

# **CENTRAL ADMINISTRATIVE TRIBUNAL PRINCIPAL BENCH**

OA 2742/2013

New Delhi this the 6th day of October, 2015

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

Lokesh Mehta  
S/o Shri Takhat Mal Mehta  
R/o Type 4 – S, Qtr. No.C-15  
Andrews Ganj Extension,  
New Delhi ... Applicant

(Through Shri Yogesh Sharma, Advocate)

## Versus

1. Union of India through its Secretary  
Ministry of Communication & IT  
Department of Telecommunications  
Govt. of India, Sanchar Bhawan,  
New Delhi
  2. The Under Secretary to the Govt. of India  
(CWG Section)  
Department of Telecommunications  
Sanchar Bhawan, New Delhi ... Respondents

(Through Dr. Ch. Shamsuddin Khan, Advocate)

## ORDER

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

The applicant was appointed as Assistant Executive Engineer (AEE) with effect from 25.03.1988 in the Department of Telecommunications (DOT). He was given *ad hoc* promotion to the post of Executive Engineer (Civil) in 1992 and was subsequently given regular promotion on 18.07.1996. The 5<sup>th</sup> Pay Commission in its report under para 50.45 recommended to revise the Non-Functional

pre-revised scale of Rs.4500-5700 (revised: Rs. 14300-18300) for Superintending Engineers and equivalent into a 'Functional' grade and to introduce a Non-Functional Second Grade in the scale of Rs.12000-16500 for the Executive Engineers and equivalent of all the Organized Group 'A' Engineering Services and promotion to this scale on completion of 13 years of service in Group 'A'. This was accepted by the government and notified under GSR 569 (E) dated 30.09.1997. Accordingly the respondents vide order dated 27.10.1997 upgraded the pay scale of the post of Superintending Engineer to the scale of Rs.14300-18300 (pre-revised Rs.4500-5700) with effect from 1.01.1996 with the following clarification:

“.....that the upgraded scale will be admissible to such of those Superintending Engineers and those holding analogous and equivalent posts in all Group 'A' Engineering Services who have completed, in all, a total service of 13 years in Group 'A'.

In view of above approval of this office is hereby conveyed for grant of the upgraded scale of Rs.14300-400-18300 to all officers holding JAG level post belonging to Group 'A' Engineering Services in Department of Telecom, who have completed, in all, a total service of 13 years in Group 'A' with effect from 01-01-1996. The pay fixation etc. of such officers may be done accordingly.”

2. The Department of Personnel & Training (DoP&T) vide OM dated 6.06.2000 (Annexure A-2) provided as follows on scales of pay of posts of Superintending Engineers and Executive Engineers:

“(a) The 'functional' grade of Rs.14300-18300 shall be applicable to the post of **Superintending Engineers** and equivalent that are variously

designated and included in the organized Group 'A' Engineering Services, recruitment to which is made through the Combined Engineering Services Examination. Placement of Personnel in this 'functional' grade will, however, be subject to actual availability of vacancies in the grade. This shall be permitted only on completion of at least thirteen years of regular service in Group 'A' and the prescribed regular service of four years in the scale of pay of Rs.12000-16500, which will henceforth be the 'non-functional' second grade for Executive Engineers and equivalent."

This OM was further modified vide OM dated 20.12.2000 (A-3) as follows:

"Sub-para 3 (a)

The 'functional' grade of Rs.14300-18300 will be applicable to the posts of **Superintending Engineer** and equivalent. Executive Engineer and equivalent may be eligible to be considered for promotion to the grade of Superintending Engineer and equivalent only on completion of nine years of regular service in the grade of Executive Engineer and equivalent, including regular service, if any, rendered in the non-functional second grade for the Executive Engineer and equivalent in the pay-scale of Rs.12000-16500. Placement of personnel in the functional grade of Rs.14300-18300 will, however, be subject to actual availability of vacancies in the grade."

3. The applicant was promoted to the post of Superintending Engineer (Civil) on *ad hoc* basis vide order dated 4.07.2002 against a clear vacancy. In the same order, it was stated that the pay scale in which the officers are to be placed on promotion to the post of Superintending Engineer (Civil) will be indicated separately. Vide order dated 6.01.2005, in continuation of earlier office order dated 4.07.2002, the respondents clarified as follows:

"In continuation to this office order No.2-3/2001-CWG/344 dated 4-7-2002 and order No.2-3/2001-CWG/396 dated 7-8-2002, the undersigned is directed to state that all the 27 officers who were promoted to the grade of SE(C) on purely ad-hoc basis are placed in the scale of Rs.12,000-16,500/- from the date they assumed the charge of the post as per the orders under reference. However, this will be further subject to the final decision to be taken regarding the eligibility criteria to be adopted for granting the scale of pay of Rs.14,300-18,300/- to the SE(C)."

