

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH**

OA 436/2015
MA 341/2015

Order reserved on: 5.11.15
Order pronounced on: 26.11.15

Hon'ble Mr. Justice Syed Rafat Alam, Chairman
Hon'ble Mr. P.K. Basu, Member (A)

1. National Audit Federation,
Through its Secretary General
Mr. L.S. Sujith Kumar S/o P. Lekshmanan
Aged about 47 years
Having its office at:
K-42, B.K. Dutt Colony, Jorbagh
Lodi Colony, New Delhi-110003
 2. SAS (Audit) Association,
Through its Secretary, Shri Jay Shankar Kumar
S/o Shri Kamleshwari Prasad, aged about 36 years
Having its office at:
DGACR Building, I.P. Estate
New Delhi-110002
 3. Accounts and Entitlement Federation
Through its Secretary General
Shri C. Sashidharan Nair, S/o Late C.S. Nair
Aged about 58 years
Having its office at:
Thiruvananthapuram, Kerala
 4. Ajay Giri S/o Shri Sarni Giri
Aged about 47 years
Assistant Audit Officer
O/o Director General of Audit
Central Expenditure, New Delhi
 5. Ashutosh Pathak S/o Shri R.S. Pathak
Aged about 45 years
Assistant Audit Officer
O/o Pv. A.G. (Audit), Delhi
AGCR Building, I.P. Estate
New Delhi-110001
- ... Applicants

(Through Ms. Sumita Hazarika, Advocate)

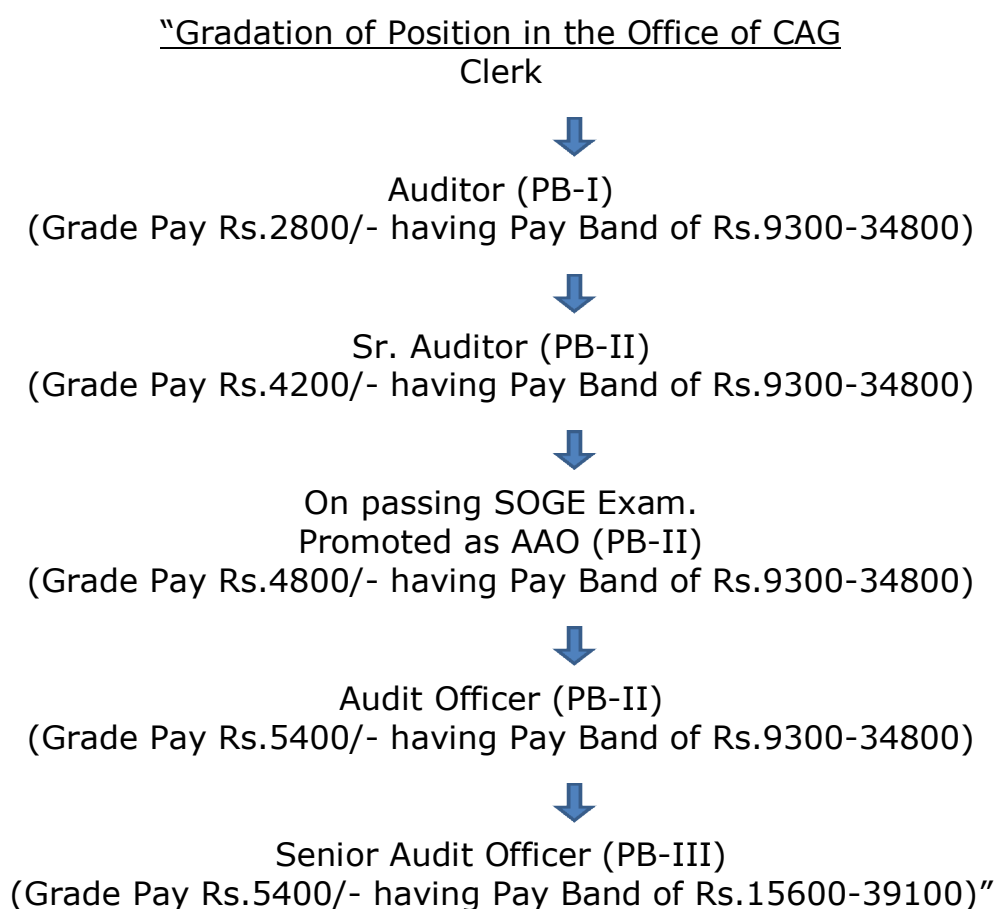
Versus

1. Union of India
Through Secretary to Government
Ministry of Personnel, Public Grievances & Pensions
(Department of Personnel & Training)
North Block, New Delhi
 2. The Comptroller & Auditor General of India
Pocket 9, Deen Dayal Upadhyaya Marg,
New Delhi ... Respondents
- (Through Ms. Eshita Baruah for Shri Gaurang Kanth, Advocate)

