

CENTRAL ADMINISTRATIVE TRIBUNAL
KOLKATA BENCH, KOLKATA

LIBRARY

No. O.A. 351/00128/2018
M.A. 351/00756/2019Reserved on: 26.11.2019
Date of order 17.12.2019Present : Hon'ble Ms. Bidisha Banerjee, Judicial Member
Hon'ble Dr. Nandita Chatterjee, Administrative Member

Dr.R.Dev Das,
 Son of Late P. RamanPillai,
 Aged about 56 years,
 By occupation service as Principal,
 GSSS Manglutan
 under the Directorate of Education,
 Andaman & Nicobar Administration,
 Port Blair,
 Residence at S-3, Sunrise Apartments,
 Dudhline, Shadipur,
 Port Blair 744101.

... Applicant.

Versus

1. The Andaman & Nicobar Administration, Service through the Lt. Governor, A&N Islands, Raj Niwas, Port Blair-744101.
2. The Secretary (Education), Andaman & Nicobar Administration, Secretariat, Port Blair-744101.
3. The Director of Education, Andaman & Nicobar Administration, Directorate of Education, VIP Road, Port Blair-744103.
4. The Deputy Director of Education (Academic/HoD), Andaman & Nicobar Administration, Directorate of Education, VIP Road, Port Blair-744103.
5. The Assistant Director of Education,(Admin-I), Andaman & Nicobar Administration, Directorate of Education, VIP Road,




Port Blair-744103.

... Respondents.

For the Applicant(s) : Mr.S.Samanta, Counsel
 Ms.A.Roy, Counsel
 Mr.P.K.Mondal, Counsel

For the Respondent(s) : Mr.R.Halder, Counsel

ORDER

Per Dr.Nandita Chatterjee, Administrative Member:

The applicant has approached the Tribunal aggrieved with the orders of the respondent authorities dated 1.2.2018 vide which the applicant's pay was refixed and he was issued a show cause notice to respond to contemplated recovery upon such refixation. The following relief has been prayed for by the applicant, in particular:-

a) Direction do issue quashing and/or setting aside the impugned memorandum/order both dated 1.2.2018 being Annexure "A-3" and Annexure "A-4" respectively, and further restraining the respondent authorities from making any recovery, as contained in the impugned memorandum/order;

b) INJUNCTION do issue restraining the respondent authorities from acting in any manner or any further manner on the basis of the impugned memorandum/order both dated 1.2.2018 being Annexure "A-3" and Annexure "A-4" respectively, and further restraining the respondent authorities from making any recovery, as contained in the impugned memorandum/order;

c) DIRECTION do issue upon the respondent authorities directing them to produce and / or cause to be produced the entire records of the case and upon such production being made to render conscientiable justice by passing necessary orders therein;

d) Cost and costs incidental hereto;

e) And / or to pass such other or further order or orders as to your Lordships may seem fit and proper."

2. Heard the rival contentions, examined pleadings and documents on record. Written notes of arguments have been filed on behalf of respondents No. 1 to 5.

3. The applicant's submissions, as canvassed through his Ld. Counsel is that, the applicant was holding the post of Lecturer in Geography in the senior scale of pay of Rs. 10000-325-15200/- for College Lecturers.

hth



Subsequently, he was selected through UPSC and appointed as Principal of Senior Secondary School w.e.f. 1.7.1999. Considering his qualifying service as Lecturer, he was awarded the Selection Grade scale of Rs. 12000-420-18300/- with retrospective effect, and, his pay was fixed at Rs. 12,000/-. Thereafter, on 1.7.1999, his pay was fixed at Rs. 12420/- vide Office Orders dated 18.7.2007.

That, an audit query was raised in 2014 by the Central Audit Team, consequent to which, the respondent authorities issued an Office Order dated 1.2.2018 refixing his pay, and, upon directing recovery of a sum of Rs. 4,88,097/-, the applicant has been asked to show-cause as to why such recovery should not be effected. The applicant would claim that his pay scale was fixed through a series of processes through several channels including the UPSC, and hence, the allegation made by the Audit and the Memorandum issued by the respondents deserves to be quashed. The applicant would further aver that the memorandum, so impugned, calling for his reply, remains an empty formality as the respondents have already finalized his revised pay fixation and nothing remains to be decided even if the applicant controverts the same.

