

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL:HYDERABAD BENCH  
AT HYDERABAD

O.A.No.607/91

Dt.of order:25.9.1995

Between

1. M.Srinivasa Prasad 7. G.V.Pulla Rao  
2. P.S.Sri Krishna 8. Mrs Mahalakshmi  
3. Y.Srinivas 9. Masood Akhtal  
4. S.B.Ramana 10.Jitendra Nath Sarma  
5. V.V.Leeladhar 11.N.N.Subramanian  
6. S.R.L.N.Royal 12.S.Ramesh

.. Applicants

and

1. The Comptroller and Auditor General of India  
Bahadurshah Az Zafar Marg, New Delhi.  
2. Principal Director of Commercial Audit  
Khairatabad, Hyderabad  
3. Accountant General (Audit)  
Andhra Pradesh, Hyderabad  
4. Principal Director of Audit  
RK Puram, New Delhi.  
5. Uptal Banik  
6. Alok Kumar Bataraya  
7. Rajendra Kothari  
8. C.S.Ramachandra Rao  
9. A.Shyamala Rao  
10. Revatilal Varma  
11. Mahendra Srivatsava  
12. Ahmed Moinuddin Ali  
13. I.Soundara Pandiah  
14. Trilok Chand Sharma  
15. C.P.Ravendran  
16. S.Ragunathan  
17. R.B.K.Pillai  
18. R.P.Goyal  
19. H.D.Yadav  
20. Ashok Kumar Mannan  
21. Sadaram Chauhan  
22. Mahendra Swaroop Saxena  
23. Shyam Sundar Kapoor  
24. Arun Kumar  
25. A.Dinakaran  
26. A.Manohara Rao  
27. Chandra Mohan Sharma  
28. Bhopan Bandopadhyay  
29. P.R.Swaminathan  
30. A.K. Goyal  
31. P.K.Gosh  
32. K.Arunachalam  
33. S.Kodandaraman  
34. Khuldipchand Shanak  
35. Upendra Bhatt  
36. Samirkr Das  
37. SBL Srivastava

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38. D.A.Korade  
 39. Goraknath Singh  
 40. K.Madhukar Sethi  
 41. Parameswara Patnaik  
 42. H.K.Bhattacharjee  
 43. K.Sudhakaran  
 44. M.K.Agarwal  
 45. M.Rajeswar Anand  
 46. Somnath Varma  
 47. Balvanth Singh  
 48. K.V.Narendran  
 49. S.S.R.Chandra Murthy  
 50. Manohar Minz  
 51. Raghbir Prasad  
 52. Smt C.Vilasini  
 53. Shiv Nath Singh  
 54. P.N.Lal  
 55. Gar Mohan Bhattacharjee  
 56. Jaganath Prasad  
 57. Samir Kr.Ganguly  
 58. K Narayanan-II  
 59. Tarasam Singh  
 60. P.R.Ponnappalam  
 61. M. Prabhakaran  
 62. S.Sivakumar  
 63. N.Rajan  
 64. Pranab Kumar Roy  
 65. Suryakanta Mainy  
 66. P.A.R.Shothan Lal  
 67. N. Balakrishnan  
 68. K. Ratnakar  
 69. N.N.Sirkar  
 70. P.N.Pathanjali  
 71. Satish Kumar  
 72. Zingade Umesh Kumar  
 73. Sarath Mukherjee  
 74. Samir Kumar Sen

## .. Respondents

Counsel for the Applicants :: Sri P.B.Vijayakumar  
 Counsel for the respondents :: Sri G.Parameshwar Rao, SC  
 R1 to R4 for AG  
 Counsel for R12,33 & 49 :: Sri P.Bhaskar

## CCRAM:

HON'BLE SHRI JUSTICE V. NEELADRI RAO, VICE-CHAIRMAN  
 HON'BLE SHRI R. RANGARAJAN, MEMBER(ADMN)

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-2-ORDERAs per Hon'ble Shri Justice V.Neeladri Rao, ViceChairman

Heard Shri P.B.Vijayakumar, learned counsel for the applicant and Shri G.Parameshwar Rao, learned Standing Counsel for R1 to R4 and Shri P.Bhaskar learned counsel for private respondents 12, 33 & 49.

