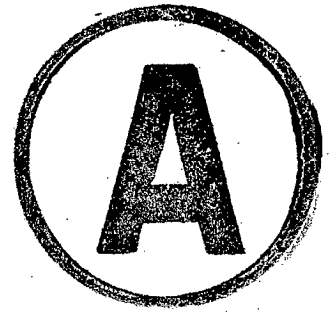


**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**



**Original Application No. 53 of 2010
with
Original Application No. 213 of 2010
with
Original Application No. 539 of 2010
with
Original Application No. 544 of 2010
with
Original Application No. 549 of 2010**

Thursday, this the 3rd day of March, 2011.

CORAM:

**HON'BLE Mr. JUSTICE P.R. RAMAN, JUDICIAL MEMBER
HON'BLE Mr. K. GEORGE JOSEPH, ADMINISTRATIVE MEMBER**

1. O.A. No. 53/2010

1. V.V. Venu,
S/o. Velayudhan Pillai,
Chargeman-I, Naval Ship Repair Yard,
Naval Base, Kochi - 680 004
Residing at "Nethramangalam",
Indira Nagar, Kadavanthra, Kochi-20
2. K.S. Aseez,
S/o. Syed Mohammed,
Chargeman-I (Machine),
Naval Ship Repair Yard,
Naval Base, Kochi -20
Residing at Kanjivathikal House,
Melapadam Road, Kalamassery.

... Applicants.

(By Advocate Mr. K.S. Bahuleyan)

v e r s u s

1. Flag Officer Commanding-in-Chief,
Southern Naval Command,
Headquarters, Kochi.
2. Commodore Superintendent,
Naval Ship Repair Yard, Kochi-4

3. Deputy Controller of Defence Accounts,
Area Accounts Office (Navy),
Perumanoor, Kochi-10

4. Union of India, represented by
Secretary to the Government of India,
Ministry of Defence, North Block,
New Delhi.

... Respondents.

(By Advocate Mr. Sunil Jacob Jose, SCGSC)

2. O.A. No. 213/2010

1. M. Damodaran,
S/o. M. Ayyappan,
Foreman (G), Naval Aeronautical
Quality Assurance Service,
Naval Base, Kochi - 04
Residing at Mancheri Purakkal,
Chilavannur South, Kadavanthra P.O.,
Kochi - 20

2. P.J. Mathew,
S/o. P.J. Joseph,
Chargeman-I (AL), Naval Aeronautical
Quality Assurance Service,
Naval Base, Kochi - 04
Residing at III C-7, Dawson Vihar,
Thykooodam, Kochi - 19

3. A.K. Ayyappan,
S/o. Kochol Kurumpan,
Chargeman-I (AL), Naval Aeronautical
Quality Assurance Service,
Naval Base, Kochi - 04
Residing at Amachottil, Chottanikkara
Pin : 683 312

.... Applicants.

(By Advocate Mr. K.S. Bahuleyan)

v e r s u s

1. Flag Officer Commanding-in-Chief,
Southern Naval Command,
Headquarters, Kochi-04.

2. Chief Controller, Naval Aeronautical
Quality Assurance Service,
Naval Base, Kochi - 04

3. Commodore Superintendent,
Naval Aeronautical
Quality Assurance Service,
Naval Base, Kochi - 04
4. Deputy Controller of Defence Accounts,
Area Accounts Office (Navy),
Perumanoor, Kochi-10
5. Union of India, represented by
Secretary to the Government of India,
Ministry of Defence, North Block,
New Delhi.

... Respondents.

(By Advocate Mr. Sunil Jacob Jose, SCGSC)

3. O.A. No. 539/2010

1. B. Padmakaran,
S/o. Bharathan,
Chargeman-I (AR),
Naval Aircraft Yard, Naval Base, Kochi-4
Residing at "Sajith Nivas",
Muttom P.O., Haripad : 690 511
2. M.C. Sukumaran,
S/o. Chothi,
Chargeman-I (AE),
Naval Aircraft Yard, Naval Base, Kochi-4
Residing at Malayil House,
Ambadimala, Kadungamangalam P.O.,
Thiruvankulam : 682 305

... Applicants.

(By Advocate Mr. K.S. Bahuleyan)

V e r s u s

1. Flag Officer Commanding-in-Chief,
Southern Naval Command,
Headquarters, Kochi-04
2. Commodore Superintendent,
Naval Aircraft Yard,
Naval Base, Kochi-04
3. Deputy Controller of Defence Accounts,
Area Accounts Office (Navy),
Perumanoor, Kochi-10

4. Union of India, represented by
Secretary to the Government of India,
Ministry of Defence, North Block,
New Delhi. ... Respondents.

