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CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH: CUTTACK


Original Application No. 198 of 2012
Cuttack, this the 16th day of *January*, 2017

Balakrishna Nayak Applicant
Versus
Union of India & Ors. Respondents

FOR INSTRUCTIONS

1. Whether it be referred to the reporters or not? ✓
2. Whether it be referred to PB for circulation? ✓


(R.C.MISRA)
Member (Admn.)


(A.K.PATNAIK)
Member (Judl.)

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CORAM
HON'BLE MR. A.K. PATNAIK, MEMBER (J)
HON'BLE MR. R.C. MISRA, MEMBER (A)

....

Balakrishna Nayak,
aged about 60 years,
S/o- Sri Fakir Charan Nayak,
Working as Carpenter,
O/o Director, Central Cattle Breeding Farm,
PO- Sunabeda-2, Dist: Koraput,
and residing at present At-C.C.B.F. Colony,
Sunabeda, PO- Sunabeda-2, Dist: Koraput.

.....Applicant

Advocate(s)-M/s- N.R.Routray, S.Mishra, T.K. Choudhury, S.Parida.

VERSUS

Union of India represented through

1. Union of India, Ministry of Agriculture, Department of Animal Husbandry and Dairying, represented through its Secretary, Krishi Bhawan, New Delhi.
2. Director, Central Cattle Breeding Farm, Semiliguda, PO: sunabeda-2, Dist: Koraput.
3. Accountant General, Orissa, Bhubaneswar, Dist: Khurda.
4. Deputy Secretary to Govt. of India, Ministry of Agriculture, Department of Animal Husbandry and Dairying, Krishi Bhawan, New Delhi.

..... Respondents

Advocate(s)..... Mr. S.K.Singh.

.....



ORDER**A.K.PATNAIK, MEMBER (JUDL.):**

The applicant, Balakrishna Nayak, a Carpenter in the office of Director, Central Cattle Breeding Farm, Sunabeda, Koraput, has filed this O.A. under Section 19 of the Administrative Tribunals Act, 1985 seeking the following relief:

“(i) To quash the order dt. 01.12.2011 and 05.12.2011 under Annexure-A/10 and A/11 respectively and Ann-A/5 dt. 25.11.2000.

(ii) And to direct the Respondents to restore the applicant to his upgraded scale of Rs. 4000-6000/- w.e.f. 09.08.1999 and further grant him the 2nd financial upgradation in scale of Rs. 5000-8000/-.

(iii) To direct the Respondents to pay the differential financial benefits.

And pass any other order.....”

2. The orders impugned in this O.A. are dated 25.11.2000 (A/5) dated 01.12.2011 (A/10) and dated 05.12.2011 (A/11), which read as under:

“Order dt. 25.11.2000 (Annexure-A/5)

Consequent on the inspection by A.G. Orissa during October, 2000, it has been decided that, the pay Scale admissible to the under mentioned incumbents who have already been granted the financial benefits under the Assured Career Progressing Scheme of D.O.P.T vide O.M. No. 35034/197 Estt.(D) dated 09.08.1999 as under:-

Sl. No.	Name & Design.	Present Pay Scale granted due to A.C.P	Basic Pay already drawn & paid w.e.f. 09.08.99	Revised pay Scale admissible	Admissible Basic Pay Payable as on 09.08.1999	Increment month
1.	Sri O.P.Mahor Agril Asst.	5500-9000	6500	5000-150-8000	6500	June, 2000
2.	Sri P. Dakua Agril, Asst.	5500-9000	6375	5000-150-8000	6350	May, 2000
3.	Sri Bala Krishna Nayak Carpenter	4000-100-6000	4200	3200-85-4900	4135	April, 2000

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The excess payment already made to the concerned be calculated and recovered from the salary payable from the month of November, 2000.

Order dated 01.12.2011 (Annexure-A/10)

Whereas, Shri B. K. Nayak, Carpenter, Central Cattle Breeding Farm (CCBF), Sunabeda, has filed an O. A. No. 105/2009 in Hon'ble Central Administrative Tribunal(CAT), Cuttack Bench praying for first financial up-gradation in his favour in the pay scale of Rs. 4000-6000/- w.e.f. 09.08.1999 in terms of ACP Schemes and consequential benefits.

2. Whereas, the Hon'ble CAT, Cuttack Bench, in its order dated 05.07.2011 directed the Respondent to "take a view, as to whether the Applicant is holding isolated post or remaining isolated post and then determine his entitlement to the scale of pay meant for 1st ACP and pass appropriate orders within a period of two months from the date of receipt of this order under intimation to the applicant".

