

CENTRAL ADMINISTRATIVE TRIBUNAL, JAIPUR BENCH, JAIPUR.

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Date of Decision: 22-07-04

OA 173/2003

Ramji Lal, Cabinman at Dabla Station of North Western Railway.

... Applicant

Versus

1. Union of India through General Manager, North Western Railway, Hasanpura Road, Jaipur.
2. Divisional Rail Manager, North Western Railway, Power House Road, Jaipur.

... Respondents

CORAM:

HON'BLE MR.S.K.AGRawal, MEMBER (A)

HON'BLE MR.M.L.CHAUHAN, MEMBER (J)

For the Applicant

... Mr.Nand Kishore

For the Respondents

... Mr.T.P.Sharma

ORDER

PER HON'BLE MR.M.L.CHAUHAN

The applicant has filed this OA thereby praying for the following relief :

- "a) It is therefore prayed that by an appropriate order or direction the Hon'ble Tribunal may kindly call for the entire records pertaining to the case after examination be pleased to direct the respondents to fix the pay of the applicant in scale Rs.260-400/950-1500 after taking into consideration the period of 24 months & 27 days of officiating. Accordingly, the pay may also be fixed in the promotion grade of Rs.1200-1800/4000-6000 w.e.f. 19.11.96.
- b) The amount wrongly recovered may be refunded with interest.
- c) The arrears of the fixation may be paid with interest @ 18%.
- d) Cost may be awarded."

2. Facts of the case are that the applicant while working in the grade of Rs.210-270 was allowed to officiate on the post of Cabinman in the scale of Rs.260-400 in different spells w.e.f. 13.9.84 to 8.10.86. For that period he was allowed officiating allowance. Such officiation was allowed on account of suspension of one Shri Shiv Narayan and thereafter on retirement of one Shri Rati Ram, Cabinman. However, the applicant was promoted as Cabinman for the first time vide order No.ET/839/4 dated

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5.9.86 and his pay in the scale of Rs.260-400 was fixed at Rs.278/- on 8.10.86 as can be gathered from letter dated 2.11.95 (Ann.A/4). It is the case of the applicant that he was allowed to officiate on the higher grade of Rs.260-400 for total period of 2 years and 27 days. The applicant was further promoted in the scale of Rs.1200-1800 vide letter dated 19.11.96 (Ann.A/5) and his pay in the said scale was fixed at Rs.1290/- without taking into consideration the relevant fact of his officiation in the higher grade. It is further averred that the scale of Rs.1200-1800 was revised to that of Rs.4000-6000 w.e.f. 1.1.96 as a result of Fifth Central Pay Commission. According to the applicant, corresponding pay of Rs.1290/- in the revised scale comes to Rs.4100/- and as such contention of the respondents that he was fixed incorrectly at Rs.4100/- is without any basis. As a matter of fact, the applicant should have been fixed at Rs.4300/- on the date of his promotion in the scale of Rs.4000-6000. The applicant represented his case vide letter dated 11.11.2002 for correct fixation after giving weightage of his officiating period in scale of Rs.260-400. Instead of correcting their own error in fixing the pay of the applicant, the respondents have started recovery of Rs.7226/-, with <sup>out</sup> any prior notice, w.e.f. December, 2002. The applicant filed representation against this arbitrary action of the respondents, which the respondents have rejected arbitrarily vide impugned order (Ann.A/2). It is on the basis of these averments that the applicant has filed this OA thereby praying for the aforesaid relief.

3. Notice of this OA was given to the respondents. In the reply, the fact that the applicant was allowed to officiate on higher scale of Rs.260-400 in different spells, has not been disputed. However, according to the respondents, the applicant was entitled to the officiating allowance amounting to Rs.1010/- for a period w.e.f. 1.1.86 to 31.7.86 and Rs.1030/- w.e.f. 1.8.86 to 8.10.86, whereas the applicant was paid officiating allowance amounting to Rs.266/-, 266/-, 272/-, 1050/- and 1070/- during the different spells of his officiation on higher post. The

