

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH**

Original Application No. 268 of 2007

***Monday*....., this the 15th day of December, 2008**

C O R A M :

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

**K.N. Prakasan, S/o. K.S. Narayana Pal,
Junior Engineer (Civil),
Office of the Regional Director,
Department of Light Houses &
Lightships, Deep Bhavan,
Kadavanthra, Kochi : 682 020
Residing at Quarter No. B-55,
CPWD Quarters, Block No. XVIII,
Kakkanad, Kochi : 682 030**

... Applicant.

(By Advocate Mr. T.C. Govindaswamy)

v e r s u s

- 1. Union of India represented by
The Secretary to the Government
of India, Ministry of shipping,
Transport Bhavan, NEW DELHI : 110 001**
- 2. Director General,
Department of of Light Houses &
Lightships (Ministry of Shipping,
Road Transport & Highways),
A-13, Sector 24, Gautham Budha Nagar,
NOIDA : 201 301 (UP)**



3. The Regional Director,
Department of Light Houses &
Lightships (Ministry of Shipping,
Road Transport & Highways),
Deep Bhavan, Kadavanthra,
Kochi : 682 020

... Respondents.

(By Advocate Mr. TPM Ibrahim Khan, SCGSC)

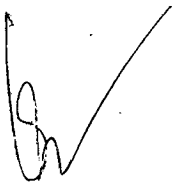
(The Original Application having been heard on 20.11.08, this Tribunal on 15.12.08... delivered the following) :

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

The applicant has filed this application seeking the following relief: -

- (a) For a declaration that the applicant i.e. entitled to be considered and granted the 1st Financial up-gradation in the scale of pay of Rs 6,500- 10,500 with effect from 9th August, 1999 and for payment of arrears arising therefrom.
- (b) For a declaration that the applicant is entitled to be considered for promotion as Assistant Engineer (Civil) in preference to his juniors and the consequential benefit of promotion with effect from 17th May 2004, the date of promotion of his junior and for payment of arrears arising therefrom.

2. The applicant was initially appointed as a Junior Engineer (Civil) on 10-02-1983 and on certain act of misconduct, his services were terminated on 10-02-1984. On rejection of appeal, he had filed Original



application No. 1205 of 1994 before the Mumbai Bench of this Tribunal which was disposed of by order dated 07-12-2000, setting aside the appellate authority's order and directing the 2nd respondent to dispose of the appeal with a speaking order. The 2nd respondent passed another order dated 26-03-2001 reinstating the applicant but treating the intervening period from 10-02-1994 to 26-04-2001 as non-duty. The applicant has again agitated against the aforesaid order of the appellate authority as well as of the Disciplinary authority in OA No. 420/2004 which was disposed of, vide Annexure A-1, with the following directions: -

"In the result, we set aside the impugned orders in this case, declare that the applicant is entitled to have the entire period from 10-02-1994 to 26-04-2001 treated as duty for all purposes including pay and allowances and direct the respondents to issue orders accordingly, fix the pay of the applicant in the revised scale w.e.f. 01-01-1996 and make available to him the entire arrears within a period three months from the date of receipt of a copy of this order."

3. The respondents had taken up the matter with the High Court but the High Court dismissed the writ petition, vide Annexure A-2 Judgment dated 3rd October 2005. SLP (C) No. 1526/2007 filed by the respondents against the Annexure A-2 judgment of the High Court is stated to be

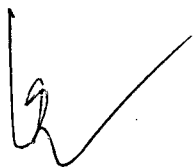


pending with the Apex Court. Meanwhile, Contempt Petition (C) No. 25/2007 filed by the applicant before this Tribunal is also pending.

4. Even before the above order of this Tribunal was pronounced, the applicant had been reinstated and the respondents have published a seniority list, posterior to the date of judgment of the High Court, of Junior Engineer (Civil) as on 01-01-2002, vide Annexure A-3, as also another list as on 01-01-2004 (Annexure A-5) and further confirmed the applicant in the said post of Junior Engineer (Annexure A-4) and also revised the pay of the applicant in the scale of pay of Rs 5,500 – 9,000 in the wake of the V Central Pay Commission vide Annexure A-6.

5. As the applicant found that some of his juniors in the 01-01-2002-seniority list were promoted to the higher post of Assistant Engineer, he had penned Annexure A-7 representation dated 11th August 2004. Again, a representation dated 6th July 2006 was sent to the respondent No. 3, vide Annexure A-10. This has not been responded to.

