

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

OA No. 70 of 2017

**Present: Hon'ble Mr. Gokul Chandra Pati, Member (A)
Hon'ble Mr. Swarup Kumar Mishra, Member (J)**

1. Krishna Chandra Choudhury, aged about 45 years, S/o Sh.N.V.Choudhury, at present working as JAO, O/o CGM, BSNL, Bhubaneswar.
2. Ch. Katyayani, aged about 51 years, W/o Sh. N.Hari Kumar, at present working as JAO, O/o CGM, BSNL, Bhubaneswar.
3. Hrudananda Behera, aged about 47 years, S/o late Natabar Behera, at present working as JAO, O/o CGM, BSNL, Bhubaneswar.
4. Premchand Das, Aged about 49 years, S/o Late Babulal Das, at present working as AO, O/o CGM, BSNL, Bhubaneswar.
5. Achyutananda Nayak, aged about 49 years, S/o Late Gangadhar Nayak, at present working as AO, O/o CGM, BSNL, Bhubaneswar.
6. Laxmipriya Behera, aged about 45 years, W/o Sh. Ahaya Kumar Behera, at present working as AO, O/o CGM, BSNL, Bhubaneswar.
7. P.Ramesh Chandra Patro, aged about 53 years, S/o Late P.Subharao Patro, at present working as JAO, O/o CGM, BSNL, Bhubaneswar.
8. Manjulata HO, aged about 53 years, W/o Sh. Sitaram Tamsoy, at present working as AO, O/o CGM, BSNL, Bhubaneswar.
9. Dharendra Rout, aged about 48 years, S/o Sh. Duryodhan Rout, at present working as JAO, O/o GMTD, BSNL, Bhubaneswar.
10. Jagadish panda, aged about 50 years, S/o late Uma Charan panda, at present working as JAO, O/o GMTD, BSNL, Bhubaneswar.
11. Prasad Kumar Tandy, aged about 53 years, S/o Late Samuel Tandy, at present working as JAO, O/o GMTD, BSNL, Bhubaneswar.
12. Ramesh Chandra Sahoo, aged about 49 years, S/o Sh. Kapila Sahoo, at present working as JAO, O/o GMTD, BSNL, Bhubaneswar, Dist.- Khurda, Bhubaneswar.
13. G.Nagaraju, aged about 47 years, S/o Late G.Chandra Sekhar Rao Achary, at present working as JAO, O/o GMTD, BSNL, Berhampur.
14. M.Sudhkar, aged about 36 years, S/o Late M.B.Reddy, at present working as JAO, O/o GMTD, BSNL, Berhampur.
15. Rabindranath Mohapatra, aged about 55 years, S/o Late Braja Sundar Mahapatra, at present working as JAO, O/o GMTD, BSNL, Berhampur.
16. Debendra Prasad Dash, aged about 46 years, S/o Sh. Rama Chandra Dash, at present working as JAO, O/o GMTD, BSNL, Koraput.
17. Sujata Mohanty, aged about 48 years, W/o Sh. Surendra pattanayak, at present working as JAO, O/o GMTD, BSNL, Koraput.
18. Satikanta Sahoo, aged about 51 years, S/o Late Ghanashyam Sahoo, at present working as JAO, O/o GMTD, BSNL, Rourkela.
19. Shambhu Nath Prasad, aged about 52 years, S/o Prem Nath, at present working as JAO, O/o GMTD, BSNL, Rourkela.

20. Sk. Abdul Kayam, aged about 59 years, S/o Late Shaikh Abdul Hamid, at present working as JAO, O/o GMTD, BSNL, Rourkela.
21. Bishnupada Das, aged about 41 years, S/o Keshab Chandra Das, at present working as JAO, O/o TDM, BSNL, Baripada.
22. Sukanta Kumar Behera, aged about 51 years, S/o Late Bishnu Charan Behera, at present working as JAO, O/o GMTD, BSNL, Cuttack.

.....Applicants.

VERSUS

1. Bharat Sanchar Nigam Limited, represented through its Chairman-cum-Managing Director, having its registered head office at New Delhi.
2. Chief General Manager, Odisha BSNL Circle, Bhubaneswar – 751009, Dist. – Khurda.
3. Dy. General manager, (HR/Admn) Office of CGMT, BSNL, Bhubaneswar.

.....Respondents.

