

(Vb)

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A. No.1002 OF 2002
M.A. No.805 OF 2002

New Delhi, this the 30th day of May, 2003

HON'BLE SHRI SHANKER RAJU, MEMBER (J)

1. P.K. Gautam,
S/o Shri N.R. Gautam,
Aged about 51 years,
R/o C-342, Vikaspuri,
New Delhi-110018.
2. A.K. Ghosh,
S/o Shri R.N. Ghosh,
Aged about 52 years,
R/o C-802, MS Apartments,
Kasturba Gandhi Marg,
New Delhi-110001.
3. B.K. Tayal,
S/o Shri J.N. Tayal,
Aged about 49 years,
R/o H-7, Fine Home Apartments,
Mayur Vihar-I,
New Delhi-110091.
4. Virendra Singh,
S/o Shri Lachhman Singh,
Aged about 50 years,
R/o BF-55, Janakpuri,
New Delhi-110058.
5. Kamlesh Kumar,
S/o Shri K.K. Srivastava,
Aged about 51 years,
R/o 139, Laxmi Bai Nagar,
New Delhi-110023.
6. S.C. Khurana,
S/o Shri M.L. Khurana,
Aged about 52 years,
R/o 45, HIG, Sector 7 Extension,
Gurgaon-122001.
7. C.S. Randev,
S/o Shri C.L. Randev,
Aged about 52 years,
R/o P-37, Sector 12,
NOIDA-201301.Applicants

(By Advocate : Shri A.K. Behra)

Versus

1. Union of India
Through the Secretary,
Ministry of External Affairs,
South Block,
New Delhi-110001.

2. The Secretary,
 Ministry of Personnel, Public Grievances &
 Pensions,
 Department of Personnel & Training,
 North Block, New Delhi-110001.

.....Respondents
 (By Advocate : Shri N.S. Mehta)

ORDER

MA 805/2002 for joining together is allowed.

2. Applicants impugn para 6 of OM dated 11.9.2001 denying them Foreign Allowance (hereinafter referred to as 'F.A.') commensurate with upgraded pay scale under the Assured Career Progression Scheme (ACPS). Also impugned are orders dated 17.10.2001 collectively whereby denial of F.A. has been justified as admissible to rank/post. Quashment of the above orders has been sought with grant of F.A. at the same rate as admissible to second Secretary/Consul while posted in Missions/Abroad commensurate with upgraded pay scale of Rs.10,000-325-15,200.

3. Applicants working as Section Officers belong to Grade II and III of General Cadre of I.F.S. Branch 'B'. In pursuance of recommendations of 5th CPC and aftermath of ACRs to tide over stagnation hardship financial upgradation to the pay scale of 10,000-15,200 has been granted to the applicants. However, in the memorandum dated 11.9.2001, F.A. was restricted treating the applicants as non-representational officers.

4. Vide OM dated 3.9.2001 under in-situ Scheme 69 Section Officers belonging to some integrated grades were granted upgradation on personal basis and further vide

order dated 21.11.2001, respondents accorded F.A., commensurate with upgraded scales to these Section Officers.

5. Being aggrieved with the aforesaid, applicants individually represented to the respondents. By orders of even date, i.e., 17.10.2001, collectively at Annexure A-2, respondents rejected the plea of the applicants, giving rise to the present O.A.

6. Shri A.K. Behra, learned counsel of applicants impugned the orders on the ground of hostile discrimination meted out to them in violation of Articles 14 and 16 of the Constitution of India, in so far as their counterparts Section Officers upgraded under in-situ are concerned.

7. It is further contended that import and object of ACP is to tide over hardship caused due to stagnation, accordingly, without promotion (as on upgradation, there is no assumption of shouldering of higher responsibility of the promotional post or status, all the pay and allowances attached to the upgraded post are admissible. In nut shell, it is stressed that F.A. is to be accorded on pay scales and not on post or status.

8. Shri A.K. Behra further drawing my attention to ACP Scheme contended that by virtue of upgradation no new post is created and as per para 6 of the Scheme of financial upgradation and as per the guidelines along with the Scheme para 6 alongwith the upgradation also

entitles the incumbent other benefits and allowances though the Scheme is personal to the employee and would not alter his seniority position.

9. It is contended that for the financial purposes like allowances an incumbent who has been upgraded under the ACP Scheme is to be treated on a higher post. As the ACP Scheme is a complete code and DA being a substitute allowance for FA when officer is posted in India, the respondents having taken stand in OA-1777/99, inter alia contending that Fifth Central Pay Commission recommended pay and allowances to the PPS equivalent to Under Secretary grade other allowances like FA are also to be same for all officers in the same pay scale. Moreover in the decision in OA-188/99 decided on 29.8.2000 by a Division Bench in Asim Kumar Ghosh v. Union of India FA was decided to be admissible and moreover by resorting to the decision of the Apex Court in Keshav Dev v. State of U.P. (1999) 1 SCC 280 it is contended that once the Government takes a stand it is estopped from taking a different stand in another proceeding.

