

RESERVED:

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH
THIS THE 13th DAY OF OCTOBER, 2006
Original Application No. 1139 of 2003

CORAM:

HON. MR. JUSTICE KHEM KARAN, V.C.

Yugal Kishore Lal Srivastava, a/a 60 ½ years
Son of Late Uma Shanker Lal Srivastava, r/o
Mohalla Bishunpurwa, Gandhinagar, Basti,
retired Dy. Post Master Barabanki and earlier
A.P.M. Basti H.O.

.. Applicant

(By Adv. Shri A. Tripathi)

Versus

1. Union of India, through the
Secretary, Ministry of Communication,
Department of Posts, Dak Bhawan,
Parliament Street, New Delhi- 110 001
2. Chief Post Master General,
U.P. Circle, Lucknow.
3. Director Accounts (Postal), U.P. Circle
Sector-D, Aliganj, Lucknow-226001
4. Supdt. Post Offices, Barabanki Division
Barabanki.
5. Post Master, Basti.

.. Respondents

(By Adv. Shri Saumitra Singh)

ORDER

JUSTICE KHEM KARAN, V.C.

The applicant joined the service as Clerk in 1966. He says after he passed Accounts Examination, he was posted as Accountant at Basti on 27.6.1981 and he worked as such till 2.12.1983 and while working as accountant he also received special pay @ Rs.45/- a month, in lieu of higher pay scale. He was promoted to the post of L.S.G on 3.12.1983. While fixing his pay on this promoted post, special pay of the lower post was taken into consideration and this increase in pay, continued to benefit him, till his retirement on 30.12.2002. Vide letter dated 29.7.2002, (Annexure A- 1), the office of respondent No.3, raised objection against fixation of his pay as A.P.M on 3.12.1983. According to it, since the

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special pay on the post of Accountant was not drawn for a minimum period of three years. So, the special pay could not have been taken into consideration, in fixation of pay on the post of APM/LSG. The Post Master Basti, however, not only justified the fixation of pay on the post APM but also informed his counterpart at Barabanki. Similar objection was earlier raised but dropped. According to him since the applicant held the post of Accountant substantively, w.e.f. 1.7.1982 vide S.P.O memo dated 13.11.1986 as recorded in service book, so in view of G.O.I.S Order No.71, Note 2(a), under FR 22(c), insistence for three years was not well founded. Unimpressed by all this, the Post Master Barabanki passed order dated 4.3.2003 (CA-2) for recovery of excess payment made to applicant, consequent to wrong fixation of pay on the post of A.P.M. Applicant's representation against the same has also been rejected vide order dated 23.6.03 (CA-1) of Post Master Barabanki. The applicant is challenging both these orders dated 4.3.03 and 23.6.03 (A-2 & A-1 respectively) on the grounds interalia;

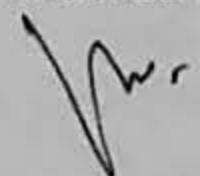
- (a) that he held the post of accountant from 27.6.1981 to 2.12.1983, substantively and the special pay @ Rs.45/- a month was paid to him in lieu of higher pay scale, so he was rightly given benefit of special pay in fixation of pay on the promoted post of APM in view of letter dated 24.2.1981 and also in view of note (a) below GOI instruction No.28 of Appendix 8.
- (b) That this fixation cannot be challenged after such a long period, especially when similar objection raised earlier in 1985 was dropped.
- (c) That even if there was such a error in fixation of pay on the post of APM, no such recovery can be effected from pensionary benefits, in view of the judicial pronouncements referred in ground No.(V) of O.A.
- (d) That no such recovery could be effected without affording opportunity of hearing to the applicant. He has also prayed for directing the respondents to pay all retrial benefits, on the basis of emoluments actually drawn by him from 30.11.1983 to 31.12.2002 and also to pay interest for delay in payments of due amounts.

