

**CENTRAL ADMINISTRATIVE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI**

O.A No.1422/2013

**Reserved On:17.04.2017
Pronounced On:20.04.2017**

Hon'ble Mr. V. Ajay Kumar, Member (J)
Hon'ble Mr. P.K. Basu, Member (A)

Kusum Lata Nayar
W/o Late Shri U.S. Nayar
R/o Railway Flat 76-B/1
Ashok Vihar, Phase-III
Delhi-110052.

... Applicant

(By Advocate: Shri Ajesh Luthra)

Versus

1. Chairman Railway Board, Ministry of Railways
Rail Bhavan, New Delhi-110001.
 2. G.M., Northern Railway,
Baroda House, New Delhi-110001.
 3. C.A.O./Const. Northern Railway
Kashmeri Gate, Delhi 110006.
 4. C.S.T.E., (Project) Northern Railway, Baroda House
New Delhi-110001.
 5. Dy. C.S.T.E./P(S.W.), Northern Railway
2nd Floor New Exch. Building, D.R.M., Office,
New Delhi.
 6. F.A. & C.A.O./Const., Northern Railway
Kashmeri Gate, Delhi 110006.
- Respondents.

(By Advocate: Shri V.S.R. Krishna)

ORDER

By Hon'ble Mr. P.K. Basu, Member (A)

The applicant was selected for the post of Stenographer in the scale of Rs.330-560 (Rs.1200-2040 revised) through the Railway

Recruitment Board (RRB) against the regular Open Line vacancy of the Northern Railway. She was given an offer of appointment vide letter dated 23.01.1986. Vide letter dated 27.01.1986, the applicant was posted in Construction Organisation. The Construction Organisation posted the applicant as Stenographer in the scale of Rs.330-560. It is stated by the applicant that no option was sought from the applicant for posting in Construction Organisation.

2. The Construction Organisation post was an ex-cadre post.
3. The applicant continues in the Construction Organisation ever since.
4. In the Construction Organisation, the applicant was promoted as Steno in Grade Rs.425-700 with effect from 24.09.1986 on ad hoc basis and was allowed to draw Rs.425/- per month, i.e., the minimum in the scale.
5. After the 4th Pay Commission, the pre-revised scale of Rs.425-700 was revised to Rs.1400-2600 with effect from 01.01.1986 as per Railway Board's letter dated 25.06.1990.
6. In the combined seniority list of Stenographers Grade Rs.2000-3200, Rs.1600-2660 and Rs.1400-2300 circulated on 12.11.1991, the

name of the applicant appears at Sl. No.35 against the scale Rs.1400-2600.

7. Applicant's lien was fixed, ipso facto, in the Headquarters Division of Northern Railway with her name shown at Sl.No.17 of Stenographer Grade Rs.330-560 (Rs.1200-2040 revised) in September, 1987. Later on, she was shown at Sl.No.76 of the seniority list notified on 10.04.1988. She got her regular promotion in the cadre of Stenographer after being subjected to suitability test conducted by Northern Railway.

8. In the seniority list of Stenographers Grade Rs.1400-2600 of the Headquarters Office, New Delhi, as on 01.09.1994, i.e., Open Side Line of the Northern Railway, the applicant appears at Sl.No.63. In column no.4 thereof, promotion in this grade as on 21.09.1986 is also indicated. The applicant states that this shows that cadre controlling authority at the Headquarter was aware of the fact of her continued officiating in scale Rs.1400-2600/revised Rs.5500-9000 in the Construction Organisation since 21.09.1986.

9. The applicant having been found suitable for promotion to the post of Steno in Grade Rs.1400-2600 on Open Line Side in her parent cadre on 20.06.1991, she stood regularised in the post of Steno in the said scale in which she was officiating on ad hoc basis hithertofore since 24.09.1986 on the project side of Construction Organisation.

10. After working for about 9 years, the applicant was further promoted to work as Confidential Assistant in the scale of Rs.1640-2900 and her pay was fixed at Rs.1880/- per month with effect from 18.10.1995. It is mentioned by the applicant that promotion in this grade of Rs.1640-2900 after 5 years of regularisation in the lower scale of Rs.1400-2600 is in the channel of promotion.

11. With effect from 01.01.1996, as a result of 5th Pay Commission, as the applicant was drawing the pay at Rs.1880/- as on 18.10.1995, her pay was fixed at Rs.5850/- in the replacement scale of Rs.5500-175-9000 from 01.01.1996.

