

CENTRAL ADMINISTRATIVE TRIBUNAL,
MUMBAI BENCH, MUMBAI

ORIGINAL APPLICATIONS Nos.512/2013, 187, 195, 196 & 218 of 2014

Dated this Wednesday, the 04th day of March, 2020CORAM: DR. BHAGWAN SAHAI, MEMBER (A)
RAVINDER KAUR, MEMBER (J)(1) OA No.512/2013Shaukat Hasan Inamdar, Accountant, Head Record Office,
R.M.S.-'B' Division, Pune 411 001 (R/o 213/1636, Sant
Tukaram Nagar, Pimpri, Pune – 18. - Applicant

Versus

1. The Union of India, Through The Secretary,
Department of Posts, Dak Bhawan, Sansad Marg,
New Delhi 110 001.
2. The Chief Post Master General, Maharashtra Circle,
GPO Building Bombay 400 001.
3. The Head Record Office (Accounts), R.M.S. 'B' Division,
Pune 411 001.
4. The Superintendent of Railway Mail Service 'B' Division,
Pune 411 001. - Respondents

(2) OA No.187/2014Shrikant Ramlochan Dubey, Aged about 50 years,
Presently working as Accountant, Chembur Head Post Office,
Sandu Garden, Chembur, Mumbai 400 071 and R/at: Sitaram Pol
Chawl, Room No.3, Anand Nagar, Jangal Mangal Road,
Bhandup (W), Mumbai 400 078. - Applicant

Versus

1. Union of India, Through The Director,
Office of the Director General of Posts, Department of Posts,
Establishment Division, Dak Bhawan, Sansad Marg,
New Delhi 110 001.
2. The Chief Post Master General, Maharashtra Circle,
G.P.O. Mumbai 400 001.
3. The Post Master, Chembur Head Post Office,
Near Sandu Garden, Chembur,
Mumbai 400 071. - Respondents

(3) OA No.195/2014

1. Ashok Tukaram Sawant, Aged about 52 years,
Presently Working as Accountant,
Chembur Head Post Office, Sandu Garden, Chembur,

Mumbai 400 071 and Presently Residing at Ganeshwadi, Chawl No.3, Room No.8, Ganeshwadi, R.B.Kadam Marg, Bhat Wadi, Ghatkopar (West), Mumbai 400 086.

2. Smt. G.Laxmi, Aged about 50 years, Presently working as Accountant in the office of the Senior Superintendent of Posts, Mumbai City, Bhandup (E), Post Office Building Bhandup, Mumbai – 400 042 and presently residing at Plot No.129, Flat No.104, Kansai Section, Ambarnath (E), District Thane 421 502.
3. Priyanka Prakash Chavan, Aged about 50 years, Presently working as Accountant, Mumbai GPO, Near CST Railway Station, Mumbai 400 001 and Residing at F-002, Mangalmurti Cooperative Housing Society, Delise Road, Mumbai 400 013.
4. Chandrakant Keshav Surve, Aged about 50 years, Presently working as Accountant, Mumbai GPO, Near CST Railway Station, Mumbai 400 001 and Residing at B/302, Siddhi Residency Cooperative Housing Society, 1st Road, Saiprastha Complex, Nalasopara (W) 401 203.
5. Smt. Ruchira Ravindra Taware, Aged about 50 years, Presently working as Accountant, Dadar Post Office opposite Pritam Hotel, Dadar, Mumbai 400 014 and Residing at Sai Siddhi, Room No.205, 2nd Floor, Umarchedi, Mumbai 400 009.
6. Sanjay Kumar Ramchandra Ghadigaonkar, Aged about 52 years, Presently working as Accountant office of the Senior Superintendent of Post Offices, Mumbai City Sub Division, GPO, New Building, 6th Floor, Mumbai 400 001 and residing at 53/31 Purvarang Tata Colony, Navghar Road, Mulund (E) Post Office 400 081.
7. D.K. Abnave, Aged about 62 years, Retired Accountant, Mumbai G.P.O., Near C.S.T. Railway Station, Mumbai 400 001 and Residing at B-1, Room No.209, Nav Maharashtra Nagar, M.P. Mill Compound, Tardeo, Mumbai 400 008.
8. Madhukar Sakharam Sonawane, Aged about 57 years, Presently working as Accountant, Office of the Senior Superintendent of Post Offices, Mumbai City North Division, Post Office Building Andheri, Mumbai 400 053 and Residing at: 'Aboli' Co-operative Housing Society, 2nd Floor, Room No.205, Golovali, Kalyan – Shil Road, Dombivali (East), District Thane 421 205.
9. Milind Mahadev Acharya, Aged about 51 years, Presently working as : Accountant, Palghar Post Office, Mahim Road, Palghar, District Thane 401 404 and

Residing at Chandradeep Apartment, Block No.1, C Wing,
Mahim Road, Palghar, District Thane 401 404.

