

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A. NO.461/2009

Dated this the 18th day of October, 2010

C O R A M

HON'BLE MRS. K. NOORJEHAN, ADMINISTRATIVE MEMBER

Karunakaran V. S/o late N. Velayudhan
T.C. No. 12/699, Varambassery
Kunnukuzhy PO
Thiruvananthapuram-37
now residing at TC 24/2089(1)
Karuna Pound Road, Thycaud PO
Thiruvananthapuram.

Applicant

By Advocate Mr. M. Rajagopalan Nair

Vs

- 1 **A.G.(A&E) Kerala Trivandrum
O/o AG (A&E) Kerala
Thiruvananthapuram.**
- 2 **Pay & Accounts Officer
AG(Kerala) Trivandrum
Director of Audit -II Central Revenue (IAAD)
Pay and Accounts Office, AG Kerala,
Thiruvananthapuram**
- 3 **Pay & Accounts Officer
Central Pension Accounting Officer
Government of India, Trikoot-2, Bhikaji
Cama Place, New Delhi-110 066**
- 4 **The Manager
State Bank of India
PB NO. 14, Trivandrum, Kerala**

Respondents

By Advocate Mr. V. V. Asokan, ACGSC for R 1-3

ORDER

HON'BLE MRS. K. NOORJEHAN, ADMINISTRATIVE MEMBER

This Application is filed by a Pensioner against the recovery of alleged excess payment of pay, pension and retiral benefits due to fixation of pay under FR 22-C.

2 The brief facts are as follows. The applicant entered service as Auditor in the Accounts Wing of AG's office, in June, 1970 and retired as Senior Accountant on 30.4.1994. His pension was sanctioned accordingly. Senior Accountants in Accounts Wing were declared functional as per the 4th CPC w.e.f. 1.4.1987 and those who were promoted after 1.4.87 were given the benefit of fixation under FR 22-C. This was upheld by the High Court. His pension was revised as per OM dated 17.12.98 (A-2). However, as per Annexure A-3 his pension was reduced and consequently recovery of pension and retiral benefits ordered from 1.1.96 onwards based on the judgment of the High Court in OP No. 15198/98. The applicant is challenging the reduction in pension and consequential recovery as arbitrary, illegal, the recovery is being effected after more than 22 years, the wrong fixation of pay and pension was not made as a result of any fraud or misrepresentation committed by the applicant, the withdrawal of benefits attached to the post of Senior Accountant is discriminative, the persons promoted after 31.3.1987 were given the benefits of FR 22-C treating the post as functional, and the reduction and recovery of pension is a blow to the applicant. Hence he filed this application to direct the respondents not to effect any recovery or reduction in his pension.

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3 The respondents 1 to 3 filed reply statement. They stated that the Government introduced non-functional selection grade posts in the Indian Audit and Accounts Wings of offices of C&AG w.e.f. 1.8.1976. As the decision adversely affected those who were promoted after 1.8.1976, a few of them approached the High Court challenging the validity of the circular. The Selection Grade Auditors who continued in Accounts Wing were not given the benefit of FR 22-C. But the posts were made functional w.e.f. 1.4.1987. The C&AG by order dated 1.11.1988 clarified that the employees who have already been placed in the scale of pay of Rs. 1400-2600 are also entitled to fixation of pay under Rule 22-C on regular placement in the higher functional grade of Sr. Accountant w.e.f. 1.4.1987. Since the post remained non-functional during 20.9.1979 and 31.3.2007 there is no justifiable claim for the applicant for fixation of pay under FR 22-C.. Aggrieved, the applicant along with others filed O.A. 183/88 which was allowed by the Ernakulam Bench of the Tribunal. The respondents filed SLP before the Apex Court which was remitted to the Tribunal for reconsideration in view of different view taken by the Hyderabad and Ahmedabad Benches of the Tribunal. A Full Bench of the Tribunal considered the matter again and held that the applicants are not entitled to the reliefs. The order of the Full Bench of the Tribunal was challenged before the High Court which was dismissed. On the basis of the judgment fixation of pay and allowances under FR 22-C w.e.f the date of promotion to the post of Senior Accountant prior to 1.4.1987 have been revised and excess pay and allowances drawn by them have been ordered to be recovered from their future pension in instalments.

