

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No. 561 of 2005

Wednesday, this the 8th day of November, 2006.

C O R A M:

**HON'BLE MRS. SATHI NAIR, VICE CHAIRMAN
HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER**

P. Aboosalakoya,
S/o. Shri P. Shaik Koya,
Ponnikam House, Kiltan Island,
Union Territory of Lakshadweep.

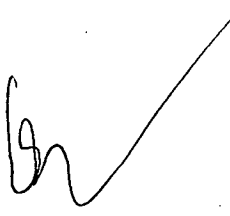
..... Applicant.

(By Advocate Mr. O.V. Radhakrishnan, Sr.)

v e r s u s

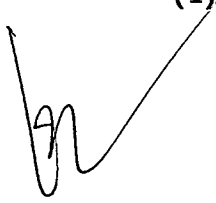
1. Administrator,
Union Territory of Lakshadweep,
Kavarati.
 2. Pay and Accounts Officer,
Principal Pay and Accounts Office,
Kavaratti Island.
 3. Director of Education,
Union Territory of Lakshadweep
(Directorate of Education),
Kavarati.
 4. Headmaster,
Government High School, Kiltan,
Union Territory of Lakshadweep.
 5. Union of India,
represented by its Secretary,
Ministry of Human Resources Development,
Department of Secondary and Higher Education,
New Delhi.
- Respondents.

(By Advocate Mr. Shafik M.A . (R1-4) and Mr. TPM Ibrahim Khan, SCGSC
for R-5).



ORDER
HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER

The applicant was initially appointed as Primary school Teacher on 18.1.1967 in the Government Senior Basic School, Kavarati; was promoted as Headmaster, Junior Basic School, on ad hoc basis on 24.8.1994 and continued till 3.10.1997 and posted as Primary School Teacher as per Order F./No.6/10/96-Edn(2) dated 3.10.1997. On promotion as headmaster, he was placed in the revised scale of Rs.5000-150-8000 from 1.1.1996 and was drawing Rs.7400/- as on 1.1.1996 vide Annexure A-1. On his reversion from the post of Headmaster from 3.10.1997 his pay in the post of Primary School Teacher was fixed in the revised scale of Rs.5000-150-8000 at the stage of Rs.7100/- vide Annexure A2. The applicant was thereafter, placed in the Selection Scale of Rs.5500-175-9000 with effect from 1.1.1998 as per Annexure A-3 order dated 11.5.2000. The applicant was promoted and posted as Headmaster, Junior Basic School.(N) Kiltan Island on regular basis as per Annexure A-4 order dated 28.6.1999. The applicant joined the post of Headmaster on 12.7.1999 FN and opted for pay fixation in the new post from the date of his next increment in the old post which was due on 1.1.2000. As the post of headmaster, Junior Basic School involved the assumption of duties and responsibilities of greater importance, his pay in the post of headmaster was fixed in the scale of Rs.5000-175-9000 under FR 22 (1)(A)(I) at Rs.8125/- as on 1.1.2000 with DNI on 1.1.2001 and future pay



of Rs.8300/- as per office order Annexure A-5 dated 28.7.2000. Later consequent on the revision of senior Scale, the pay of the applicant in the post of Primary School Teacher was re-fixed in the pay scale of Rs.6500-200-10500 under FR 22(1)(a)(ii) at Rs.7950/- as there was no stage equivalent to Rs.7950/- in the revised Selection Scale of pay, his pay was fixed at the next stage of Rs.8100/- with effect from 1.1.1998 as per Annexure A-6 order dated 17.7.2002. Thereafter, the pay of the applicant was re-fixed in the post of Headmaster under FR 22(1)(a)(i) at Rs.8900/- as on 1.1.2000 as per Annexure A-7 order dated 17.7.2003. The applicant retired on superannuation on 31.1.2005 and last pay drawn by him was Rs.13588/- his basic pay being Rs.9900/- as per Annexure A-8. The applicant was served with a letter dated 22.1.2005 on 20.2.2005 to the effect that on verification of his service book it was noticed that the fixations of his pay on promotion/awarding of selection scale/revision etc. was not correct and his admissible pay as on 1.1.2005 was Rs.9100/- as against Rs.9900/- allowed. Therefore, the pay of the applicant was directed to be reviewed with effect from 1.1.1996 onwards and also directed to assess the excess payments and the refundable amounts vide Annexure A-9. The applicant submitted A-11 representation dated 8.6.2005. Thereafter, he has been served with Annexure A-12 order dated 12.4.2005 re-fixing his pay with effect from 1.1.1996. Hence, this O.A.

2. Grounds for reliefs with legal provisions:



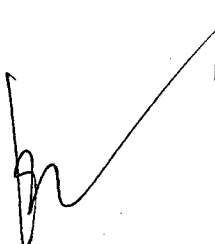
- (a) The action of the respondents 2 to 4 in re-fixing the pay of the applicant with effect from 1.1.1996 without notice and without affording him an opportunity of being heard is clearly illegal, arbitrary and violative of the principles of natural justice.
- (b) The applicant effectively retired on superannuation on 31.1.2005 and he became a pensioner on and from 1.2.2005. Thereafter, it is not permissible to revise the pay of the applicant retrospectively from 1.1.1996.
- (c) No reason or ground for re-fixing the pay of the applicant in Annexure A-9 is shown except making a bald statement that his admissible pay as on 1.1.2005 is Rs.9100/- only instead of Rs.9900/- allowed.
- (d) Assuming without conceding that the fixation of pay was made wrongly, the applicant was not responsible in any manner for the alleged wrong fixation of pay made as early as on 1.1.1996. He has not played any fraud or misrepresentation in the matter of fixation of his pay. The alleged excess pay drawn by the applicant cannot be adjusted or recovered from the retirement gratuity amount legitimately due to him.
- (e) Rule 65(2) of the CCS(Pension) Rules, provides that the amount of gratuity as determined by the Accounts Officer under Clause (a) of sub rule (1) shall be intimated to the Head of office with



