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CENTRAL ADMINISTRATIVE TRIBUNAL,

CUTTACK BENCH, CUTTACK.

ORIGINAL APPLICATION NO. 626 OF 1999
Cuttack, this the 7th day of September, 2001

Sri M.K.Birabara Deo 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.


(G.NARASIMHAM)
MEMBER(JUDICIAL)

Sonmath Singh
(SONNATH SINGH)
VICE-CHAIRMAN
7.9.2001

CENTRAL ADMINISTRATIVE TRIBUNAL,
CUTTACK BENCH, CUTTACK.

ORIGINAL APPLICATION NO. 626 OF 1999
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CORAM:

HON'BLE SHRI SOMNATH SOM, VICE-CHAIRMAN
AND
HON'BLE SHRI G.NARASIMHAM, MEMBER(JUDICIAL)

Sri M.K.Birabara Deo, aged about 64 years, son of late
Deo, at present residing at Engineering School Campus,
Cuttack-7

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Applicant

Advocates for applicant - M/sGaneswar Rath
S.N.Misra
A.K.panda
T.K.Prahraj

Vrs.



1. Union of India, represented by the Comptroller & Auditor General of India, New Delhi-110 002.
2. The Accountant General (A&E), Orissa, Bhubaneswar
3. Deputy Accountant General (Works), At/PO/Dist.Puri
4. State of Orissa, represented by the Secretary, Irrigation Department, Secretariat Building, Bhubaneswar, District-Khurda.

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Respondents

Advocate for respondents - Mr.A.K.Bose
Sr.CGSC

O R D E R

SOMNATH SOM, VICE-CHAIRMAN

S. Som
In this application the petitioner has
prayed for a direction to the respondents to fix the pay
of the applicant with effect from 15.2.1982 as per FR
22-C and to direct the respondents to sanction pension in
favour of the applicant with reference to his pay as
Emergency Divisional Accountant (hereinafter referred to
as "EDA") with immediate effect. The third prayer is for
payment of interest at the rate of 18% per annum from the

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date of retirement till the date of sanction of pension.

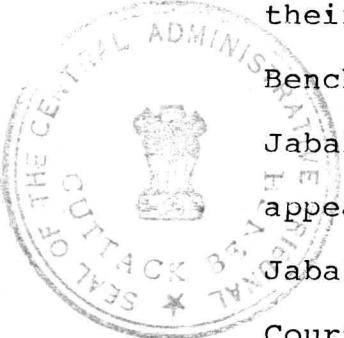
2. The applicant while working as Upper Division Clerk (UDC) in the office of Superintending Engineer, Eastern Circle, Cuttack, in the pay scale of Rs.320-550/-, was appointed as EDA with effect from 15.2.1982 in order dated 17.12.1983 at Annexure-1. In this order it was mentioned that the pay of the applicant was fixed at Rs.425/- in the scale of Rs.425-750/- under FR 22-C read with Comptroller & Auditor General's letter dated 31.10.1983. It was also mentioned that he would be eligible to draw DA, ADA, DP and IR at the Central rates. It was also indicated in this order that the emoluments drawn by him in the State Government which are inclusive of DA, ADA, etc., would be protected by giving him personal pay which will be continued during his entire duration of work as EDA, meaning thereby that this personal pay would not be absorbed in future increments. The admitted position is that posts of Divisional Accountants are created in the offices of Executive Engineers and Superintending Engineers of Public Works, Irrigation and other construction Departments of the State Government and the posts are created by the State Government. These are manned by a cadre of Divisional Accountants which is controlled by the Accountant General of the State. Because there were lot of vacancies in the post of Divisional Accountant, EDAs were selected through a separate test and the applicant was one such person. According to the terms of appointment they were required to face the Divisional Accountants' Grade Examination in five chances within a period of two years, failing which they were liable to be reverted to their parent

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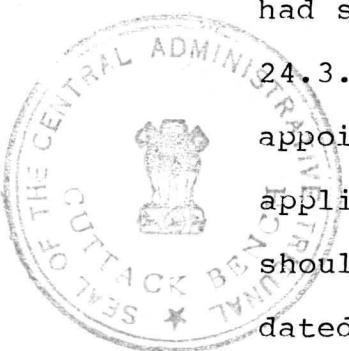


