

(2024) 04 CAT CK 0015

In the Central Administrative Tribunal

Case No : Original Application No. 223 Of 2019

Upendra Kumar Rai & Others

APPELLANT

Vs

Union Of India Through General Manager, Head Quarter,
North Eastern Railway, Gorakhpur & Others

RESPONDENT

Date of Decision : 10-04-2024

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19

Citation : (2024) 04 CAT CK 0015

Hon'ble Judges : Rajiv Joshi, Member (J); Dr. Sanjiv Kumar, Member (A)

Bench : Division Bench

Advocate : S.M. Ali, Bablu Singh

Final Decision : Allowed

Judgement

Dr. Sanjiv Kumar, Member (A)

1. By means of the instant original application filed under section 19 of Administrative Tribunals Act 1985, the applicants have prayed for quashing the impugned order dated 14.08.2018. Prayer has also been made for a direction to the respondents to restore the pay of the applicants and to refund the recovered amount alongwith 12% interest in the light of Railway Board Letter dated 27.04.2021 and R.B.E No. 91/2012 dated 17.08.2012 with all other consequential benefits.

2. The facts of the case, in brief, are that the applicants, who initially joined duties on the post of Trackmen (substitute) in pay scale of Rs. 4440-7440 subject to successful screening test as per office order Nos. 50/2008, 55/2008 and 04/2009, were granted temporary status w.e.f. 04.02.2009, 28.04.2009 and 13.06.2009 respectively as per the office order No. 07/2010 dated 02.04.2010. The applicants were regularized on the post of Trackmen in pay scale Rs. 4440-7440/- vide office order no. 33/14 dated 17.07.2014 with the condition that they will be earned PB 5200-20200 +G.P Rs. 1800/- after passing 10th class

within five years. The applicants contended that they passed high school examination in the year 2017, 2015 and 2016 respectively and submitted high school certificate and mark-sheet in the office of Assistant Divisional Engineer, Ballia. Thereafter, the Assistant Divisional Engineer vide office order no. 65/17 dated 27.10.2017 granted PB 5200-20200 +GP Rs. 1800/- with immediate effect and also granted benefits of 7th Pay Commission. But, the Senior Assistant Divisional Engineer, Ballia vide office order no. 60/2018 dated 14.08.2018 refixed the pay of the applicants from Rs. 24,000/- to 19,700/-, 23,500/- to 19,700/- and 23,500/- to 19,700/- respectively with direction for recovery of over payment. Thereafter, the applicants preferred representation dated 24.12.2018 to the D.R.M. (P), Varanasi against the aforesaid order dated 14.08.2018, which is still pending.

3. Aggrieved by the aforesaid order dated 14.08.2018, the applicants have filed the instant original application on the ground that the impugned order has been passed without any notice and opportunity of hearing to them. They contended that the action of the Senior Assistant Divisional Engineer is illegal, unwarranted, ex-parte and against the settled principle of law and rules. The applicants further contended that the Railway Board has also issued circular RBE No. 72/2016 dated 22.06.2016 with regard to wrongful excess payment made to the government servants and directed that recovery from the employee would be impermissible in the light of the judgment of Hon'ble Supreme Court in the case of State of Punjab and others Vs. Rafiq Masih – (2015) 2 SCC (L&S) 33. The applicants also contended that they never misrepresented the department and the excess payment received by them has occurred due to erroneous payment by the department and it cannot be recovered from them as per the Railway Board's Circular dated 22.06.2016. The applicants further alleged that the impugned order dated 14.08.2018 has been passed without application of mind and without considering the circulars of the Railway Board dated 27.04.2011 by which relaxation of minimum educational qualification to the substitutes was granted upto 31.07.2011. The applicants contended that they were appointed as substitute in the year 2008 and received Grade Pay of Rs. 1800/- without passing 10th class vide office order dated 02.04.2010 within relaxation period as per the recommendation of 6th Pay Commission applicable w.e.f. 01.09.2008. Hence, they pray that the impugned order dated 14.08.2018 may be quashed and the relief should be granted by allowing the OA.

