

CENTRAL ADMINISTRATIVE TRIBUNAL  
ERNAKULAM BENCH

OA No. 324 of 2003

Friday, this the 31st day of October, 2003

CORAM

HON'BLE MR. T.N.T. NAYAR, ADMINISTRATIVE MEMBER  
HON'BLE MR. K.V. SACHIDANANDAN, JUDICIAL MEMBER

1. K. Chandrika Rajan,  
W/o K.A. Rajan,  
Stenographer (Grade II)(Retd.),  
Shreniketan, Netaji Road,  
Alwaye. ....Applicant

[By Advocate Mr. T.C. Govindaswamy]

Versus

1. Union of India rep. by the Secretary to  
the Government of India, Ministry of Finance,  
Department of Revenue, New Delhi.
2. The Chief Income Tax Commissioner,  
Kochi.
3. The Assistant Commissioner of Income Tax,  
Circle-I, Aluva.
4. The Senior Authorised Representative,  
Income Tax Appellate Tribunal, Kochi. ....Respondents

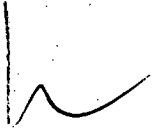
[By Advocate Mr. C. Rajendran, SCGSC]

The application having been heard on 18-9-2003, the  
Tribunal delivered the following on 31.10.2003.


O R D E R

HON'BLE MR. K.V. SACHIDANANDAN, JUDICIAL MEMBER


The applicant joined as a Lower Division Clerk in the  
Commissionerate of Income Tax, Mumbai on 20-3-1965 and her  
designation was changed as Stenographer in the scale of pay of  
Rs.330-560. She was further promoted as Stenographer  
(selection grade) in 1978 and was transferred on request from  
Mumbai Charge to Kerala Charge. She joined the Kerala Charge  
on 16-5-1988 and her pay was fixed at the stage of 2040/- in  
the scale of pay of Rs.1200-2040 applying FR 22. The Zonal  
Accounts Office of the Central Board of Direct Taxes, Cochin



raised some objections regarding the applicant's fixation of pay with effect from 16-5-1988. The applicant submitted a representation on 18-10-1996 to the 2nd respondent. No action was taken thereafter and the applicant continued to draw the pay, which she was drawing. The applicant's pay was fixed at the stage of Rs.6000/- with effect from 1-1-1996 under the replacement scale of Rs.4000-6000 of the Vth Central Pay Commission. The applicant was also drawing one stagnation increment with effect from 1-1-1998 by Annexure A1 order dated 20-3-1998. Copy of the statement fixing the applicant's pay is Annexure A2 dated 4-6-1998. The applicant was due for her first and second financial upgradations to the scales of pay of Rs.5000-8000 and 5500-9000 with effect from 9-8-1999 under the Assured Career Progression (ACP) Scheme, but was denied the benefit. Against the same the applicant made representation to the 2nd respondent. In the meantime, in the normal course, she was promoted to the scale of pay of Rs.5000-8000 by Annexure A3 order dated 28-2-2001. She took over the duties of the higher post and exercised an option to fix her pay with effect from the date of increment in the lower post. Accordingly, the applicant's pay was fixed at Rs.6350/- with effect from 28-2-2001 at the stage of Rs.6500/- by Annexure A4 order dated 31-5-2001. Despite Annexure A4, the applicant was not granted the benefit of higher pay in the higher scale. The Zonal Accounts Officer again raised some disputes regarding the applicant's initial fixation of pay in the Kerala Charge and the applicant submitted another detailed representation to the 2nd respondent. No order refixing the applicant's pay with effect from 16-5-1988 was issued and the applicant continued to draw the basic pay of Rs.6000/- with effect from 1-1-1996 with one stagnation increment each on 1-1-1998 and 1-1-2000. Considering the request of the applicant for grant of financial upgradation under the ACP Scheme, the 2nd respondent was




pleased to fit the applicant in the scale of pay of Rs.5500/with effect from 9-8-1999 vide Annexure A5 order dated 12-11-2001. Despite Annexure A5, the respondents refused to draw the applicant's pay in the higher scale of pay with effect from 9-8-1999. Aggrieved by the same, the applicant filed OA.No.299/2002 before this Tribunal. Pending disposal of the OA, the 2nd respondent issued Annexure A6 letter dated 3-5-2002 indicating that the applicant's pay on posting in Kerala Chapter cannot be fixed under FR 22(1)(a)(2). The 4th respondent also issued a similar order, which is Annexure A7 dated 19-6-2002. Aggrieved by Annexure A6 and Annexure A7, the applicant amended the OA.No.299/2002 and prayed to quash Annexure A6 and Annexure A7. The Tribunal set aside A6 and A7 (Annexure A9 and A-10 in OA.No.299/2002) vide Annexure A8 order dated 10-12-2002. In the meantime, the applicant retired from service on 31-10-2002 and was paid her settlement dues as if she had retired from service on the reduced pay. The entire alleged difference of pay and allowances were also recovered from the applicant's promotional and ACP arrears and retirement gratuity. In purported compliance of Annexure A8 order, the 4th respondent issued Annexure A9 letter dated 29-1-2003 fixing the applicant's pay at a very reduced stage again with effect from 13-5-1988 and calling for objections. The applicant stating her objections submitted Annexure A-10 representation dated 12-2-2003. Rejecting the said explanation the 4th respondent issued Annexure A-11 order dated 28-2-2003. The impugned Annexure A9 and Annexure A-11 orders are totally arbitrary, discriminatory and unconstitutional, according to the applicant. Aggrieved by the said impugned orders, the applicant has filed this OA seeking the following reliefs:-




