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Central Administrative Tribunal
Principal Bench

O.A. 1050/2000

New Delhi, this the day of 11th May, 2001.

Hon'ble Shri Govindan S. Tampi, Member(A)

Shri B.R. Lal,
S/o Late Shri Bhai Thakur,
R/o B-7/75/1, DDA Flats,
Safdarjung Enclave,
New Delhi-110029.
(By advocate: Shri Shyam Babu)

...Applicant.

Versus

1. Union of India through
Comptroller & Auditor
General of India,
10, Bahadur Shah Zafar Marg,
I.P. Estate
New Delhi - 110002.
2. Accountant General (Audit) Delhi,
A.G.C.R. Building
I.P. Estate
New Delhi-110002.
3. Bank of India
Safdarjung Enclave Branch,
New Delhi 110029
through its Manager
(By advocate: Sh.M.K. Gupta)

Respondents

Order

By Shri Govindan S. Tampi, Member(A)

Applicant in this OA, challenges order No. PAO/PN-916/94-2000 issued by the Accountant General(Audit), Delhi and seeks a declaration directing his fixation of pay in the pay scale of Rs.2250-2500/- w.e.f. 26.4.82, when his junior was promoted to that grade or in the scale of Rs.5900-6700 w.e.f. 1.1.86, with all consequential pensionary/reitral benefits including arrears with interest. 2. The facts of the case as brought out in the application are that the applicant, belonging to the Indian Audit and Accounts Service, while working in the grade of Rs.2000-2250/- proceeded on deputation as Financial Adviser and Chief Accounts Officer in Chukha Hydel Project, Chimakothi, Bhutan and was granted the pay scale of Rs.2250-2500 w.e.f. 1.5.1980. While he was in the foreign service, he become eligible for promotion as Accountant General

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Level II in the scale of Rs.2250-2500 when his junior was promoted on 26.4.1982. But being on deputation, he was not so promoted. His representation dated 1.10.82 seeking refixation of his pay in the grade of Rs.2250-2500 inviting the attention to Note 7 below Rule 33 of the CCS (Pension) Rules, 1972, keeping in view his impending retirement on 31.5.1983, did not meet with any success. He remained on deputation till his superannuation on 31.5.1983 when he was informed that there would not be any material difference in his emoluments for the purpose of pension, as his pay of Rs.2250/- in Selection Grade of Junior Administrative Grade was the same as the minimum pay in Accountant General's grade. His pension was accordingly finalised at the stage of Rs.2250/-. Following the acceptance of the recommendations of the Vth Central Pay Commission w.e.f. 1.1.1990, pay of Govt. Servants who retired prior to 1.1.86 were fixed for purposes of pension in the scale of the post held by them at the time of their retirement. The scale of pay of Rs.2000-2250/- held by the applicant by the time of his retirement had become Rs.4500-5700 while the pay scale of Accountant General Level-II at Rs.2250-2500 which he became eligible to hold had become Rs.5900-6700 w.e.f. 1.1.1986. In view of the above, the applicant represented on 10.6.1998, for notional fixation of his pay in the grade of Accountant General Level-II, to which grade he would have been promoted but for his proceeding on foreign service. In response to the reference made to it by the respondents on 24.9.1998, Deptt. of Pension and Pensioner's Welfare confirmed on 13.11.1998 that "the pay which he would have drawn under the Government, had he not been on foreign service shall be treated as pay