6. As the applicant has been singled out and also no ACP was granted, this application has been filed, seeking the relief as reflected in para 1 above.



7. Respondents have contested the O.A. According to them, in so far as ACP is concerned, in fact the applicant's pay scale of Rs 5,500 – 9000 was based on the provision that 50% of the posts of Junior Engineer were to be placed in that grade and the applicant had been placed in that grade from the date of his reinstatement. This higher pay scale had been granted on the basis of seniority without considering the ACRs. The DOPT has clarified that those who have been placed from the pre-revised pay scale of Rs 1400 – 2300 (5000 – 8000) to the grade of 1640 – 2900 (Rs 5,500 – 9,000), are not to be again considered for ACP.

8. The applicant has filed the rejoinder, reiterating his contentions as raised in the OA and has denied that the case of the applicant was considered for promotion during 2001 onwards. He has, therefore, called for the records to be perused. Again, in so far as ACP is concerned, the applicant submitted that earlier fixation was only replacement of pay scale and as such, he was not granted any benefit under FR 22(1)(a)(i).

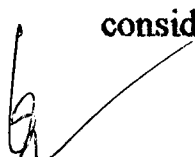
9. In their additional reply, the respondents have stated that the applicant was certainly considered for promotion but since the DPC did not recommend his name, he was not promoted. And, as regards fixation

of pay under FR 22(1)(a)(i), the respondents have added Annexure R4 to substantiate that while fixing the pay, element of FR 22(a)(1) (a)(i) was taken into Account.

10. Counsel for the applicant submitted that in so far as ACP was concerned, the contention that in view of fixation of higher pay scale, the same amounts to ACP has been specifically repelled by the Tribunal in its order in OA No.421/2004. As regards promotion, the counsel submitted that records would reveal the actual fact.

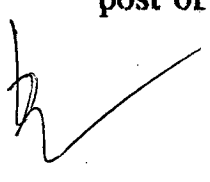
11. Counsel for respondents reiterated in their arguments their contentions as contained in the counter and additional reply. In addition, they have made available the records of DPC.

12. Arguments were heard and documents perused. The records do confirm that the case of the applicant was considered successively from 2002-2003 onwards but in all these years, the DPC had assessed him as unfit for promotion. It is for the applicant to challenge in a separate proceedings against the same, if he so chooses. For, his case in the instant OA was that he was not considered but since he has been considered, that grievance does not subsist.



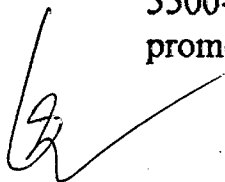
13. In so far as ACP is concerned, the contention of the applicant is that his pay scale as of 01-01-1996 in Rs 5,500 – 9,000 is in the form of upgradation and the same cannot be treated as a promotion to deny him the ACP. Respondents have however stated that the pay scale of 50% of the Joes is Rs 5,50-0 – 9,000 and the rest would be fixed in the scale of Rs 5000 – 8000/-. And, the applicant has been afforded the higher pay scale and hence, he is not eligible to the ACP. Counsel for the applicant however, submitted that whenever there is an upgradation of pay scale of a particular post, the same shall not be treated as any promotion granted to the incumbent and in this regard, he had invited our attention to an earlier decision of this Tribunal in OA No. 421/2004.

14. The Tribunal in OA 421/2004 had occasion to consider the case of an Assistant Engineer (Mechanical) who was initially in the pay scale of Rs 1400 – 2300 and the Fifth Central Pay Commission recommended 30% of the posts in the cadre of Technicians (General) to be granted the revised scale of pay of Rs 5500 – 9000/- as replacement scale of pay w.e.f. 1-1-1996 and accordingly the applicant was granted that pay scale. The next promotion in the hierarchy for technician (General) is to the post of Assistant Engineer (M) in the scale of Rs 6,500 – 10,500/- and



thereafter to the post of Deputy Director (Regional) in the scale of Rs 10000 – 15200/-. Since the applicant had more than 26 years of service as on 09-08-1999 he was entitled to be granted the first and second financial upgradation w.e.f. 9-8-99. These benefits however, were not extended to him and other similarly placed ones and the applicant in the normal course had been promoted as Assistant Engineer in the scale of Rs 6500 – 10500/- w.e.f. 01-02-2002. The claim of the applicant for the second financial upgradation was rejected and hence the applicant approached this Tribunal for a direction to the respondents that he should be extended the ACP benefit by way of fixing his pay in the scale of Rs 10,000 – 15,200/-. In regard to the claim of the applicant the Tribunal had considered and held as under:-