3. Whereas, the grant of first financial up-gradation in the pay scale of Rs. 4000-6000/- instead of Rs. 3200-4900/- to Shri B. K. Nayak, Carpenter, Central Cattle Breeding Farm(CCBF), Sunabeda, has been considered in consultation with the Department of Personnel & Training(DOPT), Govt. of India. DOPT has clarified that the "the Pay Commission has not recommended specific scales under ACPs for carpenters. In CPWD also, Carpenters have been allowed first ACPs for Carpenters in the Scale of Rs. 3200-4900. The case of industrial employees under Ministry of Defence that may include carpenters also, is different. They are governed by a separate 3-grade structure recommended for industrial employees. This can not be replicated for carpenters, or other skilled categories in other Ministries/Department either of promotional avenue, or for grant of ACPS. Therefore, Prima facie the action of allowing him the scale of Rs. 3200-4900 is in order." Hence it is apparent that the post of Carpenter in CCBF, Sunabeda, Orissa falls under 'remaining isolated category' as the Pay Commission has not recommended specific scales.



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under Assured Career Progression (ACP) Scheme for Carpenters. His case is thus covered under Clarification No. 10 of DOPT's O.M. No. 35034/1/97-Estt.(D)(Vol-IV) dated 10th February, 2000. He has been rightly given the pay scale of pay of Rs. 3200-4900/- under Assured Career progression (ACP) Scheme.

4. This order is in pursuance of the Hon'ble CAT, Cuttack's Order dated 05.07.2011 in O.A No. 105/2009 vide which earlier orders No. 23(24)/2000/3288(6) dated 15.11.2000, No. 54/2005-Admn.II dated 26.05.2008 and No. 23(24)/ACP/2005/1903 dated 21.10.2005 have been quashed.

Order dated 05.12.2011 (Annexure-A/11)

Please find enclosed herewith an order No. 5-2/2009-Admn.III dated 01.12.2011 passed by competent authority in the Ministry in the Ministry in compliance to the judgement delivered by Hon'ble CAT, Cuttack Bench, Cuttack on 05.07.2011 in OA NO. 105/2009 filed by Sri B. K. Nayak, Carpenter versus Union of India and others which will speak for itself.

Further, in view of above order, Sri B. K. Nayak's pay has already been fixed by granting him 1st financial up-gradation under ACP Scheme in the pay scale of Rs. 3200-4900 w.e.f. 09.08.1999 and accordingly 2nd financial up-gradation in the pay scale of Rs. 4000-6000/- as per advice of DoPT and in accordance with the instruction contained in O. M. No. 35034/1/97-Estt.(D) dated 09.08.1999."

3. In nutshell, it is the case of the applicant that he was appointed as Attendant w.e.f. 01.07.1978 on ad hoc basis in the pay scale of Rs. 196-232/-. Subsequently, his appointment was treated as regular one w.e.f. 15.04.1980. Thereafter, he was appointed as Carpenter (temporarily) in the pay scale of Rs. 260-400/- vide order dated



22.03.1984. As a matter of policy, the Govt. of India issued Office Memorandum for granting two financial upgradations w.e.f. 09.08.1999, one after 12 years and another after 24 years of regular service. Accordingly, the applicant was granted the first financial upgradation under ACP Scheme w.e.f. 09.08.1999 vide order dated 16.11.1999 in the scale of Rs. 4000-6000/-. Subsequently, the financial upgradation granted to the applicant was withdrawn vide order dated 15.11.2000. The applicant challenged the said order in O.A. No. 618/2005, which was disposed of on 04.01.2008. The relevant portion of the order is extracted hereunder for ready reference:

“4. Without going to the merit of claim of the applicant as it is a disputed question as to whether it is an isolated post or a remaining isolated post as referred in Clause-10 (Annexure-R/2), we direct the concerned department to refer the case of the applicant to the concerned ministry for their decision and accordingly, the ACP would be fixed by the department. However, there was no latches on the part of the applicant in fixation of the higher pay, thus the alleged excess amount shall not be recovered from the applicant. If it is already recovered, the same be refunded to the applicant within three months from the date of receipt of this order. We hope that the department/ministry will do good to dispose of the question of ACP within six months from the date of communication of this order.”

4. The Respondents considered the case of the applicant but rejected his claim for granting him the scale of Rs. 4000-6000/- as first financial upgradation under the ACP Scheme and instead his pay was fixed at Rs. 3200-4950/- vide order dated 26.05.2008. The applicant



again filed O.A. No. 105/2009, which was disposed of on 05.07.2011.