ORDER

Mr. P.K. Basu, Member (A)

The applicants are Assistant Audit Officer (AAO) with the Comptroller and Auditor General of India. The hierarchy of posts in their cadre is as follows:



2. Senior Auditors/ Senior Accountants are promoted as Section Officer (SO) only on passing of an examination, namely Section Officer Grade Examination (SOGEx). All the applicants have passed this examination and have been promoted as Assistant Accounts Officers (AAOs) in the Grade Pay of Rs.4800/-. The alleged paradox is that those Auditors/ Clerks, who could not pass the SOGE, got the benefit of third upgradation under Modified Assured Career Progression Scheme (MACPS) in the Grade Pay of Rs.5400/-. Therefore, they started getting higher Grade Pay than the applicants though the applicants are their superiors now and also are obviously more meritorious because they cleared the SOGE. The Pay Band for both is the same namely PB-2 i.e. Rs.9300-34800. So effectively superiors are drawing lesser grade pay than their subordinates. When the applicants sought pay protection i.e. Grade Pay of Rs.5400/- as given to Senior Auditors under MACPS, the respondents gave a vague reply dated 26.11.2014 as follows:

"1. Order for universal implantation of judgment passed by CAT, Bangalore in OA No.489/2011 has not yet been received from the Department of Personnel and Training/ Ministry of Finance.

2. Order for implementation of judgment of CAT, Chennai to similarly placed AAOs is not yet received from the DoPT."

3. Being aggrieved by this order, the applicants have approached this Tribunal with the following prayers:

"8.a) Applicants may be placed in the same grade pay of Rs.5400/- w.e.f. the same date as has

been given to their juniors i.e. Senior Auditors in view of the fact that the OM dated 03.08.2009 has been set aside by the Chennai High Court in W.P. No.18611/2011; and

- b) Pass such other order or orders as this Hon'ble Court deems fit and proper in the interests of justice."

4. The applicants mainly rely on the principle of precedents and for that matter, have cited the following orders/ judgments in their favour:

- (i) Order dated 29.12.2010 in OA Nos.966 and 967 of 2009 of the Madras Bench of the Central Administrative Tribunal in the matter of **S. Prabhu-II and others Vs. Union of India and others**. The issue before the Madras Bench was exactly the same and the Tribunal allowed the OA and directed the respondents to grant the revised pay to the applicants by extending the benefit of MACP Scheme in favour of the applicants by fixing their grade pay at Rs.5400/- from the date on which the said benefit was extended to the private respondents and to disburse the accrued arrears, if any, to the applicants within a period of four weeks....."
- (ii) Order dated 13.07.2012 in OA No.856/2011, **K.K. Vijayan and others Vs. The Principal Registrar, Central Administrative Tribunal** decided by Ernakulam Bench of the Central Administrative Tribunal (CAT). This matter

pertained to parity in fixation of pay as on 1.01.2006 in the pay scale of Assistants in the Tribunal. Clearly the facts of the cited case do not match with the case in hand and this order need not be considered.

- (iii) Order dated 1.02.2013 in OA No.2124/2011, **All India Postal Accounts Employees Association and another Vs. Union of India** decided by the Principal Bench of the CAT. This case pertained to demand for grant of stepping up of pay at par with Senior Accountants who were junior in the cadre of Senior Accountant. The dispute therein is clear from paragraph 3 of the order, which is quoted below:

"3. The grievance of the applicants is that they have been denied benefits under this Scheme on the grounds that they had joined as LDC and had already found two promotions in their cadre, namely, to the post of Junior Accountant and then as Senior Accountant whereas those who had joined the department as direct recruits to the post of Junior Accountant and had found only one promotion to the level of Senior Accountant were given benefit of the ACP Scheme and placed in higher grade. The applicants have contended that due to denial of benefit of ACP Scheme to them many of the direct recruits who are junior to them in the cadre have started drawing more salary than their seniors. The applicants have further stated that all Senior Accountants regardless of the fact whether they are promotees or direct recruits are placed in a single gradation list and their seniority is determined on the basis of their date of appointment as Senior Accountants. The applicants had represented before the respondents but their representations had been rejected."

The Tribunal directed for stepping up of pay of the applicant. It primarily relied on the judgment of the Hon'ble Supreme Court in **Commissioner and Secretary to Government of Haryana and Ors. Vs. Ram Sarup Ganda and Ors.**, 2006 (12) SCALE 440. Again, in this case, the facts are clearly distinguishable as the issue in Ram Sarup Ganda (supra) related to ACP Scheme and the dispute was between direct recruits and promotees. Therefore, the order of the Tribunal in All India Postal Accounts Employees Association (supra) will not act as a precedent in the present case.