4. Upon notice, the respondents have filed counter in which they denied every averments made in the OA and its annexures. They say that the order dated 14.08.2018 is passed by the respondents after due consideration of the relevant rule position and the entire documents available on record. The respondents contended that High school certificates of applicants were received in the respondents office in the month of September, 2017 and thereafter the same were verified from the website and thereafter the benefits as per 6th pay commission Rs.5200-20200 + 1800 grade pay were given to the applicants with immediate effect and all the applicants were given Rs.5200+1800-7000/- the

salary as per 6th of pay commission and as per 7th pay commission Rs.18000/- fixed the pay from order dated 24.10.2017. They vehemently submitted that by the amended re-fixation of pay no order of recovery was passed against the applicants.

5. The respondents further submitted that at the time of appointment all the applicants were class-8th passed and according to 6th pay commission, they were appointed in pay band of Rs.4440- 7440 without grade pay and thus salary of Rs.4440/- fixed at the time of their appointment. But at the time of granting time scale, all the applicants were given the benefits of Rs.5200-20200+ 1800 grade pay instead of pay band of Rs.4440-7440 without grade pay. Therefore, by the Railway Board letter no.PC-VII/2016/1/6/1 RBE N/140/2017 dated 28.09.2017, General Manager (P) Gorakhpur by letter no.E/205/3/Part-VII/4 dated 11.10.2017, DRM (P) Varanasi by letter no.Ka/W/256/Misc. Letter/08 dated 23.04.2018 and DRM(Eng.), Varanasi letter no.E/261/1/Trackmaintainer/E-6 dated 07.05.2018 directed that all the class-8th passed employees who have fixed pay band of Rs.4440-7440 without grade pay according to 6th pay commission they are entitled to minimum salary of Rs.18000/- at level 1 since 01.01.2016 as fixed in 7th pay commission according to Railway Board circular dated 27.09.2017 and in compliance to above mentioned letters, pay fixation of all the employees including applicants were made since 01.01.2016 and from July 2018, salary of Rs.19700/- was fixed which is absolutely correct and according to rules. Hence, the respondents say that there is no merit in the case of the applicants and the OA is liable to be dismissed.

6. The applicants have filed their rejoinder wherein they reiterate their stand as in the OA and request to allow them the reliefs, as claimed in the OA.

7. The case came up for final hearing on 04.04.2024. Shri S.M. Ali, learned counsel for the applicants and Shri Bablu Singh, learned counsel for the respondents were present and both were heard. We have carefully gone through the entire record, and considered the rival contentions.

8. From the OA, it is very clear that the applicants have asked for quashing the impugned order dated 14.08.2018 and they want that their pay be restored as it was before the aforesaid order and to refund them the recovered amount with 12% interest.

9. As far as the recovery is concerned, the respondents in para 12 of the counter have stated following: -

"12. That the contents of paragraph no. 4.6 and 4.7 of this original application are wrong and vehemently denied. In reply it is submitted that by the amended re-fixation of pay, no order of recovery was passed against the applicants."

Simple reading of the above shows that the respondents' stand is that there was no recovery order passed pursuant to the re-fixation of pay by the impugned order dated 14.08.2018. But in the aforesaid order, at the foot note, as pointed

out by the applicants, it is clearly written as under: -

“4. उपरोक्त वेतन ननर्धारण के अनुसंधार वेतन अन्तर की कटौती सुननश्चित करते हुये बिर् वधउिर सं. के सधथ इस कधयधारय को अनतशीघ्र अवगत करधर्वे।”

10. From the above, it is revealed that pursuant to the order dated 14.08.2018, the respondents had indeed ordered for some recovery, but if they themselves are asserting that they have not ordered any recovery pursuant to the said order, we will have to believe the same and we direct the respondents again to re-check whether pursuant to aforesaid foot note, any recovery was ordered against the applicants and if any recovery was made and as they have agreed that they never initiated any recovery pursuant to the order dated 14.08.2018 from the applicants, hence point 4 of the aforesaid foot note is certainly liable to be quashed as the applicants have rightly argued that as per the law laid down by the Hon^{ble} Supreme court in the case of Rafiq Masih (Supra), recovery cannot be made from the applicants as they are class III employees. Hon^{ble} Supreme Court in the case of Rafiq Masih (Supra) in para 18 has held as under: -

“18. 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 decision referred to herein above, we may, as a ready reference, summaries 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 wrongly 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 employees, 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.”

