

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

JODHPUR BENCH : JODHPUR

Date of order : 06.01.2000

O.A. No. 204/1996

Ismail Khan son of Shri Fateh Khan aged 36 years resident of Rly. Quarter No. 2033, Nehru Park Colony, Jodhpur, at present Section Officer (Accounts), Office of Dy. Chief Engineer Construction II, Northern Railway, Jodhpur.

... Applicant.

v e r s u s

1. Union of India through the General Manager, Baroda House, New Delhi.
2. Divisional Accounts Officer, N. Rly., Jodhpur.
3. Work Shop Accounts Officer, N. Rly, Jodhpur.
4. Dy. Chief Engineer (Construction II), N. Rly., Jodhpur.

... Respondents.

Mr. Vijay Mehta, Counsel for the applicant.

Mr. V.D. Vyas, Counsel for the respondents.

CORAM:

Hon'ble Mr. A.K. Misra, Judicial Member.

Hon'ble Mr. Gopal Singh, Administrative Member.

ORDER

(Per Hon'ble Mr. A.K. Misra)

The applicant had filed this O.A. with the prayer that the impugned order dated 4.6.96 (Annexure A/1) be quashed and the respondents be restrained from reducing the salary of the applicant and from recovering the amount in compliance of order Annexure A/1. - The applicant has further prayed that the respondents be directed to pay back any amount if the same has been recovered in pursuance of Annexure A/1.

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2. The applicant has also prayed for staying the operation of impugned order Annexure A/1 dated 4.6.96.

3. Notice of the O.A. was sent to the respondents who have filed the detailed reply to which a rejoinder was filed by the applicant. The respondents have also filed additional reply to the rejoinder.

4. In the O.A. the applicant had prayed for staying the operation of Annexure A/1 dated 4.6.96 as an interim relief which was considered and it was ordered that "no recovery of the excess payment made shall be made till the next date". This stay order is continuing till today.

5. The facts relating to the controversy in hand are not in dispute. However, for better appreciation of the controversy in hand, facts in brief are given hereunder.



6. The applicant who was initially appointed on the post of Clerk Grade-II was further promoted to Clerk Grade-I on 27.6.86 and was, thereafter, further promoted to the post of Accounts Assistant with effect from 26.6.89. Shri Brijraj Singh was appointed directly on the post of Clerk Grade-I in December, 1984. Shri Brijraj Singh was transferred from Traffic Accounts to the Divisional Accounts Office on his own request vide order dated 19.1.88 and was given bottom seniority. Thereafter, Shri Brijraj Singh was promoted on the post of Accounts Assistant on stop gap basis vide order dated 21.3.88 whereas the applicant was promoted as Accounts Assistant on 26.6.89.

7. It is alleged by the applicant that in the seniority list of Clerk Grade-I, the name of Shri Brijraj Singh appeared at sl. No. 24 whereas the name of the applicant appeared at sl. No. 12. Likewise, in the gradation list of Accounts Assistant as on 1.1.90 the name of the applicant had appeared at sl. No. 64 whereas the name of Shri Brijraj Singh appeared at sl. No. 78. Thus, Shri Brijraj Singh was junior to the applicant at both the stages. However, the pay of Shri Brijraj Singh on promotion to the post of Accounts Assistant was fixed at higher stage and was drawing more pay than the applicant. To remove this anomaly, the pay of the applicant was also ordered to be stepped up with

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effect from 28.1.91 equal to the pay of Shri Brijraj Singh vide order dated 31.1.92. The applicant was paid the arrears due to stepping up of his pay. It is further alleged by the applicant that the respondent No. 3 vide his order dated 20.7.95 cancelled the order relating to stepping up of his pay on the basis of order dated 29.6.95. The applicant challenged the order withdrawing the benefit of stepping up by way of an original application. The original application was accepted and the order passed by the respondents cancelling the benefit of stepping up was quashed and the respondents were directed to proceed in the matter after giving show cause notice to the applicant. Thereafter, the applicant was given a show cause notice by the respondents and after considering the representation made by the applicant in this regard passed the impugned order, which is under challenge. The applicant has challenged the impugned order on the ground that the order has been passed in violation of principles of natural justice, has been passed mechanically and without disclosing any reasons whatsoever, therefore, the order is arbitrary and discriminatory and against the relevant facts.



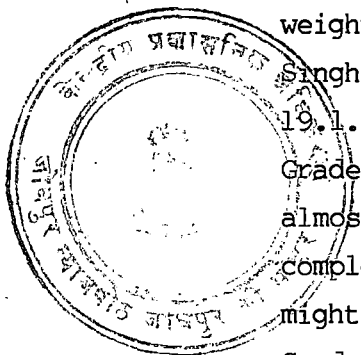
8. We have heard the learned counsel for the parties and gone through the records. Both the learned counsel for the parties elaborated their arguments on the lines of the pleadings which we have also considered.