- (iv) Judgment dated 27.11.2013 of the Hon'ble Delhi High Court in W.P. (C) No.7421/2013, **Union of India and another Vs. All India Postal Accounts Employees and another**. The matter involved the same posts and the Hon'ble High Court upheld the decision of the Tribunal that the principle of stepping up of pay would be applicable.
- (v) Judgment dated 3.01.2014 of the Hon'ble Delhi High Court in W.P. (C) No.7840/2012, **Sh. Tejbir Singh Dagar and others Vs. Union of India and others**. Here the facts of the case are completely different in as much as this matter related to Railway Protection Force and the controversy related to ACP Scheme. The

applicant specifically referred to para 28 and 29 of the judgment, which read as follows:

"28. The above case was concerned with the cadre of Ministerial staff in the CRPF wherein an anomaly cropped up regarding the juniors in the Administrative Officer, Section Officers posts were getting high salary than their senior ones. The court relied on the decision of the Apex Court reported in 1997 (3) SCC 176 UOI and Others v. P. Jagdish and others, wherein it was held that Article 39 (d) of the Constitution was the guiding factor in interpreting FR-22 and the Principle of stepping up contained in the fundamental rules, comes into play when a junior person in the same post starts receiving salary more than his senior on the same post.

29. In P. Jagdish case (supra), the Apex Court has observed that the principle of Stepping up prevents violation of the principle of "equal pay for equal work". Applying the same principle of law here, a junior in the same posts cannot be allowed to draw salary higher than the seniors because that would be against the ethos of Article 39 (d) of the Constitution which envisages the principle of "equal pay for equal work". Hence granting of stepping up is the only way out to remove the said anomaly, which permits juniors to draw higher salary in the same rank than their seniors. The only way to remove is the stepping up of salary of seniors.

The rules and provisions which allow the said anomaly to exist and prohibit the stepping up are violative of the principles of natural justice and equity; are contrary to Article 39(d) of the Constitution which envisages "equal pay for equal work" and contrary to the principles of law laid down by the Apex Court in its pronouncements."

In this judgment, the Hon'ble High Court directed to upgrade the pay of the petitioners therein from the date their juniors were given the higher pay in the same rank.

- (vi) Judgment dated 19.03.2014 of the Hon'ble High Court of Madras in W.P. Nos.18611 and 18612 of 2011 in which the High Court upheld the order of the Tribunal passed in OA Nos.966 and 967 of 2009, referred to above.
- (vii) Judgment dated 26.03.2014 of the Hon'ble Supreme Court of India in Special Leave to Appeal (Civil) No.4952/2014, **Union of India and another Vs. All India Postal Account Employees and another**, which was filed by the respondents against the order of the Hon'ble Delhi High Court in CWP No.7421/2013. The SLP was dismissed.
- (viii) Judgment dated 19.08.2014 of the Hon'ble Supreme Court in SLP (C) CC No.11103/2014 filed by the respondents against the judgment dated 19.03.2014 of the Hon'ble High Court of Madras, where the Hon'ble Supreme Court passed the following order:
- "Delay condoned.
- We find no merit in this petition. The Special Leave Petition is dismissed. However, the question of law is left open."
- (ix) Order dated 25.02.2015 of CAT, Guwahati Bench in OA 040/00008 of 2014, **Shri Ashim Kumar Biswas and others Vs. The Union of India and others**. This was an order of the third Member when there was difference of opinion

between the Judicial Member and the Administrative Member. The OA was allowed with a direction to the respondents to fix the Grade Pay of the applicants at Rs.5400/- with effect from the date on which such benefit has been extended to the juniors.

- (x) Order dated 23.03.2015 of CAT, Circuit Bench, Ranchi in OA 051/00073/2015, **Anand Kumar Chhawchharia and others Vs. Union of India and others**. Again the same issue had come up and relying on CAT, Guwahati Bench decision in Shri Ashim Kumar Biswas (supra), the OA was disposed of.
- (xi) Order dated 3.08.2015 of CAT, Principal Bench in OA 2823/2015, **Bhim Sen Singh and others Vs. The Comptroller and Auditor General of India and others**. This OA pertained to exactly the same issue and was allowed by the Tribunal in view of the order of the Coordinate Bench at Madras in OA Nos.966 and 967 of 2009, which was upheld by the Hon'ble High Court of Madras in W.P. Nos.18611 and 18612 of 2011.
- (xii) Order dated 14.09.2015 of CAT, Chandigarh Bench in OA 060/00376/2015, **Bhajan Lal and others Vs. Comptroller and Auditor General of India and others**. The dispute was regarding the same cadre and our attention was drawn to

paragraphs 9, 13, 14 and 16 of the order, which are reproduced below:

"9. The aforesaid judgment was upheld by the Hon'ble Madras High Court by a detailed order dated 19.03.2014. The Hon'ble High Court after making detailed discussion came to be conclusion that there was no infirmity in the reasons assigned by the Tribunal for allowing the Original Applications and granting relief to the applicants. The respondents went in appeal in Hon'ble Supreme Court by filing an SLP which was also dismissed by their Lordships on 19.08.2014. Thereafter the respondents passed office order dated 28.08.2014, implementing the judgment.

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13. The issue of stepping up of pay to a senior at par with junior who has started getting higher pay on account of grant of benefits under MACP Scheme has been settled by now in various cases including in O.A.No.842-JK-2007 – Madan Gopal Sharma & others Vs. Union of India & others decided on 17.11.2009. In that case reliance was placed on decision of Hon'ble Apex Court in the case of Ram Sarup Ganda (supra) in which it was held that a senior is entitled to step up his pay as a general rule as and when any junior gets fixed in a pay scale higher to him on account of grant of ACP Scale. Similar view was taken in Harcharan Singh Sudan (supra). Para 14 of the said decision is reproduced as under:

"14. However, one aspect is to be seen. In the case decided by the apex court, the State Government was the applicant and the challenge was against the High Court judgment, which held that the higher pay scale be given to the respondent at par with their juniors whose pay scale became higher on account of the benefit of ACP afforded to them. The appeal was not dismissed but partly allowed and it was declared that the respondents were entitled to stepping up of pay. In other words, there shall only be the stepping up of pay and not the pay scale. The pay scale

in respect of the applicants would remain the same as of date but the pay would be fixed in appropriate stage and if there is no stage to match the pay drawn by the junior, the difference shall be treated as one of personal pay. The pay partly would be compared annually and partly would be maintained in future."

The relevant para of decision in the case of Ashok Kumar Sharma (supra) reads as under:

"With this O.A. stands disposed of and the respondents are directed to step up the pay of the applicant at par with his junior aforesaid and in terms of the directions contained in the case of Harcharan Singh Sudan (supra). It is made clear that the applicant shall be given stepping up of pay only and not the pay scale, as explained above. The pay may be fixed accordingly and arrears be also paid to him within a period of three months from the date of receipt of a copy of this order.

The consistent view taken by this Tribunal has also been upheld by the Hon'ble High Court in CWP No.12894 of 2010, Union of India & others Vs. Central Administrative Tribunal, Chandigarh Bench, Chandigarh decided on 23.07.2010."

14. Now we proceed to deal with the objection raised by the respondents that the applicants are not entitled to the benefit of decision of learned Madras Bench in the case of Prabhu-II (supra) as that decision is not of universal application and per incuriam. In the case of E.S.P. Rajaram and others Vs. Union of India & others, AIR 2001 SC page 581, the controversy related to the scale of pay admissible for Traffic apprentices in the Railway appointed prior to the cut off date. It was observed that the controversy in its very nature is one which applies to all such employees of the Railways. If the judgment of the Tribunal which had taken a view contrary to the ratio laid down by Supreme Court judgment was allowed to stand, then the resultant position would have been that some Traffic Apprentices who were parties in those cases would have gained an unfair and underserved advantage over other employees who are holding the same post.

Such enviable position would not only have been per se discriminatory but could have resulted in a situation which is undesirable for a cadre of large number of employees in a big establishment like that of the Indian Railways. To avoid such a situation the direction impugned was passed. It was absolutely necessary for the same of maintaining quality and fair-play with the other similarly placed employees.

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16. The issue in this case is as to whether the applicants can be granted only stepping up of pay or they are entitled to grant of stepping up of pay with grade pay at par with their junior/subordinates as has been granted by Madras Bench of this Tribunal as upheld upto Apex Court of the country, despite a contrary view taken by another Bench of same Tribunal."

The Tribunal held that the applicants are entitled to the grant of stepping up of pay by grant of Grade Pay of Rs.5400/- .