11. As is clear from the pleadings of the parties and the record that the applicants are a class III employees and if at all any wrong fixation of pay was done on the part of the authority concerned. There was no mis-representation on the part of the applicants or they have not played any fraud. The respondents have passed the impugned order inflicting recovery of the excess payment from the applicants which is in violation of principles of natural justice as well as in

violation of the law laid down by the Hon'ble Supreme Court in the case of Rafiq Masih (Supra).

12. The applicants have also referred to RBE No. 72/2016 dated 22.06.2016 which is regarding recovery of wrongful/ excess payments made to Government servants. In the aforesaid RBE, following has been mentioned: -

"4. 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.

5. The matter has, consequently, been examined in consultation with the Department of Expenditure and the Department of Legal Affairs. The Ministries / Departments are advised to deal with the issue of wrongful / excess payments made to Government servants in accordance with above decision of the Hon'ble Supreme Court in CA No.11527 of 2014 (arising out of SLP (C) No.11684 of 2012) in State of Punjab and others etc. vs Rafiq Masih (White Washer) etc. However, wherever the waiver of recovery in the above-mentioned situations is considered, the same may be allowed with the express approval of Department of Expenditure in terms of this Department's OM No.18/26/2011-Estt (Pay-1) dated 6th February, 2014."

13. Simple reading of the above shows that the applicants being class III and IV employees and were not involved in misrepresentation or any kind of fraud, so no recovery should be made from them. Hence, certainly there is no case for recovery in the light of the aforesaid judgment of Hon'ble Apex Court. Moreover, the respondents themselves in para 12 of their counter have stated that no recovery was ordered, we consider that recovery is not made. But, in case, any recovery is made, the respondents shall forthwith refund the same to the

applicants and stop further recovery, if any, pursuant to the impugned order dated 14.08.2018.

14. Further, as is gathered from the counter, again in pursuance of various directions issued by the Railway Board in RBE No. 140/2017 dated 28.09.2017, letter No. E/205/3/Part-VIII/4 dated 11.10.2017 issued by the General Manager (P), Gorakhpur, letter No. Ka/W/256/Misc.letter/08 dated 23.04.2018 issued by the DRM (P), Varanasi, and letter no.E/261/1/Trackmaintainer/E-6 dated 07.05.2018 issued by the DRM(Eng.), Varanasi, it was directed that all the class-8th passed employees who have fixed pay band of Rs.4440-7440 without grade pay according to 6th pay commission they are entitled to minimum salary of Rs.18000/- at level 1 since 01.01.2016 as fixed in 7th pay commission according to Railway Board circular dated 27.09.2017 and in compliance to above mentioned letters, pay fixation of all the employees including applicants were made since 01.01.2016 and from July 2018, salary of Rs.19700/- was fixed.

15. But, on the other hand, the applicants have relied on Railway Board letter dated 27.04.2011 granting relaxation on minimum educational qualification for recruitment in various categories including substitutes upto 31.07.2011 and the applicants were appointed as substitutes in the year 2008 and received Grade Pay of Rs. 1800/- as per the office order dated 02.04.2010 within relaxation period as per the recommendation of 6th Pay Commission applicable w.e.f. 01.09.2008. Thereafter, the fixation of pay and recovery of excess payment vide the impugned order dated 14.08.2018 appears to be contrary to said Railway Board letter, and may be totally illegal. And as per their averments in para 4.10 of the OA, the applicants have also filed the said relaxation rule as Annexure A-14, which reads following: -

"Subject: Minimum educational qualifications for recruitment in PB-1 Rs. 5,200-20,200 with grade pay of Rs. 1800/-

[No.E(NG)11/2009/RR-1/10/Pt., dated 27.4.2011]

Attention is invited to this Ministry's letter of even number dated 5.1.2011 (Bahri's RBO 2011 Sl.No.-6 p.202) on the above subject, stipulating therein, to continue with the existing practice that has been followed before the issue of Board's letter of even number dated 9.12.2010 (Bahri's 2010 Sl No. 42, p-up to 31.3.2011 for appointment on compassionate grounds, engagement as substitutes (fresh face, TADK, Act Apprentices etc.) and legal heirs of accident victims where specific approval has been given by the Board.

