

CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

Original Application No. 1044/94

Transfer Application No.

Date of Decision 14-02-96

R. Ramakrishnan

Petitioner/s

Mr. M. S. Ramamurthy

Advocate for
the Petitioners

Versus

U.O.I. & Ors.

Respondent/s

Mr. R. K. Shetty

Advocate for
the Respondents

CORAM :

Hon'ble Shri. M.R. Kolhatkar, Member(A)

Hon'ble Shri.

- (1) To be referred to the Reporter or not ?
- (2) Whether it needs to be circulated to other Benches of the Tribunal ?

M.R. Kolhatkar

(M.R. KOLHATKAR)

Member(A)

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BEFORE THE CENTRAL ADMINISTRATIVE TRIBUNAL
BOMBAY BENCH

ORIGINAL APPLICATION NO: 1044/94

Pronounced this, the 14th day of February 1996

CORAM: HON'BLE SHRI M.R.KOLHATKAR, MEMBER(A)

R.Ramakrishnan, .. Applicant
(By Advocate Shri M.S.Ramamurthy)

-versus-

1. Union of India
through
The Director General of
Quality Assurance,
Department of Defence
Production(Admn 6A)
DHQ P.O. New Delhi-110011.
2. Director of Quality Assurance
(Stores),
Department of Defence
Production, D.G.Q.A.
DHQ P.O. New Delhi-110011.
3. Controller,
Controllerate of Quality
Assurance(Textile & Clothing)
Govt. of India,
Min. of Defence, P.O.Box No.294,
Kanpur 208 004.
4. Senior Quality Assurance Officer,
Senior Quality Assurance Esta-
blishment(General Stores),
Ministry of Defence, D.G.Q.A.Complex,
Vikhroli, Bombay- 400 083.

(By counsel Shri R.K.Shetty) .. Respondents

ORDER

(Per Mr. M.R.Kolhatkar, Member(A))

In this O.A. u/s. 19 of the A.T. Act
the applicant has impugnd the letter dt. 23-10-1992
at Ex.. 'A' which reads as below :

"Fixation of pay on promotion
under FR 22(C)

Ref: Your letter No.1206/F/AD-3
dt. 27-8-92.

Since Shri R.Ramakrishnan, JSO
has failed to exercise his option
for fixation of pay on promotion
under Rule FR-22(C), within one
month from the date of his promo-
tion, his request for revision of
option date cannot be acceded to
under the rules."

2. The facts of the case are as below:

While working as Foreman in the 4th Respondent's
office, i.e. Senior Quality Assurance Establishment,
Ministry of Defence, Vikhroli, Bombay in the scale
of Rs.2375-3500 the applicant was promoted as
Junior Scientific Officer(JSO) ^{in the scale of Rs.2000-3500} w.e.f. 9-9-1988
in the office of the 3rd Respondent viz. Contro-
llerate of Quality Assurance (Textile and Clothing)
Min. of Defence, Kanpur. According to the applicant,
the third respondent did not carry out the fixation
of pay of the applicant on his promotion in
accordance with the provisions of FR-22-C because
of the fact that the lower post of Foreman from which
the applicant was promoted was in an apparently higher
scale. The bills submitted by the office of the third
respondent earlier, granting fixation on such promotions
in certain cases were returned to the office of
third respondent about the time the applicant stood
promoted. There was correspondence with higher authorities
and a clarification was issued by letter dt. 14-3-1991

from Ministry of Defence at Ex. 'D', page 29.
The relevant portion of clarification reads as
under :

"2. In this connection it may be mentioned here that DGQA/RMD(PE) had sought clarification from Min. of Finance, Department of Expenditure, the appointment of Gr. 'C' in the scale of Rs.2375-3500 to Gp 'B' post in the scale of Rs.2000-3500 will constitute a promotion and pay fixation under FR 22(C) will be permissible. Min. of Fin. Deptt. of Expenditure have advised that the lower post have been placed in a better scale than promotional post and in fact has been merged with a post '(Principal Foreman)' having no further avenue of promotion. Since the post in the scale of Rs.2375-3500 Gp. 'C' post, the incumbents on promotion to Gp. 'B' in the scale of Rs.2000-3500 are entitled to benefit of FR 22 C. This is also in view of the fact that Gp. 'B' post will supposedly carry higher responsibility."

