ministry of Communication &
Information Technology,
Department of Telecommunication,
Government of India,
Sanchar Bhawan,
20, Ashoka Road,
New Delhi - 110 001.
2. The Secretary,
Ministry of Communication &
Information Technology,
Department of Telecommunication,
Government of India,
Sanchar Bhawan,
20, Ashoka Road,
New Delhi - 110 001.
3. The Principal Controller of
Communication Accounts,
Ministry of Communication &
Information Technology,
Department of Telecommunication,
Calcutta Telephone District,

Telephone House, 8, Hare Street, 2nd Floor,
Kolkata – 700-001.

4. The Joint Controller of
Communication Accounts & CPIO,
Ministry of Communication &
Information Technology,
Department of Telecommunication,
Calcutta Telephone District,
Office of the PR. Controller of
Communication Accounts,
Telephone House, 8, Hare Street, 2nd Floor,
Kolkata – 700 001.
5. The Senior Communication Accounts
Officer (Pension/ Revision),
Ministry of Communication &
Information Technology,
Department of Telecommunication,
Calcutta Telephone District,
Office of the PR. Controller of
Communication Accounts,
Telephone House, 8, Hare Street, 2nd Floor,
Kolkata – 700 001.
6. The Chief General Manager,
Calcutta Telephones,
Bharat Sanchar Nigam Limited,
(A Government of India Undertaking),
Telephone Bhawan,
34, B.B.D. Bag (South), 3rd Floor,
Kolkata – 700 001.
7. The General Manager (Vigilance),
Calcutta Telephone District,
Bharat Sanchar Nigam Limited,
(A Government of India Undertaking),
34, B.B.D. Bag (South), 2nd Floor,
Kolkata – 700 001.
8. The Accounts Officer (Cash) City,
Bharat Sanchar Nigam Limited,
(A Government of India Undertaking),
Office of the DGM (NWO - CITY),
Calcutta Telephones,
P – 10, New C.I.T. Road, 5th Floor,
Kolkata – 700 073.
9. Bharat Sanchar Nigam Limited,
(A Government of India Undertaking),

Service through the Chairman &
Managing Director,
Having Corporate Office at
Bharat Sanchar Bhawan,
Harish Chandra Mathur Lane, Janpath,
New Delhi – 110 001.

10. The Chairman & Managing Director,
Bharat Sanchar Nigam Limited,
(A Government of India Undertaking),
Having Corporate Office at
Bharat Sanchar Bhawan,
Harish Chandra Mathur Lane, Janpath,
New Delhi – 110 001.

.....Respondents.

For the applicants : Mr. S. Sanyal, counsel
Ms. S. Sarkar, counsel

For the respondents : Mr. L.K. Chatterjee, counsel
Mr. M.K. Ghara, counsel
Mr. B.K. Chatterjee, counsel
Mr. R.N. Pal, counsel

Heard on : 06.12.2018

Order on : 13.03.2019

Bidisha Banerjee, Judicial Member

The Id. counsels were heard. Materials on record and written arguments were perused and considered.

2. Irrefutably, indubitably and admittedly the fact remains that the applicant while serving under Department of Telecommunication(DOT in short) was absorbed in Bharat Sanchar Nigam Limited(BSNL in short), after the latter came into being in the year 2000. He was chargesheeted by C.B.I. due to his acts and actions while serving the DOT. He was convicted while serving the BSNL. The charges were relatable to the period of service under DOT. But the BSNL, due to his conviction, has sought to withhold his pension, that accrued due to his service

in DOT, by invoking Rule 61(4)(1) read with Rule 40 of BSNL CDA Rules. He was asked to show cause why he would not be penalised due to his conviction. Having failed to respond to the show cause notice dated 03.01.2015 he has been penalised by BSNL, in terms of Rule 61(4)(1) read with Rule 40 of Bharat Sanchar Nigam Limited Conduct Discipline and Appeal Rules, 2006 (hereinafter referred to as BSNL CDA Rules), with the penalty of "*withdrawing pension for combined services of BSNL and DOT period, in full, on permanent basis.*"

3. The applicant in this O.A. has questioned the vires of Rule 61(4)(1) of BSNL CDA Rules on the ground that such rules are unconstitutional and illegal. The applicant has also challenged the authority of Respondent No.6 to issue the impugned Memo dated 03.01.2015 on the ground that the said memo was issued without authority and as such did not require a reply, and thus this application has been filed to seek the following reliefs:-

"8.a) An order declaring that Rules 61(4)(1) and 61(4)(2)(a) of the BSNL CDA Rules, 2006 are illegal, arbitrary, unconstitutional, without authority and jurisdiction and ultra vires of Article 309 and 300A of the Constitution of India as well as Rules 9(1) and 37A of the CCS (Pension) Rules, 1972;

b) An order declaring that Memoranda Nos. VIG/2010/A/4(i) dated 3rd January, 2015 and VIG/2010/A/4(ii) dated 3rd January, 2015 are illegal, unauthorised, unconstitutional, without authority and jurisdiction and ultra vires of Article 309 and 300A of the Constitution of India as well as Rules 9(1) and 37A of the CCS (Pension) Rules, 1972;

c) An order quashing the Memoranda Nos. VIG/2010/A/4(i) dated 3rd January, 2015 and VIG/2010/A/4(ii) dated 3rd January, 2015 issued by the respondent no. 6.

d) An order staying the operation of the Memoranda Nos. VIG/2010/A/4(i) dated 3rd January, 2015 and VIG/2010/A/4(ii) dated 3rd January, 2015 issued by the respondent no. 6 till the disposal of the application;

e) An order restraining the respondents and/or each one of them from withholding and/or stopping the provisional pension of the applicant until disposal of the Criminal Appeals pending before the Hon'ble High Court at Assam.

f) An order commanding and/or directing the respondents and/or each one of them to go on paying the provisional pension to the applicant till the disposal of the application or the Criminal Appeals pending before the Hon'ble High Court at Assam whichever is later."

4. The impugned memorandum dated 03.01.2015(Annexure A/10), which is basically a show cause notice issued by the BSNL is extracted hereunder with supplied emphasis for clarity:-

"BHARAT SANCHAR NIGAM LIMITED
OFFICE OF THE CHIEF GENERAL MANAGER, CALCUTTA TELEPHONES
TELEPHONE BHAVAN, 34, B.B.D. BAG(SOUTH), KOLKATA-700001

No.VIG/2010/A/4(i)

Dated at Kolkata-I, the 03-01-2015

MEMORANDUM

WHEREAS , the Court of Hon'ble Special Judge, CBI/Assam, Addl. Court No.1, Chandmari, Guwahati vide its Judgment dated 17-10-2013 has convicted the accused P.K. Bagchi (i.e., Shri Pijush Kanti Bagchi, the then SDE/OFC/Imphal, thereafter SDE, Calcutta Telephones, now retired) under-sections 420, 477A, 120B of IPC and 13(1)(d) r/w 13(2) of P.C. Act, 1988 on the criminal charges of cheating, causing wrongful loss by falsification of accounts, criminal conspiracy and criminal misconduct by corrupt or illegal means respectively and the said Shri Pijush Kanti Bagchi has been awarded the sentence of RI for two years and fine of Rs.5,000/- u/s 420 of IPC. RI for two years and fine of Rs.5,000/- u/s 477A of IPC. RI for one year and fine of Rs.5,000 u/s 120B of IPC and RI for two years and fine of Rs.5,000/- u/s 13(2)r/w 13(1)(d) of P.C. Act 1988(such rigorous imprisonments are ordered to run concurrently and in default of fine he is to suffer SI for 3 months, on each count) vide the Spl. Case No.7/06, State-Vs-P.K. Bagchi & 3(three) others.