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4 The applicants filed rejoinder reiterating the averments in the O.A opposing the recovery proceedings.

5 Heard learned counsel for the parties at length and perused the pleadings and documents produced before me.

6 The issue that comes up for consideration in this Application has been considered by the Tribunal in various cases and finally on the direction of the Apex Court, a Full Bench of the Tribunal in O.A.K No. 139/88, OAK No. 183/88 and O.A No. 1876/92 was constituted. The Full Bench held as follows:

"Here in this case by the order dated 12.6.87 the post of Senior Accountants was upgraded as a higher functional grade with effect from 1.4.87 (It has now to be mentioned that after restructuring of the IA&AD into Audit and Accounts wings separately with effect from 1.3.84 the post of Senior Auditor was again treated as a functional post carrying higher responsibilities and the pay of the Auditors on promotion as Senior Auditor came to be fixed under FR 22-C. But similar upgradation of the post of Senior Accountants from non-functional to functional was not made. The applicants in these cases were persons who had opted to continue in the Accounts Wing. It was on the recommendations of the Pay Commission to bring parity between the Accounts and the Audit cadres, that the order dated 12.6.87 was issued upgrading the posts of Senior Accountants as a functional grade having higher duties and responsibilities. In effect the dispensation under the order dated 12.6.87 is beneficial to the Accounts cadre and cannot be considered as discriminatory at all. What has been done by this order is not sub-classifying Senior Accountants but upgrading the non-functional post of Senior Accountants as functional grade. It is the prerogative of the Government to classify and reclassify posts or grades as functional and non-functional taking into account the relevant aspects. When the post of Senior Accountant was reclassified as functional with effect

74

from 1.4.87 on the basis of the clarificatory order issued on 1.11.88 by the second respondent, all the senior Accountants including the applicants have been granted the benefit of fixation of pay under FR 22-C w.e.f. 1.4.87. Since between 20.9.79 and 1.4.87 the post remained non-functional there is no justifiable claim for the applicants to fixation of pay invoking FR 22-C w.e.f. the dates of their promotion during that period. On account of the action taken pursuant to the clarificatory order dated 1.11.88, the grievance if any, of the applicants had have been redressed. The Sr. Accountants who had been holding the non-functional selection grade, were fitted in the functional selection grade w.e.f. 1.4.1987 and their pay was refixed under FR 22-C. Therefore, the sub-classification of a homogeneous class of Senior Accountants has not taken place as contended by the applicants, to attract the vice of arbitrariness unjustifiable classification and hostile discrimination involving violation of Art. 14 of the Constitution whereas in Nakara's case the Court held that a homogeneous class of pensioners were subjected to arbitrary classification based on a fortuitous date fixed, which has no nexus with the legislative intent of bettering the living conditions of pensioners who had served the Government during the better part of their lives.

14 In the conspectus of facts and circumstances and legal position, as discussed above, we do not find any merit in these applications. The applications therefore fail and are dismissed leaving the parties to bear their own costs."

7 The order of the Full Bench of the Tribunal was challenged before the High Court in O.P. No. 15191 of 1998. The OP was dismissed by judgment dated 17.10.2006. The judgment of the High Court is extracted below:

"Ext. P-4 is under challenge. It is a common judgment of the Central Administrative Tribunal, Ernakulam Bench in OAK Nos. 139/88, 183/88 and OA No. 1876/92. A Division Bench of this court in OP NO. 12165/98 dismissed the challenge against the judgment so far as it relates to OAK

74

139/88 is concerned. Another Division bench in OP Nos. 6646/98 and 19784/98 also dismissed the challenge so far as OA. No. 1876/92 is concerned. Necessarily, the challenge in this writ Petition by some of the petitioners in OAK NO. 183./88 cannot produce any different result. Necessarily OP fails and is dismissed."

Therefore, the issue of fixation of the pay of the applicant and similarly situated persons is settled by the judgment of the High Court cited above.

