

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Original Application No. 208 of 2011

with

Contempt Petition No. 58 of 2011 in OA No. 208 of 2011

Original Application No. 283 of 2011

with

Contempt Petition No. 55 of 2011 in OA No. 283 of 2011

Original Application No. 303 of 2011

with

Contempt Petition No. 60 of 2011 in OA No. 303 of 2011

Original Application No. 764 of 2011

MONDAY, this the 23rd day of January, 2012

CORAM:

Hon'ble Mr. Justice P.R. Raman, Judicial Member

Hon'ble Mr. K. George Joseph, Administrative Member

1. Original Application No. 208 of 2011 -

1. K. Balakrishnan, Foreman (PPC), Naval Ship Repair Yard, Naval Base, Kochi-680004, Residing at No. 15, Padmapriya, Pratheeksha Nagar, Thoppumpady, Kochi.
2. S. Mohan Raj, Foreman (Radio, Naval Ship Repair Yard), Naval Base, Kochi-680004, Residing at No. 27/1798-A, L-24, Kasturba Nagar, Kochukadavanthra, Kochi.
3. Darly John, Technical Assistant (Engineering), Naval Ship Repair Yard, Naval Base, Kochi-680004, Residing at Kannanthadathil House, Maradu P.O., Ernakulam.
4. D. Gerogekutty, Foreman (EGF), Naval Ship Repair Yard, Naval Base, Kochi-680004, Residing at Poikavila House, Fr. Mulavarikkal Road, Konthuruty, Thevara P.O., Kochi-13.
5. R. Shajikumar, Foreman (Power), Naval Ship Repair Yard, Naval Base, Kochi-680004, Residing at Vijaya Bhavan, Kannanakuzhy P.O., Mavelikkara, Alappuzha District-690505.

Applicants

(By Advocate – Ms. K. Girija)

V e r s u s

1. Union of India, represented by Secretary to the Government of India, Ministry of Defence, North Block, New Delhi.
2. The Flag Officer Commanding in Chief, Southern Naval Command, Headquarters, Kochi.
3. The Chief Staff Officer (Personnel and Administration), Headquarters, Southern Naval Command, Naval Base, Kochi-68 004.
4. The Principal Director of Civilian Personnel, Integrated Headquarters, Ministry of Defence (Navy), New Delhi.
5. The Commodore Superintendent, Naval Ship Repair Yard, Naval Base, Kochi – 682 004.
6. Joint Control of Defence Accounts, Area Accounts Office, (Navy), Perummannur, Kochi-10. **Respondents**

(By Advocate – Mr. Sunil Jacob Jose, SCGSC)

2. Contempt Petition No. 58 of 2011 in OA No. 208 of 2011

1. K. Balakrishnan, Foreman (PPC), Naval Ship Repair Yard, Naval Base, Kochi-680004, Residing at No. 15, Padmapriya, Pratheeksha Nagar, Thoppumpady, Kochi.
2. Darly John, Technical Assistant (Engineering), Naval Ship Repair Yard, Naval Base, Kochi-680004, Residing at Kannanthadathil House, Maradu P.O., Ernakulam. **Petitioners**

(By Advocate – Ms. K. Girija)

V e r s u s

1. Vice Admiral K.N. Suseel, Age and father's name not known to the petitioner, Now working as Flag Officer Commanding in Chief, Southern Naval Command, Headquarters, Kochi.
2. O.P. Kaura, Age and father's name not known to the petitioner, Now working as Chief Staff Officer (Personnel and Administration), Headquarters, Southern Naval Command, Naval Base, Kochi-68 004.

3. Vivek Chawla,
 Age and father's name not known to the petitioner,
 Now working as Commodore Superintendent,
 Naval Ship Repair Yard,
 Naval Base, Kochi – 682 004.

4. S. Remani,
 Age and father's name not known to the petitioner,
 Now working as Joint Control of Defence Accounts (in charge),
 Area Accounts Office (Navy),
 Perummannur, Kochi. **Respondents**

(By Advocate – Mr. Sunil Jacob Jose, SCGSC)

3. Original Application No. 283 of 2011 -

1. C.J. Paulose, Foreman (ICE), Naval Ship Repair Yard,
 Naval Base, Kochi-680004, Residing at Choothukulayil House,
 S.N. Puram, Aluva West Village, Aluva.