The applicant would advance the following grounds in support of his claim:-

- (a) That, the order, so impugned, suffers from errors of facts and law.
- (b) That, such action of the respondent authorities suffers from malafide, arbitrariness as well as unjust reasoning.
- (c) That, as the UPSC had concurred to his pay fixation, audit had failed to take into account the UPSCs approval while mandating his refixation.

hphm

The Ld. Counsel for the applicant would particularly reiterate, that he had filed an M.A. bearing No. 756 of 2019 in which he has called for an order to be issued on the respondents for production of records relating to correspondence between the Respondent administration and the UPSC to substantiate his claim that the UPSC had concurred to his revised pay fixation.

4. The respondents, per contra, would, in their reply dated 8.2.2019, in their written instructions in compliance to directions of this Tribunal dated 5.9.2019, as well as in their written notes, aver as follows:-

- (i) That, the applicant was initially appointed as a Lecturer on adhoc basis in JNRM, Port Blair, and, his adhoc appointment was subsequently regularized w.e.f. 23.8.1985.
- (ii) The applicant was appointed to the post of Principal vide orders dated 23.11.1998, he had joined the said post on 1.7.1999, and, his appointment orders had stated that he would be drawing a pay scale of Rs. 10,325-15200/- to be fixed from the date he reports for duty in his respective place of posting.
- (iii) That the applicant, who had opted to vacate his post of Lecturer prior to joining the post of Principal as on 1.7.1999, had joined the post of Principal in the lower pay scale, and, subsequently, considering his qualifying service in the post of Lecturer, he was awarded the senior scale of pay in the post of Lecturer in the scale of Rs. 12000-420-18300/- with retrospective effect w.e.f. 27.7.1998 and such pay fixation was concurred with the Personnel Department of the local Administration, placing reliance on DOP&T O.M. dated 14.6.2006.
- (iv) That, during the year 2013-2014, an audit query was raised by the Central Audit wherein it was pointed out that the applicant's



4/1

pay was fixed at a higher stage without concurrence of UPSC which is not permissible as because the applicant was appointed initially in consultation with UPSC and, hence, as per Govt. of India instructions below FR 27 para (iv), specific recommendations of the UPSC to an higher scale of pay than the minimum pay of the post, could be granted only on the advice of the UPSC.

The respondent authorities had moved UPSC for clarification, but, having received no positive reply therefrom, and, in the interest of complying with the audit query, the pay scale of the applicant was refixed in the scale of Rs. 10000-325-15200/- vide office order dated 1.2.2018.

As an excess payment had been made to the applicant to the tune of Rs. 4,88,097/-, the same was required to be recovered from his salary in 27 equal instalments w.e.f. February, 2018. In compliance to the directions of the Tribunal in O.A. No. 128 of 2018, however, such recovery has been stayed and the respondents are awaiting final adjudication by the Tribunal.

(v) Respondents have further clarified that the applicant was issued show-cause notice to dispute his recovery, if so desired, within a period of 7 days from the issue of the notice dated 1.2.2018. The applicant, however, failed to reply before 15.2.2018, although the Tribunal, while staying the recovery in the context of O.A. No. 128 of 2018, had not granted any extra tenure to the applicant to reply to the recovery notice of the respondent authorities. The respondents would also aver, that, while the Tribunal had stayed the operation of the notice at Annexure A-3, the pay fixation at A-4 of the said O.A. was not interfered with by the Tribunal.

hph



5. Hence, the issues to be adjudicated by the Tribunal in the instant matter are two fold:-

- (a) Whether the revised pay fixation of the applicant dated 1.2.2018 suffers from any irregularity.
- (b) And, whether the applicant's reply to such show cause notice at Annexure A-3 to the O.A. is to be treated only as an empty formality or, whether, in absence of such reply within the specified period of time, the applicant has consciously waived his right to dispute the process of recovery proposed to be initiated by the respondents.

6.1. The applicant, in his pleadings as well as in his response to the show cause notice (Annexure E to the instructions), has stated as follows:-

“ I very humbly state and submit that the order of re-fixation of my pay under the memorandum/office order above referred and recovery of the sum of Rs. 4,88,097/- of alleged overpayment is unsustainable both in law and on facts in view of the following:

- (i) The fixation of pay scale was a cause of “pay protection” and not “advance increments” in accordance with service rules and the Personnel Department of the administration is the competent authority for the same; the central Audit team failed to differentiate between “pay protection” and “advance increments” thereby mixing up the issues and arriving at a wrong conclusion.
- (ii) Since I was already drawing higher scale of pay as a permanent government employee under the administration my higher scale of pay was protected and reduced to the lower scale as per fitment stage in terms of DOPT guidelines; this is on the principle of equity that an incumbent cannot be paid less than what he is already drawing
- (iii) The fixation of my pay scale was a product of a series of processes through several channels including UPSC which the central Audit team failed to take into account more particularly the fact that I was already in the higher scale of pay in the Selection Grade of pay Rs. 12420/- at the time of joining the post of Principal in the Education Department.

