UNION OF INDIA AND ORS. A

v.

SHRI BHANWAR LAL MUNDAN

(Civil Appeal No. 7292 of 2013)

AUGUST 27, 2013 B

[ANIL R. DAVE AND DIPAK MISRA, JJ.]

Service Law:

Pay fixation – Repatriation of employee from deputation C
post in parent department on promotional post – Pay on the deputation post higher than the pay on promotional post – Pay fixation on promotional post on the basis of the higher pay on the deputation post – At the time of superannuation, D
accounts department realizing that pay fixation was erroneous, refixed the pay of the employee and directed to refund the excess sum – Courts below quashed the order – Held: Fixation of pay on the promotional post on the basis of higher pay scale on the deputation post, was erroneous – Hence, E
authorities were within domain to rectify it – However, there shall be no recovery of the excess amount paid to the employee.

The respondent employee in JU Division of the appellant-employer, was sent on deputation to Construction Organisation. He was called to participate in selection process for promotional post in his parent department. On being successful, he joined the promotional post. Since his pay on the deputation post was higher than the pay on the promotional post, his pay G
on the promotional post was fixed on the basis of the pay he was drawing on the deputation post. At the time of determination of his pension, on superannuation, it was

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A realized that he had been given excess pay due to erroneous fixation of pay. Therefore, the respondent was sent a communication re-fixing his pay and directing recovery of excess sum.

B The respondent challenged the order of re-fixation, and the Administrative Tribunal quashed the same. High Court confirmed the order of Tribunal. Hence the present appeal.

C Partly allowing the appeal, the Court

HELD: 1. The repatriation has to be to the original post and benefit of promotion in the department to which an employee is deputed is of no consequence subject to his entitlement of status otherwise available in the parent D department. When a deputationist is repatriated he cannot claim promotions in the parent department on the basis of officiation in a higher post in the borrower organization. [Paras 19 and 20] [570-C-D]

E 2. In the present case, the respondent was getting higher scale of pay in the post while he was holding a particular post as a deputationist. After his repatriation to the parent cadre on selection to a higher post, he was given higher scale of pay as it was fixed keeping in view F the pay scale drawn by him while he was working in the *ex-cadre* post. Such fixation of pay was erroneous and, therefore, the authorities were within their domain to rectify the same. Thus the tribunal and the High Court have fallen into error by opining that the respondent G would be entitled to get the pension on the basis of the pay drawn by him before his retirement. [Para 22] [571-A-C]

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3. Orders passed by the tribunal as well as by the High Court are set aside directing fixation of pension on the basis of pay drawn by the respondent. However, there shall be no recovery of the excess amount paid to the respondent. [Para 23] [571-D]

D.M. Bharati vs. L.M. Sud and Ors. **1991 Supp (2) SCC 162: 1990 (1) Suppl. SCR 580;** *Puranjit Singh vs. Union Territory of Chandigarh* **1994 Supp (3) SCC 471;** *State of Punjab and Ors. vs. Inder Singh and Ors.* **(1997) 8 SCC 372: 1997 (4) Suppl. SCR 425 – relied on.**

Inder Pal Yadav and Ors. vs. Union of India and Ors. **(2005) 11 SCC 301;** *Badri Prasad and Ors. vs. Union of India and Ors.* **(2005) 11 SCC 304;** *Sayed Abdul Qadir and Ors. vs. State of Bihar and Ors.* **(2009) 3 SCC 475: 2008 (17) SCR 917;** *Union of India and Anr. vs. P.N. Natarajan and Ors.* **(2010) 12 SCC 405;** *State of Orissa vs. Dr.Binapani Dei* **AIR 1967 SC 1269: 1967 SCR 625;** *Sayeedur Rehman vs. State of Bihar* **(1973) 3 SCC 333: 1973 (2) SCR 1043 – distinguished.**

Case Law Reference:

(2005) 11 SCC 301	**distinguished**	**Para 10**
(2005) 11 SCC 304	**distinguished**	**Para 14**
2008 (17) SCR 917	**distinguished**	**Para 14**
(2010) 12 SCC 405	**distinguished**	**Para 16**
1967 SCR 625	**distinguished**	**Para 16**
1973 (2) SCR 1043	**distinguished**	**Para 16**
1990 (1) Suppl. SCR 580	**relied on**	**Para 19**

A **1994 Supp (3) SCC 471 relied on Para 20**

1997 (4) Suppl. SCR 425 relied on Para 21

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7292 of 2013.

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From the Judgment and Order dated 09.05.2011 of the High Court of Rajasthan at Jodhpur in CWP No. 11838 of 2010.

S.P. Singh, N.K. Karhail (for B. Krishna Prasad) for the C Appellants.

Aishwarya Bhati for the Respondent.