10. Sanjay Atmaram Kshirsagar, Aged about 50 years,
Presently working as Accountant, Office of the Senior
Superintendent of Post Offices, Mumbai City,
North West Division, Kandivali (E), Mumbai 400 101 and
Residing at: 106, Shree Shivdarshan Co-op Hsg. Soc.,
Samarthnagar, Mojos Wadi, Jogeshwari, Mumbai 400 060.
11. Santosh B. Parab, Aged about 43 years,
Presently working as HSG II Accountant, Mumbai GPO,
CST Railway Station, Mumbai 400 001 and
Residing at D/205, Opp Poonam Cosmos School,
Janata Market, Bhandup (West) 400 708. - Applicants

Versus

1. The Union of India, through The Director,
Office of the Director General of Posts,
Department of Posts, Establishment Division,
Dak Bhavan, Sansad Marg, New Delhi 110 001.
2. The Chief Post Master General, Maharashtra Circle,
G.P.O. Mumbai 400 001. - Respondents

(4) OA No.196/2014

1. Smt. Mamata Keshav Madanani, Aged about 50 years,
Presently working as Accountant, Thane Head Post Office,
Near Thane Collectorate, Thane 400 601 and
Presently residing at: 2nd Floor, Kamalesh Society,
Thane 400 603.
2. Shrikrishna Janardan Sail, Aged about 58 years,
Presently working as : Accountant, Chinch Bandar Head
Post Office, Near Masjid Railway Station, Mumbai 400 009
and Residing at: 303, Mani Dham Co-op Hsg. Soc.,
Station Road, Behind Bank of India, Kalva (West),
District Thane 400 605.
3. Ramesh Ramdas Shah, Aged about 58 years,
Presently working as Accountant, Kalbadevi Post Office,
Near Parsi Temple, Mumbai 400 002 and
Residing at A4/3/9, Asmita Complex, Phase II,
Near Siddivinayak Temple, Titwala (East),
District Thane 401 404. - Applicants

Versus

1. The Union of India, The Director,
Office of the Director General of Posts, Department of Posts,
Establishment Division, Dak Bhavan, Sansad Marg,
New Delhi 110 001.
2. The Chief Post Master General, Maharashtra Circle,
G.P.O. Mumbai 400 001. - Respondents

(5) OA No.218/2014

1. Smt. Vaibhavi Anand Javkar, Aged about 40 years, Presently working as: Accountant, Dadar Post Office, Near Prital Hotel, Dadar, Mumbai 400 014 and residing at L-4/A/303, Ashwath Co-op. Hsg. Soc., Pratiksha Nagar, Sion (East), Mumbai 400 022.
2. Pralhad Tulsiram Meshram, Aged about 44 years, Presently working as : Assistant Post Master (Accounts), Kalbadevi Post Office, Near Parsi Temple, Mumbai 400 002 and Residing at: A-101, Shivalaya Complex, Phase II, A Wing, Omkarnagar, Behind Lokvatika, Near Marathi School No.19, Netivali, Kalyan (East), District Thane 421 306.
3. Chiman Bhagwan Tettumbde, Aged about 50 years, Presently working as: Accountant, Office of the Chief Post Master General, Maharashtra Circle, Near CST Railway Station, GPO, Mumbai 400 001 and residing at Shrey Apartment, Room No.16, Datta Chowk, Belavali, Badlapur (West), District Thane 421 503.
4. Smt. Rajashree Mahesh Alwe, Aged about 41 years, Presently working as Accountant, Mumbai Central Post Office, Near Railway Station, Mumbai 400 008 and Residing at 202/203, Sidhant Building, 2nd Floor, A Wing, G.D.Ambekar Marg, Opp. Nirlep House, Parel Village, Mumbai 400 023.
5. Smt. Uma Subramaniam Mudaliar, Aged about 44 years, Presently working as Accountant, Kalyan City Head Post Office, Post Office Building, Kalyan District Thane and residing at 201, Sangam Society, Adarsh Colony, Thane (East) 400 603.
6. Smt. Sushma Dhaku Parab, Aged about 45 years, Presently working as Accountant, Dadar Post Office near Pritam Hotel, Dadar, Mumbai 400 014 and residing at Building No.10, Room No.4, Opp. Manisha Nagar, Sai Baba Colony, Sai Baba Nagar, Kalva (West), District 400 605.
7. Smt. Sunita Narsu Amle, Aged about 45 years, Presently working as Accountant, PLI GPO Building, Near CST Railway Station, Mumbai 400 001 and residing at 2-11/C, Sankalpa Building, Sane Guruji Marg, Chinchpokali, Mumbai 400 012.
8. Smt. Seema Jagdeep Bhangre, Aged about 35 years, Presently working as Accountant, Mumbai GPO, Near CST Railway Station, Mumbai 400 001 and residing at A-1/605, Krishna Kunj Mangeshi Sahara Near Chhabi Bungalow, Chikanghar, Kalyan (West), District Thane 421 301.