organisation. The applicant and several others failed to clear this examination and were reverted to the State Government. Against the order reverting them to the State Government, the applicant and several others came up before the Tribunal in OA No.495 of 1990 which was disposed of in order dated 23.2.1993. Apparently, similar matters had been agitated before Jabalpur, Guwahati and Allahabad Benches of the Tribunal and while the decisions of Jabalpur Bench and Guwahati Bench went along the same lines and the petitions of the applicants before them were allowed, Allahabad Bench of the Tribunal had rejected the petition. Cuttack Bench of the Tribunal in their order dated 23.2.1993 noted the decisions of other Benches and issued directions in the lines given by Jabalpur Bench and Guwahati Bench on the ground that appeal filed by Union of India against the decision of Jabalpur Bench had been dismissed by the Hon'ble Supreme Court. Cuttack Bench of the Tribunal did not issue any detailed direction but merely ordered that the respondents should follow the same procedure which has been indicated in the orders passed by Guwahati Bench and Jabalpur Bench. The direction given by the Tribunal, in short, was that all the applicants, who had already exhausted six chances, should be allowed one more chance to pass the DAG Examination and they should not be repatriated till then. This order, as already noted, was pronounced on 23.2.1993 and the applicant retired on superannuation on 31.7.1993. The applicant has stated that no Examination was held after the decision of the Tribunal and before he retired on superannuation and therefore, he could not avail of the additional chance allowed by the Tribunal. His grievance is that even

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even though he retired as EDA, his pension was not finalised in accordance with Central Civil Services (Pension) Rules and a view was taken that because of his failure to pass the DAG Examination, the applicant is deemed to have been reverted to State Government and his pension should be fixed in accordance with the State Government Pension Rules by working out the notional pay which he would have received in the State Government on 31.7.1993, i.e., the date of his superannuation. The applicant's case is that there is no provision for deemed repatriation and as he has retired while working as EDA, his pension should be fixed according to CCS (Pension) Rules. On the point of his pay fixation, the applicant had stated that Government of India in their order dated 24.3.1994 indicated how pay has to be fixed for EDA appointed after 1.1.1973 and before 1.1.1986 and as the applicant was appointed as EDA on 15.2.1982 his pay should have been fixed in accordance with this circular dated 24.3.1994.



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2. The respondents have filed counter opposing the prayers of the applicant. It is not necessary to refer to all the averments made by the respondents in their counter because these will be taken note of while considering the submissions made by the learned counsel for the parties.

3. We have heard Shri Ganeswar Rath, the learned counsel for the petitioner and Shri A.K.Bose, the learned Senior Standing Counsel for the respondents and have perused the records including the record of OA No.495 of 1990 and the decisions of Jabalpur Bench, Guwahati Bench and Allahabad Bench.

4. Before proceeding further it is to be noted that for a confirmed Divisional Accountant, pension, on his retirement, is fixed according to CCS (Pension) Rules and his pension as well as his pay and allowances during his service career as Divisional Accountant are met by the State Government out of State Government Consolidated Fund. Thus, irrespective of the present controversy, the undoubted position is that the pension of the applicant will be paid by the State Government from the State Consolidated Fund. This has been clearly mentioned in paragraph 2(a) of Annexure-R/2 filed by the respondents. It is also the admitted position that the applicant was appointed as EDA in order dated 17.12.1983 (Annexure-A/2). In this order it was not mentioned that the applicant was taken on deputation to the post of EDA which has been held to be an ex cadre post on deputation. When a person is taken on deputation/foreign service, period of such deputation/foreign service is fixed and terms of deputation are also issued. Respondents themselves have made the following averments in paragraph 14 of the O.A:

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".....No doubt, the term of appointment of the applicant is not covered under deputation or Foreign service, but since the service is subject to reversion on failure to pass the Divisional Accountant Grade Examination; technically it is to be treated as Deputation even in the absence of such terms...."

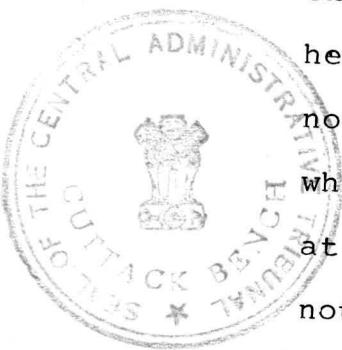
From the above it is clear that the applicant's service as EDA was not initially taken as on deputation or foreign service. This is also clear from Annexure-2 from which it appears that he was taken as a direct recruit in the post of EDA because his pay was fixed at the initial of the scale of Rs.425-750/- . In view of this, it cannot