The Judgment of the Court was delivered by

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DIPAK MISRA, J. 1. Leave granted.

2. This appeal by special leave is directed against the judgment and order dated 9.5.2011 passed by the High Court of Judicature of Rajasthan at Jodhpur in D.B. Civil Writ Petition E No. 11838 of 2010 whereby the Division Bench has concurred with the view expressed by the Central Administrative Tribunal, Jodhpur Bench at Jodhpur (for short "the tribunal") in O.A. No. 109 of 2008 wherein the tribunal had quashed the order passed by the competent authority re-fixing his pay prior to his F retirement and directing recovery of the amount paid from 3.12.1994 to 31.12.2007.

3. The undisputed facts are that the respondent was appointed as a Gangman on JU Division on 15.1.1966 as a G substitute and was regularized in the year 1972. He was promoted to the post of Store Keeper in October, 1977 and thereafter, he went on deputation to Construction Organization in December, 1977. He was given the post of PW Mistry in the Construction Organization with effect from 10.4.1981 in the pay

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scale of Rs.380-560. On completion of the training he came in the grade of Rs.1400-2300 by the Construction Wing of the railways. Subsequently, when there was a regular selection for the post of JE-I in his parent department, he was called to participate in the selection which he did and being declared successful, he joined in the said promotional post on 3.12.1994. While giving him posting in the year 1994, his pay was fixed keeping in view the benefit he had availed while he was working in the Construction Organization. When the date of superannuation approached and pension was going to be determined, it was noticed by the accounts department that he had been given excess pay due to erroneous fixation of pay scale and, accordingly, a communication was sent on 22.10.2007 refixing his pay and directing recovery of the excess sum.

4. Being dissatisfied with the said action, the respondent approached the tribunal which, placing reliance on the authorities in *Inder Pal Yadav and others v. Union of India and others*[1], *Badri Prasad and others v. Union of India and others*[2] *and Sayed Abdul Qadir and others v. State of Bihar*[3] *and others,* quashed the order of refixation and directed the benefit of pension be extended to him on the basis of pay he was actually drawing before the retirement within three months failing which the employer would be liable to pay interest at the rate of 15% per annum.

5. Grieved by the aforesaid order, the Union of India and its functionaries approached the High Court, which, by the impugned judgment, came to hold as follows: -

"In our considered opinion, no flaw can be noticed in the

1. (2005) 11 SCC 301.
2. (2005) 11 SCC 304.
3. (2009) 3 SCC 475.

A reasoning arid the conclusion of the Tribunal while allowing the Original Application. In the first place, it is based on the Supreme Court decision quoted in the order itself. Secondly, there is no distinction brought about the facts of the case that is subject matter of the case in hand the B one before the Supreme Court. Thirdly the impugned directions for fixation of the pension on the basis of last drawn pay cannot be said to be either illegal or arbitrary or against any provision of Act or/and rule made thereunder."

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6. On the basis of aforesaid analysis the writ court dismissed the petition.

7. Criticising the orders passed by the tribunal as well as D by the High Court Mr. S. P. Singh, learned senior counsel for the appellants has submitted that when the respondent was sent on deputation and came back to the parent department accepting promotion he was to be treated at par with other promotees and could not have been entitled to draw higher pay E scale solely on the ground that he was getting a better pay while he was on deputation. It is urged by him when the respondent had no legal right to get a particular pay scale and it was wrongly fixed and could only be noticed prior to his retirement it became obligatory on the part of the authorities to refix the F pay and accordingly determine the pension and hence, the action of the authorities could not have been found fault with. It is his further submission that neither the tribunal nor the High Court has addressed the issue pertaining to the entitlement of the respondent but directed the pension to be paid on the basis G of the pay drawn by him before the retirement. Learned counsel would further contend that as far as recovery is concerned, the petitioners have no intention to recover the same.

8. Ms. Aishwarya Bhati, learned counsel for the respondent H relying on the authorities which have been pressed into service

by the tribunal and accepted by the High Court urged that pay protection was given when the respondent came back to the parent cadre on promotion and, therefore, the said protection could not have been withdrawn on the foundation that there was an erroneous fixation of pay. It is argued by her that when a long time has lapsed from the date of repatriation on promotion to the parent cadre, steps for refixation immediately prior to superannuation of the respondent is neither permissible in law nor is it equitable. Learned counsel has canvassed that in any case there cannot be recovery of the same as there had been no misrepresentation by the respondent to avail the said benefit.

9. From the aforesaid rivalised submissions two questions, namely, (i) whether the pay of the respondent was erroneously fixed and (ii) whether there could have been a direction for recovery of the amount alleged to have been excessibly paid to the respondent, emerge for consideration.