AND WHEREAS, the undersigned has carefully considered the grounds of the conduct of the said Shri Pijush Kanti Bagchi which led to his conviction, as aforesaid, and is of the opinion that because of his conviction as per judgment passed by the Hon'ble Special Judge, CBI/Assam, Addl. Court No.1, Chandmari, Guwahati vide the Judgment dated 17-10-2013 in the said criminal case, Spl. Case No.7/06 (the case was registered as RC SIL 2002 A 0006 dated 25-07-2002) the circumstances of the case warrant the imposition of the penalty of withdrawing pension for combined service of BSNL and DOT period, in full till further order, on him. It is, therefore, proposed to impose the said penalty on the said Shri Pijush Kanti Bagchi(HR No.197000783), the then SDE/OFC/Imphal, thereafter SDE, Calcutta Telephones(now retired), in terms of Rule 61(4)(1) of BSNL CDA Rules, 2006.

NOW THEREFORE, Shri Pijush Kanti Bagchi(HR No.197000783), SDE, Calcutta Telephones(Retd.) is hereby given an opportunity of making representation on the penalty proposed above. Any representation which he may wish to make on the penalty proposed will be considered by the undersigned. Such representation, if any should be made in writing and submitted so as to reach the undersigned not later than 15 days from the date of receipt of this Memorandum by the said Shri Pijush Kanti Bagchi.

In case of non receipt of representation within the stipulated period or receipt of representation within the stipulated period but without any convincing ground against the said proposal, an order imposing the proposed penalty or as deemed fit would be passed by the undersigned.

The receipt of this Memorandum may please be acknowledged by Shri Pijush Kanti Bagchi(HR No.197000783), SDE, Calcutta Telephones(Retd.).

(K.K. Sapra)
Chief General Manager
Calcutta Telephones"

Further, a penalty order dated 10.08.2018, issued by CMD, BSNL during pendency of this O.A., assailed through M.A.634/2018, is extracted hereunder:-

"ORDER"

WHEREAS, Shri Pijush Kanti Bagchi (HR No.197000783), the then SDE/OFC/Imphal, subsequently SDE, Calcutta Telephones (now retired) was found guilty under sections 420, 477A, 120B of IPC and 13(2) r/w 13(1)(d) of P.C. Act 1988 vide Judgment dated 17-10-2013 passed by the Lt. Special Judge, CBI/Assam, Addl. Court No.1, Chandmari, Guwahati in Spl. Case No. 8/06 (State -Vs- P.K. Bagchi & four others) and was convicted as he entered into criminal conspiracy with Sri H. Brojendra Singh while executing OFC trenching and laying in subsection 14 of Imphal Moreh Route on NH-39 in Manipur during 1996-1997. Further, Sri Pijush Kanti Bagchi while acting as the site in-charge had made the entries in MB with regard to 1st RA bill and 2nd RA bill which were proved false and Sri Bagchi in agreement with the contractor Sri H. Brojendra Singh prepared bill amount for rocky soil and RCC work without any explanation which were proved false, etc. Therefore, Special Judge, CBI/Assam, Addl. Court No.1, Chandmari, Guwahati awarded him punishments of RI for two years and fine of Rs. 5,000/- u/s 420 of IPC, RI for two years and fine of Rs. 5,000/- u/s. 477A of IPC, RI for one year and fine of Rs. 5,000/- u/s. 120B of IPC and RI for one year and fine of Rs. 10,000/- u/s. 13(2), r/w 13(1)(d) of P.C. Act, 1988. Further, in default of the fine the accused Shri Bagchi to suffer SI for 3 months on each count and also the RIs to run concurrently and earlier period of detention, if any, is to be set off as against the sentence of imprisonment imposed upon him.

AND WHEREAS, the grounds of the said conduct of Shri Pijush Kanti Bagchi leading to his conviction and award of punishments as stated above, were considered by the Disciplinary Authority.

AND WHEREAS, on going through the said judgment dated 17-10-2013, the Disciplinary Authority issued a show-cause notice vide memorandum No. VIG/2010/A/4(ii) dated 03-01-2015 expressing his opinion therein to the effect that because of the conviction as per the said judgment, the circumstance of the case warrants imposition of the penalty of withdrawing pension for combined service of BSNL and DOT period, in full, on the said Shri Bagchi.

AND WHEREAS, the show-cause vide memorandum No. VIG/2010/A/4(ii) dated 03-01-2015 was duly served upon the said Shri Pijush Kanti Bagchi on 05-01-2015 under acknowledgment of receipt.

AND WHEREAS, the Disciplinary Authority duly provided an opportunity to the said Shri Bagchi, to represent, in writing, as he might wish to make on the said notice proposing imposition of penalty, within 15 days of receipt of the said show-cause notice further mentioning therein to the effect that in case of non receipt of representation within the stipulated period or on receipt of representation within the stipulated period but without any convincing ground against the said proposal, an order imposing the proposed penalty or as deemed fit would be passed by the Disciplinary Authority.

AND WHEREAS, Shri Pijush Kanti Bagchi did not submit any representation, in writing, within the specified period of 15 days, however, he approached the Hon'ble CAT, Calcutta Bench, and filed an O.A. vide no. 350/00109 of 2015 challenging the vires of the said notice/memorandum. The Hon'ble court listed the case for hearing on dated 22.01.2015 vide O.A. No. 350/00109 of 2015 (Pijush Knati Bagchi Vs Bharat Sanchar Nigam Limited & Ors.)

AND WHEREAS, on taking up the matter, the Hon'ble CAT passed an Order (Oral) on 22-01-2015. From the said order it transpired that the Ld. Counsels for both sides were present on the said day and the Ld. Counsel for the respondents has sought time etc. and that the Hon'ble Tribunal observed and ordered to the effect that 'Since the notice has been issued under Rule 61(4)(1) of BSNL CDA Rules, 2006 the vires of which is under challenge in the present O.A., let the provisional pension be continued till the next date of hearing' etc.

AND WHEREAS, following an order passed by the Hon'ble CAT, Calcutta Bench dated 22/04/2016 to the effect that 'Disciplinary proceedings in pursuance of show-cause notice are not stayed. The department may continue to conclude the proceedings. Liberty is granted to the applicant to file the reply to the show-cause, if not filed and the proceedings have not been concluded, etc. The disciplinary proceedings, as instituted vide memorandum VIG/2010/A/4(ii) dated 03-01-2015 has been proceeded further accordingly.