12. The annual increment was accruing to the applicant on 1st of October every year and she drew the annual increment as such on 01.10.1997 onwards till 01.10.2007 at which stage applicant's pay was Rs.7950/-.

13. As per the instructions dated 28.09.1999 (RBE No.225/1999) cadre of Stenographers underwent restructuring and the existing post of Stenographer in the pre-revised scales of Rs.1200-2040, Rs.1400-2600 and Rs.1640-2900 were revised to be pooled together and restructured in the ratio of 40:40:20.

14. In view of the above order, the Northern Railway approved the promotion of the applicant as Confidential Assistant in the Grade Rs.5500-175-9000 retrospectively with effect from 23.02.2000 in the parent cadre as per Notice dated 21.06.2002. She was also directed to be repatriated to the Headquarter Office. After reconsideration, the Headquarter Division decided to continue to utilise her services on the project side and regularised her services as Confidential Assistant in the scale Rs.5500-9000 as per Notice issued on 16.10.2002.

15. On receipt of 6th Pay Commission recommendation, the pay scale of Rs.5500-9000 was revised and replaced by Pay Grade Rs.9300-34800 (PB-2) + Rs.4200 (Grade Pay) with effect from 01.01.2006.

16. As on 01.10.2005, applicant's pay was determined to be Rs.7600/-.

17. Based on the 6th Pay revision pay fixation formula, applicant's pay was revised to Rs.18340/- per month with effect from 01.01.2006. Thereafter, her pay was fixed giving annual increment @ 3% of the revised basic pay as on 1st of July of each year and ultimately her pay was fixed at Rs.20060/- with effect from 01.07.2008.

18. The following table indicates the various posts/promotions the applicant went through after her appointment:-

Date	Post	Scale	Parent Office (Open line)	Construction Organization
28.01.1986	Appointed as Stenographer	Rs.330-560 Rs.1200-2040 (Revised)	Through RRB, Chandigarh in the office of CAO/Const., Delhi (Respondent No.3) vide Office order dated 11.09.1985	
24.09.1986	Promoted to the post of Stenographer (CA) on ad hoc basis	Rs.425-700 Rs.1400-2600 (Revised)		Construction Organization of Northern Railway
18.07.1991	Promoted as CA on regular basis	Rs.1400-2300 Rs.5000-8000 (Revised)	In the parent office (open line)	
18.10.1995	Promoted as CA on ad hoc basis	Rs.1640-2900 Rs.5500-9000		Construction Organization
23.05.2000 (vide notice dated 16.10.2002)	Promoted on regular basis as CA in higher scale	Rs.5500-9000	In the parent office (Open Line)	
01.09.2008	Financial upgradation under MACP Scheme vide Notice dated 23.02.2010	Rs.9300-34800 with Grade Pay of Rs.4600	In the parent office (Open Line)	

19. The applicant is aggrieved as without any notice or intimation, in the month of September, 2009, her pay was reduced from Rs.7600/- per

month to Rs.7250/- in the pre-revised scale of Rs.5500-9000 with effect from October, 2005. As a result, the applicant stood reverted by 3 stages and pushed down to the position as obtaining in October, 2003 when her pay was fixed at Rs.7250/-. Pay slip for October, 2003 at Annexure A-29.

20. Consequently, her pay as on 01.01.2006 was considered as Rs.7250/- and thereafter granting annual increments on 1st of July each year, her salary was fixed at Rs.19340/- as on 01.07.2008 instead of Rs.20060/- fixed earlier and resultantly respondents recovered a sum of Rs.23,344/-.

21. The applicant made a representation on 25.09.2009. She was informed vide letter dated 23.10.2009 that revised pay fixation was accurate (Annexure A-1). Along with this letter, photo copy of pay fixation and pay slips were also enclosed [Annexures A-1(a) and A-1(b)]. A notice was also issued on 30.04.2010 by Northern Railway intimating financial up-gradation in PB-2 + Grade Pay Rs.4600/- (MACP) based on the revised pay.

22. The applicant was also informed vide letter dated 29.01.2013, which is a speaking order in consequence of her representation dated 03.03.2010 and directions of this Tribunal vide order dated 15.05.2012

in OA No.1824/2010, that action taken for refixing her pay in accordance with the extant rules has been agreed to by the Railway Board also and it is in order. The OA had been disposed of with the following directions:-

“(a) The respondents are directed to refund a sum of Rs.23,344/-, recovered from the applicant in respect of payments for the past periods, made on account of alleged erroneous fixation made by them without any fault or misrepresentation of the applicant. This should be done within a period of four weeks from the date of receipt of a copy of this order.