be said that the applicant is ~~deemed~~ to have been on ^{taken} ~~J.Som.~~ ~~deemed~~ deputation. Admittedly, the applicant did not pass the DAG Examination and in terms of his appointment, was liable to be reverted after completion of two years as EDA because the term of appointment was that he must clear the examination within a period of ~~three~~ ^{two} years in the chances provided during that period. It is also the admitted position that the Tribunal in OA No. 495 of 1990 issued direction to allow him one more chance and accordingly he continued as EDA till he retired. The applicant has made a grievance that no examination was held after the passing of the order of the Tribunal on 23.2.1993 and till his superannuation on 31.7.1993 and therefore for this lapse on the part of the respondents he is no way responsible. We do not consider this to be a lapse on the part of the respondents because DAG Examination is an all-India examination and it was not possible for the respondents to hold an examination specifically for the applicant alone before he retired. The respondents have pointed out that after receipt of the order of the Tribunal in OA No. 495 of 1990 they were processing the matter for holding the examination, but by that time the applicant retired. Therefore, no adverse view can be taken against the Accountant General for not holding the examination before superannuation of the applicant. But the fact of the matter is that the applicant continued as EDA till his superannuation. It is also the position that pension to be given to the applicant is relatable to the pay drawn by him in the post held by him at the time of superannuation. Under CCS(Pension) Rules, pension is fixed on the basis of average of last ten months' pay whereas under the State Government the pension is fixed

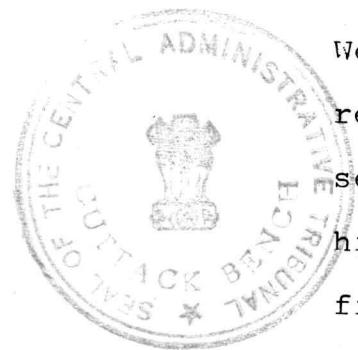


on the basis of last pay drawn. The respondents have stated that as the applicant was not qualified to be absorbed in the post of Divisional Accountant, he should be deemed to have been reverted to the State Government and his pension should be fixed on the basis of notional fixation of his pay which he would have got had he continued in the State Government from 15.2.1982 to 31.7.1993. Superintending Engineer of the State Government to whom the pension papers were sent by the Accountant General had, to our mind, rightly pointed out that after a passage of 11 years it is not possible to fix the pay of the applicant notionally in the State Government pay scale. Had the applicant continued under the State Government during this period from 1982 to 1993 he might have got certain promotions and therefore, notional fixation of pay in the scale of Rs.320-550/- which the applicant was holding in the State Government at the time of his appointment as EDA will obviously be not in accordance with rules and also ^{will be} ~~totally~~ inequitous. ^{^ Jom.}

Jom We also note that the Deputy Accountant General (Works) under whom the applicant was working at the time of his superannuation, wrote in his letter dated 1.7.1994 at Annexure-A/7 that EDAs have not been treated as on deputation and foreign service. He has also pointed out that between 1985 and 1990 eight EDAs have retired from Government service and their pension cases have been finalised by Accountant General, Orissa, without raising any doubt about their entitlement for pension presumably under CCS(Pension) Rules. The applicant has also mentioned two cases of EDAs whose pension has been finalised under CCS(Pension) Rules. The respondents have



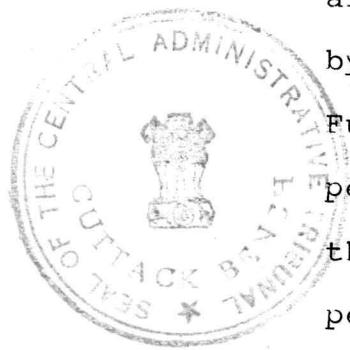
stated in reply that on a reference made by Comtroller & Auditor General, the Ministry of Finance, Department of Expenditure in their U.O. dated 5.10.1992 had clarified that a Divisional Accountant is technically treated as on deputation till he is confirmed in the post and strictly speaking therefore, he continues to be governed by the Pension Rules of the State Government under whom he holds a lien until he is confirmed as Divisional Accountant. They have pointed out that the same position obtains in respect of other State Government employees on deputation to Government of India and in case EDAs are allowed pension according to CCS (Pension) Rules, then similar demands may come from other employees similarly situated. We are unable to accept this proposition for the simple reason that normally when a State Government employee is sent to Government of India on deputatin/foreign service his period of deputation and terms of deputation are fixed and issued. But in case of EDAs like the applicant, they were not taken on deputation/foreign service as has been admitted by the respondents in their counter which has been extracted by us earlier. No terms of deputation were also fixed for the applicant. There is no provision in any service rules for deemed deputatin, much less for deemed repatriation from a post held in deemed deputation status. The most important point to be noted here is that Accountant General in terms of the appointment of the applicant could have reverted the applicant after two years of his work as EDA on his failure to pass the DAG Examination. But this was not done and the applicant was continued for a number of years. In view of this, it cannot be held that the



