

**CENTRAL ADMINISTRATIVE TRIBUNAL
KOLKATA BENCH
(CIRCUIT AT PORT BLAIR)**



No. O.A. 351/00436/2019
No. O.A. 351/92/2018
M.A.351/87/2018
No. O.A. 351/93/2018

Date of Order 22.02.2021



Present: Hon'ble Ms Bidisha Banerjee, Judicial Member
Hon'ble Mr Tarun Shridhar, Administrative Member

O.A.436/2019

Shri R. Babuyan, Aged about 60 years,
S/o Late Raghavan,
Retired Assistant Sub-Inspector of Police,
A & N Police, R/o Prothrapur,
Port Blair.

O.A. 92/2018
Dibakar Bhattacharya

O.A.93/2018
Ignas Ekka

.....Applicants

-Versus-

1. The Union of India,
Through Secretary to the Ministry of Home Affairs,
Govt. Of India, North Block,
New Delhi – 110 001.
2. The Ministry of Finance,
Through the Secretary, Department of
Expenditure, Government of India,
Implementation Cell, North Block, Lok
Nayak Bhawan, New Delhi.
3. The Ministry of Personnel, Public Grievances
And Pensions, the secretary, Govt.
Of India, North Block, New Delhi- 110001.
4. The Lieutenant Governor,
Andaman and Nicobar Islands,
Port Blair.

5. The Director General of Police,
A & N Police Department,
Police Headquarter,
Allanta Point, Port Blair, A & N Islands.

6. The Superintendent of Police,
South Andaman, A & N Police,
Port Blair.



7. The Deputy Superintendent of Police (HQ),
Police Head Quarter, Atlanta Point,
Port Blair.

.....Respondents

Advocate for the applicants : Ms A. Nag.

Advocate for the respondents : Mr K. Rao

ORDER

MS BIDISHA BANERJEE, MEMBER(J)

As identical facts have been pleaded and identical issues have been raised, these O.As are taken up for analogous hearing to be disposed of by this common order. For the sake of brevity O.A.436/2019 is delineated and discussed hereunder.

2. The applicants in O.A. 436/19 has sought for the following reliefs :
 - a. An order /orders quashing the orders dated 28.05.2018 and 06.08.2018 (2 orders) so far as it relates to pay fixation and reduction in the pay band of the applicant and recovery of the amount from the gratuity of the applicant.
 - b. An order/ orders directing the respondent authorities to fix the monthly pension of the applicant by considering the date of appointment of the applicant as 15.02.1977 in the post of Constable Driver and not as 01.01.1986 and also that the applicant was absorbed as Constable (Driver) and not promoted as Constable (Driver).
 - c. An order / orders directing the respondent authorities to release the difference in the pension which was paid to the applicant from 01.06.2018 till date after fixing the pension of the applicant in the manner prayed in the prayer b. of this application.
 - d. An order / orders directing the respondent authorities to refund the amount of Rs. 6,87,861/- (Rupees six lakhs eighty seven thousand eight hundred and sixty one only) with interest to the applicant.
 - e. An order / orders directing the respondent authorities to grant all the consequential and monitory benefits to the applicant after fixing the

monthly pension of the applicant considering the appointment of the applicant as on 15.02.1977 and not on 01.01.1986 and also that the applicant was absorbed as Constable (Driver) and not promoted a Constable (Driver).

- f. An order directing the respondent authorities to act in accordance with law.
- g. An Order to issue directing the respondents to produce the records of the case before this Hon'ble Tribunal so that conscious able justice may be done.
- h. Such other or further order direction or directions, as Your Lordships deem fit and proper in the interest of Justice.



3. The long and short of the grievance of the applicant, as Ld. Counsel for the applicant would contend at hearing, is that their claim for reckoning appointment from 15.02.1977 instead of 1.1.86 as Constable Driver has been rejected. They have prayed for quashing of the orders dated 28.05.2018 and 06.08.2018 whereby and where under their pay has been reduced and a considerable amount has been recovered from the gratuity. They have claimed for appointment from the initial date based on the fact that one James Surian and Shri V. Subramanian O.A.88/AN/2012 and O.A.89/AN/2012 respectively being identically aggrieved as the present applicants. This Tribunal had quashed the impugned orders of recovery which order when on challenge before Hon'ble High Court in WP(C) No.236/2016 was upheld and was implemented by refunding the recovered amount to the said applicants. It was rendered in view of the decision of Hon'ble Apex Court in **State of Punjab and Ors. vs. Rafiq Masih, 1994(2) SCC.521**. Ld. Counsel would further contend that review petition was preferred before the Tribunal which when rejected, the department approached the Hon'ble High Court challenging the order on the ground that the order passed by Judicial Member sitting singly was *caram non judice*. The view of the Judicial Member was affirmed and the WP(C) was dismissed.

