

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

O.A.No.146/10

.....Friday....., this the 28th day of October, 2011


C O R A M :

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER

HON'BLE Ms.K.NOORJEHAN, ADMINISTRATIVE MEMBER


1. Senthil Kumar M,
S/o.P.N Murugesan,
Tax Assistant, O/o.CIT (TDS),
4th Floor, Central Revenue Building,
I.S Press Road, Kochi – 682 016.
Residing at No.C.70, Block-X,
Income Tax Residential Complex,
Panampilly Nagar, Kochi – 682 036.
2. Mathew Antony N.J,
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Residing at C-67, Income Tax Residential Complex,
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3. Saju B,
S/o.Baburajan,
Tax Assistant, O/o.DCIT,
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Residing at Valiya Vila Veedu,
Near Chempottu Temple, Kottiyam PO,
Kollam – 691 571.
4. K.A.Nesar,
S/o.K.M.Aboobekar,
Tax Assistant,
O/o.Additional Commissioner of Income Tax,
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Malikapeedika, Alangad PO,
North Parur, Ernakulam.



5. Asamol Abraham,
D/o.A.L.Abraham,
Tax Assistant,
O/o.Chief Commissioner of Income Tax,
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Residing at 96/LPS RA, LPS Road, Pallinada,
Palarivattom, Cochin – 25.
 6. Sanal Kumar,
S/o.V.N.Kumar,
Tax Assistant, O/o.CIT (Central),
Kandomkulathy Towers, M.G.Road, Kochi.
Residing at 49/741 C, Karama Road,
Elamakkara, Kochi.
 7. Mrs.Pushpa Jemy,
W/o.Jerry Joseph,
Tax Assistant,
O/o.Commissioner of Income Tax (Appeals)-II,
San Juvan Towers, Ernakulam North, Kochi.
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Trichur District.
 8. Sivapalan V,
S/o.K.Vamadevan,
Tax Assistant,
O/o.Chief Commissioner of Income Tax,
Ayakar Bhavan, Kowdiar, Thiruvananthapuram.
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139, Pattathanam Nagar, Kollam.
 9. Rajeswari S,
W/o.B.Santhosh Kumar,
Tax Assistant,
O/o.Additional Commissioner of Income Tax,
Range – 1, Aaykar Bhavan, Kowdiar, Trivandrum.
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Karumom PO, Thiruvananthapuram – 2.
 10. Manju Sen V.,
W/o.L.S.Lohi,
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O/o.Assistant Commissioner of Income Tax,
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Kowdiar, Trivandrum.
Residing at Vasanth, Vedivachancoil,
Vedivachancoil PO, Thiruvananthapuram – 695 501.
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11. Manoj S.M.,
S/o.S.K.Madhavan,
Tax Assistant,
O/o.Assistant Commissioner Income Tax,
Tariff Bazar, Opp.Town Hall,
Tirur PO, Malappuram – 676 101.
Residing at XIV/23 Sree Narayana Purath House,
Koorkenchery PO, Thrissur – 680 007.
12. Anil Kumar N.G.,
S/o.N.V.Gopalan,
Tax Assistant, O/o.Additional CIT,
Range 1, Aaykar Bhavan, Kannothenchal,
Chovva PO, Kannur – 670 006.
Residing at C-11, Income Tax Quarters,
Kannothenchal, Chovva PO, Kannur – 670 006.
13. Sunil C.J.,
S/o.C.R.Joseph,
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14. K.Prema,
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15. Veenadharan K.V.,
S/o.Narayanan M.K.,
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16. Sasi K.T.,
S/o.Andy K.C.,
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17. Jayaprakash R,
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 18. K.K.Sivaramakrishnan,
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Chottanikkara, Emakulam.
 19. V.P.Vijayakumar,
S/o.V.P.Baladevan Namboothiri,
Tax Assistant,
O/o.Joint Commissioner of Income Tax,
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New Annexe Building, Mananchira, Kozhikode.
Residing at Vadakkedath,
B/h Pulimparamba Sree Krishna Temple,
Taliparamba – 670 141, Kannur.
 20. Thomas Mathew,
S/o.late P.M.Mathew,
Tax Assistant,
O/o.Additional Commissioner of Income Tax,
Palakkad Range, Income Tax Office,
English Church Road, Palakkad – 678 014.
Residing at Melepeedikayil House, Kozhenchery PO,
Melukara, Pathanamthitta – 689 641.
 21. Ramu G Pillai,
S/o.Gopala Pillai,
Stenographer Gr.III,
O/o.Commissioner of Income Tax (A)-1,
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Residing at Radhasadhanam, Inchakkadu,
Mylom PO, Kalayapuram (Village),
Kottarakara, Kollam (Dist), Kerala.
 22. Lali D.,
S/o.Damodaran K.,
Stenographer Gr.III,
O/o.CIT(A)-IV, Kera Bhavan, 6th Floor,
Opp.SRU High School, Kochi.
Residing at Mohana Vilasam, Veliyam PO,
Kottarakkara, Kollam (Dist) – 691 540.
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23. Joshilal L.P.,
S/o.N.K.Pappunny,
Stenographer Gr.III,
O/o.Commissioner of Income Tax (Appeals),
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Kochi – 682 011.
Residing at Lailalayam, Kalavamkodam PO,
Shertallai, Alleppey Dist. Kerala – 688 586.
24. Unnikrishnan P.,
S/o.C.Balakrishnan,
Stenographer Gr.III,
O/o.Chief Commissioner of Income Tax,
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Residing at C-80, Block XII,
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Panampilly Nagar, Kochi – 682 036.
25. E.A.Varghese,
S/o.E.A.Anthony,
Stenographer Gr.III,
O/o.Director General of Income Tax (Inv.),
Madaparambil Building, South Railway Station, Kochi.
Residing at Ettumanukkarar House,
Oruma Ayalkootam Road, Kodakara PO, Thrissur. ...Applicants