the remarks that the amount of gratuity may be drawn and disbursed by the Head of Office to the retired Government servant after adjusting the Government dues, if any, referred to in rule 71. Rule 73 (1) provides that the Head of Offices shall take steps to assess the dues two years before the date on which the government servant is due to retire on superannuation and sub rule (2) provides that the assessment of Government dues referred to in sub rule (1) shall be completed by the Head of office eight months prior to the retirement of the government servant. Sub Rule (2) of Rule 71 provides that the government dues as ascertained and assessed by the Head Office which remain outstanding till the date of retirement of the Government Servant shall be adjusted against the amount of the retirement gratuity becoming payable. Rule 71(3) defines 'Government dues' and specifically excludes over payment of pay and allowances from the gamut of the expression Government dues.

(f) Rule 68(1) of the CCS (Pension) Rules mandates that, interest shall be paid at such rate as may be prescribed and in accordance with the instructions issued from time to time.

(g) In the decision in Sahib Ram Vs. State of Haryana reported in (1995) Supple (1) SCC 18, the Hon'ble Supreme court has held that "However, it is not on account of any misrepresentation made by the applicant that the benefit of the higher pay scales



was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault. Under the circumstances, the amount paid till date may not be recovered from the appellant".

- (h) In a recent decision rendered by the Hon'ble High Court of Kerala in Sivankutty Nair Vs. the Secretary to government and another reported in ILR 2005 (3) Kerala 118 following a catena of decisions of the Hon'ble Supreme Court has reiterated that excess payment made pursuant to wrong fixation of pay cannot be recovered unless there is fault on the employee like misrepresentation and that the excess payment made on account of wrong fixation of pay cannot be recovered unless the employee has, in any way, contributed to the mistake.

3. Reliefs sought:

To declare that the review/revision of pay of the applicant from 1.1.1996 made as per Annexure A-12 order dated 12.4.2005 on the basis of A-9 and A-10 is without authority of law, ultra vires and void;

To call for the records leading to Annexure A-9, A-10 and A-12 and be set aside the same;

Appropriate direction be issued or order directing the respondents to work out the retirement gratuity, commuted value of pension, monthly pension and other retiral benefits of the applicant



without regard to Annexures A-9, A-10 and A-12 and to sanction and disburse the amounts payable to the applicants towards retiral benefits and monthly pension forthwith and at any rate, within a time-frame that may be fixed by this Hon'ble Tribunal;

To issue appropriate direction to sanction and pay interest on the retirement gratuity, commuted value of pension and the arrears of pension at the rate of 18% from the respective dates they became due, till the date of actual payment.

4. The respondents have filed a detailed reply statement in which it is contended that, annexure A-6 pay fixation statement made by the Headmaster, Government High School, Kiltan was not correct. The Headmaster, Government High School, Kiltan has fixed the pay of the applicant as per rule FR 22 (i) (a) (ii)., the department has sought clarification regarding the above rule from the Ministry and the Ministry has clarified that when a teacher is promoted to the next higher post from basic scale or senior scale his/her pay will now be fixed under FR 22(i)(a)(i) as per order no. F.5-20/98 UTI, Government of India MHRD, (Department of Education dated 9.9.1994. At superannuation on 31.01.2005 last pay drawn by the applicant as per correct fixation is Rs.9100/- vide Annexure R-2. The Government officials pay fixations are done by the concerned departments' Drawing and Disbursing Officers and fixation statements are signed by the employee after scrutiny. There is an element of moral responsibility on the part of the applicant, to pay the excess amount back. The applicant had



declined to accept payment of DCRG as per his letter dated 25.8.2005 as per Annexure R-4. Being a responsible retired government employee it is the duty of the applicant to receive the pensionary benefits from the government. The pay of the applicant on 1.1.1986 in the post of PST (Senior Scale) is Rs.1800/- in the pre-revised scale of Rs.1400-40-1500-50-2300-60-2600/-. Pay of the applicant in 1994 was Rs.2200/- . Later the applicant had been promoted to the post of Headmaster Government Junior Basic School on ad-hoc basis with effect from 11.9.1994. His pay on the date of ad-hoc promotion was Rs.2200/- and he has opted the benefit of promotion after receiving the increment. As such, the pay of the applicant was Rs.2250/- as on 1.1.1995. The pay was fixed on the new post at Rs.2300/- as per FR 22(1)(a) (i) vide order F.no.2/11/94-95-GHSK dated 17.1.95. The pay was later modified and fixed at Rs.2360/- with effect from 1.1.1995 instead of Rs.2300/- in the scale of pay Rs.1400-2600/-. He had been reverted from the post of Headmaster , Government Junior Basic School to the post of Primary Teacher at junior Basic School vide order dated 3.10.1997 and reported for duty on 11.1.1997. His normal pay in the post of Primary School Teacher is as follows.