(b) The respondents are directed to re-consider the request of the applicant, within a period of eight weeks from the date of receipt of a copy of this order, for re-fixation of her pay (as made in her representation dated 03.03.2010), keeping in view the decision of the High Court of Delhi in **Union of India v. Girwar Singh** (supra) and decision of this Tribunal in **Jagdish Singh** (supra) and the Judgement of the Hon’ble Apex Court in **Badri Prasad** (supra), and Railway Board’s Circulars on the subject, after consultation with the Railway Board, and then issue appropriate orders as may be warranted”.

The Tribunal had directed the respondents to reconsider the request of the applicant keeping in view the decision of the Hon’ble High Court of Delhi in ***Union of India and Others Vs. Girwar Singh*** decided on 01.07.2008 in W.P. (C) No.1256-1258 of 2006, decision of this Tribunal in ***OA No.2698/2008 – Jagdish Singh Vs. Chairman Railway Board, GM, Northern Railway and Others*** decided on 02.12.2010, judgment of the Hon’ble Apex Court in ***Badri Prasad Vs. U.O.I. 2005 (4) SCALE 72*** and Railway Board’s Circulars on the subject. Through the letter dated 29.01.2013, the applicant was

informed that the refixation of the pay was in order and the applicant's representation was disposed of. It is alleged by the applicant that while rejecting her prayer vide letter dated 29.01.2013, the respondents had not considered the above judgments mentioned by the Tribunal.

23. The applicant is aggrieved by the above quoted order and has sought the following reliefs:-

“(1) The impugned refixation of pay as envisaged, being uncalled for, unjustified, unsustainable, as in Annex.A-1 dated 23.10.2009, alongwith Refixation sheets at Annex. AI/a & A-I/b and Annex-A-II dated 30.04.2010, which is an offshoot of Annex.A-I, and order dated 29.01.2013, A-III, which is only a blatant attempt to justify the wrongful action, which has no legs to stand upon, in face of the decision of the Girwar Singh case in which the issue of protection of pay in continued adhoc promotion, on regularization in the regular cadre, does not require refixation by downgrading in the lower pay scale prior to the period of regularization and as such impugned herein Annex.A-III is absolutely misconceived, bad in law as also in facts, be set-aside and quashed.

(2) The Respondents may be directed to restore the pay of the applicant as fixed in grade in Scale 5500-9000(RSP) effective from 1.1.96, as worked out with reference to the pay of the applicant as per para 4-16&4-17, which required no erosion and further pay in the revised structure in revised pay Band in PB-2 Rs.9300-34800+4200 Gr. Pay as already reckoned at Rs.18340/- vide para 4-23 on 1-1-2006, Rs.18900/- w.e.f. 1-7-2006 vide para 4-24, Rs.19470/- w.e.f. 01-7-2007 as in para 2-25, and Rs.20060/- w.e.f. 01-7-2008, as in para 4-26 and so on be restored as these were correctly fixed in accordance with Rules at the relevant point of time and accurately drawn throughout and the case of the applicant is fully covered by the decision in the case of Girwar Singh (supra), since there was no error or mistake in the fixation as originally done, it required no rectification under the veil of refixation as misconceived in terms of impugned orders 23-10-2009 Annex.A-I, Impugned order dated 30-4-2010 and last order dated 29-1-2013 impugned as Annex.A-III.

(3) Respondents may be directed to pay interest at 12% P.A., on the amount of Rs.23344/- illegally recovered in September 2009 and refunded on 9-12-2012 i.e. after a lapse of over 3 years time and the applicant deprived of the use of that money which remained in the hands of the respondents unlawfully.

(4) Respondents may be further directed to release forthwith the amount of wages admissible to the financial upgradation in next scale Rs.9300-34800+4600 Gr. Pay at Rs.21070/- w.e.f. 01-7-2009 as indicated in para 4-33 and so on and consequently the extent of wages less drawn to the extent of Rs.89043/- as computed in para 4-74 (pertaining to the period 1-9-2008 to 31st March 2013) illegally withheld be released with interest at 12% P.A. till the date of payment.

