

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

OA No. 305 of 2000

Wednesday, this the 7th day of February, 2001

CORAM

HON'BLE MR. A.M. SIVADAS, JUDICIAL MEMBER

1. MM Varghese, S/o. late MV Mathew,
Assistant Naval Store Officer,
Base Victualling Yard, Naval Base, Kochi-4
residing in Mavunkal House,
C.M.C. 25, Cherthalai PO, Alappuzha.Applicant

[By Advocate Mr. P.J. Joseph]

Versus

1. The Chief of Naval Staff, represented by
the Director of Civilian Personnel,
Naval HQrs (DCP), New Delhi - 110011

2. The Flag Officer Commanding in Chief,
represented by the Chief Staff Officer,
[Personnel & Administration], HQrs,
Southern Naval Command, Kochi - 682004

3. Union of India, represented by Secretary,
Ministry of Defence, Govt. of India,
New Delhi.Respondents

[By Advocate Mr. Govindh K. Bharathan, SCGSC (rep.)]

The application having been heard on 7th of February, 2001,
the Tribunal on the same day delivered the following:

O R D E R

HON'BLE MR. A.M. SIVADAS, JUDICIAL MEMBER

Since the opinion was equally divided by the Members of
the Division Bench, this matter is referred to me invoking
Section 26 of the Administrative Tribunals Act.

2. The point on which there is difference is:

"Whether a Government servant who gets directly
recruited by the Union Public Service Commission and
gets appointed to a higher grade post, is eligible for
exercising an option for refixation of his pay in the

higher grade post from the date of accrual of increment in his earlier lower grade post in accordance with FR 22(1)(a)(1)."

3. The brief facts are: the applicant while working in the Railways as Chargeman in the scale of pay of Rs.1400-2300 got appointment as Assistant Naval Store Officer (ANSO for short) in the scale of pay of Rs.2000-3500 on the basis of the selection made by the Union Public Service Commission. In the new post, his pay was fixed at Rs.2060/- in the scale of Rs.2000-3500 with effect from 23-11-1992. According to him, he is entitled to get his pay fixed at Rs.2120/- with effect from 1-1-1993 for the reason that if he had continued in the Railways as Chargeman, he would have earned an increment on the said date. He says that as per FR 22(1)(a)(1), he is entitled to the same.

4. Respondents say that the applicant is not entitled to get fixation at Rs.2120/- and the pay of the applicant fixed at Rs.2060/- is in order. Reliance is mainly based on R2(B) for that purpose.

5. The applicant is mainly relying on A6 and A-14 in support of his claim.

6. A6 is the copy of the letter issued by the Naval Headquarters on the 30th of April, 1983. It says that where no examination or test is prescribed for completion of the probation, FR 22-B is not attracted and pay is to be fixed under FR 22-C subject to the condition that the post is higher than the post previously held by the Government Servant and also there is continuity of service. It further says that:

"It has also been clarified that the benefit of past service for fixation of pay can be given where the Government servant was asked to resign before taking up

the appointment provided he had applied through proper channel, treating the resignation as a technical formality."

7. So, as per A6, in order to get the benefit of past service for fixation of pay for the applicant, it is a must that he should have been asked to resign before taking up the appointment. A3 is the order of appointment issued to the applicant as ANSO. Nowhere in A3 it is stated that before accepting the post as ANSO the applicant should resign from the post of Chargeman under the Railways.

8. The definite stand taken by the applicant in the OA is that:

"On receipt of Annexure A3 letter, the applicant was retired from the post of Chargeman "B"/DSL(E) by the Central Workshops, Personnel Branch, Ponnامalai, with effect from 21.11.92, by its office order No.P1319/92 dtd. 20.11.92."

9. So, the admitted case of the applicant is that after getting the order of appointment, he retired from the post of Chargeman. There is a difference between 'retirement' and 'resignation'. Both are not synonymous. In the rejoinder, the applicant has stated that:

"The petitioner is not retired from the post of Chargeman - B/DS/Elec as evidenced from Annexure A4 and word used retired is a typing error and may be read as relieved."

10. The rejoinder is not the proper place to take a new plea. A rejoinder cannot have the effect of amending the OA. If the case of the applicant is that he did not retire but he was only relieved and if by mistake it was so shown in the OA, the proper course was to amend the OA. That has not been done. That apart, even in the rejoinder, the case of the applicant is

not that he was asked to resign for the purpose of taking up the post of ANSO, but he was relieved only.

11. A4 is the order issued by the Workshop Personnel Officer of Southern Railway, where the applicant was working formerly. In A4 it is stated that the applicant was relieved on 21-11-1992 and if he is not permanently absorbed within a period of two years from the date of his appointment in the new post, he should immediately on expiry of the said period of two years, either resign from Railway service or revert to his parent post in Railways. The learned counsel appearing for the applicant submitted that the applicant tendered his resignation and in pursuance of the same A4 was issued relieving him from service. There is no such plea and that being so, it is not a matter to be looked into. But, still this plea cannot be accepted for a moment for the obvious reason that in A4 it is clearly stated that if the applicant is not permanently absorbed within a couple of years from the date of appointment, he should immediately on expiry of the said period, either resign from the Railway service or revert to his parent post in the Railways. So, there was no resignation. There can be resignation only once and not repeatedly.

