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CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Original Application No. 295 of 2007
with
Original Application No. 368 of 2007

Wednesday, this the 12th day of November, 2008

C O R A M :

HON'BLE DR. K B S RAJAN, JUDICIAL MEMBER
HON'BLE MS. K. NOORJEHAN, ADMINISTRATIVE MEMBER

1. O.A. No. 295 of 2007


S. Geethakumari,
W/o. Umesh,
Social Security Assistant,
Employees' Provident Fund Organization,
Sub Regional office, Old Municipal Office
Building, Chinnakkada, Kollam,
Residing at : Geetha Bhavan, Pullimoodu
Junction, Vellaikkadavu, Puliarakkonam,
Thiruvananthapuram.

... Applicant.

(By Advocate Mr. T.A. Rajan)

v e r s u s

1. Union of India represented by
The Secretary, Government of India,
Ministry of Labour, New Delhi
2. The Central Provident Fund Commissioner,
Bhavishya Nidhi Bhavan,
14, Bikaji Cama Palace, New Delhi.

3.  The Regional Provident Fund Commissioner (II),
Provident Fund Organization,
Bhavishya Nidhi Bhavan,
Bikaji Cama Palace, New Delhi.
4. The Regional Provident Fund Commissioner (II),
Employees' Provident Fund Organization,
Sub Regional Office, Old Municipal Office Building,
Chinnakkada, Kollam.
5. The Assistant Provident Fund Commissioner (Adm),
Employees' Provident Fund Organization,
Regional Office, Pattom, Thiruvananthapuram.

.... Respondents

(By Advocates Mr. TPM Ibrahim Khan, SCGSC for R1 and
Mr. N.N. Sugunapalan (Sr.) with Mr. S. Sujin for R2-5)

2. O.A. No. 368 OF 2007

Beena Pradeepkumar,
W/o. Pradeepkumar,
Social Security Assistant,
O/o. Regional Provident Fund Commissioner,
Bhavishya Nidhi Bhavan, Kaloore, Kochi - 17,
Residing at Kannanganatt House,
Thururthipuram, Moothakunnam

Applicant.

(By Advocate Mr. T.A. Rajan)

v e r s u s

1. Union of India represented by
The Secretary, Government of India,
Ministry of Labour, New Delhi
2. The Central Provident Fund Commissioner,
Bhavishya Nidhi Bhavan,
14, Bikaji Cama Palace, New Delhi.

3. The Regional Provident Fund Commissioner (II),
Employees' Provident Fund Organization,
Bhavishya Nidhi Bhavan,
14, Bikaji Cama Palace, New Delhi.
4. The Regional Provident Fund Commissioner ,
Bhavishya Nidhi Bhavan, Kaloor, Kochi-17 ... Respondents.

(By Advocate Mr.N.N. Sugunapalan (Sr.) with Mr. S. Sujin)

O R D E R

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

As the issue involved in the above two O.A.s is one and the same, this common order is passed in respect of the two cases.

2. The short questions involved in these cases are as under: -
 - (a) Whether the post of D.E.O. which the applicants had held on ad hoc basis before their regular promotion as Social Security Assistant is an ex cadre post?
 - (b) Whether provisions of FR 22 (IV) is applicable in the case of the applicants at the time of their promotion on regular basis to the post of Social Security Assistants.
 - (c) Whether the provisions of order dated 19th April 2006 are applicable to the case of the applicants.
3. Brief facts of the case as per the O.A. are given in the succeeding paragraphs: -

3.1 O.A No. 295/2007 : The applicant was initially appointed as LDC in the Food and Nutrition Board Chennai in June 1990 and later on transferred in that capacity in the Employees' Provident Fund Organization at Trivandrum in January 1997. Later on, on a temporary basis, she was appointed as Data Entry Operator (DEO) in the scale of Rs 4000 – 6000 in June 1998. Also having qualified in the Computer Skill Test, the applicant was promoted on regular basis as Social Security Assistant in the scale of Rs 4000 – 6000/- with effect from 28-10-2005. Serial No. 50 of Annexure A-1 order dated 28-10-2005 refers.

3.2 Though the applicant was working as DEO, there were no separate sanctioned posts of DEO but within the sanctioned Strength of LDC/UDC, depending upon the functional requirement, the posts of DEO were operated. Later on, these posts of LDC/UDC were merged with SSA by Annexure A-2 order dated 19-04-2006, which states as under: -

- i. Henceforth, LDCs/UDCs/SSAs who have been appointed as DEOs on adhoc and have been promoted as SSA on regular basis on passing Computer Skill Test may be treated as Social Security Assistant and may be adjusted against the sanctioned post of Social Security Assistant.