4. Per contra, refuting the contention of the applicants, respondents would state that R. Babuwan was initially appointed as Police Constable on 15.02.1977 in the pay scale of Rs.210-270/-. He was absorbed in the post of Driver (Police Constable) with effect from 01.01.1986 in the higher scale of Rs.950-1500/- (4th, 11th, 18th, 19th) on the strength of his



willingness when the revised pay of Police Constable was Rs.825-1200/-. The applicant was granted first ACP with effect from 09.08.1999 in the pay scale of Rs.3200-4900/- (as per 5th CPC) and second financial upgradation in the pay scale of Rs.4000-6000/- (5th CPC) with effect from 15.02.2001 vide order dated 07.03.2003. After implementation of MACP Scheme with effect from 01.09.2008 the applicant was granted 1st financial upgradation under MACP which according to the respondents was made inadvertently taking into account his service as Police Constable as qualifying service with effect from 15.02.1977 when his pay was fixed in that pay band of Rs.9300-34800/- plus Grade pay of Rs.4200 as per 6th CPC. When the applicant was due for retirement on superannuation with effect from 31.05.2018 his pension papers were processed and forwarded to Pay and Accounts Office. The PAO returned the pension papers with remarks :

"The effective date of grant of 2nd financial upgradation under ACPS may be reviewed as the employee has not completed 24 years of regular service in the post of constable (Driver) as on 15.02.2001.

The effective date of grant of 3rd financial up-gradation under MACPs may be reviewed as the employee has not completed 30 years of regular service from the grade of constable (Driver) as on 01/09/2008."

According to the respondents, as per clarification contained in the O.M. No.350/1/97-Estt(D) (Vol. IV) dated 10.02.2000, an appointment made in the higher pay scale either on direct recruitment or on absorption would be treated as direct recruitment and the past service/promotion would not count under ACPs/MACPs. Therefore, the service rendered by the applicant as Police Constable from 15/02/1977 to 31.12.1985 was inadvertently taken into account especially for grant of 2nd financial up-gradations under ACPs w.e.f. 15/02/2001 and 3rd financial up-gradations under MACPs w.e.f. 01/09/2008. The matter was placed before the DPC to review the grant of 2nd and 3rd financial up-gradations. The DPC recommended cancellation of the financial up-gradations and instead recommended 2nd financial upgradation under MACP in the pay band of PB-1 Rs.5200-20200/- plus Grade Pay of Rs.2800/- as per 6th CPC with effect from 01.09.2008. Accordingly, the excess amount paid to the applicants, to the tune of Rs.6,87,861/-, was recovered.

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5. We heard the learned counsel for the parties and perused the records. We discern as under :

(i) Annexure A-1, the appointment certificate of Babuwan, refers Babuwan as Constabulary No.917. That the coinage "Constabulary" connoted constable and not constable driver; could not be deciphered.

(ii) The order Book No.3155 dated 28.08.1987 indicates that some Constable Drivers 37 in number who were working in Police Motor Transport prior to 01.01.1986 were absorbed against the existing vacancies in the Andaman & Nicobar Police. Their pay in the time scale of Rs.950-1500/- was fixed with effect from 01.01.1986. The applicant Babuwan figures at Sl.No.30 of the said list while B. Bhattachariya figures at Sl. 24 and Igness Ekka figures at Sl.29. The applicants James Surian (O.A.88/AN/2012) and V. Subramanian (O.A.89/AN/2012) also figure in the list at Sl.Nos.37 and 28 respectively meaning thereby that the present applicants Babuwan, B. Bhattachariya and Igness Ekka stand on same footing as James Surian and V. Subramanian.

(iii) Vide order dated 11.11.1997, the pay of the Drivers of Andaman & Nicobar Police Fire Service, who opted for revised pay scale with effect from 01.01.1996 have been fixed. The present applicants figured in the said list along with James Surian and V. Subramanian.