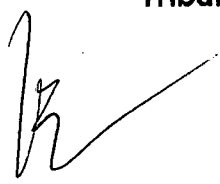
(By Advocate Mr.M.R.Hariraj)

V e r s u s

1. Union of India represented by the Secretary,
Ministry of Personnel, Public Grievances & Pensions,
North Block, New Delhi.
2. Union of India represented by the Secretary,
Ministry of Finance, New Delhi.
3. Central Board of Direct Taxes
represented by its Chairman, New Delhi.
4. Chief Commissioner of Income Tax,
Central Revenue Building,
I.S.Press Road, Kochi – 682 018. ...Respondents

(By Advocate Mr.M.V.S.Nampoothiry,ACGSC)

This application having been heard on 21st October 2011 this
Tribunal on 28th October 2011 delivered the following :-

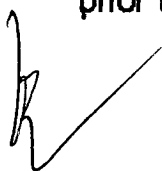


ORDER

HON'BLE Dr.K.B.S.RAJAN, JUDICIAL MEMBER

This case poses an interesting question. Fundamental Rules (FR, for short) provide for transfer to a lower post on request and how the pay should be fixed is also so provided in the very Fundamental Rules. The applicants in this O.A., who were earlier serving as Senior Tax Assistants in the pay scale of Rs.5000 – 8000 outside Kerala Region, have been, on their request, accommodated in the Kerala Region as Tax Assistants in the pay scale of Rs.4000 – 6000 in March 2008. Annexure A-1 is a specimen copy of the inter-charge transfer of one of the applicants. At that time, the Revised Pay Rules 2008 (in the wake of the acceptance of the recommendations of the Sixth Pay Commission) were not published. Gazetted though on 29th August, 2008, the Revised Pay Rules came into existence with retrospective effect from 01-01-2006. As such, as on the date of their transfer, the applicants' pay was fixed on the basis of the pre-revised pay scale of Rs.4000 – 6000 but in accordance with the provisions of FR 22(1)(a)(2) of the Fundamental Rules. Provision exists for protection of pay drawn in the higher post (prior to transfer) subject to certain ceilings as contained in the aforesaid Fundamental Rule.

