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CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH

O.A.No.669/2000
M.A.No.877/2000

Hon'ble Shri V.K.Majotra, Member (A)
Hon'ble Shri Shanker Raju, Member (J)

New Delhi, this the 11th day of July, 2001

1. Shri Kulwant Rai Gupta
MES No.355727
s/o Shri Shiv Nandan Gupta
r/o TP 121/Pritampura
Delhi - 34.

2. Shri Dev Raj Sachdeva
MES 355712
s/o Shri Ram Prakash Sachdeva
r/o C-I/122 Second Floor
Lajpat Nagar
New Delhi.

... Applicants

(By Advocate: Mrs. Meera Chhibber)

Vs.

1. Union of India through
Engineer-in-Charge
Army Headquarters
Kashmir House
New Delhi - 11.

2. Chief Engineer
Western Command
Chandimandir.

3. Commander Works Engineer
Airforce Palam
Delhi Cantt.
Delhi.

... Respondents

(By Advocate: Shri R.P.Aggarwal)

O R D E R

By Mr. Shanker Raju, Member (J):

MA 877/2000 for joining together is allowed.

2. The applicants, two in number, redesignated as Junior Engineers, have assailed the order passed on 7.12.1999 whereby on account of their non-passing of the departmental examination they have

been denied the scale of Rs.3000-3500 even after completion of 15 years of service as directed by the Bangalore Bench of this Tribunal in OA 1337, 1364 to 1375 of 1994 decided on 31.3.1995. The applicants have claimed accord of higher scale which has been revised to Rs.6500-10500 w.e.f. August, 1998 with all the consequential benefits.

3. The brief facts of the case are that the applicants have been promoted as Superintendents E&M Gr.II (hereinafter called as 'SE Gr.II') in the revised scale of Rs.1400-2900. On filing of OAs 1337, 1364 to 1375 of 1994 before the Bangalore Bench by some of the SE Gr.II claimed parity with Junior Engineers of CPWD have been allowed the claim by Judgement dated 31.3.1995 and directed the respondents to grant higher pay scale as paid to the Juniors Engineers in CPWD bringing the scale of Rs.1640-2900 as and when the complete five years of service in the grade w.e.f. 1.1.1986 and should complete 15 years to be accorded in the pay scale of Rs.2000-3500 w.e.f. 1.1.1991. The SLP preferred against the Judgement was dismissed on 9.4.1996. Similar OAs filed by Superintendent Gr.II were also allowed in the above terms. The respondents while implementing the directions of the CAT, Bangalore Bench vide letter dated 24.4.1996 allowed the said scales to all the similarly situated employees. Subsequently by a presidential letter dated 25.4.1996 sanction has been accorded for grant of higher scales to the individual Superintendent (BR/EM)/Surveyor Assistants Gr.I and II of MES. As per the respondents letter dated 24.4.1996 the applicant has become entitled for the scale of

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Rs.1640-2900 after five years as they were recruited as Superintendents in 1983 were rightly accorded first higher scale of Rs.1640-2900 w.e.f. 19.8.1988 vide an order dated 30.9.1996 without being subjected to any departmental examination.. Similar employees, i.e., Superintendent Gr.II who had completed 10 years were given both the scales after a gap of 5 and 15 years respectively, namely, Chandan Singh Verma, Shri Sunil Kaul and Shri Harbans Lal Gupta without subjecting them to any departmental examination/test etc. The pay of the applicants were revised on the recommendations of the Fifth Central Pay Commission and was fixed in the scale of Rs.5500-9000 w.e.f. 1.1.1996. The applicants have become entitled for second upgradation and accord of next scale of Rs.2000-3500 in August, 1998 after completion of 15 years service. As the scale was not granted the applicants have filed representation which was forwarded by their respective units showing their entitlement to the same. On 9.7.1999, on the sanction of the President, the Superintendent Gr.I and II has been redesignated as Junior Engineers and as such the applicants were accordingly redesignated as Junior Engineers. Vide the impugned order dated 7.12.1999 the applicants have been deprived of second revision of the pay scale even after completion of 15 years of service on the ground that though considered by the DPC but as they could not pass the MES departmental examination, they are not entitled for the pay scale. Subsequently, the Hon'ble High Court of J&K, Shri Kanwal Dev & Others Vs. Union of India & Others, CWP No.494/97, decided on 11.2.2000 while dealing with an

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identical issue ruled that the benefit of higher grade is not to be construed as promotion for which their should be a requirement to pass a departmental examination.

