

Central Administrative Tribunal Principal Bench, New Delhi

O.A. No.497/2015

Order reserved on 21st July 2017

Order pronounced on 1st August 2017

Hon'ble Mr. K.N. Shrivastava, Member (A)

1. Dileep Kumar Jain (Chief Engineer)
s/o late Mr. R P Jain
r/o D-7/134, Vasant Kunj
New Delhi
2. Ramesh Kumar (Chief Engineer)
s/o late Mr. B Prakash
r/o G-53, Nivedita Kunj, Sec 10
R K Puram, New Delhi
3. Dinesh Chandra (Chief Engineer)
s/o Mr. Prakash Chandra
r/o A-5, NRPC Colony
Katwaria Sarai
New Delhi – 110 016
4. K N Garg (Member)
s/o Mr. C B Narain
r/o KJ-38, Kavi Nagar
Ghaziabad, UP 201002
5. Prabhat Mohan (Chief Engineer)
s/o late Mr. Hari Mohan
r/o C-317, Pragati Vihar Hostel
Lodhi Road, New Delhi – 110 003
6. Pankaj Batra (Chief Engineer)
s/o Mr. A C Batra
r/o 111/3C2, Silver Oaks Apts.
DLF City, Phase I, Gurgaon – 122002
7. Mam Chand (Chief Engineer)
s/o Mr. Sumer Chand
r/o A-406, Sector 47
NOIDA, UP

..Applicants

(Mr. M K Bhardwaj, Advocate)

Versus

Union of India & others through

1. The Secretary
Govt. of India
Ministry of power
Sharam Shakti Bhawan, Rafi Marg
New Delhi
2. Central Electricity Authority
Through its Chairman
Govt. of India, Ministry of Power
Sewa Bhawan, R K Puram
New Delhi

..Respondents

(Mr. Gyanendra Singh, Advocate)

O R D E R

Through the medium of this O.A., filed under Section 19 of the Administrative Tribunals Act, 1985, the applicants have prayed for the following main reliefs:-

“i) To declare the action of the respondents in reducing the Transport Allowance from Rs.7000/- + DA to Rs.3200/- + DA as illegal arbitrary and unconstitutional and issue directions for restoring the Transport Allowances Rs.7,000 with all consequential effects.

ii) To quash and set aside the impugned order dated 31.12.2014 and 28.02.2014.

iii) To declare the action of respondents in reducing the TA arbitrarily and effecting recoveries as illegal and arbitrary.”

2. Brief facts of the case are as under:-

2.1 The applicants at relevant point of time were serving as Chief Engineer in Central Electricity Authority (CEA) in Pay Band – 4 - `37400-67000 with Grade Pay of `10000/-. In terms of Annexure A-4 O.M dated 29.08.2008 issued by the Department of Expenditure, the officers drawing

Grade Pay of `10000 & `12000/- and those in the HAG + scale, who are entitled to the use of official car in terms of O.M. No.28.01.1994, shall be given the option to avail themselves of the existing facility or to draw the transport allowance @ `7000/- per month + DA.

2.2 The Department of Personnel & Training (DoPT), following the implementation of 6th Central Pay Commission (CPC) recommendations, issued O.M. dated 24.04.2009 (Annexure A-5), which provides for grant of non-functional upgradation for officers of Organized Group 'A' Services in Pay Band – 3 & 4. The order reads as under:-

“Subject: Non-Functional upgradation for Officers of Organised Group 'A' Services in PB-3 and PB-4

Consequent upon the acceptance of the recommendations of the Sixth Central Pay Commission, the following orders are issued:-

- (i) Whenever an Indian Administrative Services Officer of the State of Joint Cadre is posted at the Centre to a particular grade carrying a specific grade pay in Pay band 3 or Pay Band 4, the officers belong to batches of Organised Group A Services that are senior by two years or more and have not so far been promoted to that particular grade would be granted the same grade on non-functional basis from the date of posting of the Indian Administrative Service Officers in that particular grade at the Centre.
- (ii) Grant of higher scale would be governed by the terms and conditions given in Annex-I.
- (iii) Appropriate amendments in the Service Rules may also be carried out.
- (iv) Establishment Division of this Department will issue orders from time to time, in consultation with the Establishment Officer, intimating the batch of the officers belonging to the Indian Administrative Service who have been posted at the Centre in the various grades of PB-3 and PB-4 as well as the date of posting of the first officers belonging to the batch.

2. Grant of higher scale (i.e. pay band and/or grade -pay) under these instructions would be w.e.f. 1.1.2006, wherever due and admissible.”

2.3 The Ministry of Power wrote to CEA vide letter dated 16.07.2014 that excess transport allowance paid to the Directors in CEA drawing Grade Pay of `10000/- is required to be recovered as per the advice of DoPT in its O.M. dated 06.02.2014. The list contained the names of the officers of CEA from whom excess recovery was ordered. All these applicants are included in the list. The order of Ministry was conveyed to all the officers from whom the recoveries were to be made vide impugned CEA O.M. dated 28.02.2014 (Annexure A-1B). Thereafter individual letters for recovery were sent to the concerned officers; one such letter dated 31.12.2014 sent to respondent No.2 is at Annexure A-1.