2. Thus, though the applicants stood transferred to the lower post in 2008, since the Revised Pay was to be effective from 01-01-2006, the applicants' pay was revised in the grade of Tax Assistants. For example, the pay of Shri.Senthil Kumar.M. Tax Assistant, the first applicant even prior to his transfer, was fixed in the Revised Pay Scale w.e.f. 10-01-2006



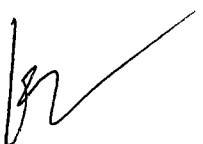
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in the pay band (PB 1) of Rs.5200 – 20200 with Grade Pay of Rs.2400. The said Senthil Kumar was later on promoted as Sr. Tax Assistant on 05-12-2006 in the pay band (PB-2) of Rs.9300- 34800 with Grade Pay of Rs.4200/- . After being paid annual increment as on 01-07-2007, the basic pay of the applicant as on 01-07-2007 was worked out to Rs.9300/- and the grade Pay Rs.4,200/-. On being posted to inter-charge Transfer on 25-03-2008, the pay band PB 2 hitherto drawn by him underwent downward revision for him and thus, he was placed in the PB 1 of Rs.5200 – 20200 plus grade pay of Rs.2400/-. However, invoking the provisions of FR22(1)(a) 2, the respondents have protected the pay drawn prior to transfer on request. Thus, the pay particulars of the first applicant are as under :-

I. Pay after granting Annual Increment w.e.f 1st July, 2006

1	Pay in the Pay Band	Rs.8190/-
2	Grade Pay	Rs.2400/-
3	Basic pay total of pay in the Pay Band and Grade Pay	Rs.10590/-
4	Rate of Increment 3% of Rs.10590/-	Rs.320/-
5	Pay in the Pay Band after increment	Rs.8510/-
6	Grade Pay	Rs.2400/-
7	Basic pay – total of pay in the Pay Band and Grade Pay as on 1 st July 2006	Rs.10910/-

II. Pay fixed on promotion from the post of TA to the post of Sr.TA



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1	Date of Promotion	05/12/06
2	Existing Pay Band and Grade Pay	PB-1 Rs.5200-20200 with G.P. Rs.2400/-
3	Pay Band and Grade Pay of promoted post	PB-2 Rs.9300-34800 with G.P.Rs.4200/-
4	Existing Basic Pay ie. Pay + GP as on 04/12/06	Rs.10910/- (Rs.8510 + GP Rs.2400/-)
	Add : one increment in the lower Pay Band (ie. 3% on Rs.10910/-)	Rs.330/-
5	Pay in the Pay Band after adding one increment in the lower post	Rs.9300/- (Rs.8510+330 = 8840, less than minimum of PB-2. Hence minimum of PB-2 to be taken.
6	Grade Pay attached to the promoted post	Rs.4200/-
7	Basic pay – total of pay in the Pay Band and Grade Pay as on 05/12/06	Rs.13500/- (Rs.9300+ G.P.4200)

III. Pay after granting Annual Increment w.e.f 1st July, 2007

1	Pay in the Pay Band	Rs.9300/-
2	Grade Pay	Rs.4200/-
3	Basic pay total of pay in the Pay Band and Grade Pay	Rs.13500/-
4	Rate of Increment 3% of Rs.13500/-	Rs.410/-
5	Pay in the Pay Band after increment	Rs.9710/-
6	Grade Pay	Rs.4200/-
7	Basic pay - total of pay in the Pay Band and Grade Pay as on 1 st July 2007	Rs.13910/-

IV. Pay fixed on reversion from the post of Sr.TA to the post of TA



1	Date of reversion	25/03/08
2	Existing Pay Band and Grade Pay	PB-2 Rs.9300-34800 with G.P.4200/-
3	Pay Band and Grade Pay of reverted post	PB-1 Rs.5200-20200 with G.P.2400/-
4	Existing Basic Pay ie. Pay + GP as on 25/03/08	Rs.13910/- (Rs.9710 + GP 4200)
5	Pay to the reverted post ie. Pay + GP as on 25/03/08	Rs.13910/- (Rs.9710 + GP 2400 + PP 1800)
6	Pay in Pay Band attached to reverted post	Rs.9710/-
7	Grade Pay attached to the reverted post	Rs.2400/-
8	Personal pay	Rs.1800/-
9	Basic pay – total of pay in the Pay Band and Grade Pay as on 25/03/08	Rs.13910/- (Rs.9710 + GP 2400 + PP 1800)

V. Pay after granting Annual Increment w.e.f 1st July 2008

1	Pay in the Pay Band	Rs.9710/-
2	Grade Pay	Rs.2400/-
3	Basic pay total of pay in the Pay Band and Grade Pay	Rs.12110/-
4	Rate of increment 3% of Rs.12110/-	Rs.370/-
5	Pay in the Pay Band after increment	Rs.10080/-
6	Grade Pay	Rs.2400/-
7	Basic pay – total of pay in the Pay Band and Grade Pay as on 1 st July 2008	Rs.13910/- (Rs.10080 + GP 2400 + PP 1430)