2. M. Vijayan, Chargeman-I (Electrical),
 Naval ship Repair Yard, Naval Base,
 Kochi-680004, Residing at Ushus,
 Thurutheparambu Road, Vazhakkala,
 Thrikkakara (PO), Kochi-682021. **Applicants**

(By Advocate – Ms. K. Girija)

V e r s u s

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

2. The Flag Officer Commanding in Chief, Southern Naval Command,
 Headquarters, Kochi.

3. The Chief Staff Officer (Personnel and Administration),
 Headquarters, Southern Naval Command, Naval Base, Kochi-68 004.

4. The Principal Director of Civilian Personnel,
 Integrated Headquarters, Ministry of Defence (Navy), New Delhi.

5. The Commodore Superintendent, Naval Ship Repair Yard,
 Naval Base, Kochi – 682 004.

6. Joint Control of Defence Accounts, Area Accounts Office,
 (Navy); Perummannur, Kochi-10. **Respondents**

(By Advocate – Mr. Sunil Jacob Jose, SCGSC)

4. Contempt Petition No. 55 of 2011 in OA No. 283 of 2011

M. Vijayan, Chargeman-I (Electrical),
 Naval ship Repair Yard, Naval Base,
 Kochi-680004, Residing at Ushus,
 Thurutheparambu Road, Vazhakkala,
 Thrikkakara (PO), Kochi-682021.

..... **Petitioner**

(By Advocate – Ms. K. Girija)

V e r s u s

1. Vice Admiral K.N. Suseel,
 Age and father's name not known to the petitioner,
 Now working as Flag Officer Commanding in Chief,
 Southern Naval Command, Headquarters, Kochi.
2. O.P. Kaura,
 Age and father's name not known to the petitioner,
 Now working as Chief Staff Officer (Personnel and Administration),
 Headquarters, Southern Naval Command, Naval Base,
 Kochi-68 004.
3. Vivek Chawla,
 Age and father's name not known to the petitioner,
 Now working as Commodore Superintendent,
 Naval Ship Repair Yard, Naval Base, Kochi – 682 004.
4. S. Remani,
 Age and father's name not known to the petitioner,
 Now working as Joint Control of Defence Accounts (in charge),
 Area Accounts Office (Navy),
 Perummannur, Kochi.

..... **Respondents**

(By Advocate – Mr. Sunil Jacob Jose, SCGSC)

5. Original Application No. 303 of 2011 -

K. Mohanakumar, Chargeman (ICE),
 Naval Ship Repair Yard,
 Naval Base, Kochi-680004,
 Residing at Pamba Vihar,
 Defence Quarters, Type III-A-5,
 Plluruthy, Kochi-6.

..... **Applicant**

(By Advocate – Ms. K. Girija)

V e r s u s

1. Union of India, represented by Secretary to the Government of India, Ministry of Defence, North Block, New Delhi.
2. The Flag Officer Commanding in Chief, Southern Naval Command, Headquarters, Kochi.
3. The Chief Staff Officer (Personnel and Administration), Headquarters, Southern Naval Command, Naval Base, Kochi-68 004.
4. The Principal Director of Civilian Personnel, Integrated Headquarters, Ministry of Defence (Navy), New Delhi.
5. The Commodore Superintendent, Naval Ship Repair Yard, Naval Base, Kochi – 682 004.
6. Joint Control of Defence Accounts, Area Accounts Office, (Navy), Perummannur, Kochi-10. **Respondents**

(By Advocate – Mr. Sunil Jacob Jose, SCGSC)

6. Contempt Petition No. 60 of 2011 in OA No. 303 of 2011

K. Mohanakumar, Chargeman (ICE),
Naval Ship Repair Yard,
Naval Base, Kochi-680004,
Residing at Pamba Vihar,
Defence Quarters, Type III-A-5,
Plluruthy, Kochi-6.