respondents have also stated that pay of the applicant as on 1.1.96 in the scale of Rs.950-1500 (Revised Rs.3050-4500) was Rs.3875/-. Since the applicant has been promoted in the grade of Rs.1200-1800 (Revised Rs.4000-6000) w.e.f. 19.11.96, therefore, after giving one additional increment of the pay fixation, the pay comes to Rs.3950/- and the next stage in higher grade is Rs.4000/-, which was permissible as per rules but due to mistake the pay of the applicant was fixed at Rs.4100/-. Thus, according to the respondents, the excess amount paid to the applicant by fixing his pay at Rs.4100/- w.e.f. 19.11.96 onwards was required to be recovered as, according to the respondents, the railway administration can rectify the clerical mistake and effect recovery from the applicant as it is public money. Thus, according to the respondents, applicant's pay was wrongly fixed at Rs.1290/- in the old scale instead of Rs.1250/- and a sum of Rs.7226/- is required to be recovered from the applicant and the action of respondents is justified.

4. We have heard the learned counsel for the parties and gone through the material placed on record.

5. So far as the contention of the applicant that since he was allowed to officiate as Cabinman in the higher scale of Rs.260-400 during different spells and in all he has officiated for a period of 2 years and 27 days as such he is entitled for refixation of his pay at higher scale, depends upon the fact whether the applicant was promoted to the higher post against which he was allowed to officiate and allowed the higher pay scale of Rs.260-400 or whether he was given current duty charge of higher post while holding the lower post substantively. At the outset, it may be stated that it has been judicially settled that where a person has been entrusted with current duty charge of higher post or has merely asked to work on a higher post with extra allowance while holding the lower post substantively is not a promotion. In such a case, person does not get salary of the higher post but only gets what in service parlance is called

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a 'charge allowance'. At this stage, it would be useful to quote the decisions of Hon'ble Apex Court, which will clinch the issue. In the case of Ramakant Shripad Sinai Advalpalkar v. Union of India & Ors., 1992 SCC (L&S) 115, the appellant before the Apex Court was asked to discharge the duties of higher post of Treasurer of a Financial Institution, which post got vacant on account of death of a person who was holding that post at the relevant time. The applicant was asked to perform the duties of Treasurer on the stipulation that he would draw besides a monthly salary of his own post as acting Grade 3 Officer an allowance of Rs.100/- pm. Subsequently, he filed a case before the competent court thereby seeking a mandamus directing the respondents to absorb him in the post equivalent to that of Treasurer of the Financial Institution. The Apex Court in para-5 held as under :

"5. The arrangements contemplated by this order plainly do not amount to a promotion of the appellant to the post of Treasurer. The distinction between a situation where a government servant is promoted to a higher post and one where he is merely asked to discharge the duties of the higher post is too clear to require any reiteration. Asking an officer who substantively holds a lower post merely to discharge the duties of a higher post cannot be treated as a promotion. In such a case he does not get the salary of the higher post; but gets only what in service parlance is called a "charge allowance". Such situations are contemplated where exigencies of public service necessitate such arrangements and even consideration of seniority do not enter into it. The person continues to hold his substantive lower post and only discharges the duties of the higher post essentially as a stop-gap arrangement."

6. Similarly, the Apex Court in the case of State of Haryana v. S.M.Sharma & Ors., 1993 SCC (L&S) 1072, has also taken the same view. In the case before the Apex Court the respondent who was substantive holder of the post of SDO was entrusted current duty charge of the post of Executive Engineer, Kaithal, in his own pay scale till further orders. Subsequently, on account of posting of another person as Executive Engineer, he was transferred to his substantive post of SDO in Bhiwani. The High Court interpreting the order came to the conclusion that the order transferring the respondent therein to the post of SDO amounts to reversion. The Apex Court while setting aside the finding given by the High Court came to the conclusion that the respondent was neither