For the applicant : Mr.K.B.Panda, counsel

For the respondents: Mr.K.C.Kanungo, counsel
Mr.s.Behlera, counsel
Mr.H.V.B.R.K.Dora, counsel

Heard & reserved on : 16.5.2019

Order on : 5.7.2019

O R D E R

Per Mr.Gokul Chandra Pati, Member (A)

The applicant has filed this OA under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs :

- "(A) The application of the applicants be allowed by this Hon'ble Tribunal and this Hon'ble Tribunal be graciously pleased to quash the letter dt. 23.11.2016 and 24.11.2016 as per Annexure 5 and Annexure 6 series.
- (B) To grant such other relief/s as deem fit and proper under the facts and circumstances of the present case."

2. The undisputed facts in brief are that the applicants were promoted to the post of the Junior Accounts Officer (in short JAO) on 13.4.2010 on the basis of an examination and were allowed officiating promotion as JAO w.e.f. 1.4.2010. Their pay was fixed at the initial level of the pay scale applicable for the post of JAO which is categorized as Executive cadre. After completion of training, the applicants were promoted as JAO on regular basis and they were asked to exercise option for fixing their pay at the higher revised pay scale as applicable for the JAOs as per the order dated 7.5.2010 (Annexure-1). It is the contention of the applicants in the OA is that they have been correctly allowed

the benefit of option for pay fixation in the revised pay scale vide order dated 7.5.2010, where as the respondents have contended in their Counter that the applicants have been wrongly allowed the benefit of pay fixation in the revised pay scale as per the order dated 7.5.2010 which was applicable for non-executive employees and as the applicants were officiating as JAO, they were categorized as executive employees to whom the order dated 7.5.2010 was not applicable.

3. Vide the notification dated 24.7.2015 (Annexure-2), the benefit of revision of pay scale was extended to all officials who were qualified in the 2010 examination included the applicants with stipulation that they will be entitled for pay fixation in the revised pay scale w.e.f. their date of promotion on notional basis till 23.7.2015 notionally without payment of any arrear and actual payment in the revised scale will be due to the applicants w.e.f. 24.7.2015 as per the averment of the respondents in the Counter. The applicants have averred in para 4.4 and 4.5 of the OA that the notification dated 24.7.2015 did not affect their pay in no way and it was incorrect on the part of the respondents to order recovery of the differential salary due to the revised scale allowed to them from the date of their promotion till 23.7.2015. The recovery of the amount was ordered by the respondents vide order dated 23.11.2016 (Annexure-5 to the OA), which was intimated to the applicants vide order issued in November/December, 2016 (Annexure-6 series to the OA).

4. Being aggrieved by the order of recovery, the applicants submitted representations, on which no action was taken. Then they filed an OA No. 910/2016 which was disposed of by this Tribunal (Annexure-8) directing the respondents to consider the representations of the applicants. Thereafter, the respondents passed the order dated 19.1.2017 (Annexure-9 series) individually for the respective applicants. The applicants have impugned the orders at Annexure 5, 6 and 9 of the OA challenging the decision to recover the payment of arrear revised pay from the date of their promotion till 23.7.2015 since for this period, notional benefit without arrear was to be extended for the above period as per the notification dated 24.7.2015.

5. Main grounds taken by the applicant in the OA include the point that the recovery cannot be made without valid reasons and justifications and such recovery affects livelihood of the applicants. The impugned orders for recovery violate the order of Hon'ble Apex Court and hence, these are illegal.

6. In the Counter filed by the respondents, it is averred that the applicants were not entitled for the revised pay in accordance with the order dated 7.5.2010 (Annexure-A/1) as they were not non-executive employees on 7.5.2010 when they were working as JAO on officiating basis. It is stated that

they were wrongly allowed the benefit of the revised pay w.e.f. their date of promotion on the basis of the order dated 7.5.2010, which was applicable for non-executive employees only. The circular dated 22.12.2011 (Annexure-R/8 series) clarified that the benefit of the order dated 7.5.2010 will be allowed to the non-executives who were placed at higher pay scale between 1.1.2007 and 7.5.2010, may be allowed another option to switch over to the revised pay structure as per the order dated 7.5.2010. Since the applicants have been regularly promoted after 7.5.2010, the benefit of this circular will not be available to the applicants. It is stated in the Counter that the benefit of the revised pay after submitting option was allowed to the applicants by virtue of the circular dated 24.7.2015 (Annexure-A/2) without payment of any arrear pay for the past period till 23.7.2015 in view of weak financial position of the BSNL. When it came to the notice of the respondents that the applicants were wrongly allowed the benefit of pay fixation and option based on the order dated 7.5.2010, which was not applicable to the applicants.