.... **Petitioner**

(By Advocate – Ms. K. Girija)

V e r s u s

1. Vice Admiral K.N. Suseel,
Age and father's name not known to the petitioner,
Now working as Flag Officer Commanding in Chief,
Southern Naval Command, Headquarters, Kochi.
2. O.P. Kaura,
Age and father's name not known to the petitioner,
Now working as Chief Staff Officer (Personnel and Administration),
Headquarters, Southern Naval Command, Naval Base, Kochi-68 004.
3. Vivek Chawla,
Age and father's name not known to the petitioner,
Now working as Commodore Superintendent,

Naval Ship Repair Yard, Naval Base, Kochi – 682 004.

4. S. Remani,
 Age and father's name not known to the petitioner,
 Now working as Joint Control of Defence Accounts (in charge),
 Area Accounts Office (Navy),
 Perummannur, Kochi. **Respondents**

(By Advocate – Mr. Sunil Jacob Jose, SCGSC)

7. **Original Application No. 764 of 2011 -**

1. K. Krishnakumar, Chargeman-I,
 Naval Ship Repair Yard, Naval Base,
 Kochi-680004, Residing at Kuzhikkattil House,
 Annanad P.O., Thrichur District – 680309.
2. C. Vijayan, Foreman,
 Naval Ship Repair Yard,
 Naval Base, Kochi-680004,
 Residing at Jaithra, 26/1063, Jyothi Nagar,
 Konthuruthy, Kochi-682 013.
3. K.G. Jose, Chargeman-I,
 Naval Ship Repair Yard, Naval Base,
 Kochi-680004, Residing at Kachappilly
 House, Champannoor, Angamally South PO,
 683573.
4. V.P. George, Chargeman-I,
 Naval Ship Repair Yard, Naval Base,
 Kochi-680004, Residing at Vazhakuzhithadathil
 House, Kadackanad PO, Kolenchery,
 Ernakulam District – 682311.
5. M.M. Sarangadharan Nair, Chargeman-I,
 Naval Ship Repair Yard, Naval Base, Kochi-680004,
 Residing at Cheppilatharayil House,
 Peroor P.O., Kottayam.
6. P.M. Peter, Chargeman-I, Naval Ship Repair Yard,
 Naval Base, Kochi-680004, Residing at
 Puthepurakal, Palluruthy, Kochi-682006.
7. P. Mani, Foreman, Naval Ship Repair Yard,
 Naval Base, Kochi-680004, Residing at
 Manu Nivas, Chemmanathukara P.O., Vaikom.
8. P.J. George, Chargeman-I,
 Naval Ship Repair Yard,

Naval Base, Kochi-680004,
Residing at Padiyara House,
House No. 1956A, Santhi Nagar,
Thevara, Kochi-682013.

..... **Applicants**

(By Advocate – Ms. K. Girija)

V e r s u s

1. Union of India, represented by Secretary to the Government of India, Ministry of Defence, North Block, New Delhi.
2. The Flag Officer Commanding in Chief, Southern Naval Command, Headquarters, Kochi.
3. The Chief Staff Officer (Personnel and Administration), Headquarters, Southern Naval Command, Naval Base, Kochi-68 004.
4. The Principal Director of Civilian Personnel, Integrated Headquarters, Ministry of Defence (Navy), New Delhi.
5. The Commodore Superintendent, Naval Ship Repair Yard, Naval Base, Kochi – 682 004.
6. Joint Control of Defence Accounts, Area Accounts Office, (Navy), Perummannur, Kochi-10. **Respondents**

(By Advocate – Mr. Sunil Jacob Jose, SCGSC)

These applications having been heard on 7.12.2011, the Tribunal on

23-01-12 delivered the following:

O R D E R

By Hon'ble Mr. K. George Joseph, Administrative Member-

Having common issues these OAs and CPs were heard together and are disposed of by this common order.

