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CENTRAL ADMINISTRATIVE TRIBUNAL
JAIPUR BENCH, JAIPUR

ORDERS OF THE BENCH

Date of Order: 03.11.2011

OA No. 344/2010

Mr. Amit Mathur, counsel for applicant.

Mr. Mukesh Agarwal, counsel for respondents.

Arguments heard in part. Put up the matter on 08.11.2011 for remaining arguments. I.R. to continue till the next date.

Anil Kumar

(ANIL KUMAR)
MEMBER (A)

K.S. Rathore

(JUSTICE K.S. RATHORE)
MEMBER (J)

Kumawat

08-11-2011 [OA No. 344/2011]

Mr. Amit Mathur, Counsel for applicant.
Mr. Mukesh Agarwal, Counsel for respondents.

Heard.

The O.A. is disposed of by a separate order on the separate sheet for the reasons recorded therein.

Anil Kumar

[Anil Kumar]

Member (A)

K.S. Rathore
[Justice K.S. Rathore]
Member (J)

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
JAIPUR BENCH

JAIPUR, this the 8th November, 2011

CORAM:

HON'BLE MR. JUSTICE K.S.RATHORE, MEMBER (JUDL.)
HON'BLE MR. ANIL KUMAR, MEMBER (ADMV.)

Original Application No.342/2010

S.K.S. Chauhan
s/o Shri B.P. Chauhan,
r/o 62-B, Pratap Nagar,
Khatipura, Jaipur,
presently working as Superintendent,
Central Excise, Jaipur-I.

Applicant

(By Advocate: Shri Amit Mathur)

Versus

1. Union of India
through the Secretary
Ministry of Finance,
Department of Revenue,
North Block,
New Delhi.
2. Chief Commissioner,
Central Excise and Customs,
Statue Circle, Jaipur
3. Commissioner,
Central Excise Commissionerate,
Jaipur-I, Statue Circle,
Jaipur
4. The Chief Accounts Officer,
Central Excise, Jaipur-I,
Statue Circle,
Jaipur

Respondents

(By Advocate: Shri Mukesh Agarwal)

Original Application No.343/2010

R.K.Sharma
s/o Shri J.P.Sharma,
r/o G-5A, Madhuvan Colony,
Tonk Road, Jaipur,
presently working as Superintendent,
Central Excise, Jaipur-1

.. Applicant

(By Advocate: Shri Amit Mathur)

Versus

1. Union of India
through the Secretary,
Ministry of Finance,
Department of Revenue,
North Block,
New Delhi.
2. Chief Commissioner,
Central Excise and Customs,
Statue Circle, Jaipur
3. Commissioner,
Central Excise Commissionerate,
Jaipur-I, Statue Circle,
Jaipur
4. The Chief Accounts Officer,
Central Excise, Jaipur-I,
Statue Circle,
Jaipur

.. Respondents

(By Advocate: Shri Mukesh Agarwal)

Original Application No.344/2010

Hari Lal Goda
 s/o Shri H.L.Goda;
 r/o Hiran Magri, Udaipur
 presently working as
 Superintendent, Central Excise,
 Jaipur-I, Udaipur.

Applicant

(By Advocate: Shri Amit Mathur)

Versus

1. Union of India
 through the Secretary,
 Ministry of Finance,
 Department of Revenue,
 North Block,
 New Delhi.
2. Chief Commissioner,
 Central Excise and Customs,
 Statue Circle, Jaipur
3. Commissioner,
 Central Excise Commissionerate,
 Jaipur-I, Statue Circle,
 Jaipur
4. The Chief Accounts Officer,
 Central Excise, Jaipur-I,
 Statue Circle,
 Jaipur

Respondents

(By Advocate: Shri Mukesh Agarwal)

ORDER (ORAL)

All the OAs involving similar question of law and facts are
 being decided by this common judgment. Facts of OA No.
 342/2010 are taken as leading case.



