

HIGH COURT OF JAMMU & KASHMIR
AT JAMMU

SWP No. 702/2013
CMA No. 3271/2013

Date of Decision. 31.01.2014

Bharat Sanchar Nigam Ltd. and ors.

Vs.

Sanchar Nigam Executives Association and ors.

Coram:

Hon'ble Mr. Justice M. M. Kumar, Chief Justice

Hon'ble Mr. Justice Hasnain Massodi, Judge

Appearing counsel:

For the appellant/petitioner(s) : Mr. Ravinder Kumar Gupta, Advocate

For the Respondent(s): Mr. Sunil Sethi, Sr. Advocate with
Mr. Ravi Abrol, Advocate

(i)	Whether to be reported in Press, Journal/Media:	Yes
(ii)	Whether to be reported in Journal/Digest:	Yes

Per Massodi-J

1. Controversy in the writ petition on hand relates to the entitlement of Executives posted in Jammu and Kashmir Telecom Circle to Special Duty Allowance (SDA). It arises in the following factual background.

2. Ministry of Finance, Department of Expenditure, Government of India on 29.08.2008 issued a communication providing for grant of Special Duty Allowance (for short, SDA) @ 12.5% of the basic pay to the employees posted from outside to North Eastern

Region. It was later decided to extend the benefit to such employees posted in Ladakh region of the J&K State from September, 2008. The policy was reviewed vide order No. 412-10/2009 pers.I dated 23.03.2010 to the extent of tenure, area/stations and facilities in respect of J&K, Gujrat and NR-II Circle. The aforesaid order made Special Duty Allowance applicable to the Jammu and Kashmir Circle. Resultantly, the Executives posted in Jammu and Kashmir Telecom Centres were allowed to draw allowance @ 12.50 per cent of their basic pay without ceiling of Rs. 1000/- P.M inforce prior to order dated 23.03.2010.

3. Bharat Sanchar Nigam Ltd.- petitioner No. 1 herein, vide Order No. 39-8/2001-TE-II(Pt.) dated 19.04.2011 directed the Chief General Manger, Telecom J&K Circle, BSNL, Jammu –respondent No. 3, to immediately stop payment of SDA to the Executives working in J&K Telecom Circle. The reason given in the order for stoppage of SDA, was that they were not eligible to the benefit and that the same was restricted to the Executives working in North Eastern (NE) region and Ladakh area of J&K only. This was followed by Order No. 904-20/Estt/VI 72 dated 19.04.2011 of identical nature addressed by Assistant General Manager (Admn.) to the Senior GMT, Kashmir and other Officers. Deputy General Manager (TE) went a

step further and vide No. 39-8/2001-TE-II (Pt.II) dated 20.09.2011 directed recovery of SDA already paid to the Executives working in Telecom Sector of J&K Circle.

4. Sanchar Nigam Executives Association (SNEA) J&K Circle and one Shri S. K. Mahaldar-Public Relation Officer in the Nigam filed Writ Petition being SWP No. 881/2011, throwing challenge to the order stopping payment of SDA to the members of petitioner's association and recovery of allowance already paid. The writ petition was subsequently withdrawn on 08.07.2011 having regard to the Central Government Notification dated 31.10.2008.
5. An application registered as O.A No. 1114/JK of 2011 was filed by the petitioners in SWP No. 881/2011 before the Central Administrative Tribunal, Chandigarh. Applicants/respondents' case before the Tribunal was that orders impugned stopping payment of SDA and recovery of amount already paid were passed without affording the applicants an opportunity to show cause against orders, to project their stand and that the orders, therefore, violated the principle of natural justice. It was pleaded that as the orders called in question resulted in civil consequences, affecting the applicants, it was obligatory on the part of petitioners/non-applicants to afford applicants/

respondents an opportunity to put forth their stand. The impugned action was stated to be discriminatory in character, inasmuch, as applicants/respondents' counterparts in Gujarat and NE-II region were allowed to draw SDA and amount already paid was not ordered to be recovered in their cases. It was next pleaded that impugned orders were not in the interest of administration as Bharat Sanchar Nigam Limited's Executives would avoid to be posted in Jammu and Kashmir Telecom Circle as such posting would deprive them of the right to get SDA. The decision taken by the petitioners/non-applicants was said to be devoid of any reason as Jammu and Kashmir State continued to be a 'Disturbed Area' and reason that earlier prompted petitioners/non-applicants to allow SDA to the Executives posted in J&K Telecom Circle continued to exist. Applicants/respondents further pleaded that as they had no role in grant of SDA and it was not allowed on their instance, petitioners/non-applicants lacked authority to order recovery of amount already paid on account of Special Duty Allowance.

6. Petitioners/ non-applicants opposed the O. A on the ground that as SDA was allowed to the Executives posted in J&K Telecom Circle inadvertently, due to sheer mistake, Petitioners/non-applicants were within their right to rectify the mistake and withdraw the

benefit erroneously extended to the Applicants/respondents, without any obligation to afford them an opportunity to show cause against withdrawal of such benefit. Petitioners/non-applicants denied that SDA was granted to the Executives working in other parts of country including Gujarat and NE-II and insisted that benefit was only available to the Executives posted in North Eastern and Ladakh region of Jammu and Kashmir. It was denied that applicants/respondents were subjected to any discriminatory treatment. It was pleaded that the decision taken by petitioners/non-applicants was in tune with the rules and no prejudice was caused to the applicants/ respondents.