AND WHEREAS, the Disciplinary Authority on carefully going through the said judgment dated 17-10-2013 in full application of mind and after taking into consideration the relevant facts and circumstances of the case including the following observations;

- (i) that Shri Bagchi had not availed the opportunity provided to him to make representation on the show-cause notice i.e. memorandum dated 03-01-2015, within the period specified therein against the penalty proposed and the reason for proposing to impose such penalty on him.
- (ii) that the Hon'ble Tribunal vide order dated 22/04/2016 in O.A. No.350/00109 of 2015, granted liberty to Shri Bagchi to file reply against show cause notice. Accordingly, the said copy of the Hon'ble Tribunal dated 22/04/2016 was served to Shri Pijush Kanti Bagchi in person on dated 28.02.2018.
- (iii) that even after granting liberty by the Hon'ble Tribunal vide order dated 22/04/2016 in O.A. No. 350/00109 of 2015, to file reply to show cause notice, Shri Bagchi has not submitted any reply.
- (iv) that non-submission of any representation / reply by Shri Bagchi even after repeated opportunities have been given to him for the same, it is securely construed that he has nothing to say in the matter.
- (v) that the said conduct of the said Shri Bagchi leading to his conviction and award of punishment by Hon'ble Court relating to the offences/misconduct like connivance with co-accused private person (contractor) with dishonest intention of cheating the department abusing his official capacity during the relevant period as the SDE has adversely affected the interests of the department / organization lowered its image, revenue and other aspects besides causing pecuniary loss and thereby not maintained absolute integrity, devotion to duty, has done acts unbecoming of a government servant, thereby has done misconduct and has proved to be dishonest.
- (vi) that on taking into account the entire conduct and gravity thereof it is evident that such conduct is undoubtedly blameworthy & punishable,
- (vii) that in this disciplinary proceeding against the said Shri Pijush Kanti Bagchi natural justice has not been denied to him, in so far as reasonable opportunities to defend himself in the proceeding is concerned,

(viii) that the Disciplinary Authority considering the facts & circumstances of this case, especially considering the fact that the said offences on the part of Shri Bagchi had been proved in the trial court of law base on the evidences, finds that it is not reasonably needed to hold an inquiry in this proceeding, has arrived at the conclusion that such conduct on the part of the said Shri Pijush Kanti Bagchi are established, on merit.

AND WHEREAS, in considering the said acts amounts to grave misconduct and the gravity thereof, the Disciplinary Authority has decided to impose a penalty commensurate with the misconduct on the part of the said Shri Pijush Kanti Bagchi, so that justice is made in relation to this disciplinary proceeding.

AND WHEREAS, the gravity of such conduct leading to conviction of Shri Bagchi in relation to the said grave criminal offences as committed by him as a public servant, is not by any standard endorse his entitlement to the combined pension for services of BSNL and DOT period, also continuing the pension to such corrupt and guilty person may also impair the moral of the public and will erode the confidence of the people in public institution and thus continuance thereof is not desirable in the public interest.

NOW, THEREFORE, in exercise of the powers conferred by Rule 40 r/w Rule 61(4)(1) of the BSNL (CDA) Rules, 2006, and in consultation with the Department of Telecommunications, the undersigned, hereby imposes the penalty of "withdrawing pension for combined services of BSNL and DOT period, in full, on permanent basis" on the said Shri Pijush Kanti Bagchi (HR No. 197000783), SDE, Calcutta Telephones (Retd.), with immediate effect.

The receipt of this order shall be acknowledged by Shri Pijush Kanti Bagchi (HR No. 197000783), SDE, Calcutta Telephones (Retd.).

(Anupam Srivastava)
CMD, BSNL
New Delhi."

The right to receive pension of employees serving DOT was governed by the CCS(Pension) Rules. The existing CCS(Pension) Rules, that applied to the employees alike the applicant who served DOT was amended in 2000 and Rule 37A was introduced.

5. Rule 37A of the Civil Services (Pension) Rules, 1972(amended in 2000)
reads as under(extracted with supplied emphasis for clarity) :-

"37A. Conditions for payment of pension on absorption consequent upon conversion of a Government Department into a Public Sector Undertaking.—

(1) *On conversion of a department of the Central Government into a Public Sector Undertaking, all Government servants of that Department shall be transferred en-masse to that Public Sector Undertaking or autonomous body, as the case may be, on terms of foreign service without any deputation allowance till such time as they get absorbed in*

~~servants shall be absorbed in the Public Sector Undertaking or autonomous body, as the case may be, with effect from such date as may be fixed by the Government.~~

(2) The Central Government shall allow the transferred Government servants an option to revert back to the Government or to seek permanent absorption in the Public Sector Undertaking or autonomous body, as the case may be.

(3) The option referred to in sub-rule (2) shall be exercised by every transferred Government servant in such manner and within such period as may be specified by the Government.

(4) The permanent absorption of the Government servants as employees of the Public Sector Undertaking or autonomous body shall take effect from the date on which their options are accepted by the Government and on and from the date of such acceptance, such employees shall cease to be Government servants and they shall be deemed to have retired from Government service.

(5) Upon absorption of Government servants in the Public Sector Undertaking or autonomous body, the posts which they were holding in the Government before such absorption shall stand abolished.

(6) The employees who opt to revert to Government service shall be redeployed through the surplus cell of the Government.

(7) The employees including quasi-permanent and temporary employees but excluding casual labourers, who opt for permanent absorption in the Public Sector Undertaking or autonomous body, shall on and from the date of absorption, be governed by the rules and regulations or bye-laws of the Public Sector Undertaking or autonomous body, as the case may be.

(8) A permanent Government servant who has been absorbed as an employee of a Public Sector Undertaking or autonomous body shall be eligible for pensionary benefits on the basis of combined service rendered by him in the government and in the Public Sector Undertaking or autonomous body in accordance with the formula for calculation of pension/family pension under these rules as may be in force at the time of his retirement from the Public Sector Undertaking or autonomous body, as the case may be.

(9) The pension of an employee under sub-rule (8) shall be calculated on the basis of his last ten months' average pay.

(10) In addition to pension or family pension, as the case may be, the employees shall also be eligible to dearness relief as per industrial dearness allowance pattern.

(11) The benefits of pension and family pension shall be available to quasi-permanent and temporary transferred Government servants after they have been confirmed in the Public Sector Undertaking or autonomous body.

(12) The Central Government shall create a Pension Fund in the form of a trust and the pensionary benefits of absorbed employees shall be paid out of such Pension Fund.

(13) The Secretary of the administrative Ministry of the Public Sector Undertaking or autonomous body shall be the Chairperson of the Board of Trustees which shall include representatives of the Ministries of Finance, Personnel, Public Grievances and Pensions, Labour, concerned Public Sector Undertaking or autonomous body and their employees and experts in the relevant field to be nominated by the Central Government.

(14) The procedure and the manner in which pensionary benefits are to be sanctioned and disbursed from the Pension Fund shall be determined by the Government on the recommendation of the Board of Trustees.

(15) The Government shall discharge its pensionary liability by paying in lump sum as a one time payment to the Pension Fund the pro rata pension or service gratuity and

retirement gratuity for the service rendered till the date of absorption of the Government servant in the Public Sector Undertaking or autonomous body,

(16) The manner of sharing the financial liability on account of payment of pensionary benefits by the Public Sector Undertaking or autonomous body shall be determined by the Government.

(17) Lump sum amount of the pension shall be determined with reference to Commutation Table laid down in Central Civil Services (Commutation of Pension) Rules, 1981.

(18) The Public Sector Undertaking or autonomous body shall make pensionary contribution to the Pension Fund for the period of service to be rendered by the concerned employees under that undertaking or body at the rates as may be determined by the Board of Trustees so that the Pension Fund shall be self-supporting.

(19) If, for any financial or operational reason, the Trust is unable to discharge its liabilities fully from the Pension Fund and the Public Sector Undertaking or autonomous body is also not in a position to meet the shortfall, the Government shall be liable to meet such expenditure and such expenditure shall be debited to either the Fund or to the public sector undertaking or autonomous body, as the case may be.

(20) Payments of pensionary benefits of the pensioners of a Government Department on the date of conversion of it into a public sector undertaking or autonomous body shall continue to be the responsibility of the Government and the mechanism for sharing its liabilities on this account shall be determined by the Government.