2. The applicants in OA No. 208/11 were promoted from the grade of Assistant Foreman (Rs. 6500-10500/-) to the grade of Foreman (Rs. 7450-11500/-) on 18.1.2006 by the respondents. The applicants in OA 283/11

were promoted on 31.1.2008 as Foreman in the scale of pay of Rs. 7450-11500/- or as Chargeman-I in the pay scale of Rs. 5500-9000/- as the case may be. The applicant in OA No. 303/11 was promoted on 10.7.2006 as Chargeman-I in the pay scale of Rs. 5500-9000/-. The applicants in OA No. 764/11 were promoted as Chargeman-I or Foreman as the case may be in the year 2006 or 2007 as the case may be. Their pay was fixed under FR 22(1)(a)(i). The grades of Assistant Foreman and Foreman or Chargeman II and Chargeman I were merged into a common cadre of Foreman or Chargeman with Rs. 9300-34800/- plus Grade pay with retrospective effect from 1.1.2006 as per CDS (Revised Pay) Rules, 2008 notified on 9.9.2008. A clarificatory letter of DOP&T dated 13.8.2009 advised the respondents to ignore the promotions granted in the merged scale during the period from 1.1.2006 to the date of amendment of recruitment rules for merged posts in terms of CDS (Revised Pay) Rules, 2008. On 4.12.2009 Annexure A-5 in OA 208/11 was issued by the Southern Naval Command to recover the fixation benefit granted upon promotion to the post merged after 31.12.2005. Vide impugned orders at Annexures A-9 to A-13 dated 5.3.2011 the applicants in OA 208/11 were informed that the fixation granted to them on promotion has been cancelled and that their pay would be reduced by one stage and that excess amount paid to them would be recovered. The 1st applicant in OA 208/11 made representations at Annexures A-6 and A-8 dated 22.12.2009 and 26.7.2010 respectively which have not yet been replied to. Aggrieved the applicants in OA No. 208/11 have sought the following reliefs:-

"(a) Call for the records leading to Annexures A5, A7 and A9 to A13 and to quash the same.

(b) declare that the applicants are entitled to protection of their pay fixed on the basis of extant rules at the time of their regulation promotion as Foreman.

(c) direct the respondents not to cancel and refix the pay fixation benefit already granted to them on their promotion as Foreman.

(d) direct the respondents not to recover the benefits of pay fixation granted to the applicants on promotion to the present grade.

(e) award costs to be paid by the respondents to the applicants, incidental to this application,

(f) pass such other orders or direction as deemed just, fit and necessary in the facts and circumstances of the case."

Similar reliefs have been sought by the applicants in other OAs as well.

3. The applicants contended that the benefit of pay fixation already granted to them under FR 22 (1)(a)(i) on account of shouldering higher duties and responsibilities on their promotion made to the vacancies in the higher post as per relevant recruitment rules cannot be taken away on the basis of clarification No. 4 in Annexure A-3 dated 13.8.2009 because retrospective amendments cannot take away the vested rights of employees. The impugned orders are illegal, unreasonable and discriminatory. In *Mohammed Surat Ali Vs. Union of India – 1975 (3) SCC 76* the Hon'ble Supreme Court observed that "it is true that a rule which confers a right of actual promotion or a right to be considered for promotion is a rule prescribing a condition of service". A rule which seeks to reverse a condition of service from an anterior date is violative of Articles 14 and 16 of the Constitution of India to the extent it operates retrospectively. The expression "ignored" used at Annexure A-3 means only "take no notice of

the promotions and not to recall it by recovering the benefits already granted". The order of promotion whereby the applicants are promoted to the post of Foreman or Chargeman have not been formerly recalled or cancelled. The financial benefits that have accrued to the applicants are their vested rights as a condition of service. The applicants contended that Annexure A-15 clarified that promotion earned and up-gradations granted under the ACP scheme subsequent to 1.1.2006, should be ignored for the purpose of granting up-gradations under the MACP scheme; therefore, respondents cannot deny the benefit of pay fixation granted to the applicants on their promotion on regular basis.