2. The aforesaid OAs are directed against the order dated 22.4.2010 passed by the respondents whereby pay of the applicants has been revised and order of granting non-functional grade pay of Rs. 5400/- has been cancelled.

3. The applicants are also aggrieved from the order dated 9.6.2010 passed by the respondents whereby representation submitted by the applicants against the order dated 22.4.2010 has been rejected.

4. Brief facts of the case are that the applicant was promoted as Superintendent vide order dated 3.6.2004. The aforesaid order was passed after his name was recommended for promotion by the DPC. In the order of promotion, it is clearly stipulated that promotion is against cost recovery post but for all the purposes his promotion was made on regular basis. It is averred that the applicant came in the scale of Rs. 7500-12000 much prior to his promotion as Superintendent but in the order of promotion it was mentioned that his promotion is on adhoc basis.

5. As per clarification dated 21.11.2008 it was clarified that non-functional grade pay will be available w.e.f. the date of completion of four years service in the grade pay of Rs. 4800/-. The case of the applicant is that grade pay of Rs. 4800/- was fixed vide order dated 3.6.2004 and in pursuance to this, his pay fixation was made vide order dated 5.3.2009. The



applicant was given grade pay of Rs. 5400/- immediately from the date he completed four years of service in the grade pay of Rs. 4800/-.

6. Further, on 15.12.2009, the respondents issued order of Group-B officers who have completed minimum four years regular service as Superintendent and who were granted the higher grade pay of Rs. 5400/- in PB-II on non-functional basis and name of the applicant was excluded. Again the respondents issued a list in the month of January, 2010 in this regard again excluding name of the applicant from the list of eligible candidates. Respondents issued order dated 22.4.2010 wherein it was mentioned that as the applicant and three other persons were promoted on adhoc basis and not on regular basis in the scale of 7500-12000, they will be entitled for grade pay of Rs. 5400/- w.e.f. the date they completed four years on regular service in the grade of Rs. 4800/-.

Pursuant to the aforesaid order, recovery was directed from the salary of the applicant and further he was allowed grade pay of Rs. 5400/- w.e.f. the date he completed 4 years of regular service in the scale of Rs. 7500-250-12000.

7. The order impugned Ann.A/1 and A/2 are challenged on the ground that applicants are entitled for non functional grade pay even they are not regularized, as the applicants are working in the scale of Rs. 7500-12000.



8. In support of his submissions the learned counsel appearing for the applicant placed reliance on the judgment rendered by the Madras High Court in the case of M.Subramaniam vs. Union of India and ors in W.P.No.13225 of 2010. The Division Bench of the Hon'ble Madras High Court vide its judgment dated 6.9.2010 observed as under:-

"7. We are unable to agree with this clarification given by the Under Secretary to Government of India, since in an earlier clarification, dated 21.11.2004 of the Deputy Secretary to Government of India, it was clarified as to how the 4 year period is to be counted for the purpose of granting non-functional upgradation to Group-B officer, i.e. whether the 4 year period is to be counted with effect from the date on which an officer is placed in the pay scale of Rs. 7500-12000 (pre-revised) or with effect from 1.1.2006 i.e. the date on which the recommendation of the 6th CPC came into force. It was clarified that the 4 year period is to be counted with effect from the date on which an officer is placed in the pay scale of Rs. 7500-12000 (pre-revised).

8. Thus, if an officer has completed 4-years on 1.1.2006 or earlier, he will be given the non-functional upgradation with effect from 1.1.2006 and if the officer completes 4 year on a date after 1.1.2006, he will be given non-functional upgradation from such date on which he completed 4-year in the pay scale of Rs. 7500-12000 (pre-revised), since the petitioner admittedly completed 4 year period in the pay scale of Rs. 7500-



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12000 as on 1.1.2008, he is entitled to grade pay of Rs. 5400/- In fact, the Government of India, having accepted the recommendations of the 6th Pay Commission, issued a resolution dated 29.8.2008 granting grade pay of Rs. 5400/- to the Group B Officers in pay Band 2 on on-functional basis after four years of regular service in the grade pay of Rs. 4800/- in pay band 2. Therefore, denial of the same benefit to the petitioner based on clarification issued by the Under Secretary to the Government was, contrary to the above said clarification and without amending the rules of the revised pay scale, such decision cannot be taken. Therefore, we are inclined to interfere with the order of the Tribunal."