- Applicants

Versus

1. Union of India, The Director,
Office of the Director General of Post, Department of Posts,
Establishment Division, Dak Bhavan, Sansad Marg,
New Delhi 110 001.
2. The Chief Post Master General, Maharashtra Circle,
G.P.O. Mumbai 400 001. **- Respondents**

Appearances :

Ms. Sujatha Krishnan, learned counsel for the applicant in OA No.512/2013.

Shri S.R.Atre, learned counsel for the applicants in OA Nos.187, 195, 196 and 218 of 2014.

Shri N.K.Rajpurohit, learned counsel for the respondents in OA No.512/2013 and 187/2014.

Shri D.A.Dube, learned counsel for the respondents in OA No.195 & 218 of 2014.

Shri R.R.Shetty, learned counsel for the respondents in OA No.196/2014.

Shri V.S.Masurkar, learned counsel for the respondents in OA No.218/2014.

Order reserved on : 15.10.2019

Order delivered on : 04.03.2020.

ORDER

Per : Dr. Bhagwan Sahai, Member (A)

The following five OAs have been filed by the applicants seeking reliefs as follows:

Sl. No.	OA Nos. Date of filing	Name of Applicants	Impugned Order under challenge	Main relief sought
1	<u>512/2013</u> 07.08.2013	Shankar S Inamdar	25.07.2013 & 07.06.2013	quashing and setting aside of the impugned orders dated 25.07.2013, 07.06.2013 and 10.01.2013
2	<u>187/2014</u> 06.03.2014	Shrikant Ramlochan Dubey	30/12/99	issued by the respondent No.3 and 4 respectively, and direction to respondents to restore basic pay of applicants received upto
3	<u>195/2014</u> 10.03.2014	Ashok Tukaram		

		Sawant and 10 Ors	30.09.2008, holding and declaring that they are entitled for pay fixation by inclusion of Special Allowance/ Special Pay of Rs.180/- in basic pay on their Time Bound Promotion in Scale of Pay of Rs.4500-125-7000 and to refund the amounts recovered from their pay, along with grant of second financial upgradation under MACP Scheme after restoring their pay as above and provide cost of these O.As.
4	<u>196/2014</u> 06.03.2014	Smt. Mamata Keshav Madanani & 2 Ors.	
5	<u>218/2014</u> 06.03.2014	Smt. Vaibhavi Anand Javkar & 7 Ors	

As the subject matter of these OAs is the same and reliefs sought are also identical, with consent of the counsels of parties in all these OAs, they were heard together on 15.10.2019 and are being decided by this common order, taking OA No.187/2014 as the lead case.

2. Summarized relevant facts:

2(a). The applicant Shri S.R. Dubey joined as Postal Assistant from 14.09.1982. At the time of filing this OA, he was working as Accountant in Chembur Head Post Office, Mumbai. The respondents held an Accountants examination in May, 1992 for appointment to posts of Accountants in Post Offices and Railway Mail Service. As per the Promotion Rules, those who passed that examination were declared as eligible for those promotions (Annex A-2). The Postal Assistants appointed as Accountants after passing the above

examination in Ordinary Time Scale of Pay also drew a special pay as per their seniority in their clerical cadre.

2(b). After passing the above examination, the applicant was appointed as Time Scale Accountant vide order dated 09.10.1992 and was posted at Chembur Head Office (Annex A-3). Thereafter, he was considered by DPC on 17.12.1998 and granted one time bound promotion in pay scale of Rs.4,500-7,000/- vide order dated 08.01.1999 with effect from 18.09.1998 (Annex A-4).

2(c). The order of Ministry of Finance, Government of India dated 26.08.1960 directed payment of special pay as per the Schedules attached to Central Civil Services (Revised Pay) Rules, 1960, when it was part of the pay meant for the post. As per the above OM, special pay of Rs.35/- was to be drawn by an Accountant and Rs.25/- by an Assistant Accountant in lieu of separate higher scale of pay in Post Offices, Railway Mail Services and Telegraph Offices and it was to be treated as part of pay towards fixation of pay on promotion to higher posts, subject to the conditions mentioned in Ministry of Finance OM dated 26.02.1965.