4. The applicants further contended that respondents are bound by the judgment in *Satyabalan Vs. Deputy Director of Education* – 1998 (1) KLT 399, *Babulal Jain Vs. State of Madhya Pradesh* – 2007 (6) SCC 18, *Sahib Ram Vs. State of Haryana* – 1995 Supp. (1) SCC 80, *Purushottam Lal & Ors. Vs. State of Bihar* – 2011 (1) SCC 492. They cannot recover any amount paid to the applicants on account of pay fixation done by the respondents themselves upon their promotion as there is no mistake or misrepresentation or fraud on the part of the applicants. In *Union of India Vs. P.N. Natrajan* – 2010 (12) SCC 405, the Hon'ble Supreme Court has held that the financial benefit payable to the employees cannot be revised to their disadvantage without giving them action oriented notice and opportunity of hearing. The undertaking given by the applicants pertains to the arrears of pay fixation which have already been audited and they have no application to the recovery of amounts paid to them as salary entitled to

them on their regular promotions before recommendations of the VIth Central Pay Commission were accepted.

5. The respondents contested the OAs. It was submitted that the CDS (Revised Pay) Rules notified on 9.9.2008 had to be implemented in a time bound manner. As directed in OM dated 30.1.2008 they had obtained from the applicants an undertaking to refund to the Government any excess payment found to have been made as a result of incorrect fixation of pay or in the light of the discrepancies noticed subsequently by adjustments against future payments due to them or otherwise. The applicants were promoted before the issuance of the notification of CDS (Revised Pay) Rules, 2008 and therefore fixation of benefits had been acceded to them upon their promotions. As per clarification at serial No. 4 in the letter dated 13.8.2009 the promotions granted in the merged scale during the period from 1.1.2006 to the date of amendment of the recruitment rules would be ignored. Since the pay band and grade pay are the same in the merged grades no claim exists for fixation of benefits on promotion effected among these grades. Accordingly, steps have been taken to recovery the excess amount paid to the applicants They had voluntarily opted for the benefits of CDS (Revised Pay) Rules, 2008 notified on 9.9.2008 with retrospective effect from 1.1.2006 subject to the condition that any overpayment made will be recovered at a later stage. The respondents have taken necessary action in compliance to Annexure A-3 letter in OA 208/11. This Tribunal had disposed of OAs Nos. 53, 213, 539, 54 and 549 of 2010 declaring that the applicants therein are not entitled to protection of their pay fixed allowing

the benefit of pay fixation on promotion effected to the merged post after 31.12.2005. The fixation of pay under CDS (Revised Pay) Rules, 2008 is done on the basis of option exercised by the applicants and undertaking given. The promotion benefit granted to them on the revised pay structure became non-existent.

6. We have heard the learned counsel for the applicants and the learned counsel for the respondents and perused the records.

7. From the facts of these OAs two types of pay fixation emerge namely i) pay fixation upon promotion and ii) pay fixation upon pay revision.

8. In pay fixation upon promotion there is at least an increase of one increment in the higher pay scale granted upon promotion on assuming higher duties and responsibilities under FR 22 (1)(a)(i). Once granted, the benefit of pay fixation upon promotion is a vested right of an employee as a condition of service. It is illegal to withdraw the benefits of pay fixation upon promotion arbitrarily. In the instant cases the applicants were promoted to vacancies in the higher posts as per extant recruitment rules and their pay was fixed under FR 22 (1)(a)(i) with effect from 18.1.2006 or later as the case may be. The respondents cannot just inform the applicants vide letter dated 5.3.2011 or similar letters that the fixation granted to them on promotion effected years ago is cancelled and start recovery of excess payment made. This would be highly illegal, arbitrary, unreasonable and unjust. Respondents have done it based on the clarification at serial No. 4 in the letter No. 3505/CR/2009-Estt(RR), dated 13.8.2009 which is reproduced

as under:-

“(iv) Promotions granted in the merged scale during the period 1.1.2006 to the date of amendment of recruitment rules would be ignored since both the posts have been merged/upgraded from 01 January, 2006 and given a common scale/grade pay/pay scale.”

All that is directed is that in implementing the CDS (Revised Pay) rules, 2008 ignore the promotions granted in the merged scale during the period from 1.1.2006 to the date of amendment of recruitment rules. This does not enable the respondents to cancel the fixation of pay granted upon promotion carried out years ago by any stretch of imagination.