Aggrieved by the impugned Annexures A-1A & A-1B letter/O.M., the applicants have filed this O.M. praying for the reliefs, as indicated in paragraph (1) (supra).

3. The applicants have pleaded following important grounds in support of their claim:

3.1 The impugned orders are in violation of principles of natural justice, as no notice was served on them and the object of issuance of O.M. dated 24.04.2009 (Annexure A-5) of DoPT, vide which the Organized Group ‘A’ Services were granted upgradation in the higher grade at par with Indian Administrative Service (IAS) officer posted at the Center to a particular grade and carrying specific Grade pay, in view of the seniority of officers of Organized Group ‘A’ Service.

3.2 The action of the respondents to withdraw the enhanced rate of transport allowance @ `7000 + DA PM would defeat the very purpose on grant of non-functional grade to Organized Group 'A' Services as per DoPT O.M. dated 24.04.2009. Paragraph 8 of Annex I appended with *ibid* O.M. clearly states that "However at the time of promotion, the pay in the grade will not be fixed again for officers who have been granted up-gradation under these orders".

3.3 The action of the respondents has caused discrimination amongst the equally placed officers of various Services drawing Grade Pay of `10000/-.

The respondents have failed to notice that the Chief Engineers are in the same pay scale and Grade Pay as that of a Joint Secretary to the Government. Hence, decision taken to withdraw the facility of transport allowance @ `7000/- + DA per month to the non-functional upgraded officers is not justified.

3.4 Hon'ble Supreme Court in the case of **Syed Abdul Qadir v. State of Bihar** (2009) 3 SCC 475 has clearly held that an official concerned cannot be punished by effecting recovery of the amount paid without misrepresentation of the employee concerned or wrong interpretation of any rule or instructions.

3.5 Hon'ble High Court of Delhi in the case of **Union of India & another v. J S Sharma & others** (W.P. (C) No.5555/2013) decided on 04.09.2013 has granted the benefits of **Syed Abdul Qadir** (supra).

4. Pursuant to the notice, the respondents entered appearance and filed their counter reply, in which they have broadly made the following averments:-

4.1 The applicants were given non-functional pay upgradation to the Grade Pay of `10000/- Pay Band – 4 (`37000-67000). They were allowed to draw transport allowance @ `7000/- + DA per month. The internal Audit audited the office of CEA and advised the CEA to stop disbursing transport allowance to the Directors of CEA drawing non-functional Grade Pay of `10000/- in Pay Band – 4 and transport allowance @ `7000/- + DA per month. In this regard, the Audit had also referred to the advice of Department of Expenditure in their O.M. dated 19.10.2013.

4.2 The Hon'ble High Court of Delhi in its judgment dated 04.09.2014 in **J S Sharma** (supra), upholding the order of the Tribunal in O.A. No.363/2012, had said that Group 'A' officers, who are at the level of Joint Secretary or above, are only entitled for transport allowance @ `7000/- + DA per month and not those Group 'A' officers, who have got non-functional upgradation to the Grade Pay of `10000/- in Pay Band – 4.

4.3 The CEA, taking note of all the legal positions in the case of **Syed Abdul Qadir** (supra) that the recovery of excess transport allowance paid to the applicants cannot be a recovery, decided to rectify the mistake and ordered payment of correct transport allowance @ `3200/- + DA per month from October 2013 onwards. Since representations have been received

against the recovery of the excess transport allowance paid, the CEA took up the matter with Ministry of Power, who, in consultation with DoPT, informed, vide letter dated 16.07.2014, that recovery proceedings may be initiated in respect of serving officers as per the instructions contained in DoPT O.M. dated 06.02.2014 (Annexure R-3).

4.4 The CEA, vide memorandum dated 14.11.2014, conveyed the decision to the competent authority to effect the recovery of excess amount of transport allowance paid to the officers. A separate communication vide letter dated 18.12.2014 was also sent to all the officers, who had retired.

5. The applicants filed their rejoinder to the reply filed on behalf of the respondents, in which broadly the averments made in the O.A. were reiterated and special emphasis has been made on the judgment of Hon'ble High Court of Delhi in **J S Sharma** (supra).

6. I have considered the arguments of learned counsel for the parties and have also perused the pleadings and documents annexed thereto.