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for the post held by the pensioner at the time of retirement" but left the decision with regard to holding of the post under the Govt. in a particular pay scale with the concerned administrative authority. In view of the above clarification, the applicant's pay was notionally fixed on 1.1.1986 and pensionary benefits were to be worked out accordingly. Therefore, his pension came to be fixed at Rs.9200/- in the revised pay scale of Rs.18,400-22,400 w.e.f. 1.1.1996 by letter dated 29.1.1999. As the applicant would have become Accountant General but for his proceeding on deputation, he requested that he be granted the above benefit w.e.f. April 1982, when his junior got the promotion. In reply to the above Deptt. of Pensions and Pensioners' Welfare gave a favourable clarification, endorsing his case in view of Note 7 below Rule 33 of the Central Civil Service (Pension) Rules, 1972. Still the respondents indicated in their order dated 19.8.1999 that had the applicant chosen to revert, when his junior was promoted as Accountant General, he also would have been placed in the rank of Accountant General and granted pay accordingly. However by their subsequent order dated 16.2.2000, respondents reduced without any notice the pension of the applicant from Rs.9200- to Rs.7150/- arbitrarily placing him in the scale of Rs.14,200-18,300, corresponding to the pre-revised scale of Rs.2000-2250. Applicant's representation against the same on 3.3.2000 and reminder dated 3.5.2000 had not been responded to. Hence the OA. Operation of the impugned order has been stayed by the Tribunal till the disposal of this OA.

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3. Shri Shyam Babu, learned counsel for the applicant states that as the applicant would have become Accountant General in the pay scale of Rs.2250-2500/- but for his deputation, his pay should notionally have been fixed at Rs.5900-6700 as on 1.1.1986 and the pension should have been worked out accordingly, followed by replacement process w.e.f. 1.1.96. This is supported by Note 7 below Rule 33 of the Pension Rules. Accordingly the first fixation of his pension at Rs.9200/- w.e.f. 1.1.96 was correct while the subsequent move to reduce the same to Rs.7150/- was therefore illegal. According to Shri Shyam Babu the applicant should have been considered for promotion even while he was on deputation, when his junior was considered for promotion and in fact promoted and there was no reason, it could have been denied. It was also worth-while to mention that the applicant had written to the respondents in this connection in October 1982 inviting their attention to the promotion of his junior and his own impending retirement in May 1983. Learned counsel also referred to the decision of the Hon'ble Supreme Court in the case of State of Mysore Vs. M.H. Bellary AIR 1965 Supreme Court 868 (V.52.C.135) wherein it has been held that " So long therefore the service of the employee in the new Deptt. is satisfactory and he is obtaining the increments and promotions in that Deptt., it stands to reason that satisfactory service and the manner of its discharge of the post he notionally fills, should be deemed to be rendered in the parent department also so as to entitle him to promotion which are open on seniority-cum-merit-basis". Natural corollary would therefore be to grant the applicant benefits flowing from the above promotion even if only notionally, which is also supported by Note-7 below Rule

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33 of the Pension Rules. Further the only correction permitted under Rule 70 of the Pension Rules was to rectify error, which was either a calculation mistake or accidental error, which was not the case in the present instance. Here a conscious decision has been taken to grant him pension @ Rs.9200/- p.m. which has subsequently been modified holding that he was not entitled for a particular grade. This would, in no circumstances be construed as a clerical error. As such, the downward revision of the pension retrospectively and that too without putting him on notice was improper and deserved to be set aside, urges Shri Shyam Babu.

4. Forcefully repelling the above contentions, Shri M.K.Gupta, learned counsel for the respondents argues that as the applicant was never promoted to and never held the post of Accountant General Level II, he was not entitled for the benefits of the higher posts as a few of his seniors were also awaiting promotion and as per terms of the deputation, the applicant on becoming due for promotion in the parent cadre was not entitled to financial benefits of the same during the period of deputation. Correct interpretation of Note 7 below Rule 33 is that the pay that the Government servant would have drawn had he not been in foreign service shall alone be treated as emoluments. The mere fact that a person junior to the applicant was promoted as Accountant General Level-II does not confer him any right for promotion as a few seniors were still awaiting promotion and the promotion on NBR can be given on one to one basis, which has been granted to one, much senior to the applicant. The applicant cannot have any grievance about it. Shri Gupta also informs that the