Taking advantage of the judgment of the Madras High Court, it is submitted by the counsel appearing for the applicants that the applicants completed 4 years period and four years is to be counted w.e.f. the date on which the officer is placed in the pay scale of Rs. 7500-12000, thus, in view of the ratio decided by the Madras High Court, the order impugned in Ann.A/1 and A/2 require to be quashed and set-aside.

9. The learned counsel Shri Amit Mathur appearing for the applicants further submits that even if the applicants are not entitled for the non-functional grade pay and if it is paid by the respondents by wrong interpretation of circulars, it is not fault of the applicants and, in such circumstances, recovery

cannot be made effective and in support of his submissions he placed reliance on the judgment rendered by the Hon'ble Supreme Court in the case of Babu Lal Jain vs. State of M.P. and Ors., reported in JT 2007 (6) SC 59 wherein the Supreme Court observed that any excess salary paid by mistake on a misconception of law cannot be recovered. Also placed reliance on the judgment of the Supreme Court in the case of Deb Narayan Shyam and Ors. Vs. State of West Bengal and Ors., reported in JT 2004 (10 SC 320 and Yogeshwar Prasad and Ors. vs. National Institute, Education Planning and Admn. and ors reported in JT 2010 (12) SC 278.

10. On the contrary, the learned counsel appearing for the respondents submitted that presently there are 278 regular posts in the grade of Superintendent, Central Excise, Group-B in Customs and Central Excise, Jaipur Zone. In addition to above regular posts, there are 5 more posts of Superintendent, Central Excise, Group-B which were sanctioned by the Ministry on cost recovery basis for the Inland Container Depots (ICDs) situated in Rajasthan. The cost of these 5 posts is recovered from the custodians of ICDs. As and when any ICD is closed, the posts including posts of Superintendent Group B sanctioned for the concerned ICD are treated as abolished/withdrawn. It is further submitted that the cost recovery posts are initially sanctioned by the Ministry for a



period of one year only and the proposal for continued retention of cost recovery posts for further one more year as per the requirement submitted by the custodian of ICDs, is sent to the Ministry for granting sanction and the Ministry has given the sanction on the basis of the proposal. Hence the posts (including the post of Superintendent Group-B) sanctioned on cost recovery basis are not regular in nature.

11. The learned counsel appearing for the respondents referred to Ann.A/3 by which the applicants were given appointment on ad-hoc basis and in the order itself it is clearly indicated that they were promoted as Superintendent Group-B purely on ad-hoc basis and immediately after abolition of the said post, the adhoc appointment will be terminated without giving any notice and it is also made clear that adhoc appointment will not give legal right to such appointee for regularization.

12. Shri Agarwal appearing for the respondents also referred to Ann.R/4 letter dated 2.5.1990 issued by the respondent by which it is indicated that taking into account the problems explained by various collectorates, it has been decided by the Board that:-

- i) Posts sanctioned on cost recovery basis may be filled by promotion on adhoc basis,



- ii) Cost recovery sanction would be limited to executive staff only and would not apply to ministerial staff.
- iii) Posts sanctioned on cost recovery basis should be separately shown in the sanctioned strength of the Collectorates to ensure that such posts are not filled on regular basis. For this purpose, Chief Accounts Officers in the Collectorate would keep necessary record along with particulars of names of the parties period of sanction and details of charges recovered from them.