4. The applicant submitted a representation dated 20.07.2006 to grant him pay scale of Rs.14300-18300 with effect from 6.07.2002. The respondents granted the functional grade of Rs.14300-18300 to the applicant with effect from 15.04.2005 i.e. the date of completion of nine years regular service as Executive Engineer, applying OM dated 20.12.2000 instead of its own order dated 27.10.1997. It is stated that OM dated 20.12.2000 was challenged before the Guwahati High Court in Writ Appeal No.7/2006 and the Hon'ble High Court was pleased to quash the same. The judgment of the Hon'ble Guwahati High Court was upheld by the Hon'ble Supreme Court in Civil Appeal No.1902/2010. It is stated that in compliance of the judgments of the Hon'ble High Court and the Hon'ble Supreme Court, the respondents vide OM dated 29.12.2010 (A-6) further amended the OMs dated 6.06.2000 and 20.12.2010.

The relevant amendment is as follows:

"3. Consequently, the sub-para 3 (a) of this Department's O.M. No.22/1/2000-CRD dated June 6, 2000 would now read as under:

"The 'functional' grade of Rs.14300-18300 shall be applicable to the posts of **Superintending Engineers** and equivalent

that are variously designated and included in the Organized Group 'A' Engineering Services. Placement of personnel in this 'functional' grade will, however, be subject to actual availability of vacancies in the grade. This shall be permitted only on completion of thirteen years of regular service in Group 'A' and regular service of four years in the grade of Executive Engineer and equivalent including the service rendered in the Non-Functional Second Grade Or nine years of regular service in the grade of Executive Engineer and equivalent, including regular service, if any, rendered in the Non-functional Second Grade for the Executive Engineer and equivalent in the pay-scale of Rs.12000-16500."

5. The learned counsel for the applicant, therefore, argued that the requirement now is thirteen years regular service in Group 'A', which the applicant has completed as he was appointed as AEE on 25.03.1988 and thus completed thirteen years service in 2001. Second condition is four years regular service in the grade of Executive Engineer, which also the applicant has completed as he has been holding the post of Executive Engineer on regular basis from 15.04.1996 (4 years completed in 2000). It is, therefore, claimed that as per these latest instructions, the applicant became entitled for grant of functional grade of Rs.14300-18300 from 2002. He claims the scale of Rs.14300-18300 with effect from 6.07.2002 as he joined duty as Superintending Engineer from 5.07.2002.

6. The grievance of the applicant is that the respondents, instead of granting him functional grade of Rs.14300-18300 with effect from 6.07.2002, vide impugned order dated 1.08.2013 have withdrawn the functional scale of Rs.14300-18300 granted to him with effect from 18.07.2005 on the ground that a charge

sheet was issued to him on 22.12.2004. Being aggrieved by this order, the applicant has filed the present OA seeking the following reliefs:

"(i) That the Hon'ble Tribunal may graciously be pleased to pass an order of quashing the impugned order dated 1.8.2013 (A/1), declaring to the effect that the same is illegal and arbitrary and consequently, pass an order directing the respondents to refund the recovered amount if any, with interest.

(ii) That the Hon'ble Tribunal may graciously be pleased to pass an order directing the respondents to grant the 'functional' grade of Rs.14300-18300 to the applicant w.e.f. 6.7.2002 as per the Govt. of India OM dated 29.12.2010 with all the consequential benefits including the difference of pay and allowances with arrears and interest."

7. The stand of the respondents is basically that the decision of withdrawal of functional scale was taken on the advice of DoP&T and CVO. The CVO had observed that the applicant who was Superintending Engineer (Civil) *ad hoc*, was granted functional scale of Rs.14300-18300 in the year 2005 when disciplinary proceedings was initiated and the officer was not clear from the vigilance angle. They advised to refer this case to DoP&T to seek opinion as to whether grant of functional scale of Rs.14300-18300 to the applicant (*ad hoc*) granted in 2005, when disciplinary proceedings had been initiated, was in order or not.

8. Further, it is argued that the DoP&T, vide their diary No.93498/12/CR dated 21.12.2012 (R-5), has opined that as per extant instructions, an *ad hoc* appointment does not bestow on the person a claim for regular appointment and the service rendered on *ad hoc* basis in the Grade concerned does not count

for seniority in that Grade and for eligibility for promotion to the next higher Grade. In the instant case, the nine years of service in STS Grade in respect of applicant, is inclusive of service rendered on *ad hoc* basis also. The provisions for placing an officer in the functional pay scale of Rs.14300-18300 prescribes for consideration of regular service only.

9. It is further argued by learned counsel for the respondents that in the present case, even if the applicant had completed regular service of nine years, as on 18th July, 2005, yet on 1<sup>st</sup> January, 2005, he was not eligible for promotion since he was issued a charge sheet on 22.12.2004. As such, allowing functional pay scale of Rs.14300-18300 to applicant in JAG in 2005 is not in order.

10. The basic point is that the applicant was not clear from vigilance angle in 2005. In reply, the applicant states that he is still holding the post of Superintending Engineer on functional basis and, therefore, the respondents have found him 'fit' to hold the post of Superintending Engineer. Moreover, the nine year clause has been superseded by the amendment dated 29.12.2010 and now a candidate is required to have thirteen years of regular service in order to become eligible for the functional grade of Rs.14300-18300 in Group 'A' and regular service of four years in the grade of Executive Engineer (both the conditions are satisfied by the applicant) **or** nine years of regular service in the grade of Executive Engineer and equivalent

including regular service, if any, rendered in the non-functional Second Grade.

