* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgment Reserved on: 08.04.2024
% Judgment Pronounced on: 31.05.2024

\+ **W.P.(C) 4473/2021 & CM APPL.13663/2021**

K S DHINGRA ..... Petitioner
Through: Ms Prema Priyadarshini, Advocate.

versus

UNION OF INDIA AND ORS. ..... Respondents
Through: Ms Nidhi Banga, Senior Panel Counsel with Mr Nishant Kumar, Advocate for respondent no.1 to 4 and 6.
Ms Bhumi Agarwal, Advocate for respondent no.7/CERC.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE AMIT BANSAL

[Physical Hearing/Hybrid Hearing (as per request)]

AMIT BANSAL, J.

1. The present writ petition impugns the order dated 29th January, 2021, passed by the Central Administrative Tribunal (CAT), Principal Bench, New Delhi in O.A. No.817/2020, whereby the Original Application (O.A.) filed by the petitioner has been dismissed.

BRIEF FACTS AND LITIGATION HISTORY

2. Brief facts leading to the filing of the present petition are as follows:

2.1 The petitioner joined the Ministry of Defence [respondent no.1] in 1973 as Assistant in the Armed Forces Head Quarters (hereinafter referred to as "AFHQ"). In 1999, the petitioner applied for being sent on deputation to the Central Electricity Regulatory Commission (hereinafter referred to as "CERC") in the post of Joint Chief (Legal).

2.2 While on deputation to the CERC, the petitioner applied for permanent absorption. Accordingly, the petitioner submitted his technical resignation from the AFHQ on 6th June, 2004 and was absorbed by CERC with effect from 7th June, 2004.

2.3 With regard to pension and other benefits, the petitioner *via* letter dated 18th January, 2005 opted to receive pro-rata retirement benefits from the Joint Secretary and Chief Administrative Officer (JS&CAO), Ministry of Defence [respondent no.4] for the service rendered up to the date of absorption in the CERC, i.e., till 6th June, 2004. Accordingly, pension and other benefits of the petitioner were fixed by the respondent no.4 on a basic pay of Rs.19,900/- *via* order dated 9th September, 2005.

2.4 Subsequently in 2018, it was discovered by the respondents that the pension and other benefits were wrongly fixed on the basic pay of Rs.19,900/- and accordingly, they were ordered to be revised downwards on a basic pay of Rs.14,875/- *via* Corrigendum dated 6th December, 2018. However, no show cause notice was issued to the petitioner in this regard.

2.5 The petitioner filed an O.A. before the CAT challenging the aforesaid downward revision of his pension, being O.A. No.4705/2018. The said O.A.

was disposed of *via* order dated 27th September, 2019, whereby the impugned order dated 6th December, 2018 was quashed on the ground that it was passed in violation of principles of natural justice. However, the respondents were directed to issue a show cause notice to the petitioner within 30 days in terms of Rule 70 of the Central Civil Services (Pension) Rules, 1972 (hereinafter "CCS Pension Rules").

2.6 Pursuant to the aforesaid order, the petitioner was issued a show cause notice dated 17th October, 2019, stating that the pension of the petitioner had been incorrectly fixed by taking into account Note 10 to Rule 33 of the CCS Pension Rules, instead of Note 7 to Rule 33 of the CCS Pension Rules. In view thereof, it was communicated that the pension of the petitioner would be reduced and the excess payments made would be recovered. The petitioner replied to the aforesaid show cause notice on 16th November, 2019.

2.7 Taking into consideration the reply filed by the petitioner, a detailed order dated 5th March, 2020 was passed by the respondent no.4, whereby the pension of the petitioner was revised and refixed at Rs.10,321/- from the date of the retirement of the petitioner from the AFHQ, i.e., 6th June, 2004. Further, it was directed that the excess amount paid to the petitioner be recovered from the date of retirement up to the date of the order.

3. The aforesaid order dated 5th March, 2020 was challenged by the petitioner before the CAT *via* O.A. No.817/2020.

4. *Via* the impugned order dated 29th January, 2021, the O.A. filed by the petitioner was dismissed by the CAT by observing, *inter alia*, that: (i) Note-10 to Rule 33 of the CCS Pension Rules is not applicable in the present case;

(ii) Note-7 to Rule 33 of the CCS Pension Rules will be attracted in the present case, as the service of the petitioner would be considered '*foreign service*' in terms of Rule 3(g) of the CCS Pension Rules, as the petitioner was not receiving his salary from the Consolidated Fund of India at the time of his absorption in the CERC; (iii) the earlier fixation of pension *via* order dated 9th September, 2005 was clearly an error in terms of Rule 70 and the question whether the error is clerical or otherwise has to be decided by the concerned Ministry or the Department and the same cannot be agitated before CAT; (iv) there is no provision of law which prescribes limitation in matters relating to revision of pension.

