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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 Stivatsava
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

38. D.A.Korade
39. Goraknath Singh
40. K.Madhukar Sethi
41. Parameswara Patnaik
42. H.K.Bhatacharjee
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
60. Manohar Minz
51. Raghubir Prasad
52. Smt C.Vilasini
53. Shiv Nath Singh
54. P.N.Lal
55. Gar Mohan Bhatacharjee
56. Jaganath Prasad
57. Samir Kr.Ganguly
58. K Narayanan-II
59. Tarasam Singh
60. P.R.Ponnepalam
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
R1 to R4 | :: Sri G.Parameshwar Rao, SC
for AG |
| Counsel for R12,33 & 49 | :: Sri P.Bhaskar |

CORAM:

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

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O.A.607/91

Dt.of order:25.9.1995

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ORDER

As 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 ^{could} ~~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 ^{have} ~~has~~ to be held
as prospective.

5. Rule (5) of 1974 IA & AD Service Rules
make a provision 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 Section
Officers (Commercial) ^{on} ~~under~~ 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 ^{twelve} ~~two~~ applicants were among those who were
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selected. In para 5 of the Memo of appointment dated
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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 on notional basis for fixing ^{date} 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.

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11. By referring to the above FR, it was stated for the applicants that duty on probation on appointment is service, ^{As probationer,} 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 ~~increments~~ 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."

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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 herein before 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

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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 applicant-s 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

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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 ~~of~~ 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 pleas 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:

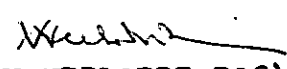
1. The applicants are entitled to the first increment on completion of one year from the date of their appointment on probation. Ofcourse, if any period has to be excluded as per FR, the same has to be excluded for fixing the date of first or later increments. The applicants are entitled to monetary 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 ~~Andix~~ 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 to the increment ^{in this order,} 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 order^{and} 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.//

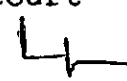

(R. RANGARAJAN)
Member (Admn)


(V. NEELADRI RAO)
Vice-Chairman

Dated: The 25th September, 1995

Dictated in the open court

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Deputy Registrar (J) 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. F. 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
VICE CHAIRMAN

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.

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No spare copy