Basic pay as on



Date	Pay in the Pay Band	Grade Pay	Basic Pay	Personal Pay
01/01/06	Rs.8190/-	Rs.2400/-	Rs.10590/-	
01/07/06	Rs.8510/-	Rs.2400/-	Rs.10910/-	
05/12/06	Rs.9300/-	Rs.4200/-	Rs.13500/-	
01/07/07	Rs.9710/-	Rs.4200/-	Rs.13910/-	
25/03/08	Rs.9710/-	Rs.2400/-	Rs.12110/-	Rs.1800/-
01/07/08	Rs.10080/-	Rs.2400/-	Rs.12480/-	Rs.1430/-

3. The applicants were perhaps satisfied with the calculations followed in the fixation of their pay as in Annexure A-4, which is evident from the fact that at that time when the above order was passed, no grievance was expressed by them. However, by virtue of Annexure A-6, the DOPT in the Ministry of Personnel, Public Grievances and Pensions, the Nodal Ministry, had issued the following procedure for fixation of pay when the transfer is at the request of the government employee from a higher to a lower post :-

"2. Consequent upon implementation of the revised pay structure comprising Grade Pays and running Pay Bands, w.e.f 1.1.2006 in cases of appointment of Government servants to posts carrying lower Grade Pay under FR 15(a) on their own request, the pay in the Pay Band of the Government servant will be fixed at a stage equal to the pay in the Pay Band drawn by him prior to his appointment against the lower post. However, he will be granted Grade Pay of lower post. Further, in all cases, he will continue to draw his increments based on his pay in the Pay Band + Grade Pay (lower).

3. Where transfer to a lower post is made subject to certain terms and conditions then the pay may be fixed according to such terms and conditions."

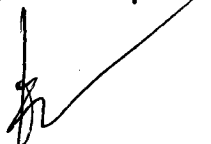
4. The above order had been effective with retrospective effect from 01-01-2006. And, the respondents had pressed into service the above order by revising the pay of the applicants (one such order being at



Annexure A-7 dated 03-12-2009). The applicants preferred a representation vide Annexure A-8. As there was no reconsideration, the applicant, along with others who are similarly situated, has preferred this OA challenging the legal validity of OM dated 21-10-2009 and in the OA the following reliefs are sought for :-

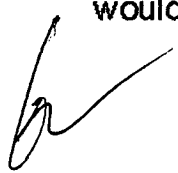
1. To quash Annexure A-6
2. To call for the records fixing the pay of the applicants *without granting protection of pay in the Pay Band and the Grade Pay in the revised pay structure on their transfer on request and quash the same.*
3. Declare that the applicants are entitled to have their basic pay, *ie. pay in the Pay Band plus Grade Pay, protected on appointment to the lower post of Tax Assistant/Stenographer Grade III.*
4. To direct the respondents to fix the pay of the applicants *protecting their basic pay ie., pay in the Pay Band plus Grade Pay, on their transfer as Tax Assistants/Stenographer Grade III with all consequential benefits and to direct the respondents to refund any amounts recovered from the applicants based on reduction effected pursuant to Annexure A-6.*
5. Grant such other relief as may be prayed for and the Tribunal may deem fit to grant, and
6. Grant the costs of this Original Application.

5. Respondents have contested the O.A. According to them, the order dated 21-10-2009 would hold the field and there is no rule which would protect the grade pay. Thus, it is only the pay in the pay scale that could be protected.



6. Counsel for the applicant argued that as on the date when the applicants were transferred to Kerala Region (in March 2008) it was only the R.P. Rules, 1997 (framed in the wake of acceptance of the recommendations of the Fifth Central Pay Commission and made effective from 01-01-1996) that was holding the field. Accordingly, the applicants' pay was fixed, invoking, admittedly, the provisions of FR 15(a) read with FR 22(1)(a)(2) and 22(1)(a)(3). These Rules are statutory in character and they relate to pay fixation when, on request, a person is posted from higher to a lower post. These statutory rules are still in vogue and these have not been superseded through any proper statutory provisions. There were no specific terms and conditions that were reflected in the transfer orders of the applicants and thus, it is only by virtue of the provisions of these Rules that the pay of the applicants was fixed.

