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CENTRAL ADMINISTRATIVE TRIBUNAL,
CUTTACK BENCH;CUTTACK.

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ORIGINAL APPLICATION NO. 716 OF 1994
Cuttack, this the 15th day of May, 1997

Shri Damodar Panda

....

Applicant

Vrs.

Union of India and others

....

Respondents

(FOR INSTRUCTIONS)

- 1) Whether it be referred to the Reporters or not? Yes.
- 2) Whether it be circulated to all the Benches of the Central Administrative Tribunal or not? NO.

Somnath Som.
(S.SOM)
VICE-CHAIRMAN 15.5.97

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CENTRAL ADMINISTRATIVE TRIBUNAL,
CUTTACK BENCH: CUTTACK.

ORIGINAL APPLICATION NO. 716 OF 1994
Cuttack, this the 15th day of May, 1997

CORAM:

HONOURABLE SRI S.SOM, VICE-CHAIRMAN

...

Shri Damodar Panda,
son of late Harekrushna Panda,
at present working as Postal Assistant,
Savings Bank Control Organisation,
Balasore Head Office,
District-Balasore

Applicant

-versus-

1. Union of India, represented by the
Secretary, Ministry of Communication,
Department of Posts, New Delhi.
2. Chief Post Master General,
Orissa Circle, Bhubaneswar.
3. Director, Postal Services,
Bhubaneswar, At/PO-Bhubaneswar,
District-Khurda.
4. Superintendent of Post Offices,
Balasore Division, Balasore.
5. Shri R.K.Satpathy, Postal Assistant,
Savings Bank Control Organisation,
at present working in General Post Office,
Bhubaneswar, District-Khurda.

..... Respondents

Advocates for applicant -

M/s R.N.Naik,
A.Deo, B.S.Tripathy,
P.Panda & P.K.Misra.

Advocate for respondents -

Mr.Ashok Misra,
Senior Panel Counsel.

ORDER

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M. VICE-CHAIRMAN

In this application under Section 19 of the

Administrative Tribunals Act, 1985, the applicant has asked for
stepping up of his pay at par with respondent no.5, for payment of
all arrears, and also for quashing the order dated 17.5.1994
(Annexure-10) rejecting his above prayers made to the departmental
authorities.

2. The facts of this case are that the applicant joined as Lower Division Clerk, Savings Bank Control Organisation, on 7.11.1977, whereas respondent no.5 joined as Lower Division Clerk, Savings Bank Control Organisation, on 4.3.1978. In the gradation list of Lower Division Clerks as on 1.7.1980, copy of which is at Annexure-1, the applicant's serial is 26 whereas serial number of respondent no.5 is 35. Thus in the rank of Lower Division Clerk, the applicant is admittedly senior to respondent no.5. It is submitted by the applicant that the authorities allowed respondent no.5 to officiate in the cadre of Upper Division Clerk from 9.2.1980 to 9.2.1981. According to the applicant, respondent no.5 was also allowed two increments illegally. The applicant was promoted as Upper Division Clerk on regular basis on 14.2.1984, vide Annexure-3. Prior to this regular appointment, the applicant was also allowed to officiate as Upper Division Clerk, Savings Bank Control Organisation, Balasore Head Office, from 6.11.1981, vide order at Annexure-4. According to the applicant, in the gradation list of Upper Division Clerks, which is at Annexure-5, the applicant has been shown senior to respondent no.5, the applicant's name appearing against serial no.13 and respondent no.5's name appearing against serial no.21. Therefore, in the gradation list of temporary Upper Division Clerks also the applicant is senior to respondent no.5. The applicant's grievance is that the pay of respondent no.5 was fixed in the rank of Upper Division Clerk by taking into account the two increments he got while officiating as Upper Division Clerk and the prayer of the applicant for stepping up of his pay to the level of respondent no.5 has been rejected. The applicant has also submitted that on similar facts, one Ganeswar Mahanta filed O.A.No.319 of 1991, which was disposed of in order dated 29.4.1993, in which the Tribunal ordered that the pay of Ganeswar Mahanta should be stepped up at par with his junior, R.K.Satpathy, the present respondent no.5, and

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10 accordingly, the Director, Postal Services, Bhubaneswar, stepped up the pay of Ganeswar Mahanta at par with that of R.K. Satpathy. Copies of the judgment in Ganeswar Mahanta's case and the order stepping up the pay of Ganeswar Mahanta are at Annexures 7 and 7/1 respectively. On the above grounds, the applicant has made the prayers referred to earlier.