13. Having referred the above provisions, the learned counsel appearing for the respondents submits that admittedly the applicants were given appointment on the post of Superintendent on cost recovery basis purely on adhoc basis. He also referred to order dated 15.10.2007 (Ann.R/15) issued by the Office of Commissioner, Central Excise, Jaipur in terms of Ministry's letter dated 16.8.2007 and letter dated 19.9.2007 by which Inspectors including adhoc Superintendents Group-B were promoted to the grade of Superintendent Grade-B in the pay scale of Rs. 7500-12000 on regular basis w.e.f. their date of joining in pursuance to this order. The applicants were also given promotion on regular basis vide order dated 15.10.2007 and submitted that the applicants are only entitled for the benefit of non-functional grade pay after completion of 4



years from the date of joining pursuant to order dated 15.10.2007 and not from the date of adhoc appointment as claimed by the applicants.

14. Further referred to Ann.R/17 issued by the Government of India, Ministry of Finance on 16.9.2009 clarifying about grant of grade pay of Rs. 5400/- on functional basis to Group-B officers in Central Board of Excise and Customs. In pursuance of Department of Expenditure Resolution dated 29th August, 2008 notifying acceptance of recommendations of 6th Central Pay Commission, it was decided to grant Grade Pay of Rs. 5400/- in PB-2 on non-functional basis to Group-B officers of Central Board of Excise and Customs i.e. Custom Appraiser/Superintendent of Central Excise/Superintendent of Customs (P) after completion of 4 years regular service in the grade pay of Rs. 4800/- in PB-2. In view of this clarification, the grant of higher grade pay of Rs. 5400/- in PB-2 on non functional basis is not linked to vacancy and may be given retrospectively w.e.f. 1.1.2006 provided the official concerned has completed minimum 4 years of regular service as on 1.1.2006 as Customs Appraiser/Superintendent of Central Excise/Superintendent of Customs (P) irrespective of the pay scale attached to the post and is clear from vigilance angle.

15. The learned counsel appearing for the respondents in support of his submissions placed reliance on the judgment

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rendered by the Apex Court in the case of Dr. Arundhati A.Pargaonkar and another vs. State of Maharashtra reported in AIR 1995 SC 962 wherein the Apex Court held that a continuous service by itself do not give rise to the claim of regularization. In the present case, the selected Inspectors/adhoc Superintendents including applicant by the DPC held on 12.9.2005, 3.5.2006 and 15.5.2007 were granted adhoc promotion purely on adhoc basis for limited period of six months vide orders dated 19.9.2005, 5.5.2006 and 16.5.2007. It was clearly mentioned in the said orders that due to abolition of cost recovery posts or for any other reason, the department has the right to revert the said officers to the grade of Inspector at any time without assigning any reason or prior notice and adhoc promotions do not confer any right to the individual concerned to claim regular promotion or to claim seniority in the higher grade. The adhoc Superintendents including applicant and Inspectors who were falling within the prescribed normal as well as extended (5 times of vacancies for the SC/ST candidates for regular promotion by adopting selection method) zone of consideration, were considered for regular promotion by the DPC held on 10.10.2007. Thereafter vide order dated 15.10.2007, 29 Inspectors including adhoc Superintendents (applicants) were promoted to the grade of Superintendent Group-B on regular basis against 29 existing



regular vacancies. The applicants are only entitled as per the guidelines and clarification for grant of non-functional grade of Rs. 5400/- in PB-2 as Superintendent Gorup-B after completion of 4 years' service after regular promotion. He further placed reliance on the judgment dated 15.3.1996 rendered by the Principal Bench of this Tribunal in OA No. 2337/1996, S.C.Agarwal vs. Union of India and others holding that department can correct at any point of time an administrative error, if the same is against rules and there is no estoppel against the laws/rules. Further relied upon the judgment of the Supreme Court dated 19.11.1997 in C.A.No. 5336 of 1995 reported in 1998 SCC (L&S) 1191 in the case of Kishorilal Charmakar and another vs. District Education Officer and another wherein it is held that an employee on whom an undeserved benefit has been conferred on account of mistake on the part of the Government is not entitled to retain.