(By Advocate Mr. Sunil Jacob Jose, SCGSC)

4. O.A. No. 544/2010

P.K. Jagadeesan,
S/o. P. Govindhan Nair,
Working as Chargeman-I,
Naval Aircraft Yard,
Naval Base, Kochi - 4
Residing at "S.J. House",
Puthiyakavu, Tripunithura ... Applicant.

(By Advocate Mr. K.S. Bahuleyan)

v e r s u s

1. Flag Officer Commanding-in-Chief,
Southern Naval Command,
Headquarters, Kochi.
2. Commodore Superintendent,
Naval Aircraft Yard, Kochi-4
3. Deputy Controller of Defence Accounts,
Area Accounts Office (Navy),
Perumanoor, Kochi-10
4. Union of India, represented by
Secretary to the Government of India,
Ministry of Defence, North Block,
New Delhi. ... Respondents.

(By Advocate Mr. Sunil Jacob Jose, SCGSC)

5. O.A. No. 549/2010

1. N. Velayudhan,
S/o. Late V. Narayanan,
Administrative Officer II,
Naval Ship Repair Yard, Kochi 4
Residing at "Visakham",
Manecheril Road, Eroor Noarth P.O.,
Ernakulam.

2. P.C. Rajeevan,
S/o. Late P.S. Chakrapani,
Working as Office Superintendent,
INS Venduruthy, Kochi – 04,
Esiding at Home No. 18/1046-B,
"Kripa", S.N. Junction,
Dhanwandhari Temple Road,
Palluruthy, Kochi – 6
 3. Clava K.J.,
W/o. C.J. Augustine,
Working as Office Superintendent,
Headquarters, Southern Naval Command,
Kochi – 04,
Residing at Chakalakal House,
Mundamveli, Kochi – 682 507
- ... Applicants.

(By Advocate Mr. K.S. Bahuleyan)

v e r s u s

1. Flag Officer Commanding-in-Chief,
Southern Naval Command,
Headquarters, Kochi.
 2. Chief Staff Officer (P&A),
Headquarters, Southern Naval Command,
Naval Base, Kochi-04
 3. Deputy Controller of Defence Accounts,
Area Accounts Office (Navy),
Perumanoor, Kochi-10
 4. Union of India, represented by
Secretary to the Government of India,
Ministry of Defence, North Block,
New Delhi.
- ... Respondents.

(By Advocate Mr. Sunil Jacob Jose, SCGSC)

The Original Applications having been heard on 18.02.2011, the
Tribunal on 03.03.2011 delivered the following:

ORDER

HON'BLE Mr. K. GEORGE JOSEPH, ADMINISTRATIVE MEMBER

These O.As have been clubbed together as the prayers are for
the same relief and are being disposed of by this common order.

2. All the applicants were promoted from the posts of Assistant Foreman/Chargeman-II/Assistant to the posts of Foreman/Chargeman-I/Office Superintendent, as the case may be, and their pay was fixed in the scale of pay of the promotion post under FR 22 (I) (a)(1). Their pay has been revised as per the provision of Civilians in Defence Services (Revised Pay) Rules, 2008 (CDS (RP) Rules, 2008, for short) read in conjunction with IHQ(MOD)(Navy) DCP letter CP(P)/8416/VI/CPC/Policy Corres dated 24.08.2009. Later, steps were taken to recover the benefit of pay fixation already effected on their promotion. Aggrieved, the applicants have filed the above O.As mainly for a direction to the respondents not to recover the benefit of pay fixation granted to them on promotion to the present posts and for a declaration that the applicants are entitled to protection of their pay on the basis of the extant rules.

3. The applicants submitted that the recovery of excess payment already made in a case where the upgraded pay scale was given due to wrong construction of the relevant orders by the authority concerned without any misrepresentation by the employees is liable to be quashed. They relied on following orders of Hon'ble Supreme Court and Hon'ble High Court of Kerala to support their contentions.

- (i) Sahib Ram vs. State of Haryana, 1995 Supp. (1) SCC 18
- (ii) Babulal Jain vs. State of M.P., (2007) 6 SCC 180
- (iii) Satyapalan vs. Dy. Director of Education, 1998 (1) KLT 399
- (iv) Sivankutty Nair vs. Secretary to Govt., 2005 (3) KLT 512