- ii. On their promotion to the cadre SSA they will draw the same pay which they drew the pay in the identical pay scale of Rs 4000 -- 100 -- 6000 as per proviso of FR 22(1).

3.3 The applicant and other DEOs were, by Annexure A-3 order dated 25-04-2006 'repatriated' to the grade of LDC with retrospective effect from 27-10-2005.

3.4 As the provisions of Annexure A-2 order were not extended to the applicant and similarly situated DEOs repatriated as LDCs as stated above, on their representation, the Regional office sought clarification from the Central P.F. Commissioner, New Delhi vide Annexure A-4 letter dated 30-08-2006. The Regional Provident Fund Commissioner II, New Delhi, vide his Annexure A-6 letter dated 5th March 2007 stated that the word 'henceforth' appearing in order dated 19-04-2006 implies only prospective operation of the said order. When the applicant requested that her pay be fixed with the benefit of order dated 19-04-2006, the same was refused, vide Annexure A-8, order dated 20th March 2007. Thus, with the above communication from the Central Office, respondents had fixed the pay of the applicant w.e.f. 28th October 2005 (the date of promotion

as Social Security Assistant) at Rs 4,200/-, ignoring the pay/pay scale of the applicant in the post of DEO but calculating the presumptive pay in the grade of LDC even for the period she was functioning as DEO in the higher scale. This has resulted in an alleged excess payment to the tune of Rs 14,693/- which has also been directed to be recovered vide Annexure A-10 order dated 30th April 2007. The applicant has come up in this OA challenging the legal validity of Annexure A-6, A-8, A-9 and A-10. Their prayer includes quashing of the aforesaid orders, with a direction to the respondents to work out the pay of the applicant keeping in view the pay drawn as DEO and pay the applicant the difference in pay with a further direction restraining the respondents from effecting any recovery sought to be recovered as stated above.

4. **O.A. No. 368/2007** : The applicant earlier functioning as LDC in the All India Radio was appointed as LDC in the respondents' office and later on was appointed as DEO in the Kochi Sub Regional Office of the respondents vide Annexure A-1 order dated 4th June 1998. Vide Annexure A-2 office order dated 8th November 2004, she was afforded the ACP benefits w.e.f. 31st July 2004. She having qualified in the Computer Skill test in 2005, vide Annexure A-3, was promoted

w.e.f. 28th October 2005 to the post of Social Security Assistant in the grade of Rs 4000 – 6000, vide Annexure A-4. In continuation thereof, vide Annexure A-6 order dated 18th February 2006, she was declared to have been repatriated (deemed) w.e.f. 27th October 2005 to the post of LDC. Thus, her presumptive pay as on 27th October 2005 was worked out in the post of LDC for having the pay fixation w.e.f. 28th October 2005 as S.S.A, vide Annexure A-7. The benefit of order dated 19th April 2006 was extended to this applicant, vide order dated 9th June 2006 (Annexure A-9) but the same was kept in abeyance, vide Annexure A-10 order dated 26th June 2006. On receipt of clarification from the Central office, vide Annexure A-11 letter dated 5th March 2007, she was informed that the benefit of order dated 19th April 2006 would not be available to the applicant, vide Annexure A-12 order dated 9th April 2007. Regulation of the pay on repatriation to the parent cadre, as contained in FR 22(IV) has been pressed into service in the case of this applicant also, vide Annexure A-13.

5. Respondents have contested the O.A. Their contentions as contained in the respective counter are as under:-

5.1. OA No. 295/2007: The EDP centre started functioning at Trivandrum Region in 1992 and since the Recruitment Rules for the post of DEO were not finalized, the EDP Centre was manned by LDCs having proficiency in typing. Thus, these LDCs were posted as DEOs on adhoc basis on a stopgap arrangement. These posts of DEOs are ex-cadre posts. Option was given for drawal of pay either on the scale of Rs 1150 – 1500 (pre-revised) attached to the post of DEO or deputation allowance with the pay of LDC. Annexure A-1 order dated 5th July 1992 refers. It was by Annexure R-2 office order dated 12th May 1998 that the applicant was appointed as DEO, stating that the post is ex cadre. As early as in 1996 instructions were issued for strictly adhering to the regulations relating to appointment to ex cadre posts and on the expiry of the fixed tenure, repatriation was made automatic, unless specifically extended. Annexure R-3 refers. Clarifications have been given in respect of fixation of pay of the DEOs on their repatriation as LDCs vide order dated 13th September 2007 wherein the provisions of FR 22(IV) have been extracted. The pay fixed by the respondents in respect of such DEOs, on repatriation and further promotion as SSA is thus in order

and in accordance with the relevant rules. Hence, the OA being devoid of merits, merits only dismissal.