7. From the records, it is quite apparent that not only in the CEA but also in other Ministries of the Government, all the officers, who were granted Grade Pay of `10000/- in Pay Band – 4 and above, were allowed to draw transport allowance @ 7000 + DA thereon in terms of Annexure A-4 O.M. dated 29.08.2008 of the Department of Expenditure. The Audit, however, pointed out that only officers in the Grade Pay of `10000/- & `12000/- and in HAG + scale, and who are otherwise entitled for official

car, can draw transport allowance of `7000/- + DA in case they choose not to avail the facilities of availing official car. In the present case, the applicants have been granted non-functional upgradation to the Grade Pay of `10000/- in Pay Band – 4 in terms of DoPT O.M. dated 28.01.1994, but they were not placed at the level of Joint Secretary posts. It is well known that there is a process of empanelment involved for empanelling officers of various Services to the grade of Joint Secretary, *albeit* the Joint Secretary post also carries the Grade Pay of `10000/- in Pay Band – 4. The HAG + level officers of all Services are, however, entitled for official car. Indisputably, the applicants had not been empanelled as Joint Secretary when they were granted the Grade Pay of `10000/- in Pay Band – 4. Thus, they were not entitled for transport allowance @`7000/- + DA per month. They were only entitled to the transport allowance @`3200/- + DA per month in accordance with Annexure A-4 O.M. dated 29.08.2008 of the Department of Expenditure. The Audit was well justified in pointing it out, which ultimately led to the CEA – respondent No.2, seeking refund of excess payment made to them towards transport allowance.

8. It is pertinent to note that the applicants have not indulged into any act of misrepresentation for claiming the higher amount of transport allowance, to which they were, in fact, not entitled. The CEA, in the case of the applicants, misinterpreting the provisions of O.M. dated 29.08.2008 of

Department of Expenditure had allowed the applicants to draw higher transport allowance @ `7000/- + DA per month.

9. This issue of excess payment of transport allowance has been considered by the Hon'ble High Court of Delhi in the case of **J S Sharma** (supra). The observations made by the Hon'ble High Court in paragraph 4 of the judgment dated 04.09.2013 are very relevant and are extracted below:-

“4. After hearing the parties in the proceedings before it, the Tribunal found that according to the OM No. 21(1)/97/E.II(B) dated 3rd October, 1997 as amended by OM dated 22nd February, 2002, only, those officers (at the level of Joint Secretary) who had been provided wpc 5555.13 Page 3 with the facility of staff car and who had the option to either avail of the facility or to switch over the payment of transport allowance were entitled to the allowance of rate of Rs.7,000/- per month + DA thereon. It observed that merely because the respondent officers were in the grade pay of Rs.10,000/- - by virtue of the non functional upgrade - they could not claim all the benefits or allowances entitled to Joint Secretary and above and that the said benefit of transport allowance was available only to those officers who are promoted to Joint Secretary grade on regular basis. It further observed that a perusal of the OM dated 24th April, 2009 would reveal that the upgrade and consequential grade pay of Rs.10,000/- would not bestow any right to the officers to claim promotion or deputation benefit and that the same is personal to the officer. Accordingly, it held that the Grade Pay Officers would not be entitled to the transport allowances.”

10. The judgment in **J S Sharma** has analyzed the ratio of law laid down by Hon'ble Supreme Court in **Syed Abdul Qadir v. State of Bihar** (2009) 3 SCC 475 and **Chandi Prasad Uniyal & others v. State of Uttarakhand & others** (2012) 8 SCC 417. In **Chandi Prasad Uniyal**, the ratio of **Rafiq Masih (White Washer)** (supra) has also been

discussed and analyzed. Paragraph of judgment in **J S Sharma** (supra), in this regard, is extracted below:-

“9. Furthermore, this court is of the opinion that the case of the grade pay officers falls in the exceptional category - which exception even the Chandi Prasad Uniyal case recognized the existence of - that would have the benefit of the ratio of Syed Abdul Qadir (supra):

"57. This Court, in a catena of decisions, has granted relief against recovery of excess payment of emoluments/allowances if (a) the excess amount was not paid on account of any misrepresentation or fraud on the part of the employee, and (b) if such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous.

"58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess..."

11. The petitioner Shri J S Sharma had first approached this Tribunal in O.A. No.363/2012, in which identical issue was involved. For better appreciation, the issue involved in O.A. No.363/2012 is extracted below:-

"Whether Group "A" officers who had been granted Grade Pay of Rs.10,000/- under Non- Functional Upgradation Scheme, were entitled for drawing the Transport Allowance at the enhanced rate of Rs.7,000/- + DA on par with Joint Secretary level officers in the Government of India, who are also in the Grade Pay of Rs.10,000/-."

The Tribunal finally vide order dated 05.02.2013 held that no recovery can be made towards the transport allowance already paid.

12. The Hon'ble High Court finally vide order dated 04.09.2013 upheld the aforesaid order of the Tribunal and thus recovery of transport allowance was not permitted.

13. In the present case also, I find that the applicants have not misrepresented any fact, nor they were in the knowledge that they were drawing transport allowance in excess of their entitlement, and hence I am of the view that their case is fully covered by the judgment in **J S Sharma** (supra).

14. In the conspectus of discussions in the foregoing paragraphs, the O.A. is allowed. Impugned Annexure A-1 order dated 31.12.2014 and A-1B order dated 28.02.2014 are quashed and set aside. Accordingly, the interim order dated 05.02.2015 passed by this Tribunal, whereby recovery was stayed, is made absolute.

No order as to costs.

(K.N. Shrivastava)
Member (A)

/sunil/