10. While referring to FA it is contended that ACP Scheme is a welfare legislation. Its object is to tide over the genuine stagnation and hardship faced by employees due to lack of promotional avenues having regard to its object and being an beneficial legislation the interpretation should be alike as held by the Apex Court in M/s International Ore Corporation v. E.S.I., (1987) 4 SCC 203. In this backdrop it is stated that applicants are seeking only allowances in the status.



11. Shri Behera contended that stand of the respondents that FA is based on post is erroneous as pay scale of various grades/posts in IFS Branch 'B' Section Officer designated as Attaché in Mission/post abroad. The scale of pay of Rs.6500-10500 of the post of SO, FA admissible to an Attaché can be allowed. In the ACP on financial upgradation to the next higher grade/post is in accordance with the existing hierarchy as applicants have been granted financial upgradation to the next grade of Under Secretary under the ACP Scheme the allowances attached to the pay scale must also be determined as per the provisions of ACP Scheme. There cannot be two criteria to grant financial upgradation as well as FA. By referring to OA-1777/99 it is contended that allowances alike FA and RG are to be determined by pay scale and would have to be same for all officers in the same pay scale. As applicants are performing identical duties and are at par in all respects regarding functional requirements they are entitled for this allowance. Citing example of a Under Secretary of Grade I of IFS 'B' who after seven years in the grade is allowed FA at the rate admissible to Under Secretary. The same accordingly apply to applicants.

12. In so far as comparison to in situ promotions are concerned, it is contended that as per OM dated 11.9.2001 on 3.9.2001 promotion under in situ does not amount to actual or factual promotion and both incumbents of ACP and in situ are to discharge duties of the post of Section Officer while posting in India or abroad and are governed by the Schemes applicable to Group

'B' gazetted officers. It is further stated that these officers are posted in Mission against the sanctioned post of Attaché and are being replaced by Attaché.

13. Applicants lastly contend that the action of respondents is arbitrary, discriminatory and violative of Articles 14 and 16 of the Constitution of India.

14. On the other hand, respondents' counsel Sh. N.S. Mehta opposed the contentions and stated that the Ministry of External Affairs (MEA) has taken a policy decision not to accord FA to applicants and as this policy decision is neither mala fide nor discriminatory this court cannot interfere in a policy matter and for this he places reliance on a decision in Leela Kant v. Collector of Customs, AIR 1980 SC 444.

15. Moreover the contention put-forth by Sh. Mehta is that as FA is intended to cover the additional cost of living at the station where office is posted over and above the corresponding category serving in India, FA is not fixed in relation to the pay scale but to the post held by an incumbent in Indian mission or post abroad. MEA has framed a Scheme for fixing FA where a Under Secretary after completion of 6-7 years service and Deputy Secretary are entitled to draw FA admissible to First Secretary while posted in Mission/Post abroad, which clearly shows that FA is based on rank/designation on which officer is posted abroad.

16. Shri Mehta stated that ACP Scheme envisages higher scale of pay but retention of old designation and enhanced benefits like HBA etc. without conferring the higher status. Whereas in the in situ Scheme Section Officers are upgraded to the Under Secretary in the scale of pay of higher post. So in ACP Scheme what has been stressed is designation but does not envisage creation of new posts and placement in the higher scale.

17. In so far as discharge of similar duties by the beneficiaries of ACP and in situ Scheme in Indian Mission/ Post abroad is concerned, the US (in-situ) are posted to Indian Missions/Posts abroad as Second Secretary/Consul whereas beneficiaries of ACPS SOs are posted as Attaché/Vice-Consul. Accordingly US (in-situ) category officers draw FA commensurate to their rank as Second Secretary, whereas SOs of ACP Scheme draw FA of the Attaché level.

18. In their additional reply respondents contended that though it is correct that ACP provides financial upgradation of the next higher grade in accordance with the existing hierarchy in a cadre/category of post, however, FA being linked to the rank which a SO who has been granted ACP benefits by granting financial upgradation of the next higher grade, i.e., Under Secretary will be posted abroad against the post of an Attaché/Vice Consul and thus entitled to the FA attached that rank only.

19. The classification of various posts located in Indian Mission is on the basis of Vienna Convention depending upon the rank of the officer pay and functional

responsibilities, allowances for that officer and the category are worked out as per the general principle. FA of Section Officer has been accorded to in situ to the officers upgraded as SO which is denied to the ACP beneficiaries as criteria laid down has not been met by them. As the Schemes are different there cannot be applicability on mutual basis. Sh. Mehta refers to the indexation Scheme to describe the formula arrived at for FA.

20. I have carefully considered the rival contentions of the parties and perused the material on record. The most important issue which is to be decided in the present OA is whether a distinction can be drawn between the Section Officers who are accorded in situ promotion and Section Officers who have been accorded ACP benefits?