2. The respondents have tried to defend the action of recovery, by saying that the question of applicant's holding the post of accountant from 27.6.1981 to 2.12.1983, did not arise as the cadre of accountants etc had already been made defunct, vide order dated 24.2.1981 (Annexure 7), and the then incumbents were brought in the scale of 260-480 with special pay of Rs.45/- a month. They say that the applicant worked as Time scale Clerk, from 27.6.1981 to 2.12.1983. According to them Govt. Order No.28 of Appendix 8 to F.R.S.R, is not applicable in the case of applicant

3. In his rejoinder, the applicant has tried to say that cadre of accountant etc was not made defunct by order dated 24.2.1981 (A-7) but it was the pay scale of those posts, which was made defunct by that order. He reiterated that he was given lien on the post of accountant and the same was sufficient enough to prove that cadre of a was alive and separate, He referred to A-12, in support of this plea.

4. Shri Avinish Tripathi, learned counsel, wanted that this case should be decided in the light of decision dated 15.4.05 of this Bench in O.A. No. 529 of 2003, Indrasen Prasad Kushwaha Vs. Union of India and Others. A close perusal of that decision, would reveal, there was no controversy, whether cadre of accountant was made defunct w.e.f. 24.2.1981, or whether the applicant of that case held the post substantively. Moreover, a perusal of the said decision, does not reveal that Govt. of India's Instruction No.28 Note 4 of Appendix 8 to Fundamental Rules our subsidiary Rules (FRSR), relied on by the applicant here was brought to the notice of Bench. In such financial and technical matters, a decision of a court of Tribunal can be cited as a finding precedent, only if, it was rendered after considering all the relevant rules/orders on the subject, otherwise it would be per incuriam.

5. Letter dated 10.11.1978 (A-6) is proof of the fact that RMS/DTO/CTO accountants/Asstt. Accountants in the postal department, formed no separate cadre and were time scale clerks, earlier to 10.11.1968 but they used to draw special pay. By this order dated 10.11.68, their pay scale was revised from 260-480 to 380-620 with no special pay, with this they formed a cadre, as provided in para-2 of this order. Annexure A-5, dated 4.1.72 would reveal that before formation of cadre, there arose a controversy whether holders of these post would get the benefit of special pay, in fixation of pay on promoted posts, even if the special pay was not drawn for a minimum period of three years. The controversy was resolved by saying this that accountants/Asstt.accountants were in the cadre of time scale clerks and not in a separate cadre and so they could not hold the said posts substantively and they would be entitled to have the benefit of



special pay, in fixation of pay on the promoted post, only if such special pay had been drawn at least for three years.

6. Later on vide order dated 24.2.1981 (CA-7), the cadre so formed on 10.11.78, was made defunct. It would be useful to reproduce the entire order dated 24.2.1981. It reads as under:

"Sub:

Revision of pay scale of PO and RMSD TOGTO Accountants/Asstt. Accountants

Attention is invited to this office memo no.31-31/74-PS 1 dated 10.11.78 where in PO and RMSD TO/GTO Accountants including Asstt. Accountants were given a revised pay scale of Rs.380-620 in lieu of the time scale of pay of Rs.260-480 plus S.P. with the revision of pay scale a separate cadre of PO and RMSD TO/GTO Accountants was formed.