3. The respondents in their counter have admitted the dates of joining of the applicant and respondent no.5 in the rank of Lower Division Clerk and have stated that in the rank of Upper Division Clerk, the applicant is senior to respondent no.5. According to the respondents, 50% of the vacancies of the posts of Upper Division Clerks in Savings Bank Control Organisation are filled up by Lower Division Clerks. Of this 50%, 30% is filled up through departmental examination based on merit and 20% is filled up by seniority-cum-fitness to be judged by Departmental Promotion Committee. The respondents' case is that the applicant, while working as Lower Division Clerk, was posted to officiate in the higher rank of Upper Division Clerk in order dated 9.3.1981, but he declined to accept the officiating promotion in his letter dated 12.3.1981. The offer and the refusal are at Annexures R/1 and R/2. The respondents have further submitted that the applicant was again given officiating promotion to the post of Upper Division Clerk on 28.10.1981 and according to the applicant, he joined the officiating post of Upper Division Clerk on 6.11.1981. His regular promotion to the post of Upper Division Clerk came in order dated 12.2.1984 in the scale of Rs.330-560/- which was later on revised to Rs.1200-2040/- and his pay was fixed at Rs.1260/- with effect from 1.1.1986. After introduction of One Time Bound Promotion Scheme (OTBP Scheme) ^{the} applicant opted for the cadre of Postal Assistant, Savings Bank Control Organisation

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and his pay was fixed at Rs.1450/- with effect from 1.10.1991. Subsequently, he was promoted to L.S.G. with effect from 7.11.1993 and his pay was fixed at Rs.1560/- in the pay scale of Rs.1400-2300/- Respondent no.5 was approved for officiation in the cadre of Upper Division Clerk in a local vacancy on ad hoc basis from 9.2.1980, i.e., before the first offer was made to the applicant which he declined. While working in the cadre of Upper Division Clerk on ad hoc basis, he was regularly promoted to the cadre of Upper Division Clerk on 6.2.1986. On the basis of the recommendation of the Fourth Pay Commission, his pay was fixed at Rs.1290/- as against Rs.1260/- for the applicant. Subsequently, on introduction of OTBP Scheme, his pay was fixed at Rs.1510/- in the rank of Postal Assistant as against Rs.1450/- for the applicant, and on promotion to the Lower Selection Grade his pay was fixed at Rs.1640/- with effect from 4.3.1994 as against Rs.1560/- for the applicant. The prayer of the applicant is to step up his pay from Rs.1560/- to Rs.1640/-. The respondents have stated that according to Office Memorandum, dated 4.11.1993, of Department of Personnel & Training, the stepping up of pay of the applicant is not permissible and accordingly, his prayer for stepping up ^{of} pay was rejected. They have also submitted that the applicant having refused his ad hoc promotion offered to him on 9.3.1981, he has no right to claim for stepping up of his pay to be at par with respondent no.5. Thus the prayer of the applicant has been contested by the respondents on two grounds; firstly, he has refused to officiate on ad hoc basis as Upper Division Clerk, and secondly, in accordance with the Office Memorandum dated 4.11.93 such stepping up of pay cannot be allowed. These two contentions are taken up separately.

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4. As regards the first contention that the applicant has refused officiating ad hoc promotion as Upper Division Clerk whereas respondent no.5 did accept such appointment on ad hoc and officiating basis, from the above narration of facts it appears that even though the applicant was much senior to respondent no.5, the offer of ad hoc officiating appointment came to him on 9.3.1981 whereas to respondent no.5, such offer was made on 9.2.1980. This has happened because such ad hoc appointments have been given, on the basis of local vacancies, to the local staff. Respondent no.5 joined as Lower Division Clerk on 4.3.1978 and even before completion of three years he was offered ad hoc officiating appointment to the post of Upper Division Clerk on 9.2.1980 which he accepted. At Annexure-2 is a circular dated 8.1.1981 from the Post Master General, Orissa, in which it has been noted that sometimes Lower Division Clerks, who have not fulfilled the condition of eligibility for promotion to the next higher cadre, are being arranged to fill up local short term vacancies and the Divisional Superintendents are approaching the Post Master General for approval of such irregular arrangements. Therefore, in the above circular the subordinate formations have been directed not to give ad hoc officiating promotion to persons in the rank of Lower Division Clerk who are not otherwise eligible. In this case, the applicant, even though senior to respondent no.5, was given ad hoc officiating promotion as Upper Division Clerk ^{only} on 9.3.1981 whereas respondent no.5 got ad hoc officiating promotion on 9.2.1980. Therefore, the fact that the applicant declined to accept such ad hoc officiating promotion and respondent no.5 accepted the same, cannot come to the help of the ^{departmental} respondents, because respondent no.5 could not be allowed to take advantage of an illegal arrangement and the benefit arising out of it. As a matter of fact, in course of hearing, the learned Senior Panel

Counsel fairly conceded the point and did not press this aspect any further.