“6. According to the admitted facts of the case, the applicant was working as a Technician (General) in the scale of 1400-2300 before the implementation of the Vth CPC Recommendations. The 5th CPC recommended 30% of the posts in this category be given a pay scale of 5500-9000 and the remaining posts were to be given the pay scale of 4500-7000. These recommendations were implemented w.e.f. 1.1.1996. The ACP Scheme came into effect w.e.f. 9.8.1999. The short question that arises for consideration is whether the grant of the higher pay scale of 5500-9000 to 30% of posts in this category of which the applicant was the beneficiary amounts to a financial upgradation/promotion for the purpose of determining his eligibility under the ACP scheme. The contention of the applicant is that the grant of pay scale of 5500-9000 is neither in the nature of upgradation or promotion as it did not result in any financial benefit to the



applicant. It was only a non-functional grade. If it was a promotion his pay should have been fixed under FR 22 a(1) (a) whereas his pay was only fixed under Rule 7 of the CCS Pay Rules. The stand of the respondents is solely based on the so called clarification given by the DOPT extracted in Annexure R2. In fact the reply statement of the respondents makes it clear that they have initially taken up the request of the applicant to the competent authority to withdraw the interim scale of 5500-9000 so that the first upgradation under the ACP can be given in the scale of 6500-10500. But the DOPT has not accepted the same. We have examined in this context the various clarifications issued by the DOPT under the ACP Scheme. These clarifications are contained in DOPT OM No. 35034/1/97-Estt(D) dated 18.7.2001 and the OM NO. 3/4/99-Director (C) dated 24.9.01. These clarificatory instructions were circulated for general awareness and for clearing the doubts raised by the various Departments/ Organisations. The doubt 35 and the clarification given thereunder are relevant to the issue on hand.

"Doubt 35:- Whether placement/appointment in higher scales of pay based on the recommendations of the Pay Commissions or Committees set up to rationalise the cadres is to be reckoned as promotion/financial upgradation and offset against the two financial upgradations applicable under the ACP Scheme?

Clarification:- Where all the posts are placed in a higher scale of pay, with or without a change in the designation without requirement of any new qualification for holding the post in the higher grade, not specified in the Recruitment Rules for the existing post, and without involving any change in responsibilities and duties, then placement of all the incumbents against such upgraded posts is not be treated as promotion/upgradation. Where, however, rationalisation/ restructuring involves creation of a number of new hierarchical grades in the rationalised set up and some of the incumbents in the pre-rationalised set up are placed in the hierarchy of the restructured set up in a grade higher than the normal

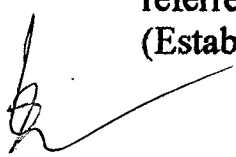
corresponding level taking into consideration their length of service in existing pre-structured/pre-rationalised grade, then this will be taken as promotion/upgradation.

It the rationalised/restructured grades require possession of a specific nature of qualification and experience, not specified for the existing posts in pre-rationalised set up, an existing incumbents in pre-rationalised scales/pre-structured grades, who are in possession of the required qualification/experience are placed directly in the rationalised upgraded post, such placement will also not be viewed as promotion/upgradation. However, if existing incumbents in the pre-rationalised grades who do not possess the said qualification/experience are considered for placement in the corresponding rationalised grade only after completion of specified length of service in the existing grade, then such a placement will be taken as promotion/upgradation.

Where placement in a higher grade involves assumption of higher responsibilities and duties, then such upgradation will be viewed as promotion/upgradation.

Where only a part of the posts are placed in a higher scale and rest are retained in the existing grade, thereby involving redistribution of posts, then it involves creation of another grade in the hierarchy requiring framing of separate Recruitment Rules for the upgraded posts. Placement of existing incumbents to the extent of upgradations involved, in the upgraded post will also be treated as promotion/upgradation and off set against entitlements under the ACPS.

For any doubts in this regard, matter should be referred to the Department of Personnel and Training (Establishment 'D' Section) giving all relevant details.