1994	Rs.2200/-
1995	Rs.2250/-(increment)
1996	Rs.2300/-(increment)
1997	Rs.2360/- w.e.f.1.1.1997
1998	Rs.2420/-



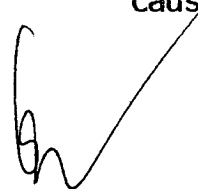
5. He had opted Revised Scale of pay with effect from 1.1.1996 as per CCS(RP) Rules, 1997 and his pay was Rs.7250/- as on 1.1.1997. He has been awarded selection scale with effect from 1.1.1998 in the pay scale of Rs.6500-200-10500/- and the pay was fixed at Rs.7700/-. He has been promoted to the post of Headmaster, Government Junior Basic School as per order F.No.6/10/96-Edn. dated 26.8.1999 on regular basis with effect from 19.7.1999 in the pay scale of Rs.5500-175-9000/- He has opted pay fixation in the promoted post from the date of his next increment i.e. 1.1.2000 and his pay has been refixed in the pay scale of Rs. 5500-175-9000/- as Rs/.8125/- but he is in the higher scale so his pay might be fixed as Rs.8100/-. In this view, his pay afterwards is given below:

1.1.2001	-	Rs.8300/
1.1.2002	-	Rs.8500/-
1.1.2003	-	Rs.8700/-
1.1.2004	-	Rs.8900/-
1.1.2005	-	Rs.9100/-.

6. The applicant has filed a rejoinder in which it is stated that, he came to be promoted to the post of Headmaster from the basic cadre of Primary School Teacher, Annexure R-1 is a clarificatory letter which cannot override FR 22 (1)(a)(i). Annexure R-1 is not an executive order issued by the Government in exercise of its powers under Article 73 read with Article 77




of the Constitution of India. It has no force of law. FR 22(1)(a)(i) provides that where a government servant holding a post in a substantive, temporary or officiating capacity, as the case may be, to another post carrying duties and responsibilities of greater importance than those attached to the post held by him., his initial pay in the time scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued or Rs. Twenty-five only whichever is more. The revised scale of which was Rs. 5000-150-8000 is a lower scale to that of the scale of pay of Rs. 5500-175-9000 admissible to the post of headmaster. Therefore, Annexure R-1 has to be understood and applied consistent with FR 22(1)(a)(i). The pay of Sri. M.V. Syed Koya, Headmaster, Government Junior Basic School Androth, who is similarly placed like the applicant was fixed at one stage above at Rs. 9100/- in the scale of pay of Rs. 6500/-200-10500 by applying FR 22(1)(a)(i) on his promotion as Headmaster from the post of Primary School Teacher (Selection Grade) as per order dated 13.1.2005 of the Headmaster, Government High School, Androth vide Annexure A-13. The last basic pay of the applicant immediately preceding the date of his retirement was Rs. 9900/- and the pension and other retiral benefits are to be determined on the basis of last pay drawn by him. An order resulting in pecuniary loss to the Government Servant must be held to be an objective rather than a subjective function. In such a case, if an opportunity to show cause against the action proposed is not afforded the order is liable to be



struck down as invalid on the ground that it is one in breach of the principles of natural justice. That is the ration of the decision in **Gopalakrishna Vs. State of MP reported in Air 1968 SC 240**. The applicant was not given any notice before his pay was revised and reduced to Rs.9100/- as per Annexure R-2 and he has been visited with adverse civil consequences thereby. Also see in **Bagvan Sukla Vs. Union of India AIR 1994 SC 2480**. No moral responsibility can be fastened on the employee in the matter of fixation of pay done by the department and that is the reason why the Hon'ble Supreme Court has consistently held that if the employee is not in any manner responsible for the fixation of pay, no recovery of pay shall be made from the employee concerned.

7. Learned senior counsel for the applicant had argued that the pay of the applicant has been correctly fixed and hence, does not call for any revision at all; assuming without accepting that there has been certain errors whereby the pay granted was more than what the applicant was due, even then, no show cause has been issued to the applicant; no rules provide for rectification of the error, much less recovery of alleged excess payment. The learned counsel had relied upon a few judgments and contended that the applicant is entitled to interest on the withheld terminal benefits.

8. The counsel for the respondents, however, submitted that there is no legal lacuna in passing the impugned orders.



9. Arguments were heard and documents perused. First as to the facts of the case, whereafter, the law point is discussed, taking into account various decisions and rules cited by the parties.

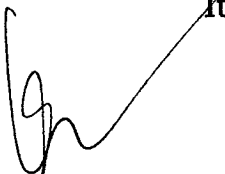
10. The admitted position is as under:-

(a) Pay as per the IV Pay Commission recommendations:
(Pay for the period upto 31-12-1995)

The pay scale attached to the post of Primary School Teacher w.e.f. 01-01-1986 was Rs 1400 -50-1500-2300-60-2600 and the applicant's pay as on 01-01-1986 was fixed at Rs 1,800/-. Gaining 8 increments, the applicant had the pay of Rs 2,200/- in 1994 and his next increment (which would raise his pay to Rs 2,250/-) fell due as on 01-01-1995 and **it was during 1994 that the applicant was promoted on ad hoc basis to the post of Head Master**. The applicant had opted for fixation of pay of Head Master after receiving the increment in the lower post of P.S.T. i.e. w.e.f. 01-01-1995. Thus, his pay was fixed at Rs 2,360/- in the pay scale of Rs 1,400 - 2600 **invoking the provisions of F.R 22(1)(a)(i).** *(However, please see Note at (c) below).* As on 01-01-1996, his pay in the old scale reached Rs 2,420/-. (Pre-revised)

(b) On revision of Pay scale as per V Pay Commission Recommendation
(From 01-01-1996 to 02-10-1997)

It was on 01-01-1996 that the revised pay scale was introduced and



the pay scale attached to the post of Primary School Teacher was Rs 5,000 – 8,000/- which was the pay scale even of the post of Head Master. And, the pay of the applicant in the post of Headmaster as of 01-01-1996 was fixed at Rs 7,400/- being the replacement pay of Rs 2,420/- in the pre-revised scale of pay of Headmaster. Annexure A-1 refers. Pay as on 01-01-1997 with an increment was Rs 7,550/-.