- "(a) Call for the records leading to the issue of Annexures A9 and A11 and quash the same and direct the respondents to grant the consequential benefits including re-fixation of pension, retirement gratuity, leave salary etc.
- (b) Direct the respondents to refund the entire amount of arrears of alleged over payment of pay and allowances recovered from the applicant's promotional/ACP arrears and retirement gratuity as a prelude to Annexures A9 and A11 forthwith, with 12% interest.
- (c) Award costs of and incidental to this Application.
- (d) Pass such other orders or directions as deemed just, fit and necessary in the facts and circumstances of the case."

2. Respondents have filed a detailed reply statement contending that while working in the scale of pay of Rs.2000-3200, the applicant was transferred to Kerala Charge on her own request offering to get reverted to the grade of Stenographer (Ordinary Grade). Thus, she joined the Kerala Charge on 16-5-1988. Applying FR 22, her pay was fixed at Rs.2040/- by the Mumbai office. But the Zonal Accounts Officer at Kochi objected to the fixing of such pay in 1993 itself on the ground that such fixation was not as per Rules and advised that "Fixation of pay on promotion from 28-2-2001 may be revised after refixing the pay on reversion to the post of Stenographer (Ordinary Grade)". The applicant's pay was replaced by the scale of Rs.4000-6000 with effect from 1-1-1996. The applicant was already drawing one stagnation increment with effect from 1-1-1998. Even though the applicant completed 24 years of service, it was not free from doubt whether she was eligible for financial upgradation under the ACP Scheme. The Scheme was applicable to those who had not received two promotions. The applicant had already received two promotions in her career when she was working at Mumbai, but on her own request she was reverted as Stenographer (Ordinary Grade) on transfer to Kerala Charge. Therefore, whether such officials who have forfeited earlier promotions




voluntarily were eligible for ACP benefit was referred to the Board/Department of Personnel and Training for clarification, which had clarified in O.M.No.35034/1/97-Estt.(D)(Vol.IV) dated 18-7-2001 that the earlier service rendered in such cases may be taken into account for considering them for ACP Scheme. Accordingly, the applicant was granted second upgradation to the scale of pay of Rs.5500-175-9000 with effect from 9-8-1999 under the ACP Scheme. As the fixation of the applicant's pay was not rectified as pointed out by the Zonal Accounts Officer, there had been some delay in implementing the upgradation of pay under the ACP Scheme with effect from 9-8-1999. Thereafter instructions were issued to the 4th respondent to refix the pay of the applicant taking into account the upgradation granted with effect from 9-8-1999 under the ACP Scheme also. After correcting the entries in the Service Book, it was returned by the Mumbai office to Aluva office only on 29-5-1998 and subsequently, the pay of the applicant was fixed by the 3rd respondent on 4-6-1998. Even though the applicant was promoted to a higher cadre with effect from 28-2-2001 and financial upgradation under the ACP Scheme was granted by the Chief Commissioner of Income Tax, the mistake pointed out by the Zonal Accounts Officer remained unrectified. As per Board's letter dated 30-3-2000 (Annexure R2), it had been clarified how the pay of an official who voluntarily seeks transfer to a lower post is to be fixed. In such cases, there is no provision to protect the pay of an official which he/she was drawing prior to his/her reversion to a lower post. In other words, the pay of the applicant should not have been fixed under FR 22(1)(a)(2), which has got the support of Farid Sattar's case. One fixation in the grade of Rs.5000-150-8000 and another fixation in the grade of Rs.5500-175-9000 have been done both with effect from 9-8-1999 in the applicant's case. The mistake in fixing the pay of the applicant on her transfer



