

(3)
16

Central Administrative Tribunal
Principal Bench, New Delhi.

O.A.No.563 of 1993

New Delhi this the 31st day of January, 1994.

Shri N.V. Krishnan, Vice-Chairman(A)

Shri B.S. Hegde, Member (Judl.)

Shri M.T. Kanse,
R/o 41, Type-V Quarters,
Lodhi Road Complex,
New Delhi-110003.

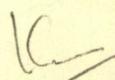
By Advocate Shri R. Doraiswamy

Versus

Union of India through
Secretary to Govt. of India,
Ministry of Commerce,
(Department of Supply),
Udyog Bhavan,
New Delhi-110001,

By Advocate Shri K.C. Sharma.

1. Whether Reporters of local papers may be allowed to see the Judgement? ✓
2. To be referred to the Reporter or not? ✓
3. Whether their Lordships wish to see the fair copy of the Judgement? ✗
4. Whether it needs to be circulated to other Benches of the Tribunal? ✗


(N.V. Krishnan)
Vice-Chairman(A)

(16)

(17)

Central Administrative Tribunal
Principal Bench, New Delhi.

O.A.No.563 of 1993

New Delhi this the 31st day of January, 1994.

Shri N.V. Krishnan, Vice-Chairman(A)

Shri B.S. Hegde, Member (Judl.)

Shri M.T. Kanse,
R/o 41, Type-V Quarters,
Lodhi Road Complex,
New Delhi-110003.

By Advocate Shri R. Doraiswamy

Versus

Union of India through
Secretary to Govt. of India,
Ministry of Commerce,
(Department of Supply),
Udyog Bhavan,
New Delhi-110001,

By Advocate Shri K.C. Sharma.

O R D E R

Shri N.V. Krishnan, Vice-Chairman

The applicant was working as Additional Director General (Inspection) in the Directorate General of Supplies and Disposals under the Ministry of Commerce (Department of Supply), the respondents. His grievance is that though the pay-scale of this post was upgraded to Rs.7300-7600 in 1991, yet he has not been given the benefit of that pay-scale till he retired on 31.7.93 when this O.A. was pending.

2. The facts giving rise to this grievance can be briefly set out as follows:

2.1 The applicant is a member of the Indian Inspection Service under the Ministry of Commerce (Department of

u

, , , , 2 . . .

Supply). He was regularly promoted as Addl. Director General of the Indian Inspection Service by the notification dated 14.2.1990 (Annex.A-1). His pay on this post was fixed in the pay-scale of Rs.5900-6700 at the stage of Rs.5900 from the date of his appointment (Annex.A-1(ii)).

2.2 A cadre review of the Indian Inspection Service was undertaken and consequent thereupon, sanction of the President was accorded on 21.1.1991 to the upgradation of the posts of Addl. Director General and Deputy Director General and the creation of certain additional posts (Annex.A2). The only post of Additional Director General in the Indian Inspection Service was thus upgraded and the pay-scale was revised from Rs.5900-6700 to Rs.7300-7600. This order was superseded by the order dated 18.4.1991 (Annex.3), which, but for a small change, is an exact replication of the Annex.2 order. The change made was that the upgradation of the two posts referred to above, was to take place with immediate effect. The superseded order did not contain such an explicit statement.

2.3 Yet, the applicant was not given the benefit of the revised pay-scale. He, therefore, submitted a representation on 2.4.1992 (Annex.A-4). He pointed out therein that he was due to retire on superannuation on 31.7.1993 and that, therefore, he should be granted the benefit of the revised pay-scale at an early date as he satisfied the eligibility criteria for getting

the benefit of the scale of Rs.7300-7600, viz., having rendered 25 years of Class I service. He also pointed out that his claim for the higher scale from the date it was notified is to be considered in accordance with the guidelines in the Department of Personnel O.M. No. 22011(10)(84)-Estt.(D) dated 4.2.1992 (Annex. A-5). According to para.2(1) of this O.M., where the upgradation of the scale is without attaching any higher responsibility or higher qualification or higher eligibility service, the suitability of the incumbent of the post which has been upgraded, need not be assessed and they may be appointed to the upgraded post with the higher replacement scale with effect from the date notified by Government.