11. Lastly, the learned counsel for the applicant argued that as per the latest judgment of the Hon'ble Supreme Court in **State of Punjab and others Vs. Rafiq Masih (White Washer) etc.**, 2014 (8) SCALE 613, no recovery can be made from the applicant as per para 12 of the judgment, which reads as follows:

"12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be 20 that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

- (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).
- (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
- (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
- (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
- (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

It is stated that condition number (iii) clearly applies in this instant case.

12. We have heard learned counsel for the parties, gone through the pleadings available on record and perused the judgment cited.

13. It would be worthwhile to summarize the history of the case before we draw any conclusions. Prior to the 5<sup>th</sup> Pay Commission, the Superintending Engineers were given Junior Administrative Grade of Rs.3700-5000 and Non-Functional Selection Grade of Rs.4500-5700. The 5<sup>th</sup> Pay Commission recommended that the Non-Functional Selection Grade of Rs.4500-5700 should be converted into a 'single' functional scale for Superintending Engineers and the scale of Rs.3700-5000 should instead be the Non-functional Junior Administrative Grade for Executive Engineers. However, in order to avoid too fast a rate of promotion in certain cadres to this grade, it was further recommended that promotions to the scale of Rs.4500-5700 would be permitted only on completion of 13 years of service in Group 'A'.

14. The 27.10.1997 order of the respondents incorporated in it 13 year condition (para 1 above). Then the OM dated 6.06.2000 modified this to 13 year service in Group 'A' and 4 year regular service in Non-Functional Selection Grade for Executive Engineers (Rs.12000-16500). Then came the modification dated 20.12.2000 by which the condition was made of completion of 9

year service and equivalent. Finally, vide OM dated 29.12.2010, there are two conditions included, fulfilling of either of which will entitle a person to functional grade of Rs.14300-18300. The following are the conditions:

"This shall be permitted only on completion of thirteen years of regular service in Group 'A' and regular service of four years in the grade of Executive Engineer and equivalent including the service rendered in the Non-Functional Second Grade

Or

nine years of regular service in the grade of Executive Engineer and equivalent, including regular service, if any, rendered in the Non-functional Second Grade for the Executive Engineer and equivalent in the pay-scale of Rs.12000-16500."

15. In this background, if one takes first of the above conditions, the applicant does not fulfill the condition of 13 year service in Group 'A' as part of 13 years, he was in *ad hoc* service and not regular service (between his *ad hoc* promotion as Executive Engineer in 1992 and regular promotion on the said post on 15.07.1996). Therefore, though he completed 4 year regular service as Executive Engineer on 15.07.2000, because 13 years is not regular service but part *ad hoc*, the applicant does not satisfy the first condition. In case the second condition of nine years of regular service in the grade of Executive Engineer and equivalent is taken, again 9 years of regular service is not complete as 2002 onwards he is on *ad hoc* service. Even if for arguments sake the 9 years period is counted, he becomes eligible on 18.07.2005 but by that time, on 22.12.2004 he has already been issued a charge sheet and hence he cannot

be granted Non-Functional Selection Grade of Rs.14300-18300. Therefore, looking at it from all possible angles, the applicant is not entitled to the Non-Functional Selection Grade of Rs.14300-18300.

16. From para 3 (e) of OM dated 6.06.2000, it will be clear that the placement of officers in the 'functional' grade of Rs.14300-18300 has to be done by the process of 'Selection by Merit' for which the composition of DPC (including association of the Union Public Service Commission) for appointment of officers to the posts of Superintending Engineers and equivalent in the 'functional' grade of Rs.14300-18300 shall be the same as already prescribed in the relevant Service/Recruitment Rules for appointment to the erstwhile 'functional' grade in the pay scale of Rs.12000-16500 (pre-revised Rs.3700-5000) and, therefore, a departmental proceeding being pending against the applicant, he could not have been appointed against the Non-Functional Selection Grade of Rs. 14300-18300 in 2005.

17. In view of above discussion, it also becomes clear that the eligibility of the applicant from 2002 cannot be accepted for the reason that part of 13 years service is not a regular service. In the light of these facts, we find that the OM dated 1.08.2013 is in accordance with law and rules and thus the relief sought by the applicant cannot be granted.

18. On the question of recovery of arrears, the judgment in Rafiq Masih (supra) will apply as pointed out by the learned counsel for the applicant. Recovery from an employee when the

excess payment has been made for a period in excess of five years before the order of recovery is issued is impermissible in law.

19. Therefore, while order dated 1.08.2013 cannot be disturbed, the respondents are directed not to recover any amount from the applicant beyond the period of five years i.e. for the period before 1.08.2008. With the above directions, the OA is disposed of.

( P.K. Basu )  
Member (A)

( Syed Rafat Alam )  
Chairman

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