from Mumbai Charge to Kerala Region on reversion has also been rectified. Since the pay and allowances drawn by the applicant due to incorrect fixation of pay on reversion from the post of Stenographer (Special Grade) to the Stenographer (Ordinary Grade) on her transfer from Mumbai Charge to Kerala Region were more than the amount due to her on granting the second financial upgradation under the ACP Scheme, a sum of Rs.33,262/- was to be recovered from her. This is proposed to be recovered from her gratuity. The Tribunal allowed the OA No.299/2002 holding that Annexure A9 and A-10 are unsustainable as they are vitiated for non-observance of the principles of natural justice because no notice was given to the applicant proposing the re-fixation of her pay with retrospective effect and the consequential recovery of excess amount drawn by her. Fixation of pay on reversion to a lower cadre/post at one's own request could be done only on notional basis as if she had not been promoted to the higher post and continued to draw pay in the reverted post as observed by the Department of Personnel and Training. As per directions of this Tribunal, a notice was issued to the applicant on 29-1-2003 giving reasonable opportunity and a detailed pay fixation order was issued on 28-2-2003 after considering the representation of the applicant. Both the impugned Annexure A9 and A-11 orders are valid and constitutional. Respondents prayed that there is no merit in the OA and the OA is liable to be dismissed.

3. The applicant has filed a rejoinder contending that it is an undisputed fact that the applicant was transferred from Mumbai Charge to Kerala Charge under FR 15(a), that she accordingly joined the Kerala Charge on 16-5-1988, that her pay was fixed applying FR 22 and based on that fixation her pay was further fixed from time to time, that the applicant enjoyed the benefit of 1988 fixation for several years and that therefore



the respondents are not justified in retrospectively reducing the applicant's pay and on that account they are not justified in making any recovery. The justification of this recovery on the aspect that there is no provision to protect the pay of the official which he/she was drawing prior to his/her reversion to a lower post, in other words the applicant's pay cannot be fixed under FR 22(1)(a)(2), is not correct. The Hon'ble Supreme Court's ruling in Farid Sattar's case mentioned in the impugned order is on different facts and footings. It is very clear that it is having only a prospective effect and on the basis of the same the respondents are not justified in effecting the fixation and recovery with retrospective effect. The Tribunal in the earlier OA had not given any liberty to the respondents to issue show cause notice or to refix the pay of the applicant. There is no provision enabling refixation of pay of a retired employee and the impugned orders have been issued after the applicant's retirement, i.e. after the Master and Servant relationship ceased to exist.

4. Respondents have filed an additional reply statement to the rejoinder reiterating the point that fixation of the applicant's pay under FR 22(1)(a)(2) was by mistake and she went on receiving the pay until refixation was made on 19-6-2002. The fixation was incorrect and the recovery is justified. Respondents also produced Annexure R6 letter dated 14-10-1998 to substantiate their contention regarding fixation of pay in case of reversion to a lower post.

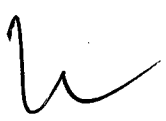
5. We have heard Shri T.C.Govindaswamy, learned counsel appeared for the applicant and Shri C.Rajendran, learned SCGSC appeared for the respondents.



6. The impugned Annexure A9 order reads back to 13-5-1988. So also the impugned Annexure A-11 order. Annexure A-11 was specifically issued with reference to the order passed by this Tribunal in OA.No.299/2002 dated 10-12-2002. The operative portion of this Tribunal's order is as follows:-

"... we find that Annexure A2 order has not been recalled. A7 order also has not been recalled. Any order of the competent authority refixing the pay of the applicant is seen issued excepting a statement of pay in A10. Under the circumstances, we find that the impugned order A9 and A10 is unsustainable as they are vitiated for non-observance of the principle of natural justice. ...."


7. On going through the decision of the Tribunal in which Administrative Member was a party, we find that there is no specific direction that the pay could be refixed after giving notice. The reason for declaring that A9 and A10 orders are unsustainable and for setting aside the same was based on non-observance of the principles of natural justice in issuance of notice. This Tribunal had not given any liberty to the respondents to issue fresh notice and pass a fresh order. If that is the case, we are afraid that there cannot be any finality to the orders passed by the Tribunals/Courts. Therefore, the assumption in Annexure A-11 that show cause notice could be issued afresh and the alleged mistake can be rectified on the part of the respondents would not stand hold good. For that reason Annexure A9 and A-11 are not issued in obedience to the directions of this Tribunal. Even when going to the merits of the case, it is clear that as per the findings in the said OA, Annexure A2 and A7 have not been recalled by the respondents and the situation still prevails as it where. So, without recalling the said orders any modification made to improve upon may not have good footing or foundation. Therefore, for that reason also, Annexure A9 and A-11 are not in the true spirit of the procedures.



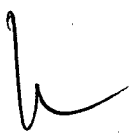


8. Now coming to the merits of the case, we find that the consistent case of the applicant is that the alleged mistake was found out by an objection raised by the Zonal Accounts Office, Cochin. The first objection came in 1993 itself and the respondents have waited for years to get it rectified whatsoever the reason may be. On going through the impugned orders it is very clear that these orders have been passed under dictation of the audit party. No independent application of mind seems to have been applied in finding out the true aspect of the case.