9. The pay fixation under CDS (Revised Pay) Rules, 2008 there is a huge increase in the pay on the basis of acceptance of the recommendations of the VIth Central Pay Commission with retrospective effect from 1.1.2006. However, there is no pay fixation under FR 22 (1)(a)(i). Instead of pay scales there is pay band plus grade pay. There is a uniform date of annual increment in the revised pay structure at the rate of 3 to 4% of the sum of the pay in the pay band and grade pay. Under the provisions of Rule 5 of CDS (Revised Pay) rules, 2008 a Government servant who has been placed in a higher pay scale between 1.1.2006 and 9.9.2008 on account of promotion can opt to switch over to the revised pay structure from the date of promotion. There is no promotion or assumption of higher duties when pay is fixed with reference to pay revision. The fixation of pay is in the nature of replacement of pay scale. Such features render the pay fixation under CDS (Revised Pay) Rules, 2008 quite different from the pay fixation under FR 22 (1)(a)(i) upon promotion. The applicants in these OAs voluntarily opted for pay in the revised pay structure

as per CDS (Revised Pay) Rules, 2008 with retrospective effect from 1.1.2006 forgoing their option to switch over to the revised pay structure from 18.1.2006, the date of their promotion in higher pay scale in the pre-revised structure of pay or later as the case may be. They had also given an undertaking to refund the excess payment made to them as a result of incorrect fixation of pay in the light of detection of discrepancies subsequently, for the sake of immediate disbursal of salary and arrears of salary as per revised pay structure under CDS (Revised Pay) rules, 2008. The clarification at serial No. 4 in the letter dated 13.8.2009 pertains to the pay fixation under CDS (Revised Pay) Rules, 2008 made with retrospective effect from 1.1.2006 and not to the pay fixation done prospectively with effect from 18.1.2006 or later under FR 22 (1)(a)(i) though the applicants are beneficiaries of both the pay fixations. The applicants cannot claim that correction of pay fixation in the revised pay structure with effect from 1.1.2006 as per revised pay rules, 2008 as illegal or arbitrary adversely affecting the vested rights as a condition of service. It was an unintentional mix up on the part of the respondents, to withdraw the benefit of pay fixation upon promotion instead of revising the pay fixation under the CDS (Revised Pay) Rules, 2008 ignoring the promotion as per clarification mentioned above.

10. We are in full agreement with the learned counsel for the applicants that the expression 'ignore' used in Annexure A-3 means only 'take no notice'. The respondents have to fix the pay of the applicants based on the pay they drew on 31.12.2005 taking no notice of the promotion granted to them subsequently. The applicants voluntarily accepted the implementation of the revised pay structure with effect from 1.1.2006 forgoing their option to have it with effect

from the dates of promotion with the effect of promotion in the pre-revised structure. Once the new pay structure comes into force there is no scope for pre-revised pay scales to exist. As provided under Rule 15 of CDS (Revised Pay) Rules, 2008, the provisions of Fundamental Rules, CDS (Revised Pay) Rules, 1997 shall not, save as otherwise provided in CDS (Revised Pay) rules, 2008 apply to cases where pay is regulated under CDS (Revised Pay) Rules, 2008 rules to the extent they are inconsistent with CDS (Revised Pay) Rules, 2008. There is no legal basis for the applicants to avail of the benefits of promotion in the pre-revised scale on 18.1.2006 or later in the pre-revised pay structure after accepting voluntarily the revised pay structure as per CDS (Revised Pay) Rules, 2008 with effect from 1.1.2006. Respondents cannot take away the vested rights of the applicants the way they did. But the applicants are fully within their right to forgo their vested rights in lieu of higher benefits as they did in the instant cases. So there is no legal impediment to correct the fixation of pay of the applicants as per the revised pay structure with retrospective effect from 1.1.2006 as per CDS (Revised Pay) Rules, 2008. The clarification dated 13.8.2009 clarifies CDS (Revised Pay) Rules, 2008 made effective from 1.1.2006. From the date of its being made effective i.e. 1.1.2006 the respondents are bound to follow it.

