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CAT/1/12

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

~~XXXXXXXXXX~~
NEW BOMBAY BENCH

O.A. No. 512/88

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DATE OF DECISION 17.3.1989

Shri Arunkumar Guha Petitioner

Ms. Radha D'Souza Advocate for the Petitioner(s)

Versus

Union of India & Another Respondent

Mr. M. I. Sethna Advocate for the Respondent(s)

CORAM :

The Hon'ble Mr. P. S. CHAUDHURI, Member (A)

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1. Whether Reporters of local papers may be allowed to see the Judgement? Yes
2. To be referred to the Reporter or not?
3. Whether their Lordships wish to see the fair copy of the Judgement?
4. Whether it needs to be circulated to other Benches of the Tribunal?



(9)

BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
NEW BOMBAY BENCH

O.A. 512/88

Shri Arunkumar Guha,
Quarter No.859, Section-I,
Central Govt.State Colony,
Kane Nagar,
Bombay - 400 037.

.. Applicant

vs.

1. The Director,
Seamen's Employment Office,
Nau Bhavan, 10 Ramji Kakani Marg,
Bellard Estate,
Bombay - 400 038.

2. Union of India
through
The Ministry of Surface,
Transport,
Directorate General of Shipping,
Jahaj Bhavan,
Walchand Hirachand Marg,
Bombay - 400 001.

.. Respondents

Coram: Hon'ble Member(A) Shri P.S.Chaudhuri

Appearances:

1. Ms.Radha D'Souza
Advocate for the
Applicant.
2. Mr.M.I.Sethna
Counsel for the
Respondents.

JUDGMENT:
(Per P.S.Chaudhuri, Member(A))

Date: 17.3.1989

This application was filed on 6.7.1988 under Section 19 of the Administrative Tribunals Act, 1985. In it the applicant prays for quashing and setting aside the order dtd. 10.5.1988 refixing his pay on promotion as Accountant on 12.3.1984 and as Deputy Superintendent on 21.5.1984 and other consequential reliefs.

2. The applicant joined service in 1954 as a Lower Division Clerk. On 16.2.1960 he was promoted as an Upper Division Clerk in the scale of Rs.330-560 in the Seamen's Employment Office, Bombay. While working in this post, by an order dated 19.9.1981 he was granted a special pay of Rs.35/- per month w.e.f. 5.5.1979. After

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reaching the maximum of the scale as Upper Division Clerk, he was granted a stagnation increment of Rs.15/- per month w.e.f. 1.10.1983.

3. By an order dated 12.3.1984 he was promoted temporarily to officiate as Accountant in the scale of Rs.425-640 w.e.f. 12.3.1984. As he was in receipt of a special pay for more than 3 years in the post of Upper Division Clerk, this special pay was taken into consideration while fixing his pay in the post of Accountant under the provisions of F.R. 22-C. His pay in the scale for the post of Accountant was accordingly fixed at Rs.620/- per month.

4. By an order dtd. 21.5.1984, he was promoted temporarily to officiate as Deputy Superintendent in the scale of Rs.425-700 w.e.f. 21.5.1984. His pay in the scale for the post of Deputy Superintendent was fixed at Rs.660/- per month under the provisions of F.R.22-C based on his pay in the post of Accountant.

5. The applicant was due to retire on superannuation on 31.5.1988. When his pension papers were submitted ^{On} ~~to the~~ ^{On} submitted to the Pay and Accounts Officer(Shipping), Bombay, these were returned on 21.4.1988 with the remarks that the applicant's pay fixation as Accountant and thereafter as Deputy Superintendent may be re-examined with reference to rules and in case this required revision, amount for recovery may be indicated and calculation of pensionary benefits may be reviewed.

6. Thereafter the respondents examined the matter and came to the conclusion that the applicant's pay had been wrongly fixed by taking into account, the special pay he had been drawing when he was working as

an Upper Division Clerk. This conclusion was arrived at on the basis of the Ministry of Finance, Department of Expenditure O.M.No.7(35)-E.III/87 dated 1.9.1987, which is reproduced below:-

"Subject:- Grant of Special Pay of Rs.35/- per month to the Upper Division Clerks in the non-Secretariat administrative offices-question whether this amount should be taken into account in the fixation of pay on promotion-Decision regarding.

The undersigned is directed to refer to this Ministry's O.M.No.7(52)E.III/78, dated 5th May, 1979 on the subject mentioned above which provides for grant of special pay at the rate of Rs.35/- per month to Upper Division Clerks in the non-Secretariat administrative offices for attending to work of a more complex and important nature. The O.M. further stipulates that the total number of such posts should be limited to 10% of the posts in the respective cadre and that these posts should be identified as carrying discernible duties and responsibilities of a complex nature higher than those normally expected of Upper Division Clerks.