7. The counsel for the applicant explained that when a Government servant on request moves from a higher post to a lower post, by virtue of FR 22(1)(a)(2) his pay drawn in the earlier higher post is protected by fixing his pay in the lower pay scale at a stage equal to the pay drawn, or the nearest higher stage. Any difference between the pay drawn in the higher post and that in the transferred post would be treated as personal pay, to be absorbed in the future increment. FR 22(1)(a)(3) is in the nature of ceiling to the pay protection in that if the maximum of the pay scale in the lower post (post to which the individual is transferred) is less than the last pay drawn by the individual at the higher post, then the pay would be fixed at the maximum. The counsel thus said that the spirit of FR




22(1)(a)(2) and 22(1)(a)(3) is pay protection, albeit, with a ceiling at one contingency. An administrative instruction issued in 2007 vide Annexure A-2 is in conformity with the aforesaid provisions as the same was issued only with reference to FR 15 and FR 22(1)(a)(3).

8. Thus, what is to be seen is whether the pay drawn at the higher scale has been protected. The term 'basic pay' in the revised Pay Rules, 2008 has been defined vide Rule 3(8) which reads as under :-

'basic pay' in the revised pay structure means the pay drawn in the prescribed pay band plus the applicable grade pay but does not include any other type of pay like special pay etc.,'

9. The counsel further submitted that his transfer to Kerala is obviously by virtue of the provisions of F.R. 15 read with 22(1)(a)(2) and 22(1)(a)(3). He has also argued that by virtue of the above provisions of the Fundamental Rules, as also by way of fixation of pay scale on the basis of the above rules, certain statutory rights have accrued to him. These accrued rights cannot be taken away by an executive instruction retrospectively.

10. In 2007, vide Annexure A-7 certain clarifications were given regarding fixation of pay in such cases with specific reference to the aforesaid F.Rs. All that was stated therein was to clarify the aforesaid provisions. The clarification was absolutely in tune with the provisions of Rule 22(1)(a)(2) read with 22(1)(a)(3). An administrative instruction to supplement the provisions of a statutory provision and in tune with the



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statutory provisions are legally tenable. However, when any administrative instructions are repugnant to any statutory provisions, then the said administrative instruction cannot be legally sustainable. Thus, in the instant case, the order at Annexure A-6 being contrary to what has been provided for in the statutory provisions of FR 22(1)(a)(2) and 22(1)(a)(3), the same is legally invalid.

11. Counsel for the respondents submitted that the applicants are the beneficiaries of the revised pay scale which came in to existence through Revised Pay Rules 2008 with retrospective effect from 01-01-2006. The very concept of grade pay is the creation of the said Revised Pay Rules and earlier such a provision did not exist. As such, be it FR 22(1)(a)(2) and 22(1)(a)(3) or for that matter any other statutory provisions that existed prior to 29th August, 2008 (the day the Revised Pay Rules, 2008 were published in gazette) would not have envisaged about grade pay. He has however, submitted that the legal position that a statutory provision cannot be overruled or varied by an administrative instructions is well settled.

12. Arguments were heard and documents perused.

13. The question for consideration is whether the order at Annexure A-6 is legally sustainable and if so, whether under the facts and circumstances of the case, the same could be pressed into service with respect to the applicants.



14. At this juncture, it is pertinent to mention that Annexure A-6 if applied in the literal sense would totally ignore the provisions of FR 22(1)(a)(2) in that pay protection to the extent as contemplated in the said F.R would not be available. Protection of the difference in grade pay is totally ignored if the said Annexure A-6 order is executed in that fashion, whereas, as per the Revised Pay Rules also, pay includes the grade pay and as such, pay protection would mean pay in the scale of pay as well as the grade pay. The overall ceiling in such protection is as given in FR 22(1)(a)(3).

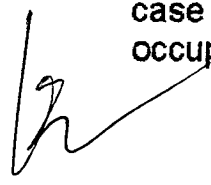
15. It is settled law that an administrative instruction cannot override the statutory provisions. In this regard, the following decisions of the Apex Court would be appropriate to be referred to :-

(a) ***Mannalal Jain v. State of Assam, (1962) 3 SCR 936***
wherein, the Apex Court has held as under :-

We doubt the wisdom of issuing executive instructions in matters which are governed by provisions of law; even if it be considered necessary to issue instructions in such a matter, the instructions cannot be so framed or utilized as to override the provisions of law. Such a method will destroy the very basis of the rule of law and strike at the very root of orderly administration of law

(b) ***A.B. Krishna v. State of Karnataka, (1998) 3 SCC 495,***
In this case, the Apex Court has held that executive instructions could at best fill up a vacuum in the statute. The Apex Court has stated in this case as under :-

As a matter of fact, under the scheme of Article 309 of the Constitution, once a legislature intervenes to enact a law regulating the conditions of service, the power of the Executive, including the President or the Governor, as the case may be, is totally displaced on the principle of "doctrine of occupied field". If, however, any matter is not touched by that



enactment, it will be competent for the Executive to either issue executive instructions or to make a rule under Article 309 in respect of that matter.