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respondents had already intimated the applicant on 27.11.82 that in terms of the terms of his deputation, merely on his becoming due for promotion in his parent office, while he was still on deputation he was not entitled for financial benefits of the same during the period of deputation. In response to a query from the Court Shri Gupta fairly conceded that one Shri S.C. Anand, who was admittedly junior to the applicant was promoted as Accountant General Level-II and continued to work in that capacity, but indicated that this promotion was a mistake and that one mistake per se would not grant any right to the applicant for promotion and consequent fixation of pay in the higher grade. As the applicant was never promoted as Accountant General Level-II, he could not have been granted the benefit of higher pay even if notionally with consequential retiral benefits. Hence the decision of the respondents by the impugned order dated 16.2.2000. The same cannot be questioned. According to Shri Gupta, the applicant's case would have been considered for promotion if he had got himself repatriated at the time when his junior was promoted and not otherwise. Note 7 below Rule 33, cited by the applicant did not come to his rescue. Nor did the reliance, placed by him on the decision of the Hon'ble Supreme Court, as his case was distinguishable in fact from the said in view of the specific terms of his deputation. Nothing also turned on the clarification given by the Department of Pension and Pensioners' Welfare dated 13.11.98, as the said authority had left the matter for the Administrative Authority to decide which they had correctly done. That being the case, the applicant has been correctly and legally dealt with and he had no reasons to complain. Respondents have only rectified a mistake, which they

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were legally bound and expected to do submits Shri Gupta. He also submits that the respondents would be prepared to issue a fresh notice and take a decision if the requirements of natural justice so warranted. In view of the above, the learned counsel felt that the impugned order deserved to be endorsed and the application dismissed.

5. In his rejoinder Shri Shyam Babu urges that it was not material for the applicant whether a few of his seniors were not promoted. It was strictly not his concern. But his concern was that one of his juniors had been promoted which gave him a cause of action and the same he was pursuing only for getting the pensionary benefits. He challenges the argument raised on behalf of the Department that it was incumbent on his part to have returned to the Department for being considered for promotion as there was no statutory prescription for the above. In the present application he was only questioning the downward revision of his pension which was correctly fixed, keeping in mind Note 7 below Rule 33 of the Pension Rules, among others. Shri Shyam Babu reiterates that the emoluments should have been worked out, not on the basis of what he has been drawing at the time of his deputation but what he would have drawn in the parent organisation but for his deputation. Fixation of pay could only have been on that basis and the impugned order which seeks to go against it was improper and deserved to be set at nought according to Shri Shyam Babu.

6. I have carefully considered the rival contention and perused the papers brought on record. In this case, applicant's pension fixed at Rs.9200/- has

been brought down to Rs.7150/- by the impugned order, without putting him on notice. Respondents have averred that they had taken this decision as the pension was wrongly fixed at Rs.9200/- keeping his pay notionally at Rs.18400/-, which in fact should have been reckoned only at Rs.14300/-, as the applicant had worked only in the grade of Rs.2000-2250/- at the time of superannuation. On the other hand, applicant's contention is that he was correctly entitled to be promoted as Accountant General Level-II in the grade of Rs.2250-2500/- before his retirement when his junior was so promoted and therefore his notional pay following the acceptance of Vth Pay Commission should have been fixed at Rs.18400/- and the pension Rs.9200/-, as was correctly done before its being illegally revised downwards. On examination of the issue, I find that the applicant's case has merit. The applicant proceeded on deputation in 1980 when he was during the pay scale of Rs.2000-2250/- and his pay on deputation was fixed in the scale of Rs.2250/2500/-. While he was continuing on deputation, his junior was promoted as Accountant General Level-II w.e.f. 26.4.1982, following which on 1.10.82 he wrote to the respondents seeking promotion/refixation which was replied by the respondents demi officially on 27.11.82 intimating that in terms of the deputation" officer becoming due for promotion in his parent department, while still on deputation, is not entitled to financial benefits of the same during the period of deputation." This does not in any way means that even after the deputation is over, the benefits can or should be held back. In fact while he was on deputation the applicant was placed and was drawing pay in the higher scale of Rs.2250-2500/- which he would have earned from April 1982 when his junior was promoted as Accountant General

Level-II, but for his deputation. There is therefore no question of his asking for the financial benefits of his promotion, while he continued to be on deputation. What has been asked for and granted originally and taken subsequently is the fixation of pay at the higher grade for fixation of pension. This is clearly covered by Note-7 below Rule 33 of the CCS (Pension) Rules 1972, which reads as follows:-

"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 above be treated as emoluments". (Emphasis supplied).