(xiii) Order dated 30.09.2015 of CAT, Madras Bench in OA Nos.310/01720 and 01721/2014, **Mangala Sundari and others Vs. Union of India and others**. Again the issue is the same and the learned counsel drew our attention to para 6 of the order, which is reproduced below:

"6. Learned Sr. counsel for the applicants argued that as the orders of this Tribunal in 2010 granting stepping up of pay to the applicants therein has been upheld by the Hon'ble Court of Madras and the SLP thereon has been dismissed by the Hon'ble Apex Court, this Tribunal is bound to follow the ratio of those cases. Even if the Hon'ble Apex Court has left the question of law involved in the case open while dismissing the SLP, it does not mean that the question of law could be agitated before this Tribunal. When the

question is left open by the Hon'ble Apex Court, it could only be decided by the Hon'ble Apex Court. In the meantime, the respondents are bound to follow the ratio of the order of this Tribunal which has already been implemented in the case of the applicants therein. The order of the Ernakulam Bench of this Tribunal or the subsequent order of the Madras Bench could not be invoked to reverse the ratio which has attained finality as far as this Bench is concerned. Even otherwise, quoting the order of the Ernakulam Bench dated 22.03.2013 to reject the claim of the applicants is not justified. The Ernakulam Bench in its order had observed that the Madras Bench had not taken into consideration the specific Clause of 20 of the MACP Scheme and to that extent the order of the Madras Bench was per incuriam. However, the decision of the Hon'ble Madras High Court dated 19.03.2014 which confirmed the 29.12.2010 order of the Madras Bench came subsequent to the Ernakulam Bench of this Tribunal. The order of the Madras Bench dated 31.10.2014 quoting the Ernakulam Bench decision to reject the claim of the applicants therein who were similarly placed as the applicants herein did not take into account the confirmation by the Hon'ble Madras High Court of its previous order and therefore, the ratio of the order dated 31.10.2014 cannot override the ratio of the judgment rendered by the Hon'ble High Court of Madras."

The OA was allowed with direction to the respondents to extend the benefits under the MACP Scheme to the applicants and fix their Grade Pay at Rs.5400/- at par with their juniors/ subordinates.

(xiv) Judgment of the Hon'ble Supreme Court in **S.I.**

Rooplal and another Vs. Lt. Governor of

Delhi, (2000) 1 SCC 644.

5. The simple contention of the learned counsel for the applicants is that time and again, this Tribunal, various Hon'ble High Courts and the Hon'ble Supreme Court have upheld the

principle of stepping up of pay and the ratio of the judgments/orders cited above clearly applies in the present case and, therefore, the prayer of the applicants should be allowed.

6. The learned counsel for the respondents point out that in the SLP challenging the order passed by the Madras High Court, the Hon'ble Supreme Court was pleased to dismiss the SLP observing as follows:

"We find no merit in this petition. The Special Leave Petition is dismissed. However, the question of law is left open."

It is thus argued that the question of law is left open and, therefore, the applicants cannot seek benefit of the said judgment. It is argued that it is settled proposition of law that dismissal of a petition in limine i.e. an order dismissing the SLP at the threshold without detailed reasons, would not constitute declaration of law or binding precedent. Such a dismissal does not mean the Court has affirmed the judgment or action impugned thereon.

7. It is further argued that the CAT Ernakulam Bench in OA 1103/2011 vide its judgment dated 22.03.2013 has rejected the claim of the applicants therein for financial upgradation under MACP Scheme at par with their juniors. The three Judges Bench of CAT Ernakulam Bench observed in its judgment dated 22.03.2013 that the CAT Madras while passing its judgment on 29.12.2010 passed in OA 966 and 967/2009 did not consider the

specific para 20 under Annexure – I of MACP Scheme and the same is per incuriam.

8. Moreover it is argued that vide its order dated 31.10.2014 in OA No.951/2011 and others, **Augustine Roy Rozario and others Vs. Union of India and others** with connected cases, when the same issue came up before the Bench, relying on clause 20 of MACP Scheme, the Tribunal held that the applicants therein were not entitled for stepping up of pay at par with their juniors and the OAs were dismissed. Interestingly, Hon'ble Mr. K. Elango, Judicial Member in this case was also a Member in OA No.310/01720 of 2014.

9. It is also contended that Grade Pay of Rs.5400/- will confer a higher pay scale to the applicants which is completely contrary to the MACP Scheme itself. It is next contended that the claim of the applicants that as per FR 22 they are entitled for removal of the anomalies by stepping up of pay at par with their juniors is also not sustainable. The financial upgradation granted to the stagnating officials does not confer any kind of seniority and the pay is personal to them. Hence, FR 22 is not applicable to the applicants for the reasons:

- (i) As per FR 22, for removal of anomaly by stepping up of pay of senior on promotion drawing less pay than his junior is subject to the following:

“(a) both the junior and senior officer should belong to the same cadre and the posts in

which they have been promoted or appointed should be identical and in the same cadre.