.2.4 The applicant contends in para.4.6 of the O.A. that he is entitled to be given the upgraded pay-scale from the date it was sanctioned, under FR-23.

2.5 As no reply to this representation was received, the applicant has filed this O.A. for a declaration that he stands appointed as Addl. Director General in the pay-scale of Rs.7300-7600 w.e.f. 21.1.1991 with all consequential benefits, or at any rate, from 18.4.1991, when the Annex. A-3 order was issued and for a direction to the respondents to give him the pay-scale of Rs.7300-7600, as prayed above.

3. The respondent has filed a reply opposing the prayer. The following important points have been made:

(19)
(20)

on 26.9.91 (Annex.R-1)

3.1 Annex. A-3 order was clarified as follows:-

"The following clarification is hereby authorised in this Department's Order No.A-42012/2(3)/90-ES-I dated 18.4.1991.

2. The date of creation/upgradation of the posts of Additional Director General (I)/Deputy Director General (I) Director (I), Deputy Director (I) as a result of Second Cadre review of Indian Inspection Service (Group A) shall take effect from the date these posts are filled in the respective grades, on regular basis, after due process of selection and approval by the Competent Authority.

3. This also has the approval of Minister of State (Commerce)."

The respondent points out that this letter has not been challenged in this O.A.

3.2 The Annex A-1(ii) and A.3 orders are merely financial sanctions, i.e., they give permission to spend money in respect of the posts. They do not automatically create the posts, which is an administrative decision which has to be taken separately. The financial sanction merely authorises incurring of an expenditure.

3.3 After the issue of Annex. A-3 order, there has been a sea change in the functions and responsibilities of the organisation of the Directorate General of Supplies and Disposals. A revised policy of decentralisation of Government purchases has been adopted. Hence, an administrative decision has to be taken about the upgradation of the post of Addl. Director General as well as the creation of other posts in the light of this new policy.

3.4 Further, considering the need for effecting economy in expenditure, the Secretary, Department of Expenditure in the Ministry of Finance, had written to the respondent

on 12.2.1992 (Annex. R-4) to undertake an exercise to earmark the posts at different levels in Group 'A' which can be surrendered as a measure of economy and requested him to send a detailed reply within a week. He also suggested that pending a decision thereon, "proposals for cadre review may not be initiated, processed or implemented". If there was any difficulty, he should be informed about it.

3.6 It is also stated that, in any case, the upgradation involves a change of status and responsibilities and, therefore, the recruitment rule has to be first amended before any regular appointment is made. The draft rules have been sent to the U.P.S.C. and are yet to be finally notified.

4. In his rejoinder, the applicant points out that the change in policy in the matter of purchases has not affected the Inspection Wing of the Department of Supply. He also points out that the Finance Ministry has given its clearance on 29.3.1993 (Annex. A-9) for filling up the post of Addl. Director General. In a further rejoinder, he has also furnished a copy of a note dated 24.1.1991 (Annex. AA-2) which is a note of the Director (Estt.) of the Department of Personnel relating to the Indian Supply Service where also the post of Addl. Director General was upgraded, as in the present case. It has been pointed out therein that the Cadre Review Division has confirmed that the upgradation has been allowed based on the existing duties and

responsibilities. It is, therefore, submitted that as there is no change in the responsibilities, this should be taken as a mere revision of the pay-scale and given effect to from the date of sanction.

5. We have heard Shri R. Doraiswamy and Shri K.C. Sharma, the learned counsel for the applicant and the respondent, respectively and considered the rival contentions which will be set out issue-wise.

6. Undoubtedly, there has been a cadre review and with the concurrence of the Finance Ministry, a decision has been taken to upgrade the post of Addl. Director General and to give it the pay-scale of Rs.7300-7600. Avoiding niceties, we can take it that this decision was notified by the Annex. A-3 order dated 18.4.1991 stating that the upgradation has immediate effect.