2. All the 12 applicants herein are direct recruits as Section Officer (Commercial) in the Indian Audit and Accounts Department (IA & AD for short). This OA was filed praying for a direction to the respondents, i.e., R1 to R4 to reckon the period from the date(s) of their appointment to the post on probation on par with the departmental promotees for fixing inter-se seniority, and that seniority has to be followed for consideration for promotion to the post of Assistant Audit Officer in the scale of Rs.2000-3200/- and they have to be given increments from the date of completion of one year from the date of appointment on probation.

3. R5 to R 74 are the promotees to the post of Section Officer (Commercial). It is stated for the applicants that the above respondents 5 to 74 were impleaded in their representative capacity.

4. The Indian Audit & Accounts Department (Subordinate Accounts Services and Subordinate Railway Audit Service) Rules 1974 (IA&AD Service Rules for short) were notified by Gazette Notification dt. 4.11.74. The said services rules include Section Officer (Commer.). It was stated in the said notification that those rules were made in exercise of powers conferred by Proviso to Article 309 and Clause (5) of Article-148 to the Constitution. It was held by the Apex Court

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in Accountant General Vs S.Doraiswamy's case  
(AIR 1981 SC 783) that, these rules ~~can~~ be formulated  
only in exercise of powers under Article 148(5)  
and not under Article 309. The notification dated  
4.11.74 stipulated that those rules had come into  
effect from 27.7.1956. It was held in Doraiswamy's  
case (cited supra) that retrospective effect cannot  
be given to the rules when they are made under  
Article 148(5) and hence, the same <sup>have</sup> ~~has~~ to be held  
as prospective.

5. Rule (5) of 1974 IA & AD Service Rules  
make a proviso for recruitment to the service by  
direct recruitment on probation in accordance with  
the orders or instructions issued by the Comptroller &  
Auditor General of India (for short C&AG) from time  
to time, or by promotion. No quota was prescribed  
for recruitment from the two sources. The Rules  
lay down that appointments to the service shall be  
made from the list prepared in accordance with the  
orders and instructions issued by the C&AG from  
time to time and applicable at the time of appointment  
to the Service.

6. Notification No.1124/CA.I/75-83 was issued  
in the year 1986 for appointment of 300 <sup>Section</sup>  
Officers (Commercial) <sup>on</sup> probation in IA & AD.  
The then pay scale for the post was Rs.500-900/-  
which corresponds to the revised scale of Rs.1640-2900.  
In pursuance of the said notification, the 12 applicants  
herein and many others appeared for the said examination  
and these <sup>two</sup> ~~two~~ applicants were among those who were  
selected. In para <sup>5</sup> of the Memo of appointment dated  
8/

14th September, 1987 issued by C& AG, it is stated as under:

"5. He/she will be allowed pay at the minimum in the pay scale of Rs.1640-60-2600-EB-75-2900 plus dearness and other allowances as may be fixed by Government of India from time to time. The first increment in the scale of pay mentioned above will accrue after one year from the date of his/her regular posting as Section Officer(Commercial) after his/her passing the examination prescribed above."

Para (7) relied upon for the applicants in this OA inter-alia states that "As the recruitment is intended to fill existing vacancies in various offices under the control of this office, no request for change of place of posting will be entertained on any ground what so ever."

7. The applicants and other direct recruits to the post of Section Officer (Commercial) were given first increment on completion of one year from the date of passing the departmental examination. Learned Standing Counsel for R1 to R4 submitted that the same is in accordance with para 5 of the Memo of appointment. But, it is stated for the applicants that ~~their~~ entire period from the date of appointment on probation has to be taken into consideration for sanctioning the increment, as FR26 read with FR9 Sub-rule 6 state that the duty on probation also counts for increment, and OM Nos. 16/16/89-Estt(Pay I) dated 22.10.90 and 16/16/92-  
of Deptt. of Pers.& Trg.  
Estt (Pay II) dated 31.3.92/lay down that even the period of training from 1.1.1986 has to be taken <sup>date</sup> on notional basis for fixing of the increment and the actual basis is from 1.10.90.

8. The period of service from the date of confirmation is taken as basis for reckoning the seniority with reference to the direct recruits, while the date of promotion is taken as basis for promotees for fixing of inter-se seniority. It is submitted that after this CA was filed, the seniority list was revised, whereby the period of service of the direct recruits were reckoned from the date of the examination in which they passed.