5. Being aggrieved with the said dismissal, the petitioner filed the present writ petition, which came up for hearing before this Court on 9th April, 2021.

6. After hearing the counsels for the parties, the earlier Division Bench passed a detailed order observing, *inter alia*, that:

(i) The CAT had correctly held that the case of the petitioner was not covered under Note 10 to Rule 33[1] of the CCS Pension Rules.

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[1] **Rule 33**:
"*The expression 'emoluments' means basic pay as defined in Rule 9(21)(a)(i) of the Fundamental Rules which a government servant was receiving immediately before his retirement or on the date of his death; and will also include non-practising allowance granted to medical officer in lieu of private practice.*
Explanation- Stagnation increment shall be treated as emoluments for calculation of retirement benefits."

Note-10 to Rule 33:
"*When a Government servant has been transferred to an autonomous body consequent on the conversion of a Department of the Government so transferred opts to retain the pensionary benefits under the rules of the Governments, the emoluments drawn under the autonomous body shall be treated as emoluments for the purpose of this rule.*"

(ii) On the basis of RTI Reply dated 6th November, 2019 issued by the Ministry of Power, wherein it was stated that the grants given to the CERC by the Central Government were from the Consolidated Fund of India, it was observed that the service of the petitioner with the CERC would not fall in the category of '*foreign service*' in terms of Note 7[2] to Rule 33 read with Rule 3(g)[3] of the CCS Pension Rules.

(iii) Pension is a recurring cause of action which can be revised subsequent to the discovery of a clerical error in fixing the amount to be granted.

7. In light of the aforesaid findings, the earlier Division Bench framed the following two issues:

> *"I. How would the pension payable to the petitioner be fixed in terms of Rule 33, if both Note-7 as well as Note-10 are not applicable?*
>
> *II. Whether the Respondents would be entitled to affect recovery from the Petitioner for the past period and if so, for what period?"*

8. Accordingly, notice was issued directing the respondents no.1 to 6 to file a counter affidavit.

9. Along with the counter affidavit, the respondents no.1 to 6 placed on record letters dated 11th January, 2005 and 18th January, 2005, written by the CERC to the respondent no.4/Ministry of Defence. In the aforesaid

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[2] **Note-7 to Rule 33**:
"*Pay drawn by a Government servant while on Foreign Service shall not be treated as emoluments, but the pay which he would have drawn under the Government had he not been on foreign service shall alone be treated as emoluments.*"

[3] **Rule 3 (g)**:
"*Foreign Service means service in which a Government servant receives his pay with the sanction of the Government from any source other than the Consolidated Fund of a State*

communications, it was specifically stated that the expenses of the CERC, including salaries and allowances were charged upon the Consolidated Fund of India up to 31st March, 2004 and thereafter, charged to the 'Grants-in-aid' received through budgetary support. Hence, the petitioner would be deemed to be on '*foreign service*' as his salary was not being paid from the Consolidated Fund of India at the time of his permanent absorption in the CERC, i.e., 7th June, 2004. Therefore, excess payments were made from 7th June, 2004 to 5th March, 2020, i.e., the date till when the order was passed by the respondent no.4 directing revision of pension.

10. In order to determine whether the petitioner's salary was sourced from the Consolidated Fund of India while he was on deputation, the CERC was arrayed as the respondent no.7 in the present writ petition on 24th August, 2022 and directed to file an affidavit with regard to the source of its funds after 1st April, 2004. Pursuant to the aforesaid directions, an affidavit was filed by the CERC.

11. In the affidavit filed on behalf of the CERC on 22nd May, 2023, it has been explained that the CERC was extended budgetary support as 'Grants-in-aid' from the financial year 2004-05 onwards with effect from 1st April, 2004. The aforesaid grants were credited to the Central Electricity Regulatory Commission Fund (CERC Fund), which was provisioned for meeting the expenses of salaries/allowances of its employees in terms of Section 99 of the Electricity Act, 2003 (hereinafter "Act"). Therefore, the salary paid to the petitioner from 1st April, 2004 onwards was paid from the CERC Fund, which in turn received funds in the form of grants-in-aid from

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or the Consolidated Fund of a Union Territory."

the Central Government. Hence, with effect from 1st April, 2004, salary of the petitioner was not paid from the Consolidated Fund of India.