According to the applicant, when the said clarification was received in the office of Respondent No.3, the applicant was ^{already} transferred and was working in the office of respondent No.4. Therefore, the applicant sent a representation dt. 26-7-1991 when he came to know about the letter dt. 14-3-91. It is contended by the applicant that immediately on promotion as JSO on 9-9-1988 he had exercised his option to have his pay fixed in the higher scale from the date of the next increment in the lower scale but the same was not acted upon in view of the doubt entertained about the applicability of FR 22-C as stated above. In the

In the representation dt. 26-7-1991 the applicant also enclosed an option certificate in duplicate. The third respondent's office accepted the option exercised by applicant and entered the same on record and published Daily Order, Part-II, No.04 dt. 31-1-92 in that connection. It appears, however, that the Controller of Defence Accounts(CDA),CC,Lucknow considered the option to be time barred, though there is official correspondence in this regard dt. 28-2-1992, (Ex.) 'H', page,36 and letter dt. 20-4-1992, Ex.I, page 38. In the letter dt. 20-4-92(in Hindi) it is specifically stated as below:

"Prior to letter dt. 14-3-91 there were no orders relating to pay fixation of Foreman promoted as JSO. Hence such officers did not think it proper to exercise option under FR 22-C at that time because such cases were lying unattended by the Govt. of India without any action at that time."

that:

It is then the impugnd letter rejecting the option exercised by the applicant was issued on the ground that option was not exercised within one month from the date of promotion as required under FR 22 C. The applicant, thereafter, made further representations on 5-7-1993 Ex.'L', page 44 and dt. 22-11-1993, Ex.'N' page 50 and 8-3-1994, Ex.'O' page 52. The applicant retired, in the meanwhile, on 31-10-1993. The applicant has pointed out that after he stood retired, there was a letter dt. 10-12-1993 from the Govt. of India Min. of Defence which appears at Ex.'B' page 26 and the relevant para reads as below:

"2. In this connection, it is mentioned that the pay of Shri R. Ramakrishnan, Ex. JSO, SQAE(GS) Bombay be fixed according to instructions contained in this HQ letter No. 08352/Gen/DGQA(Adm-6A) dt. 14-3-91.

3. Instructions to all CDAs have been issued by the CGDA RK Puram, New Delhi vide their letter No. AT/II/2431/VI dt. 18 Nov. 91 in this regard. "

The applicant contends that the instructions in the subsequent letter dt. 10-12-1993 are ^adirect contradiction of the impugnd order dt. 6-11-92. In fact they directed pay fixation of the applicant to be done in accordance with clarification dt. 14-3-91 referred to above but no action was taken by the respondents. The applicant has therefore prayed for the following reliefs:

"(a) that the respondents be directed to re-fix the pay of the applicant in the scale of Junior Scientific Officer, scale Rs. 2000-3500/- under FR 22 C as from 1-1-1989 and grant him consequential further re-fixation of pay till retirement from the evening of 31-10-1993 together with the benefit of stagnation increments and calculate and pay the arrears of emoluments to the applicant within such time as this Hon'ble Tribunal may fix;

(b) that on the basis of the re-fixation of pay, in terms of prayer (a) above, the respondents be directed to pay the applicant the benefit of encashment of earned leave of 244 days which is not paid to him till date;

- (c) that in terms of refixation of pay as per prayer (a) above, the Respondents be directed to recalculate and pay the difference in the retiral dues namely, Gratuity, Provident Fund, Commutation value of Pension etc.;
- (d) that in terms of refixation as per prayer (a) above, the Respondents be directed to revise and refix the amount of monthly pension and also arrange to pay the arrears of pension on that basis from 1-11-1993 onwards;
- (e) that the respondents be directed to pay the applicant, the salary for October, 1993 which has not been paid to him till date. "

3. The contention of the applicant is that till the clarification dt. 14-3-91 was issued, the applicant cannot be blamed for not exercising option within one month of his joining the post of Junior Scientific Officer on 9-9-1988 because the 3rd Respondent's office was not in a position to entertain such option and act upon it and there were cases of several other persons which were kept pending. In any case, the applicant exercised option on 26-7-91 as soon as he came to know about the clarification and his option, then exercised, ought to have been accepted. Moreover the letter dt. 10-12-93 ought to have been acted upon because it undid what was sought to be done by letter dt. 6-11-92. According to the applicant, in any case non refixation of his pay is grossly discriminatory because ^{it was} only in the cases of employees working in the office under the jurisdiction of Controller, CDA, CC

Lucknow that the problem of re-fixation had arisen and cases were kept pending which necessitated the issue of clarification dt. 14-3-1991. In the rest of the country, options had been taken from the employees and they were acted upon and re-fixation granted in all cases. Thus discrimination has been practised against the applicant merely because he had worked in Lucknow region.

4. The respondents have opposed the O.A. Firstly it is contended that the application is time barred because it has been filed on 7-9-94 in respect of ^acause of action which arose on promotion of applicant on 9-9-88. Secondly there is no record of the applicant having exercised any option under FR-22-C prior to 26-7-91. The applicant exercised option for the first time only on 26-7-91. The applicant could have even exercised option ^{within one month} of 14-3-91 but the applicant failed to do so. Most importantly the time limit of one month laid down in FR 22-C is a statutory time limit and the court has no power to direct the respondents to **over** ride the statutory time limit especially when the vires of relevant statutory provision have not been challenged. It is conceded that clarification was sought as to whether the provisions of FR-22-C are applicable in such cases and the same was received on 14-3-91 but the mere clarification does not confer any right on the applicant to claim fixation of pay as long as he has not exercised any option for fixation of pay in the higher post from the date of accrual of next increment in the lower post within the stipulated one month time from the date of

promotion. The letter dt. 10-12-93 only gives the clarification to Controller of Quality Assurances to regulate the cases as per letter dt. 14-3-91. It does not say that pay fixation should be done ^{even} when an option ~~had not been exercised~~ within one month. Regarding the claim of the applicant for leave encashment benefit, (relief (b)) and payment of the salary for the month of October, 1993, (relief (e)) it is stated by the respondents that the applicant has been paid pay for October '93 (Rs. 8634/-) and encashment for 240 days E.L. (Rs. 56,760/-) through cheques dt. 19-1-95.