9. The recruitment rules for the post of Assistant Audit Officer lay down three years eligibility period for Section Officer (Commercial) for consideration for promotion. They also make it clear that the period of two years probation as Section Officer (Commercial) for direct recruit will not count for the eligibility period. There was no provision for probation in regard to promotees before 1988 rules came into effect. The plea for the applicants is that if the period of two years probation is not taken into consideration for reckoning the eligibility period, it will be discriminatory.

10. FR 26(a) provides that duty in a post of time scale counts for increments in that time scale. The proviso is to the effect that for the purpose of arriving the date of next increment in that time-scale, the total of all such periods that do not count for increment in that time scale shall be added to the normal date of increment. It does not lay down therein that in case of appointment on probation, the duty during the period of probation does not count for increment. FR 9(6) inter-alia states that duty includes service of the probationer or apprentice provided that such service is followed by confirmation.

11. By referring to the above FR, it was stated for the applicants that duty on probation <sup>of probation</sup> on appointment is service and hence, the said service has to be considered as 'duty' for construing FR 26(a).

12. The learned Standing Counsel for R1 to R4 referred to Audit Instruction(4) which is at Page 141, Swamy's compilation of FRSR Vol.I 1994 Edition and which is as under:

"Except where the terms of probation or any general or special orders of Government relating to a clause of Service provides otherwise, if a probationer is confirmed at the end of the period of probation exceeding 12 months, he is entitled to claim retrospectively the ~~maximum~~ increments which but for his probation that he would have received in the ordinary course."

It is urged that the above audit instruction contemplates a discretion on the part of the Government to exclude the period of probation for sanction of increment. But the point for consideration is whether it is open for C&AG to amend, alter or add anything to the FR to the extent applicable to the employees working in IA & AD.

13. Article 148(5) of the Constitution of India reads as follows:

"Subject to the Provisions of this Constitution and of any law made by Parliament, the conditions of service of persons serving in the Indian Audit and Accounts Department and the Administrative powers of Comptroller and Auditor General ~~of~~ shall be as such may be prescribed by rules made by the President after consultation with the Comptroller and Auditor-General."

It is manifest from the above, that the President is the competent authority to prescribe rules in regard to the conditions of service of persons serving in IA & AD, if the Parliament has not enacted in regard to the same. It is also open to the President to supplement, to provisions if any made by the Parliament in regard to the same. The only limitation is that the President can exercise the powers only after consulting the C&AG. But, it is not open for C&AG on his own, to make any provision in regard to the condition of service of persons serving in the IA & AD.

14. It is not the case of R1 to R4 that Audit instructions were issued by the President. Hence, audit instruction which is inconsistent with the FR, is not valid.

15. FR9(6) makes it clear that the service of a probationer is duty. An employee on probation is probationer. There is nothing in FR 26 to indicate that a meaning other than the definition as per FR9(6) has to be made applicable for construing the word 'duty'.

16. Hence, we feel that the period of service on probation has also to be reckoned for sanctioning increment under FR 26, and it is not open to C&AG on his own to exclude it.

17. The C&AG has given concurrence in regard to the OM dated 31.3.1992 hereinbefore referred to. Thus, the benefit of the said OM is applicable even to the employees of the IA & AD.

18. It is stated that the direct recruitment in regard to the post of Section Officer (Commercial) was resorted to only in 1986. As per 1988 recruitment

rules, the method of recruitment to the post of Section Officer (Commercial) and some other services is only by way of promotion, failing which, by transfer, failing which, by direct recruitment.

19. The training for directly recruited Section Officer (Commercial) is for 4 months and it is part of two years period prescribed for probation. The applicants herein were sent for training on 1.11.1987. The first increment for the applicants accrue on completion of the duty period of one year. We held that the period of probation on completion of training, has to be treated as 'duty'. When the period of 4 months training has to be reckoned on notional basis. In effect, they will be entitled to the first increment on completion of one year from the date of their appointment and the later increments as and when they are due. Hence, R1 to R4 have to pay the increments accrued to the applicants from the date on which, they completed one year of service including the period of training which is part of probation.

20. FR9(6) states that the service of a probationer has to be treated as 'duty', if it is followed by confirmation. Hence, unless confirmation is made, it cannot be stated as to whether the service of a probationer has to be treated as duty or not. The applicants herein were confirmed only ✓

on 1.11.1989. They also made a representation on 6.8.90 praying for sanctioning of increment on completion of one year from the date of appointment on probation. This OA was filed on 14.6.1991. Hence, we feel, this is a case where the monetary benefit in regard to the increments has to be ordered from the date ~~as~~ on which first increment became due.