9. It is pertinent to note that when the applicant was transferred from Mumbai Charge to Kerala Charge under FR 15(a), her pay was fixed applying FR 22 and based on that fixation she was enjoying the benefit from 1988 onwards, i.e. for several years. The law as it stood in 1988 when she came on transfer under FR 15(a), her pay was fixed under FR 22(1)(a)(2). FR 22(1)(a)(2) is a subsequent development in the fundamental rules and whatever the benefit that has been earned in the earlier rule position, according to us, cannot be taken away from the applicant, which she was in enjoyment for quite a long time. Therefore, the contention that the applicant's pay should have been fixed under FR 22(1)(a)(2) and alleging that she has been in excess drawing of the fixation as per the subsequent ruling cannot be accepted. On going through the records and the ruling position applying FR 22, this Court cannot find any reason to believe that her pay was fixed on a wrong notion. It is also an admitted fact that the applicant has completed 22 years of service and admittedly the respondents have stated in the reply statement that vide O.M. No.35034/1/97-Estt.(D) (Vol.IV) dated 18-7-2001 the Department of Personnel and Training had clarified that the earlier




service rendered in the case of employees who have forfeited earlier promotions voluntarily, may be taken into account for considering them for ACP Scheme and that the applicant's case was considered along with other cases and was granted second financial upgradation to the scale of pay of Rs.5500-175-9000 with effect from 9-8-1999 vide order dated 12-11-2001. Respondents are relying upon Annexure R2 order, which prescribes the manner in which the pay of the officials who voluntarily seek transfer to a lower post. The contention that there is no provision to protect the pay of the official which she was drawing prior to the reversion to the lower post, we are unable to accept. We have also closely scrutinised Farid Sattar's case which, strictly speaking, has no application in this case. In Farid Sattar's case, we find, the applicant therein had made a technical resignation and joined the new place as a fresher/new recruit accepting the fact that the applicant therein will go to the bottom of the pay scale. Whereas, in this case, there is no resignation as such, but only a transfer where all her pay has been protected. From a reading of the provisions of mutual transfer it is clear that the applicant has to forfeit seniority, but not the pay. Therefore, we cannot accept that the applicant's pay has to be fixed under FR 22(1)(a)(2). The pay and increment that an employee earns in service is the right that such employee earns through his/her length of service and once such a fixation is made it is not legal to withdraw it on the ground that the pay should have been fixed at the bottom of the scale when she came on request transfer. It is also an admitted case that ACP Scheme has been implemented in the case of the applicant, but no amount was paid in cash because of the alleged excess amount drawn by the applicant on a fixation made by mistake in 1988. For the reasons stated above, we are unable to accept the proposition that when a transfer is effected on request the pay



will be fixed on notional basis as if she has not been promoted to the higher post and continued to draw pay in the reverted post. Now, the protection of pay of an employee is a guarantee given to such employees which cannot be taken away for such untenable reasons.

10. For all the above reasons, we are of the view that the applicant's fixation made earlier vide Annexure A1 to Annexure A4 cannot be faulted and the applicant is entitled to get all the benefits flowing out of such orders.

11. It is pertinent to note that apart from the merit position regarding the applicant's entitlement as discussed above, it cannot be alleged that the applicant made any misrepresentation to obtain such a fixation in her favour. The department has been granting the benefit for decades and all of a sudden on the basis of an audit objection the same is sought to be rectified. In the decision reported in Sahib Ram vs. State of Haryana & Others [1995 SCC (L&S) 248], the Hon'ble Supreme Court has made it clear that if the benefit is granted to an employee without any misrepresentation on his/her part, it cannot be withdrawn after a lapse of time, that too retrospectively [also see - Shyam Babu and Others vs. Union of India & Others - 1994 SCC (L&S) 683]. Moreover, the recovery is now sought to be effected after her retirement. It is the well settled position of law that proceedings against a retired employee can only be initiated by the President of India in exceptional circumstances and not by the department, since the employee-employer relationship has ceased to exist. For that reason also, the impugned orders are not sustainable and are liable to be set aside.



12. In the conspectus of facts and circumstances, we are of the considered view that the impugned Annexure A9 and A-11 orders are not sustainable; and therefore, we set aside these impugned orders. Respondents are directed to grant all consequential benefits flowing out of this order including refund of amount already recovered and grant the reliefs by issuing appropriate orders as expeditiously as possible and, in any case, within a period of four months from the date of receipt of a copy of this order.

13. The Original Application is allowed as above. In the circumstances, we direct the parties to bear their respective costs.

(Friday, this the 31st day of October, 2003)



K.V. SACHIDANANDAN  
JUDICIAL MEMBER



T.N.T. NAYAR  
ADMINISTRATIVE MEMBER

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