- (b) The scales of pay of the lower and higher posts in which the junior and senior officers are entitled to draw pay should be identical.
- (c) The anomaly should be directly as a result of the application of FR 22-C. For example, if even in the lower post the junior officer draws from time to time a higher rate of pay than the senior by virtue of grant of advanced increments or any other account the above provisions will not be invoked to step up the pay of the senior officer."

In the present case, the anomaly is not a result of application of FR 22 (1) (a) (i) and it is not because of promotion. The juniors were never promoted to the posts held by the applicants. The juniors remain in their same post and financial upgradation has been granted under MACP scheme in view of the stagnation. Thus, no promotion is involved in the present case and therefore FR 22 cannot be invoked by the applicants.

10. It has been stated that the FR provisions speak of the pay as a whole and not the Grade Pay in isolation. When the total pay of the applicants are seen, they draw higher pay than their juniors. The respondents also submit that the applicants cannot segregate their Grade Pay from their totally pay and seek parity

on Grade Pay alone. The anomaly, if any, is only in terms with the Grade Pay; none of the applicants are drawing any less salary as a whole in comparison to their juniors. In view of the above, it is submitted that the claim of the applicants is not sustainable and the OA deserves to be dismissed.

11. We have heard learned counsel for the parties, perused the pleadings available on record and the written statements filed by either side and gone through the judgments cited by either side.

12. Clearly, this Tribunal in various cases have passed contradictory orders, some of which have been upheld by the High Courts. However, when the matter came before the Hon'ble Supreme Court, while dismissing the SLP, the Hon'ble Supreme Court left the question of law open. In this regard, we have examined the law settled on 'precedents' and quote some relevant judgments. We refer to the judgment of the Hon'ble Supreme Court in **Bharat Petroleum Corporation Ltd. and another Vs. N.R. Vairamani and another**, JT 2004 (8) SC 171 and specifically to paragraphs 8 and 10 of the judgment where their Lordships have discussed the principle of precedent as follows:

"8. Courts should not place reliance on decisions without discussing as to how the factual situation fits in with the fact situation of the decision on which reliance is placed. Observations of courts are neither to be read as Euclid's theorems nor as provisions of a statute and that too taken out of their context. These observations must be read in the context in which they appear to have been stated. Judgments of courts are not to be construed as statutes. To interpret words, phrases and provisions of a statute, it may become necessary for judges to embark into

lengthy discussions but the discussion is meant to explain and not to define. Judges interpret statutes, they do not interpret judgments. They interpret words of statutes; their words are not to be interpreted as statutes....."

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"10. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. Disposal of cases by blindly placing reliance on a decision is not proper."

Again in **Shikshan Prasarak Mandal Vs. State of Maharashtra**, the Hon'ble Bombay High Court vide its judgment dated 17.09.2009 in Writ Petition No.4835/2002 held as follows:

"11. It is clear from the above dictum that precedents are to be applied with due regard to facts while adhering to the principles of "ratio decidendi". Precedents are described as, "Authorities to follow in determinations in Courts of Justice". Precedents have always been greatly regarded by the Sages of the Law. The Precedents of Courts are said to be the laws of the Courts; and the Court will not reverse a judgment, contrary to many Precedents. Even for a precedent to be binding, it cannot be without judicial decision or arguments that are of no moment. To be a good precedent, it has to be an adjudged case or decision of a court of competent jurisdiction considered as furnishing an example or authority for an identical or similar case or a similar question of law afterward arising. It is the ratio understood in its correct perspective that is made applicable to a subsequent case on the strength of a binding precedent. In a recent judgment, a Full Bench of this court in the case of [State of Maharashtra v. Prashram Jagannath Auti](#), 2007(5) Mh. L.J. 403 : 2007 (5) BCR 847, while referring to the binding precedents, held as under: -

"The ratio is variously defined to be the relation between two magnitudes of the same kind in terms of quality and quantity. Ratio decidendi is the reason for deciding as reasoning is the soul of decision making process. It is formulation of an opinion by the Judge which is necessary in the facts of the case for determination of the controversy. In the case of [C.D. Kamdar v. State of Orissa](#),

(1985) Tax L.R. 2497, expressing its views in relation to the binding precedents, the Court held as under: -

"Mr. R. Mohanty, the learned counsel for some of the petitioners submitted that the power of the Board under [section 90\(7\)](#) of the Act is to levy fees simpliciter. He cited the case reported in (1978) 34 Cut LT 122 (SC) (Laxmidhar Sahu v. Supdt. of Excise Berhampur) in support of the contention. Reading the entire judgment, the contention as raised by Mr. Mohanty, is not spelt out. A Decision is an authority only for what it actually decided and not for what may logically follow from it. Every judgment must be read as applicable to the particular factors proved, or assumed to be proved, since the generality of the expressions, which may be found there, are not intended to be expositions of the whole law but governed or qualified by particular facts of the case in which such expressions are to be found. See AIR 1983 SC 1246. (Sreenivasa General Traders etc v. State of Andhra Pradesh). The case of Laxmikanta Sahu (supra) was considered by the Supreme Court in AIR 1975 SC 1121 : (1975 Tax LR 1569) (Harsankar v. Dy. Excise and Taxation Company). In para 61 at page 1134 it has been observed that in that case it was expressly contended on behalf of the State of Orissa that the levy was a tax and not a fee. The decision being based on a concession did not involve the determination of the point whether the fee levied under [section 90\(7\)](#) of the Act is a fee simpliciter."