Further, it was submitted by the applicants that they were promoted to their present posts as per the Recruitment Rules after 01.01.2006. They had qualifying regular service in the feeder cadre and had passed the

departmental qualifying test and were selected by the DPC. The vested right of the applicants for fixation of pay on promotion made prior to the notification of the revised pay rules cannot be taken away with retrospective effect. The recovery of the amount paid on fixation of pay in the higher post is legally unsustainable. The promotions were to the posts having higher duties and responsibilities. As such the fixation of pay of the applicants was made correctly under FR 22(I)(a)(1). On pay revision, their pay was fixed as per clarification No.2 of Annexure A4 dated 13.09.2008 which deals with the method of fixation of pay on promotion after 01.01.2006. In O.A. Nos. 740/2003, 741/2003 and 882/2003, this Tribunal had decided on 17.05.2005 that it would be wrong to deprive an employee of the benefit of seniority enjoyed by virtue of regular promotion, by an act of retrospective revision of cadre structure entitling for forfeiture of promotional seniority already availed. Similarly, by an act of retrospective merger of feeder post and the promotion post, the vested right of the applicants in the pay fixation accrued on regular promotion cannot be taken away. The applicants are entitled to the benefit of pay fixation already made.

4. The respondents contested the O.A. In their reply statement, they submitted that the CDS (RP) Rules, 2008 was notified on 09.09.2008 with a view to expedite implementation of the recommendations VI Central Pay Commission, in a time bound manner. As per Annexure R1, the arrears claim was to be paid without pre-check of the fixation of pay in the revised scale of pay. The employees including the applicants had submitted undertakings that any excess payment that might be found to have been

made as a result of incorrect fixation of pay or any excess payment detected in the light of discrepancies noticed subsequently would be refunded to Government by adjustments against future payment due to them or otherwise. The post of Assistant Foreman was merged with the post of Foreman, Chargeman-II with Chargeman-I and Assistant with Office Superintendent as per CDS (RP) Rules, 2008. The applicants were promoted before issuance of the notification for CDS (RP) Rules, 2008. Therefore, the fixation benefits as in the normal promotion has been extended to the applicants with effect from the date of promotion to the grades of Foreman/Chargeman-I. As per the clarification dated 13.08.2009 issued by the Ministry of Defence, the promotions granted in the merged scale during the period 01.01.2006 to the date of amendment or Recruitment Rules should be ignored. The CDS (RP) Rules, 2008 were promulgated with retrospective effect and the financial benefits of the rules were received by the employees including the applicants with effect from 01.01.2006 for which they have voluntarily opted subject to the condition that any overpayment made will be recovered at a later stage. As the Pay Band and Grade Pay are same in the merged grades, no claim exists for the fixation benefits on promotion effected among the merged grades. It was further submitted by the respondents that the judgements quoted by the applicants are not applicable in the matter being challenged in the O.As.

5. In the rejoinder, the applicants submitted that the undertakings given by them pertain to arrears of pay fixation which already remains audited. The undertakings have no further application. The undertakings given by

the applicants cannot override the judicial decisions on the subject.

6. In the additional reply statement, it was submitted by the respondents that the applicants are getting the Grade Pay corresponding to the higher pay among the merged scales and as such they are not entitled to get any fixation benefit.

7. We have heard Mr. K.S. Bahuleyan, learned counsel for the applicant and Mr. Sunil Jacob Jose, learned SCGSC, appearing for the respondents and perused the material on record.

8. On admitting the O.As, interim orders were granted on effecting recovery from the applicants.

9. The CDS (RP) Rules, 2008, were notified on 09.09.2008 for implementing the recommendations of the VI Central Pay Commission. As per recommendation of the Pay Commission, the feeder posts and the promotion posts of the applicants were merged. Subsequent to fixation of their pay on promotion as per rules, they were granted revision of pay scales which were given with retrospective effect. The applicants had the option of retaining the present pay scales or of accepting the revised pay scales. They voluntarily opted for the revised pay scales. As per the clarification dated 13.08.2009, the promotions granted in the merged scale during the period from 01.01.2006 to the date of amendment of the Recruitment Rules were ignored as the posts from which they were promoted were merged with the posts to which they were promoted from

01.01.2006 and were given common scale/Grade Pay. The respondents are bound to implement the CDS (RP) Rules, 2008, as per the clarification received from the Government. Therefore, the revision of their pay which in any case is bound to result in higher emoluments than they were getting in the pre-revised pay scale is wholly justified and legally tenable as the applicants had opted for the revised pay scale foregoing their right to retain the pre-revised pay scale. The applicants are not entitled to protection of their pay on the basis of the extant rules.