(21) Nothing contained in sub-rules (12) to (20) shall apply in the case of conversion of the Departments of Telecom Services and Telecom Operations into Bharat Sanchar Nigam Limited, in which case the pensionary benefits including family pension shall be paid by the Government.

(22) For the purposes of payment of pensionary benefits including family pension referred to in sub-rule (21), the Government shall specify the arrangements and the manner including the rate of pensionary contributions to be made by Bharat Sanchar Nigam Limited to the Government and the manner in which financial liabilities on this account shall be met.

(23) The arrangements under sub-rule (22) shall be applicable to the existing pensioners and to the employees who are deemed to have retired from the Government service for absorption in Bharat Sanchar Nigam Limited and shall not apply to the employees directly recruited by the Bharat Sanchar Nigam limited for whom it shall devise its own pension scheme and make arrangements for funding and disbursing the pensionary benefits.

(24) Upon conversion of a Government Department into a public sector undertaking or autonomous body-

(a) the balance of provident fund standing at the credit of the absorbed employees on the date of their absorption in the public sector undertaking or autonomous body shall, with the consent of such undertaking or body, be transferred to the new Provident Fund Account of the employees in such undertaking or body, as the case may be;

(b) earned leave and half pay leave at the credit of the employees on the date of absorption shall stand transferred to such undertaking or body, as the case may be;

(c) the dismissal or removal from service of the public sector undertaking or autonomous body of any employee after his absorption in such undertaking or body for any subsequent misconduct shall not amount to forfeiture of the retirement benefits for the service rendered under the Government and in the

event of his dismissal or removal or retrenchment the decisions of the undertaking or body shall be subject to review by the Ministry administratively concerned with the undertaking or body.

(25) In case the Government disinvests its equity in any public sector undertaking to the extent of fifty-one per cent or more, it shall specify adequate safeguards for protecting the interest of the absorbed employees of such public sector undertaking or autonomous body.

(26) The safeguards specified under sub-rule (25) shall include option for voluntary retirement or continued service in the undertaking or body, as the case may be, voluntary retirement benefits on terms applicable to Government employees or employees of the public sector undertaking or autonomous body as per option of the employees assured payment of earned pensionary benefits with relaxation in period of qualifying service, as may be decided by the Government."

6. Ld. counsel for the applicant, citing the aforesaid provisions, would submit that once the applicant got absorbed in BSNL, he ceased to remain a Government servant and is deemed to have retired from Government service. Accordingly he should be considered as a pensioner in terms of Sub Rule 8 of Rule 37A supra.

Ld. counsel could further argue that the connotation 'These rules' in such Sub Rule 8 should be construed to mean as CCS(Pension) Rules, 1972 and, therefore, the pension, that the applicant would have earned by virtue of his service under DOT, could not be affected by BSNL since his right to pension for service under DOT is governed by the CCS(Pension) Rules and by BSNL CDA Rules and that, in terms of Sub-Rule 12, the pension fund created by Central Government could not be touched by BSNL.

He would further contend that in terms of Sub-Rule 14, the manner in which pensionary benefits were to be sanctioned and disbursed from the pension fund could be determined only by the Government on the recommendation of the Board of Trustees and not by the Managing Director, BSNL under any provision of law as the same would mean acting contrary to the rules framed under Article 309.

Further that, the BSNL, in terms of para 18 supra was only authorized to make pension or contribution to the pension fund created by the Government, but in no manner touch the right of the applicant to receive pension for the services rendered under Central Government. Moreover, in terms of Para 21, once the pensionary benefits including the family pension, once payable by the Government and while Para 24(c) is explicit that dismissal or removal from public sector undertaking or autonomous body of an employee after his absorption in such undertaking or body for any subsequent misconduct i.e. misconduct while working under such public sector undertaking or autonomous body shall not amount to forfeiture of retirement benefits for the service rendered under the Government, therefore, in the garb of exercise of power in terms of Rule 61(4)(1) of BSNL CDA Rules, the statutory right of an employee to receive pension in terms of Rule 37A (supra) could not be affected or touched or taken away.

7. Rule 61(4)(1) of BSNL CDA Rules referred to supra, lay down the following provisions:-

"Rule 61. DISCIPLINARY PROVISIONS FOR RETIRING EMPLOYEES

- (1) The employee against whom disciplinary proceedings have been initiated will cease to be in service on the date of superannuation but the disciplinary proceedings will continue as if he was in service until the proceedings are concluded and final order is passed in respect thereof. The concerned employee will not receive any pay and/or allowance after the date of superannuation. He will also not be entitled for the payments of retirement benefits till the proceedings are completed and final order is passed thereon except his own contribution to Provident Fund and he will be entitled for the provisional pension as per applicable rule.
- (2) Disciplinary proceedings, if instituted while the employee was in service whether before his retirement or during the re-employment, shall after the retirement of the employee, be deemed to be proceeding under these Rules and shall be continued and concluded by the authority by which it was commenced in the same manner as if the employee had continued in service.
- (3) During the pendency of the disciplinary proceedings the disciplinary authority may withhold payment of gratuity for ordering the recovery from gratuity of the whole or

part of any pecuniary loss caused to the company, if the employee is found in the disciplinary proceedings or judicial proceedings to have been guilty of offences/misconduct as mentioned in sub-section (6) of Section 4 of the Payment Gratuity Act, 1972 or to have caused pecuniary loss to the company by misconduct or negligence, during his service including service rendered on deputation or on re-employment after retirement. However, the provisions of Section 7(3) and 7(3A) of the payment of Gratuity Act, 1972 should be kept in view in the event of delayed payment in case the employee is fully exonerated.

(4) (i) Chairman/Managing Director is the competent authority to issue sanction to institute the departmental proceedings against the absorbed employees after retirement for withholding a pension for combined service of BSNL and DOT period (herein referred as pension) or gratuity or both either full or in part or withdrawing a pension in full or in part, whether permanently or for a specified period and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Company, if, any disciplinary or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during the period of service, including service rendered upon re-employment after retirement:

Provided that the Administrative Ministry shall be consulted before any final orders are passed:

Provided further that where a part of pension is withheld or withdrawn, the amount of such pensions shall not be reduced below the amount of rupees one thousand two hundred seventy five (Rs. Three thousand five hundred from 01.01.2006).

(4)(2)(a) The disciplinary proceedings referred to in sub-rule 4(1), if instituted while the absorbed employee was in service whether before his retirement or during his re-employment, shall, after the final retirement of the absorbed employee, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the absorbed employee had continued in service:

Provided that where the disciplinary proceedings are instituted by an authority subordinate to the Chairman/Managing Director, that authority shall submit a report recording of its findings to the Chairman/Managing Director.

(4)(2)(b) The disciplinary proceedings, if not instituted while the absorbed employee was in service, whether before his retirement, or during his re-employment,-

(i) Shall not be instituted save with sanction of the Chairman/Managing Director,

(ii) Shall not be in respect of any event which took place more than four years before such institution, and

(iii) Shall be conducted by such authority and in such place as the Chairman/Managing Director may direct and in accordance with the procedure applicable to disciplinary proceedings in which an order of dismissal from service could be made in relation to the absorbed employee during his service.

(4)(3) In the case of the absorbed employee who has retired on attaining the age of superannuation or otherwise and against whom any disciplinary or judicial proceedings are instituted or where disciplinary proceedings are continued under this rule, a provisional pension shall be sanctioned with the prior approval of Department to Telecom.

(4)(4) Where the Chairman / Managing Director decides not to withhold or withdraw pension but order's recovery of pecuniary loss from pension, the recovery shall not ordinarily be made at a rate exceeding one-third of the pension admissible on the date of retirement of a absorbed employee.