In view of the above I am therefore to request your good self to be so good as to rescind/cancel/withdraw the memorandum and office order dated 1.2.2018 referred to hereinabove for the ends of justice as also on the principle of equity and for this act of kindness I shall remain ever grateful.”

The following are inferred from his submissions:-

- (i) The applicant was given a senior scale of pay as a matter of pay protection as he was enjoying a higher scale of pay as

Attn:

Lecturer and had joined the post of Principal in a lower grade of pay.

- (ii) Any imputation that the fixation of pay scale was on the ground of grant of advanced increments is fallacious.
- (iii) The administration had followed DOP&T guidelines in fixing his pay in the senior scale and in granting him pay protection.
- (iv) The UPSC had granted concurrence all along through the process of his pay fixation and, that, audit had failed to reckon the concurrence of UPSC while mandating a revised pay fixation and recovery against the applicant.

6.2. As the audit memo is the root cause of the dispute, we refer to the said audit memo which is at R-5 to the reply of the respondents. The extracts of the said audit memo are as under:-



“ INDIAN AUDIT AND ACCOUNTS DEPARTMENT
O/O THE DIRECTOR GENERAL OF AUDIT (Central),
KOLKATA
BRANCH : UNION TERRITORY OF A & N ISLANDS
SP/1, SOUTH POINT, PORT BALIR - 744106

Sub: Audit query on the General Accounts of the Directorate of Education, A&N Administration, Port Blair for the period from 01/02/2010 to 31/12/2013.

Shri R. Dev Das was appointed to the post of Principal in the Directorate of Education on the recommendation of UPSC vide Commissions letter No. F.1/268/96-R.IV dated 15.09.1998 in the scale of 10000-325-15200. As per the direction of the UPSC, his initial pay in the grade was to be fixed at Rs. 10000/- at the minimum of the scale.

As per Govt of India's order 3 below Rule FR 27 and under the existing rules and orders, the Ministries and other authorities have full discretion of granting advance increments in respect to appointment to these posts, whether temporary or permanent which they are empowered to create. However as per clause (c) of the same order it has been clarified that, where initial appointment is to be made in consultation with UPSC, the grant of higher initial pay/increments should be based on their recommendation. As per Govt of India's instruction below FR 27 under Para 4(iv), specific recommendations of the UPSC on a higher initial pay than the minimum pay of the post, the Commission should admit such higher initial pay. Which means that, higher initial pay other than one recommended by the UPSC should be given only on the advice of the UPSC.

In the instant case, Shri Dev Das was holding the post of Lecturer (HOD) Geography in Jawaharlal Nehru Rajkeeya Mahavidyalaya (JNRM) Port Blair and was drawing the basic pay of Rs. 11,300 in the Senior scale of 10,000-325-

hsl

15200 on the date of his joining (01.07.1999) as Principal in the Directorate. His pay was initially fixed at Rs. 11,625/- under FR 22 (1) (a) (1) on 01.07.1999.

After joining the Directorate of Education as Principal, Shri Dev Das was awarded the Selection Grade Scale of 12000-420-18300 with retrospective effect from 27.07.1998 in his previous post of Lecturer in JNRM and his pay was Rs. 12,420/- as on 01.07.1999.

The Personnel wing of A&N Administration on the pretext of DOP&T letter No. 16/6/2001-Estt. Pay 1 dated 14.2.2006, which states that pay of officials who opted for transfer to a lower post/scale under FR 15(a), the pay of a Government servant holding a post on regular basis will be fixed at a stage equal to the pay drawn by him in the higher grade. If no such stage is available, the pay will be fixed at the stage next below the pay drawn by him in the higher post and the difference may be granted as personal pay to be absorbed in future increments. If the maximum of the pay scale of the lower post is less than the pay drawn by him in the higher post, his pay may be restricted to the maximum under FR 22(1)(a)(3). The Personnel Wing of the Administration directed (May 2007) to fix his pay at Rs. 12275 plus P Pay 145 to be absorbed in the next increment in the pay scale of 10000-325-15200."

