

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH.

ORIGINAL APPLICATION NO.: 1325 of 1993.

Dated this 18th day of April, 2000.

Surendra S. Mahajan & 6 Others. Applicants.

Shri M. S. Ramamurthy, Advocate for the
applicants.

VERSUS

Union of India & Others, Respondents.

Shri V. S. Masurkar, Advocate for the
Respondents.

CORAM : Hon'ble Shri Justice R. G. Vaidyanatha,
Vice-Chairman.

Hon'ble Shri B. N. Bahadur, Member (A).

(i) To be referred to the Reporter or not ? 74

(ii) Whether it needs to be circulated to other Benches ✓
of the Tribunal ?

(iii) Library. 74

Reported
(R. G. VAIDYANATHA)
VICE-CHAIRMAN.

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Hon'ble Shri B. N. Bahadur, Member (A).

1. Surendra S. Mahajan,
Divn1. Engineer (Installation),
Kandivali Telephone Exchange,
Kandivali, Bombay.
2. Devesh Kumar,
Divn1. Engineer (E-10B
Installation), M.T.N.L.,
Ghatkopar, Bombay - 400 028.
3. V. Munindranath,
Divn1. Engr. (E-10B Engg.)
M.T.N.L., Bombay - 400 028.
4. P. Sampath Kumar,
Divisional Engr. (Internal),
M.T.N.L. Telephone Exchange-II,
Wadala, Bombay - 400 031.
5. L.U. Rao,
Divn1. Engr. (OFC-M/W MICE)
M.T.N.L., Bombay - 400 028.
6. K. Madhusudana Rao,
Divisional Engineer (QA),
Telecom Quality Assurance Circle,
C.T.S., Compound, Sweree,
Bombay.
7. N. Ramachandran,
Divn1. Engineer (Internal),
M.T.N.L., Mulund-III Exchange,
Mulund, Bombay - 400 080. Applicants.

(By Advocate Shri M.S. Ramamurthy)

VERSUS

1. The Union of India through
The Secretary to the Govt.
Of India, Department of
Telecommunication,
Sanchar Bhavan,
20, Ashoka Road,
New Delhi - 110 001.

...
fay

2. The Chief General Manager,
Mahanagar Telecom Nigam Ltd.,
15th Floor, Telephone House,
V.S. Marg, Prabhadevi,
Bombay - 400 028.

3. The Chief General Manager,
Quality Assurance Circle,
Department of Telecommunication
Circle, 61, Cockturn Road,
Bangalore - 560 051. ... Respondents.

(By Advocate Shri V. S. Masurkar)

O R D E R

PER : Shri R. G. Vaidyanatha, Vice-Chairman.

This is an application filed under Section 19 of the Administrative Tribunals Act. Respondents have filed reply. We have heard Mr. M. S. Ramamurthy, the Learned Counsel for the applicants and Shri V. S. Masurkar, the Learned Counsel for the respondents.

2. The short point for consideration in this application is, whether the decision of the competent authority refixing the salary of the applicants is sustainable or not ? To decide this question, only few facts are necessary, which are all admitted and undisputed.

Though there were eight applicants in the first instance, the name of one applicant has been deleted and we are now concerned with only seven applicants, and all have passed the competitive examination held by the U.P.S.C. and were appointed to the Group 'A' post of the Indian Telecommunication Services. They underwent probation of two years prescribed under the rules. On completion of training/probation, the applicants were posted as Assistant Divisional Engineers in the scale of Rs. 2200-4000.

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After the applicants passed the departmental examination for the purpose of next promotion, they came to be promoted on officiating basis in the Senior Time Scale of Rs. 3000-4500. This was in 1990 but on different dates. Subsequently, the officiating promotion came to be regularised and they were promoted on regular basis sometime in 1992. Sometime in 1993, a Government Circular was issued stating that the officers promoted on officiating basis are entitled to only charge allowance and not the scale of pay of the promotional post. On that basis, the Government wanted to refix the salary of the applicants. There were some correspondence in this behalf. Ultimately, the Government passed the impugned order dated 16.11.1993 informing all the officers that the pay will be fixed on the basis of D.O.P. Circulars dated 08.01.1993 and 31.01.1993. Being aggrieved by these orders, the applicants have approached this Tribunal for quashing the impugned order of the Government and to declare that the applicants are entitled to regular pay of the promotional post and not mere the charge allowance and for consequential benefits. The applicants have taken number of grounds challenging the legality and validity of the action of the Government.