10. It is perceptible from the orders passed by the tribunal as well as by the High Court that they have set aside the order dated 22.10.2007 placing reliance on three authorities. In *Inder Pal Yadav* (supra), a two-Judge Bench dealt with regularization and permanent absorption. It also dealt with the entitlement of the right of the employees to continue in the concerned project or to resist reversion back to the cadre or to enjoy a higher promotion merely on the basis of locally provisional promotion granted to them in the project in which they had been employed at a particular point of time. The Court has observed that if the stand of the petitioners therein was to be accepted, it would operate inequitably so far as the regular employees in the open line department are concerned. Thereafter, the learned Judges proceeded to state as follows: -

> ".....while the petitioners cannot be granted the reliefs as prayed for in the writ petition, namely, that they should not

A be reverted to a lower post or that they should be treated as having been promoted by reason of their promotion in the projects, nevertheless, we wish to protect the petitioners against some of the anomalies which may arise, if the petitioners are directed to join their parent B cadre or other project, in future. It cannot be lost sight of that the petitioners have passed trade tests to achieve the promotional level in a particular project. Therefore, if the petitioners are posted back to the same project they shall be entitled to the same pay as their contemporaries unless C the posts held by such contemporary employees at the time of such reposting of the petitioners is based on selection."

11. The learned counsel for the respondent would place D reliance on the last part of above quoted paragraph but the same, we are inclined to think, does not in any way buttress the submission put forth by the learned counsel for the respondent.

E 12. In *Badri Prasad* (supra) the issue was whether an employee substantially holding Group 'D' post can claim regular promotional post, i.e., Group 'C'. The Court in that context observed that the practice adopted by the Railways of taking work from employees in Group 'D' post on higher Group 'C' F post for unduly long period legitimately raises hopes and claims for higher posts by those working in such higher posts. As the Railways is utilising for long periods the services of employees in Group 'D' post for higher post in Group 'C' carrying higher responsibilities, benefit of pay protection, age relaxation and G counting of their service on the higher post towards requisite minimum prescribed period of service, if any, for promotion to the higher post must be granted to them as their legitimate claim. But they cannot be granted relief of regularising their services on the post of Storeman/Clerk merely on the basis of H their ad hoc promotion from open line to higher post in the

project or construction side. After so stating the Court opined thus:-

> "Without disturbing, therefore, orders of the Tribunal and the High Court the appellants are held entitled to the following additional reliefs. The pay last drawn by them in Group 'C' post shall be protected even after their repatriation to Group 'D' post in their parent department. They shall be considered in their turn for promotion to Group 'C' post. The period of service spent by them on ad hoc basis in Group 'C' post shall be given due weightage and counted towards length of requisite service, if any, prescribed for higher post in Group 'C'. If there is any bar of age that shall be relaxed in the case of the appellants."

13. Reading the decision in entirety we are persuaded to think that the directions were issued in the special fact- situation and, in any case, it does not pertain to a situation where someone gets repatriated on being selected to a higher post and on that foundation would claim pay protection and consequent fixation of pay in the selection post.

14. In *Syed Abdul Quadir* (supra) the Court was dealing with fixation of pay under FR 22-C and as there was a wrong fixation, the question of recovery arose. The Court, relying on earlier decisions, opined thus:-

> "The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong

A payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. See *Sahib Ram v. State of Haryana*[4], *Shyam Babu Verma v. Union of India*[5], *Union of India v. M.* B *Bhaskar*[6], *V. Gangaram v. Director*[7], *Col. V.J. Akkara (Retd.) v. Govt of India*[8], *Purshottam Lal Das v. State of Bihar*[9], *Punjab National Bank v. Manjeet Singh*[10] and *Bihar SEB v. Bijay Bhadur.*[11]"

C 15. From the aforesaid decision it is clear as day that it has been relied upon to by the tribunal as well as by the High Court for the purpose that there should be no recovery. Mr. Singh has conceded that steps shall not be taken for any recovery, and we think that the concession has been justly D given. Be it noted, the aforesaid decision does not assist the respond to pyramid the submission of pay fixation and grant of pension.

16. In *Union of India and another v. P.N. Natarajan and* E *others*[12] the Court was dealing with a fact-situation where there was withdrawal of pensionary benefits. Adverting to the concept of natural justice and, relying on the decisions in *State of Orissa v. Dr. Binapani Dei*[13] and *Sayeedur Rehman v. State of Bihar*[14], the Court ruled thus: -

F 4. 1995 Supp (1) SCC 18.
5. (1994) 2 SCC 521.
6. (1996) 4 SCC 416.
7. (1997) 6 SCC 139.
8. (2006) 11 SCC 709.
G 9. (2006) 11 SCC 492.
10. (2006) 8 SCC 647.
11. (2000) 10 SCC 99.
12. (2010) 12 SCC 405.
13. AIR 1967 SC 1269.
H 14. (1973) 3 SCC 333.