12. In response to the aforesaid affidavit, the Petitioner filed a Reply Affidavit dated 22nd July, 2023, stating that the grants made to the CERC were from the Consolidated Fund of India and reiterating that the petitioner was not on '*foreign service*' at the time of his absorption.

13. Subsequently, in the Affidavit in Rebuttal to the Reply Affidavit filed by the petitioner, the CERC submitted that after 1st April, 2004, the Ministry of Power continued to discharge payment and accounting functions on behalf of the CERC on an interim basis since appropriate manpower resources were not available with the CERC. Even though the CERC Fund Account was operationalised with effect from 1st October, 2004, the entire expenditure of the CERC for the period 1st April, 2004 to 30th September, 2004 was subsequently adjusted against the 'Grants-in-aid'.

SUBMISSIONS ON BEHALF OF THE PARTIES

14. Counsel appearing on behalf of the petitioner has made the following submissions:

(i) The findings given by the earlier Division Bench in its judgment dated 9th April, 2021 after hearing the counsels for the parties have attained finality and cannot be interfered with.

(ii) The Ministry of Power in the RTI Reply dated 6th November, 2019 has categorically stated that during 2004-05, the CERC was allocated Rs.6.71 crores out of the Consolidated Fund of India.

(iii) CERC Fund did not exist during 1st April, 2004 to 6th June, 2004, as the 'Constitution of Central Electricity Regulatory Commission Fund and

the Manner of Application of the Fund Rules, 2004' (hereinafter "Fund Rules") were notified only on 22nd October, 2007. No evidence has been produced by the CERC in support of its contention that the CERC Fund was governed in accordance with the Fund Rules till October, 2007.

(iv) If none of the Notes to Rule 33 are applicable, the petitioner's pension is to be fixed under Main Rule 33 and the term 'emoluments' would be the petitioner's salary in the CERC.

(v) No recovery can be effected from the petitioner as he is a retired employee and excess payment has been made for a period exceeding five years before the order of recovery. In this regard, reliance has been placed on the judgment of the Supreme Court in ***State of Punjab* v. *Rafiq Masih***, 2015 (4) SCC 334.

15. *Per contra*, counsel appearing on behalf of the respondents no.1 to 6 has made the following submissions:

(i) Note 7 to Rule 33 of the CCS Pension Rules would be applicable in the present case as the CERC was extended budgetary support in the form of 'grants-in-aid' from 1st April, 2004. Therefore, the petitioner was on '*foreign service*' as the salary of the petitioner was not attributable to the Consolidated Fund of India.

(ii) In view of Rule 70(2) and (3) of the CCS Pension Rules, retired government servants are required to refund the excess pension disbursed to them within a period of two months from the date of such notice. In case such refund is not made, short payments of pension would be made in the future in order to recover the excess amount paid.

ANALYSIS AND FINDINGS

16. We have heard the counsels for the parties and perused the material placed on record. The parties have also filed written submissions in support of their contentions.

17. In the judgment dated 9th April, 2021, on the basis of an RTI Reply dated 6th November, 2019 issued by the Principal Accounts Office (PAO), Ministry of Power, the previous Bench took a view that the CERC was being funded by the Consolidated Fund of India. Therefore, it was observed that the petitioner would not be covered by Note 7 of Rule 33 of the CCS Pension Rules as he could not be stated to be on '*foreign service*' under Rule 3(g) of the said Rules. It is pertinent to note that the aforesaid observations were made before the respondents were called upon to file their counter-affidavit and therefore, would necessarily be in the nature of tentative observations. However, as discussed in subsequent paragraphs, the aforesaid observations would not hold good in light of the affidavits/counter-affidavits filed on behalf of the respondents.

18. Along with the counter-affidavit, the respondents no.1 to 6 have placed on record communication dated 11th January, 2005 read with Corrigendum dated 18th January, 2005 sent by the CERC to the respondent no.4/Ministry of Defence (Annexure R-4 and R-5 to the short counter affidavit), wherein it has been specifically stated that up to 31st March, 2004, the salaries and allowances of Chairperson and Members of the CERC were charged upon the Consolidated Fund of India. However, with effect from 1st April, 2004, the CERC was extended budgetary support in the form of 'Grants-in-aid'.