2. The President is now pleased to decide that the cadre of PO and RMSD TO/GTO Accountants in the pay scale of Rs.380-620 be declared as defunct and the incumbents of these posts be brought on to the scale of Rs.260-480 plus a uniform rate of special pay of Rs.45/-p.m. The existing incumbents in the pay scale of Rs.260-480 have the option to retain the defunct scale under FR 23 and will not be eligible for promotion to any Higher post in the general line. The option should be exercised on or before 31.5.82. The option should be exercised on or before 31.5.82. If no option is exercised within the stipulated date, the officials shall be deemed to have automatically elected the pay scale of Rs.260-480 plus special pay and their pay will be fixed as under. The individuals who opt for the pay scale with special pay now introduced will be eligible for promotion to higher posts in the normal channel of promotion as were available before the issue of this OM 31-31/74-PE 1 dated 10.11.78.
3. The pay of the existing incumbents in the pay scale of Rs.380-620 may be fixed in the pay scale of 260-480 at a stage as would have been arrived at had they initially continued in the pay scale of 260-480. To the stage so arrived at, a special pay of Rs.45/- p.m only may be allowed. Where the pay so fixed plus the special pay of Rs. 45/- p.m falls short of the pay drawn in the scale of Rs.380-620 the difference may be allowed as personal pay to be absorbed in future increases of pay.
4. The special pay of Rs.45/-p.m referred to in para 2 is in lieu of higher scale of pay.
5. The pay of PO and RMS/D TO/GTO Accountants in the prescribed scale of Rs.260-480 plus special pay of Rs.45/- on promotion on to LSG may be fixed under FR-22-C
6. This issues with the concurrence of P&T Finance Advice-I vide their UP No.607/FAI dated 2.2.81."
7. Though the applicant has tried to say that this order simply put the time scale (380-620) of Accountants etc. defunct (in abeyance) and not the cadre so created vide letter dated 10.11.78 (A-6), but seeing the first 4 lines, of para-2 of order dated 24.2.81, there appears to be no substance in this plea. It is plain enough that cadre of PO and RMS/D TO/CTO Accountants in the scale of 380-620 was made defunct and the then incumbents were brought, subject to their options under FR 23, to time scale of Rs.260-480 with uniform special pay of Rs.45/- a month and with a provision that those coming to this scale of 260-380 will be eligible for

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promotion to higher posts in the normal channel of promotion as were available before the issue of O.M. 31-31/74-PE-1 dated 10.11.78. Those incumbents who exercised their options under FR 23 to retain the defunct scale, were debarred from any promotion to any higher post in the general line. In other words, by this order of 24.2.81, the position that obtained prior to 10.11.78, was restored. This order of 1981 however clarified that special pay of Rs.45/- a month was in lieu of higher scale of pay.

8. The appointment of the applicant on the post of accountant, took place on 27.6.81, much after the above order dated 24.2.81. He has not filed copy of that order by which he was appointed on the post of accountant on 27.6.81. Undoubtedly the post he held from 27.6.81 to 2.12.83, did not form part of a separate cadre, but was in the time scale clerks as stated in para -21 of the reply. So, I am of the view what was said in the earlier order dated 4.1.72 (A-5) in respect of the holders of the post of PO/RMS/DTO, Accountant/Asstt. Accountant, would apply to the applicant in so far as the benefit of special pay, in fixation of pay on the promoted post is concerned.

9. Shri Tripathi has referred to Note No., appended to Order No.28 of Appendix 8 of FRSR, so as to say that since the applicant held the post of Accountant, substantively as shown in Annexure 4) and so he was rightly given the benefit of special pay in fixation of pay on LSG/APM on 3.12.83, and it was not necessary for him to draw special pay for three years to get that benefit. Shri Tripathi has also submitted that letter dated 21.11.89 (A-1)) of Post Master Basti would show that similar objection raised earlier by Director Accounts was dropped, on position being clarified in that letter. Note-2 to order 28 of Appendix 8 of FRSR is as under:-

Note- 2. (a) The condition of special pay having been drawn continuously for a minimum period of three years as well as the certificate of continued drawal of special pay but for promotion should not be insisted upon in the case of a person holding substantively the lower post carrying special pay in lieu of a separate higher scale. This exemption will not be available to officers with substantive position in a cadre and holding a post carrying a special pay in lieu of a separate higher scale in the cadre, as confirmation of officers in the cadre is not made against individual posts. The condition of drawal of special pay in such posts continuously for not less than three years should be applied in those cases.

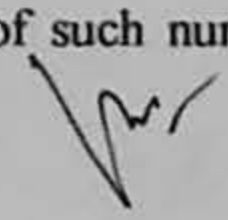
(b) The certificate of continued drawal of special pay but for promotion cases, where special pay is in lieu of a higher scale of pay and has been drawn continuously for at least three years, should be dispensed with. In other cases, such a certificate should be insisted upon.