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appointed/promoted/posted as Executive Engineer nor was he ever reverted from the said post. He was only holding the current duty charge of the post of Executive Engineer. The Chief Administrator never promoted Sharma to the post of Executive Engineer and as such the question of his reversion from the post did not arise. Similarly, in the instant case, the applicant who was allowed to officiate on the post of Cabinman firstly on account of suspension of one Shri Shiv Narayan and subsequently on account of retirement of one Shri Rati Ram, on different spells, was never appointed/promoted in the higher scale of Rs.260-400. In fact, he was allowed the officiating allowance for the difference spells during the period he was allowed to work on higher post in addition to pay in lower scale. Thus, for all intends and purposes, he was merely asked to discharge duties of higher post and for that purpose he was allowed charge allowance. Thus, the matter is squarely covered by the ratio laid down in para-5 of the judgement of the Apex Court in the case of Ramakant Shripad Sinai Advalpalkar (supra) ~~and also the judgement of the Apex Court in the case of S.M.Sharma (supra)~~ <sup>According to us</sup> and also the judgement of the Apex Court in the case of S.M.Sharma (supra), the applicant continued to hold his substantive lower post and he was only discharging the duties of the higher post essentially as a stop-gap arrangement. Thus, the applicant has not made out any case that during the officiating period in different spells he was drawing the salary in the time scale of higher post. Such period cannot be treated as promotion in the higher scale. Same could have been counted for the purpose of grant of increment on his subsequent promotion on 8.10.86 only if the applicant was allowed to officiate on time scale of higher post i.e. Rs.260-400.

7. At this stage it will also be useful to notice the subsequent decision of the Apex Court in the case of Mohd.Swaleh v. Union of India & Ors., 1998 (1) SLJ 1, where the Apex Court has held that pay of higher post can be given only if promotion is ordered by the competent authority. Since the applicant during his period of officiation on the post of Cabinman was not allowed the pay scale of Cabinman, as such the period

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cannot be counted for the purpose of increment on his subsequent promotion as Cabinman in scale Rs.260-400 w.e.f. 8.10.86.

8. So far as the second grievance of the applicant that recovery of Rs.7226/- has been effected from him even without issuing any show-cause notice and his pay has been wrongly fixed at Rs.4000/- instead of Rs.4100/- in the scale of Rs.4000-6000 when he was subsequently promoted on 19.11.96, there is substance in the submission so made. Though the respondents in the reply have stated that the recovery was effected after issuing the show-cause notice and for that purpose they have relied on the letter dated 17.12.2002 (Ann.R/1) but the submission made by respondents is contrary to what has been recorded in the letter (Ann.R/1). The letter (Ann.R/1) has been written by Sr.DPO to the applicant thereby intimating that the over payment of Rs.7226/- is being recovered from the salary of the applicant w.e.f. December, 2002 onwards. This letter cannot be said to be a show-cause notice. The Apex Court in the case of Lakshmi Narayan Mukhopadhyay v. Union of India & Ors., JT 2002 (5) SC.355, has set aside the action of the respondents holding that there is nothing to show that amount was arrived at by giving opportunity to the appellant. Same is the case here. In the instant case, the recovery of the aforesaid amount was effected by the respondents without giving show-cause notice to the applicant. At least the applicant was entitled to know how the amount has been recovered and on what basis his pay has been fixed at a lower stage, before such an order could have been passed by the authorities. This having not been done, according to us, the action of the respondents in effecting the recovery is in violation of Principles of natural justice. At this stage, we want to make it clear that we have not given any finding on merit that the respondents cannot rectify mistake and fix the pay at proper stage in case the applicant was getting higher pay scale on account of wrong fixation. It will be permissible to the respondents to rectify such mistake after giving show-cause notice to the applicant and considering his representation pursuant to such show-cause notice and then

pass appropriate order. Similarly, we also do not wish to express any opinion as to whether a sum of Rs.7226/- on account of excess amount paid to the applicant could be recovered from him and for that purpose we want to observe that the competent authority before passing appropriate order, if any, must also take into account the fact that the excess amount which has been paid erroneously to the applicant and in the payment of which he had no role to play or he committed no misrepresentation, can be recovered in view of law laid down by the Apex Court in the cases of Sahib Ram v. State of Haryana - 1995 (2) RSJ 139, and P.H.Reddy & Ors. v. National Institute of Rural Development & Ors. - 2002 (2) ATJ 208.

9. Accordingly, the OA is partly allowed and the respondents are restrained from effecting recovery of Rs.7226/- from the applicant and in case the respondents have recovered any amount pursuant to such recovery, the same shall be refunded to the applicant within a period of two months from today. It is also made clear that it will be permissible for the respondents to pass appropriate order regarding recovery of amount and fixation of his pay w.e.f. 19.12.96 at appropriate stage after issuing a show-cause notice giving opportunity to the applicant to make representation against that show-cause notice. No order as to costs.

  
(M.L. CHAUHAN)

MEMBER (J)

  
(S.K. AGRAWAL)

MEMBER (A)