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NOTES OF THE REGISTRY

ORDERS OF THE TRIBUNAL

03.07.2008

OA No. 368/2006

Mr. P.N. Jatti, Counsel for applicant.

Mr. T.P. Sharma, Counsel for respondents.

This case has been listed before the Deputy Registrar due to non availability of Division Bench. Be listed before the Hon'ble Bench on 22.07.2008.

  
(GURMIT SINGH)  
DEPUTY REGISTRAR

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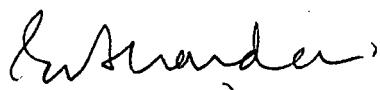
22-7-2008

Mr. P.N. Jatti, Counsel for applicant.

None present for respondents

Heard learned Counsel for applicant

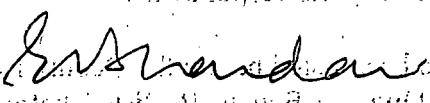
Order Reserved.

  
(R.R. Bhandari)  
M(A)

  
(M.L. Chauhan)

M(J)

Later on Mr. Mukesh Dahiya, Proxy  
Counsel to Mr. T.P. Sharma appeared and  
argued his case.

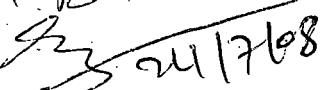
  
(R.R. BHANDARI)

Adm. member

  
(M.L. CHAUHAN)

Jud. member

order pronounced today  
in the open court by  
the above said Bench

  
22/07/2008

C.O.

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,  
JAIPUR BENCH

JAIPUR, this the 24<sup>th</sup> day of July, 2008

ORIGINAL APPLICATION No. 368/2006

CORAM:

HON'BLE MR. M.L. CHAUHAN, MEMBER (JUDICIAL)  
HON'BLE MR. R.R. BHANDARI, MEMBER (ADMINISTRATIVE)

Radhey Shyam Sharma  
s/o Shri Sedu Ram  
r/o Village Bhagwanpura,  
P.O. Raipur  
Via Andhi (Jaipur),  
presently Retd. From  
Head Record Officer,  
JP Dn. Jaipur

.. Applicant

(By Advocate: Shri P.N. Jatti)

Versus

1. Union of India through the Secretary to the Govt. of India, Department of Posts, Dak Bhawan, Sansad Marg, New Delhi.
2. Chief Postmaster General, Rajasthan Circle, Jaipur
3. Senior Superintendent, Post Offices, Jaipur City Dn., Jaipur
4. Head Record Officer, Railway Mail Service, Opp. Radio Station, M.I. Road., Jaipur

.. Respondents

(By Advocate: Shri Mukesh Dahiya, proxy counsel for  
Mr. Tej Prakash Sharma)

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O R D E R

Per Hon'ble Mr. M.L.Chauhan

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

"That by a suitable writ/order or the direction the impugned order dated 15.6.2006 be quashed and set aside and further by a suitable writ/order or the direction the respondents be directed to pay.

- (A) The pay of the higher post of HSG-I for the period from 20.9.2004 to 30.5.2005.
- (B) Additional 10% of the presumptive pay of the additional post of AHRO-I (HSG-II) for the period with effect from 20.9.2004 to 31.5.2006."

2. Briefly stated, facts of the case are that the applicant was promoted on the post of AHRO-I (HSG-II) vide order dated 8.9.2004 which post he joined on 18.9.2004. Vide Memo dated 20.9.2004 (Ann.A2), he was authorize to work as officiating HRO (HSG-I) against vacant post of Drawing and Disbursing Officer w.e.f. 20.9.2004 F/N and he performed duty of the post of HRO-I, R.M.S. Jaipur Division in addition to his own duty without any extra remuneration. However, he was given regular promotion on the post of HSG-I vide order dated 30.5.2005 (Ann.A3) in the scale of Rs. 6500-10500. The grievance of the applicant is that he is entitled to the pay of the post of HSG-I w.e.f. 20.9.2004 to 30.5.2005 when he performed additional duty of the post though he was not granted promotion on the said post. Besides this, the applicant has also prayed ~~that~~ <sup>for</sup> additional 10% of the presumptive pay on the post of AHRO-I (HSG-II) for the aforesaid period.

It is on the basis of these facts, the applicant has filed this OA thereby praying for the aforesaid reliefs.

For the purpose of aforesaid reliefs, reliance has been placed on FR-49. The applicant has also made representation to the authorities which was rejected vide impugned order Ann.A1 on the ground that the applicant was not eligible for promotion to the post of HSG Grade-I as per the recruitment rules, as the eligibility criterion for promotion is 3 years' service in HSG-II. Further case of the applicant is for grant of additional 10% of the presumptive pay for looking after the work of the lower post in addition to his own duty was also declined, as according to the respondents, the condition of combination of appointments is also not fulfilled, as such, no presumptive pay (10%) is admissible.