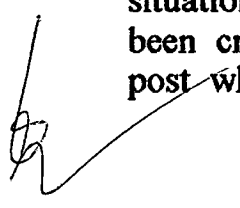


7. In the second OM certain clarifications regarding ACP Scheme for Canteen employees are given as doubts were raised on the manner of implementing the scheme since certain posts in the Canteen establishment were placed on a higher scale of pay.

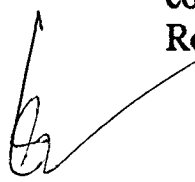
The point of doubt:- In the pre-revised scale, the scale of Sweeper, Wash Boy, Bearer and TEA/Coffee Maker was placed in the same scale of pay Rs.750-12-870-EB-940. But in the revised scale, Sweeper and Wash Boy are placed in the scale of Rs. 2550-55- 2660-60-3200 and Bearers, Tea/Coffee Maker are placed in the higher scale of pay of Rs. 2610-60-3150-65-3540. So it may please be clarified whether the higher scale of pay given to the Bearer and Tea/Coffee Maker in the revised pay, scale will have to be taken into consideration at the time of considering the aforesaid categories of employees for extending ACP benefits.

Clarifications:- Bearer and TEA/Coffee Maker who have been placed in a higher grade on the recommendation of Fifth Central Pay Commission should not be deemed to have availed a financial upgradation for the purpose of adjustment against ACP benefits.

8. The general purport of these clarifications, it appears is that when the posts are placed in a higher scale of pay with or without a change in the designation without requirement of any qualification and without involving any change in the responsibilities and duties, then such placement should not be treated as promotion/upgradation. However, wherever new hierarchical grades are created and some are placed in the hierarchy of restructured cadre involving the need for framing of separate Recruitment Rules, then such placement will be treated as promotion/upgradation to be off set against entitlement under the ACP Scheme. From the averments of the respondents in the reply we could not find any such situation having arisen where a new hierarchical grade has been created. The recruitment rules for Grade-A Gazetted post which comprises of post upto the level of Assistant



Executive Engineers have been produced by the respondents. No rules pertaining to the grade of AEs and Technicians have been produced before us nor is there any averment that the Recruitment Rules have been revised for these categories by introducing a new intermediary grade within the category of Technicians. There is no assumption of higher responsibilities and duties on account of this placement on a higher scale. Regarding the hierarchical channel of promotion, the respondents have categorically stated in para 6 of their reply statement that the next promotion in the hierarchy of Technician (General) is to the post of Assistant Engineer in the scale of 6500-10500 and the next promotional grade is to the post of Assistant Executive Engineer in the scale of 8000-10500. There is no mention of any intermediary grade between the grade of Technician (General) and that of the A.E. As pointed out from the applicant's side the placement of 30% of the posts in the higher scale has been given strictly according to seniority from the existing scale of 1400-2300. The Annexure A2 order and this order as well as the pay fixation orders produced by the respondents themselves do not make any reference to any restructuring of grades nor was the pay fixation being done under FR 22 1 (a)(1) as it would have been in the case of promotion. Hence we are in agreement with the contention of the applicant that the placement in the higher scale of pay in pursuance of the Vth Pay Commission recommendations cannot be deemed to be a financial upgradation for the purpose of ACP. We are fortified in taking this view by the clarifications given by the department itself in the OMs referred to above. In fact, the 'Note' of the DOPT OM in the file relied on by the respondents (Annexure R2) shows that the clarification had been given on the assumption that the existing Recruitment Rules have been amended after such upgradation introducing the upgraded grades as new hierarchical levels. The extracted portion under (ii) of the note refers. There is nothing on record before us to show that such an assumption was, indeed correct and any action had been taken to amend the Recruitment Rules.



9. The next question is regarding scales to which the applicant would become eligible under the ACP scheme. The conditions for grant of the benefits under the ACP scheme are contained in the Annexure to the scheme itself. The condition No. 15 which is relevant in this regard states as under:

“ subject to condition No.4 above, in cases where the employees have already completed 24 years of regular service, with or without a promotion, the second financial upgradation under the scheme shall be granted directly. Further, in order to rationalise unequal level of stagnation, benefit of surplus regular service (not taken into account for the first upgradation under the scheme) shall be given at the subsequent stage (second) of financial upgradation under the ACP scheme as a one time measure..... ”