©It may happen that a senior person promoted to the higher post before completing three years in the special pay post draws less pay than his junior who is promoted after completing three years in the special pay post. Where such cases occur, the pay of the senior should be stepped upto the level of pay of the junior from the date of promotion of the latter, provided the junior was not drawing a higher pay than the senior from time to time in the lower post and the lower and higher posts held by the junior and the senior belong to the same".

7. I fail to understand as to how this Note, helps the applicant, in overcoming the clarification made in earlier order dated 4.1.72 (A-5), which says

incumbents of such posts, which do not form a separate cadre, cannot hold the posts substantively. After the cadre of Accountants etc was made defunct vide order dated 24.2.81, the question of applicant's holding the post of Accountant substantively did not arise. Annexure A-4 will not make any difference. The fact that similar objection in 1985-89, against fixation of pay on the post of LSG/APM was dropped, will not advance the case of applicant. Firstly, there is no authentic proof that the objection was positively dropped. In absence of any such proof, this much could be said that it was not pursued further. Secondly, not pressing the objection after letter of Postmaster Basti, will not prevent him from raising the same now. If the fixation of pay on 3.12.83 was wrong being against the rules it can be pointed out now. Thus the objection raised by respondent No.3, in letter dated 29.7.02 (CA1) against consideration of special pay, in fixation of applicants pay on the promoted posts of LSG/APM, on the ground that he did not draw special pay for minimum period of three years, was well founded and was rightly followed by Postmaster Barabanki.

But I am of the view that impugned order dated 4.3.03 (A-2) in so far as it directs recovery of an amount of Rs.61,184/- from the amounts to be paid to the applicant, is not justified for the following reasons. There is nothing on record to reveal that applicant made any misrepresentation or misled the authorities at the stage of fixation of his pay on the post of LSG/APM. In other words, the fault that crept in that fixation of his pay on that post cannot be attributed to him or he cannot be held responsible for the same. Secondly, it is a fact that the mistake was pointed out by Director of Accounts as back as in 1985 but inspite of that authority concerned did not rectify the same rather it justified the same by writing a letter in 1989 to the Director of Accounts. In other words, fixation of pay of the applicant on the post of LSG/APM by taking into account his special pay of the post of Accountant was a conscious decision of the authority concerned though it was wrong in view of conclusion reached by me. It has been held by Jodhpur Bench of this Tribunal in Mahaveer Suingh vs. Union of India & ors (1996) 33 Administrative Total cases pg 683 recovery of an amount overpaid to the applicant cannot be made now after lapse of such number of years and



especially from retrial benefits. Similar view was taken by the same bench in Arjun Singh Vs. union of India & Ors. I see no reason not to go by the said views of Jodhpur Bench. Had the applicant been instrumental in such wrong fixation of his pay on the post of LSG/APM or had he misled the authorities in getting the benefit of the special pay in fixation of his pay on the promoted post, matter would have been otherwise. So I come to the conclusion that no such recoveries on account of over payment made to the applicant due to wrong fixation of his pay on the post of LSG/APM, can be made from his retrial benefits and to that extent the decision of the authority concerned as indicated in (A-2) is not sustainable in law and deserve to be quashed. In the peculiar facts and circumstances of the case I find no good reason to award interest on the amount with-held by the respondents.

8. The net result is that the OA is to be partly allowed and partly dismissed. His retrial benefits including gratuity etc are to be calculated on the basis of the pay which he would have drawn, had his pay on the post of LSG/APM not been wrongly fixed on 3.12.1983 but no recovery is to be made from these benefits on account of over payment to him as a result of wrong fixation of pay. The order dated 4.3.03 (A-2) and order dated 23.6.03 (A-1) stand quashed to the extent indicated above. The OA is disposed of accordingly as stated above. No order as to costs.

/s/ J. S. Chavhan
13.10.06
VICE CHAIRMAN

Dated: October 13, 2006
Uv/