8 The applicant is relying on the judgment of the High Court in WA No. 2662 Of 2007 dated 29th May, 2007 on the recovery of the excess amount from the retiral benefits of the petitioner therein. I have gone through the judgment of the High Court. The High Court relying on the judgment of the High Court in Sivankutty Nair V. Secretary to Government (2005 (3) KLT 512), Santhakumari V. State of Kerala (2005 (4) KLT 649), the judgments of the Apex Court in Babulal Jain V. State of M.P. (2007) 6 SCC, Aleyamma Varghese V. Secretary, General Education Department (2007 (3) KLT 700 (SC)) the High Court allowed the appeal. In that case, on the basis of audit objection it was decided that the petitioner has drawn excess pay and he was not responsible for granting him higher wages and that if the wages granted to him from 1989 is recovered after the retirement, at this distance of time it will cause undue miseries and difficulties as now he is getting only the pension.

In United India Insurance Co.Ltd. V. Roy (2005 (2)KLT 63), a Division Bench of the High Court of Kerala held as follows:

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"To err is human, to correct an error is also human.....It is a large organisation where several employees are working and large volume of work is being transacted. In such a situation, human error at times cannot be avoided. Nobody could expect an ideal situation without any error or mistake in the matter of administration. Due to inadvertence or otherwise a mistake has been committed which can always be corrected. Duty is cast not only on the administrators but on the beneficiary of the mistake to correct the error. The beneficiary is also part of the administration like the person who has committed the mistake."

In Santhakumari Vs. State of Kerala (2005(4) KLT649, the High Court of Kerala held as follows:

5. In our view, if an employee has received any amount contrary to a statutory provision, the mistake is mutual since the administration as well as the employee is bound by the statutory provision. Paying and receiving the amount contrary to the statutory provision is illegal. When a mistake is mutual that has to be shared by both the parties. Law would nullify such an action if the parties are mistaken on the same fact situation. In a case where the mistake is mutual, both the parties act on the same mistake assumption. Person who pays the amount is on the legitimate belief that the person who receives the amount is entitled to receive it and the person who receives the amount is on the belief that he is entitled to receive the same. Mistake in such a situation, in our view, is mutual. Consequently same has to be set right in public interest unless there is statutory bar in recovering the amount."

In the case on hand, as the applicant was denied the benefit of fixation of pay under FR 22-C he along with others approached the Tribunal through O.A. 183/88 which was allowed with a direction to the respondents to regulate the pay for the applicants therein after granting the benefit of fixation under FR 22-C from the date of promotion to

74

the non-functional selection grade post of Accountant. The respondents moved the Apex Court by filing SLP. However, they implemented the order subject to the outcome of the SLP. The Apex Court however, remitted the matter before the Tribunal for a fresh decision in the light of divergent opinion by Hyderabad and Ahmedabad Benches of the Tribunal. That was finally decided by a Full Bench of the Tribunal which is extracted above. The applicants therein moved the High Court against the Full Bench order which was dismissed in 2006. Till then the applicant was receiving the benefit of fixation under FR 22-C. The department in implementation of the judgment of the High Court issued the impugned orders for recovery of the excess amount which is under challenge in this O.A. The recovery proceedings at Annexure A-3 and A4 are however, stayed by the judgment of the High Court in WP(C) 11109/2009 dated 3.4.2009.

9 The issue that remains to be considered in this O.A is whether the action of the respondents in reducing the pay and pension of the applicants and consequential recovery of excess payment by Annexure A-3 and A-4 is valid or not. I find that only those Senior Accountants promoted during the period from 20.9.79 and 1.4.1987 did not get the benefit of fixation of pay under FR 22-C. However, the applicant was paid the benefit pursuant to the order of the Tribunal which attained finality with the judgment of the High Court in OP No. 15191 of 1998 dated 17th October, 2006.

10. In the facts and circumstances of the case, I am of the view that the interest of justice will be met if the recovery is not effected as the payment has been made on the genuine implementation of the

74

order of this Tribunal in O.A. 183/88 and it continued during these years. Therefore, I quash the recovery part of the impugned orders at A-3 and A-4. However, I make it clear that the revision of pension shall be in force w.e.f the date of pronouncement of this order. The O.A is partially allowed as above. No costs.

Dated 18th October, 2010


K. NOORJEHAN
ADMINISTRATIVE MEMBER

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