(c) On Reversion of the applicant from Head Master to Primary School Teacher w.e.f. 03-10-1997 :

(Revision of pay by withdrawing the benefit of 22(a)(i) granted from 1994 to 31-12-1997 and revising the pay as per 5th Pay Commission Recommendations w.e.f. 01-01-1996).

However, since the applicant was reverted to the post of Primary School Teacher w.e.f. 03-10-1997, the pay of the applicant was to be rescheduled by working out notionally his pay as if he was not promoted to the post of Head Master and thus, the pay was worked out as under:-

Pay as on 01-01-1995: Rs 2,250/-
 Pay as on 01-01-1996: Rs 2,300/- in the Pre-revised pay scale.
 Pay as on 01-01-1996: Rs 7,100/- in the Revised pay scale. (Annexure A-2)
 Pay as on 01-01-1997: Rs 7,250/- by gaining one increment.
 Pay as on 01-01-1998: Rs 7,400/- by gaining one more increment.

(Note: **By the above fixation, the original fixation of pay with the benefit of FR 22(1)(a)(i), vide (a) above had been withdrawn**)

(d) On Revision of pay scale of Primary School Teacher at Rs 5,500-9000/- (From 01-01-1998 to 11-12-1999)



It was as on 01-01-1998 that the applicant was placed in the selection grade scale of Rs 5,500 – 175 – 9000 vide Annexure A-3 and his pay was therefore, fixed **invoking the provisions of F.R. 22(1)(a)(ii)**. His pay as on 01-01-1999 was Rs 7,600/- (Annexure A-5).

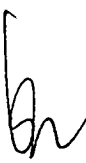
(e) On Regular promotion as Headmaster in the scale of Rs 5,500 - 9000

(From 12-07-1999 onwards)

The applicant was then promoted as Head Master on regular basis vide order dated 28-06-1999 (took over on 12-07-1999 FN, vide Annexure A-5) in the scale of Rs 5,500 – 175 – 9000/-. He had chosen to have the pay fixed w.e.f. 01-01-2000 i.e. on the date of his next increment. Thus, when he gained one more increment and his pay in the post of Primary School Teacher was Rs 7,775/- as on 01-01-2000, his pay in the post of Head Master was fixed at Rs 8,125/- (i.e. **by grant of one notional increment of Rs 175** (Rs 7,775 + 175 = 7,950/-) and bringing the same to the next stage i.e. Rs 8,125/-. Annexure A-5 refers. **Here, of course, the provisions of F.R. 22(1)(a)(i) had been applied.** (Please see note under (g) below).

(f) On revision of Selection Scale Pay from 5,500 – 9,000 to Rs 6,500 – 10,500/- (prior to promotion as Headmaster)

The selection grade scale of Rs 5,500 – 175 – 9,000/- w.e.f. 01-01-1998 was revised by order dated 04-04-2002 (referred to in Annexure A-6)



retrospectively from 01-01-1998 itself to Rs 6,500 – 200 – 10,500/-. **This resulted in the pay of the applicant w.e.f. 01-01-1998 to be revised in the aforesaid revised scale. Accordingly his pay was fixed at Rs 8,100/- from the erstwhile Rs 7,775/-.** Annexure A-6 refers. (In the statement of fixation of pay vide the said Annexure, pay as of 01-01-1998 was taken as Rs 7,775/- and by **allowing one notional increment** in the erstwhile scale of Rs 5,500 – 175 – 9000, the pay was fixed in the revised scale of Rs 6,500 – 200 – 10,500/- at Rs 8,100/- with the next date of increment scheduled as on 01-01-1999, raising his pay to Rs 8,300.) **Here again, the benefits of the provisions of FR 22(1)(a)(i) has been given.**

(g) On revision of pay scale of Head Master from 5500 – 9000 to 6500 – 10500/-

Again, since the aforesaid pay scale of Rs 6,500 – 200 – 10,500/- happens to be the pay scale of Head Master as well and the applicant having been promoted as on 19-07-1999 to the post of Head Master and his option for fixation of pay having been as of 01-01-2000, the pay fixed as of Head Master was, vide Annexure A-7, as under:-

Pay as on July, 1999: Rs 8,300/-
 Pay as on 01-01-2000: Rs 8,500/-
Add: One Notional Increment of Rs 200/- (Rs 8,700/-)
 Pay fixed as on 01-01-2000 at the next higher stage in the scale: Rs 8,900/-.

(Here again, provisions of FR 22(1)(a)(i) had been applied)



(h) Subsequent increments paid were as under:-

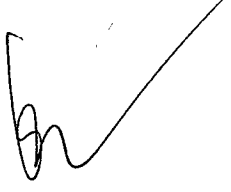
Pay fixed as on 01-01-2001: Rs 9,100/-
 Pay fixed as on 01-01-2002: Rs 9,300/-
 Pay fixed as on 01-01-2003: Rs 9,500/-
 Pay fixed as on 01-01-2004: Rs 9,700/-; and
 Pay fixed as on 01-01-2005: Rs 9,900/- (Vide Annexure A-8)

11. The above pay of Rs 9,900/- was sought to be reduced to Rs 9,100/- on the ground that the pay of Rs 9,900/- was based on wrong fixation of pay from 01-01-1996 and the details have been given in Annexure A-12. (i.e. there is a sudden decrease of as much as Rs 800/-.) The difference in pay has the root from 01-01-1998.