(4)(5) For the purpose of this rule,-

(a) disciplinary proceedings shall be deemed to be instituted on the date on which the statement of charges is issued to the absorbed employee or the pensioner, or if the absorbed employee has been placed under suspension from an earlier date, on such date; and

(b) Judicial proceedings shall be deemed to be instituted-

(i) in the case of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognizance, is made, and

(ii) in the case of civil proceedings, on the date the plaint is presented in the Court.

Explanation

For the purpose of these rules "absorbed employee" means DOT including erstwhile DTS/DTO employees who have taken permanent absorption in BSNL."

Placing supra, Id. counsel for the applicant would vociferously submit that the authorities have misdirected themselves in withholding the pensionary benefits of the applicant due to pendency of criminal case and not only that, they have also laid down the BSNL CDA Rules that are contrary to Article 309 of the Constitution of India which rules unless set aside, would enable the respondent authorities to perpetrate the illegality in withholding the pensionary benefits of all such absorbed employees of DOT, absorbed in BSNL. Id. counsel would urge that the misconduct alleged was admittedly and irrefutably related to the alleged period of 1994-1996 when the applicant was in DOT, when the BSNL was not even formed. Therefore, such employees, whose right to receive pension accrued by virtue of Rule 37A of Central Civil Services (Pension) Rules, 1972 as extracted

supra, which could only be affected by the constitutional power of President in terms of Rule 9 of CCS(Pension) Rules, could not be affected by the Board of Directors of BSNL.

8. The arguments advanced by Mr. Subir Sanyal, Id. counsel for the applicant at hearing and through his written submissions are the following:-

- (a) The respondent No.9, company(BSNL) has no power, authority and jurisdiction to frame any rule or regulation for withdrawing pension, in full or in part, whether permanently or for a specified period, of any employee of the Department of Telecommunication (DOT), Government of India, subsequently absorbed in the respondent no.9 company, in terms of the provisions of Article 309 of the Constitution of India.
- (b) By virtue of the provisions of proviso to Article 309 and clause (5) of Article 148 of the Constitution of India, the Hon'ble President of India has amended the CCS(Pension) Rules, 1972 by inserting Rule 37A of the amended Pension Rules, 2000 which deals with conditions for payment of pension on absorption, consequent upon conversion of a Government Department into a Central Autonomous Body or a Public Sector Undertaking.
- (c) The BSNL CDA Rules, 2006 is a non statutory rule and there cannot be any statutory rule in existence even for a moment contrary to and against the provisions, in the instant case, Article 309 of the Constitution of India.
- (d) Rule 61(4)(1) of BSNL CDA Rules, 2006 is illegal, unconstitutional and ultra vires the provisions of Rules 37A(14), 37A(22) and 37A(23) of the amended Pension Rules, 2000 inasmuch as the pensionary benefits accrued in respect of the employees who are deemed to have retired from the government service, like

the present applicant, can be dealt with only by the provisions of Rule 37A of the amended Pension Rules, 2000 and not by the Rules 61(4)(1) of the BSNL CDA Rules, 2006 framed by the respondent no.9 company.

(e) Rule 61(4)(1) of the BSNL CDA Rules, 2006 is illegal and ultra vires of rule 37A(8) of the amended Pension Rules, 2000 and therefore, the same cannot be allowed to remain in the BSNL CDA Rules, 2006.

(f) Rules 37A(14) to Rule 37A(24) of the amended Pension Rules, 2000 creates the right of the employees of the government department and the liabilities of the Central Government for paying pensionary benefits to its employees by transferring the accrued pensionary fund and by creating a trust and therefore, such pensionary benefit being a constitutional right under Article 309 read with Article 300A of the Constitution of India cannot be taken away or dealt with by a non-statutory rules framed by a company.

9. Per contra, the Id. respondents' counsel Mr. L.K. Chatterjee leading Mr. B.K. Chatterjee would in defence, submit that the O.A. was not maintainable as it was filed without exhausting the available departmental remedy of furnishing a reply to the show cause notice dated 03.01.2015 and pending disposal of criminal appeal, when not the conviction but the sentence was stayed and there was no bar in issuing appropriate orders in terms of BSNL CDA Rules.

Further that framing of Rule 61(4)(1) of BSNL CDA Rules, 2006 was intra vires as it laid down provisions applicable to BSNL employees. It transpired at hearing that the applicant has been honourably acquitted of the criminal charges in connection with appeals that arose from the judgment in Spl. Case 8/06, on 04.10.2018 before the Hon'ble Guwahati High Court. However, prior to such

honourable acquittal, he stood already penalised vide order dated 10.08.2018 with "*Withdrawing of pension for combined services of BSNL and DOT period, In full, on permanent basis.*" due to his conviction on 17.10.2013 in Spl. Case 8/06 and, therefore, Id. counsel agreed that due to such acquittal the reason for further withholding his pensionary dues does not subsist, and, therefore, the benefits can be released. The judgment of the Hon'ble High Court of Guwahati have been furnished in support.

10. Upon hearing the Id. counsels for both sides, the issues that cropped up for determination were two fold—(i) Constitutionality of Rule 61 (4)(1) of BSNL CDA Rules, which empowers the Chairman/Managing Director of BSNL to issue sanction to institute the departmental proceedings against the erstwhile employees of DOT absorbed in BSNL after their retirement from BSNL for withholding their pension for combined service of BSNL and DOT and (ii) Correctness of invoking the provision read with Rule 40, to impose penalty of withdrawing pension for combined services of BSNL and DOT.

11. It was argued that the provisions of Rule 61(4)(1) supra impinges upon the right of the DOT employees, absorbed in BSNL, to receive pension from the Central Government for service rendered in DOT, which power is vested only with the President in terms of Rule 9 of CCS (Pension) Rules framed under Article 309 of the Constitution of India. Therefore, the Chairman/Managing Director by virtue of these rules has been empowered to usurp the authority of the President by giving a total gobyte to the statutory rules of Central Government framed under Article 309. Therefore, it would be highly illegal and unconstitutional to allow Rule 61(4)(1), so long it tends to touch the pensionary right of an absorbed employee of DOT in BSNL in regard to an alleged misconduct committed while in

DOT, to continue to apply to such pensioners for the purpose of touching their right to pension for service rendered under DOT which right to pension would be governed by Rule 37A of CCS(Pension) Rules, as extracted supra.

12. We note that the Chairman/Managing Director of BSNL, in terms of Rule 61(4)(1) supra, is empowered to sanction institution of departmental proceedings against the absorbed employees after retirement for withholding a pension for combined service of BSNL & DOT period or gratuity or both either full or in part or withdrawing a pension in full or in part, whether permanently or for a specified period and of ordering recovery from a pension or gratuity of the whole or part of any pecuniary loss caused to the Company, if in any disciplinary or judicial proceedings, the pensioner was found guilty of grave misconduct or negligence during the period of service, including service rendered upon reemployment after retirement.

While interpreting the connotation "if in any disciplinary or judicial proceedings, the pensioner was found guilty of grave misconduct or negligence during the period of service" above, a 'committed' if read between "negligence" and "during", would make the provision comprehensible since the commission if committed while in DOT cannot be questioned by BSNL in terms of BSNL(CDA) Rules, given that, an 'Employee' under Rule 3(8)(a) of BSNL(CDA) Rules is "a person in the employment of the Company including employees whose service are temporarily placed at the disposal of the company." If an erstwhile employee of DOT subsequently absorbed in BSNL is to be proceeded against for a conduct while in DOT, it could either be pending proceeding initiated while in DOT service in terms of CCS(CCA) Rules or a proceeding under Rule 9 of CCS(CCA) initiated after retirement from DOT. BSNL(CDA) cannot have any application therein.

