

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH:
NEW DELHI**

O.A. NO.1418 of 2019

This the 23rd day of September 2019

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

Chand Ram, aged – 60 years, 'C'
S/o Sh. Gaje Singh,
Retired as Traffic Inspector,
From DTC, Vasant Vihar Depot, New Delhi.
R/o Vill & PO Herahadi, P.O. Khod,
Distt. Gurgaon (Haryana)

.... Applicant

(By Advocate : Shri Yogesh Sharma)

VERSUS

1. Delhi Transport Corporation through
The Chairman,
Govt. of NCT of Delhi,
I.P. Estate, New Delhi.
2. The Depot Manager,
Delhi Transport Corporation,
Vasant Vihar Depot,
New Delhi.

..... Respondents

(By Advocate : Shri Sushant Sharma for Shri Manish Garg)

O R D E R (Oral)

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

- “(i) That the Hon'ble Tribunal may graciously be pleased to pass an order of quashing the impugned order dated 15.04.2019 and dated 25.04.2019 (Annex.A/1 & A/2) declaring to the effect that the same are illegal, arbitrary and against the principle of natural justice and consequently, pass an order directing the respondents to restore the pay of the applicant with all consequential benefits including revision

of all retirement benefits and arrears of difference of retirement benefits with interest.

- (ii) That the Hon'ble Tribunal may graciously be pleased to pass an order directing the respondents to refund the recovered amount of Rs.4,42,327/- if any from the gratuity of the applicant with interest.
- (iii) That the Hon'ble Tribunal may graciously be pleased to pass an order directing the respondents to release all the retirement benefits of the applicant immediately with interest @ 18% from the date of retirement till the date of payment of the retirement benefits.
- (iv) Any other relief which the Hon'ble Tribunal deem fit and proper may also be granted to the applicants along with the costs of litigation."

2. The grievance of the applicant against the order dated 15.4.2019 and Corrigendum date 25.4.2019 by which the respondents just few days before the retirement of the applicant re-fixed the pay of the applicant from 24.9.2012 and directed him to refund excess payment of Rs.4,42,327/- or otherwise, the same will be recovered from the gratuity of the applicant. Due to the aforesaid alleged recovery, the respondents have withheld all the retirement benefits of the applicant, which according to the applicant is totally illegal, arbitrary, against the principle of natural justice and against the law of the land.

3. During the course of hearing, counsel for the applicant submitted that applicant, being a Group 'C' employee, who was initially appointed as Conductor on 23.3.1982, subsequently promoted to the post of Assistant Traffic

Inspector in the year 2013 and further to the post of Traffic Inspector on adhoc basis w.e.f. 27.2.2018 and was retired on 30.4.2019 and third MACP was granted to him on 24.9.2012 upon completion of 30 years of service. However, the respondent vide Order dated 15.4.2019 and Corrigendum dated 25.4.2019 stated that the applicant was wrongly granted 3rd MACP from 24.9.2012 whereas he was entitled for the same w.e.f. 1.4.2017. Counsel further submitted that the impugned orders have been issued by the respondents in violation of principle of natural justice as no show cause notice was issued to him before taking the final decision which has a civil consequence.

3.1 Counsel further submitted that there is no misrepresentation and fraud on the part of the applicant at the time when 3rd MACP was granted to him w.e.f. 24.9.2012 and as such in view of the decision of the Hon'ble Supreme Court in the case of ***State of Punjab and others vs. Rafiq Masih and others***, 2015 (4) SCC 334, wherein the Hon'ble Supreme Court while observing that it is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement has summarized the following few situations, wherein recoveries by the employers would be impermissible in law:-

- (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
- (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
- (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
- (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
- (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.

As such the aforesaid recovery by the impugned orders is not sustainable in the eyes of law.

3.2 Counsel for the applicant further submitted that the Apex Court in the case of **Dwarka Prashad and others vs. Union of India and others**, 2004 (1) ATJ (SC) 591, held that “right to be considered for promotion on fair and equal basis without discrimination may be claimed as a legal and fundamental right under Article 14 & 16 of the Constitution of India.” In support of claim of the applicant, counsel placed reliance on the decision of the Apex Court in **Babu Lal Jain vs. State of M.P. & Ors.**, (2006) 6 SCC wherein it has been held as under:-

“15. We, however are of the opinion that in case of this nature, no recovery should be directed to be made. The appellant has discharged higher responsibilities. It is not a case where he obtained higher salary on committing any fraud or misrepresentation. The mistake, if any, took place on a misconception of law.”