(c) **General Manager, Uttaranchal Jal Sansthan v. Laxmi Devi, (2009) 7 SCC 205**, wherein, the Apex Court has held as under :-

We fail to understand how a mere circular letter which has no force of law shall prevail over the statutory rules. The respondents themselves have relied upon the decision of this Court in *DDA v. Joginder S. Monga* wherein it was held that executive instructions cannot run contrary to the statutory provisions.

(d) **Mahabir Vegetable Oils (P) Ltd. v. State of Haryana, (2006) 3 SCC 620**. By this decision, the Apex Court has held that amendment could not take away the rights retrospectively.

44. By reason of Note 2, certain rights were conferred. Although there lies a distinction between vested rights and accrued rights as by reason of a delegated legislation, a right cannot be taken away. The amendments carried out in 1996 as also the subsequent amendments made prior to 2001, could not, thus, have taken away the rights of the appellant with retrospective effect.

16. In fact, the above decision is reiteration of the law declared by the Apex Court that rights accrued cannot be taken away retrospectively by way of any legislation. In this regard, the following decisions of the Apex Court are apt to be referred to at this juncture :-

(a) **State of Gujarat vs Raman Lal Keshav Lal Soni (1983) 2 SCC 33** where the Apex Court had an occasion to deal with the question as to whether the status as civil servant conferred on the Panchayat employees could be taken away by retrospective operation of amended law. This Court held that the retrospective operation was arbitrary, unreasonable and unconstitutional on the following reasoning :

 "The law must satisfy the requirements of the

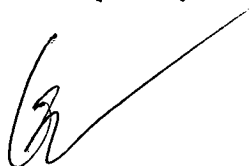
Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, 20 years ago the parties had no rights, therefore, the requirements of the Constitution will be satisfied if the law is dated back by 20 years. We are concerned with today's rights not yesterday's. A legislature cannot legislate today with reference to a situation that obtained 20 years ago and ignore the march of events and the constitutional rights accrued in the course of the 20 years. That would be most arbitrary, unreasonable and a negation of history. It was pointed out by a Constitution Bench of this Court in *B.S. Yadav v. State of Haryana*. Chandrachud, C.J., speaking for the Court held: (SCC headnote)

'Since the Governor exercises the legislative power under the proviso to Article 309 of the Constitution, it is open to him to give retrospective operation to the rules made under that provision. But the date from which the rules are made to operate must be shown to bear either from the face of the rules or by extrinsic evidence, reasonable nexus with the provisions contained in the rules, especially when the retrospective effect extends over a long period as in this case.'

(b) **Ex-Capt. K.C. Arora vs State of Haryana** : In this case, amendment to the Punjab National Emergency (Concessions) Rules, 1965, whereby the expression 'Military Service' was restricting the benefit of military service of defence service personnel only upto 10-01-1968 on their re-appointment, which took away the acquired vested rights of certain defence personnel was held to be unconstitutional and the Apex Court has, in that case held as under :-

"The question, however, has been pointedly considered recently by a Constitution Bench of this Court in *State of Gujarat v. Raman Lal Keshav Lal Soni*....(1983) 2 SCC 33 In view of this latest pronouncement by the Constitution Bench of this Court, the law appears to be well settled and the Haryana Government cannot take away the accrued rights of the petitioners and the appellants by making amendment of the rules with retrospective effect.

