

CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

OA 1471/95

(19)

New Delhi, this the 28th day of April, 1997

Hon'ble Dr. Jose P. Verghese, Vice-Chairman(J)
Hon'ble Shri S. P. Biswas, Member (A)

M.B.Usgaonkar,
H-23/5, DLF Qutab Enclave Phase-I,
Gurgaon (Haryana) ..Applicant

(By Advocate Shri C. Harishankar)

Versus

1. Union of India through
Secretary,
Dept. of Personnel & Training
(Establishment Division),
North Block, New Delhi.
2. Secretary,
Ministry of Defence,
South Block,
New Delhi.
3. The Chairman, Rs
S.S.S.D.C.,
A-Wing, Sena Bhawan,
New Delhi. ..Respondents

(By Advocate Shri KCD Gangwani)

O R D E R
(Dr. Jose P. Verghese, Vice-Chairman(J))

The petitioner in this O.A. is seeking a direction from this court for payment in the scale of Rs. 5900-6700 for the period during which he was employed as Member (Finance) from 19.7.1991 to 30.4.1993. Petitioner is also seeking payment in the scale of Rs. 7300-8000/- from 1.9.92 to 22.2.1993 during which period he held the additional charge of Chairman, SSSDC. The payment referred to above is to be calculated and to be paid only after deducting the

actual amount received by him. His request is that his pension may also be re-fixed on the basis of the last pay drawn in the scale of Rs. 7300-8000/-.

(20)

The applicant belonged to Central Civil service and was in the grade of Director when he was posted against the newly created post of Member (Finance) of SSSDC for which the scale of pay was Rs. 5900-6700, so fixed at the time when the said post was sanctioned. However, he was not given the scale only on the ground that his appointment to the Joint Secretary Level post was not approved by that time, even though he was actually posted and worked as Member (Finance) from that date onwards. In his appointment letter, it was mentioned that he will continue to draw in the Director's scale of Rs. 5900-6700. On 28.4.1992, a gazette notification was issued appointing him as Joint Secretary in the scale of 5900-6700 by upgrading the post of Director. On 1.9.1992, the Ministry issued another order that he should also discharge the duties of Chairman, SSSDC in addition to his duties as Member (Finance). The petitioner retired from service on attaining the age of superannuation on 30.4.1993.

2. The submission on behalf of the petitioner was that even though the applicant was appointed against the post to which the scale of pay determined at the time of sanctioning, was 5900-6700, the same was not given to the petitioner only on the ground that his appointment to the Joint Secretary level post was not approved as on that date, even though the said approval was given subsequently on 28.4.1992. The petitioner claims that even though he was not approved for appointment at Joint Secretary level post at the time when he was holding the post of Member (Finance), since he has actually worked on the post, he is

(21)

entitled to the scale of pay determined by the appropriate competent authority payable to the incumbent of the said post at the time of sanctioning the post.

3. The annexure A-2 at page 23 of the paper book is the order issued in this regard which specifically states that the said appointment is initially for one year or until further orders, whichever is earlier. It is not disputed that by the said order the petitioner is appointed against the post of Member (Finance). Annexure A-3 at page 24 shows that the sanction of the President is accorded to create the said post alongwith various other posts and the scale of pay attached to the said post at the time of creation of the post is Rs. 5900-6700. The claim of the petitioner is, therefore, that even though his name was not in the panel, he should not be deprived of the scale prescribed to the post since he was holding the post from 19.7.91. He also claims that since the order dated 28.4.92 infact intended to apply to the petitioner as a measure personal to him, his contention is that it should rightly understood to have been taken effect from the date when he started holding the post of Member (Finance) in the scale of 5900-6700. The said order, on the face of it, indicates that the approval for the petitioner to hold the post of the level of Joint Secretary has been given to him by upgrading the post of Director held by him as a measure personal to him. The contention of the petitioner that this has been done with a view to his ensuing retirement has some force. Therefore, to deny the payment of the post, validly said to be payable to the incumbent of the post at the time when the post was created and sanctioned only on the ground that he was not holding a post equivalent to the Joint Secretary and even though his own post of Director was upgraded as a measure personal to him, seems to be unjustified.