2(d). Under Fundamental Rule 9(25), Appendix A - Grant of special pay to various categories of Government servants and its treatment for the purpose of fixation of pay on promotion is provided, Special pay is to mean an addition of the nature of

pay to emoluments of a post or of a Government servant granted in consideration of specially arduous nature of duties or specific addition in work or responsibility.

2(e). The applicant initially represented to Director of Accounts (Postal), Nagpur for fixing his pay accordingly on promotion under time-bound promotional scale of LSG Accountants. He was informed on 05.09.2000 that for counting special allowance of Rs.180/- as part of basic pay, the matter had been referred to the Directorate by Chief Post Master General, Maharashtra Circle, Mumbai by letter dated 14.03.2000 and decision thereon would be informed to him.

2(f). As per DOPT OM dated 22.04.1998 (Annex A-8), issued on acceptance of V Central Pay Commission recommendations (paragraph No.109.4), the Government decided that special pay already admissible would be doubled in those cases where it was sanctioned at the current rate between 01.01.1986 and 31.12.1990 and enhanced by 50% in those cases where it was revised or introduced at higher than current rates after 31.12.1990. It was further provided that wherever the special pay had been sanctioned as a percent of the basic pay, the quantum would be decided in consultation with that Department or Ministry of Finance. That DOPT OM further provided that the Special Pay would henceforth be termed as Special Allowance as per recommendations of V

Central Pay Commission and it would be granted subject to same conditions as are stipulated in Fundamental Rule 9(25) (Annex A-8). The applicant claims that as per the above DOPT OM, the Special Pay which was granted to him earlier was only to be treated as Special Allowance and the conditions of its grant would remain the same as provided in the Fundamental Rules 9(25).

2(g). One Shri S. Mohan Kumar was promoted as Accountant at Head Record Office, Bengaluru on 01.11.1984 and his appointment carried as Special Pay of Rs.90/- under One Time Bound Promotion Scheme from 05.11.1997. He was placed in higher grade after completing three years of service as Accountant and his pay was fixed by considering the Special Pay of Rs.90/- which he had received for more than three years. However, by memorandum dated 18.08.2001, he was informed that fixation of his pay on promotion under the One Time Bound Promotion Scheme by including Special Pay of Rs.90/- was erroneous and therefore, re-fixation of his pay and recovery would be made. This was on the basis of DOPT OM dated 22.04.1998 which provided that the Special Pay was to be treated as Special Allowance and was not to be counted as part of Basic Pay for pay fixation and that order of that OM would take effect from 01.08.1997.

2(h). Shri S.Mohan Kumar challenged that order of respondents before Bengaluru Bench of the Tribunal in OA No.296 of 2002 and by order dated 22.10.2002, the Tribunal set aside the order of refixation of his pay and recovery because he had already received pay as per the pay fixation which resulted in accrual of vested rights to him and it could not be taken away by a memorandum issued by the respondents subsequently with retrospective effect (copy Annex at A-9). A challenge to that decision of the Tribunal in Writ Petition No.7593 of 2003 in Karnataka High Court, (Bengaluru Bench) was dismissed on 10.11.2010 (Annex A-10) upholding the decision of the Tribunal. An SLP filed by the respondents against that High Court order was also dismissed for delay and on merits by the Apex Court order dated 05.07.2012 (Annex A-11).

2(i). After knowing about the Apex Court order in case of S.Mohan Kumar, the applicant submitted representations on 18.09.2012 and 23.10.2012 pointing out that his pay on his One Time Bound Promotion should have been fixed by including the Special Allowance received by him as had been allowed in S.Mohan Kumar's case. When he was promoted as Accountants on 01.08.1992 he had been granted the Special Pay of Rs.90/- which he received for more than three years and it should have been included in his basic pay when it was

refixed on his One Time Bound Promotion from 28.09.1998. This was because the subsequent grant of Special Allowance to him was as per the same conditions under Fundamental Rules 9(25).

2(j). But a general circular was issued by the respondent No.1 i.e. Director, Office of Director General of Posts, Department of Posts (Establishment Division), Dak Bhawan, Sansad Marg, New Delhi dated 11.01.2013 that the benefit of inclusion of Special Pay as part of basic pay on promotion/financial upgradation will be extended only in those cases where the promotions or financial upgradation had taken place on or after 01.08.1997 and before 22.04.1998 (Annex A-12).