7. Applicants/respondents did not press the first limb of their case before the Tribunal and restricted their claim to the non-recovery of allowance already paid. It was argued that though respondents/applicants were taken to be not entitled to SDA and the benefit having mistakenly been extended to them, yet the amount already paid on account of SDA could not be recovered for the reason that the respondents/ applicants had no role in granting of SDA to the Executives working in Jammu and Kashmir Telecom Circle.
8. The Central Administrative Tribunal took a view that as SDA was granted to the respondents/applicants by the

non-applicants on their own, without any request or demand from applicants/respondents and as the respondents/applicants had no role in extension of such benefit, amount of SDA paid prior to the order dated 19.04.2011 could not be recovered from the respondents/ applicants. The Central Administrative Tribunal while holding so, placed reliance on *Budh Ram and others v. State of Haryana (2009) SCT 333*. The O.A No. 1114/JK/2011 was accordingly disposed of with a direction to the petitioners/non-applicants not to make recovery of amount already paid to the respondents/applicants.

9. The Central Administrative Tribunal's order dated 04.07.2012 is questioned by the Bharat Sanchar Nigam Ltd. and others-non-applicants before the Central Administrative Tribunal, in the writ petition on hand on the ground that as respondents/applicants did not press the first limb of their case i.e. their entitlement to SDA, they are to be presumed to have conceded that they were not entitled to receive the allowance and therefore, cannot resist recovery of the amount erroneously paid on account of said allowance. The Central Administrative Tribunal is said to have erred while holding that petitioners were stripped of the authority to recover the amount already paid. It is reiterated that the order No. 904-D/Estt/VI/31 dated

08.04.2010 was issued in violation of letter No. 1-33/2008-PAT (BSNL) dated 04.09.2009, whereby the payment of SDA was restricted to Executives posted in North Eastern (NE) region and Ladakh area of J&K State and therefore, amount, if any, paid, pursuant to communication dated 08.04.2010 was to be returned by the Executives working in Jammu and Kashmir Telecom Circle.

10. It is well settled law that amount paid by the employer/Government to his employee, inadvertently or due to mistake is recoverable from the employee on the principle that as the employee has no right to get such amount, therefore, the employee cannot resist its recovery. In the same way, the employer, who has in mistaken belief withheld the amount due to an employee, is under obligation to pay such amount to the employee. The courts may intervene and stop recovery of the amount paid to the employee due to mistake or inadvertence where such recovery is to work harshly against the employee and push him and his family to penury. However, discretion exercised in such cases is in equity and not because the employee has right to oppose recovery. In such cases also discretion cannot be exercised where there is element of deceit and fraud on the part of the employee.

11. Law on the subject has been succinctly laid down by the Supreme Court in *Col. B. J. Akkara (Rtd.) v. Government of India and ors. (2006) II SCC 709* as under:

“25. The last question to be considered is whether relief should be granted against the recovery of the excess payments made on account of the wrong interpretation/understanding of the circular dated 7.6.1999. This Court has consistently granted relief against recovery of excess wrong payment of emoluments/allowances from an employee, if the following conditions are fulfilled:

a) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee.

b) Such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

Such relief, restraining recovery back of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion, to relieve the employees, from the hardship that will be caused if recovery is implemented. A Government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, Courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any

particular case refuse to grant such relief against recovery.”

12. The Apex Court reiterated the principle of law in *Chandi Prasad Uniyal & ors. v. State of Uttarakhand* and ors. as follows:

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

13. The principle has found expression in recent pronouncement of Supreme Court in *U.T. Chandigarh and ors. v. Gurcharan Singh and anr.* in Civil Appeal No. 9873 of 2013. In this case, salary of respondent was wrongly fixed vide order dated 02.09.1992 and the mistake committed in pay fixed was rectified vide

order dated 13.10.1998. The court rejecting the prayer on behalf of the respondent that no amount should be recovered from the salary held:

“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 cannot 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.”

14. Principle of law emerging from above case law, is that to arrive at the conclusion whether recovery of amount paid to an employee is to expose him to hardship and warrant exercise of judicial discretion in favour of the employee, the Court is to have regard to the following circumstances.

(i) Whether the employee belongs to lower rung of Government service, not expected to be aware of the fact that the payment made to him was not due to him and was being made because of a mistake or inadvertence on the part of the employer/ Government and further that the recovery would push him to hardship and make it difficult for him to sustain himself and his family; and

(ii) Whether the recovery was being affected a long time after amount was paid due to mistake, say after retirement and it was unfair to allow recovery after such a long interval.

15. In the case, on hand, the recipients of SDA under mistaken belief are working as Executives in petitioners department and not employees working in the lower rung of service. They are expected to have aware the benefit extended to them, was not due to them. They are in service, therefore, not to be visited with any hardship in the event the amount mistakenly paid to them is recovered. Notwithstanding the fact that the benefit was not extended at their request and they have no role in extending the benefit, Applicants/respondents are to realize that they had no right to get the benefit and are duty bound to repay what was not due to them.
16. Viewed thus, there is merit in the writ petition and same is accordingly allowed and order of Central Administrative Tribunal, Chandigarh dated 04.07.2012, set aside.

(Hasnain Massodi)
Judge

(M. M. Kumar)
Chief Justice

Jammu
31 .01.2014
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