

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No. 63 of 2004

Friday, this the 20th day of June, 2008.

C O R A M :

**HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER
HON'BLE DR. K.S. SUGATHAN, ADMINISTRATIVE MEMBER**

P.K. Krishnan Kutty Nair,
S/o. Late Krishna Pillai,
Senior Accountant, Custom House,
Kochi - 9 : Residing at 'Jayahari',
Vikram Sarabhai Road,
Maradu P.O. : 682 304

... Applicant.

(By Advocate Mr. O.V. Radhakrishnan (Sr.) with Mr. Antony Mukkath)

1. Union of India, represented by its
Secretary, Ministry of Finance and
Company Affairs, Department of
Expenditure (F-III-B Branch), New Delhi.
2. Controller General of Accounts,
Ministry of Finance, Department of
Expenditure, Room No. 714, 'C' Wing,
7th Floor, Khan Market, Lok Naik Bhavan,
New Delhi - 110 003
3. Principal Chief Controller of Accounts,
Central Board of Excise and Customs,
A.G.C.R. Building, 1st Floor, I.P. Estate,
New Delhi : 110 002
4. Deputy Controller of Accounts,
Central Board of Excise and Customs (South Zone),
26/1, M.G. Road, Room No. 20,
Central Excise Annex Building,
Chennai : 600 034
5. Pay and Accounts Officer,
Office of the Commissionerate of
Customs, Custom House, Kochi -9

... Respondents.

(By Advocate Mr. Thomas Mathew Nellimoottil)



O R D E R
HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER

The question is short and simple. The applicant was appointed as LDC in 1972 in the respondent's organization. He was later on positioned as auditor w.e.f. 01.12.1975 on his qualifying in the departmental examination. In 1976, there was a bifurcation of the Department of Audit and Accounts as P & T Audit and P & T Accounts Departments and the applicant was retained in the P & T Audit Department. He was later on transferred to the Collectorate of Customs, Custom House Cochin as Junior Accountant in April, 1977 vide Annexure A-1. Later on he was promoted as Senior Accountant w.e.f. 01-04-1987, vide Promotion Order at Annexure A-4. The Assured Career Progression scheme was introduced on 09-08-1999 which provides for two financial upgradations after completion of 12/24 years respectively in case an individual had not got any promotion during this period. Annexure A-5 refers. Treating the promotion as Senior Accountant as the lone promotion, Respondent No. 3 had afforded the second financial upgradation to the applicant w.e.f. 08-01-2001 vide Annexure A-7. As the applicant felt that his 2nd ACP should have been w.e.f. 01-12-1999 (24 years from 01-12-1975, the date when he was positioned as Auditor), Annexure A-8 representation was filed by him. However, the applicant was served with an office order No. 278 dated 14th November, 2003 to the effect that in terms of the provisions of Ministry of Personnel, Public Grievances and Pension, DOPT, OM dated 09-08-1999 and CGA's instructions issued as per OM dated 17-10-2003, the benefits of second financial upgradation under ACP scheme given to the applicant

and two others as per Office Order vide Annexure A-7 was to be withdrawn w.e.f. 08-01-2001. It has further been ordered that the amount of over payment made in this regard may be recovered from the applicant. Annexure A-10 order dated 14-11-2003 refers. It is this order that has been challenged.

2. The respondents have contested the O.A. According to them, the initial positioning as auditor, of the applicant was not a direct recruitment but one of promotion and as such, the applicant had been afforded two promotions i.e. one on 01-12-1975 and the other in April, 1987. As such, the benefit under the ACP scheme is not available to him.


3. The applicant in his additional affidavit, enclosed a copy of C & AG's Standing Orders vide Annexure A-11. He has also, vide Annexure A-12 added a copy of the Recruitment Rules for the clerical staff. Respondents have filed additional reply in response to the additional affidavit filed by the applicant. In addition, since there has been a reference of "quota for appointment" vide Annexure A-11, the respondent had filed a copy of paragraph 392 of Chapter VI - Class III Establishment (Other than the Subordinate Accounts Service).

4. Counsel for the applicant had taken us through the following:-

" The procedure to be followed by the Centralised Recruiting Agency is described in the succeeding paragraphs:

.....
378.

Note.2 : While advertising the posts for auditors, a certain



minimum percentage of marks depending upon the standard of education in the Universities to which the bulk of the applicants belong, may be specified. [C.A.G's letter No. IS4S-NGE-II/51-69(III) dt. 23.03.69].

Note.3 : The requirements of the auditors/clerks/typists should be intimated to the Central (Surplus Staff) Cell of the Ministry of Home Affairs, Government of India, at the time of issue of advertisement, and candidates sent by them possessing the requisite educational qualifications should be considered alongwith those from the open market [C.A.G.'s letter No. 796-NGE-II/76-66 dt. 16.6.66].

380.