The applicant further submitted a representation on 11.01.2013 requesting that he should be granted all benefits of inclusion of Special Pay / Special Allowance as part of the basic pay as had been done in case of S. Mohan Kumar. Not fixing of his pay by the respondents by including the Special Pay/ Special Allowance of Rs.90/- and Rs.180/- as part of his basic pay as provided under Fundamental Rule 9(25) is illegal and bad in law. Hence, this OA has been filed.

3. Contentions of the parties:-

The applicant and his counsel on 15.10.2019 have contended that -

3(a). when he was appointed as Time Scale Accountant from 09.10.1992, that post carried a Special Pay of Rs.90/- in lieu of higher scale of pay. When he was promoted under One Time Bound Promotion from 28.09.1998, the Special Pay of Rs.90/- per month was doubled to Rs.180/- as Special Allowance and that should have been included as part of basic pay in his pay fixation from 08.01.1999. But this has not been done by the respondents causing loss to him. Therefore, the Special Allowance of Rs.180/- should be included as a part of basic pay and he should be granted all due benefits accordingly, along with appropriate interest;

3(b). non-inclusion of the Special Allowance of Rs.180/- in his basic pay when he was promoted in September, 1998 is illegal and contrary to DOPT OM dated 22.04.1998, which stipulated that the Special Allowance at double rate would be granted as per provisions of Fundamental Rules 9(25). Such Special Pay or allowance is to be included in Basic Pay as provided under Fundamental Rule 22(a)(1) as it was done under Fundamental Rules 22(c). The action of the respondents in not doing this is illegal and bad in law and therefore, the OA should be allowed.

3(c). the contention of the respondents that Special Allowance was not to be taken into consideration during fixation of pay under TBOP is incorrect as evident from the decision in S.

Mohan Kumar Vs. PMG, Bengaluru. The orders issued by the Directorate on 10.01.2013 are contrary to the above judgment and there are no intelligible criteria having nexus with the date of promotion of an officer between 01.08.1997 to 22.04.1998 and others promoted after 22.04.1998. Once service benefit of Special Pay / Allowance is allowed to a Government servant, it cannot be withdrawn by an executive order with retrospective effect as the order dated 10.01.2013 is an executive order having effect from 22.04.1998 without any change in Recruitment Rules, Fundamental Rules and Service Rules;

3(d). the Special Pay/Special Allowance has been treated as part of pay from 23.11.1983 to 22.04.1998 for all Accountants and after 22.04.1998 it was allowed to Accountants such as Shri R.R. Dubey, Shri Shirang Sakpal, Smt.Poornima Angnekar and many others. There is no legality in discriminating the applicants from such other Accountants on artificial and unreasonable grounds. The DOPT OM under reference clearly stated that the nomenclature of Special Pay had been changed to Special Allowance, however, the terms and conditions remained unchanged;

3(e). since the applicant has been drawing Special Pay of Rs.90/- as part of pay, after having been treated as part of pay, inclusion of the Special Allowance in pay cannot be denied in contravention of the Fundamental Rules. The orders of

Ministry of Finance dated 26.08.1960 are obsolete and they have to be interpreted in view of the relevant OM because in 1960 the concept of TBOP/MACP was not there. The DOPT OM under reference was to decide the quantum of Special Pay and it does not make any change in the existing decision as mentioned in Para (d) that the Special Pay will henceforth be termed as Special Allowance and will be granted under the same terms and conditions. The minimum eligibility for promotion to higher post is 10 years of service as Accountant and if there is no vacancy available for promotion, then a person would be granted the TBOP after 10 years of service and the pay fixation is to be done in the same way as it is done on promotion to a higher post; and

3(f). The applicant has attempted to benefit from these caselaws:-

(i). High Court of Karnataka at Bangaluru in Writ Petition No.7593/2003 in case of S. Mohan Kumar, (Para 5) held that -

“once a vested right has accrued in favour of the Employee in terms of the Rules which governed him on the day the said benefit was extended and he had worked continuously for 3 years and drawn the said amount. Merely because some recommendations were made in the V Pay Commission that would not have the effect of taking away a vested right in him.”

(ii). Decision of Jaipur Bench of the Tribunal dated 10.11.2017 in O.A.463/2015 in case of Mohd. Yusuf Khan Vs.

Union of India, through Secretary, Ministry of Communications & IT, Department of Posts & others, held that re-fixation of pay of the applicant therein by excluding the Special Pay was illegal and the respondents were directed to re-fix his pay on promotion by considering his Special Pay and to refund Rs.20,968/- to him which had been wrongly recovered from his pay.