17. While the above was the law declared by the Apex Court in the past, in certain cases, there have been slight divergence from the above. For example, in the case of **Virender Singh Hooda vs State of Haryana** (2004) 12 SCC 588, the Apex Court has held as under :-



"52. It is not possible to accept the contention that vested rights cannot be taken away by the legislature by way of retrospective legislation. Taking away of such right would, however, be impermissible if violative of Articles 14, 16 and any other constitutional provision. In *State of T.N. v. Aroorran Sugars Ltd.* this Court held that whenever any amendment is brought in force retrospectively or any provision of the Act is deleted retrospectively, in this process rights of some are bound to be affected one way or the other. In every case, it cannot be urged that the exercise by the legislature while introducing a new provision or deleting an existing provision with retrospective effect per se shall be violative of Article 14 of the Constitution. If that stand is accepted, then the necessary corollary shall be that the legislature had no power to legislate retrospectively, because in that event a vested right is affected."

18. Be that as it may, in the instant case, there is no amendment to the F.R. or the Pay Rules. The change has occurred by way of an executive instructions, which cannot in view of the settled legal position that the statutory provisions cannot be upset by any administrative instructions, be held valid. The validity of such administrative instructions would be affirmed only when the provisions of the administrative instructions borrow their colour from the statute or they are in tandem and not otherwise.

19. Thus, unless Annexure A-6 is read harmoniously with the provisions of FR 22(1)(a)(2) read with FR 22(1)(a)(3) as well as the definition of the term "basic pay" as per the Revised Pay Rules, 2008, the said OM cannot be given effect to.

20. Relevant portion of FR 15 and 22(1)(a)(2) and 22(1)(a)(3) read as under :-

F.R.15 (a) The President may transfer a Government servant from one post to another provided that except -



- (1) on account of inefficiency or misbehaviour, or
- (2) on his written request,

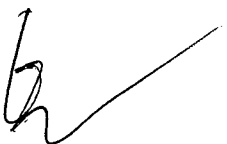
a Government servant shall not be transferred to, or except in a case covered by Rule 49, appointed to officiate in a post carrying less pay than the pay of the post on which he holds a lien.

F.R. 22(1)(a)(2) and (3):

"22. (1)(a)(2) When the appointment to the new post does not involve such assumption of duties and responsibilities of greater importance, he shall draw as initial pay, the stage of the time-scale which is equal to his pay in respect of the old post held by him on regular basis, or, if there is no such stage, the stage next above his pay in respect of the old post held by him on regular basis:

(3) When appointment to the new post is made on his own request under sub-rule (a) of Rule 15 of the said rules, and the maximum pay in the time-scale of that post is lower than his pay in respect of the old post held regularly, he shall draw that maximum as his initial pay."

21. In so far as this case is concerned, when the transfer took place in March, 2008, the revised pay rules were not published and there was no confusion or complication in the fixation of the pay of the applicants in the lower transferred post. At that time, the pay scale for the higher post was Rs.5000 – 150 – 8000 and the pay scale for the lower post was Rs.4000 – 100 – 6000. The pay drawn by the first applicant at the time of his transfer was Rs.5,150/-. It could be possible to apply the provisions of FR 22(1)(a)(2) subject to the ceiling as contained in F.R. 22(1)(a)(3) in such cases. Thus, the applicant was fixed at Rs.5,100/- in the pay scale attached to the lower post and the balance of Rs.50/- was reflected as personal pay, to be adjusted against the future increment. The pay scale



at that time did not contain the element of grade pay. However, when the revised pay scale came into force, there has been a broad band of scale of pay, one applicant to the higher post (Rs.9300 – 34800) and one for the lower post (Rs.5200 – 20200) and there has been difference between the grade pay which is Rs.4,200/- for the higher post and Rs.2400/- for the lower post. Since the term 'basic pay' as per the Revised Pay Rules, 2008 includes also the grade pay, pay protection as contemplated in FR 22(1)(a)(2) should take into account the grade pay also. It was for this reason, presumably, that Annexure A-4 order ensured that there is no depletion in the pay drawn by the applicant. Of Course, the calculation is by way of grant of personal pay. However, this pay fixation was made before the issue of OM dated 21-10-2009 and as such, on the issue of the aforesaid OM dated 21-10-2009, respondents have issued Annexure A-7 order, which results in a truncation of the pay drawn by the applicant at the time of his transfer.