11. The retrospective implementation of CDS (Revised Pay) Rules, 2008 resulted in overlap of pre-revised and revised pay structures. This cannot be wished away. The applicants were not given the benefit of fixation upon promotion on 18.1.2006 or later as they opted for the revised pay structure with effect from 1.1.2006. Had they known that a clarification would come to take away the fixation benefit of promotion perhaps they would have opted to have

the revised pay structure with effect from the date of promotion in the pre-revised pay structure only. When the benefit of pay fixation under FR 22 (1)(a)(i) was granted it was as per rules. There was no mistake at all. The applicants did not commit any fraud or made any mis-representation to get pay fixation. Therefore, the withdrawal of the benefit of pay fixation in the pre-revised pay structure and consequent recovery of excess amount paid are illegal. The correction of pay fixation in the revised pay structure ignoring the promotions after 1.1.2006 as per CDS (Revised Pay) Rules, 2008 voluntarily accepted by the applicants is legal but the question of consequent recovery needs to be examined.

12. The new pay structure with pay in pay band and grade pay for the first time is retrospectively implemented with effect from 1.1.2006 vide CDS (Revised Pay) Rules, 2008. It is implemented in a time bound manner. The merger of posts especially the merger of feeder category posts and promotion cadre posts had made a situation hugely complex which called for the clarification dated 13.8.2009 from the DOP&T. The applicants had given un-revocable option accepting the revised pay structure and also had given an undertaking that any excess payment owing to incorrect fixation would be refunded by them to the Government. While the Government can resort to issue a clarification at a later stage with retrospective effect, the applicants do not have the option of switching over at a later stage with retrospective effect to the revised pay structure from the date of promotion in the pre-revised pay scale between 1.1.2006 and the date of notification of CDS (Revised Pay) Rules, 2008. When the applicants gave the undertaking for recovery, they were quite

unaware of the clarification that was to come. There was no mistake, misrepresentation or fraud on the part of the applicants in the misconception of law regarding pay fixation as per CDS (Revised Pay) Rules, 2008 by the respondents. Further, hardship is caused to the applicants, when recovery is effected, years after implementing the revised pay structure. We are of the view that here is a fit case for exercising the judicial discretion to refuse recovery of excess payment from the applicants.

13. In OA No. 53 of 2010 and connected cases the same issue as in these OAs arose for consideration. This Tribunal held that the applicants therein are not entitled to protection of pay fixed allowing the benefit of pay fixation on promotion effected to the merged post after 31st December, 2005 and that no recovery of excess amount paid on account of the benefit of pay fixation upon promotion should be made. Cancellation of the benefit of pay fixation upon promotion is quite different from ignoring the benefit of pay fixation upon promotion in fixing the pay in the revised pay structure, legally speaking.

14. In the present cases the learned counsel forcefully argued relying on Annexures A-15 and A-16 (both are identical) that if for the purpose of granting of MACP, promotions earned and up-gradations granted under the ACP scheme subsequent to 1.1.2006 are to be ignored for the purpose of granting up-gradations under MACP scheme, the benefit of pay fixation granted on regular promotions alone cannot be withdrawn. We do not find any merit in this argument. In paragraph 5 and 6.1 of the MACP scheme it is

stated as under:-

“5. Promotions earned/up-gradations granted under the ACP Scheme in the past to those grades which now carry the same grade pay due to merger of pay scales/up-gradations of posts recommended by the Sixth Pay Commission shall be ignored for the purpose of granting up-gradations under Modified ACPS.

Illustration

The pre-revised hierarchy (in ascending order) in a particular organization was as follows:

Rs. 5000-8000, Rs. 5500-9000 & 6500-10500.

- (a) A Government servant who was recruited in the hierarchy in the pre-revised pay scale Rs. 5000-8000 and who did not get a promotion even after 25 years of service prior to 1.1.2006, in his case as on 1.1.2006 he would have got two financial up-gradations under ACP to the next grades in the hierarchy of his organization, i.e., to the pre-revised scales of Rs. 5500-9000 and Rs. 6500-10500.
- (b) Another Government servant recruited in the same hierarchy in the pre-revised scale of Rs. 5000-8000 has also completed about 25 years of service, but he got two promotions to the next higher grades of Rs. 5500-9000 & Rs. 6500-10500 during this period.