10. However, the impugned orders of recovery from the applicants are on a different footing. The applicants were promoted as per the extant rules and their pay was fixed under FR 22(I)(a)(1) correctly. The retrospective application of CDS (RP) Rules, 2008, cannot legally take away the vested right of the applicants in the pay fixation accrued on regular promotion as per Recruitment Rules. The undertakings given by the applicants were for refunding the excess payment, if any, on account of incorrect fixation of pay in the revised pay scale in accordance with the notification of the CDS (RP) Rules, 2008 on 09.09.2008 for implementing the VI CPC recommendations and can have only prospective effect. The undertaking was not for refunding the benefit of pay fixation correctly made under FR 22(I)(a)(1) on regular promotion granted to them. The issue of refund arose only because of the retrospective effect of implementation of the CDS (RP) Rules, 2008 with subsequent clarifications. No rule can be implemented with retrospective effect adversely affecting the vested right of the affected parties without following the due procedure.

11. In **Sahib Ram vs. State of Haryana**, 1995 Supp. (1) SCC 18 and **Purushotam Lal Das and Ors. vs. State of Bihar and Ors.**, 2006 (11) SCC 492, the Hon'ble Supreme Court held that the law is equally clear that when an overpayment is made by the Government not on the basis of any misrepresentation by the employees, Government cannot effect any recovery. In **Satyapalan vs. Dy. Director of Education**, 1998 (1) KLT 399, Hon'ble High Court of Kerala held that the amount obtained by reason of wrong fixation of pay made by the administrative authority cannot be directed to be refunded. Again, in **Sivankutty Nair vs. Secretary to Government**, 2005 (3) KLT 512, Hon'ble High Court of Kerala held that the excess amount paid on account of wrong fixation of pay cannot be recovered unless the employee has in any way contributed to the mistake.

12. In the instant cases, the recovery now proposed by the respondents is the amount that was paid on fixation of their pay on regular promotion correctly made under FR 22(I)(a)(1). It is not directly related to fixation of pay in revised pay scale in accordance with the VI Central Pay Commission. In the light of the various decisions of the Hon'ble Supreme Court and the Hon'ble High Court of Kerala, the recovery of the amount which was paid as per the extant rules, cannot be justified by the retrospective application of CDS (RP) Rules, 2008. The respondents are justified in refixing the pay of the applicants in the revised pay scale in the wake of implementation of the VI Central Pay Commission. But they cannot recover the amount already paid legally to the applicants upon their promotion as per Recruitment Rules.

13. In **Sahib Ram v. State of Haryana**; 1995 Supp (1) SCC 18 and **Shyam Babu Verma v. Union of India**; (1994)2 SCC 521, it is contended that any excess payment made to the employees should not be recovered from them. In **Registrar, Cooperative Societies Haryana and Others vs. Israil Khan and Others**; (2010)1 SCC(L&S) 1123, the Apex Court held that:-

"There is no "principle" that any excess payment should not be recovered back by the employer. This Court, in certain cases has merely used its judicial discretion to refuse recovery of excess wrong payments of emoluments/allowances from employees on the ground of hardship, where the following conditions were fulfilled:

"(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" "

Therefore, we have to examine as to whether the excess payment made in this case falls under any of the two conditions aforementioned before we grant any relief. In this case the fixation benefit was admitted as admissible under FR 22(I)(a)(1) in the pre-revised pay scale initially and was subsequently extended to the revised pay scale as per the VI Central Pay Commission recommendations. But as per the VI Pay Commission recommendations, the posts were merged into an identical grade pay. It is only by virtue of the subsequent clarifications issued by the Department dated 4.12.2009 (copy of which is produced as Annexure A4 in O.A. No. 53/2010), it has become necessary to revise the fixation of the pay effected in all cases of identical pay scales/grade pay and benefit granted to the merged/upgraded pay scale. Thus the

excess payment was made only because of applying a wrong principle based on particular interpretation of a rule or order which was subsequently found to be erroneous and thus falls under condition No. (b) referred to in the Apex Court's judgement (supra). Therefore, even though the respondents are entitled to refix the pay, the recovery sought to be made has to be set aside as it will cause undue hardship especially when one of the conditions for granting such relief is satisfied in this case.

14. In the light of the above, it is ordered as follows :

The order dated 04th December, 2009 to the extent it directs recovery of the benefits granted on promotion to merged/upgraded pay scale from the pay and allowances of the applicants is hereby quashed and set aside. The interim stay orders on the recovery of benefit of pay fixation granted to the applicants in O.A. Nos. 53/10, 213/2010, 539/2010, 544/2010 and 549/2010 on promotion to the present posts are made absolute. However, the applicants are not entitled to protection of their pay fixed allowing the benefit of pay fixation on promotion effected to the merged/upgraded pay scale/posts after 31st December, 2005.

15. The O.As are disposed of as above. No order as to costs.

(Dated, the 03rd March, 2011)

(K. GEORGE JOSEPH)
ADMINISTRATIVE MEMBER

(JUSTICE P.R. RAMAN)
JUDICIAL MEMBER

cvr.