"12..... This is extremely pertinent especially in the current era of globalisation where the entire philosophy of society, on the economic front, is undergoing vast changes. Besides this well accepted precept, there are exceptions to the rule of precedent. There are judiciously accepted exceptions to the rule of precedent and they are decisions per incuriam, sub-silentio and stare decisis. These principles explain when and where a precedent, which is otherwise a good law, necessarily need not be accepted in subsequent judgments if it fully satisfies essentials of these exceptions."

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"16. The analysis of the above enunciated principles show that a judgment would be applicable as

precedent to the subsequent case only where ratio decidendi is squarely applicable to the facts of a subsequent case. The Courts or Tribunals are expected to follow the law of precedent subject to well accepted limitations.”

In **Saurashtra Oil Mills Assn., Gujarat Vs. State of Gujarat and another**, (2002) 3 SCC 202, the Hon’ble Supreme Court held as follows:

“Dismissal of a special leave petition without a speaking order would only mean that the Court was not inclined to exercise its discretion in granting leave to file the appeal. It does not attract the doctrine of merger and the view expressed in the impugned order does not become the view of the Supreme Court. The dismissal of the special leave petition by a non-speaking order would remain a dismissal simpliciter in which permission to file the appeal to the Supreme Court is not granted. This may be because of various reasons. It would not mean to be the declaration of law by the Supreme Court.”

In **Union of India and another Vs. Manik Lal Banerjee**, (2006) 9 SCC 643, the Hon’ble Apex Court held as follows:

“D. Precedents – Per incuriam decisions – Judgment rendered without taking into consideration statutory provisions relevant for determining the issue renders the judgment per incuriam.

E. Constitution of India – Art. 141 – Precedent – Dismissal in limine of appeal under Art. 136 – Does not amount to laying down any law within the meaning of Art. 141.”

Therefore, question of law has to be examined *de novo* and earlier orders will not act as precedent.

13. The question of law here is whether principle of stepping up of pay will apply. Therefore, first of all, we examine the issue

of stepping up of pay. It is clear from the rules pertaining to stepping up of pay that stepping up of pay does not mean that in any situation where a superior officer or a senior gets less pay than his subordinate/ junior, his pay has to be brought at par with the junior. There are numerous situations in the government when this may happen. In fact, the DoP&T OM dated 4.11.1993 regarding stepping up of pay cites some such examples and we quote below same as follows:

"23. Instances which do not constitute an anomaly for stepping up of pay with reference to juniors.- Cases for stepping up of the pay of seniors in a pay scale to that of juniors are generally considered if the following conditions are satisfied:-

(a) both the junior and senior officer should belong to the same cadre and the posts in which they have been promoted or appointed should be identical and in the same cadre;

(b) the scales of pay of the lower and higher posts in which the junior and senior officer are entitled to draw pay should be identical;

(c) the anomaly should be directly as a result of the application of FR 22-C. For example, if even in the lower post the junior officer draws from time to time a higher rate of pay than the senior by virtue of grant of advance increments or on any other account, the above provisions will not be invoked to step up the pay of senior officer.

2. Instances have come to the notice of this Department requesting for stepping up of pay due to the following reasons:-

(a) where a senior proceeds on Extraordinary Leave which results in postponement of Date of Next Increment in the lower post, consequently he starts drawing less pay than his junior in the lower grade itself. He, therefore, cannot claim pay parity on promotion even though he may be promoted earlier to the higher grade;

(b) if a senior forgoes/refuses promotion leading to his junior being promoted/appointed to the higher post earlier, junior draws higher pay than the senior. The senior may be on deputation while junior avails of the ad hoc officiating/regular service rendered in the higher posts for periods earlier than the senior, cannot, therefore, be an anomaly in strict sense of the term;

(c) if a senior joins the higher post later than the junior, for whatsoever reasons, whereby he draws less pay than the junior in such cases, senior cannot claim stepping up of pay at par with the junior;