19. The relevant extracts of the communication dated 11th January, 2005 are set out below:

> *"Leave Salary/Pension Contribution:As the expenses of the Commission including all salaries and allowance payable to, or in respect of, the Chairperson and the Members of the Central Commission for and upto the period 31-03-04 were charged upon the consolidated fund of India, the question of leave salary and pension/ CPF contribution upto 31.03.2004 does not arise.* ***The Commission is being extended budgetary support as Grants-in-aid from the financial year 2004-05 onwards i.e., w.e.f. 1.4.2005, and would be governed by the existing rules on the issue***."

20. Subsequently, Corrigendum dated 18th January, 2005 was issued, which is set out below:

> *"Reference CERC's letter of even number dated 11th January 2005 on the above subject.*
>
> *2.* ***In the last line of the para under heading Leave Salary/ Pension Contribution, the expression "w.e.f. 1.4.2005" may be read as "w.e.f 1.4.2004"***."
>
> [Emphasis Supplied]

21. This position has also been reiterated by the CERC in its affidavit dated 22nd May, 2023, wherein it is averred that consequent to the enactment of the Electricity Act, 2003, the CERC was extended budgetary support by the Central Government in the form of Grants-in-aid from financial year 2004-05 onwards. This was done as per the mandate of Section 98 of the Electricity Act, 2003. Furthermore, pursuant to Section 99 of the Electricity Act, 2003, the CERC Fund was set up and one of the sources for the CERC Fund was grants made by the Central Government to the CERC, as provided for in Section 98 of the Act. Section 99(2) of the Act clearly mandates that salaries, allowances and other remuneration of all employees of CERC would be met from the CERC Fund. For the ease of convenience, Sections

98 and 99 of the Act are set out below:

> ***"98. Grants and loans by Central Government**.—The Central Government may, after due appropriation made by Parliament in this behalf, **make to the Central Commission grants and loans of such sums of money as that Government may consider necessary.***
>
> ***Section 99. (Establishment of Fund by Central Government): --- (1)** There shall be constituted a Fund to be called the Central Electricity Regulatory Commission Fund and there shall be credited thereto-*
>
> *(a) any grants and loans made to the Central Commission by the Central Government under section 98;*
> *(b) all fees received by the Central Commission under this Act;*
> *(c) all sums received by the Central Commission from such other sources as may be decided upon by the Central Government.*
>
> *(2) The Fund shall be applied for meeting –*
>
> *(a) **the salary, allowances and other remuneration of Chairperson, Members, Secretary, officers and other employees of the Central Commission**;*
> *(b) the expenses of the Central Commission in discharge of its function under section 79;*
> *(c) the expenses on objects and for purposes authorised by this Act.*
>
> *(3) The Central Government may, in consultation with the Comptroller and Auditor-General of India, prescribe the manner of applying the Fund for meeting the expenses specified in clause (b) or clause (c) of sub-section (2).*"
>
> [Emphasis Supplied]

22. Though the CERC Fund was provisioned from 1st April, 2004, since the CERC did not have adequate manpower/resources at that point of time, the Ministry of Power was administering the CERC Fund as an interim arrangement till 30th September, 2004.

23. In this regard, reference may be made to a letter dated 2nd August, 2004 sent by the Controller of Accounts, Ministry of Power to the CERC which specifically notes that a 'Grants-in-aid' of Rs.9.55 crores for the year 2004-05 has been approved by the Parliament in the Annual Budget of the

Ministry of Power and shall be provided to the CERC by the Ministry of Power (Annexure R-3 to Affidavit in Rebuttal filed on behalf of the respondent no.7).

24. This was followed by another communication dated 1st September, 2004 from the Controller of Accounts, Ministry of Power to the CERC, wherein it was stated that the various payments released to the CERC by the Ministry of Power towards its expenses would have to be reverted back by debiting the Grants-in-aid made to the CERC. It was also mentioned that the CERC must get its account opened before 1st October, 2004.

25. From the discussion above, the position that emerges is that with the enactment of the Electricity Act, 2003, the Central Government had to provide budgetary support to the CERC in the form of Grants-in-aid and the CERC had to start payment and accounting functions of its own with effect from 1st April, 2004. Since, the CERC did not possess adequate resources at that point of time, payment and accounting functions of the CERC were discharged by the PAO, Ministry of Power from 1st April, 2004 to 30th September, 2004.