12. A5 says that the applicant will retain his lien in the post of Chargeman 'B'/DSL(E) in his parent department for a couple of years. If the applicant had resigned, there is no question of retaining his lien. So, it is crystal clear that the applicant was not asked to resign before taking up the post of ANSO and he has not sought his resignation. That being so, A6 has no applicability at all.

13. A-14 is the other document pressed into service by the learned counsel appearing for the applicant. In the rejoinder

it is stated that A6 supersedes R2(A) and R2(B). The learned counsel for the applicant across the bar submitted that it is not A6 that supersedes R2(A) and R2(B), but it is A-14. During the course of argument the learned counsel for the applicant submitted that as a matter of fact A-14 does not supersede R2(A) and R2(B), but only gives a clarification. So, the stand taken in the rejoinder that R2(A) and R2(B) are superseded, is given a goby and now a stand is taken that it is further clarified as per A-14. R2(B) says that option is to be allowed only in cases of promotion to higher posts in the normal line in a cadre Department and the OM will not be applicable in cases of appointment by transfer on deputation and the like. The applicant admittedly is a direct recruit to the post of ANSO. That being so, by virtue of the clarification contained in R2(B), the applicant is not entitled to have the option and the benefit of fixation as claimed by him. Then the question is, by virtue of A-14 whether the applicant is entitled to the claim or not. In A-14 it is stated that:

"it has, therefore, been decided to reiterate these instructions to ensure that in the order of promotion/appointment covered by FR 22(1)(a)(i) a clause should invariably be incorporated to this effect with a view to avoid undue hardship to the officials as well as unnecessary references to this Department."

The wordings there "these instructions" refer to R2(A) and R2(B) for the reason that in the beginning portion of A-14 it is stated that:

"The undersigned is directed to invite a reference to this Department Office Memoranda cited in the margin and the saving clause of FR 22(1)(a)(i) on the above subject."

The Memoranda stated in the margin are R2(A) and R2(B). So, by virtue of A-14 what is done is that what is already contained

in R2(A) and R2(B) is reiterated. So, there is no modification to R2(A) and R2(B). A-14 thus does not alter the nature and character of R2(A) and R2(B).

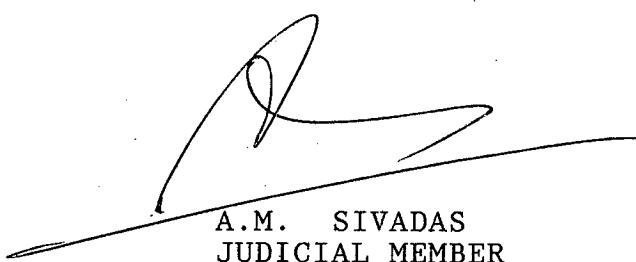
14. As per R2(B), the applicant is not entitled to the fixation A6. So, A6 and A-14 do not help the applicant. The stand of the respondents is well justified in the light of R2(B). That being the position, the applicant is not eligible for exercising an option for refixation of his pay in the higher grade post from the date of accrual of increment in his earlier lower grade post in accordance with FR 22(1)(a)(i).

15. The third prayer in the OA is to direct the respondents to refix the pay of the applicant in the scale of pay of Rs.2060-60-2300-EB-75-3200-100-3500 with effect from 23-11-1992 and refix his pay in the scale of pay of Rs.2120-60-2300-EB-75-3200-100-3500 with effect from 1-1-1993. There are no scales of pay as Rs.2060-3500 and Rs.2120-3500. The scale of pay Rs.2000-3500.

16. The point referred to as far as the applicant is concerned is answered in the negative.

17. Accordingly, the Original Application is dismissed. No costs.

Wednesday, this the 7th day of February, 2001



A.M. SIVADAS
JUDICIAL MEMBER

ak.

List of Annexure referred to in this order:

1. A3 True copy of the letter No. CP(C)1713/786 dated 8-9-92 issued by the 1st respondent.
2. A4 True copy of the office order No. P.1/319/92 dated 20-11-92.
3. A5 True copy of the appointment order No. 141/11/92 dated 26 Nov. 1992.
4. A6 True copy of the letter No. CS 2101/43 dated 23 May 1983
5. A-14 True copy of the office memorandum No. 13.2.97 Estt-(Pay-II) dated 12-12-97 issued by the Ministry of Personnel, P.G. and Pension (Dept. of Personnel and Training).
6. R2(A) True copy of the OM No.7/1/80-Estt(P-1) dated 26th September, 1981.
7. R2(B) True copy of the OM No.13/26/82-Estt(P-1) dated 8th February, 1983.