Recruitment to the cadre of auditors should be made on the basis of both written test and interview. Only those candidates need be called for the interview who secure marks above a certain percentage in the written test as may be decided by the recruiting authority having regard to the number of names proposed to be empanelled. It may be suitably indicated in the advertisement that such a procedure will be followed. The written test will be as indicated below :

.....

381. The priority of candidates for appointment to the various cadres should be as under :

(a) Retrenched employees of the Indian Audit and Accounts Department.

(b) Retrenched employees of the Defence Accounts Department.

(c)

383.

Note.1 : In the case of auditors, names will be empanelled on the basis of total marks secured by the candidates in the written test and the interview taken together. [C.A.G's letter No. 1380-NGE.II/64-67 dated 10.7. ...]

384. The strength of the approved panels for recruitment shall be twice the number of vacancies. The panels will remain in force for a period of one year.



385. Appointments should be made in the order of seniority in the panel. Whenever a vacancy occurs in an office, it should be reported to the office which is in charge of operating the panel for naming the person to be appointed against that vacancy. Orders for appointment to the person concerned should issue from the office where the vacancy exists.

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Note.4 : All appointments against the Direct Recruitment quota of Auditors / Stenographers' posts should be made only after the person resigns the previous post held by him in the Government service, whether within or outside the Indian Audit and Accounts Department. [C.A.G's letter No. 1399-NGE.II/61-67.II dated 12th July, 1968]

392.


Note.2 : No formal resignation from the post of Clerk is necessary in the case of an S.A.S. Part.I or Part.II passed Clerk promoted as an auditor against the direct recruitment quota in the manner explained above. "

5. Counsel for the respondent submitted that the service book also reflects the nature of the appointment of the applicant as auditor, as promotion and hence, the applicant had obtained two promotions.

6. Since the entire issue revolved round the nature of appointment of the applicant as Auditor w.e.f. 01-12-1975, respondents were directed to produce a copy of the relevant order and the judgment was reserved. The respondents have produced the same.

7. The said order reads as under:-

"Shri P.K.Krishnankutty Nair, Departmental Examination passed clerk is promoted to officiate, until further orders, as Auditor with effect from 1-12-1975(FN).



His promotion as Auditor is against the Departmental Promotion Quota. Orders fixing his seniority in the Auditor's cadre will be issued shortly."

8. The above order clinches the issue. It is evident that the applicant's appointment as Auditor is only by way of promotion and not of Direct recruitment. As such, he having received two promotions, the benefit of ACP is not admissible to him. As such, withdrawal of ACP order dated 07-06-2001 vide Annexure A-7 is perfectly legal. However, in so far as recovery of excess amount paid, vide para 2 of impugned order dated 14-11-2003, the same cannot be justified in view of the following decisions of the Apex Court:-


(a) Sahib Ram v. State of Haryana, 1995 Supp (1) SCC 18: "... 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."

(b) Bihar SEB v. Bijay Bhadur, (2000) 10 SCC 99 :

"We do record our concurrence with the observations of this Court in Sahib Ram case 1 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) Col. B.J. Akkara (Retd.) v. Govt. of India, (2006) 11 SCC 709 :

"27. The last question to be considered is whether relief should be granted against the recovery of the excess payments made on account of the wrong interpretation/understanding of the circular dated 7-6-1999. This Court has consistently granted relief against recovery of excess wrong payment of emoluments/allowances from an employee, if the following conditions are fulfilled (vide Sahib Ram v. State of Haryana, Shyam Babu Verma v. Union of India, Union of India v. M. Bhaskar and V. Gangaram v. Regional Jt. Director):



(a) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee.

(b) Such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

28. Such relief, restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery."

(d) Purshottam Lal Das v. State of Bihar, (2006) 11 SCC 492 :

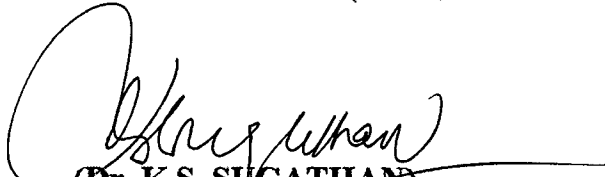
"We do record our concurrence with the observations of this Court in Sahib Ram case and come to a conclusion that since payments have been made without any representation or a misrepresentation, the appellant Board could not possibly be granted any liberty to deduct or recover the excess amount paid by way of increments at an earlier point of time. The act or acts on the part of the appellant Board cannot under any circumstances be said to be in consonance with equity, good conscience and justice. "

9. In view of the above, the O.A. is partly allowed in that, while the impugned order at Annexure A-10 is held to be legal in so far as it withdraws the order at Annexure A-7 is concerned, the later portion of the order relating to recovery is held to be illegal and the same is quashed and set aside. Respondents are directed

not to effect any recovery from the applicant.

10. Under the circumstances, there shall be no orders as to costs.

(Dated, the 20th June, 2008)


(Dr. K S SUGATHAN)
ADMINISTRATIVE MEMBER


(Dr. K B S RAJAN)
JUDICIAL MEMBER

CVI.