3. Notice of this application was given to the respondents. The respondents have filed reply. The stand taken by the respondents in the reply is same as given in the impugned order Ann.A1 that as per DOPT Order No. AB/14017/54/2003 Estt (PR) dated 4.12.2003 officiating promotion is to be given to the officials who are eligible for the post as per recruitment rules and the applicant was ordered locally to look after the work of HRO, RMS, Jaipur Division, Jaipur without any extra remuneration. Since the applicant do not

have requisite year of regular service in HSG-II cadre for promotion to HSG-I, thus, his claim of officiating pay is not covered under the rules. Regarding grant of 10% presumptive pay, the stand of the respondents is that the applicant was only asked to look after the work of higher post and he was not found entitled for presumptive pay as he was regularly posted on his post of HRO-I w.e.f. 31.05.2005 and he has only attended the current duty of the higher post and not re-appointed on the post on officiating capacity.

4. The applicant has also filed rejoinder thereby reiterating the stand taken by him in the OA.

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

6. Before we proceed further, it may be useful to quote, order dated 20.9.2004 in extenso whereby the applicant was asked to perform the current duty of the higher post and thus reads:-

"Shri Radhey Shyam on being posted as A.H.R.O.I (HSG-II) HRO RMS 'Jp' Division, Jaipur vide C.O. Jaipur Memo No. Staff/10-68/I dated 6/9/2004 and this office Memo No. B1/HSG-II (Norm based) 03 dated 8/9/2004 is hereby authorized to work as officiating HRO (HSG-I) drawing and disbursing officer with effect from 20/9/2004 Fore Noon. He will also perform the current duties of the post of H.R.O. R.M.S. Jp-Dn.Jaipur in addition to his own duties without any extra-remuneration.

(emphasis to underline)

Thus from perusal of the aforesaid order, it is clear that the applicant was authorize to work on the higher post without any extra remuneration and it is clearly mentioned in the said order that the applicant will perform current duties of the higher post in addition to his own duties. Admittedly, the applicant has not been given appointment on the higher post of HSG-I. It may be significant to point out here that the applicant joined the post of HSG-II only one day prior to the order dated 20.9.2004 whereby he was asked to look after the duties of the higher post. The stand taken by the respondents is that as per the recruitment rules, promotion to the post of HSG-I can be given where a person has put in 3 years of service in HSG-II grade. As already stated above, the applicant has rendered only one day's service in HSG-II cadre before he was given duty of higher post in addition to his own duties. Thus, we see no infirmity in the action of the respondents whereby case of the applicant for grant of higher pay scale of the post of HSG-I was declined.

7. Law on this point is no longer res-integra and the same stood decided by judgments rendered by the Hon'ble Apex Court as well as by Hon'ble High Court.

The matter was considered by the Hon'ble Courts, on the basis of provisions contained in FR-49 on which reliance has been placed by the learned counsel for the applicant. The Hon'ble Courts have repeatedly held that benefit of salary of higher post can be given only if a person is appointed on the post and not otherwise. At this stage, it will be useful to quota decision of the Guwahati High Court in the case of Golap Chandra Chetia vs. The Assam Administrative Tribunal, Guwahati and ors., 2004 (4) SLR 500 whereby the Hon'ble High Court in Para 3 and 4 has made the following observations:-

"3. It is contended by the counsel for the appellant before us that by virtue of FR-49 he having worked on the post of Financial Adviser for more than 39 days he is entitled for fixation of the salary on the basis of FR 49. The relevant portion of FR 49 reads as under:

"FR 49- The State Government may appoint one Government servant to hold substantively, as a temporary measure, or to officiate in, two or more independent posts at one time. In such cases his pay is regulated as follows:-

(a) Where a Government servant is formally appointed to hold full charge of the duties of a higher post or posts which is or are in the same office as his own and in the same cadre line of promotion, in addition to his ordinary duties, he shall be allowed the pay of the higher post, or the ten per cent of the presumptive pay of the additional post or posts, if the additional charge is held for a period exceeding 39 days: Provided that the concurrence of the Financial Department shall be obtained for making such arrangements and for payment of additional pay."

4. It is amply clear from FR 49 (a) that a Government servant can be asked by the Government to hold substantively, as a temporary measure, or to officiate in, two

or more independent posts at one time and in that case his pay shall be regulated as provided under Clause (a) of FR 49 on fulfilling other conditions mentioned therein. The necessary condition for application of FR 49 is appointment on two or more (sic) independent posts at one time. We have gone through the orders issued by the Government wherein the appellant was directed to hold the charge of the Financial Adviser in the Health and Family Welfare Department from this it is clear that he has not been appointed on the post of Financial Adviser but he has been directed to hold the charge of the post. In the absence of any appointment in the post, FR 49 has no application as it stood before its amendment in 1991. That being the case, we do not find any infirmity in the orders passed by the Tribunal as well as by the learned single judge."