4. The learned counsel of the applicant at the outset while referring to the decision of the Bangalore Bench stated that while according parity to the applicants a formula has been drawn for grant of higher pay scales after expiry of five years and fifteen years respectively and there is no mention of any eligibility test to be passed by an incumbent for accord to these two pay scales. According to her what has been accorded to the applicants is upgradation and not a promotion as such the applicants are not to be subjected to any departmental test as a pre-condition for accord of the pay scales. By referring to the decision of the J&K High Court (supra) our attention has been drawn to the fact that therein it has been held that requirement of passing a departmental examination would arise only if the employee is promoted from lower hierarchy. But if he has to acquire the status of a certain grade on account of the judgement of this Tribunal then insistence on passing of test would not arise. The learned counsel of the applicant has by drawing our attention to the Presidential order issued on 25.4.97 stated that accord of pay scale would be on the basis that the applicants are not declared unfit. There is no applicability of FR 22 (1) (9) (i) and for accord of the second pay scale of Rs.2000-3500 after completion of 30 years that has been subjected to fitness. What

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has been laid down in this order is that in case of non-availability of vacancies in the grade the higher scale is accorded which is to be treated on personal basis and a reference to personal promotion is not in fact regular promotion for which the normal procedure is to be adopted but only fitness is to be seen which is on the basis of the ACR etc. and in that event this is not the case of the respondents that the applicant was in any manner unfit to be accorded the pay scale. It is further stated that in case of regular vacancy the promotion has to be made by observing the normal procedure. It has also been highlighted that by accord of this personal promotion there is no change in the performance of any duties and functions which clearly demonstrate that it is not a regular promotion, otherwise there is no question of according them the benefit of FR 22(1)(a)(i). It is in this conspectus stated that the Presidential order is final and cannot be over-ridden by executive orders passed by the respondents on 24.4.97 and 28.4.2000, where it has been clarified that before accord of pay scale and passing of examination held by CME would be compulsory w.e.f. 1.1.98. It is also stated that these letters do not pertain to accord of second pay scale on completion of 15 years of service as the reference has been made to the pay scale of Rs.1640-2900. The applicant has further alleged discrimination by stating that the similarly situated persons viz. Sh. Sunil Kumar, Superintendent Grade II, Chandan Singh Verma as well as Harbans Lal Gupta vide orders issued by the respondents have been accorded both pay scales without passing any test. In

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this way, subjecting the applicants to the test for accord of benefit of pay scale in view of the decision of the Bangalore Bench (supra) would be violative of Articles 14 and 16 of the Constitution of India. The applicants have placed reliance on Ajay Jadhav v. Govt. of Goa and Others, 2000 (1) AISLJ SC 223, K.C. Sharma & Others v. Union of India & Others, 1997 (6) SCC 721 and Kamlakar & Others v. Union of India & Others, 1999 (2) AISLJ SC 309. In all these cases it has been laid down that similarly situated persons should not be meted out a differential treatment which would not be in consonance with Articles 14 and 16 of the Constitution of India. It is also contended that the upgradation which has been allowed to the applicants is on account of stagnation and the High Court decision referred to supra has not been challenged by the respondents and is still to be over-ruled and as such is a binding precedent. As the applicants have already been granted the first pay scale Annexures R-1 and R-2 letters issued by the respondents cannot have any application.

5. The respondents in their reply rebutted the contentions of the applicants and further stated that the ratio of J&K High Court supra would not be applicable as the circulars issued by the respondents have not been brought to the notice of the Court and the aforesaid case has not been contested by the Department. It is also stated that the issue therein was of accord of scale of Rs.1640-2900 and the same would not apply to the case of the applicants. It is also contended that the Bangalore Bench decision has

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only granted pay upgradation and the recruitment rules existing and stipulating passing of examination is mandatory. It is stated that grant of higher pay scale to Engineering cadre is subject to the fitness which, inter alia, includes passing of any procedural examination. By referring to the Presidential order it is stated that by way of this order the promotion has been accorded to the applicant and the accord of pay scale is subject to fitness. As regards the Annexures R-1 and R-2 two clarifications issued by the respondents, it is contended that the same have not superseded the Presidential order and are only clarificatory in nature. By referring to the J&K High Court decision it is contended that the JEs have two pay scales and on personal promotion benefit of promotion is given. It is stated that after completion of 15 years of total service the promotion will be on fitness and as and when regular vacancy of Assistant Engineers arises such officers who have been accorded personal promotion will be adjusted against those vacancies subject to normal procedure. As the applicants have not passed the departmental examination they have not been accorded the benefit of revision of pay scale after completion of 15 years service which has been made compulsory w.e.f. 1.1.98 as a policy decision. The respondents have denied any discrimination meted out to the applicants in view of their policy letter dated 24.4.97 as after 1.1.98 the departmental examination is mandatory and as the applicants have become eligible for grant of second revision of the pay scale, letter issued in November, 1998 is binding on them. It is also stated that the

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applicants are neither degree nor diploma holders as such the examination was made compulsory as per the recruitment rules.

6. The applicants in their rejoinder re-iterated their contentions raised in their OA. It is further stated in the rejoinder that the J&K High Court in its judgement has categorically observed that Grade I and Grade II have since merged and as such on merger the petitioners therein are right that they are entitled to be designated as Superintendent. A new policy regarding merging the post of Superintendent EMI automatically stands abolished as there is only one post existing i.e. of G.O. and as such no examination is required to be passed to continue in the existing post.