The relevant portion of which is quoted hereunder for ready reference:

“7. We have also considered the submission made by the Ld. Counsel for the parties. From the pleadings of the parties, it reveals that the Respondents has passed two distinct orders, i.e. Office Order F. No. 23(24)/ACP/2005/1993 dated 21.10.2005 and F. No. 5-4/2005-Admn.III dated 26.05.2008 (Annexure-6) which is self contradictory in so far as the post of Carpenter as held by the applicant is concerned. Whereas vide office order dated 21.10.2005, the Respondents have categorized the post of Carpenter as an “Isolated Post, vide order dated 26.05.2008 (Annexure-6) they have categorized the said post as “remaining isolated” Post. It implies that the Respondents have attempted to blow hot and cold from the same breath. Besides the above, the order dated 26.05.2000(Annexure-6) has not been issued in supersession of Office Order dated 21.10.2005. Viewed from this, in the absence of a definite finding as to whether the applicant is holding isolated post, the matter is remitted back to the Respondents to at first take a view, keeping in mind two contradictory orders as indicated above, as to whether the applicant is holding isolated or remaining isolated post and then determine his entitlement to the scale of pay meant for 1st ACP and pass appropriate orders within a period of two months from the date of receipt of this order under intimation to the applicant. For the purpose of technicality, we quash Annexure-5 and 6 and Office Order dated 21.10.2005.”

5. The Respondents considered the case of the applicant in pursuance of the order of the Tribunal referred to above and finally rejected the same vide order dated 05.12.2011 (cited supra). Being aggrieved, the applicant has filed this O.A. seeking the aforesaid reliefs.



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6. Per contra, the Respondents have filed the counter stating therein that as per the condition No. 7 of the ACP Scheme, financial upgradation shall be given in the next higher grade in accordance with the existing hierarchy in the cadre/category of posts without creating new posts for the purpose. However, there is an exception carved out for isolated post where the upgradation is especially provided to be granted in the next higher (common) pay scale. In the case of financial upgradation in the existing hierarchy, it is only the next grade within the existing hierarchy structure which is to be given. As per the ACP Scheme issued by the DOP&T, the applicant along with other employees were granted first financial upgradation after completion of 12 years of service erroneously to the pay scale of Rs. 4000-6000/- w.e.f. 09.08.1999. The A.G. Audit while verifying the ACP cases detected this error and pointed out to refix the pay of the applicant in the pay scale of Rs. 3200-4900/- instead of Rs. 4000-6000/- with an order for recovery of the excess payment already paid to them. Accordingly, the ACP case was reviewed by the Review Departmental Committee and the pay of the applicant was fixed as first financial upgradation in the scale of Rs. 3200-4900/- w.e.f. 09.08.1999. The excess payment made due to the aforesaid reason was also recovered from the applicant. Accordingly, the Respondents have prayed that there being no error in the decision taken in the matter, this O.A. is liable to be dismissed.

7. The applicant has filed rejoinder in which he has relied upon



the two decisions of the Hon'ble High Court of Orissa, one rendered in the case of Union of India and Ors. Vs Purna Chandra Nayak reported in 2010 (2) OJR 661 and in the case of Union of India & Ors. Vs Gangadhar Mohanty 110 (2010) CLT 626 and stated that as no action has been taken by the Department in so far as the cases of others, who have wrongly been given such pay scale, withdrawal and recovery from the applicant is bad in law. Accordingly, he has reiterated the stand taken in the O.A.

8. Heard Mr. N.R.Routray, Ld. Counsel for the applicant, and Mr. S.K.Singh, Ld. Addl. Central Govt. Standing Counsel appearing for the Respondents, and perused the materials placed on record.

9. The conditions for grant of benefits under ACP Scheme reads as under:

“(i) The Scheme envisages merely placement in then higher pay scale/grant of financial benefits (through financial upgradation) only to the government servant concerned on personal basis and shall, therefore, neither amount to functional/regular promotion nor would require creation of new posts for the purpose.

(ii) The highest pay-scale up to which the financial upgradation shall be available will be Rs. 14,300-18,300/-.

(iii) The first financial upgradation under the Scheme will be allowed after 12 years of regular service and the second upgradation after 12 years of regular service from the date of the first financial upgradation. If the first upgradation gets postponed on account of the employee not found fit or due to departmental proceedings, etc, this would have consequential effect on the second upgradation which would also get deferred accordingly.