(iii). Rajasthan High Court (Jodhpur Bench) decision dated 06.10.2018 in case of Union of India and others Vs. Mohd. Yusuf Khan observed that the respondents in O.A.463/2015 failed to justify relevance of restricting benefit between two dates i.e. the benefit of Special Pay restricted for promotion / financial upgradation between 01.08.1997 till 22.04.1998. The DOPT OM dated 22.04.1998 gave the benefit with effect from 01.08.1997 to increase the Special Allowance by doubling it which meant that those who were earlier in receipt of Special pay of Rs.90/- would thereafter get Special Allowance of Rs.180/- per month.

(iv). Bombay High Court (Aurangabad Bench) decision dated 17.08.2012 in case of Ajay Kishanrao Losarwar Vs. State of Maharashtra & Ors. in Writ Petition No.7596/2006 and Writ Petitions No.6231 & 7404/2010 holding that the pay of the petitioners had been rightly fixed by merging the amount of Rs.400/- per month before undertaking promotional

fitment and there was or is no question of effecting any recovery from them and directed the respondents to merge the amount of Rs.400/- per month received by the applicants with their basic wages and then to redetermine the wages.

(v). Apex Court decision dated 26.04.1984 in Writ Petition Nos.6436-37/1980 and Civil Appeal Nos.3095-96/1980 in case of Ex-Capt. K.C. Arora and another Vs. State of Haryana and others held that accrued rights cannot be taken away by Government by making amendment in Rules with retrospective effect. Referring to the decision of a Constitution Bench in respect of State of Gujarat Vs. Raman Lal Keshav Lal Soni which held Gujarat Panchayats Service (Third Amendment) Act, 1978 as unconstitutional, as it offends Articles 311 and 14 and was arbitrary and unreasonable and a law made today would be plainly invalid as offending constitutional provisions in the context of the existing situation cannot become valid by being made retrospective, allowed the Writ Petitions and Civil Appeals, set aside the order of the High Court dated 10.10.1980 and impugned rule 4(ii) of Punjab Government National Emergency (Concessions) Rules, 1965 as amended by the Haryana Government Gazette Notification dated 22.03.1976 and notification dated 09.08.1976 which amended the definition of the expression 'military service' in rule 2.

In view of these caselaws since the applicant had already been granted the benefit of Special Pay with its inclusion in the basic pay, the O.A. should be allowed.

In their reply and arguments on 15.10.2019, the respondents have contended that -

3(g). after passing the accountants' examination Shri S.R. Dubey, Postal Assistant, was appointed as Accountant since 02.10.1992 with a Special Pay of Rs.90/- in lieu of higher pay scale. The V CPC recommendations were implemented from 01.01.1996 and as per DOPT OM dated 22.04.1998, the Special Pay came to be termed as Special Allowance subject to same conditions as stipulated in FR 9(25) and the Special Pay of Rs.90/- was doubled as Rs.180/- with effect from 01.08.1997. The Special Pay drawn for more than three years was counted for fixation of pay on his promotion. However, TBOP was only a financial upgradation and not a promotion to higher stage and, therefore, an objection was raised that the Special Allowance was not to be taken into consideration for fixation of pay under the TBOP Scheme. Subsequently the Directorate issued orders on 10.01.2013 for counting Special allowance for fixation of pay under TBOP when the official is promoted under TBOP only between 01.08.1997 and 22.04.1998;

3(h). the Special Pay and Special Allowance are two different matters. According to FR 9(25), Special Pay means an addition of the nature of pay to the emoluments of pay, whereas Special Allowance is just like other allowances such as travelling allowance, washing allowance, cash handling allowance, machine allowance, Special allowance for child care, etc. It is a fact that Shri S. Mohan Kumar had got financial upgradation under TBOP from 05.11.1997 that is before DOPT OM dated 22.04.1998 was issued which has converted the Special Pay into Special Allowance and, therefore, it is not to be counted as part of pay for fixation of pay. Since the applicants are drawing Special Allowance at present, and it cannot be treated as part of pay for the purpose of re-fixation of pay on promotion, request of the applicant for payment of arrears along with 18% is not proper and cannot be accepted. In the light of these facts and circumstances, the applicant is not entitled for any relief in the O.A.

3(i). The respondents have attempted to benefit from the Apex Court decision dated 10.04.1990 in case of **Mallikarjuna Rao and others Vs. State of Andhra Pradesh and others** which held that it is neither legal nor proper for the High Courts or the Administrative Tribunals to issue directions or advisory sermons to the executive in respect of the sphere which is exclusively within the domain of the executive cadre

under the Constitution. Since the Special Rules were framed under Article 309, the legislative power under the Constitution is to be exercised by the President or the Governor of a State, as the case may be, the High Courts or the Administrative Tribunals cannot issue a mandate to the State Government to legislate under Article 309 of the Constitution. The Courts cannot usurp the functions assigned to the executive under the Constitution and cannot even indirectly require the executive to exercise its rule making power in any manner. The Courts cannot assume to themselves a supervisory role over the rule making power of the executive under Article 309. In view of this, the OA should be dismissed.