(5) Respondents having forced the respondents to second round of avoidable Litigation, mental agony, financial hardship, be burdened with exemplary heavy cost.

(6) Respondents have deliberately, and knowingly filed a wrong Compliance affidavit in the Tribunal on 30-1-2013. In CCP.No.614/2012, in O.A.1824/2010, with the avowed object of being scared of their personal appearance & to secure discharge of Notices for non Compliance of Tribunal Orders of 15-5-2012, In O.A. No.1824/2010, despite successive adjournments, and thereby misled the court that their orders/directions were complied with (Which in fact were otherwise not complied with in letter and spirit) as is evident from the facts, circumstances as stated and discussed in detail in this O.A. and as such have committed offence of perjury, for which they may be proceeded with according to law.

(7) Any other or further relief, this Hon'ble Tribunal may deem fit & proper in the facts & circumstances of the case".

24. The learned counsel for the applicant stated that it is necessary for the Tribunal to look into the earlier direction of the Tribunal to the respondents and the case laws referred to in the order dated 15.05.2012. He proceeded to elaborate on the same:

- (i) **Badri Prasad and Others Vs. U.O.I. & Others** 2005 (11) SCC 304. In this case the applicants were daily-rated employees on different posts of Khalasi, Gangman etc. between the years 1918 to 1982. They were given temporary status on the post in which they were working. They continuously worked on the post of Storeman, which is a Group 'C' post, for long periods till they were reverted by the impugned order dated 29.07.1999 from Group 'C' post of Storeman to Group 'D' post of Khalasi in Open Line. The applicants claimed that they should be regularised as Group 'C'. The Tribunal had partly allowed the claim of the applicants by directing reconsideration of their cases if found fit after screening. The Union of India challenged the order made by this Tribunal in granting partial relief to the applicants before the Hon'ble High Court of Delhi. The Hon'ble High Court allowed the petition filed by the Union of India and set aside the order passed by the Tribunal. However, it observed that the case of the applicants may be considered for regular appointment along with other eligible candidates in terms of the Recruitment Rules after giving them the benefit of relaxation of age keeping in view the fact that they had worked for such a long time. After examining the judgments of the Hon'ble Supreme Court in **Union of India Vs. Vijay Prakash** SLP No.12947/1993 decided on

25.10.1996 and ***Inder Pal Yadav Vs. U.O.I.*** (2005) 11 SCC

301, the Hon'ble Supreme Court directed as follows:-

“15. Without disturbing, therefore, orders of the Tribunal and the High Court the appellants are held entitled to the following additional reliefs. The pay last drawn by them in group 'C' post shall be protected even after their repatriation to group 'D' post in their parent department. They shall be considered in their turn for promotion to group 'C' post. The period of service spent by them on ad hoc basis in group 'C' post shall be given due weightage and counted towards length of requisite service, if any, prescribed for higher post in group 'C' If there is any bar of age that shall be relaxed in the case of the appellants.

16. With the above modifications in the directions of the Tribunal and the High Court, the appeal partly succeeds. In the circumstances the parties shall bear their own costs”.

(ii) **Girwar Singh Vs. U.O.I. & Others (Railways) – OA**

No.2786/2003 order dated 26.07.2005. In this case the

applicant was screened as a regular Gangman on 27.03.1970 and

promoted on ad hoc basis as Mason in the grade of Rs.260-400 on

12.08.1970. While working in the Construction Organisation and

retaining his lien in Open Line, the applicant was also promoted

on ad hoc basis as highly skilled Mason in the grade of Rs.1200-

1800 on 14.06.1988. However, in the parent cadre at New Delhi

Division applicant was regularised as Mason in the grade of

Rs.950-1500 on 27.06.1990. The applicant was issued a show

cause notice on 30.01.2002 to fix his pay as per Railway Board's

instructions dated 17.08.1998, as while being promoted on ad hoc

basis in ex-cadre of Construction Organisation, allegedly his pay

was erroneously fixed in the ex-cadre lower grade whereas the

same should have been fixed as per PS 9824. Applicant had made

representation to respondents as his juniors in the parent cadre had been promoted in the grade of Rs.1200-1800. Applicant retired on superannuation from Construction Organisation as ad hoc Mason on 31.08.2003 in the scale Rs.4000-6000. Apart from relying upon other judgments of the Hon'ble Apex Court, the applicant relied on **Badri Prasad Vs. U.O.I. 2005 (4) SCALE 725** to show that in case of ad hoc promotion in Construction Organisation, pay of concerned employee has to be protected in Group 'C' with all benefits of pay protection, counting service towards higher post etc.