12. Vide paragraph 5 of the counter, the respondents have arrived at Rs 9,100/- as under:-

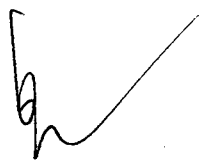
- (a) Pay as P.S.T. in the revised Pay scale of Rs 6500 – 10500 as on 01-01-1998: Rs 7700/-
- (b) Pay as 01-01-2000 by adding 2 increments @ Rs 200/-
Rs 8100/-
- (c) Pay as on 01-01-2001 by adding one increment @ Rs 200/-
Rs 8300/-
- (d) Pay as on 01-01-2002 by adding one increment @ Rs 200/-
Rs 8500/-
- (e) Pay as on 01-01-2003 by adding one increment @ Rs 200/-
Rs 8700/-
- (f) Pay as on 01-01-2004 by adding one increment @ Rs 200/-
Rs 8900/-
- (g) Pay as on 01-01-2005 by adding one increment @ Rs 200/-
Rs 9100/-

13. The above calculation would show that when the applicant's pay was



fixed in the scale of Rs 6,500 – 10,500/- on 01-01-1998, he was holding the post of P.S.T and NOT Head Master. His promotion on regular basis as Headmaster was w.e.f. July 1999 and he had opted for fixation of pay in the scale of Headmaster w.e.f. 01-01-2000. Though the pay scale of PST and Headmaster was one and the same i.e. Rs 6,500 – 200 – 10,500/- by virtue of the fact that the latter post was of higher responsibility, benefit under FR 22(1)(a)(i) was admissible which, if granted would have resulted the pay of the applicant raising it from Rs 8,100/- to Rs 8,500/- (i.e. add one notional increment in the feeder post (i.e. Rs 8,300/- and fix it at the next higher stage, i.e. Rs 8,500/-). In that event, pay for the subsequent years would be raised correspondingly to Rs 8,700/- as on 01-01-2001, Rs 8,900/- as on 01-01-2002, Rs 9,100/- as on 01-01-2003, Rs 9,300/- as on 01-01-2004. **And, the pay of the applicant works out to Rs 9,500/- as on 01-01-2005.** This has not been done. This is the error committed while issuing the impugned order at Annexure A-9.

14. Thus, while the pay fixed as per the initial calculation was Rs 9,900/- as on 01-01-2005, the pay actually to be fixed is Rs 9,500/- as on 01-01-2005. As the applicant was originally in the post of P.S.T and later on promoted as Headmaster, he is entitled to the benefit of FR 22(1)(a)(i) only once. Since the pay scale of the two posts happens to be one and the same, i.e. Rs 6,500 – 200 – 10,500/-, the benefit under this Rule would be one notional increment at the feeder grade, and raising the pay at the next



stage. In this case, the same would amount to Rs 200 + Rs 200 i.e. Rs 400/-. It was this amount that was omitted by the respondents while calculating the pay when the impugned order was passed. In the earlier fixation, however, apparently, the benefit of FR 22(1)(a)(i) has been given twice, i.e. first when the pay was fixed in the wake of revision of pay scale of the post of P.S.T from Rs 5,500 – 9000 to Rs 6,500 – 10,500/- (see para (f) above) and again at the time of actual promotion from the post of P.S.T to the post of Headmaster (vide para (g) above). It is thus the benefit having been granted twice that has resulted in an additional Rs 400/- having been paid to the applicant.

15. Thus, from the calculations, it is clear that the pay of Rs 9,900/- drawn by the applicant as on 01-01-2005 was incorrect and the pay of Rs 9,100/- now fixed vide the impugned order is also equally wrong. It should be Rs 9,500/- as explained above.

16. Now coming to the legal issues raised by the Senior Counsel for the applicant. The contention of the learned Senior Counsel is that once the pay has been fixed, the same is incapable of undergoing downward revision after retirement, for the relationship between the master and servant ceases on retirement. In addition, according to the counsel, there is a statutory bar of recovering any amount of alleged excess pay and allowances from the gratuity. Further, in this case, even the minimum requirement of issue of

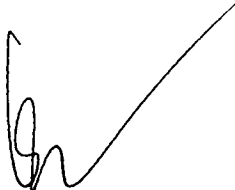


show cause had not been followed. It has also been contended by the counsel for the applicants that as a matter of fact, it is the Government which has to pay interest on delayed payment of terminal benefits, as some amount of Gratuity has been withheld and when the same is released, it should be incremented with interest in accordance with the provisions of Rule 68 of the CCS (CC&A) Rules. The following rules and decisions have been cited by the counsel in support of his contention:-

(a) Rules relied upon: Rule 58, 59, 60 of the CCS (Pension) Rules, dealing with preparation and completion of pension papers in advance of the date of retirement, so as to enable the department to rectify the mistakes if any, as is evident from the provisions of Rule 73. The contention of the applicant's counsel is that such a stipulation is made as the pension fixed cannot be subject to alteration after retirement. Provision, of course, exists for adjustment of government dues from the terminal benefits, but in so far as excess of pay and allowances is concerned, the same falls outside the purview of 'government dues' vide Rule 71(3) of the Pension Rules. And, in so far as delayed payment of terminal benefits, vide rule 68 of the said rules, interest is payable for delayed payment.

(b) Decisions relied upon:

(i) **Gopalakrishna vs State of M.P. AIR 1968 SC 240** - In this case invoking provisions of Rule 54 of FR, for the period of suspension, though suspension was held to be not wholly justified, full pay was not given and thus there was pecuniary loss to the government servant and the government servant had not been issued with a show cause notice before passing the orders. The Apex Court held in the case of ***M. Gopala Krishna Naidu v. State of M.P., (1968) 1 SCR 355*** as under:-



7. It is true as Mr Sen pointed out that FR 54 does not in express terms lay down that the authority shall give to the employee concerned the opportunity to show cause before he passes the order. Even so, the question is whether the rule casts such a duty on the authority by implication. The order as to whether a given case falls under clause 2 or clause 5 of the Fundamental Rule must depend on the examination by the authority of all the facts and circumstances of the case and his forming the opinion therefrom of two factual findings; whether the employee was fully exonerated and in case of suspension whether it was wholly unjustified. Besides, an order passed under this rule would obviously affect the government servant adversely if it is one made under clauses 3 and 5. Consideration under this rule depending as it does on facts and circumstances in their entirety, passing an order on the basis of factual finding arrived at from such facts and circumstances and such an order resulting in pecuniary loss to the government servant must be held to be an objective rather than a subjective function. The very nature of the function implies the duty to act judicially. In such a case if an opportunity to show cause against the action, proposed is not afforded, as admittedly it was not done in the present case, the order is liable to be struck down as invalid on the ground that it is one in breach of the principles of natural justice.