Therefore, inarguably and indubitably the provisions under Rule 61(4)(1) apply to misconducts /negligence committed during the "period of service" in BSNL and not otherwise. In the present case the applicant was proceeded against for allegations while serving the DOT and not while he was at the disposal of the BSNL. Therefore, Rule 61(4)(1) could not have been invoked to punish him.

13. Adverting to the legal propositions for striking down a provision as unconstitutional, we note the following:-

(i) Section 39 of the Fire Force Act, 1964 under which Mysore Fire Force has been established, gave rule-making power to the State Government, in exercise of which the State Government made Mysore Fire Force (Cadre Recruitment) Rules, 1971. In the case where a question arose whether Karnataka Civil Services (General Recruitment) Rules, 1977 or Rules made by the State Government under Section 39 of the Fire Force Act, 1964 would apply, the Hon'ble Apex Court in A.B. Krishna and Others vs. State of Karnataka and Others reported in (1998)3 SCC-495 held as follows:-

"5. Rule-making power, so far as services under the Union or any State, are concerned,

are vested in the President or the Governor, as the case may be, under Article 309 of the Constitution which provides as under :-

"309. Recruitment and conditions of service of persons serving the Union or a State-Subject to the provisions of this constitution, Acts of the appropriate Legislature may regulate the recruitment, and conditions of services of person appointed, to public services and posts in connection with the affairs of the Union or of any State:

Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

6. It is primarily the Legislature, namely, the Parliament or the State Legislative Assembly, in whom power to make law regulating the recruitment and conditions of service of persons appointed in public services and posts, in connection with the affairs of the Union or the State, is vested. The legislative field indicated in this Article is the same as is indicated in Entry 71 of List I of the Seventh Schedule of Entry 41 of List II of that Schedule. The Proviso, however, gives power to the President or the Governor to make Service Rules but this is only a transitional provision as the power under the Proviso can be exercised only so long as the Legislature does not make an Act whereby recruitment to public posts as also other conditions of service relating to that post are laid down.

7. The Rule-making function under the Proviso to Article 309 is a legislative function. Since Article 309 has to operate subject to other provisions of the Constitution, it is obvious that whether it is an Act made by the Parliament or the State Legislature which lays down the conditions of service or it is the Rule made by the President or the Governor under the Proviso to that Article, they have to be in conformity with the other provisions of the Constitution specially Article 14, 16 310 and 311."

"8. The Fire Services under the State Government were created and established under the Fire Force Act, 1964 made by the State Legislature. It was in exercise of the power conferred under Section 39 of the Act that the State Government made Service Rules regulating the conditions of Fire Service. Since Fire Service had been specially established under an Act of the Legislature and the Government, in pursuance of the power conferred upon it under that Act, has already made Service Rules, any amendment in the Karnataka Civil Services (General Recruitment) Rules, 1977 would not affect the special provisions validly made for Fire Services. As a matter of fact, under the scheme of Article 309 of the Constitution, once a Legislature intervenes to enact a law regulating the conditions of service, the power of Executive, including the President or the Governor, as the case may be, is totally displaced on the principle or "Doctrine of Occupied Field". If, however, any matter is not touched by that enactment, it will be competent for the Executive to either issue executive instructions or to make a Rule under Article 309 in respect of that matter.

9. It is no doubt true that the Rule-making authority under Article 309 of the Constitution and Section 39 of the Act is the same, namely, the Government (to be precise, Governor, under Article 309 and Govt. under Section 39), but the two jurisdictions are different. As has been seen above, power under Article 309 cannot be exercised by the Governor, if the legislature has already made a law and the field is occupied. In that situation, Rules can be made under the Law so made by the legislature and not under Article 309. It has also to be noticed that Rules made in exercise of the rule-making power given under an Act constitute Delegated or Sub-ordinate legislation, but the Rules under Article 309 cannot be treated to fall in that category and, therefore, on the principle of "occupied field", the Rules under Article 309 cannot supersede the Rules made by the legislature.

10. So far as the question of implied supersession of the Rules made under Section 39 of the Act by the General Recruitment Rules, as amended in 1977, is concerned, it may be pointed out that the basic principle, as set out in Maxwell's Interpretation of Statutes (11th edn., page 168), is that :-

"A general later law does not abrogate an earlier special one by mere implication. Generalia specialibus non derogant, or, in other words, 'where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force

of such general words, without any indication of a particular intention to do so. In such cases it is presumed to have only general cases it is presumed to have only general cases in view, and not particular cases which have been already otherwise provided for by the special Act.

11. This principle was reiterated in *Vera Cruz's case*, (1884) 10 AC 59, as under :-

"Where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation... that earlier and special legislation is not to be held indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so."

12. *Vera Cruz's case* was followed in *Eileen Louise Nicolle v. John Winter Nicolle*, (1992) 1AC 284, as under :-

"It is no doubt a sound principle of all jurisprudence that a prior particular law is not easily to be held to be abrogated by a posterior law, expressed in general terms and by the apparent generality of its language applicable to and covering a number of cases of which the particular law is but one."

13. To the above effect, is also, the decision of this Court in *Maharaja Pratap Singh Bahadur v. Thakur Manmohan Dev*, AIR 1966 SC 1931 = (1966) 3 SCR 663, in which it was indicated that an earlier Special Law cannot be held to have been abrogated by mere implication. That being so, the argument regarding implied supersession has to be rejected for both the reasons set out above."

Hon'ble Court foūhd :-

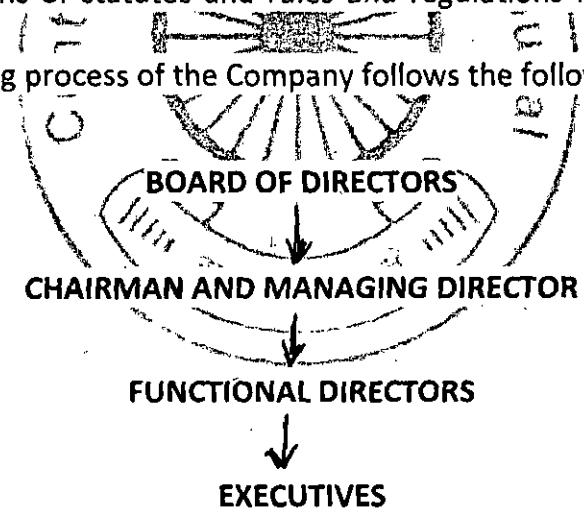
"15. As pointed out earlier, fire service was created and established under Fire Force Act, 1964 made by the State Legislature which gave rule-making power to the State Government. Instead of amending the General Recruitment Rules, the Government could well have exercised its power under Section 39 of the Fire Force Act, 1964 and amended the Rules specially made for the fire services. The Government, however, in its wisdom, did not do it obviously because it never intended to touch the fire services specially created by the State Legislature."

14. In the backdrop of such legal proposition, as enumerated supra, we note that Bharat Sanchar Nigam Limited, a Public Sector Company fully owned by Government of India was formed on 15th September 2000 in pursuance of Telecom Policy 1999, to take over the ongoing business of the Department of Telecom Services (DTS) and Department of Telecom Operations (DTO) from 1st October 2000. The Company has been incorporated as a company with limited liability by shares under the Companies Act, 1956 with its registered Corporate, office in New Delhi. The overall management of the corporate office is vested

with the Board of Directors, the Highest decision making body within the corporate office and is accountable to the shareholders of the corporate office which is the ultimate authority of the corporate office. BSNL being a Public Sector Enterprise, the Board of Directors is also accountable to Government of India.