- (iv) Two financial upgradations under the Scheme in the entire career of an employee will be counted against regular promotions (including in situ and fast-track promotion availed through limited departmental competitive examination) availed from the grade in which an employee was appointed as a direct recruit.
- (v) If an employee has already got one regular promotion, he shall qualify for the second financial upgradation only on completion of 24 years of regular service. In case two prior promotions on regular basis have already been received by an employee, no benefit under the Scheme shall accrue to him.
- (vi) The period of regular service for grant of benefits under the Scheme will be counted from the grade in which an employee was appointed as a direct recruit.
- (vii) Financial upgradation under the Scheme will be given to the next higher grade in accordance with the existing hierarchy in a cadre/category of posts without creating new posts for the purpose.
- (viii) The financial upgradation under the Scheme will be purely personal to the employee concerned and will have no relevance to his seniority position.
- (ix) On upgradation under the Scheme, pay of an employee will be fixed under the provisions of FR 22(a)(1). The financial benefit allowed under the Scheme will be final and no pay fixation benefit will accrue at the time of regular promotion, i.e., posting against a functional post I the higher grade.
- (x) Grant of higher pay scale under the Scheme shall be conditional to the fact that an employee while accepting the said benefit shall be deemed to have given his unqualified acceptance for regular promotion on occurrence of vacancy subsequently.
- (xi) Existing time-bound promotion schemes, including in situ promotion scheme, in various Departments may, as per choice continue to be operational for the concerned categories of employees; but these schemes will not run concurrently with the Assured Career Progression Scheme."

10.

Ld. Counsel for the applicant submitted that the Respon-



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dents while rejecting the claim of the applicant miserably failed to assign any reason as to why the post of the applicant does not fall under the category of the isolated post and falls under the remaining isolated post and in a very mechanical manner rejected his case. As the applicant was already conferred with higher pay scale of Rs. 4000-6000, reversion to lower pay scale is nothing but amounts to punishment, which ought not to have been done without holding a disciplinary proceeding. The Respondents have committed a grave error in causing discrimination between the similarly situated persons thereby violating the provisions enshrined under Article 14 and 16 of the Constitution of India.

11. On the other hand, Ld. Counsel for the Respondents has objected to such plea of the applicant by stating that as the applicant was not entitled to the higher pay scale, question of giving him an opportunity before effecting the recovery does not arise. Further, he has submitted that granting of a particular pay scale to an employee falls within the scope and ambit of the policy decision of the Government. Therefore, the applicant has no right to claim the benefit, which he is not otherwise entitled under the law.

12. We have given our anxious consideration to the submissions made by Ld. Counsel for the respective parties. Grant of a particular pay scale to an employee even under the ACP Scheme is a matter to be decided by the authorities as a matter of policy. As to why the authority determined the post of Carpenter coming under the category of



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remaining isolated post is not within the domain of the Tribunal to look into. Facts remain that the applicant was granted Rs. 4000-6000/- scale erroneously, which was also rightly objected to by the A.G. Audit and, accordingly, the applicant was allowed the pay scale of Rs. 3200-4900/- and, therefore, we find no illegality in the matter necessitating interference by this Tribunal.

13. So far as recovery is concerned, it is to be noted that the Hon'ble Supreme Court in State of Punjab and others Vs. Rafiq Masih, (White Washer) reported in All India Services Law Journal VI-2015(2) page 152 has laid down the law as under:

"12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law;

(i) Recovery from employees belonging to class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.


(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.


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(v) In any other case, where the court arrives at a conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

14. We have considered the submission made by the Ld. Counsel for the applicant in the light of the decisions of the Hon'ble Supreme Court in Rafiq Masih (supra). From the facts narrated in the O.A., we are of the view that the applicant being a Carpenter comes within a purview of the categories as laid down by the Hon'ble Supreme Court, as mentioned above. Accordingly, while we decline to accede to the relief sought by the applicant to direct the Respondents to restore him to his upgraded scale of Rs. 4000-6000 w.e.f. 09.08.1999 and further to grant him second financial upgradation in the scale of Rs. 5000-8000/- after quashing impugned orders dated 01.12.2011 (A/10), 05.12.2011 (A/11) and dated 25.11.2000 (A/5), we would direct the Respondents not to effect recovery of the excess amount, if any, paid to the applicant. In the result, the O.A. is partly allowed. No costs.


(R.C.MISRA)
Member (Admn.)


(A.K.PATNAIK)
Member (Judl.)

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