5. The second ground urged against the prayer of the applicant is that in terms of the Office Memorandum dated 4.11.1993, the stepping up of pay cannot be done. It is not necessary to refer to the entire Office Memorandum. It will be adequate to extract sub-paragraphs (b) and (c) of paragraph 2 which have been relied upon by the learned Senior Panel Counsel. These are extracted below:

"(b) If a senior foregoes/refuses promotion leading to his junior being promoted/appointed to the higher post earlier, junior draws higher pay than the senior. The senior may be on deputation while junior avails of the ad hoc promotion in the cadre. The increased pay drawn by a junior either due to ad hoc promotion in the cadre.(sic) The increased pay drawn by a junior either due to ad hoc officiating/regular service rendered in the higher posts for periods earlier than the senior cannot, therefore, be an anomaly in strict sense of the term.

(c) If a senior joins the higher post later than the junior for whatsoever reasons, whereby he draws less pay than the junior, in such cases senior cannot claim stepping up of pay at par with the junior."

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As regards sub-paragraph (b) it was pointed out to me in course of hearing that this sub-paragraph is not applicable to this case because this sub-paragraph deals with a case where a senior foregoes or refuses promotion and because of the refusal the junior gets promoted to the higher post earlier and draws higher pay than the senior, or when the senior is on deputation and junior avails of ad hoc promotion in the cadre. In such case, stepping

up of pay of the senior to the level of the junior is not permitted. In this ^{case,} ad hoc appointment given to respondent no.5 to the rank of Upper Division Clerk was not because of refusal of ad hoc promotion by the applicant. As a matter of fact, the offer of ad hoc promotion to the applicant came later than the ad hoc promotion given to respondent no.5 and therefore, sub-paragraph(b) is not applicable to this case. Sub-paragraph (c) lays down that if a senior joins the higher post later than the junior for whatsoever reason, whereby he draws less pay than the junior, then in such cases the senior cannot claim stepping up of pay at par with the junior. As regards the applicant and respondent no.5, it is seen that in all stages of regular appointment at the levels of Upper Division Clerk, OTBP Scheme and Lower Selection Grade, the applicant has been promoted ahead of respondent no.5. This appears from paragraphs 3(d) to 3(f) of the counter. But the difference in pay has come about only because of earlier officiating promotion of respondent no.5. This very point came up for consideration in the case of Kailash Chandra Sethi -versus- the departmental respondents and the present respondent no.5 in O.A.No.573 of 1995, disposed of in order dated 28.6.1996. While allowing the prayer of Kailash Chandra Sethi, who prayed for stepping up of his pay to the level of the present respondent no.5, who was also respondent no.5 in that Original Application, Hon'ble Mr. Justice A.K. Chatterjee made the following observation:

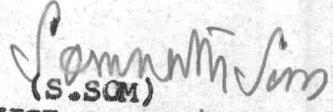
"....The Office Memorandum dated 4.11.1993 cannot be attracted so as to deny the claim of stepping up of pay of the applicant which arose much earlier to the issue of this O.M. In other words, this O.M. cannot be given any retrospective effect because it is firmly settled position of law that by an executive act a person cannot be divested of a right which has already vested in him. It is also noticed that this question came up

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for consideration before different Benches of this Tribunal and in O.A.No.393 of 1994 (Baidyanath Bandopadhyay v. Union of India and others) and O.A.No.274 of 1995 (Motilal Chanda & ors v. Union of India and others) before Calcutta Bench and in O.A.No.337 of 1993 (G.K.Nair v. Union of India) before Ernakulam Bench, stepping up of pay was allowed even in the face of the Office Memorandum dated 4.11.1993."

I am in respectful agreement with the above logic. Here the claim has arisen prior to the issue of the Office Memorandum dated 4.11.1993 for stepping up of pay at the levels of Upper Division Clerk, OTBP Scheme and correspondingly in the Lower Selection Grade and therefore, this Office Memorandum cannot be pressed into service to deny the claim of the applicant.

6. In the result, therefore, the Original Application is allowed. The departmental respondents are directed to step up the pay of the applicant to the level of respondent no.5 within a period of three months from the date of receipt of copy of this order and pay him arrears within another two months. No costs.


(S.SOM)
VICE-CHAIRMAN