4. Analysis and conclusions:

We have perused the OA memos and their annexes, rejoinders of the applicants, replies filed by the respondents and considered the arguments advanced by counsels of both sides on 15.10.2019. On their careful consideration, the clear position emerges as follows :

4(a). The main prayer sought in these OAs is direction to the respondents to re-fix their pay at the time of time-bound promotion/grant of MACP even after 22.04.1998 by including the special pay/special allowance in their Basic Pay received by them before the promotion/financial upgradation and pay them arrears of pay accordingly.

4(b). The undisputed facts in these cases are that the applicants before their promotion under the time-bound promotion scheme or grant of financial upgradation under MACP, they were in receipt of Special Pay as per Fundamental Rule 9(25). After acceptance of V Central Pay Commission recommendations, DOPT issued the OM dated 22.04.1998 by which amount of the Special Pay already admissible was doubled in those cases where it had been sanctioned at current rates between 01.01.1986 and 31.12.1990, and enhanced by 50% in those cases where it was revised or introduced at higher rates after 31.12.1990. That OM further specified that the Special Pay would henceforth be termed as Special Allowance and would be granted subject to same conditions as are stipulated in Fundamental Rule 9(25) and these orders would be effective from 01.08.1997.

4(c). As per the letter dated 10.01.2013 issued by the Department of Posts, Ministry of Communications and Information Technology, Government of India, in view of dismissal of SLP No.CC 1080/2012 by Apex Court in **Union of India Vs. S.Mohan Kumar**, the issue of reckoning Special Pay termed as Special Allowance for pay fixation on promotion/financial upgradation was examined with consultation of the Department of Expenditure, Ministry of Finance and as per their concurrence, the Nodal Ministry gave

concurrence dated 21.12.2012 to implement the judgment of the Bengaluru Bench of the CAT dated 22.10.2002 in OA No.296/2002 upheld by the Karnataka High Court in Writ Petition No.7593/2003 in respect of Shri Mohan Kumar and other similarly placed persons who were promoted after completing three years of service as PO and RMS Accountants before 22.04.1998 and in whose cases the Special Pay was Rs.90/- at the time of promotion.

4(d). In the letter dated 10.01.2013, concurrence was also conveyed that the above judgment of the Tribunal, and the judgments of Ernakulam Bench of the Tribunal in OA Nos.691/2005 and 437/2006 in cases of **Ms. K.Rajeshwari and Ms. Anita K. Alexander**, respectively and of Chennai Bench of the Tribunal in OA No.773/2010 in case of **Ms. Jayalaxmi** may be implemented by reckoning the Special Pay termed as Special Allowance as part of the Basic Pay for the purpose of pay fixation of the above then PO and RMS Accountants. The recovery, if any made from their pay and allowances on that account shall be refunded.

It was further mentioned in that letter that the above benefit of pay fixation on promotion/financial upgradation shall also be extended to all similarly placed cases of PO and RMS Accountants where the Special Pay/Special Allowance at the rate of Rs.90/- per month was drawn continuously for three

years before 22.04.1998. In cases where promotion/financial upgradation has taken place on or after 01.08.1997 but before 22.04.1998, special pay/allowance of Rs.90/- will only be reckoned for this purpose.

4(e). As per the DOPT OM dated 22.04.1998, the Special Pay drawn before 01.08.1997 was doubled to Rs.180/- per month from that date and termed as Special Allowance. However, at the time of their one time-bound promotion or grant of financial upgradation under MACP to the applicants, the Special Allowance at the rate of Rs.180/- per month has not been included in their Basic Pay while re-fixing the pay. The applicants in these OAs seek the inclusion of the Special Allowance of Rs.180/- per month as part of their Basic Pay at the time of re-fixation of their pay after promotion under the one time bound promotion or grant of financial upgradation under the MACP Scheme.

4(f). However, The respondents contend that in view of stipulation in para 4 of the letter dated 10.01.2013, only in those cases where the concerned employees had received Special Pay of Rs.90/- per month continuously for a period of three years has been included as a part of Basic Pay but as the promotion/financial upgradation to the applicants has been granted after 22.04.1998, the Special Allowance received by

them cannot be included as part of the Basic Pay on their promotion or grant of financial upgradation.