7. It is true that, subsequently, the Annex.R-1 memorandum dated 26.9.1991 clarified that the upgradations ordered in Annex.3 order, will not be given immediate effect but shall take effect only from the date the upgraded posts are filled in, on a regular basis, after due process of selection and approval by the competent authority. However, Shri Doraiswamy contended that this clarification is incompetent because it modifies an order issued by the President without obtaining Presidential sanction.

8. We are unable to agree. Annex. R-1 clearly states, as can be seen from para.3.1, that this order has the approval of the Minister of State for Commerce. Therefore,

(22)
(23)

it is as good as order
an order of the President. This has not been
challenged in the O.A. and, therefore, it holds good
in all respects. Therefore, insofar as this aspect
of the matter is concerned, the respondent seems to
be on a strong ground.

9. The applicants' principal contention is that
the case is covered by FR-23, which reads as follows:-

"F.R.23. The holder of a post, the pay
of which is changed, shall be treated as if he
were transferred to a new post on the new pay:
provided that he may at his option retain his
old pay until the date on which he has earned
his next or any subsequent increment on the old
scale, or until he vacates his post or ceases
to draw pay on that time-scale. The option once
exercised is final."

The learned counsel for the applicant urges that this
is a simple case of revision of pay-scale and, therefore,
FR-23 should have been applied from the date Annex.
A-3 sanction was issued. Therefore, there was no need
for any amendment to the recruitment rule in this regard.
He also contended that, as a matter of fact, the appli-
cants' case is covered by para. 1(i) and para. 2(i)
of the O.M. dated 4.2.1992 (Annex. A-5) issued by the
Ministry of Personnel.

10. On the contrary, Shri K.C. Sharma, the learned
counsel for the respondent, submitted that the post
has been upgraded and the pay-scale attached to that
post makes it equivalent to that of an Additional Secre-
tary. In other words, there has been a change in the
grouping (i.e., classification) of the posts. The appli-
cant was promoted as Addl. Director General on a regular

(23)
(24)

basis in the pay-scale of Rs.5900-6700. He was not assessed for holding a post of the rank of Additional Secretary. He further contends that the present case is covered by para.1(ii) of the Annex.5 memorandum of the Department of Personnel and hence, the appointment will be made by following the procedure laid down in para.2(iii) of that memorandum.

11. As both parties rely on the Annex.5 guidelines, it is reproduced below:-

"New Delhi, the 14th February, 92

OFFICE MEMORANDUM

Subject:-Revision of pay scale/upgradation of the posts - Date of regular appointment of the incumbents to the upgraded post.

The undersigned is directed to say that in the event of revision of pay scales or upgradation of posts, the question as to what criteria should be adopted in assessing the suitability of the incumbents of the posts as well as the date of appointment to the upgraded posts has been under consideration in this Department. In the matter of appointments to upgraded posts, the following four situations can be expected:-

- (i) Upgradation of posts involves only a higher replacement scale without any higher responsibilities/higher qualifications or higher eligibility service;
- (ii) Upgradation involves only higher replacement scale without any higher responsibility but the officers concerned have to fulfil the higher eligibility service;
- (iii) The upgradation of the posts involves higher responsibility or higher qualifications or higher eligibility service; and
- (iv) Upgradation involves change in group but without higher responsibility or higher qualification (or higher eligibility service).

2. The following criteria may be adopted in assessing the suitability of the incumbents of the post/deciding the date of appointment to upgraded posts:-

1. Where the upgradation involves only a higher replacement scale without any additional responsibility/higher qualification/higher eligibility service, the suitability of the incumbents need not be assessed and they may be appointed to the post with the higher replacement scale with effect from the date notified by the Government, giving effect to the recommendations of the Pay Commission or similar bodies etc.