The case of the respondents basically was that the applicant was promoted as Highly Skilled Mason on ad hoc basis though his name in the parent cadre was incorporated at Sl.No.41 of the seniority list of Mason, the fixation of pay on account of ad hoc promotion was not correctly done leading to excess pay and allowances and as a consequence recovery was made.

The Tribunal allowed the OA relying on **Badri Prasad** (supra) and observations in **OA No.325/1998 – Ranbir Singh Vs. U.O.I** decided on 17.10.2000. We quote below the concluding paras of the order for ready reference:-

“21. Here is a case where applicant though regularised as Mason in his parent department and juniors had been promoted to Highly Skilled Mason Grade, yet applicant has not been promoted before his continuance in Construction Organisation. Had he been repatriated or considered for promotion in

division, he would have been in this pay scale on which he retired on superannuation from the Construction Organisation. Once, the ratio that an ad hoc employee in Construction when repatriated to the Group 'D' is entitled for protection of pay then fixation of pay of applicant cannot be found fault with.

22. Moreover, the condition precedent for application of Railway Board's Circular dated 17.08.1998 that while fixation of pay, railway employee should be extended an option to draw pay in the scale of pay in the ex-cadre post. As, such an option has not been sought from applicant, the aforesaid letter would not in any manner be applicable to his case.

23. In the result, for the foregoing reasons, Original Application is allowed. Impugned orders are set aside. Respondents are directed not to make recovery from applicant and his withheld retiral benefits be released to him within two months from the date of receipt of a copy of this order along with simple interest of 9% per annum from the date it became due till actual disbursement. No costs".

(iii) The order dated 26.07.2005 was challenged by the respondents – **Union of India & Others Vs. Girwar Singh** in the Hon'ble High Court of Delhi W.P. (C) No.1256-1258/2006 which was decided by judgment dated 11.07.2008. The Writ Petition was dismissed as being devoid of merit. The Hon'ble High Court also took note of the judgment of Hon'ble Supreme Court in Badri Prasad (supra) and other judgments relied upon by the Tribunal before coming to its conclusion. We quote below para 3 and 4 of the judgment of High Court for easy reference:-

"3. It is clear from the facts narrated above that though the parent cadre of the petitioner was New Delhi division, he was made to work in the Construction Organization for most of his service period. In the Construction Organization, he was also given an ad hoc promotion as highly skilled Manson in the grade of Rs.1200-1800 way back in 14.6.1988. This pay

scale was revised with effect from 1.1.1996 whereby his pay was fixed in the replacing pay scale of Rs.4000- 6000. Thus, the respondent continued to enjoy the pay in the said pay scale right from the date of his promotion in the year 1988 till his retirement on 31.8.2003. No doubt, sometime before his retirement he was issued a show-cause notice, but no orders were passed thereupon till his retirement. In any case, even the said show-cause notice was issued more than 14 years after fixation of his pay. We also do not find it to be a mistaken case. Since the respondent was working in the Construction Organization throughout, he was given promotion there in the higher pay scale and his promotion was also not withdrawn at any point of time. Even presuming it to be a case of mistake, it cannot be said that such a mistake is attributable to the respondent. Therefore, in the light of the decision of the Apex Court in *Shyam Babu Verma v. Union of India*, 1994 (27) ATC (SC) 121 and *Sahib Ram v. State of Haryana*, 1995 SCC (L&S) 248, the Tribunal rightly concluded that the petitioner could not make any recovery in respect of the alleged excess salary paid to him, that too after his retirement and from his retiral benefits.

4. The petitioners have themselves issued a circular in the year 1998 as per which the Construction Organization and project are reckoned as extension of the cadre of the post in the Railway/Division. If that is the position clarified by the petitioners themselves, how could a different yardstick be applied for the purpose of fixation of pay is the moot question. The answer for this has to be against the petitioner. We may also note that the Tribunal relied upon the judgment of the Supreme Court in *Badri Prashad v. Union of India*, 2005 (4) Scale 725, wherein the Supreme Court held that in case of ad hoc promotion in Construction Organization, pay of the concerned employee has to be protected in Group „C“ with all benefits of pay protection, counting of service towards higher post, etc. Following discussion contained in the said judgment is worth a quote :-