This note is sought to be interpreted by the respondents holding that as in the parent department he was not promoted to or held the post of Accountant General Level-II in the pay scale of Rs. 2250-2500/-, before his retirement on superannuation his emoluments would have to be worked out at the appropriate level in the lower scale of Rs. 2000-2250/-. Respondents do fairly concede that a junior of the applicant has been promoted but go on to describe it as a mistake which did not according to them give any right to the applicant to agitate. At the same time, it is pertinent that the respondents did not take any corrective action, if it was a mistake, but permitted it to continue. In fact in their letter dated 19.8.99 the respondents have averred as below "The fact that Shri Lal's junior was promoted to the grade prior to Shri Lal's retirement gives an indication that all those senior to him were also eligible for promotions, but they were not promoted because they were out of the Department. Therefore if Shri Lal had chosen to revert to the Department on 26.4.82, the date on which Shri Anand was promoted to

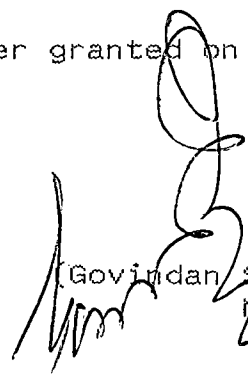
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the grade of A.G., he would have been placed in the rank of Accountant General (Level-II) and given the pay of the rank". On the basis of this communication, which has not been disputed by the respondents, it is evident that the applicant would have been placed in the rank and pay of Accountant General but for the fact of his not reverting to the parent organisation in April, 1982. Mere fact of his non-reversion from deputation did not extinguish his right for consideration for placement the rank and pay as Accountant General Level-II notionally for grant of consequential retiral benefits. Decision of the Hon'ble Apex Court in the case of State of Mysore vs. M.H. Bellary (Supra) squarely covers the situation. Accepting any proposition to the contrary would mean denying to the applicant, the benefit of pension on the basis of the pay he was actually ^{drawn} on ² deputation at the time of his retirement or the pay he would have drawn if he was not on deputation. Such a situation has no sanction in law. Besides, the fact that a few of his seniors who were similarly placed did not protest or acquiesced in the promotion of the junior Shri Anand does not militate against the claim of applicant, as he had made his representation, in the matter in October, 1982 itself, specifically keeping in mind his superannuation in May, 1983. In the circumstances, it is evident that the respondents had correctly interpreted the clarification given by Department of Pensions and Pensioners' Welfare on 13.11.98 and fixed his pay notionally at Rs.5900-6700/- w.e.f.1.1.86 and at Rs.18400-22400/- w.e.f. 1.1.96 and worked out his pension at Rs.9200/-. There was no reasonable ground or justification to revise it downwards. This decision was therefore wrong and has to be set aside. The applicant had also stated that the

downward revision in pension was ordered by the respondents without putting him on notice. In this connection, I find that the learned counsel for the respondents had stated at the bar that they would be prepared to do the needful to issue a notice to the applicant and rectify the omission if any concerning fulfilment of the principles of natural justice. To my mind, that would not now be necessary as the impugned order is being set aside not for violation of the principles of natural justice but on merits. I am also not convinced of the respondents' plea that what has been done is only the rectification of a mistake-a clerical error-of calculation and re-computation, as the downward revision ordered is on account of a wrong interpretation of law and incorrect application of ~~facts~~ facts by the respondents. The same therefore has to fail.

7. In the result, the application succeeds and is accordingly allowed. The impugned order dated 16.2.2000 is quashed and set aside with all consequential benefits to the applicant. The interim order granted on 1.6.2000 is made absolute.

No Costs.


(Govindan S. Tampi)
Member(A)

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