The following transpire from the said office memorandum:

(i) The personnel wing of the respondent authorities had relied on DOP&T O.M. dated 14.2.2016, which states, that, for officials who opted for transfer to a lower post/scale under FR 15(a), their pay for holding a post on regular basis will be fixed at a stage equal to the pay drawn by him in the higher grade. If no such stage is available, the pay will be fixed at the stage next below the pay drawn by him in the higher post and the difference may be granted as personal pay to be absorbed in future increments. If the maximum of the pay scale of the lower post is less than the pay drawn by him in the higher post, his pay may be restricted to the maximum under FR 22(1)(a)(3).

In the case of the applicant, as reiterated by his appointment order (annexed as R-1 to the reply), it is undisputed that the applicant's appointment as Principal is a fresh appointment and he was appointed on the pay scale of Rs. 10000-325-15200/- to be fixed from the date he reported for duty in his place of posting. The respondents have also clarified that the applicant had resigned



h/t

from his post as Lecturer in JNRM prior to taking up his assignment as Principal.

Accordingly, the DOP&T O.M. dated 14.2.2006 would not apply to the applicant who was appointed as Principal as a fresh appointee and no transfer was involved in his movement from Lecturer to Principal.

(ii) The offer of appointment dated 12th October, 1998, as made to the applicant to the post of Principal, SSS, A&N Islands is examined in detail. Para 2 of the said offer letter clearly states that the scale of pay of the post of Principal, SSS is Rs. 10,000-325-15,200/- and that initial pay in the grade would be Rs. 10,000/-. There are no indications of pay protection if the candidates were from a higher grade post. The applicant has obviously accepted such offer, culminating in his appointment letter dated 1st July, 1999 that reiterates his entitlement to a pay scale of Rs. 10,000-325-15,200/-.

(iii) Despite his repeated averments, the applicant has not been able to furnish any concurrence of UPSC to his revised pay fixation. Ld. Counsel for the applicant would vociferously agitate that it is the respondents who should be directed to produce the correspondence between them and the UPSC in this regard.

Ld. Counsel for the applicant would also refer to page 48 of the O.A. (Annexure A-2) wherein the communication dated 6.1.2006 between the respondent authorities and the UPSC is on record. The logical corollary therefrom is that such correspondence that seeks post facto approval in the case of the applicant, would not have been necessary if UPSC's concurrence was made available during applicant's pay protection.

h.s.s



The respondents have furnished a communication from UPSC dated 3.3.2006 on the subject of fixation of pay to the posts of Principal that reads as follows:-

"I am directed to refer to your letter No. 3-28/2000-D-III dated 6th Jan, 2006 on the above mentioned subject and to say that the commission have already given its recommendation letter regarding fixation of pay of Shri Dev Das. For further clarification you may take up this issue with the Ministry of Home Affairs as the Commission has no role in the matter."

In an office note, respondents would further clarify as follows:-

"In response, the UPSC vide their letter No. 1/268-96-R.IV dated 03/03/2006 has informed the UT Administration that the commission have already given its recommendation letter regarding fixation of Pay of Shri Dev Das and for further clarification Administration may take up the issue with the Ministry of Home Affairs as the Commission has no role in the matter (Annexure -B).

The Administration thereafter has taken up the matter with MHRD after the Audit has raised query dated 21/02/2014 for taking up the matter with the MHA as advised by the UPSC vide letter No. 3-28/2009-D-III(I) dated 12th June, 2014, whereby it was clearly mentioned that, "As per terms and conditions of UPSC's letter dated 15/09/1998 ibid, the pay recommended by the Commission is "pay" according to rules or instructions issued by the Govt. of India as the case may be in the pre-revised pay scale of Rs. 3000-4500 and revised scale of Rs. 10000-15200 (Annexure-C)."

The respondents would take pains to explain that the matter of irregular pay fixation of the applicant was never placed earlier to audit and, that the applicant himself was officiating in various capacities in the Directorate of Education during 2005-2008.

We also infer from the response of the respondent authorities that MHRD has not volunteered any reply in favour of the applicant till date and as the respondents cannot indefinitely refrain from complying with the audit observations, they had to resort to the revised pay fixation of the applicant.

Accordingly, we do not find that the observation of the Audit or the consequent action of the respondent authorities suffers from malafide, malice or extraneous considerations. The entire error emanates from inappropriate interpretation of DOP&T O.M. dated 14.2.2006 which refers to officials moving for transfer to a lower post and not to fresh appointees.

H.H.

6.3. It is, however, relevant to examine the actions of the respondents in the context of fair play and natural justice.

We refer herein to the ratio held in ***Divisional Supdt. Eastern Railway v. L.N. Keshri, AIR 1974 SC 1889***, that reduction of pay scale without hearing a confirmed employee is illegal.