8. Further the Apex Court in the case of Mohd. Swaleh vs. Union of India and Ors., 1998 (1) SLJ 1 has held that a person who was deputed to hold current charge of duties of Registrar cannot claim remuneration of the said post. That was a case where the appellant therein was deputed to work as Registrar in addition to his duties of Deputy Registrar by the Chairman, Central Administrative Tribunal. The Appellant demanded pay of the higher grade. The Hon'ble Apex Court held that since no promotion can be made by the Chairman, as such, higher pay cannot be allowed and the condition laid down in FR-49 is not satisfied.

In the instant case also, the applicant could not have been promoted on the higher post as he does not fulfill qualification. On that parity, the applicant is not entitled to grant of higher pay scale. The

Hon'ble Apex Court also held that principle of 'quantum merit' is not applicable where the field governed by the specific statutory rules namely Rule 49 of FRs and such principle is attracted where liability arises under the Contract Act. At this stage, it will be useful to quote para 24 of the judgment, which thus reads:-

"24. Learned counsel for the appellant made a submission that the principle of quantum meruit (sic) would apply to the facts of the case and relied upon the decision of the Supreme Court in State of West Bengal vs. B.K.Mondal and Sons., AIR 1962 SC 779. In that case it was held that though the contract for certain works was not executed as per the provisions of Section 179 (3) of the Government of India Act, still compensation could be paid under Section 70 of the Contract Act. In our view the said decision which is based on Section 70 of the Contract Act is not applicable to the present situation where the field is governed by specific statutory rules namely Rule 49 of the Fundamental Rules."

Thus, according to us, the applicant is not entitled to any relief.

9. The learned counsel for the applicant has placed reliance on the decision of this Tribunal in OA No.371/04 decided on 17.2.2007, M.L.Malvia vs. Union of India and ors. whereby while relying on the judgment of the Apex Court in the case of Selva Raj vs. Lt. Governor of Island, Port Blair and Others, AIR 1999 SC 838 has granted relief of officiating allowance to the applicant therein as prescribed under FR-49 without discussing as to how the provisions of FR-49 are attracted on the principle of 'quantum

merit'. Thus according to us, the applicant cannot take assistance from this judgment. Further, the principle of quantum merit is not attracted in the instance case as held by the Apex Court in the case of Mohd. Swaleh (supra) relevant portion of which has been reproduced hereinabove.

Further, this Bench in the case of M.L.Malvia (supra) has relied on the judgment mechanically without going into the facts and circumstances of the case under which the said judgment was rendered by the Apex Court. That was a case where the appellant therein was transferred to lookafter the duties of Secretary (Scout) with immediate effect. It was further mentioned that his pay was to be drawn against the post of Secretary (Scout) under GFR 77. It was in the context of these facts, the Apex Court held that when the applicant has been appointed against the post of Secretary and it has been mentioned in the order that his pay will be drawn against that post, under such circumstances, the appellant is entitled to the scale of the said post. Thus, the judgment was rendered in the facts and circumstances mentioned above and it was on that context that Hon'ble Apex Court has observed that quantum merit is attracted in this case. The present is not the case of such nature. As already stated above, the order specifically mentioned that the applicant will perform current duties of the higher post in addition to his duties

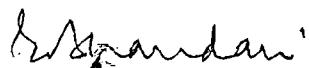
without any extra remuneration. Thus, the applicant cannot take any assistant from the judgment in M.L.Malvia (supra) case which has been affirmed by the High Court.

10. So far as case of the applicant regarding payment of 10% of the presumptive pay is concerned, from the material placed on record, we find that the case of the applicant has been rejected on the ground that the condition of combination of appoint is not fulfilled, as such, no presumptive pay is admissible. The respondents have not given any reasoning in the order as well as in the reply as to on what basis the authority concerned has arrived on this conclusion. According to us, the matter is required to be considered on this aspect, which also find support from the judgment of the Hon'ble Apex Court in the case of Ramakant Shripad Sinai Advalpalkar vs. Union of India and ors. 1992 SCC (L&S) 115 whereby the Apex Court has held that being merely asked to work on a higher post cannot be treated as promotion. In such a case the person is not entitled to get salary of the higher post but gets only what in service parlance is called a 'charge allowance'.

11. Thus, we are of the view that the matter on this point is required to be reconsidered. Accordingly, the respondents are directed to consider the case of the applicant regarding grant of extra

amount/presumptive pay within a period of two months from the date of receipt of copy of this order.

12. With these observations, the OA stands disposed of with no order as to costs.



(R.R.BHANDARI)  
Admv. Member



(M.L.CHAUHAN)  
Judl.Member

R/