“19. Moreover, in *Badri Prasad* (supra) while dealing with regularization persons working on higher post in Group „C“ in Construction division, the following observations have been made :-

“12. Reliance is placed on the decision on this Court in the case of *Inder Pal Yadav vs. Union of India* in Writ Petition No. 548 of 2000 decided on 13.1.2003. In that case, similarly placed railway employees, who were substantively holding Group „D“ post were made to work for long period on a higher group „C“ were granted partial relief by making the following directions :

“However, while the petitioners cannot be granted the reliefs as prayed for in the writ petition, namely, that they should not be reverted to a lower post or that they should be treated

as having been promoted by reason of their promotion in the projects, nevertheless, we wish to protect the petitioners against some of the anomalies which may arise, if the petitioners are directed to join their parent cadre or other project, in future. It cannot be lost sight of that the petitioners have passed trade tests to achieve the promotional level in a particular project. Therefore, if the petitioners are posted back to the same project they shall be entitled to the same pay as their contemporaries unless the posts held by such contemporary employees at the time of such reposting of the petitioners is based on selection.

Additionally, while it is open to the Railway Administration to utilize the services of the petitioners in the open line, they must, for the purpose of determining efficiency and fitment take into account the trade test which may have been passed by the petitioners as well as length of service rendered by the petitioners in the several projects subsequent to their regular appointment.”

13.The practice adopted by the railways of taking work from employees in group „D“ post on a higher Group „C“ post for unduly long period legitimately raises hopes and claims for higher posts by those working in such higher posts. As the railway is utilizing for long periods the services of employees in group „D“ post for higher post in Group „C“ carrying higher responsibilities benefit of pay protection, age relaxation and counting of their service on the higher post towards requisite minimum prescribed period of service, if any, for promotion to the higher post must be granted to them as their legitimate claim.

14.As held by the High Court – the appellants cannot be granted relief of regularizing their services on the post of Store man/Clerk merely on the basis of their ad hoc promotion from open line to higher post in the Project of construction side. The appellants are, however, entitled to claim age relaxation and advantage of experience for the long period spent by them on a higher group „C“ post.

15.Without disturbing, therefore, orders of the Tribunal and the High Court the appellants are held entitled to the following additional reliefs. The pay last drawn by them in group „C“ post shall be protected even after their repatriation to group „D“ post in their parent department. They shall be considered in their turn for promotion to group „C“ post shall be given due weightage and counted towards length of requisite, if any, prescribed for higher post in group „C“. If there is any bar of age that shall be relaxed in the case of the appellants?”

(iv) **OA No.2698/2008 – Jagdish Singh Vs. U.O.I. and Others (Railways)** decided on 02.12.2010. The applicant in this case had joined Northern Railway, Jodhpur on 31.07.1992 in Group 'D' post. He was transferred to the office of Chief Printing and Stationery Superintendent, Shakur Basti in the year 1973 and was promoted as Junior Compositor in the grade of RS.210-290 on 27.11.1975 and further became Proof Reader in the Grade of Rs.260-400 in Group 'C' post.

He was transferred to the Construction Organisation on 16.12.1980 as Junior Clerk in the grade of Rs.260-400 where he was promoted to the post of Sr. Clerk in the grade Rs.330-560 on 01.11.1980 on ad hoc basis, which was revised to Rs.1400-2300 with effect from 01.01.1996. He was given regular promotion as Sr. Clerk with effect from 24.02.1993 which was further revised as Rs.5000-8000 with effect from 01.01.1996. He retired from service from the post of Head Clerk in the grade of Rs.5000-8000 with effect from 30.06.2008 on superannuation.

The same issue arose and a show cause notice was issued to the applicant calling upon him to explain why his pay should not be refixed with reference to his cadre pay. On the applicant giving his reply to the show cause notice, he was informed that his pay fixed on the basis of cadre pay holds good and his pension was also fixed, based on the pay so refixed and an amount of Rs.32467/- was recovered from his gratuity.

The applicant relied on **Girwar Singh** (supra) judgment of the Hon'ble High Court of Delhi as well as the observations of the Hon'ble Supreme Court in the case of **Badri Prasad** (supra) and **Inder Pal Yadav** (supra). In view of these judgments, the OA was allowed and the respondents were directed to refund the amount which had been recovered from the DCRG and issue revised PPO on the basis of the last pay drawn by the applicant.