22

4. The learned counsel appearing on behalf of the petitioner relied upon a judgement of this Tribunal passed in OA-115/88 decided on 4.5.90 wherein the petitioner had claimed the pay of Rs. 8000/- fixed for FA(DS) on the basis of the recommendation of the 4th Pay Commission but was allowed only the scale of 7300-8000 for the post of FA(DS) after 1.1.1986. In the said case the applicant therein belonged to a organised service, i.e., Indian Defence Service and the same argument that the officers who had been screened for the post of Secretary carrying a fixed pay scale of Rs. 8000 were still awaiting the placement was advanced. Considering all the aspects, this Tribunal observed as follows:-

"We are of the opinion that if the pay scale of the FA effective from 1.1.1985 is Rs. 8000/-(fixed), it has to be paid the persons working as FA and a person cannot be paid a scale lower than what has been recommended by the Commission and accepted by the Government of India. At best, the Government could have screened such officers to examine their suitability to continue as Financial Adviser, but till such time as they continued to hold the post, the pay attached to that post cannot be denied to the incumbents. In view of the fact that Shri M.S.Narayanan, Chairman, Central Board of Direct Taxes was also given the scale of Rs. 8000/-(fixed), the applicant would certainly be entitled to the pay of Rs. 8000/- even though it might be on ad hoc basis and since he retired on that pay, he should be deemed to have retired on a salary of Rs. 8000/-(Fixed) w.e.f. 1.1.1986. We do not wish to discuss the points regrding higher pay drawn by the Controller General of Defence Accounts and other matters raised. In our view, it is sufficient that a person must receive the salary of the post on which

23

he is employed and the pay of the Financial Adviser on 1.1.1986 was Rs. 8000(Fixed), the same must be given to the applicant. It is not the case of the Government that the case of the applicant was considered for appointment to Secretary level post and he was not found fit to hold that post. Infact, he was found fit to hold this post when he was appointed as Financial Adviser. In the circumstances the application is allowed and we direct that the respondents should fix the pay of the applicant at Rs. 8000/- with effect from 1.1.1986 and pay him the arrears with reference to the pay of Rs. 8000/- from 1.1.1986 to 30.1.1993 and his pension and other terminal benefits including leve encashment, may be determined with reference to the pay of Rs. 8000/- and other reasonable emoluments."

The learned counsel for the petitioner also relied upon the judgement of the Karnataka High Court given in B.Kodandapani Vs. Director of Text Books & another in which it was held that the management cannot take work in the higher post from an employee and give him only the pay attached to the lower post.

5. The petitioner had approached this court on an earlier occasion vide OA-874/94 and this court on 11.11.1994 passed an order stating that the petitioner even though was not holding the post at the level of Joint Secretary but was considered by the Members of the Board and was appointed as Member (Finance) on his own merit. It was also pointed out that there was a panel of three seniormost officials sent to the Ministry of Defence for considering them for the same post but the Board did not select any of these officers from the said panel on the ground that they had no background in defence matters and they proceeded to appoint the applicant as Financial Adviser.

2/2

The court observed as follows:

"When the Ministry of Defence was approached for appointment of Shri M.B.Usgaonkar, they emphasised that the officer must be of the level of Joint Secretary. The members of the Board found considerable merit in the proposal and felt that the applicant may be considered for the post to the level of Joint Secretary. They also observed that though Shri Usgaonkar was considered for the 1986 panel and could not make it, the review panel was only held in 1989 whereas under the existing policy his case should have been reviewed after 1988 panel. A clarification as to why the review in his case was delayed was to be explained in the next meeting of the Board for final decision. In case the relevant instructions on the subject were followed the applicant would have been placed senior to the officers of 1989 panel. In such an eventuality, the applicant would have been found eligible for the post of Joint Secretary at the time when he was posted as Financial Adviser in the SSSDC. I also note that a panel of three seniormost officials was sent to the Ministry of Defence for considering them for the post but the latter did not select any officer from the panel on the ground that they had no background in defence matters. They insisted on the applicant being posted as Financial Adviser."