7. It is further stated in the Counter that the applicants, while furnishing their option in 2010 in pursuance to the order dated 7.5.2010 had also given undertaking to the effect that if the amount will be found to have been wrongly disbursed to them in future, then they will refund the same. Copies of the option forms have been enclosed at Annexure-R/14 to the Counter. It is also mentioned in the Counter that the the employees who were promoted as JAO on the basis of 2010 examination, were allowed the benefit of pay revision w.e.f. their date of promotion on notional basis with actual payment of the pay from 24.7.2015 vide the order dated 24.7.2015 (copy at Annexure-A/2 to the OA). It is also stated in the Counter that this issue of arrear pay to the JAOs and recovery of the excess pay disbursed on the similar ground was considered by this Tribunal, Calcutta Bench in the OA No. 1393/2014 and vide order dated 1.7.2016 of the Tribunal in the said OA (Annexure-R/16 to the Counter) has dismissed the OA and upheld the decision of the respondents to recover the amount in question from the respective employees and the case of the present applicants being similar, the order dated 1.7.2016 will also apply to the present case.

8. The respondents in their Counter have also relied upon the judgment dated 29.7.2016 of Hon'ble Apex Court in the case of High Court of Punjab and Haryana & Ors vs. Jagdev Singh in Civil Appeal No. 3500 of 2006 (Annexure R/15 to the Counter) in which it was held that recovery of excess amount can be made in the cases in which the employees had furnished undertakings for such recovery/refund. It was contended that applying the ratio of the judgment in the case of Jagdev Singh (supra), the applicants are liable to refund the excess amount which had been wrongly disbursed to them. The

respondents have also cited the judgment of Hon'ble Apex Court in the case of Chandi Prasad Uniyal vs. State of Uttarakhand reported in (2012) 8 SCC 417 in support of their submissions in this case.

9. The applicant has filed the Rejoinder stating that since the respondents have taken the plea that the benefit of the pay revision vide order dated 7.5.2010 was wrongly allowed to the applicants, then the officials responsible for such wrong decision should have been identified and punished suitably. It is stated that there is no order prior to 2016 in which the issue of erroneous payment to the applicants has been raised. It was contended that having not raised the issue within 5 years, it cannot be raised after 5 years and amount cannot be recovered. It is stated in the Rejoinder that the respondents would have recovered the excess amount in 2011-12, then the applicants would not have faced the hardship they are facing now. It is also stated that vide order dated 24.7.2015, the applicants have been allowed the benefit of the revised pay from the date of their promotion to the executive grade and hence, it is wrongly mentioned in the Counter that the revised pay benefit was wrongly allowed in this case. Regarding the recovery made in the case of some Calcutta based employees, it is stated that the recovery action was initiated in that case in 2012-13 which is prior to 5 years, where as the recovery against the applicants was initiated in the year 2016 after it was detected during inquiry on the complaint of one of the employees, Sri Jagdish Rout. It is averred that the respondents cannot undertake recovery based on the undertaking after a gap of 5 years.

10. Learned counsel for the applicants was heard and he also filed a written note of argument, reiterating the grounds mentioned in the pleadings. It was argued that in the notification dated 24.7.2015 (Annexure-A/2 of the OA), there was no mention about recovery and the applicants were informed about the recovery in 2016 without giving any opportunity to the applicants before ordering recovery. The representations filed by the applicants were rejected vide order at Annexure-7 series of the OA. It was further submitted that the revised pay was disbursed by the authorities and there was no fault on the part of the applicants and hence, as per the ratio of the judgment of Hon'ble Apex Court in the case of State of Punjab vs. Rafiq Masih (white washer) reported in (2015) 4 SCC 334 which will apply to the present case. It is further argued by learned counsel for the applicant that the judgment of Jagdev Singh will be applicable for the situations covered by the proposition (ii) of the judgment in Rafiq Masih which pertains to the case of the employees due to retire within one year. Hence, the judgment in the case of Jagdev Singh will not apply to the case of the applicants which is covered by promotion (iii) of the Rafiq Masih judgment

and as per the DOPT OM dated 2.3.2016 (Annexure II to the rejoinder) issued in pursuance to the judgment in Rafiq Masih case.

11. Learned counsel for the respondents was heard and he also filed his written arguments enclosing copy of the following judgments:-

- i) Order dated 1.7.2016 by the Calcutta Bench of the Tribunal in OA No. 1393/2014 along with OA No. 1324/2014.
- ii) Judgment of Hon'ble Apex Court dated 29.7.2016 in the case of High Court of Punjab and Haryana -vs- Jagdev Singh, Civil Appeal No. 3500 of 2006.
- iii) Judgment of Hon'ble Supreme Court in the case of Chandi Prasad Uniyal -vs- State of Uttarakhand [(2012) 8 SCC 417].