(iv) A seniority list vide memo dated 05.07.2006 demonstrates in list of Drivers in PMT Unit B. Bhattachariya, Igness Ekka and Babuwan figure against Sl. 2, 7 and 8 respectively while James Surian and V. Subramanian are at Sl. 6 & 5 respectively. Further orders reveal that the applicants were promoted to the rank of Head Constable on officiating basis vide order dated 06.10.2006 having qualified in a Departmental Promotion Test held on 25.09.2006. Their pay was fixed vide order dated 10.11.2010 by granting 3rd MACP in the revised pay band of Rs.9300-34800/- plus Grade Pay of Rs.4200/-, where applicants figure along with the applicants in O.A.88 & 89/2012.

(v) By an order dated 20.11.2010 their pay was fixed on account of grant of 3rd MACP.

(vi) Babuwan was further promoted to the post of Assistant Sub Inspector Driver vide order dated 5.11.2012. At the time of his retirement his pay was refixed by an order dated 28.05.2018 and Pension Payment Order issued on 01.08.2018 as contained in Annexure A-9 and further orders are explicit that an amount of Rs.6,87,861/- has been recovered from his admissible gratuity of Rs.8,40,378.

(vii) James Surian and V. Subramanian preferred O.A.88 & 89 respectively being aggrieved by withdrawal of their financial up-gradation granted to them earlier on the plea that their advancement from Constable to Constable Driver was to be taken into consideration, they challenged the order of recovery of over payment made from the payable DCRG. They had also sought for quashing of the order of the withdrawal of benefits. This Tribunal by a detailed order disposed of their claim in the following manner.

"10. We also find that as on 1.1.1986 two pay fixations have been made in favour of the applicant, i) as a Constable and (ii) as a Driver on officiating basis. In the service book we have come across an entry granting him technical pay of Rs.



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40/- per month. Is it that the special pay was subsequently enhanced? Subsequently, an order was issued in 1995 fixing his pay under proviso of note 4 below rule 7 of CCS (Revised Pay Rules) 1986. Why was this fixation made? The orders brought on record show that a cadre of created and applicant, who was working as driver absorbed as driver. The applicant was assigned seniority as a driver from the date he was initially appointed. Is it a case that he was working as driver in the scale of pay of Constable along with special pay and after creation of a separate cadre he was placed in the pay scale without any special pay. If such absorption was indeed a promotion then his pay ought to have been fixed under FR by granting an increment. No such order is on record. Neither the speaking order nor the reply answers any of these questions.



10. It is also well settled that no order having civil consequences can be passed without putting the concerned person to notice. No notice has been given in the instant case. There is no reference to the representation submitted by the applicant which was submitted before passing of the impugned order – either in the order or in the reply.

11. Judgements of the Apex Court lay down that where the alleged over-payment was not on account of mis-representation, recovery for over-payment should not be made from the low paid employment. The CCS (Pension) Rules provide for recovery of assessed and ascertained dues from DCRG. Assessment and ascertainment implies notice to concerned person. It is not an empty formality.

12. In view of the foregoing discussions, the impugned order cannot be sustained. The same is quashed and set aside. We, however, give liberty to the respondents to reconsider the matter regarding grant of ACP benefit after putting the applicant to notice and having regard to what has been discussed above and re-fix the pension, if need be. The mount already recovered should be refunded. In case after doing the exercise the respondents come to a conclusion that benefits can be withdrawn, they will keep the judgements of Apex in mind on the subject of recovery. We have expressed no opinion on the applicability of concerned classification to the ACP Scheme to the facts of this case. We also hold that recovery may not be made under such circumstances and recovery amount should also be refunded. OA is disposed off accordingly. No cost. "

A review application was carried out before this Tribunal being numbered as R.A.4/AN/2013, when this Tribunal reviewed its earlier passed in O.A.89/2012 filed by V. Subramanian, which order went on challenge before Hon'ble High Court in WP(C) 234/2016 and was set aside along with consequential order passed by administration dated 19.05.2016 and the administration was directed to act in terms of the order passed by this Tribunal in O.A.89/2012. The order O.A. 89/12 thus attained a finality.

(viii) A show cause notice dated 02.01.2017, was issued to Shri Babuwan. He replied to the same on 09.01.2017. An identical notice was issued to Subramanian. By an order dated 09.02.2017 the Superintendent of Police (HQ) disposed of the representation/reply of the said V. Subramanian having noted as under :

"It is irrefutable fact on record that Shri V. Subramaniam was initially appointed as a temporary Police Constable on 05.06.1975 and confirmed in the rank of Constable on 04.06.1978. Later, he was absorbed in the post of Driver

(Police Constable) w.e.f. 01.01.1986 after giving his willingness for such absorption. In terms of clarification contained in the O.M. No. 35034/1/97-Estt.(D) (Vol.IV) dated 10.02.2000, if the appointment is made in the higher pay scale either on direct recruitment or on absorption shall be treated as direct recruit and the past service/promotion shall not count for granting benefits under ACPs.