3.3 Counsel further submitted that the ratio laid down in the following judgments that even in case of erroneous payment, the recovery of excess/overpayment already paid cannot be recovered, and therefore, there is no question of recovery of any over payment or excess payment at this stage without any reasons or justification and show cause notice and therefore, the impugned orders are liable to be quashed:-

- (a) ***S.Leikh Abdul Rashid & Ors. Vs. State of J&k***, JT 2008(1) SC 127.
- (b) ***Union of India Vs. Narendra Singh***, 2008(1) SCC (L&S) 547.
- (c) ***Duryodhan Lal Jatav Vs. State of UP Anr.*** 2005(3) ATJ 56.
- (d) ***Shyam Babu Verma Vs. Union of India & ors.*** 1994(2) SCC 521.

4. On the other hand, counsel for the respondents by referring to their counter affidavit submitted that third MACP was wrongly given to the applicant on 24.9.2012 whereas he was not entitled for that due to his adverse ACR (the same has not been challenged till date) and entitled for third MACP on 1.4.2017 as per the record. He submitted that accordingly vide orders impugned in this OA, the applicant was directed to refund the excess payment of Rs.4,42,327/- and otherwise

it will recovered from gratuity of applicant. Counsel further submitted that after receipt of undertaking from the applicant dated 17.5.2019 (page 37 of the paperbook) wherein it was undertaken that any amount of over payments of Pay & Allowances, PF, Pension, Gratuity etc. detected by audit or any authority of DTC, he will refund the same in lump sum without any delay with interest as applicable from time to time, the admissible amounts of retiral dues after deducting the excess payment of Rs.4,42,327/- were released to the applicant. Counsel for the respondents placed reliance on the decision of the Apex Court in the case of U.T. Chandigarh & Ors. Vs. Gurcharan Singh and another (Civil Appeal No.9873 of 2013) decided on 1.11.2013, reported in [2013] 12 S.C.R. 853, wherein it has been held that :

“12. Though a submission had been made on behalf of the respondent that no amount should be recovered from the salary paid to the respondent, the said submission can not be accepted because if any amount had been paid due to mistake, the mistake must be rectified and the amount so paid in pursuance of the mistake must be recovered. It might also happen that the employer might have to pay some amount to the respondent as a result of some mistake and in such an event, even the appellant might have to pay to the respondent. Be that as it may, upon settlement of the account, whatever amount has to be paid to the respondent employee or to the appellant employer shall be paid and the account shall be adjusted accordingly.”

5. After hearing learned counsel for the parties and carefully perusing the pleadings available on record, it is observed that at the time, the 3rd MACP was granted to the

applicant w.e.f. 24.9.2012, the so called adverse ACRs were very much available with the respondents and the said 3rd MACP was granted by the DPC duly constituted for this purpose at the relevant point of time and as such at this belated stage reliance on the said adverse ACRs taken by the respondents to withdraw the said 3rd MACP w.e.f. 24.9.2012 vide orders impugned in this OA is based on wrong interpretation of law on the subject as the law is well settled that non-communication of adverse ACRs at the relevant point of time cannot be used against the employee to deny him his due promotion/financial upgradation. Moreover, the applicant has not played any fraud or misrepresentation to secure the said 3rd MACP upgradation.

6. Accordingly the action of the respondents withdrawing the said 3rd MACP w.e.f. 24.9.2012 that too after a lapse of seven years just few days before the applicant's retirement cannot be sustainable in law keeping in view of the law laid down by the Hon'ble Supreme Court in the case of ***State of Punjab and others vs. Rafiq Masih and others*** (supra). Therefore, the impugned orders are quashed. The respondents are directed to refund the amount of Rs.4,42,327/- recovered from the applicant's gratuity amount and also restore the pay of the applicant with all consequential benefits including revision of all retiral benefits and arrears of difference of retirement benefits but without

any interest. The aforesaid exercise shall be completed by the respondents within a period of three months from the date of receipt of a copy of this Order.

7. The present OA is allowed in above terms. There shall be no order as to costs.

(Nita Chowdhury)
Member (A)

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