(v) OA No. 1240/2009 – **Ram Phal Giri VS. U.O.I. and another (Railways)** order dated 18.1.2011. The issue again was the same of alleged erroneous fixation of pay and not according to the cadre pay. The Tribunal based on **Badri Prasad** (supra) and order in OA No.2698/2008 again allowed the OA directing the respondents to refund the recovered amount from DCRG and issue revised PPO on the basis of the last pay drawn by the applicant.

(vi) **W.P. (C) No.5093/2011 – U.O.I. & Others Vs. Jagdish Singh and W.P. (C) No.5382/2011 – U.O.I. & Others Vs. Ram Phal Giri**. These writ petitions were filed by the respondents challenging the orders of this Tribunal in OA 2698/2009 (Jagdish Singh) and OA No.1240/2009 (Ram Phal Giri). The writ petitions were dismissed holding that retiral benefits ought to be computed on the basis of the pay which the employees were receiving in their officiating capacity with the Construction Organisation from where they retired.

25. It is contention of the learned counsel for the applicant that from the decision of the Hon'ble Supreme Court in **Badri Prasad** (supra) and thereafter orders of Tribunal in **Girwar Singh** (supra), **Jagdish Singh** (supra), **Ram Phal Giri** (supra) and Hon'ble High Court of Delhi in **Girwar Singh** (supra), **Jagdish Singh** (supra) and **Ram Phal Giri** (supra), it would be clear that the respondents cannot re-fix the pay now quoting Railway Board's letter dated 17.08.1998 and Annexures A-1, A-1(a), A-1(b), A-1(b)(1), A-2 and A-3 needs to be quashed and set aside.

26. In their reply, the respondents case is that in terms of Railway Board letter dated 17.08.1998 in cases of appointment from ex-cadre post to another ex-cadre post, where Railway employee opts to draw pay in the scale of pay of the ex-cadre posts, the pay in the second or subsequent ex-cadre posts should be fixed under the normal rules with reference to the pay in the cadre post only. Further, these instructions also provide that on appointment to a second or subsequent ex-cadre post in higher pay scale than that of the previous ex-cadre posts, the pay may be fixed with reference to the pay drawn in the cadre post and if the pay so fixed happens to be less than the pay drawn in the previous ex-cadre post, the difference may be allowed as personal pay to be observed in the future increase in pay subject to the condition that on both the occasions the employee should have opted to draw the pay in the scale of pay attached to the ex-cadre post.

27. It is also argued that in the case of **U.O.I. Vs. Shri Bhawar Lal Mundan Civil Appeal No.7292/2013** arising out of **SLP (Civil) No.14007/2012** has held as under:-

“22. In the case at hand, as stated earlier, the respondent was getting higher scale of pay in the post while he was holding a particular post as a deputationist. After his repatriation to the parent cadre on selection to a higher post he was given higher scale of pay as it was fixed keeping in view the pay scale drawn by him while he was working in the ex-cadre post. Such fixation of pay, needless to say, was erroneous and, therefore, the authorities were within their domain to rectify the same. Thus analysed, the irresistible conclusion is that the tribunal and the High Court have fallen into error by opining that the respondent would be entitled to get the pension on the basis of the pay drawn by him before his retirement”.

28. It is further argued that applicant had filed the OA No.1824/2010 before the Hon'ble Tribunal for quashing of the impugned orders of reduction of pay of the applicant which was fixed and corrected as per the Railway Board order dated 17.08.1998. The Hon'ble Tribunal after hearing the matter passed the order dated 15.05.2012 (para 22).

29. The respondents have relied primarily on RBE No.177/98 which is the letter dated 17.08.1998 and states as follows:-

“R.B.E. No.177/98

Subject: Fixation of pay on appointment from one ex-cadre post to another ex-cadre post.

In terms of the extant Rules/ orders on the subject, in case of appointment from one ex-cadre post to another ex-cadre post where a Railway employee opts to draw pay in the scale of pay of the ex-cadre posts, the pay in the second or subsequent ex-cadre posts should be fixed under the normal rules with reference to the pay in the cadre post only. However, in respect of appointments to an ex-cadre post on time scale of pay identical to the time scale of

pay of an ex-cadre post held on an earlier occasion(s), the pay fixed in the subsequent ex-cadre post shall not be less than the pay, other than special pay, personal pay or any other emoluments which may be classified as pay by the President under Rule 1303 (iii) – R.II/1987 edition (FR-9(21)(a)(iii) which he drew on the last occasion, and he shall count the period during which he drew that pay on such last and any previous occasions for increment in the stage of the time scale equivalent to that pay.