"**16.** It is not in dispute that before directing revision of the pension, etc. payable to the private respondents, the Central Government did not give them action-oriented notice and opportunity of showing cause against the proposed action. Therefore, it must be held that the direction given by the Central Government to revise the retiral benefits including the pension payable to the respondents was nullity.

17. Dehors the above conclusion, we are convinced that the action taken by the appellants to revise and reduce the retiral benefits payable to the respondents was ex facie arbitrary, unreasonable and unjustified and the learned Single Judge did not commit any error by declaring that the Central Government did not have the jurisdiction to unilaterally alter/change the option exercised by the writ petitioners under Section 12-A(4)(*b*) read with Section 12-A(4-C)."

17. The aforesaid conclusion was arrived at as the Union of India as such could not have invoked the terms of the memorandum of settlement to justify the directives and retiral benefits payable to the respondents. The aforesaid decision has to be read in the context of its facts and not to be construed as a precedent for the proposition that if the pay has been erroneously fixed that cannot be revised even if the facts are absolutely clear and undisputed.

18. We may note with profit that Mr. Singh, learned senior counsel, has submitted that the respondent was holding an ex-cadre post and it was the duty of the employer to ask him to participate in the selection in the promotional post, in the parent cadre. The respondent, being conscious of his position and to have the status, appeared in the selection process, got selected and joined the parent cadre. The learned senior counsel would submit that under a mistaken pression his pay

A was fixed in the promotional post in the parent cadre as a consequence of which he got more than the promotees in his batch and, hence, the same was required to be rectified and the employer was within its right to do so.

B 19. It is not in dispute that the respondent was sent on deputation and his lien in the parent department continued and hence, it was obligatory on the part of the authorities in the parent department to intimate him when the selection process for the higher post was undertaken as he had already come C within the zone of consideration. In this context, we may refer with profit to the authority in *D.M. Bharati v. L.M. Sud and Others*[15] wherein the Court was dealing with a case whether the employee had got a promotion in the department to which he was sent on deputation. While considering the effect of the D said promotion after repatriation the Court observed thus:-

> "that the appellant's promotion as junior draftsman and proposed promotion as Surveyor-cum-Draftsman in the Town Planning Establishment cannot confer any rights on E him in his parent department. When he left the Municipal Corporation and joined the Town Planning Establishment he was a tracer and he can go back to the Estate Department or any other department of the Municipal Corporation only to his original post i.e. as tracer, subject F to the modification that, if in the meantime he had qualified for promotion to a higher post, that benefit cannot be denied to him. "

Thus, the repatriation has to be to the original post and benefit of promotion in the department to which an employee G is deputed is of no consequence subject to his entitlement of status otherwise available in the parent department.

H 15. 1991 Supp (2) SCC 162.

20. In *Puranjit Singh v. Union Territory of Chandigarh*[16] it has been held that when a deputationist is repatriated he cannot claim promotions in the parent department on the basis on officiation in a higher post in the borrower organization.

21. In *State of Punjab and others v. Inder Singh and others*[17], the learned Judges elaborately adverted to the concept of deputation and the right of a deputationist and in that context opined thus:-

> "The concept of "deputation" is well understood in service law and has a recognised meaning. "Deputation" has a different connotation in service law and the dictionary meaning of the word "deputation" is of no help. In simple words "deputation" means service outside the cadre or outside the parent department. Deputation is deputing or transferring an employee to a post outside his cadre, that is to say, to another department on a temporary basis. After the expiry period of deputation the employee has to come back to his parent department to occupy the same position unless in the meanwhile he has earned promotion in his parent department as per the Recruitment Rules."

22. In the case at hand, as stated earlier, the respondent was getting higher scale of pay in the post while he was holding a particular post as a deputationist. After his repatriation to the parent cadre on selection to a higher post he was given higher scale of pay as it was fixed keeping in view the pay scale drawn by him while he was working in the ex-cadre post. Such fixation of pay, needless to say, was erroneous and, therefore, the authorities were within their domain to rectify the same. Thus analysed, the irresistible conclusion is that the tribunal and the High Court have fallen into error by opining that the respondent would be entitled to get the pension on the basis of the pay

16. 1994 Supp (3) SCC 471.

17. (1997) 8 SCC 372.

A drawn by him before his retirement.

23. Consequently, the appeal is allowed in part and the orders passed by the tribunal as well as by the High Court are set aside directing fixation of pension on the base of pay drawn
B by the respondent. However, as conceded to by Mr. Singh, there shall be no recovery from the excess amount paid to the respondent. There shall be no order as to costs.

K.K.T. Appeal Partly allowed.

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