Learned counsel for the respondents reiterated the averments made in the Counter stating that since the applicants had furnished the undertaking to return the excess amount if detected subsequently, the applicants are liable to refund the amount.

12. We have considered the submissions by the counsels for both the sides and also the materials available on record. The issues for decision in this case are (i) whether the pay fixation of the applicants done in the year 2010 on the basis of the order dated 7.5.2010 and the option furnished by the applicants was sustainable and (ii) whether the applicants are entitled for the benefit of no recovery in accordance with the judgment of Hon'ble Apex Court in the case of Rafiq Masih (supra).

13. The applicants have averred that their pay was correctly fixed on the basis of the option furnished by them in pursuance to the order dated 7.5.2010, allowing them the benefit of the revised pay w.e.f. the date of their promotion. The respondents have stated that the applicants are not entitled for the benefit of the order dated 7.5.2010, but they will be covered by the order dated 24.7.2015 by which they have been allowed the revised pay w.e.f. the date of their promotion. Hence, it was submitted by the applicants that they were entitled for the revised pay from their promotion date, but such benefit was on notional basis from the promotion date till 23.7.2015 as per the order dated 24.7.2015 and they have been allowed the benefit of the revised pay w.e.f. their promotion date by the order dated 7.5.2010, for which the decision to recover the amount is not justified. Respondents, on the other hand have submitted that the applicants were in the executive cadre as on 7.5.2010, for which the order dated 7.5.2010 was not applicable to them as the order was clearly stated to be for non-executive employees.

14. The para 3.6 of the order dated 7.5.2010 (Annexure A/1) stated as under:-

"The non-executives can opt for the revision of pay on 1.1.2007, or from the date of promotion after 1.1.2007, or from the date of next increment in the existing scale. The option under this shall be exercised in writing in the form as per Annexure-II so as to reach the authority within a period of three months from the date of issue of this order."

It is seen from above that above stipulations in the order dated 7.5.2010 were applicable to the non-executives. The order itself was applicable for non-executive employees and not to the applicants who were officiating as JAO in executive cadre. The applicants have not refuted the contention of the respondents that they belonged to executive cadre as on 7.5.2010. It is also not the case of the applicants that they belonged to non-executive cadre as on the date 7.5.2010. Hence the contention of the respondents that the applicants were given the benefit of revised pay scale on the basis of the order dated 7.5.2010 (Annexure A/1) has merit and the pay fixation and extension of the benefit of the revised pay scale to the applicants allowed in the year 2010 were wrongly allowed by the respondent authorities. The issue No. (i) of paragraph 12 is answered accordingly in negative.

15. Regarding the issue No. (ii) the applicants have argued that in accordance with the judgment of the Hon'ble Supreme Court in the case of Rafiq Masih (supra) no recovery can be made from the applicants who were allowed the benefit of revised pay scale w.e.f. their date of joining vide order dated 24.7.2015 (Annexure A/2), by which the benefit of revised pay was extended to the applicants as in order dated 7.5.2010, but with the difference that the differential pay from the date of joining till 23.7.2015 will not be paid and the applicants who will be allowed notional benefit during that period due to financial constraints faced by the BSNL and the actual benefit of the revised pay will be allowed from 24.7.2015 onwards. In this case the applicants had got such benefit in the year 2010 from the date of joining till 23.7.2015 on the basis of the order dated 7.5.2010, which was not applicable to the applicants who had been already promoted on officiating basis to the executive cadre by the time the order dated 7.5.2010 was issued. As stated in para (v) of the counter that the BSNL clarified vide the letter dated 22.12.2011 (Annexure R/8 series) clarifying that the employees who were promoted from non-executive to executive cadre from 1.1.2007 to 7.5.2010 will be permitted to be allowed the option to switch over to the revised pay scale as per the order dated 7.5.2010. In reply, the applicants in rejoinder have stated that the respondents should have asked the applicants to refund the excess amount disbursed on the basis of clarifications issued in 2011 and having not taken any action for recovery immediately after issue of clarification on 22.12.2011, it is not open for them to order recovery in the year 2016. It is not stated by the respondents as to how such a benefit was allowed to the applicants in 2010 and why it could not

be corrected within a reasonable time after issue of letter dated 22.12.2011 (Annexure R/8 series). It is not stated in the counter if any responsibility for such serious lapse resulting in loss of more than Rs.65 lakhs to the BSNL, has been fixed and action taken as per rules. The fact that the applicants are not entitled for the actual benefit of the revised pay from their date of joining till 23.7.2015 has not been disputed by the applicants by furnishing appropriate rules or Government orders or guidelines of the respondents.