3. The defence is, that the applicants' officiating promotion in 1990 was contrary to rules, since the applicants were not eligible for promotion at that time, having not completed the prescribed years of service under the recruitment rules. It is, therefore, stated when an officiating or adhoc promotion is contrary to rules, then the officer is not entitled to the pay of the promotional post but only entitled to charge allowance as per Government Orders issued under F.R. 35.

4. Mr. M.S. Ramamurthy, the Learned Counsel for the applicants contended that when once the applicants have been promoted by giving whatever nomenclature like officiating, adhoc, regular, etc., the officers on promotion are entitled to regular pay of the promotional post and the pay has to be fixed as provided under F.R. 22. It was also further argued that the action of the Government giving only charge allowance under F.R. 35 is illegal and F.R. 35 is not attracted to the facts and circumstances of the case. Then an alternate submission is made that even if it is held that the action of the Government is justified under F.R. 35, no recovery can be made from the salary of the applicants for the alleged excess amount paid during the officiating promotion. On the other hand, Shri V.S. Masurkar contended that the applicants were not qualified and eligible for promotion in 1990 and their promotions were contrary to rules and, therefore, their pay cannot be fixed under F.R. 22 and in such a case, F.R. 35 is attracted and applicants are entitled to only charge allowance under different Government orders issued under F.R. 35.

5. The applicants came to be appointed as Assistant Divisional Engineers on different dates in 198⁷. The applicants have not disclosed this information but respondents have disclosed this information in the annexures to the replies. For instance, the first applicant, S. S. Mahajan, was appointed as Additional Divisional Engineer on 01.03.1988. His local officiating promotion as Divisional Engineer was on 18.07.1990, which means, he is promoted within a period of two years and four and a half months after the initial appointment, including the period of probation (vide exhibit R-2 at page 19 of the

second written statement). Then the second applicant, Devesh Kumar, was first appointed as Additional Divisional Engineer on 22.06.1987 and promoted as Divisional Engineer on local officiating basis on 10.01.1990, which is again about two and a half years after the initial appointment, vide page 20 of the second written statement. Similarly, we find from pages 21 to 25 that remaining applicants were also appointed sometime in 1987 and promoted sometime in 1990, within about two and a half years or less than three years from the date of the initial appointment.

The orders of promotion show that it is local officiating promotion.

One such order of the sixth applicant, K. Madhusudhana Rao, is at page 19 of the Paper Book, which shows that it is on local officiating basis for a period not exceeding 180 days or till the termination of the local officiating promotion, whichever is earlier. It is further stated in that order that this officiating arrangement is purely temporary, adhoc and does not confer any claim whatsoever for regular absorption or preferential treatment over the seniors.

That the argument of the Learned Counsel for the applicant that when an officer is promoted to a higher post, he is entitled to the pay of the post, or nomenclature of promotion notwithstanding, is no doubt attractive. In the first flush we thought that such a contention should be accepted and an officer is entitled to the pay of the post. But on deeper scrutiny and

going through the relevant statutory rules, we find it difficult to accept this argument.

6. It is not a case of the applicants being promoted on the basis of their seniority. It is not a case of applicants having minimum eligibility for being promoted under the recruitment rules. The Learned Counsel for the respondents has placed before us the Indian Telecommunication Service (Group 'A') Recruitment Rules, 1992. We have perused the rules. The applicants were promoted to the Sr. Time Scale. According to the Recruitment Rules, an officer in the Junior Time Scale is entitled to be promoted to the Sr. Time Scale if he has completed four years regular service in the grade. Therefore, minimum eligibility for promotion from Jr. Time Scale to Sr. Time Scale is four years service in the Jr. Time Scale.

We have already seen that in the present case all the applicants were promoted to Sr. Time Scale within about two and a half years or so. They were appointed in 1987 or 1988 and they were promoted in 1990. Therefore, the promotion is contrary to the Recruitment Rules, which has prescribed minimum four years service in the feeder cadre.

Therefore, we find in this case that the officiating promotion of the applicants was contrary to recruitment rules on two grounds, one is, that it is not based on All India seniority and further, the applicants did not have the minimum four years service required under the recruitment rules.

7. The Learned Counsel for the applicants contended that the applicants' salary should be fixed as per the pay of the promotional post, as provided in F.R. 22. Though F.R. 22 has number of sub clauses, for our present purpose, what is relevant is F.R. 22(I)(a)(1) as given in Swamy's Compilation of F.R.S.R. 1997 Edition, which reads as follows :

"(a)(1) Where a Government servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity, as the case may be, subject to the fulfilment of the eligibility conditions as prescribed in the relevant Recruitment Rules, to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued or rupees twenty five only, whichever is more."