7. We have carefully considered the rival contentions of the parties and perused the material on record. As regards accord of first pay scale of Rs.1640-2900 to the applicants in the grade II Superintendent is concerned, the same has not at all been disputed and disturbed by the respondents. The applicants in view of the decision of the Bangalore Bench and the decision of the respondents take on 24.4.96 as a policy decision have been accorded. The said revision as soon as they had completed five years of service from 1983 and were accorded the benefit w.e.f. 19.8.88 vide order dated 30.9.96. The resort of the respondents to Annexures R-1 and R-2 letters issued on 24.4.97 and a clarification issued on 28.4.2000 wherein passing of CME examination for grant

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of higher pay scale of Rs.1640-2900 is made compulsory w.e.f. 1.1.98 would not be applicable to the applicants as they have already been accorded the said scale by the respondents much before the cut off date.

8. As regards the aforesaid clarification, presuming without admitting that the same are to be made applicable to the applicants before accord of certain scale of Rs.2200-3500 now revised by the Fifth Pay Commission is concerned, we find that the implementation of the decision of the Bangalore Bench has been put at rest by issuance of the Presidential order on 25.4.97 wherein while according grant of second upgradation of pay scale of the applicants on completion of 15 years total service in the scale of Rs.2000-3500 would be on the basis of fitness and would be treated as personal promotion and is to take place when there is no availability of vacancy in the grade. In case the regular vacancies in the grade are available then officers would be adjusted and at that time there arises need for observance of the normal procedure which may include passing of the departmental test. The accord of benefit of FR 22 (a) (1) (i) in pay fixation would not itself make it a regular promotion for which a departmental test is to be passed. Accord of pay scale on the fitness basis of CRs etc. of the incumbent. One more thing which supports the contention of the applicants regarding the issue of grant of pay scale not being a promotion is that on this grant of scale an personal promotion the incumbent have to perform the same duties and functions of the posts which they are holding and this

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would indicate that the grant of scale is not a promotion as contended by the respondents, otherwise, incumbent has to perform the duties and responsibilities of higher post. Had this been a promotion then there would not have been any occasion for the respondents to have restricted the pay fixation under FR 22 (a) (1)(i). To our considered view in case of non-availability of vacancies and on completion of 15 years of service and in view of the ratio laid down by the Bangalore Bench and implemented by the Presidential order there is no requirement for passing the departmental examination. Any letter issued contrary to the Presidential order issued on 25.4.97 which does not lay down a pre-condition for passing the departmental test before accord of pay scale would amount to supersession of the Presidential order by only issuing an administrative instruction and would not be legally tenable. The contention of the respondents that the letters issued at Annexures R-1 and R-2 are only clarificatory is ex facie inconsistent as there is no reference of passing of a departmental test in the Presidential order and the same cannot be brought into operation by way of a modification under the guise of a clarification.

9. Another mitigating factor which would entitle the applicants to this revision of the pay scale after completion of 15 years is that they have been subjected to hostile discrimination vis-a-vis others who have been similarly situated. We find from the record that similarly situated officers while being accorded the benefit of first scale have been

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simultaneously accorded the benefit of the second scale on completion of the 15 years of service without being subjected to any departmental test. The applicants who have been similarly situated in all respects have been meted out a differential treatment by mis-interpreting the orders issued by the President and unmindful of the decision of the J&K High Court (supra), which has attained finality would amount to treating the equals unequally. We do agree with the applicants that they have been arbitrarily discriminated in violation of Articles 14 and 16 of the Constitution of India. The ratio as referred to supra relied upon by the applicants' counsel squarely covers the present case where similarly placed persons have been treated differently. The applicants are also entitled to be accorded the benefit of second upgradation of pay scale on completion of their 15 years service in August, 1968. As the applicants on the basis of their CRs etc. are not found unfit and this is also not the case of the respondents they cannot be deprived of the same arbitrarily or on the basis of the decision of the respondents taken by way of a clarification contrary to the Presidential order passed on the subject.

10. The decision of the High Court of J&K, referred to supra though deal with the accord of pay scale of Rs.1640-2900 has also dealt with the issue after the merger and what has been held is not referring to first pay scale but the fact that passing departmental examination is necessary when an employee is promoted from lower hierarchy. As we have already

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found that the accord of pay scale would not amount to promotion the ratio which has attained finality by its non-challenge by the respondents would apply to the facts and circumstances of the case and would be a binding precedent. We also agree with the contentions of the applicants that on re-designation of Superintendent Grade I and II as Junior Engineers w.e.f. 9.7.99 there is no requirement for them to have passed the departmental examination to continue in the said re-designated post.

11. Having regard to the discussion made above and the reasons recorded we set aside the letters issued at Annexures P-1 and direct the respondents to release to the applicants the higher pay scale of Rs.2000-3500 as revised to Rs.6500-10500 w.e.f. August 1998 when they had completed the requisite 15 years of service and also to grant them all the arrears and other benefits within a period of two months from the date of receipt of this order. The O.A. is allowed in the above terms, but without any order as to costs.

S. Raju

(SHANKER RAJU)
MEMBER(J)

'San.'

V.K. Majotra

(V.K. MAJOTRA)
MEMBER(A)