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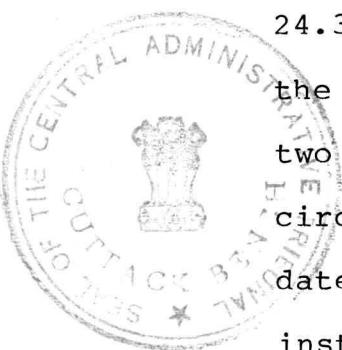
applicant was on deputation to the post of EDA and even though he has retired from that post, he is taken to have been repatriated to the State Government. This proposition is obviously fraught with absurd results. The deemed repatriation as indicated by the respondents in their counter has to be at the latest on the date of his superannuation or any date earlier. But as a matter of fact on that date the applicant was working as EDA and therefore it cannot be said that he is deemed to have been repatriated. In view of this, we have no hesitation in holding that the applicant is entitled to have his pension fixed in terms of CCS (Pension) Rules. We have already noted that pension so fixed will have to be borne by the State Government and met out of State Consolidated Fund. The applicant is already receiving provisional pension as determined under CCS(Pension) Rules. We direct that his final pension should be determined within a period of 90 days from the date of receipt of copy of this order.

5. The other prayer of the applicant is for correct pay fixation on his appointment as EDA on 15.2.1982. The respondents have stated that this is a matter unconnected with pension and his prayer is liable to be rejected on the ground of plural remedies. This proposition is held to be absolutely without any merit because pension has to be determined in accordance with pay as earlier noted and pay fixation is a matter which is unavoidably connected with his pension. Respondents have pointed out that the applicant's pay as on 15.2.1982 was fixed at the minimum of the scale of Rs.425-750/- under FR 22-C. The respondents have pointed out that the



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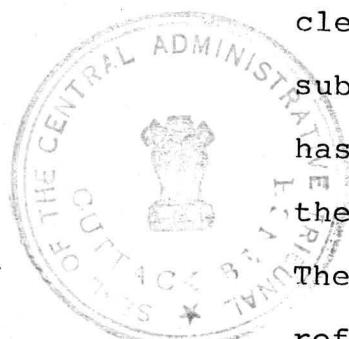
applicant has never made a grievance about his pay fixation as on 15.2.1982. Obviously, fixation of his pay at the minimum of the pay scale of Rs.425-750/- has not been done in accordance with FR 22-C because from the counter of the respondents it appears that prior to 15.2.1982 the applicant was getting Rs.454/- as basic pay in the scale of Rs.320-550/-. But this aspect need not concern us at ~~the~~ present because the applicant's grievance is that his pay has not been fixed in accordance with paragraph 3 of the circular dated 24.3.1994 (Annexure-A/3). It is necessary to note that the pay of EDA used to be fixed earlier on the basis of two circulars dated 30.7.1966 and 17.11.1975. These two circulars were quashed by Jodhpur Bench in their order dated 25.5.1993 and direction was given for issuing fresh instructions in the matter. After considering the matter, in the order dated 24.3.1994 it has been laid down that EDAs appointed after 1.1.1973 till 31.12.1985 should have their pay fixed by reducing the element of DA/ADA/Interim Relief, etc., granted by the State Government after 1.1.1973 and after calculating the basic pay in the aforesaid manner their pay would be fixed under FR 22-C which was then in force and has since been replaced by FR 22(T)(a)(1). The respondents have stated that this order dated 24.3.1994 applies only to serving persons and does not apply to persons who have retired. We are unable to accept this proposition because the position of law is well settled that all executive orders are given prospective operation unless it is specifically or by necessary implication given retrospective



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operation. On a reading of the circular dated 24.3.1994 it is clear that this circular has been given retrospective operation because in this circular issued in March 1994 it has been laid down as to how pay has to be fixed of EDA on their appointment as such between 1.1.1973 and 31.12.1985. As this circular has been given retrospective operation the applicant is entitled to have his pay fixed in terms of paragraph 3 of this circular. We order accordingly. Such fixation of pay of the applicant should be made within a period of 90 days as indicated by us. This prayer of the applicant is accordingly allowed.

6. The third prayer of the applicant is for payment of interest. From our discussions above it is clear that the matter of pay fixation has been subject-matter of litigation and ultimately final order has been passed in 1994. On the question of pension also the situation of the applicant was not free from doubt. The Comptroller & Auditor General had to make a reference to the Ministry of Finance on the subject. In view of this, it cannot be said that the respondents are guilty of any avoidable delay in finalising the applicant's pension. The prayer for payment of interest is accordingly rejected.



7. In the result, the O.A. is partly allowed in terms of our observation and direction above.

No costs.

(G.NARASIMHAM)
MEMBER(JUDICIAL)

SOMNATH SOM
VICE-CHAIRMAN

AN/PS

Somnath Som
1.9.2001.