4(g). A gist of the case laws relied upon by the applicants brings out the position that once an employee has been extended the benefit of Special Pay/Special Allowance for certain period as per the existing rules, that employee has a vested right in favour of that Special Pay/Allowance and by subsequent instructions or amendment to the Rules such a vested right cannot be withdrawn retrospectively. Non-inclusion of the Special Pay as a part of Basic Pay at the time of re-fixation of pay has been set aside by Jaipur Bench of the Tribunal in case of Mohd. Yusuf Khan Vs. Union of India and that decision was upheld by the Rajasthan High Court Jodhpur Bench.

4(h). As per the DOPT OM dated 22.04.1998, the distinction has been removed between the Special Pay received earlier as per stipulations under Fundamental Rule 9(25) and its subsequent name as Special Allowance at doubled the rates allowed from 01.08.1997 under the same conditions stipulated under FR 9(25). Therefore, the contention of the respondents is not correct that only Special Pay was to be included as part of the Basic Pay on promotion or financial upgradation and the Special Allowance does not qualify for such inclusion.

In fact in the order of the respondents in letter dated 10.01.2013, there is no such distinction between the Special Pay and Special Allowance and based on the decisions of the Bengaluru, Ernakulam and Chennai Benches of the Tribunal, the Special Pay termed as Special Allowance has been allowed as a part of Basic Pay for pay fixation of PO and RMS Accountants i.e. similarly placed counterparts of the present applicants.

4(i). The second main contention of the respondents is reliance on the Apex Court decision dated 10.04.1990 in case of **Mallikarjuna Rao and others Vs. State of Andhra Pradesh and others, reported in (1990) 2 SCC 707** holding that it is neither legal nor proper for the High Court or the Administrative Tribunals to issue directions or advisory sermons to the Executive in respect of sphere which is exclusively within the domain of the executive cadre under the Constitution such as framing of rules under Article 309 of the Constitution.

However, it is to be noted that the present cases are not for issuing any special directions with reference to rule making power of the Government under Article 309 of the Constitution. They are seeking relief by treating the Special Allowance received by them on par with the Special Pay received by them earlier for inclusion in their Basic Pay while

refixing the pay on promotion or grant of financial upgradation. Therefore, this contention of the respondents is also not helpful to them.

4(j). The language of the DOPT OM dated 22.04.1998 was very unambiguous that the Special Pay would henceforth be termed as Special Allowance and would be granted subject to same conditions as are stipulated under Fundamental Rule 9(25). Therefore, for this purpose, there is no distinction between Special Pay and Special Allowance and as the applicants were granted the Special Pay earlier under Fundamental Rule 9(25) under certain terms and conditions, the Special Allowance granted to them under the same FR 9(25) at the applicable rates qualifies for inclusion as part of the Basic Pay when their pay was refixed on promotion under the One Time Bound Promotion Scheme or on grant of MACP upgradation.

4(k). As regards the differentiation made by the respondents with reference to inclusion of the Special Pay in the Basic Pay only if it was received before 22.04.1998, the Jodhpur Bench of this Tribunal in its decision dated 10.11.2017 in OA No.463/2015 in case of **Mohd. Yusuf Khan Vs. Union of India & Others & Ors.** has held that the refixation of the pay of the applicant by excluding the Special Pay was illegal and this decision of the Tribunal has been upheld by the Rajasthan High Court (Jodhpur Bench) dated 06.10.2018 and that there is no justification in restricting the benefit between the two dates i.e. giving benefit of

the Special Pay only when the promotion/financial upgradation took place between 01.08.1997 to 22.04.1998. Also when decisions of other Benches of this Tribunal mentioned in the order of the respondents dated 10.01.2013, have been implemented for similarly placed Accountants by reckoning the Special Pay termed as Special Allowance as part of the Basic Pay for the purpose of the pay fixation, such benefits cannot be denied to the present applicants.

In view of the above analysis, we are of the opinion that the applicants in these OAs have made out a justified case for inclusion of the special allowance granted to them under FR 9(25) in the basic pay on refixation of the pay on promotion/financial upgradation under MACP. Therefore, these OAs deserve to be allowed.

5. Decision:

OAs are allowed with direction to the respondents to include the Special Allowance received by the applicants at the time of their promotion under the One Time Bound Promotion Scheme or grant of financial upgradation under the MACP Scheme and release payment of arrears of their pay to them accordingly in three months from today. However, they will not be entitled for payment of any interest on such arrears. If any recovery has been made from the applicant(s) after withdrawing such inclusion of Special allowance in basic pay, it should be refunded.

(Ravinder Kaur)
Member (Judicial)

(Dr. Bhagwan Sahai)
Member (Administrative)

H/kmg*