22. Provisions of FR 22(1)(a)(2) had not undergone any change to include the grade pay. However, the Revised Pay Rules include the same as a part of basic pay. Thus, the fixation of the pay of the applicants in the pay scales attached to the post they are now holding should be such that the same takes into account the pay in the pay scale as well as the grade pay and it is to be ensured that the fixation of pay is not in variation from the statutory provision. As stated earlier, the statutory provisions ensures pay protection [subject to the ceiling as per FR 22(1)(a)(3)]. The executive instructions contained in Annexure A-6 do not ensure protection



of pay as per FR 22(1)(A)(2) in that it has totally ignored the difference in the grade pay. Admittedly, the fixation of pay of the applicants should conform to the provisions of FR 22(1)(a)(2). If the impugned Annexure A-6 order has to be legally sustained, then it has to be read in harmony with the provisions of the Statutory Rule FR 22(1)(a)(2) and FR 15. Reading harmoniously the said provisions and the definition of the term 'basic pay' in the Revised Pay Rules, two options are available as under :-

(a) As worked out by the respondents themselves, vide Annexure A-4, the basic pay is kept in tact in the broad band pay scale and the difference between the two grades pay is treated as personal pay to the applicant, which gets offset as and when annual increments are due.

(b) Keeping the grade pay at the rate applicable to the lower post, the balance is included in the basic pay in the broad band.

23. In case of (a) above, the difference being Rs.1800/- adjusting the same against future increments would mean the applicant would not be entitled to any increment for a substantial period. In the instant case the same would come to a span of five to six years. Earlier, such personal pay would be such that the same would be a part of annual increment to be adjusted within one increment or at best two. Again, such a situation was inevitable in the pre-revised pay scales as the stages may not be there to exactly fit the pay in the pay scale. Such is not the case under the present system of pay scale. There is no fixed increment, nor is there any fixed intermediate stage. From Rs.5,200 to Rs.20200, the pay could be fixed at any stage. Of course, treatment of difference as personal pay could be possible where the difference is only in grade pay, while the broad band



.22.

scale of pay is the same (as in the case of Rs.5200 – 20200 with grade pay of Rs.2400/- and Rs.5200 – 20200 with grade pay of Rs.2,800/-, in which case the difference being less, the same could be adjusted within the first or first two annual increments.

24. The applicants, by making a request for transfer to the choice station, are losers in respect of the following:-

- (a) They occupy only a lower post.
- (b) The pay scale attached and the grade pay associated with the scale of pay are much less than the pay scale and the grade pay attached to the higher post held by them.
- (c) They stand to lose their seniority.

25. Forcing them to suffer loss of increment on account of adjustment of personal pay for a span of five to six years would be totally demoralizing.

26. In view of the above, the second option i.e. keeping the grade pay at the rate applicable to the lower post, the balance is included in the basic pay in the pay band appears to be the only option available.

27. Thus, applying the same in the instant case the calculation would be as under :-

" Total pay drawn by the applicant No. 1 at the time of his transfer is Rs 13910/-. This contains the element of grade pay of Rs 4,200/- as well. At the time of fixation of pay in the lower post, necessarily the grade pay should be restricted to Rs 2,400/-. Thus, subtracting Rs 2,400 from the total amount of Rs 13,910/-, the balance i.e. Rs 11,510/- would be construed to constitute the pay in the pay band of Rs 5,200 – 20,200. The applicant's pay would then be -

.23.

Pay in the Pay Band of Rs 5,200 – 20,200 :	Rs.11,510/-
Grade Pay :	Rs.2,400/-
Total :	Rs.13,910/-

Pay as on 01-07-2008: (after grant of one increment of Rs.420 being 3% of total pay of Rs 13,910 after rounding off to the nearest ten)

Pay in the Pay Band of Rs 5,200 – 20,200 :	Rs.11,930/-
Grade pay attached to the post :	Rs.2,400/-
	Rs.14,330

Date of Next increment : 01-07-2009."

28. The O.A. is thus **allowed**. It is declared that Annexure A-6 is not applicable to the case of the applicant as the same is repugnant to the provisions of the statutory rule. Respondents are directed to afford the applicants protection of pay as envisaged in FR 22(1)(a)(2) subject to the ceiling as contained in FR 22(1)(a)(3). The calculation as contained above would meet the requirement without offending the provisions of FR. If so desired, the respondents may consider either amendment to the statutory provisions in the FR or else issue a fresh notification which would not be in conflict with the statutory provisions.

29. This order shall be complied with, within a period of two months from the date of communication of this order.

30. No cost.

(Dated this the 28th day of October 2011)


K.NOORJEHAN
ADMINISTRATIVE MEMBER


Dr.K.B.S.RAJAN
JUDICIAL MEMBER

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