(Underlining is ours)

The remaining portion of this sub-rule is also not relevant for our present purpose. From the underlined portion above, we find that whatever the nomenclature may be, i.e. promotion being in a substantive capacity or temporary or officiating capacity, but it must be "subject to the fulfilment of eligibility condition as prescribed in the relevant rules." Then only the officer is entitled to the salary of the post as provided under F.R. 22.

Now we have seen that applicants' promotion is not in accordance with the recruitment rules and they did not have the eligibility condition as prescribed under the Recruitment Rules and further, the promotion was not made on the basis of All India

Seniority list but they were promoted on local officiating basis. Hence, in the circumstances, we are constrained to hold that applicants' promotion was just a stop gap arrangement on local officiating basis in administrative interest and it is contrary to the Recruitment Rules and, therefore, application of F.R. 22 is not called for to the facts of this case. Therefore, applicants' salary cannot be fixed on the basis of F.R. 22.

8. If F.R. 22 is not attracted to a case of this type, then there is no special provision under F.R.S.R. to fix the salary of an official of this type whose promotion per se is contrary to Recruitment Rules and was not on the basis of seniority list and the only provision which is attracted to the case of this type is F.R. 35. F.R. 35 as given in Swamy's Compilation of F.R.S.R., 1997 Edition reads as follows :

"The Central Government may fix the pay of an officiating Government servant at an amount less than that admissible under these rules."

This F.R. 35 enables the Government to fix the pay at a lesser rate in case of officiating appointment. Then under the F.R. 35 at page 169 there is reference to Government of India O.M. dated 18.07.1986 and 29.07.1987. These O.Ms. were in existence when the applicants' officiating promotion were issued in 1987 or 1988. These circulars show that it applies to cases where the promotions are not on regular basis and who do not fulfil the eligibility conditions under the Recruitment Rules. In such a case, the officer on officiating promotion is only entitled to certain allowances, which ranges from 12% to 20% of the basic pay depending upon the basic pay of the officer in the officiating

promotion. Therefore, the applicants' salary will have to be fixed in terms of the two O.Ms. of 1986 and 1987 under F.R. 35 and not under F.R. 22.

Therefore, in our view, the action taken by the Government in refixing the salary of the applicants by restricting their pay on officiating promotion, ^{to} the charge allowance as prescribed under the O.Ms. of 1986 and 1987 is perfectly in order.

9. In addition to this, we find that an identical case was filed by some officers of the same department before the Ahmedabad Bench of the Tribunal in O.A. No. 271/93 and two other O.As. A copy of the unreported judgement is annexed to the first written statement of the respondents at page 8 of the Paper Book. The judgement is dated 11.05.1994. The Division Bench of the Ahmedabad Bench of the Tribunal held that in ^{the} case of this type, the officers on officiating promotion are entitled to only charge allowance as per the O.M. of the Government and not the salary of the promotional post. We are bound by the judgement of a co-ordinate Bench unless we come to the conclusion that the judgement is not correct and requires consideration and in such a case, we will have to refer the matter to the Hon'ble Chairman for constituting a larger Bench. But after going through the materials on record we do not find any reason to take a different view than the one taken by the Division Bench of Ahmedabad Bench of this Tribunal.

10. The only comment made by the applicants is that the Government Circular dated 08.01.1992 was not produced before the

Ahmedabad Bench of this Tribunal. The circular dated 08.01.1992 is produced as Annexure A-4 at page 25 of the Paper Book. The circular says that in cases where officers are directed to hold full charge of higher posts for temporary period, then they are entitled to charge allowance and this is purely prospective in nature and the old cases should not be re-opened. It is further stated that the scheme of charge-allowance is effective from 01.07.1991.

If charge allowance had been introduced for the first time under the circular dated 08.01.1992, then what the Learned Counsel for the applicants argued, would be valid. But we have already referred to the O.Ms. of 1986 and 1987 where there is already a provision providing for charge-allowance at different rates depending on different basic pay. Therefore, the applicants' salary have to be fixed under the O.Ms. of 1986 and 1987. If there are some subsequent promotions after 01.07.1991, they will be governed by the circular of 08.01.1992. The 1992 circular will not apply to applicants' case, since they were promoted on officiating basis in 1987 and 1988 when the O.Ms. of 1986 and 1987 were very much in force and applicants' pay has to be fixed under those O.Ms.

Even granting for a moment that 1992 circular applies and it contains a clause that it will not apply to previous promotions, we can only say that such a Government circular which is contrary to statutory rules cannot be given any effect.