15. The powers & duties of the officers and workmen of the Company are derived mainly from job descriptions, manuals, terms and conditions of appointment and Delegation of Authorities enunciated by the Company. The workmen of the Company are appointed for carrying out the business operations of the Company, which are in line with the objectives specified in the Memorandum of Association of the Company. While discharging duties and responsibilities, officers & workmen of the Company are complying with the applicable provisions of statutes and rules and regulations framed there under.

The decision making process of the Company follows the following channel



Overall management of the Company is vested with the Board of Directors of the Company. The Board of Directors is the highest decision making body within the Company. Bharat Sanchar Nigam Limited being a Public Sector Enterprise (PSE), the Board of Directors of the Company is also accountable to Government of India. The day-to-day management of the Company is entrusted with the Chairman cum Managing Director and the Functional Directors and Executives of the Company. For this purpose, the Board of Directors have delegated powers to

the Chairman and Managing Director, Functional Directors, and the Executives of the Company through Delegation of Financial and Administrative Powers. The Board of Directors have also delegated few of its specific powers to a committee, known as Management Committee comprising of CMD and Functional Directors. Functional Directors and executives exercise their decision-making powers as per this delegation of powers.

Most of Group A officers of various organized central services are on deemed deputation with the Company, who are governed by the rules and regulations of the Central Government. So far the absorbed employees are concerned, at present, except for the rules made by the BSNL, broadly, they are governed by the rules and regulations of the Central Government.

In terms of such powers the Company, Bharat Sanchar Nigam Limited Conduct, Discipline and Appeal Rules (BSNL CDA Rules in short) were introduced.

16. The Company provides long term employee benefits to its employees under its "Defined Contribution Plan", which lays down:

i) Pension Contribution (including gratuity)

The employees of DoT who have opted for absorption / absorbed in the company, and the employees on deemed deputation from Government are eligible for pension, which is a defined contribution plan. The company makes monthly contribution (including liability on account of gratuity) at the applicable rates as per Government Pension Rules, 1972 and FR & SR, to the Government who administers the same;

ii) Employees' Provident Fund

All directly recruited employees of the company are entitled to receive benefits under the Provident Fund. Both employee and employer make monthly contribution to the plan at a predetermined rate of employee's basic salary and dearness allowance. These contributions to provident fund are administered by the Provident Fund Commissioner. Employer's Contributions to Provident Fund are expensed in the Statement of Profit and Loss.

iii) Contribution for Leave Salary

For employees on deemed deputation from Government, Leave salary contribution is paid by BSNL to DoT for the deputation period in accordance with FR115(b) of FRSR Part I. Consequently the leave salary payable for those on deputation during the period of

leave rests with Government. Further any leave encashment either before or after quitting service is also the responsibility of Government.

17. We note that the pension contribution shared by Government and BSNL in the pension fund administered by Government is on pro rata basis. While right to pension of a Central Government Employee is governed by the provisions of CCS(Pension) Rules, the BSNL CDA Rules have been framed to empower its CMD to exercise discipline and control over its employees including those erstwhile DOT employees absorbed in BSNL to have control over their acts and actions for the period of service rendered in BSNL. But such provisions including the Rule 61 amended as Rule 61(4)(1) has no conflict with the CCS(Pension) Rules which regulate pension and other benefits of Central Government employees or even regulated pensions of erstwhile DOT employees for the period of service in DOT.

18. When vires of a provision is under challenge, the moot question to be looked into is presence of manifest arbitrariness. Having noted the true import of the provisions of Rule 61(4)(1) of BSNL CDA Rules we do not find any offending provision which tends to touch the right to pension of absorbed employees under CCS(Pension) Rules for the service rendered in DOT for any offence or conduct while serving DOT. Rather it empowers its Chairman-cum-Managing Director to exercise the power of discipline and control over its employees including those absorbed in BSNL upon transfer from DOT, for offences/misconduct committed while serving BSNL. The provision, if struck down as unconstitutional, would take away the right of the BSNL authorities of enforcing discipline in regard to their own employees and encourage indiscipline and, therefore, it cannot be termed as arbitrary.

19. If CCS(CCA) Rules or CCS(Pension) Rules fall under the "doctrine of occupied field", the BSNL CDA Rules apply to employees of BSNL who do not come under the purview of CCS(CCA) Rules or for that matter CCS(Pension) Rules. Therefore, BSNL (CDA) Rules have been correctly promulgated and the rules cannot be termed arbitrary, the rules do not tend to abrogate the CCS(CCA) or the CCS(Pension) Rules. The BSNL (CDA) Rules are capable of reasonable and sensible application on the subjects of BSNL.

20. Therefore, BSNL CDA Rules, particularly Rule 61(4)(1) supra does not tend to take away the right of erstwhile employees of DOT, absorbed in BSNL, their right to receive pension for a misconduct while under DOT's disposition. It is the Company that has wrongly invoked the provisions to take away the pension of an absorbed employee for an act committed while in DOT, completely oblivious to the provisions as laid down in rule 37(A) of CCS(Pension) Rules that bind them, particularly in the context of sub-rule 24(c) as enumerated supra. Hence it need not be termed as unconstitutional, or *ultra vires* Article 309 or Article 300 A or 37(A) of Pension Rules.

21. Coming to the second issue whether the Rule 40 was correctly invoked, we note that the BSNL CDA Rules provide as under which both the sides have failed or omitted to place:-

(i) **"Rule 33. PENALTIES**

The following penalties may be imposed, on an employee, as hereinafter provided, for misconduct committed by him or for any good and sufficient reasons:

(A) Minor Penalties

- (a) Censure,
- (b) Withholding of promotion,
- (c) Withholding of increments of pay with or without cumulative effect,

(d) Recovery from pay of the whole or part of any pecuniary loss caused by him to the company by negligence or breach of orders,

(e) Reduction to a lower stage in the time scale of pay for a period not exceeding three years, without cumulative effect and not adversely affecting his pension / terminal benefits.

(B) Major Penalties

(f) Save as provided for in clause (e) above, reduction to a lower stage in the time scale of pay for a specified period, with further directions as to whether or not the employee will earn increments of pay during the period of such reduction and whether on expiry of such period, the reduction will or will not have the effect of postponing the future increments of his pay,

(g) Reduction to a lower time scale of pay, grade, post or service which shall ordinarily be a bar to the promotion of the employee to the time scale of pay, grade, post or service from which he was reduced, with or without further directions regarding conditions of restoration to the grade or post from which the employee was reduced and his seniority and pay on such restoration to that grade or post.

(h) Compulsory retirement

(i) Removal from service which shall not be a disqualification for future employment under Govt./or the Corporation/ Company owned or controlled by the Govt.

(j) Dismissal from service which shall ordinarily be a disqualification for future employment under the Govt. or the Corporation/ Company owned or controlled by the Government.

Provided that, in every case in which the charge of possession of assets disproportionate to known sources of income or the charge of acceptance from any person of any gratification, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act is established, the penalty mentioned in clause (i) or clause (j) shall be imposed.

Provided further that in any exceptional case and for special reasons recorded in writing, any other penalty may be imposed.