In the case of both (a) and (b) above, the promotions/financial up-gradations granted under ACP to the pre-revised scales of Rs. 5500-9000 and Rs. 6500-10500 prior to 1.1.2006 will be ignored on account of merger of the pre-revised scales of Rs. 5000-8000, Rs. 5500-9000 and Rs. 6500-10500 recommended by the Sixth CPC. As per CCS (RP) Rules, both of them will be granted grade pay of Rs. 4200 in the pay band PB-2. After the implementation of MACPS, two financial up-gradations will be granted both in the case of (a) and (b) above to the next higher grade pays of Rs. 4600 and Rs. 4800 in the pay band PB-2.

6.1 In the case of ACP up-gradations granted between 01.01.2006 and 31.08.2008, the Government servant has the option under the CCS (RP) Rules, 2008 to have his pay fixed in the revised pay structure either (a) w.e.f. 01.01.2006 with reference to his pre-revised scale as on 01.01.2006; or (b) w.e.f. the date of his financial up-gradation under ACP with reference to the pre-revised scale granted under ACP. In case of option (b), he shall be entitled to draw his arrears of pay only from the date of his option i.e. the date of financial up-gradation under ACP.”

(emphasis supplied)

The illustrations in the above extract make it clear that the expression ‘in the past’ refers to the period before 1.1.2006. Employees who have been granted ACP up-gradations between 1.1.2006 and 31.8.2008 have been given option (a) or (b); if they opt for option (b) they will be eligible to draw arrears of pay only from the date of financial up-gradation. The grant of option (b) is in line with option granted to the applicants under Rule 5 of CDS (Revised Pay) rules, 2008 which is extracted as under:-

“5. Drawal of pay in the revised pay structure – Save as otherwise provided in these rules, a government servant shall draw pay in the revised pay structure applicable to the post to which he is appointed; Provided that a government servant may elect to continue to draw pay in the existing scale until the date on which he earns his next or any subsequent increment in the existing scale or until he vacates his post or ceases to draw pay in that scale.

Provided further that in cases where a Government servant has been placed in a higher pay scale between 1.1.2006 and the date of notification of these Rules on account of promotion, up-gradation of pay scale etc., the Government servant may elect to switch over to the revised pay structure from the date of such promotion, up-gradation, etc.”

(emphasis supplied)

Because of the retrospective effect of the revised pay structure with effect

from 1.1.2006 what are to be ignored are promotions or up-gradations granted after 1.1.2006. The clarifications issued by the DOP&T required ignoring the promotions granted after 1.1.2006 in the pre-revised scale for the purpose of pay fixation in the revised pay structure. There is not even a whisper of cancelling the promotions already granted because that is not required at all. The respondents unwittingly went about cancelling the promotions lawfully granted without realizing the implications of doing so.

15. Following the decision of this Tribunal in OA No. 53 of 2010 and connected cases and in the light of the above discussion it is ordered as under:-

The impugned orders in these OAs to the extent they direct recovery of the benefits granted on promotion to merged/up-graded pay scale from the pay and allowances of the applicants is set aside. The interim stay orders for the recovery of the benefit of pay fixation granted to the applicants on promotion to the present post are made absolute. However, the applicants are not entitled to protection of their pay fixed without ignoring the benefit of pay fixation on promotions effected to the merged/up-graded pay scales/posts after 31.12.2005. The respondents can revise the pay fixation under CDS (Revised Pay) Rules, 2008 without effecting recovery of excess payment already made.

16. CP(C) No. 58/11 in OA No. 208/11, CP(C) No. 55/11 in OA No. 283/11 and CP(C) No. 60/11 in OA No. 303/11 are filed for initiating

contempt proceedings against the respondents for willful disobedience and disregard of the interim directions given in OA No. 208/11, OA No. 283/11 and OA No. 303/11 restraining them from recovery of any benefit of pay fixation granted to the applicants.

17. We have perused the reply affidavit filed by the respondents and heard both sides.

18. In view of the substantial compliance of the interim orders by the respondents the contempt petitions Nos. 58/11, 55/11 and 60/11 are closed forthwith.

19. The OAs are disposed of as above. No order as to costs.

**(K. GEORGE JOSEPH)
ADMINISTRATIVE MEMBER**

**(JUSTICE P.R. RAMAN)
JUDICIAL MEMBER**

“SA”