21. The notification in regard to the recruitment of Section Officer(Commercial) was issued by the office of the C&AG. Shri G Parameswara Rao, learned Standing Counsel ~~for R1 to R4~~ submitted that necessary instructions on the basis of which the appointment orders were issued are not available in the office of the Principal AG at Hyderabad. As already observed, the representation by the applicant was made on 6.8.90 wherein the applicants claimed that the period of service from the date of appointment on probation has to be reckoned for fixing ~~of~~ inter-se-seniority. The Ministry referred the matter to C&AG. It is stated that the said representation was not disposed of. As the necessary records are not available with the Principle AG, we feel that it is just and proper to require C&AG to dispose the representation of the applicants and other direct recruits in regard to their claim for seniority. The decision in regard to the same will have a bearing for considering as to whether the recruitment rule for promotion to the post of Assistant Audit Officer to the extent it states that the period of probation has to be excluded is discriminatory. So, we feel that it is not just and proper to advert to the said plea at this stage.

22. It is submitted for the applicants that as the representation was made in 1990, they may be given an opportunity to file additional representation so as to allow them to refer to various judgements which may be having bearing in regard to the same.

23. In the result, the OA is ordered as under:

1. The applicants are entitled to the first increment on completion of one year from the date of their appointment on probation. Ofcourse, if any period has to be excluded as per FR, the same has to be excluded for fixing the date of first ~~or later~~ increments. The applicants are entitled to menetary benefit on fixation of pay after granting of increments as above.
2. C&AG (R1) has to dispose the representation dated 6.8.90 of the applicants and any additional representation with reference to the claim for fixing of seniority. The same has to be disposed of expeditiously and preferably by 31.3.1996. The additional representation if not sent by RPAD by 31.10.1995, need not be considered.
3. If the applicants are aggrieved by the decision of C&AG, they are free to challenge it by filing an application under Sec.19 of the AT Act, and then they are also free to challenge the recruitment rules for promotion as ~~Audit~~ Assistant Audit Officer to the extent it prescribes that the period of probation has to be excluded for eligibility period.

24. We make it clear that our finding in regard in this order, to the increment/need not be taken as basis for determining the question as to whether the period of service from the date of appointment on probation has to be reckoned for fixing ~~of~~ inter-se seniority.

It is needless to say that if the applicants are aggrieved by the decision of C&AG, they are free to move this Tribunal under Section 19 of the AT Act. It follows that the C&AG has to pass a reasoned and order if any OMs/letters/instructions are relied upon, the same has to be enclosed to the said order.

25. OA is ordered accordingly. No costs.//

*me*  
(R.RANGARAJAN)  
Member (Admn)

*X*  
(V.NEELADRI RAO)  
Vice-Chairman

Dated: The 25th September, 1995

Dictated in the open court

mvl

11/09/95  
Deputy Registrar (S) CC

To

1. The Comptroller and Auditor General of India, Bahadurshah Zafar Marg, New Delhi.
2. The Principal Director of Commercial Audit Khairatabad, Hyderabad.
3. The Accountant General (Audit) A.P. Hyderabad.
4. The Principal Director of Audit R.K. Puram, New Delhi.
5. One copy to Mr.P.B.Vijayakumar, Advocate, CAT.Hyd.
6. One copy to Mr.G.Parameshwar Rao, SC for AG. CAT.Hyd.
7. One copy to Mr.P.Bhaskar, Advocate, CAT.Hyd.
8. One copy to Library, CAT.Hyd.
9. One spare copy.

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19/10/95

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IN THE CENTRAL ADMINISTRATIVE TRIBUNAL  
HYDERABAD BENCH AT HYDERABAD

THE HON'BLE MR.JUSTICE V.NEELADRI BAC  
VICE CHIEF JUDGE

AND

THE HON'BLE MR.R.RANGARAJAN :M(A)

DATED: 25/9/1995

ORDER/JUDGMENT

M.A./R.A./C.A.NO.

in

O.A.No. 607/91

T.A.No. (W.P.No. )

Admitted and Interim directions  
Issued.

Allowed.

Disposed of with directions.

Dismissed.

Dismissed as withdrawn.

Dismissed for default.

Ordered/Rejected.

No order as to costs.

No spare copy

p.v.m.