2. The Staff Side in the National Council of the J.C.M. made a demand that Rs.35/- per month paid to the Upper Division Clerks as special pay in terms of the O.M. dated 5th May, 1979 referred to above, should be taken into account in fixation of pay on promotion. The matter was referred to the Board of Arbitration which gave its Award on 28th April, 1987. Accordingly, pursuant to the Award of the Board of Arbitration, the President is pleased to decide as under:-

Rs.35/- per month paid to U.D.C. as special pay under Ministry of Finance (Department of Expenditure) Office Memorandum No.F.7(52)/E.III/78 dated 5.5.1979 shall be taken into account for fixation of pay on promotion subject to the conditions -

- (a) that the incumbent is a substantive holder of the post to which the special pay is attached;
- (b) that the incumbent, on the date of his appointment to higher post, if officiating in the lower post to

which the special pay is attached, continuously for a period of not less than three years.

3. These orders take effect from 1st September, 1985."

7. The respondents* accordingly refixed the applicant's pay as Accountant and Deputy Superintendent in terms of the above mentioned O.M. dated 1.9.1987 and issued the impugned order dated 10.5.1988. The respondents concluded that an excess payment of Rs.5,184/- had been made to the applicant and recovered this amount from him.

8. Being aggrieved by this order dtd.10.5.1988, the applicant filed this application. The respondents have opposed it by filing the affidavit of Shri O.P.Kapur, Director, Seamen's Employment Office, Bombay. I have also heard the arguments of Ms.Radha D'Souza, learned advocate for the applicant and Mr.M.I.Sethna, learned Counsel for the respondents and Mr.J.D.Desai, learned advocate holding the brief for Mr.M.I.Sethna.

9. A number of submissions were made for the applicant. The applicant's first submission was that FR 5-A provided that where any Ministry or Department of the Government was of the opinion that the operation of any of these rules may cause undue hardship to any person, that Ministry or Department may, by order, for reasons to be recorded in writing, relax the requirements of that rule to such extent and subject to such conditions as it may consider ~~it~~ necessary for dealing with the case in a just and equitable manner. It was the applicant's contention that there had been no application of mind in terms of this provision. The respondents countered this by submitting that it was not because of any Fundamental Rule that the pay of the applicant had been refixed. It was their submission that all that they had done was to implement the above mentioned O.M. dtd. 1.9.1987. It was their contention that, therefore,

FR 5-A was not applicable in the present case. After considering these rival submissions, I do not see any merit in this submission of the applicant.

10. The second was that fixing a date of 1.9.1985 in the above mentioned O.M. dtd. 1.9.1987 was arbitrary and discriminatory. The respondents countered this by submitting that this O.M. was based on an Award by a Board of Arbitration and hence had to take effect from a specific date. As regards the order being discriminatory, I asked Ms. Radha D'Souza ^{as} to whether she wanted to cite any similar case, either in the applicant's office, which was a small one, or even in any other office in which the person concerned had been promoted on a date prior to 1.9.1985 but in whose case, nonetheless, the special pay had been taken into account when fixing his pay on promotion. She, however, stated that she had no such case to cite. I do not, therefore, see any merit in this submission of the applicant.

11. The applicant's third submission was that the reduction in his pay was an administrative action resulting in civil consequences and hence must be taken in accordance with the rules of natural justice. It was his contention that he should have been heard before such action was taken. The respondents countered ^{this} by submitting that there was no reduction in pay as such and all that had been done was to re-fix the applicant's pay in accordance with the Award of a Board of Arbitration as communicated in O.M. dtd. 1.9.1987. It was their submission that this was certainly not done by way of any penalty or punishment. It is their submission that the order dtd. 10.5.1988 re-fixing the pay of the applicant in pursuance of this O.M. and had been communicated to him. His representation dtd. 13.5.1988 had been duly considered but had been rejected by a letter dtd. 17.5.1988. It was their submission that there had been no delay and that the

requirement of natural justice had thus been fully met. After considering the rival submissions, I do not see any merit in this submission of the applicant.

12. The applicant's fourth submission was that his pay as Accountant and the Deputy Superintendent had been fixed in 1984 and he continued to draw pay on that basis till 1988. It was his submission that departmental audit had been carried out during this period and his pay fixation had not been held to be wrong. It was his contention that, therefore, even if the pay fixation was wrong it must be held to be either an oversight or a case of wrong interpretation of financial rules and hence no recovery could be made on this account after such a long lapse of time. The respondents countered this by stating that any overpayment made to the employees had to be recovered and there were no rules which preclude them from making such recoveries. It was their submission that all that they had done was to implement O.M. dtd. 1.9.1987 which made it clear that special pay was to be taken into account only in respect of promotions made on or after 1.9.1985. It was their submission that there was neither an oversight nor a wrong interpretation of financial rules. All that they had done was to implement the O.M. dated 1.9.1987. It was their final submission ^{that,} in any case, there had been no delay. After considering these rival submissions, I do not see any merit in the submission of the applicant.

13. It was the applicant's fifth submission that had he known in advance that the special pay that he was drawing would not be taken into account when fixing his pay as an Accountant he might conceivably have even refused promotion. From the impugned order it is, however, seen that the applicant had at no time got less pay than what he would have got had he refused promotion. On the

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contrary, he got higher pay. I, therefore, do not see any merit in this submission.