24
25

2. Where the upgradation involves a higher replacement scale without higher responsibilities or higher qualifications but with a higher eligibility service, the incumbent need not be assessed for their suitability but it should be ensured that they have completed the requisite qualifying service for appointments to the upgraded post. In case they had completed the qualifying service on or before the date notified by the Government, they may be appointed to the upgraded post from that date. In the case of others who fulfil the qualifying service on a later date, they should be appointed to the upgraded post from the date on which they complete the qualifying service. This would be subject to the condition that irrespective of the date of appointment, the original seniority of the incumbent in the grade prior to upgradation will be maintained for appointment to the upgraded post.

3. If the upgradation involves higher responsibility or higher qualification or higher eligibility service, the suitability of the incumbents has to be assessed and if found suitable, they will be appointed to the upgraded post prospectively i.e. not earlier than the date of the U.P.S.C.'s advice letter or if the assessment is made by the Departments themselves, the date of assessment.

4. If the upgradation involves change in the group, but there is no higher responsibility or higher qualification or (higher eligibility service) the suitability of the incumbents has to be assessed and if found suitable, they will be appointed to the upgraded post from the date notified by the Government.

3. These instructions may please be brought to the notice of all concerned for guidance and compliance. #

12. We have considered this matter and are unable to accept the contentions of the applicant for the following reasons:-

12.1 Firstly, this is not a case of a simple upgradation of the pay-scale alone, as sought to be brought out in para 4.2 of the O.A. and in the arguments of Shri Doraiswamy. This is a case where the post itself has been upgraded and a higher pay-scale has been attached thereto. This is clear from the

V

Annex.3 order. Therefore, FR-23 does not apply and appointment of the incumbent is not automatic.

12.2 Secondly, it appears that the stand is not new. It is being taken by the Ministry of Personnel in cases of pay fixation which have arisen after the Fourth Pay Commission's recommendations. This is clear from the Annex. AA-II note dated 24.1.1991 of the Director (E) of the Ministry of Personnel recorded in the case of the similar upgradation/creation of posts in the Indian Supply Service, produced by the applicant. After referring to the fact that the Cadre Review Division has confirmed that the upgradation has been allowed based on the existing duties and responsibilities, the note states as follows:-

"2. The situation is similar to the one which applied to certain posts for which upgraded scales higher than the normal replacement scales were recommended by the Fourth Pay Commission. In that case, we had clarified in our O.M. dated 30.10.87 that the existing incumbents should be screened and approved for appointment to the higher level before they are allowed to draw salary in the higher scale. On the basis of these instructions, it is, therefore, necessary first to amend the recruitment rules in respect of the posts of DG, Additional D.G. and DDG and screen the existing incumbents before allowing them the benefit of higher scale on regular basis."

Therefore, the respondent cannot be faulted for holding that the recruitment rule for the post of Addl. Director General has to be first amended.

12.3 Thirdly, even if it is assumed for the sake of argument that the upgradation involved only a change in the group, without any change in either responsibilities or eligibility conditions, para.2.4 of the Annex. A-5 memorandum alone will apply, which makes

(27)

it clear that the appointment to the upgraded post will take effect only after the suitability of the incumbent has been assessed and, if found suitable, appointed to the upgraded post.

13. The learned counsel of the applicant has drawn our attention to the judgement dated 4.5.1990 of the Principal Bench in OA-115 of 1988 - C.L. Chowdary Vs. U.O.I. & Others, a copy of which has been produced for our perusal and prayed that on the ratio of the decision, this O.A. deserved to be allowed.