2. Further, the orders contained in Board's letter No.E(P&A)II-85/PP-24 dated 31.12.1985 provide that on appointment to a second or subsequent ex-cadre post in higher pay scale than that of the previous ex-cadre post, the pay may be fixed with reference to the pay drawn in the cadre post and if the pay so fixed happens to be less than the pay drawn in the previous ex-cadre post, the difference may be allowed as personal pay to be absorbed in future increases in pay subject to the condition that on both the occasions the employee should have opted to draw pay in the scales of pay attached to the ex-cadre posts.

3. Instances have, however, come to notice where fixation of pay on appointment from one ex-cadre post to another ex-cadre post has been done incorrectly, i.e. without reference to pay of the cadre post. In most of the cases, the mistake is generally detected when the employee is at the verge of retirement and settlement dues are being worked out. That necessitates not only recovery of huge amount of over-payment made as a result of wrong fixation of pay but also of pensionary dues being fixed at reduced rates than the employee had expected.

4. It is, therefore, imperative that the extant instructions regarding fixation of pay on appointment from one ex-cadre post to another ex-cadre post as indicated in Para 1 & 2 above are strictly observed without any deviation. Wherever any instances of deviation are noticed, responsibility must be fixed and the staff found responsible for erroneous fixation of pay should be immediately taken up under D&A Rules.

5. The above may please be brought to the notice of all concerned for guidance and strict compliance".

The respondents have refixed the salary of the applicant in accordance with these instructions.

30. The respondents have also stated in their reply that the OA is not maintainable and should be dismissed on the ground that the Hon'ble Supreme Court has held in catena of judgments that the respondents

can recover the amount which has been wrongly fixed/paid by the respondents. In this regard they have relied upon the following judgments:-

- (i) **Syed Abdul Kadir Vs. State of Bihar 2009 (3) SCC 475**; and
- (ii) **B.J. Akkara Vs. Govt. of India 2006 (11) SCC 709**.

31. We have heard the learned counsels and have gone through the pleadings and various judgments relied upon by the parties.

32. From the series of judgments starting with **Badri Prasad** (supra), **Vijay Singh** (supra), **Inder Pal Yadav** (supra), **Bhawar Lal Mundan** (supra), **Syed Abdul Kadir** (supra) and **B.J. Akkara** (supra) of the Hon'ble Supreme Court, thereafter orders of Tribunal in **Girwar Singh** (supra), **Jagdish Singh** (supra), **Ram Phal Giri** (supra) and Hon'ble High Court of Delhi in **Girwar Singh** (supra), **Jagdish Singh** (supra) and **Ram Phal Giri** (supra), what emerges is as follows:-

- (i) Even if the applicant had been repatriated, his pay had to be protected as personal pay to be adjusted against future increments;
- (ii) Fixation of pay has to be as per the Circular dated 17.08.1998;
- (iii) Wrong fixation can be corrected by respondents and excess payment recovered;

(iv) Circular dated 17.08.1998 holds the field as it has not been set aside by any of the Court orders cited; and

(v) In the case of **Girwar Singh** (supra), the Tribunal had taken note of the Circular dated 17.08.1998 and held that the condition precedent of asking for an option as per Circular dated 17.08.1998 was also not satisfied.

33. All the subsequent judgments relied on the ratio laid down in **Badri Prasad** (supra). **Badri Prasad** (supra) only laid down the ratio that on reversion to parent cadre from ex-cadre post the employee's pay has to be protected as personal pay to be adjusted in future increments. Nothing more. What emerges, therefore, is that on appointment to another higher ex-cadre post from an existing ex-cadre post, the pay has to be as per the normal rules with reference to cadre pay (1998 Circular). Secondly, in case pay has been fixed wrongly that can be rectified and excess payment recovered. Thirdly, the higher pay drawn in the ex-cadre post has to be protected on the employee's repatriation to parent cadre as special pay to be adjusted against future increments. We are also of the view that the question of option has no relevance on the pay fixation issue at all. In view of this, we find no irregularity in issuance of impugned orders. The OA is, therefore, dismissed. No costs.

(P.K. BASU)
MEMBER (A)

(V. AJAY KUMAR)
MEMBER (J)

Rakesh