6. In our view this court had earlier recorded a finding that the appointment of the petitioner as Member (Finance) after a proper selection by the concerned Board and the petitioner was appointed only on the basis of his own merit. Inspite of the said finding, the court did not proceed to pass an order directing the respondents to pay the arrears of payment on the basis of the scale of 5900-6700 for the actual period in which he held the post from

(25)

9.7.1991 to 30.4.1993 rather this court directed the respondents to pass a final order on the question of the empanelment of the petitioner as Joint Secretary which should have been reviewed according to the court, before empanelment of his juniors in the year 1988.

On the basis of the said direction, the respondents considered his representation in this regard and passed the impugned order dated 17.4.1995. The respondents by that order rejected the representation/request of the petitioner to consider the approval for appointment of the petitioner as Joint Secretary and consider the order of the respondents dated 28.4.1992 to have been issued w.e.f. 19.7.1991. The respondents by the impugned order passed the following order:-

"Since Shri Usgaonkar was not approved for appointment to a Joint Secretary level post on 24.7.1991 as his name did not figure in the panel dated 16.1.1989 and as he was empanelled only in 1991 in the second review, his request for grant of scale of Rs. 5900-6700 w.e.f. 24.7.1991 cannot be acceded to."

Aggrieved by the said impugned order, the petitioner has now approached this court for the reliefs as stated above.

7. We are of the considered view that the petitioner is entitled to payment in accordance with the scale of pay of Rs. 5900-6700 for the following reasons:-

One, the petitioner has actually worked on the post for the said period and the post at the time of sanctioning the same carried the same scale of

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(26)

pay and the incumbent is to obtain the same scale of pay but for the reason stated by the respondents that the petitioner's case has not been approved to hold the post at the level of Joint Secretary. It is an admitted case on behalf of the respondents that the respondents themselves had approved the case of the petitioner to hold the post at the level of Joint Secretary a few months later and there is no reason that the same order, which has been passed in his favour on a personal basis, should not be made applicable w.e.f. 19.7.1991 again on a personal basis in order to remove the technical objection of non-approval to the petitioner's case to hold the post at the level of Joint Secretary.

Two ,this court on a previous occasion by an order dated 11.11.1994 has infact recorded a finding that the petitioner has been appointed after due selection and the Members of the Board have found him, meritorious even against other three eligible seniormost officials suggested by the department and his appointment was approved due to the special background and suitability of the petitioner to hold the post and in view of this the previous court did not pass an order that the petitioner is entitled to the said scale of pay only because the said court was giving an opportunity to the respondents to cure a technical difficulty for the purpose of straightening their own record. Respondents, on the other hand, did not consider the case in the same light and spirit of the previous order which has become final

27

for want of appeal and we have no other option but to follow the findings of the previous court and direct the respondents now to make the payment to the petitioner in accordance with the scale of pay which the post carried at the time of sanctioning the same on the basis that the petitioner had actually been appointed against and discharged the duties of the said post during the period referred above.

Thirdly, that the petitioner is also entitled to payment under FR 49. FR 49 (3) is extracted hereinbelow:-

"Where a Government servant is formally appointed to hold charge of another post or posts which is of or are not in the same office, or which, though in the same notice, is or are not in the same cadre/line of promotion, he shall be allowed the pay of the higher post, or the highest post if he holds charge of more than two posts, in addition to ten percent of the presumptive pay of the additional post or posts, if the additional charge is held for a period of exceeding 39 days but not exceeding 3 months."