9. The main contention of the applicant is that Shri Brijraj Singh was transferred on his own request and was given bottom seniority as Clerk Grade-I in the office of the respondent No.2. Therefore, he could neither be promoted to the next higher grade of Accounts Assistant nor could his pay be fixed higher than that of the applicant. But we do not subscribe to this argument of the learned counsel for the applicant. It should not be forgotten that Shri Brijraj Singh was a direct appointee of the year 1984 on the post of Clerk Grade-I whereas the applicant was a promotee of the year 1986 on the post of Clerk Grade-I. By accepting the bottom seniority on request transfer, Shri Brijraj Singh had not relinquished his pay inspite of his placement at the bottom stage seniority. Shri Brijraj Singh was drawing pay of Clerk Grade-I since 1984. It has not been placed on record that right from his appointment Shri Brijraj Singh was continuously drawing lesser pay than the applicant, therefore, it

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cannot be said that the applicant was drawing higher pay than Shri Brijraj Singh even while both of them were working in Clerk Grade-I. On request transfer, the concerned employee may be given bottom seniority in his grade, but that does not mean that his pay would be reduced accordingly. Therefore, even while such employee may be given bottom seniority, his pay may be higher than those whose names may appear senior to such persons in the gradation list. Therefore, on this basis, the applicant cannot be allowed to say that he was senior to Shri Brijraj Singh and was entitled to stepping up of pay. If the contention of the applicant is considered in that light then pay of all those persons will have to be stepped up on the principle of junior drawing more pay than the senior if somebody joins on transfer at bottom seniority on his own request.

10. It was argued by the learned counsel for the applicant that Shri Brijraj Singh having been given bottom seniority in Clerk Grade-I should not have been promoted as Accounts Assistant so as to affect the applicant adversely, but we would not like to give weight to this argument for one simple reason that Shri Brijraj Singh was promoted on the post of Accounts Assistant as back as 19.1.88 on completion of 3 years' period of working on Clerk Grade-I whereas the applicant was promoted on the same post after almost 1½ years, i.e. on 26.6.89, when the applicant himself completed 3 years' service as Clerk Grade-I. Since Brijraj Singh might have been drawing higher pay while he was working as Clerk Grade-I though on bottom seniority, his pay was bound to be fixed at higher level while he was promoted to the post of Accounts Assistant, may be on a stop gap arrangement. Thus, in our opinion, the anomaly of pay which had arisen between the applicant and Shri Brijraj Singh was not directly attributable to the application of rules relating to pay fixation and was, therefore, liable to be corrected as and when the same was discovered. In our opinion, for matter of stepping up placement of an incumbent at bottom seniority due to transfer on request is never a guiding principle. There are many reasons for which a person may seek his transfer to another unit on the condition of being placed at bottom seniority. But placement at bottom seniority does not entail reduction of his pay and consequently,



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the principle that no junior should allow to draw higher pay than the senior is not applicable in such cases.

11. We have also considered the order Annexure A/1 dated 4.6.96 and the arguments relating thereto. We do not think that the order Annexure A/1 is the result of non-application of mind. In show cause notice, it has been clearly mentioned that the order of stepping up of applicant's pay was in contravention to the provisions of para 1316 of Indian Railway Establishment Manual Vol.II and the Railway guidelines. Therefore, no further reason was required to be given in the show cause notice. The applicant could have defended the action of the respondents by explaining his position vis-a-vis the rules, therefore, it cannot be said that the show cause notice did not contain any reason for the proposed action. Therefore, the arguments of the learned counsel for the applicant in this regard are rejected.

12. Having come to the conclusion that the applicant was given the benefit of stepping up of pay against the rules, the question of recovery of excess payment is required to be disposed of. In this case, it appears that the Railway Administration had suo-moto given the pay fixation to the applicant by stepping up of his pay equal to Shri Brijraj Singh. In other words, the applicant was given the benefit of stepping up of pay without his having represented/misrepresented. Therefore, the well recognised principle as laid by Hon'ble the Supreme Court has to be followed. It has been decided by Hon'ble the Supreme Court that if the pay fixation wrongly done is not solely attributable to misrepresentation of the applicant then he cannot be found at fault and no recovery of such over-payment can be made from him. At the same time, it is also well settled that <sup>mistake</sup> the/should not be allowed to perpetuate if the Railway Administration has found or has discovered that the benefit of stepping up of pay was wrongly given to the applicant then the same could be corrected as and when the mistake is discovered. But due to such revised order, the applicant may not be called upon to make the payment of excess payment received by him. In view of this, while we are of the view that <sup>in</sup> passing the impugned order Annexure A/1, the respondents have committed no mistake, ~~but~~ we feel that whatever



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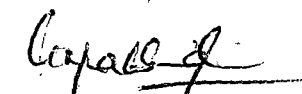
amount the applicant had received due to stepping up of his pay as per the orders of the respondents, the same should not be recovered from him.

13. It was argued by the learned counsel for the respondents that the recovery of the excess payment made to the applicant would be in terms of the mistake discovered and the public money should not be allowed to be retained by the applicant which he had wrongly received. But we are of the view that the applicant had received a paltry amount by way of such fixation on his stepping up of pay which he might have spent and it would not be in order to permit the respondents to recover the amount from the applicant.

14. In view of the above discussion, the O.A. deserves to be partly allowed. While the impugned order relating to withdrawing the benefit of stepping up of pay deserves to be maintained, the part of the order relating to initiation of recovery deserves to be quashed.

15. The O.A. is, therefore, partly accepted. The impugned order so far as it relates to withdrawing the benefit of stepping up of pay to the applicant vis-a-vis the pay of Shri Brijraj Singh and ordering re-fixation of pay accordingly is held to be in order and maintained. However, the order relating to initiation of recovery of amount so paid to the applicant consequent to such stepping up of pay is quashed and the respondents are directed not to recover from the applicant any amount of pay which has been paid consequent to the stepping up of pay fixation in question. If the respondents have recovered from the applicant any amount in pursuance of Annexure A/1 dated 4.6.96, the same should be refunded to the applicant but without any interest.

16. Parties are left to bear their own costs.



(GOPAL SINGH)  
Adm. Member

  
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( A.K. MISRA  
Judl. Member

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