(d) if a senior is appointed later than the junior in the lower post itself whereby he is in receipt of lesser pay than the junior, in such cases also the senior cannot claim pay parity in the higher post though he may have been promoted earlier to the higher post;

(e) where a person is promoted from lower to a higher post, his pay is fixed with reference to the pay drawn by him in the lower post under FR 22 C and he is likely to get more pay than a direct appointee whose pay is fixed under different set of rules. For example, an UDC on promotion to the post of Assistant gets his pay fixed under FR 22C with reference to the pay drawn in the post of UDC, whereas the pay of Assistant (DR) is fixed normally at the minimum under FR 22-B (2). In such cases, the senior direct recruit cannot claim pay parity with the junior promoted from a lower post to higher post as seniority alone is not a criteria for allowing stepping up;

(f) where a junior gets more pay due to additional increments earned on acquiring higher qualifications.

3. In the instances referred to in Para.2 above, a junior drawing more pay than the senior will not constitute an anomaly. In such cases, stepping up of pay will not, therefore, be admissible.

[G.I.,Dept.of Per.& Trg.,O.M.No.4/7/92-Estt.(Pay-I), dated the 4th November, 1993.]”

14. Another simple example would illustrate this. When a direct recruit IAS officer joins as SDM on his first posting, it may happen that the second officer (his subordinate) may draw higher pay as a result of his length of service. That does not reduce the authority or control of the SDM as a superior officer. But he cannot claim stepping up of pay. Therefore, on careful reading of the rule position regarding stepping up of pay and the respective Schemes, one would say that such stepping up of pay can be granted only in specific cases, as would be seen from the circular quoted above. We, therefore, are in agreement with the learned counsel for the respondents that this is a case where principle of stepping up of pay would not apply at all. In fact, even if for arguments sake to apply stepping up of pay, we find that the Courts have only guaranteed stepping up of 'pay' and as pointed out by the respondents total pay drawn by applicants is higher. So, there is no contradiction.

15. The other fact that should be noted is that MACP is an anti-stagnation measure. If a government servant does not get regular promotions to higher posts, then in order to ensure that at least his pay scale (now grade pay) goes up, he is given upgradation in pay scale (now grade pay) without change in his designation and duties. Again in such a situation, it may happen that a junior draws higher pay as a result of this but in no way, it would change the authority of the superior. Moreover, MACP is an 'upgradation' not a 'promotion' as argued by the learned counsel for the respondents. Also, the respondents have clarified that the total pay of the applicants is not less than the

pay of their subordinates. It is only the Grade Pay which is different as a result of the MACP Scheme. It is for this reason that para 20 of the MACP Scheme, cited above, specifically provides for such a situation as follows:

"20. Financial upgradation under the MACPS shall be purely personal to the employee and shall have no relevance to his seniority position. As such, there shall be no additional financial upgradation for the senior employees on the ground that the junior employee in the grade has got higher pay/ grade pay under the MACPS."

16. Therefore, we are of the considered opinion that the claim of the applicants is completely misplaced relying on application of wrong principles which would, in fact, result in double benefit because they would get the benefit of promotion as well as upgradation, which was never the spirit of the MACP Scheme. We, therefore, find no merit in this OA and dismiss the same.

17. However, while disposing of this matter, we came across an interesting fact, which is para 20 of the counter affidavit, which reads as follows:

"20. That the Accountants (Entry Grade of Rs.2800/-) who did not pass S.O.G.E. examination and who got their promotions as Senior Accountants (Grade Pay Rs.4200/-), thereafter got their second financial upgradation under ACP Scheme on completion of 24 years to pre-revised pay scale of Rs.6500-10500 (replaced with GP 4800 w.e.f. 1.1.2006) and subsequently, were granted third financial upgradation to GP 5400 on completion of 30 years of service."

18. What is not clear to us is why the second financial upgradation on completion of 24 years of service was in PB-2

with Grade Pay Rs.4800/- with effect from 1.01.2006? This is so for two reasons:

- (i) The replacement scale of Rs.6500-10500 is PB-2 with Grade Pay Rs.4600/-; and
- (ii) MACP upgradation has to be in the hierarchy of pay band/ Grade Pay and not hierarchy of promotional post. The next hierarchy of Grade Pay after 4200/- is 4600/-.

19. Therefore, on both counts it appears that second upgradation should have been in the Grade Pay of Rs.4600/-, in which case the third upgradation would be in the Grade Pay of Rs.4800/-. In such a situation, the paradox mentioned right in the beginning of this order vanishes. Since this is not an issue before us, we do not pass any direction on this. However, the respondents, if they so desire, may revisit this issue.

(P.K. Basu)
Member (A)

(Syed Rafat Alam)
Chairman

/dkm/