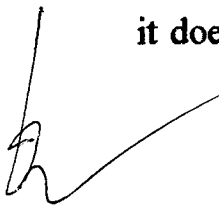
10. The applicant herein had already completed 26 years of service on the date of introduction of the scheme. Therefore even if his placement in a higher scale as on 1.1.96 was taken as a promotion, he should have been given the second financial upgradation directly from the date of implementation itself. May be considering this, the respondents have now issued Annexure R-3 orders granting a higher pay scale of 6500-10500 to the applicant as on 9.8.1999. This order has been issued after the filing of this OA. However, it does not answer the prayer of the applicant. The claim of the applicant is that he should be granted the second financial upgradation in the scale of 10000-15200. The respondents have categorically stated in their reply that the hierarchical promotional avenues from the post of Technician (General) is to A. E. And then to Assistant Executive Engineer which are in the pay scale of 8000-10500 and the scale of pay in 10000-15200 referred to by the applicant is that of Deputy Director which is the next promotional grade to the post of Assistant Executive Engineer. It is seen that the Recruitment Rules introducing the grade of Assistant Executive Engineer came into effect only in the year 2002 and as on the date of introduction of the ACP Scheme, the next channel of promotion from the



post of Assistant Engineer was to that of Deputy Director. This channel is still kept open to the extent of those who were in the pay scale of 6500-10500 on the date of notification of the Recruitment Rules. For the purpose of implementation of the ACP Scheme as the applicant had become eligible for second upgradation in the year 1998 itself, the hierarchy as it existed as the date of implementation of the ACP Scheme has to be taken into account. Therefore, the second financial upgradation in the case of the applicant would be to that of the scale of 10000-15200. Since that is the scale of pay to which the applicant had channel of promotion at that point of time. Therefore he is entitled to that scale w.e.f. 9.8.1999.

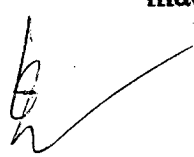
11. In the light of the above discussions, we are of the view that the applicant has made out a case and his prayer is to be upheld. Annexure A7 is quashed. The respondents are directed to grant the benefit of second financial upgradation in accordance with the condition 15 of the ACP Scheme in the scale of 10000-15000 w.e.f. 9.8.1999 with all consequential benefits. The OA is allowed. No costs."

15. In view of the above decision, the placement of the applicant in the scale of Rs 5,500 – 9000 cannot be treated as a substitute for his first financial upgradation. However, in Writ Petition (Civil) No. 17130/2006, the Hon'ble High Court has granted stay of the order of this Tribunal. Nevertheless, as held in the case of *Shree Chamundi Mopeds Ltd. v. Church of South India Trust Assn., (1992) 3 SCC 1*, "the stay of operation of an order only means that the order which has been stayed would not be operative from the date of the passing of the stay order and it does not mean that the said order has been wiped out from existence."



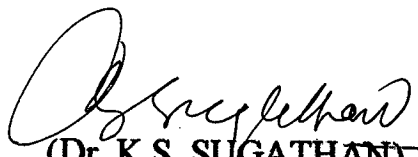
Hence, one can safely have such an order as a precedent, though stay has been granted. As such, following the above order, it is to be held that the applicant is entitled to the ACP in the grade of Rs 6,500 – 10500/- on his completion of 12 years of regular service or the date of his reinstatement whichever is later. On his regular promotion as Assistant Engineer, subsequent to the grant of ACP, the pay would be regulated as per the Rules.

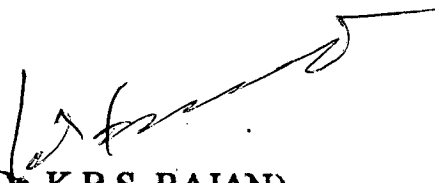
16. In view of the above, the *O.A. is allowed* to the extent that the applicant would be entitled to the grant of 1st ACP on completion of 12 years of service or the date of reinstatement which ever is later. This however, be converted into completion of 12 years of regular service or 09-08-1999 whichever is latter, after the Apex Court has decided the case whether the intermediate period when the applicant was kept away from service should be treated as pay for all purposes. The pay of the applicant on grant of the ACP benefit shall be fixed in the scale of Rs. 6,500 – 10,500/-. Respondents are at liberty to fasten a condition upon the applicant before making payment that grant of this benefit may be made subject to the decision of the High Court in the CWP No.17130/06.



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

(Dated, the 15TH December, 2008)


(Dr. K S SUGATHAN)
ADMINISTRATIVE MEMBER


(Dr. K B S RAJAN)
JUDICIAL MEMBER

Cvr.