21. The only difference in situ and ACP is that in in-situ an incumbent though not actually or functionally promoted but on upgradation is bestowed with the designation and the scale of pay of higher post but continue to perform the same duties and functions which he performs before the upgradation. However, in ACP Scheme an incumbent is merely placed in the higher pay scale for grant of financial benefits which is personal and does not amount to any functional or regular promotion. However, other benefits like HBA, advances etc. shall be ensured for grant of benefits.

22. The Government though has reply in OA-1777/99, in so far as FA is concerned, averred that on recommendations of Fifth Central Pay Commission pay and allowances to the PPS were made equivalent to Under Secretary grade.

23. In so far as FA is concerned, the same have to be same for all officers in the same pay scale. In order to be entitled to FA allowance the condition precedent which is to be established is that Section Officers (in-situ) and Section Officers (ACP) are equal in all respects, i.e., the discharge of duties and other functional requirements. A classification which has a reasonable nexus with the object sought to be achieved and is not arbitrary is sustainable in the eye of law. It is only when the same is unreasonable and treat [↓] same classes differently rested on same footing is in violation of the enshrined principles of equality under Article 14 of the Constitution of India. Merely because respondents have taken a stand that FA is dependent on pay scale in a case of PPS would not mutatis mutandis applies to the case of applicants and moreover as a policy decision FA is disallowed on reasonable basis and on rational criteria cannot be questioned in absence of any mala fides or violation of Articles 14 and 16 of the Constitution of India.

24. The fact that FA has no relationship with the pay scale is clearly demonstrated from the fact that MEA on an elaborate Scheme for fixing an allowance under the indexation scheme fixed FA for different categories including First Secretary, Second Secretary, Third



Secretary, Attaché and other group 'D' staff. A Under Secretary after completion of seven years in the grade and Deputy Secretary though drawing different scale of pay and DA are entitled to draw FA admissible to First Secretary while posted in Mission/post abroad. For the officers of the same grade FA does not vary with the pay scale. For example FA drawn by a Director level officer, equivalent to the rank of Counsellor in a Mission/post abroad will remain the same irrespective of the pay scale in the rank of Director.

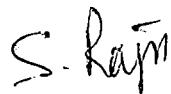
25. In so far as discharging similar and equal duties by the beneficiaries of ACP and in-situ are concerned, the Under Secretary (in-situ) are posted to Indian Missions/Posts abroad as Second Secretary/Consul whereas beneficiaries of ACP Scheme SOs are posted as Attaché/Vice-Consul. Accordingly FA is admissible commensurate with their post. The criteria to fix the quantum of FA is rightly determined on the basis of the rank. Merely because ACP Scheme allows other allowances would not amount that FA being one of it is to be at par with that of upgraded scale of pay. FA basically is paid to the officer to cover additional cost of living at the station where the officer is posted and also depends on the expenditure of the officer while serving at home or abroad over and above with that of corresponding category serving in India is expected to bear. This is one of the components and ingredients to show that FA is not fixed in relation to the pay scale but to the post held by the incumbent in Indian Mission/Post abroad.

26. The contention put-forth by Sh. A.K. Behera that the respondents have taken a different stand cannot be countenanced, as the stand taken in the OA is valid and has reasonable nexus with the object sought to be achieved. i.e., FA is to be determined in accordance with the discharge of duties as per post held and rank of the officer.

27. As regards beneficial legislation is concerned, in interpreting a statute the rule of beneficial legislation would not be applied when as a result there would be re-legislation of a provision by addition/substitution or alteration of words and violence would be done to the spirit of the provision. It is also not to be applied where words of provision are capable of being given only one meaning and there is no ambiguity in the provision. However, when there is doubt the rule of beneficent construction would apply to advance the object of the Act. The aforesaid view is fortified by the decision of the Apex Court in Shyam Sunder v. Ram Kumar (2001) 8 SCC 24.

28. From the perusal of the ACP Scheme and comparing it with in-situ I do not find any ambiguity either in clause 6 of the condition in the ACP or in the OM dated 110.10.2001 where FA has been denied treating applicants as non-representational officers. As such having regard to the object of the ACP Scheme FA cannot be computed on the basis of pay scale of the upgraded post but dependent on the rank/post. The provision is unambiguous and interpreted as per its literal meaning and context.

29. As applicants are not at par with SOs of in-situ and are not equal in all respects prescribing different FA shall not violate the mandate of Articles 14 and 16 of the Constitution of India. The classification made is reasonable and is valid for its object sought to be achieved. The respondents have discharged their burden to justify the administrative action in the concept of equality as the twin test of reasonable classification and rational principle co-related with the object sought to be achieved has been discharged in view of the decision in R.D. Shetty v. IAAI, (1979) 3 SCC 489 I do not find any merit in the present OA, which is accordingly dismissed. No costs.


(Shanker Raju)
Member (J)

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