5. In his rejoinder the counsel for the applicant has contended that the condition of exercise of option within one month incorporated in the FR 22 C has to be read in the facts and circumstances of the case. It has come on record that all pay fixation ^{cases} under CDA Lucknow had been held up because of a doubt and that the applicant exercised option as soon as he came to know about the clarification and that in any case the condition of exercise of option within one month has to be treated as directory and not mandatory because the relevant FR does not lay down that an option if not exercised within one month cannot be allowed ^{to be} exercised after one month. In the absence of such a negative provision the ground for rejection of claim of the applicant cannot be said to be valid.

6. I have heard the matter at length on an earlier occasion and had adjourned the same to enable the respondents to file the relevant documents viz. the papers relating to exercise of option and the papers of ^{pay}fixation. From ^{documents}the ~~it~~ is clear that applicant had in fact exercised option for the first time only on 26-7-91 when he made representation from Bombay office (respondent No.4) to Kanpur Office (respondent No.3). The question, then, is whether the applicant ought to have exercised the option within one month of the date of promotion or within one month of the date of clarification. The correspondence on record makes ^{it}amply clear that there was a genuine doubt regarding whether the promotion from a pay scale which was apparently higher viz. 2375-3500 to another pay scale which is apparently lower (Rs.2000-3500) ^{fixation}(entailed ~~pay~~ and that there was detailed correspondence. Clarification was issued ^{only}on 14-3-91 and the cases of JSO were required to be processed according to the clarification. The applicant has taken us through the relevant orders especially the order dt. 5-9-88 in which it is stated that the officer will ^{draw}his existing rate of pay pending approval of pay fixation by the Controller, CDA CC Lucknow. There is no clause in the order of promotion requiring the applicant to exercise option within a specified date as is the practice in other organisations. The clarification dt. 14-3-91 read with subsequent instruction dt. 10-12-93 make it clear that in the facts and circumstances of the case an option exercised within one month of the

clarification would have been in order. The applicant instead of exercising option on or before 14-4-91 exercised the same on 26-7-91 for reasons which appear to be genuine viz. that he was away from the parent office and came to know about it only subsequently. The period from 14-4-91 to 26-7-91 cannot be said to ^{be} an unreasonably long delay considering the fact that the applicant was working in a different office and considering that no communication was received at all by the applicant from respondent No.3. The relevant portion of FR 22-C reads as below:

"the Government servant shall have the option, to be exercised within one month from the date of such appointment, for fixation of his pay in the new post with effect from the date of appointment....."

The condition relating to exercise of option within one ~~month is incorporated~~ in a ~~subordinate adverbial~~ ^{positive} clause of time. There is no provision that the option has to be exercised within one month and option exercised beyond the period of one month would be invalid. The law regarding what provisions are treated as directory and what provisions are treated as mandatory has been well settled. The Supreme Court observed in the case of The Administrator Municipal Committee Charkhi Dadri and Another v. Ramji Lal Bagla and Ors. JT 1995(5)SC 486 that "One of the well-accepted tests for determining whether a provision is directory or mandatory is to see whether the enactment provides for the consequence flowing from non-compliance with the requirement prescribed. ^{In} Manbodhan Lal Srivastava v. State of U.P. (AIR 1959 SC 912) it has been observed that

the other tests in this regard are, whether the section provides expressly or by necessary implication that non-compliance therewith would result in nullification of the action taken or the consequence implied. Still other tests are: placement of the provision, its place in the scheme of the Act, use of the term "shall" etc. We have already observed that the time limit of one month has been placed not in a positive independent statement but in a subordinate adverbial clause of time and nothing has been said regarding consequence flowing out of the non observance of the time limit. Applying the law laid down by the Supreme Court to the facts of the present case I hold that the time limit of one month for exercising of option has to be read from the date of issue of clarification in a directory sence and not in a mandatory sense. The applicant having exercised option within a reasonably short time from the date of clarification especially keeping in view that he was away from the concerned office (Kanpur) and had no communication from that office, cannot be denied the benefit of pay fixation under FR 22-C merely on the ground that he did not exercise the option within one month from the date of promotion. The respondents, therefore, had unfairly denied the benefit of pay fixation to the applicant who is entitled to the relief.

7. There is no doubt that the applicant is entitled to the relief from the date of his promotion but considering the fact that the applicant has since retired from service I am required to consider the