Pursuant to references received from some of the zonal Railways and also the recognized Federations, the issue of relaxation in educational qualification for the above categories have been reviewed by the Board and it has been decided to extend the date of relaxation of the minimum educational qualification to the above categories up to 31.7.2011 beyond 31.3.2011, uniformly to all zonal Railways. Other conditions remain the same.

Further, wherever the model code of conduct for elections comes in the way, the concerned Railway may take prior clearance from the Election Commission."

16. Further, the respondents have addressed para 4.10 of the OA in para 15 of the counter and they have mentioned following: -

"That the contents of paragraph no. 4.10 of this original application are wrong and vehemently denied and detailed reply is already given in reply of para no. 4.8 and the same may be read in present paragraph"

17. Simple reading of the above shows that the respondents have generally denied the contents of paragraph 4.10 but they were only eluding to para 4.8 in their counter in para 13 of the counter, which mentions following: -

"That the contents of paragraph no. 4.8 of this original application are wrong and vehemently denied. In reply, it is submitted that at the time of appointment all the applicants were class-8th passed and according to 6th pay commission, applicants were appointed in pay band of Rs.4440-7440 without grade pay and thus salary of Rs.4440/-fixed at the time of their appointment. But at the time of granting time scale, all the applicants were given the benefits of Rs.5200-20200+ 1800 grade pay instead of pay band of Rs.4440-7440 without grade pay. Therefore, by the Railway Board letter no.PC-VII/2016/1/6/1 RBE N/140/2017 dated 28.09.2017, General Manager (P) Gorakhpur by letter no.E/205/3/Part-VII/4 dated 11.10.2017, DRM (P) Varanasi by letter no.Ka/W/256/Misc. Letter/08 dated 23.04.2018 and DRM(Eng.), Varanasi letter no.E/261/1/Trackmaintainer/E-6 dated 07.05.2018 directed that all the class-8th passed employees who have fixed pay band of Rs.4440-7440 without grade pay according to 6th pay commission they are entitled to minimum salary of Rs.18000/- at level 1 since 01.01.2016 as fixed in 7th pay commission according to Railway Board circular dated 27.09.2017 and in compliance to above mentioned letters, pay fixation of all the employees including applicants were made since 01.01.2016 and from July 2018, salary of Rs.19700/- was fixed which is absolutely correct and according to rules."

18. Simple reading of the aforesaid paragraph does not make it clear how some of the correspondences which are mentioned in the paragraphs, overrules the relaxation provided on minimum educational qualification for recruitment in PB 5200-20200 +GP 1800/-, as was done in letter dated 27.04.2011, as was argued and shown in Annexure A-14 and para 4.10 by the applicants. Hence, we will have to rely that the respondents' department had relaxed minimum educational qualification in the case of the applicants, who are substitutes Trackmen in Group 'D' post, which is mentioned in para 4.1 of the OA and in reply to this para, the respondents in para 10 of the counter have mentioned that "the contents of paragraph no. 4.1 to 4.4 of this original application needs no comments". Thus, the respondents agreed that the applicants were appointed as substitute Trackmen in Group 'D' and considering the nature as substitute and for substitute appointees as there was relaxation vide letter dated 27.04.2011

and considering same, we are of the considered opinion that the applicants have made out a case for themselves that their reduction of pay was no justified and was erroneous, hence there is need to interfere with the impugned order.

19. Considering the above facts and ratio of the judgment of Hon?ble Apex Court in the case of Rafiq Masih (Supra), we pass following order : -

The OA is allowed and the impugned order dated 14.08.2018 is set aside. The respondents are directed to restore the pay of the applicants and to refund the recovered amount, if any, with 6% interest in the light of the foregoing discussions within a period of three months from the date of receipt of copy of this order. If there is no recovery from the applicants (as has been mentioned by the respondents in para 12 of the counter), there is no requirement for such refund.

20. All associated Misc. Applications stand disposed off.

21. No order as to costs.