16. Learned counsel for the applicants in his written argument has submitted that since the salary on account of revised pay has been disbursed to applicants and no action was taken for recovery for more than 5 years, it cannot be recovered as per the judgment of Hon'ble Apex Court in Rafiq Masih (supra). In Rafiq Masih judgment the principles have been laid down by Hon'ble Supreme Court are as under :

"12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

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

17. We are unable to accept the argument of learned counsel for the applicants that the excess amount was paid more than five years back for which it cannot be recovered. This is because the benefit of higher pay was allowed to the applicants from 2010 till 2015 every month till it was detected in 2016 vide copy of the notice to the applicants issued in November/December, 2016 in Annexure - 6 series of the OA. Therefore, the benefits received by the applicants after November 2011 till 23.7.2015 cannot be termed to have been disbursed more than five years back from the issue of notice in 2016. Major part of such benefit of revised pay had been paid to the applicants within 5 years from the date of notice issued in November/December, 2016. We are,

therefore, of the view that the benefit of the judgment of Hon'ble Apex Court in the case of Rafiq Masih (supra) will not be of any help to the applicants' case.

18. The respondents have cited the judgment of Calcutta Bench of this Tribunal in OA 1393/2014 and No. 1324/2014 vide order dated 1.7.2016 copy of which has been enclosed at Annexure R/16 to the counter. The applicants in that case, were Junior Accounts Officers and they were also allowed the benefit of revised pay from 2010 on the basis of the order dated 7.5.2010 after exercising the option as per the para 3.6 of the order dated 7.5.2010 like in the present OA. Subsequently, the respondents decided to recover this excess amount as in the present case. This decision was challenged before the Calcutta Bench of the Tribunal. After examining the entire issue and the orders of the respondents issued from time to time, this Tribunal passed the order dated 1.7.2016 in the above mentioned OAs and it was held as under :

"21. The issues are completely different. The communication dated 24.7.2015 applies to the pay fixation of Executive Cadres only where pay on promotion to Executive Cadre, though due to be paid from the date of promotion, nevertheless will be paid from the date of this order i.e. 24.7.2015 which means that no arrears from the date of promotion to 3.7.2015 will be paid due to financial constraints.

23. The case of the Applicants are entirely different. They were erroneously over paid by the respondents because of wrong fixation based on an invalid option exercised in pursuance of the order dated 7.5.2010 which applies to Non Executive Cadre employees only. The applicants did not take any action on clarification dated 18.5.2011 of order dated 7.5.2010, to the effect that the date of promotion to Executive Cadre should be between 1.1.2007 and 7.5.2010 for exercising option. The Applicants were promoted after 7.5.2010.

24. On examination of the matter we do not see any merit in both the OAs which are accordingly dismissed by leaving the parties to bear their own costs."

19. In reply to the contentions of the respondents relating to the order dated 1.7.2016 of the Calcutta Bench of the Tribunal the applicants in the rejoinder, have mentioned that by the time the dispute was considered by the Calcutta Bench, the excess payment was made for less than 5 years. It is further stated that if the respondents would have recovered the amount in 2011-12, then the applicants would not have faced the hardship as they are facing now. We have discussed this part in paragraph 17 of this order and held that the excess payment cannot be treated to have been made more than 5 years from the date of intimation to the applicants in November/December, 2016 (Annexure-6 series of the OA).

20. In the facts and circumstances as discussed above, we are of the considered view that the facts and issues in this case are similar to the facts

and issues involved in OA 1393/2014 and OA 1324/2014, which were disposed by Calcutta Bench of this Tribunal vide order dated 1.7.2016 (Annexure R/16). Nothing has been produced by the applicants to show that this order of the Tribunal has been modified by any higher forum. Hence, this order dated 1.7.2016 (Annexure R/16 of the counter) is squarely applicable to the present case.

21. In view of above, the issue No. (ii) of paragraph 12 of this order is answered against the applicants. The OA being devoid of merit is liable to be dismissed and hence, it is dismissed with no order as to cost.

(SWARUP KUMAR MISHRA)
MEMBER (J)

(GOKUL CHANDRA PATI)
MEMBER (A)

I.Nath