26. Ultimately, the CERC funds and accounts were operationalized with effect from 1st October, 2004 and the expenditure of the CERC for the period of 1st April, 2004 to 30th September, 2004 was adjusted against the Grants-in-aid received for the year 2004-05. This position was confirmed in the audit report prepared by the Comptroller and Auditor General of India (CAG) in respect of the CERC for the financial year 2004-05. The relevant extracts from the said report (Annexure R-5 to the Affidavit in rebuttal) are extracted below:

> "*Upto 2003-04 the expenditure of the Commission was charged to the Consolidated Fund of India and the accounts of the Commission were part of Departmentalized Accounting System. The Commission is fully funded by government of India, Ministry of Power.* ***During the year 2004-05, the Commission received Rs. 645.05 lakh as grant in aid out of which Rs. 0.98 lakh remained unspent during the year.*** *As required under Section 100(2) of the Electricity Act, 2003, the audit of CERC has been conducted under Section 19(2) of Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971*."
>
> [Emphasis Supplied]

27. In sum, even if the funds pertaining to the year 2004-05 initially came to the CERC from the Consolidated Fund of India, since the CERC Fund did not exist on 6th June, 2004, all expenses of the employees of the CERC incurred with effect from 1st April, 2004 were subsequently debited to the 'Grants-in-aid' received from the Government. Therefore, with effect from 1st April, 2004 till 6th June, 2004, i.e., a day before the petitioner's final absorption in CERC, the petitioner's salary was debited to the CERC Fund.

28. Resultantly, in our view, the CAT has correctly come to the conclusion that at the time of the petitioner's absorption in CERC on 7th June, 2004, the petitioner was not receiving his salary from the Consolidated Fund of India and therefore, his case was covered under Note 7 of Rule 33 read with 3(g) of the CCS Pension Rules.

29. We are unable to accept the submission made on behalf of the petitioner that no evidence was placed on record by the respondents. As discussed above, the respondents have placed adequate material before this Court in support of their submissions that the salary of the petitioner was chargeable to the grants-in-aid received from 1st April, 2004 and not from the Consolidated Fund of India.

30. Therefore, the order dated 5th March, 2020, passed by the respondent

no.4 to the extent that it revises downwards the pension of the petitioner is held to be valid.

31. This brings us to the other submission raised on behalf of the petitioner that recoveries of the excess amount already paid to the petitioner cannot be made in view of the refixation of the pension. *Via* order dated 5th March, 2020, the respondent no.4 directed recovery of excess pension disbursed from 6th June, 2004 till the date of the order.

32. In ***Rafiq Masih*** (supra), the Supreme Court has held that excess payments made on account of a mistake by the employer without any fault of the employee cannot be subsequently recovered. In this regard, the Supreme Court has laid down certain instances wherein recoveries would be impermissible. The relevant observations are set out below:

> "*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 decisions referred to herein above, 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.*"

[Emphasis Supplied]

33. The aforesaid principles laid down in ***Rafiq Masih*** (supra) have been consistently followed by the Supreme Court in subsequent decisions. Reference in this regard may be made to ***Thomas Daniel*** **v.** ***State of Kerala***, 2022 SCC OnLine SC 536 and ***Sasikala Devi P.*** **v.** ***State of Kerala***, 2023 SCC OnLine SC 513.

34. In the case at hand, the pension refixation order in respect of the petitioner was passed on 5th March, 2020 and subsequently, *vide* communication dated 21st May, 2020, the respondents sought to make recovery of the excess amounts paid towards pension to the petitioner with effect from 6th June, 2004. The petitioner is a retired employee and the respondents refixed the pension after an enormous delay of around 15 years. Applying the aforesaid principles of ***Rafiq Masih*** (supra) to the facts of the present case, it is clear that the case of the petitioner would be squarely covered under scenarios '(ii)' and '(iii)' as set out above.

35. Concededly, the higher fixation of pension was on account of a mistake committed by the respondents in interpreting the CCS Pension Rules. It is also not the case of the respondents that the petitioner had made any misrepresentation or fraud which led to excess pension being disbursed to him.

36. In view of the above, it is held that the respondents cannot recover the excess amount paid to the petitioner at this stage. However, in light of our findings that there is no infirmity in the refixation of pension, the respondents would be entitled to disburse the revised pension from the date of the order refixing the pension.

37. Any recoveries made by the respondents pursuant to the order dated 5th March, 2020 and communication dated 21st May, 2020 shall be refunded to the petitioner.

38. Resultantly, the writ petition is partly allowed in the aforesaid terms.

39. The pending application stands disposed of.

AMIT BANSAL
(JUDGE)

RAJIV SHAKDHER
(JUDGE)

MAY 31, 2024
at