F.R. 22 is a statutory rule. It says that an officer is entitled to the salary of a promotional post if the promotion is

as per recruitment rules. There cannot be an administrative direction giving pay of the promotional post to an officer even if his promotion is contrary to recruitment rules, since such a circular will be contrary to the statutory rule like F.R. 22 and, therefore, legally it has no force (vide judgement in O.A. No. 549/93 & two other connected matters decided on 27.03.2000 by a Division Bench of this Tribunal). In this connection, we are fortified in our view by number of decisions of the Apex Court where it has been held that any administrative or executive instructions contrary to statutory rules has no legal validity (vide C. C. Padmanabhan & Others V/s. The Director of Public Instructions & Others reported in 1980 (2) SLR 599, Palaru Ramkrishnaiah & Others V/s. Union of India & Another reported in AIR 1990 SC 166 and K.K.M. Nair & Others V/s. Union of India & Others reported in AIR 1994 SC 244).

11. In view of the above discussions and having regard to the statutory rule F.R. 22 (I) (a)(1) and F.R. 35 and the O.Ms. of 1986-87, we hold that the action taken by the Government in refixing the applicants' salary by giving them only charge-allowance and not the pay of the promotional post, is perfectly justified and according to rules and, therefore, the applicants are not entitled to the pay of the promotional post.

12. Having come to the conclusion that the action taken by the respondents in refixing the salary of the applicants by giving them only charge-allowance and not the pay of the post is justified, the question is, whether at this distance of time the respondents should be permitted to recover the excess amount paid to the applicants ? It is nobody's case that there was any fraud

practiced by the applicants or any misrepresentation made by the applicants for getting the salary of the promotional post. May be by misinterpreting the rules or not properly applying the rules, the administration ~~the~~ paid the salary of the promotional post to the applicants. This was during the period between 1987 to 1990. Now the action is sought to be taken in 1993 when the department wanted to recover the excess payment made and, therefore, the applicants have approached this Tribunal and the Tribunal has granted stay of the recovery.

The Ahmedabad Bench of the Tribunal in its judgement dated 11.05.1994 which is relied on by the Learned Counsel for the respondent, stayed the recovery and the order has become final. We have also come across many decisions of the Apex Court and different Benches of this Tribunal where consistent view is taken that in cases of this type where the administration on its own has fixed the salary of the officials, it should not be allowed to recover the excess amount from the officers after a lapse of time. We have given considered reasons in our judgement dated 04.04.2000 in O.A. No. 116/99 and held that such recovery should not be permitted by basing our decisions on the judgement of the Apex Court and some judgements of different Benches of this Tribunal. We adopt the same reasoning in this case also. Hence, in the circumstances, we hold that respondents should not recover the excess amount paid to the applicants on the basis of wrong fixation of pay of the applicants when they were on officiating promotion.

We, therefore, direct the administration to notionally fix the salary of the applicants as per O.Ms. of 1986 and 1987

R.M. ... 13

issued under F.R. 35 by providing charge allowance, etc. Therefore, on regular promotion, the applicants' salary should be fixed notionally in the year 1992 and onwards. Though the department can do the exercise of fixing the salary of the applicants notionally from time to time, the department is prohibited from recovering any excess amount paid to the applicants till the date of filing of this application, namely - 30.12.1993. There is an interim order passed by this Tribunal on 31.12.1993 which has been subsequently modified by another interim order dated 21.02.1994. If any excess amount is paid to the applicants after 31.12.1993 in view of the interim order passed by this Tribunal, then the said amount can be recovered from the applicants by reasonable monthly instalments or by adjusting the same out of any amount due to the applicants.

13. In the result, the application is allowed partly as follows :

- (i) It is open to the respondents to refix the salary of the applicants for the period of officiating promotion by giving Charge Allowance or other monetary benefits under circulars issued under F.R. 35, as observed in the course of judgement. On that basis, the pay of the applicants can be notionally fixed from time to time.
- (ii) Notwithstanding the exercise of notionally fixing the applicants' salary, as mentioned in (i) above, no recovery should be made from the applicants for any excess payment made from the date of their initial local officiating promotion till the date of filing this application, namely - 30.12.1993.

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(iii) It is further made clear that there is no bar for the respondents to recover any excess amount paid to the applicants after 31.12.1993 till today or hereafter, till the refixing is done. In such a case, the excess amount paid to the applicants after 31.12.1993 may be recovered in reasonable monthly instalments from their monthly pay or by adjusting any amount due to the applicants, as observed in the course of the judgement.

(iv) The interim order granted in this case is hereby vacated.

(v) In the circumstances of the case, there will be no order as to costs.

B.N. Bahadur

(B.N. BAHADUR)
MEMBER (A).

OS*

R.G. Vaidyanatha
18-4-2000
(R.G. VAIDYANATHA)
VICE-CHAIRMAN.