14. Ms. Radha D'Souza cited a number of cases in support of her submissions. The first was State of Punjab and another v. Iqbal Singh (AIR 1976 SC 667). This case deals with a cut in pension and gratuity and I find that it is not applicable in this case. The second was K.L. Tripathi v. State Bank of India and others (AIR 1984 SC 273). This deals with an appellant who was dismissed from service and I find that it also is not applicable in this case. The third is Liberty Oil Mills and Others v. Union of India and Others (AIR 1984 SC 1271). This deals with the case arising of the Imports and Exports (Control) Act and I find that this also is not applicable in this case. The fourth case is M.M. Kumaraswamy v. State of Mysore (1974 SLJ S.N.8) In that case retrospective promotion was given to the petitioner and arrears of salary with all consequential benefits accrued were also paid. The petitioner retired from service. Thereafter the State Government made an order the effect of which was to affirm the action for giving retrospective promotion but denying him consequential monetary benefits. Then directions were issued to the effect that the arrears already paid may be recovered from the petitioner. This order of recovery ~~was~~ ~~not~~ was set aside by the Mysore High Court as the impugned order had not been made after following the rules of natural justice. I find that the applicant's case is not on all fours with that of Kumaraswamy. It is not as if some arrears which were paid because of retrospective promotion are now sought to be taken away. It is also not as if there ~~is any recovery order being issued~~ after the applicant's retirement. The fifth case which she cited was C.S. Bedi v. Union of India and another (ATR 1988(2) CAT 510). In that case

there was a wrong fixation of the pay of the applicant on his repatriation to his parent department in 1970. Payments were received by the applicant on that basis. The fixation of his pay on his promotion to a higher post in 1981 was done on the same basis. The applicant continued to draw salary on that basis till July, 1986. Then the mistake was detected and an order was issued for refixing his pay. This order refixing his pay was set aside by this Tribunal. I find that the applicant's case is also not on all fours with that of C.S. Bedi. It is not that as if the applicant had moved from one department to another resulting in a wrong fixation of pay. It is also not as if a mistake has been detected after as long a period ^{as} ~~of~~ 7 years as mentioned in another case, let alone 16 years. In this case the pay of the applicant has been refixed within a reasonable period in pursuance of an award of a Board of Arbitration as detailed in the O.M. dtd. 1.9.1987. Further the applicant's representation in this regard had been considered even though it was eventually rejected.

15. The applicant's final submission was that he was entitled to have the special pay included for the purpose of fixing his pay on his promotion as Accountant on the analogy of stepping-up of pay of seniors. The respondents had sought a short adjournment to check this point. It was the respondents' submission that stepping up of pay of seniors in such cases had not been allowed. They cited DG(Posts) letter No.6-9/87-PAP dtd. 30.11.1988 (printed as Serial No.27 at page 40 of Swamy's News, for January, 1989). This letter is reproduced below:

"I am directed to invite a reference to the Ministry of Finance O.M. No.7(35)-E.III/87 dated 1st September, 1987 (published in Swamy's news as SlNo.334 of November, 1987)

permitting Rs.35 p.m. paid to U.D.Cs as special pay under Ministry of Finance (Department of Expenditure) O.M.No.F.7 (52)/R.III/87, dated 5.5.1979, to be taken into account for fixation of pay on promotion subject to the conditions mentioned therein. In this connection a question has been raised whether the pay of those U.D.Cs who were drawing special pay of Rs.35 p.m. for performing complex nature of duties and promoted to higher grade posts prior to 1.9.1985 without taking the special pay into account for pay fixation may be stepped up, in case pay of their juniors promoted after 1.9.1985 by taking the special pay of Rs.35 into account for pay fixation, happens to be more.

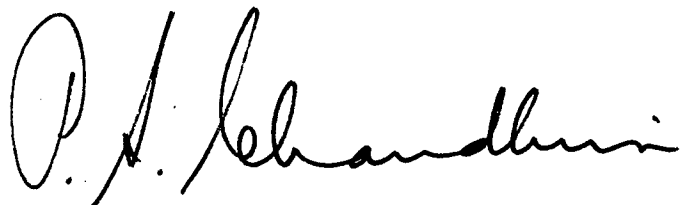
The question has been carefully considered in consultation with the Ministry of Finance and it has been decided that since the crucial date 1.9.1985 has emerged by the Award of the Board of Arbitration and the Government has accepted the Award in toto without suggesting any amendment, stepping up of pay in such cases cannot be allowed.

The representations on the above subject received in this office from your circle have been rejected. All those concerned may be informed accordingly."

I, therefore, do not see any merit in this submission.

16. Based on this decision I am of the view that the application cannot succeed and hence deserves to be dismissed.

17. The application is accordingly dismissed. In the circumstances of the case there will be no order as to costs.



(P.S. CHAUDHURI)
Member(A)