16. Having heard the rival submissions of the respective parties and upon careful perusal of the material available on record as well as the judgments and the documents referred by the respective parties, basically the case of the applicant is based on the judgment of the Division Bench of the Madras High Court. Before the Madras High Court the order passed by the Central Administrative Tribunal dated 19.4.2010 was under challenge and by allowing the Writ Petition, the respondent



were directed to grant grade pay of Rs. 5400/- to the petitioner from 1.1.2008 as per the resolution dated 29.8.2010.

The clarification which was under consideration before the Hon'ble Madras High Court was altogether different and bare perusal of the judgment reveals that the main challenge before the Madras High Court was with regard to grant of benefit of 6th Central Pay Commission but nowhere in the judgment it is mentioned that the petitioner was working on adhoc basis. Therefore, the clarification was considered and it was observed that since in the clarification dated 21.11.2004 of the Deputy Secretary to Government of India it was clarified as to how the 4 year period is to be counted with effect from the date on which an officer is placed in the pay scale of Rs. 7500-12000 or with effect from 1.1.2006 i.e. the date on which the recommendations of 6th CPC came into force and it was clarified that that the 4 year period is to be counted with effect from the date on which an officer is placed in the pay scale of Rs. 7500-12000. If an officer completed 4 years on 1.1.2006 or earlier, he will be given the non-functional upgradation w.e.f. 1.1.2006 and if the officer completes 4 years on a date after 1.1.2006, he will be given non-functional upgradation from such date on which he completes 4 year in the pay scale of Rs. 7500-12000.



17. Here in the instance case, it is admitted case that the applicants were promoted as Superintendent Group-B on adhoc basis and that too for the fixed period and with the condition that immediately on completion of the said period their service are liable to be terminated without any notice at any time and it is also admitted that this promotion is not given on regular basis. As submitted by the respondents, the applicants were regularly promoted on the post of Superintendent Group-B only vide order dated 15.10.2007. Thus, the applicants were not entitled to get the non-functional Grade Pay of Rs. 5400/- and the benefit extended was by mistake and as per the ratio decided by the Hon'ble Supreme Court in the case of Kishori Lal Charmakar (supra), the employee on whom an underserved benefit has been conferred on account of mistake is not entitled to retain it.

18. We have also carefully scanned the judgment in the case of Babu Lal Jain (supra) decided by the Hon'ble Supreme Court with regard to recovery of excess salary paid on account of mistake and the mistake took place on misconception of law. The case before the Hon'ble Supreme Court was altogether different and thus the ratio decided in this case is not applicable to the present case.

19. With regard to the case of Yogeshwar Prasad (supra) relied upon by the applicants, the ratio decidendi in that case



was with regard to the principle of 'equal pay for equal work' which applies to the employees working under the same category. Admittedly, applicants in the present case were promoted purely on adhoc basis for a fixed terms on the post of Superintendent Group-B with certain conditions, so it cannot be said that the case of the applicants is at par with the employees regularly appointed as Superintendent Group-B and thus the ratio decided by the Hon'ble Supreme Court in the case of Yogeshwar Prasad is also not applicable to the present case.

20. Having thoroughly considered the submissions made on behalf of the respective parties and the judgment of the Principal Bench of this Tribunal as well as the judgment of the Division Bench of the Madras High Court and Hon'ble Supreme Court, we are fully convinced that non-functional grade pay of Rs. 5400/- extended in favour of the applicants was contrary to the circulars issued by the respondents and Ann.A/1 and A/2 have been rightly passed by withdrawing the said benefit as the applicants have not completed 4 years of regular service in the Grade Pay of Rs. 4800/- in PB-2 after regular promotion to the grade of Superintendent Group-B. The applicants are only entitled to get the benefit on completion of 4 years' regular service from the date of regular promotion and admittedly, the applicants have not completed 4 years



regular service from the date of regular promotion. Therefore, we find no illegality in the impugned order Ann.A/1 and A/2 and no interference, whatsoever, is called for.

21. Consequently, all the OAs deserve to be dismissed being devoid of merit and the same are hereby dismissed with no order as to costs.

(ANIL KUMAR)
Admv. Member

(JUSTICE K.S.RATHORE)
Jdl. Member

R/