In ***Binod Saharia v. Prag Bosimi Synthetics Ltd., 2005 (4) SLR 320***, the Hon'ble Court ruled that prior to initiating any action for reduction of pay, a reasonable opportunity of hearing should be accorded to the affected employee. In particular, it was held as follows:-

"10. Upon hearing learned counsel for the parties at length and also on meticulous inspection of the materials available on records including the impugned judgment, we are of the considered view that by the letter dated 2.1.90, the pay structure of the appellant was entirely changed giving him only an amount of Rs. 7350/- per month without showing any valid or good reasons for such abrupt reduction of salary and that too without giving him any opportunity of hearing in this regard. The communication dated 21.1.90 was made at the whims of the authorities in violation of service conditions. Therefore, we hold that the appellant is entitled to a pay scale of Rs. 12,000/- per month which was slashed without notice to Rs. 7,350/- per month, with effect from January, 1990 till his termination i.e. on 6th of November, 1991 with all other allowances and benefits contained in the communication dated 2.1.90."

In ***Bhagwan Shukla v. Union of India, 1994 Lab IC 2493 (SC)*** it was held that where it is alleged that basic pay was reduced with retrospective effect because there was initial wrong fixation, the concerned employees must be given an opportunity to make representations. In particular, the Hon'ble Court held as follows:-

"2. The controversy in this appeal lies in a very narrow compass. The appellant who had joined the Railways as a Trains Clerk w.e.f. 11.8.12.1955 was promoted as Guard, Grade-C w.e.f. 18.12.1970 by an order dated 27.10.1970. The basic pay of the appellant was fixed at Rs. 190 p.m. w.e.f. 18.12.1970 in a running pay scale. By an order dated 25.7.1991, the pay scale of the appellant was sought to be refixed and during the refixation his basic pay was reduced to Rs. 181 p.m. from Rs. 190 p.m. w.e.f. 18.12.1970. The appellant questioned the order reducing his basic pay with retrospective effect from 18.12.1970 before the Central Administrative Tribunal, Patna Bench. The justification furnished by the respondents for reducing the basic pay was that the same had been 'wrongly' fixed initially and that the position had continued due to 'administrative lapses' for about twenty years, when it was decided to rectify the mistake. The petition filed by the appellant was dismissed by the Tribunal on 17.9.1993.

3. We have heard learned counsel for the parties. That the petitioner's basic pay had been fixed since 1970 at Rs. 190 p.m. is not disputed. There is also no dispute that the basic pay of the appellant was reduced to Rs. 181 p.m. from Rs. 190 p.m. in 1991 retrospectively w.e.f. 18.12.1970. The appellant has

L.H.



obviously been visited with civil consequences but he had been granted no opportunity to show cause against the reduction of his basic pay. He was not even put on notice before his pay was reduced by the department and the order came to be made behind his back without following any procedure known to law. There has, thus, been a flagrant violation of the principles of natural justice and the appellant has been made to suffer huge financial loss without being heard. Fair play in action warrants that no such order which has the effect of an employee suffering civil consequences should be passed without putting the (sic employee) concerned to notice and giving him a hearing in the matter. Since, that was not done, the order (memorandum dated 25.7.1991, which was impugned before the Tribunal could not certainly be sustained and the Central Administrative Tribunal fell in error in dismissing the petition of the appellant. The order of the Tribunal deserves to be set aside. We, accordingly, accept this appeal and set aside the order of the Central Administrative Tribunal dated 17.9.1993 as well as the order (memorandum) impugned before the Tribunal dated 25.7.1991 reducing the basic pay of the appellant from Rs. 190 to Rs. 181 w.e.f. 18.12.1970."

In this matter too, the applicant's pay scale was reduced unilaterally based on an audit observation that denied him fair play in action. The ratio in ***Bhagwan Shukla (supra)*** applies squarely in this case.

6.4. In terms of the above ratio, and, in the interest of natural justice, we therefore direct the respondent authorities to accord a hearing to the applicant and thereafter decide on his revised pay fixation as well as consequent recovery, and within a period of 12 weeks from the date of receipt of a copy of this order as per law. The memorandum dated 1.2.2018 (Annexure A-3 & A-4 to the O.A.) which have been issued without giving any reasonable opportunity to the applicant, stands quashed.

The applicant's entitlement, in the interregnum, will be decided by the concerned respondent authority, as per law.

7. This O.A. is hence disposed of with the above directions. M.A. No. 351/00756/2019 filed by the applicant calling for production of records is disposed of accordingly.

(Dr. Nandita Chatterjee)
Administrative Member

(Bidisha Banerjee)
Judicial Member

SP