5.2. **O.A. 368/07:** The contentions as raised in the other O.A. have been adopted in the case of the applicant in this OA as well.

6. Rejoinder has been filed by the applicants reiterating their stand as contained in the respective O.As.

7. Counsel for the applicant argued that there being no repatriation after 3 years, it should be deemed that the applicant was promoted on ad hoc basis to the post of DEO as if the DEO's post is a cadre post. In any event, the cut off date i.e. 19th April 2006 is thoroughly arbitrary as there is no significant change in the legal position of those who were holding the post of DEO anterior to or posterior to 19th April 2006. Further it has been argued that in the case of the applicant in OA No. 295/07, recovery cannot be effected in view of the settled law vide judgment of the Apex Court in the case of Sahib Ram vs State of Haryana and other subsequent decisions.

8. Counsel for the respondents argued that right from the beginning respondents have made it very specific that the post of DEO is an ex cadre post and repatriation order has also been passed in all such cases. Hence, the applicants cannot contend that they were not holding the post of DEO on ex-cadre basis. And, order dated 19-04-06 is only prospective.

9. Arguments were heard and documents perused. In so far as the post of D.E.O. is concerned, Annexure A-1 reflects the post as an ex cadre post only. Thus, under normal circumstances, it is the provision as contained in FR 22(IV) that would apply. The said provision reads as under:-

" Notwithstanding anything contained in this rule, where Government servant holding an ex-cadre post is promoted or appointed regularly to a post in his cadre, his pay in the cadre post will be fixed only with reference to this presumptive pay in the cadre post which he would have held but for his holding any ex-cadre post outside the ordinary line of service by virtue of which he becomes eligible for such promotion or appointed".

10. The question is whether the cut off date whereby DEOs promoted to the post of SSA anterior to 19th April 2006 would be treated in a particular manner in respect of their pay fixation in the

grade of SSA and DEOs promoted to the said post of SSA posterior to 19th April 2006 would be treated in a different manner has any significance so as to justify the stand of the respondents.

11. So far as fixation of a cut off date, the same amounts to classification of ad-hoc DEOs promoted on regular basis as SSAs into two categories, as (i) those promoted prior to 19-04-2006 (date of issue of Annexure A-2 order in OA No. 295/2007) and (ii) those promoted on or after 19-04-2006. The former is denied the benefit of protection of pay drawn as DEO, while the latter class being afforded the said pay protection. Whether such a classification is permissible is the question. Answer to the said question is available in the decision of the Apex Court in the case of **Dharam Chand v. Haryana Agricultural University**, (2004) 9 SCC 74, wherein the Court has held, **"It is now well known that the State is entitled to make a classification provided the same is a reasonable one and based on intelligible differentia."** This dictum of the Apex Court is in symphony with its earlier observation in **K. Thimmappa v. Chairman, Central Board of Directors, SBI**, (2001) 2 SCC 259, wherein the observation of the Apex Court is, **"It is too well settled that even if a classification would be permissible, but unless**

there is any rational basis for the same, the very basis would be hit by Article 14."

12. The above law has now to be telescoped upon the facts of this case to examine whether there is any rational basis for classifying the DEOs promoted as SSA anterior and posterior to 19-04-2006 and affording differential treatment in regard to fixation of pay at the time of promotion as SSA.