This court in a number of decisions had followed this rule contained in FR 49 and has directed that wherever the incumbent has actually worked in a higher post, the scale of pay attached to the said post, shall not be denied. In the present case as well the petitioner has been actually holding the post of Member(Finance) and the scale of pay normally available to an incumbent was not paid to the petitioner rather a lower scale of pay of Director was paid. Even though the petitioner was not actually holding a higher post but this is a case where the petitioner was granted a lower scale by denying higher scale of pay otherwise stipulated to be paid for the post of Member (Finance). It is, therefore, fit and proper that since respondents have not availed the opportunity to consider case in the light of the finding

(23)

that has become final, given by this court in the previous OA, that they be directed to make the payment to the petitioner in the scale of Rs. 5900-6700/- w.e.f. 19.7.1991 to 30.4.1993 deducting the actual amount already paid to him during the same period.

8. The second relief sought by the petitioner in this case is that the respondents may be directed to pay the salary in the scale of Rs. 7300/- for the period from 1.9.1992 to 22.2.1993 during which period the petitioner had held the additional charge of Chairman, SSSDC. The appointment to the said post was made by an order dated 1.9.1992. The said order is reproduced hereinbelow:-

"Lt.Gen K.R.Nath, AVSM, AOC(IC-7109 H) is relieved of his duties as OSD-cum-Chairman, Special Surplus Stores Disposal Committee, Ministry of Defence with effect from the afternoon of the 31st August, 1992.

2. Shri M.B.Usgaonkar, CSS, Member (Fin), SSSDC will discharge the duties of Chairman, SSSDC in addition to his own duties, till the substitute of Lt. Gen. K.R.Nath assumes charge, or until further orders, whichever is earlier."

It is clear from the said order that the petitioner did discharge the duties of the Chairman, SSSDC in addition to his own duties till the substitute of Lt. Gen KR Nath assumed charge or until further orders whichever is earlier. It is an admitted case that there was no substitute who took over charge of the Chairman from the petitioner nor any contrary orders had been passed during this period.

9. The submission made by the learned counsel for the respondents was that normally all the orders of this nature are passed in the name of the President while this



29

is not an order of that nature. Therefore, there is no formal appointment of the petitioner to the said post and this being only an appointment to look after the duties, the scale of pay of Rs. 7300/- could not be granted to the petitioner. The main contention of the learned counsel for the petitioner was that this case is squarely covered by FR 49(3). FR 49(3) is extracted hereinbelow:-

"Where a Government servant is formally appointed to hold charge of another post or posts which is of or are not in the same office, or which, though in the same office, is or are not in the same cadre/line of promotion, he shall be allowed the pay of the higher post, or the highest post if he holds charge of more than two posts, in addition to ten per cent of the presumptive pay of the additional post or posts, if the additional charge is held for a period of exceeding 39 days but not exceeding 3 months."

This Court in a number of decisions had followed this rule contained in FR 49 and has directed that wherever the incumbent has actually worked in a higher post, the scale of pay attached to the said post, shall not be denied. FR 49(3) read with OM dated 11.8.1989 issued by the Department of Personnel & Training in which guidelines have been laid down in the matter of entrustment of additional charge of any post, to an officer, the petitioner is entitled to the said payment as stated above. It is also pertinent to note that this court in the case of Tara Thomas Vs. Union of India & ORs. decided on 12.7.1991 and reported in 1992(19) ATC P. 26 relying on the said OM dated 11.8.1989 stated that the applicant therein was directed to look after the day to day work attached to the post and as such he was entitled to the salary and allowances attached to the said post.