Explanations:

The following shall not amount to a penalty within the meaning of this rule: -

- (i) Withholding of increment of an employee for failure to pass a prescribed test or examination;
- (ii) Stoppage of an employee at the efficiency bar time scale on the ground of his unfitness to cross the bar;
- (iii) Non-promotion, whether in an officiating capacity or otherwise, of an employee to a higher post for which he may be eligible for consideration but for which he is found unsuitable after consideration of his case;
- (iv) Reversion of an employee officiating in a higher grade or post to a lower grade or post on the ground that he is considered, to be unsuitable for such higher grade or post or on any administrative grounds unconnected with his conduct;
- (v) Reversion of an employee appointed on probation to another grade or post to his permanent grade or post during or at the end of the period of probation in accordance with the terms of his appointment or the rules and orders governing such probation;
- (vi) Compulsory retirement of an employee in accordance with the provision relating to his superannuation or retirement;
- (vii) Termination of service-
 - of an employee appointed on probation during or at the end of the period of probation, in accordance with the terms of his appointment; - of an employee

appointed in a temporary capacity on the expiry of the period for which he was appointed or earlier in accordance with the terms of his appointment;

- of an employee appointed under a contract or agreement in accordance with the terms of such contract or agreement; and,
- of an employee on reduction of establishment."

(ii) **"Rule 40. SPECIAL PROCEDURE IN CERTAIN CASES"**

Notwithstanding anything contained in Rule 35 or 36 or 37, the Disciplinary Authority may impose any of the penalties specified in Rule 33 in any of the following circumstances:

- (a) the employee has been convicted on a criminal charge or on the strength of facts or conclusions arrived by a judicial trial ; or
- (b) where the Disciplinary Authority is satisfied for reasons to be recorded by it in writing that BSNL it is not reasonably practicable to hold an inquiry in the manner provided in these rules; or
- (c) where the disciplinary authority is satisfied that in the interest of the security of State or of the Company it is not expedient to hold an enquiry in the manner provided in these Rules."

While the provision at Rule 40, indubitably exemplifies that the CMD/MD is empowered to penalise its employee if convicted on a criminal charge, it also explicitly stipulates that Rule 40 can only be invoked to penalise a serving employee, in terms of Rule 33, and cannot be invoked to affect his right to pension governed by Rule 61 of BSNL/CDA Rules.

Therefore, in the instant case, the Disciplinary Authority, while invoking Rule 61(4)(1) read with Rule 40 to punish a pensioner by taking away his right to pension, has committed a grave error of law, inasmuch as he has acted beyond his competence or jurisdiction and acted illegally being fully alive to the provisions of his own Company. Such fallacious and pernicious move deserves to be condemned.

22. We take note of the fact that the Hon'ble High Court at Calcutta in WPCT 408 of 2012 has already observed as under :-

".....There is no dispute that the BSNL took over the Calcutta Telephones in the year 2006 and the rules came into effect on 10th October, 2006. Therefore, although the BSNL had taken over the establishment of the Calcutta Telephones and the service of the respondent, the old rules of the Central Civil Service (Classification, Control & Appeal)

Rules prevailed and covered the service conditions of the employees working in the erstwhile department, prior to the take over. The new rules became applicable only in October, 2006.

There is no dispute that the respondent had been suspended on 6th October, 2005 in exercise of the powers conferred in sub-rule(1) of Rule 10 of the Central Civil Services(Classification, Control & Appeal) Rules. Therefore, a review ought to have been undertaken within 90 days from 6th October, 2005 as required under sub-rules (6) of Rule 10 of the aforesaid Central Civil Services (Classification, Control & Appeal) Rules. Sub rule (7) of Rule 10 stipulates that an order of suspension or deemed suspension is not valid after 90 days unless it has been reviewed and extended for a further period of 90 days. Indisputably, no review has been undertaken within this period of 90 days and, therefore, the suspension which has been continued against the respondent, is bad in law and void after 90 days from 6th October, 2005.

The Tribunal has, in our opinion, committed no error in allowing the application filed by the respondent."

Such pronouncement implies that BSNL(CDA) rules shall apply only to actions undertaken post promulgation of such rules.

23. Now, in order to determine whether a particular provision or rules is ultra vires, it is also to be determined whether:

- (i) The power exercising authority has transgressed the limits of the provision by which the rule making power was conferred upon it, i.e. whether BSNL has acted within the limits of the power granted to it;
- (ii) Whether the Rule or provision is repugnant to another statute which is binding on BSNL.

It is axiomatic and settled law that the powers conferred by a statute for a particular purpose cannot be used for different purpose. Provisions enumerated supra explicitly reveal that BSNL has transgressed the limits by including the words 'and DOT' in Rule 61(4)(1) of CDA Rules which power it did not have. Such inclusion is expressly and indubitably repugnant to Rule 37 A of CCS(Pension) Rules particularly in the context of the provisions at paragraphs 21,23 and 24(c) therein, as enumerated supra. By virtue of paras 21,23 and 24(c), BSNL has been

expressly debarred from touching the pension contribution payable by the Government or the fund supposed to be administered by the Government. Therefore, inclusion of the words "and DOT" in the rules need to be suitably modified. The BSNL cannot be expected to wield far greater power than what it is supposed to possess.

24. Accordingly, although we hold, that Rule 61 (4)(1) is *intra vires* nevertheless, it ought to be corrected/amended or suitably modified so as to exclude from its purview the contributions of DOT towards pension or gratuity of any pensioner (erstwhile employee of DOT, absorbed & retired from BSNL) for his services rendered under DOT and shall only apply to an act of indiscipline committed by an employee while in disposition of the BSNL authorities, that too, in order to affect the pension payable by BSNL and not by the DOT and in scrupulous observation of Rule 37(A) *ibid*. The BSNL is, therefore, directed to amend the provisions in question suitably.

25. Further, the BSNL is authorised to frame rules for disciplining its staff for the service rendered under BSNL, but it cannot punish an absorbed employee for offence committed during the service rendered under the Government unless Rule 8 of CCS(Pension) Rules come into play, for which matter has to be referred to the appropriate Ministry.

26. In the aforesaid backdrop, to put an end to the glaring arbitrariness committed by BSNL while invoking powers under Rule 61(4)(1) and Rule 40 of BSNL CDA Rules to punish a pensioner, we hold that the Rule 61(4)(1) of BSNL CDA Rules shall not be invoked for affecting the rights of erstwhile employees of DOT absorbed in BSNL, to receive pension from DOT for any misconduct or

offence committed while in DOT, moreso in view of the provisions ingrained in the Rules itself that it shall not be in respect of any event which took place more than four years before such institution.

27. To sum up our conclusions:-

- (i) Rule 61(4)(1) is intra vires the constitution or the amended Rule 37 A of CCS(Pension) Rules, but needs to be suitably amended so that BSNL does not meddle with pension contribution by DOT.
- (ii) BSNL is not permitted to invoke the Rule 61(4)(1) to question the conduct of an erstwhile employee of DOT committed while under disposal of DOT.
- (iii) Rule 40 cannot be invoked to punish a pensioner.

28. We are informed that the pension and other retiral benefits were not released even long after acquittal.

29. Accordingly we quash the impugned orders with consequential benefits and allow the O.A. with direction upon the authorities to immediately release the withheld pensionary and retiral dues within 2 weeks from the date of receipt of a copy of this order with interest at admissible banking rates and pay a cost of Rs.20000/- to the pensioner for unnecessarily harassing him after his retirement.

30. The M.As accordingly stand disposed of.

(Dr. Nandita Chatterjee)
Administrative Member

(Bidisha Banerjee)
Judicial Member

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