14. We have seen the judgement. Shri C.L. Choudary was Addl. Secretary, Ministry of External Affairs. He was appointed as Financial Adviser, Ministry of Defence from 1.10.1985 and retired on 30.9.1986. He was in the pre-revised pay-scale of Rs.3000-3500. The Fourth Pay Commission generally recommended the replacement pay-scale of Rs.7300-8000 for posts in the pre-revised scale of Rs.3000-3500. But it specifically recommended Rs.8000(fixed) for the post of F.A., Ministry of Defence. By a notification dated 13.3.1987 of the Ministry of Finance, the pay-scale of this post was revised to Rs.8000(fixed), as recommended by the Fourth Pay Commission. However, the applicant was given the pay-scale of Rs.7300/- only from 1.1.1986. The applicant challenged the decision on many grounds. It was pointed out that in the notification dated 13.3.1987, the fixed pay of Rs.8000/- has been notified for several other posts. The incumbents of all these posts have been given this revised pay of Rs.8000 from 1.1.1986. Further, it is by this notification that the revised pay was specified in column 4 of the First Schedule to the

CCS(Revised Pay) Rules, 1986 against the post of Financial Adviser (Defence Services) specified in col.2 of that Schedule. Therefore, by operation of Rule 4, the revised pay of the post from the date of commencement of the Rules is the pay mentioned in col.4 which is Rs.8000/-. Hence, the applicant had a right to get this pay.

The respondents contended that Shri Choudhary was holding a post only in the scale of Rs.3000-3500 and was not cleared for the post of Secretary whose pay was Rs.3500/-fixed. The post of F.A. (Defence Services) is to be filled under the Central Staffing Scheme by one who has been cleared for Secretary's post. The respondents also pointed out to the instruction dated 3.10.1987 of the Department of Personnel in this context. It is to be mentioned here that it is this O.M. that is referred to in the extract of the Directorate's note at para.12.2. The judgement refers to this submission as follows:-

.....He referred to para.(ii) of the Office Memo. dated 30th October, 1987 issued by the Department of Personnel (Annex.R1 to the counter filed by the respondents) that posts carrying a pre-reviewed scale of Rs.3000.00 (fixed) have been upgraded to the scale of Rs.7300-8000. The Memorandum also states that "there are other cases of this type. In all such cases, the individuals holding the post from 1.1.1986 cannot be appointed against the revised scale of pay even on ad hoc basis unless the incumbents are screened and approved for appointment to the higher level. Ministries/Departments concerned should, therefore, send proposals for consideration of appointment of these incumbents on ad hoc basis against these posts retrospectively with effect from 1.1.1986 giving full particulars and for their regularisation with immediate effect to the Establishment Officer of the Department of Personnel & Training. They may

(u)

be allowed the revised pay scale only after the clearance is obtained for their ad hoc appointment and continuance against the post by the Establishment Officer. This may be done immediately and pay given to them with effect from 1.1.1986 may be treated as purely provisional subject to the decision of the Government.

8. Shri Mittal said that it is clear that unless a person was screened and found fit by Government, he could not be allowed the scale of Rs.8000/-(fixed)."

The Bench held as follows:-

.....The applicant was working as financial Adviser even prior to 1.1.1986 and he continued to work in the same capacity till his retirement. There was no change in his work or responsibility with effect from 1.1.1986. Para. 10.116 of the 4th Pay Commission's Report reads as follows:

"The Finance Division of the Ministry of Defence is headed by Financial Adviser who exercises financial control over the proposals involving expenditure from the Defence budget. He is also responsible for internal audit and accounting of the defence expenditure and this responsibility is discharged through CGDA. Keeping in view the role of the Financial Adviser, we recommend that the pay of the post of Financial Adviser may be revised from Rs.3000-3500 to Rs.8000/- (fixed). The post should be held by members of Indian Defence Accounts Service."

12. The argument by the learned counsel for the respondents that the applicant had been cleared only for the post of Additional Secretary is not convincing. Before he was appointed F.A. (DS) he was already working as Additional Secretary in the Ministry of External Affairs. The pay of Additional Secretary was Rs.3000(fixed) whereas the applicant was drawing a pay scale of Rs.3000-3500 which is higher than the scale admissible to an Additional Secretary."

.....We are of the opinion that if the pay scale of the F.A. effective from 1.1.1986 is Rs.8000/- (fixed), it has to be paid to the person working as F.A. 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 our view it is sufficient that a person must receive the salary of the post on which he is employed and as the pay of the Financial Adviser on 1.1.1986 was Rs.8,000 (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. In fact, he was found fit to hold this post when he was appointed as Financial Adviser. In the circumstances, the application is allowed."