13. Vide para 2 of the counter in OA 295/2007, "Since the Recruitment Rules for the post of DEO was not finalized, the EDP Centre was manned by Lower Division Clerks having proficiency in typing. They were posted as DEOs on ad hoc basis as a stop gap arrangement on administrative exigencies as Ex-cadre appointment." It was thus on the ground that no recruitment rules were framed that the post of DEOs were operated as ex cadre posts. Recruitment Rules do not seem to have been framed for the post of DEOs. Meanwhile, there has been a merger of LDC/UDC/ to the post of SSA and consequent upon the merger of LDC/UDC cadre into SSA cadre in the pay scale of Rs 4000 – 6000 and conversion of LDC/UDC to the post of SSA, it was decided that the LDCs/UDCs/SSAs who have

been appointed as DEOs on ad-hoc and have been promoted as SSA on regular basis on passing computer skill test are treated as Social Security Assistant and adjusted against the sanctioned post of Social Security Assistant. If the DEOs promoted as SSAs on or after 19-04-2006 are circumstanced to be entitled to the above benefits, equally, the applicants, who were promoted to the post of SSA vide order dated 28-10-2005 are similarly circumstanced, for the character of the post of DEO as ex cadre has not undergone any change by virtue of the issue of order dated 19-04-2006. It is not the case of the respondents that the post of DEO has been converted from ex cadre to cadre post on 19-04-2006. As long as the character of the post of DEO remained the same unaltered, regulation of pay should be as per FR 22(IV) and if the respondents have chosen to afford pay protection at the time of promotion to the post of SSA to those who have been functioning as DEO (ad hoc) at the time of promotion, that should be uniform as otherwise, that would amount to creating a class within a class which is not permitted. It is appropriate to cite the observations of Hon'ble Mr. Justice V.R. Krishna Iyer in *State of J&K v. Triloki Nath Khosa, (1974) 1 SCC 19*, wherein his Lordship stated -

"Mini-classifications based on micro-distinctions are false to our egalitarian faith and only substantial and straightforward classifications plainly promoting relevant goals can have constitutional validity. To overdo classification is to undo equality."

14. In the instant case, even the micro-distinction is absent. Hence, benefit of order dated 19th April 2006 cannot be denied to the applicants.

15. In any event, there is no scope for effecting recovery on the ground of alleged excess payment in view of the decisions of the Apex Court in the following cases:-

(a) Sahib Ram v. State of Haryana, 1995 Supp (1) SCC 18: *"....it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the appellant."*

(b) Bihar SEB v. Bijay Bhadur, (2000) 10 SCC 99 :

"We do record our concurrence with the observations of this Court in Sahib Ram case 1 and come to a conclusion that since payments have been made without any representation or a misrepresentation, the appellant Board could not possibly be granted any liberty to deduct or recover the excess amount paid by way of increments at an earlier point of time."

(c) Col. B.J. Akkara (Retd.) v. Govt. of India, (2006) 11 SCC 709 :

"27. The last question to be considered is whether relief should be granted against the recovery of the excess payments made on account of the wrong interpretation/understanding of the circular dated 7-6-1999. This Court has consistently granted relief against recovery of excess wrong payment of emoluments/allowances from an employee, if the following conditions are fulfilled (vide *Sahib Ram v. State of Haryana*, *Shyam Babu Verma v. Union of India*, *Union of India v. M. Bhaskar* and *V. Gangaram v. Regional Jt. Director*):

(a) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee.

(b) Such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

28. Such relief, restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial

discretion, courts may on the facts and circumstances of any particular case refuse to grant such relief against recovery."

(d) Purshottam Lal Das v. State of Bihar, (2006) 11 SCC 492 :

"We do record our concurrence with the observations of this Court in Sahib Ram case and come to a conclusion that since payments have been made without any representation or a misrepresentation, the appellant Board could not possibly be granted any liberty to deduct or recover the excess amount paid by way of increments at an earlier point of time. The act or acts on the part of the appellant Board cannot under any circumstances be said to be in consonance with equity, good conscience and justice. "

14. In view of the above **the OA succeeds.** It is declared that pay protection as contained in order dated 19-04-2006 Annexure A-2 would be equally applicable to those who were promoted to the post of SSA who were on the date of promotion functioning as DEO on ad hoc basis, even prior to the issue of the said order. Thus, the applicants are entitled to the same and consequently, respondents are directed to work out the pay admissible to them on their promotion to the post of SSA in accordance with the provisions of Order dated 19th April 2006 and difference between the pay due and drawn be paid to them. This drill shall be completed within a period of three months from the date of communication of this order.

15. No order as to costs.

(Dated, the 12th November, 2008)

(K. NOORJEHANY)
ADMINISTRATIVE MEMBER

(Dr. K B S RAJAN)
JUDICIAL MEMBER

cvr.

CERTIFIED TRUE COPY

Date

Deputy Registrar