.....

11. The appeal is allowed and the High Courts order is set aside. The competent authority is directed to consider the question *be nava* after giving to the appellant a reasonable opportunity to show cause against the action proposed against him.

(ii) ***Bhagwan Shukla v. Union of India, (1994) 6 SCC 154,***

wherein the Apex Court has held as under:-

"3. We have heard learned counsel for the parties. That the petitioners basic pay had been fixed since 1970 at Rs 190 p.m. is not disputed. There is also no dispute that the



basic pay of the appellant was reduced to Rs 181 p.m. from Rs 190 p.m. in 1991 retrospectively w.e.f. 18-12-1970. The appellant has obviously been visited with civil consequences but he had been granted no opportunity to show cause against the reduction of his basic pay. He was not even put on notice before his pay was reduced by the department and the order came to be made behind his back without following any procedure known to law. There has, thus, been a flagrant violation of the principles of natural justice and the appellant has been made to suffer huge financial loss without being heard. Fair play in action warrants that no such order which has the effect of an employee suffering civil consequences should be passed without putting the (sic employee) concerned to notice and giving him a hearing in the matter. Since, that was not done, the order (memorandum) dated 25-7-1991, which was impugned before the Tribunal could not certainly be sustained and the Central Administrative Tribunal fell in error in dismissing the petition of the appellant. The order of the Tribunal deserves to be set aside. We, accordingly, accept this appeal and set aside the order of the Central Administrative Tribunal dated 17-9-1993 as well as the order (memorandum) impugned before the Tribunal dated 25-7-1991 reducing the basic pay of the appellant from Rs 190 to Rs 181 w.e.f. 18-12-1970."

(iii) *Sahib Ram v. State of Haryana, 1995 Supp (1) SCC 18* wherein it has been held:

"5. Admittedly the appellant does not possess the required educational qualifications. Under the circumstances the appellant would not be entitled to the relaxation. The Principal erred in granting him the relaxation. Since the date of relaxation the appellant had been paid his salary on the revised scale. However, it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the appellant."

(iv) *Sivan Kutty Nair vs the Secretary to Govt. & Anr ILR 2005 (3) Kerala 118 -*



In this case it has been held that excess payment made pursuant to wrong fixation of pay cannot be recovered unless there is fault on the employee like misrepresentation and that the excess payment made on account of wrong fixation of pay cannot be recovered unless the employee has, on any way, contributed to the mistake.

17. Counsel for the respondents, however, submitted that the error was on account of wrong calculation of pay at the time of fixation of pay when the applicant was afforded the revised pay scale as also at the time of promotion and as such, the same is sought to be rectified.

18. The questions to be answered with the help of the Rules and decisions are as under:-

- (a) Whether downward revision of pay is permissible after retirement of the applicant?
- (b) When such downward revision of pay affects pensionary benefits, is the government servant entitled to show cause before revising the pay?
- (c) Whether recovery from retirement Gratuity, of excess amount on account of such downward revision of pay, is permissible?
- (d) Whether pension has also to be re-worked on the basis of reduced pay last drawn?
- (e) Whether the recovery of excess payment could be made even when such



over payment is not on the representation or misrepresentation of the applicant?

- (f) If no recovery can be made from the DCRG or Pension, whether the applicant is entitled to interest on the delayed payment of gratuity?

19. As regards permissibility or otherwise of downward revision of pay , vide ground B, the contention of the applicant is that it is not permissible to revise the pay of the applicant pensioner retrospectively from 01-01-1996 as the applicant had already become a pensioner w.e.f. 01-02-2005. It is seen from the records that the decision to rectify the mistake in grant of higher pay to the applicant had been taken earlier to the retirement of the applicant. While the retirement of the applicant is as on 31-01-2005, order refixing the pay at Rs 9,100/- had been passed more than a week in advance of date of superannuation, though received by the applicant after his superannuation. As such, downward revision cannot be said to be after retirement. Thus, Ground B of the OA cannot be accepted that. If the government has the power to rectify the mistake in calculation of pay at a particular time, it can well do so. (In this regard attention is invited to the decision of the Apex Court in the case of **Jai Singh Dalal v. State of Haryana, 1993 Supp (2) SCC 600** : wherein the Apex Court has held:

we see no reason to hold that a State Government which has the power to specify the method of special recruitment by notification has no inherent power to revise the same if it for good reasons considers the same necessary. To so hold would



mean that even if the State Government has committed a mistake it has no power to rectify or correct the same.