15. That judgement is distinguishable in many respects. It was held by the Bench that the applicant there was not merely an Additional Secretary, but that, he was cleared for the post of F.A. which has a higher pay scale (Rs.3000-3500), the maximum being equal to that of a Secretary's pay. That was a case of only a revision of pay-scale and not an upgradation of post. There was also a finding that there was no change in the duty and responsibility of the post. We have not been able to record such a finding as the applicant has ^{not} produced such evidence (Annex. A-A II referred to in para 12.2 supra is only in respect of the post of Addl. Director General in the Indian Supply Service.) Lastly, the pay was revised from 1.1.1986. In the present case, while the upgradation was made from 18.4.1991 (Annex.A-3), it was later on clarified on 26.9.1991 (Annex.R-I) by a valid order that the upgradation will be effective when this post is filled after proper selection. Therefore, the ratio of that judgement cannot be applied to this case.

(u)

(20)
(31)

16. In the circumstances, we do not find any merit in the reliefs sought in this O.A.

17. However, the applicant is entitled to some other relief. Undoubtedly, the main object of a cadre review is to improve the chances of promotion of the employees. The post of Addl. Director General was upgraded as a result of cadre review. It would be an irony of fate if the incumbent on the only post available in the Cadre and who has been working on that post from ^{is denied} 14.2.1990₁ - due to procedural delays - the benefit of consideration of his case for appointment to this post before his retirement on 31.7.1993, though the decision to upgrade had been taken in January, 1991. He had drawn the attention of the respondent to this fact.

18. We do not wish to make any comments on the delay that has taken place, or the merits of the reasons advanced by the respondent. It now appears that the Ministry of Finance has given its concurrence on 29.3.93. It would have been only just and fair if on receipt of the approval, the respondents had immediately considered the applicants' case for ad hoc appointment from 1.4.93, pending finalisation of the rules, maybe on the basis of the draft rules₁. In fact, this suggestion had already been made by the Ministry of Personnel vide the note dated 24.1.1991 at Annex. AA-II, which has the approval

U

....1...,

of the Secretary. Para.4 of that note is as follows:-

"4. Keeping in view the position mentioned above, it is suggested that the ACC may be moved for approving the ad hoc appointment of the existing incumbents in the upgraded scale from the date from which the upgradation has been approved by the Cabinet, pending the amendment of the recruitment rules and screening of the officers for regular appointment. This has the approval of Secretary (P)."

Further, the respondents too had intended to consider the case of the applicant, who was an incumbent on the pre-upgraded post of Addl. Director General, for appointment to the upgraded post. For, in the draft recruitment rules enclosed as Annex.I to the additional affidavit filed by the respondent on 22.10.1993, a special provision has been made to enable the applicants' case to be considered, even though he does not fulfil the type of service stipulated as essential vide serial No.1 in Schedule III to the draft rules. Therefore, it is only right and proper to direct the respondents to consider the case of the applicant for ad hoc appointment.

19. In the circumstances, while we hold that the reliefs sought by the applicant cannot be granted, interests of justice demand that a direction be issued to the respondent to consider appointing the applicant on an ad hoc basis to the post of Addl. Director General in the pay-scale of Rs.7300-7600 w.e.f. 1.4.1993 until his retirement on 31.7.1993, pending the finalisation of the recruitment rules to this post, within a period of three months from the date of receipt of this order. ^{so. If} We do /the applicant is so appointed, he shall be entitled

to the salary of that post from 1.4.1993 and consequent revision of pensionary benefits and the difference in respect of both salary and pensionary benefits, shall be paid to him within a period of four months from the date of such appointment. O.A. is disposed of as above. No costs.

B.S. Hegde
(B.S. Hegde)
Member (J)

N.V. Krishnan
(N.V. Krishnan)
Vice-Chairman (A)

31.1.94
SLP