This court in the previous OA namely OA 874/94 also considered this issue and applying the ratio of Tara

Thomas Vs. UOI observed that this is a covered case in terms of the OM dated 11.8.1989 as well as that of the case of Tara Thomas. The court in the said OA stated as follows:-

"The learned counsel for the respondents has argued that the applicant was given an additional charge of the O.S.D.-cum-Chairman SSSDC w.e.f. 30.8.1992. He was required to attend to the usual routine day-to-day work of the post only, as such, he was not given the pay of the Chairman SSSDC. For getting the benefit of FR 49(3), it is necessary that a Government servant is formally appointed to hold the charge of another post. A perusal of the relevant order shows that various orders appointing the applicant as Director (Finance) have been issued in the name of the President. It is not so in case of the order asking him to look after the work of the Chairman in addition to his own duties till a substitute is found. Obviously, this can only be termed as a stop gap arrangement. However, as held by this Tribunal in Tara Thomas case (supra), it was incumbent upon the respondents to follow the guidelines given in the O.M. dated 11.08.1989 and indicate clearly as to what type of duties of the post of Chairman he was expected to discharge."

11. Even after making the above said observation, the court did not proceed to pass an order immediately rather directed the respondents to reconsider the case of the petitioner for grant of payment in the scale of Rs. 7300/- and in the light of what has been observed by the said court. The court further directed that the case of the petitioner for fixation of pay during the period when he was looking after the work of the Chairman, SSSDC shall be reviewed in accordance with the judgement of this Tribunal in the case of Tara Thomas vs. UOI and, if a negative order is passed, reasons shall be given by the respondents and the said order shall be passed within a period of six months from the date of receipt of a certified copy of the Order.

In response to the said direction, the respondents

(31)

passed the impugned order by which they are said to have considered the case of the petitioner and rejected his claim for payment in accordance with the scale of pay of Rs. 7300/- applicable to an officer at the level of Additional Secretary. That part of the impugned order dated 17.4.1995 wherein this relief has been rejected as far as the respondents are concerned, is re-produced hereinbelow:-

"The case has been considered in the light of directions given by the Hon'ble C.A.T. and the judgement pronounced by the Tribunal in Tara Thomas case. The judgement in Ms Thomas case was given in terms of the special circumstances of that case and had specifically directed that she was not entitled to any extra salary in terms of provision of FR 49(i) and FR 49(iii). In the Tara Thomas case judgement the Hon'ble Tribunal did not lay down an universal principle of law. The request of Shri Usgaonkar for the benefit of extra-emoluments under FR 49(iii) for holding additional charge as Chairman, SSSDC is not sustainable as he was not formally appointed to hold charge of the post of Chairman, SSSDC. The formal appointment to the post of Chairman, SSSDC requires the approval of the ACC (Appointment Committee of Cabinet). The functioning of Shri Usgaonkar as Chairman, SSSDC was an informal one and was made in order to carry on the routine work (excluding the statutory functions) attached to the post of Chairman, SSSDC (the post being equivalent to Additional Secretary) on formal basis as Shri Usgaonkar was holding the post of Joint Secretary and that too on personal basis."

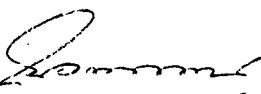
reasons stated above,
12. For the / we are inclined to allow the relief sought by the petitioner to the extent that even though the petitioner may not be entitled to scale of Rs. 7300/-, he would be entitled to a compensation for discharging the duties of the higher post which carried out the scale of 7300/-. The respondents shall calculate the payment due on

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(32)

the basis of the scale of Rs. 7300/- after deducting the actual amount already paid to the petitioner, the remaining amount shall be paid to the petitioner as a compensation for the petitioner who had been discharging the duties of the post of Chairman, SSSDC. We make it clear that we do not intend to pass an order directing the respondents to grant the scale of Rs. 7300/- rather he will be entitled only to a 'compensation' which shall be calculated by the respondents as stated above. We also make it clear that since the petitioner is not entitled to the scale of pay of Rs. 7300/-, even though he is entitled to the payment only as 'compensation', the question of revision of pension on the basis of last pay drawn does not arise at all. These directions shall be complied with within two months from the date of receipt of a copy of this order.

as contained in paras 7 & 12,
13. With these above directions, this OA is disposed of with no orders as to costs.


(S.P.Biswas)
Member (A)


(Dr. Jose P. Verghese)
Vice-Chairman (J)

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