20. The government servant is entitled to show cause notice prior to effecting any reduction in pay or for that matter recovery of arrears of pay and allowances, as the same would entail civil consequence, for which show cause notice is a must. Reliance placed by the counsel for the applicant, i.e. **Gopalakrishna vs State of M.P. (1968 SC 240)** clearly holds that a show cause is a must. In a latests case of **Mohd. Sartaj v. State of U.P., (2006) 2 SCC 315**, the Apex Court has consolidated a few earlier judgment to press into service the need to follow Principles of natural justice, in the following terms:

"13. In the matter of S.L. Kapoor v. Jagmohan(1980) 4 SCC 379 this Court has observed that a separate showing of prejudice caused is not necessary and the non-observance of natural justice is in itself a prejudice caused. The Court has relied upon the decision given in State of Orissa v. Dr. Binapani Dei(1967) 2 SCR 625 for the proposition that even if an administrative action involves civil consequences it must observe the rules of natural justice. Mohinder Singh Gill v. Chief Election Commr.(1978) 1 SCC 405 has also been cited, as civil consequences undoubtedly cover infraction of not merely property or personal rights but of the civil liberties, material deprivation and non-pecuniary damages. In its comprehensive connotation, everything that affects a citizen in his civil life inflicts a civil consequence. The Court has also cited the observation of one of the judges of the House of Lords in Ridge v. Baldwin1964 AC 40 for the purpose that the administrative body may in a proper case be bound to give a person who is affected by their decision, an opportunity of making representation. But all depends on whether he has some right or interest or some legitimate expectation of which it would not be fair to deprive him. Similarly, the Privy Councils decision in Alfred Thangarajah Jaurayappah v. W.J. Fernando(1967) 2 AC 337 has also been referred to show that there are three matters which should always be borne in mind while considering whether



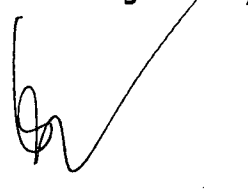
the principle audi alteram partem should be complied with or not. First, what is the nature of property, the office held, the status enjoyed or services to be performed by the complainant of injustice. Secondly, in what circumstances or upon what occasions is the person claiming to be entitled to exercise the measure of control entitled to intervene. Thirdly, when the right to intervene is proved, what sanctions in fact is the latter entitled to impose upon the other. It is only upon a consideration of all these matters that the question of the application of the principle can properly be determined.

14. However, in *S.L. Kapoor v. Jagmohan* this Court has also observed as under:

In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced. As we said earlier where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs."

21. Non observance of show cause notice before effecting downward revision of pay of the applicant certainly vitiates the action of the respondents. Thus, issue of annexure A-9, A-10 and A-12 orders cannot be legally sustained.

22. Once the impugned orders are not legally tenable, other questions are generally of academic interest. Nevertheless, in the instant case, since



there is withholding of DCRG, and the applicant has claimed interest, reply to the other questions will be advantageous. So far as adjustment of dues out of DCRG is concerned, the learned senior counsel argued that rule 71(3) specifically excludes from the ambit of 'government dues' excess pay and allowances. The said rule states,

The expression 'Government dues' includes

(a) dues pertaining to Government accommodation including arrears of licence fee, if any;

(b) dues **other than those** pertaining to Government accommodation, namely, balance of house building or conveyance or any other advance, **overpayment of pay and allowances** or leave salary and arrears of income tax deductible at source under the Income Tax Act, 1961(43 of 1961)" (Emphasis supplied).

23. The view of the Learned senior counsel cannot be accepted. Government dues have been divided into two classes, viz (a) dues pertaining to government accommodation and (b) dues other than (a) above, and in this category, fall all other advances, overpayment of pay and allowances etc., It is trite that balance of house building advances including interest thereof is adjusted against the DCR Gratuity. Thus, dues as spelt out in Rule 71(3)(b) include overpayment of pay and allowances. In this regard, Government of India, Ministry of Finance O.M. No. F. 11 (3) E.V (A)/76 dated 28th February 1976, para 10 (f) as extracted in Swamy's Pension Compilation 17th Edition at page 166 reads as under:-

(2) **Adjustment of dues other than pertaining to Government accommodation:**



In respect of other Government dues, steps should be taken to ascertain or assess the outstanding dues when the processing of pension papers is taken up two years prior to the retirement date. As the next stage of the actual preparation of pension papers is reached only after a year and four months, there is ample time for ascertaining all kinds of Government dues. Once that stage is reached, i.e. eight months before the retirement of the Government servant, any further probing of records for recoveries due shall cover only a limited period, i.e. not more than two years before the date of retirement. It should thus be quite possible for the Head of Office, or the Office which is to issue the Pension Payment Order, as the case may be to ascertain or assess all the dues, particularly those pertaining to long-term advances, such as house building or conveyance advance, overpayment of pay and allowances, and such other dues, prior to the prescribed deadline for the issue of Pension Payment/Gratuity payment orders or the Provisional Pension/Gratuity order.... The pension papers should clearly indicate the total amount of outstanding dues which should be recovered out of the retirement gratuity before authority for payment of gratuity (whether final or provisional) is issued; and if, after the pension payment order, additional recoveries to be made from the gratuity come to notice, the fact shall be promptly reported to that office. In a case where no major recoveries are due, but 10% of the gratuity or Rs 1,000 has been withheld because there might be unassessed government dues, or because the gratuity has been provisionally paid or because last pay Certificate has not been received, the withheld amount shall automatically become payable on the expiry of the six months after retirement....."

24. Reason as to why dues pertaining to Government accommodation have been separately spelt out is obvious as such dues could possibly accrue even after retirement. And, it is for this reason that for recovery of such dues relating to government accommodation, a separate Rule 72 of the Pension Rules provides for "adjustment and recovery of dues pertaining to Government accommodation". As regards recovery of dues other than those pertaining to govt. accommodation, a separate Rule 73 provides for that

such dues other than the dues pertaining to occupation of Government accommodation as referred to in Clause (b) of sub-rule (3) of Rule 71 shall have to be worked out in advance and shall be adjusted against the amount of retirement gratuity becoming payable to the Government servant on retirement. It cannot be argued that if the dues are not worked out eight months in advance as provided for in Rule 73(2), the same has to be written off. Before retirement, such dues can well be worked out and adjustment made from the DCR Gratuity.