In view of the above, the applicant Shri V. Subramaniam is only entitled for second financial up-gradation under MACPS and his pay was rightly revised and re-fixed in the Pay Band of Rs. 5200-20200/- Grade Pay Rs. 2800/- as recommended by the Departmental Screening Committee instead of Pay Band of Rs. 9300-34800/- Grade Pay Rs. 4200/-.



However, in view of the judgement /order dated 18.12.2014, passed by the Hon'ble Apex Court in the matter of Civil Appeal No. 11527 of 2014-State of Punjab & others etc. -Vs- Rafiq Masih (White Washer) etc. and as directed by the Hon'ble C.A.T and Hon'ble High Court, the excess paid amount of Rs. 2,06,106/-, which was recovered from the retirement gratuity of Shri V. Subramaniam, retired HC(Driver)/1235 vide Order dated 06.06.2012, is hereby ordered to be refunded to him.

Sd/-

Superintendent of Police (HQ)
Police Headquarter, Port Blair"

(ix) Both Babuwan and James Surian approached this Tribunal through O.As 501 & 502/2017 respectively challenging the speaking orders issued to them on 09.02.2017 pursuant to the show cause notice dated 02.01.2017 as mentioned supra. The Single Judicial Member of this Tribunal noticed that a matter which stood already adjudicated by this Tribunal in earlier O.As and upheld by the Hon'ble High Court could not be permitted to be twisted or to be made sterile as it was not legally permissible and entertainable. That, a Tribunal could not sit over the judgment of Hon'ble High Court, as also on its earlier order. Hon'ble Member also found that the conclusion of the respondents in the impugned orders and show cause notices were contrary to the earlier findings of this Tribunal. Having noticed as such, Hon'ble Member quashed the show cause notice dated 02.01.2017 and directed the respondents to fix the monthly pension of the applicant by considering the earlier observations of the Tribunal in O.A.88 & 89/2012. The said orders passed by Single Judicial Member was assailed before the Hon'ble High Court in W.P(C) No.257 & 258 on the ground that the order passed by a Judicial Member was *coram non judice*. The respondents while referring to Apendix 7 Sl. 19 of CAT (Rules of Practice) 1993 claimed that the issue had to be decided by a Division Bench while the Ld. Counsel for the respondents Subramanian and Surian, referring to 1996(2) SCC 437, contended that matter related to pension benefits and the plea of absence of jurisdiction could not be taken once the petitioners submitted to jurisdiction of the Tribunal. The Writ Applications were dismissed.

6. The present applicants have simply sought for the benefits that have been extended to their counteracts V. Subramanian and James Surian as they stood on the same footing due to the reasons indicated above and orders enumerated supra.

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7. At hearing Ld. Counsel for the applicant would urge that the present applicants being retired employees deserved identical benefits on par with V. Subramanian and James Surian, and as such deserved refund of the entire recovered amount.

8. We considered the rival contentions and perused the record. Irrefutably and indubitably the facts borne by records suggest that nature of grievance of the applicants are identical to V. Subramanian and James Surian as discussed supra. In the aforesaid backdrop and for parity of reason we feel that present applicants deserve the same relief, particularly in view of the fact that while disposing of O.A:88 and 89/2012 this Tribunal had discussed the records in details and consulted service books of the said applicants and found as under :

"Absorbed in the cadre of driver Constable w.e.f. 1.1.86 against the existing vacancy in A & N Police. His pay in the time of scale of 950-20-1150-EB-250-1500/- shall be fixed w.e.f. 1.1.86 (Driver Const.). His pay fixed at Rs.950/-2---1150-EB-1500/-. Allowed to date of next increment at Rs.970/-p.mw.e.f. 1.10.86."

In the present case we had directed production of service book, of the applicants which were not provided. Hence, going with the order of this Tribunal in the earlier O.A. & the parity in the claim of the present applicants vis a vis James Surian & Subramanian. We direct the authorities to recall the refixation orders and refund the recovered amount within 4 weeks from the date of receipt of a copy of this order. In the event the respondents desire to reduce the pay and affect the pension they would act in accordance with law.

OAs are accordingly allowed. No costs.

M.A. also stands disposed of.

(Tarun Shridhar)

Administrative Member

(Bidisha Banerjee)

Judicial Member