25. As regards revision of pension on the basis of revised pay, provisions exists vide Rule 70 of the CCS (Pension) Rules, which reads as under:-

70. Revision of pension after authorization:

(1) Subject to the provisions of Rules 8 and 9, pension once authorized after final assessment shall not be revised to the disadvantage of the Government servant, unless such revision becomes necessary on account of detection of a clerical error subsequently.

Provided that no revision of pension to the disadvantage of the pensioner shall be ordered by the Head of Office without the concurrence of the Department of Personnel and Administrative Reforms if the clerical error is detected after a period of two years from the date of authorization of pension.

2. For the purpose of sub rule (1), the retired Government servant concerned shall be served with a notice by the Head of Office requiring him to refund the excess payment of pension within a period of two months from the date of receipt of notice by him.

(3) In case the Government servant fails to comply with the notice, the Head of Office shall, by order in writing, direct that such excess payment, shall be adjusted in instalments by short payments of



pensions in future, in one or more instalments, as the Head of Office may direct."

26. In the instant case, the fact of over payment has been deducted prior to retirement of the applicant but it took some time for the administration to process recovery and the Tribunal has provided that there shall be provisional pension on the basis of Rule 64 of the Pension Rules until final assessment.

27. As regards recovery of excess payment already made, the learned counsel is right when he argued that such recovery cannot be made if such over payment is not on the basis of any representation or misrepresentation. His reliance on the decision of *Sahib Ram vs State of Haryana* (1995) Supp 1 SCC 18 as extracted earlier, fully supports him.

28. In addition to the above case, the following decisions also support the case of the applicant:-

(a) ***Shyam Babu Verma v. Union of India*, (1994) 2 SCC 521,**

In this case, the Apex Court has, inter alia, held as under:-

"Although we have held that the petitioners were entitled only to the pay scale of Rs 330-480 in terms of the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, they became entitled to the pay scale of Rs 330-560 but as they have received the scale of Rs 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1,



1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same."

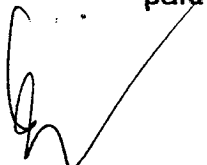
(b) **Bihar SEB v. Bijay Bhadur, (2000) 10 SCC 99**, wherein the Apex Court has held, "The High Court also relied on the unreported decision of the learned Single Judge in the case of Saheed Kumar Banerjee v. Bihar SEB². We do record our concurrence with the observations of this Court in Sahib Ram case¹ and come to a conclusion that since payments have been made without any representation or a misrepresentation, the appellant Board could not possibly be granted any liberty to deduct or recover the excess amount paid by way of increments at an earlier point of time"

(c) In a very recent case of **Purushottam Lai Das & Others vs The State of Bihar & Others (Civil Appeal No 4386/2006, decided on 10-10-2006,)** the Apex Court has held:

"We do record our concurrence with the observations of this Court in Sahib Ram case (supra) and come to the conclusion that since payments have been made without any representation or a misrepresentation, the appellant Board could not possibly be granted any liberty to deduct or recover the excess amount paid by way of increments at an earlier point of time."

29. In view of the above discussions what is discerned is as under:-

(a) The pay of the applicant has not been properly fixed from 01.01.1998. The last pay was neither Rs 9,900/- as already fixed and paid, nor Rs 9,100/- as stated in the impugned order dated 22-01-



2005 but the same works out to Rs 9,500/-. Thus, there is a mistake in having paid the applicant the pay of Rs 9,900/- p.m.

(b) The respondents are within their power and right to rectify any mistake that has crept in the fixation of pay of the applicant and accordingly, revise the pay of the applicant as on the date of retirement on the basis of which terminal benefits including monthly pension can be worked out.

(c) Before, however, any such downward revision of pay and allowances during the period of service is made, the applicant is entitled to show cause and it is after considering the representation, if any, to the show cause that the authorities shall arrive at a decision relating to revision of pay.

(d) If the revision is inevitable, even then, the same shall be only notional and actual would be prospective and not retrospective, in that, any over payment already made cannot be recovered, if such over payment is not on account of representation or misrepresentation by the applicant.

30. In view of the above, the **OA is disposed of**, with the following observations/directions:

(a) The impugned orders at Annexure A-9 (dated 22-01-2005), A-10 (dated 23-02-2005) and A-12 (dated 12-04-2005) are quashed and set aside.

(b) It is declared that the pay of the applicant as on 01-01-2005 works out to Rs 9,500/- as explained in para 13 above.



(c) Since the applicant has already superannuated, downward revision of pay shall be worked out on notional basis to arrive at the last average ten months pay purely for the purpose of calculation of pension and attendant terminal benefits and effective only with regard to pension and such other terminal benefits. Nothing less; nothing else.

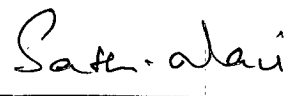
(d) The respondents are at liberty to issue necessary show cause notice to the applicant and if even after consideration of the representation, if any, filed by the applicant, the respondents decide to revise the pay of the applicant at Rs 9,500/- they may do so and work out the extent of DCR Gratuity payable and similarly the extent of pension payable and the difference between the amount already paid as provisional pension under Rule 64 and actually payable after working out the same as stated above, along with the difference in gratuity, may be adjusted from out of the DCR Gratuity which has been withheld by the respondents and the balance paid to the applicant.

(e) Till such time the above drill is performed, the applicant shall continue to be paid the provisional pension.

31. Under the above circumstances, there shall be no order as to costs.

(Dated, the 8th November, 2006)


K B S RAJAN
JUDICIAL MEMBER


SATHI NAIR
VICE CHAIRMAN

cvr.