

Central Administrative Tribunal
Principal Bench: New Delhi

OA No. 4008/2013

Reserved on: 08.09.2015
Pronounced on: 11.09.2015

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

Sh. Vinoy Kumar
S/o Sh. Nageshwar Roy,
R/o 1018-A, Sector – 29,
Faridabad.

Working as LSG Accountant in
M/o Communication
Department of Posts,
O/o G.P.O., New Delhi.

...Applicant

(By Advocate: Sh. M.L. Chawla)

Versus

1. Union of India through
Secretary,
M/o Communication,
Department of Posts, Dak Bhawan,
New Delhi – 110 001.
2. The Chief Post Master General,
Delhi Circle,
Meghdoot Bhawan,
New Delhi – 110 001.
3. The Director (Admn.),
Department of Posts,
O/o Director, G.P.O.,
New Delhi -110 001.

...Respondents

(By Advocate: Sh. A.K. Singh)

O R D E R

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

The applicant was appointed as Postal Assistant in the Department of Posts on 15.06.1983. He qualified in the Accounts Examination in Post Office and Railway Mail Service

(PO&RMS) in August, 1995 and was appointed as regular PO&RMS Accountant on 22.09.1995. At that time, he was granted special pay amounting to Rs.90/-. The provision regarding treatment of such special pay for purpose of fixation of pay on promotion is contained in clause 18 (Appendix-8) of FR&SR which, *inter alia*, provides as follows:-

“(18) Transfer of special pay for purpose of fixation of pay on promotion.-(A) When the special pay is in lieu of a separate higher scale.- In cases where a Government servant is in receipt of a special pay in a post, his pay on promotion to a higher post may be fixed after taking into account the special pay drawn in the lower post subject to the conditions mentioned below—

- (i) The special pay in the lower post should have been granted in lieu of separate higher scale (e.g. special pay granted to stenotypist, clerk-in-charge, etc.);
- (ii) If the special pay has been drawn in the lower post continuously for a minimum period of three years on the date of promotion, the pay in the higher post will be fixed, under the normal rules, treating the special pay as part of basic pay. In other cases, the pay in the time-scale of the higher post will be fixed, under the normal rules, with reference to the basic pay drawn in the lower post (excluding the special pay); where this results in drop in emoluments, the difference between the pay so fixed and the pay plus special pay drawn in the lower post will be allowed in the form of personal pay to be absorbed in future increases of pay;

Clarification (1) – It is clarified that where such special pay has been drawn for a minimum period of three years without

break in more than one post within the same cadre or department, the total period will be taken into account. In cases where the quantum of special pay varies in different posts, the least of the special pay drawn in different posts should be taken into account for the purpose of fixation of pay in the higher post. [GI, MF, OM No.F.6(1)-E.II(B)/68 dated the 8th January, 1968].”

2. On implementation of 5th Central Pay Commission, the special pay granted to PO&RMS Accountants was termed as ‘special allowance’. This was made effective from 01.08.1997 as per GI (1) in Appendix-8 of FR&SR [DOP&T OM dated 22.04.1998]. Since the special pay was termed as ‘special allowance’ and allowances cannot be a part of pay, it could not have been merged with the pay on promotion.

3. On completion of 16 years of service on 18.06.1999, the applicant was granted financial upgradation in the scale of Rs.4500-6000 [5th CPC scale) under One Time Bound Promotion (TOBP Scheme] and the pay of the applicant was allowed to be fixed under FR 22(1)(a)(i) with the special pay being raised from Rs.90/- to Rs.180/-. This was only a special pay in lieu of higher pay scale. The pay of the applicant was thus fixed at Rs.5125/- w.e.f. 18.06.1999. On the recommendations of the 6th CPC, the applicant’s pay scale was revised to Rs.5200-20200/- with Grade Pay of Rs.2400/-.

4. The applicant's grievance arose when vide order dated 08.04.2013 the respondents reduced his basic pay, without issuing any show cause notice, from Rs.5125/- to Rs.5000/- [as per 5th CPC) w.e.f. 18.06.1999 retrospectively unsettling his settled pay, and also ordered recovery of Rs.53,181/-. This OA has, therefore, been filed with the following prayers:-

- "8.1 To quash and set aside the order of reduction in pay as well as outstanding recovery amounting to Rs.53,181/-;*
- 8.2 To further direct the respondent to stop recovery/reduction in pay of the applicant, the amount already recovered may be directed to be refunded to the applicant; AND*
- 8.3 Further direct the respondents to refund the salary recovered/reduced from the basic pay of the applicant who is at the fag end of retirement having nearly 30 years of unblemished record of service.*
- 8.4 To pass any other order or orders, direction or directions as deemed fit in the facts and circumstances of the case so as to meet the ends of justice;*
- 8.5 To allow this OA with heavy cost, because the applicant has been dragged into avoidable litigation."*

5. The case of the applicant is that one S. Mohan Kumar, Accountant, whose pay had been similarly reduced after the applicant had offered placement in higher scale of TOBP Scheme after completion of three years posting as Accountant and his pay in the higher scale was fixed taking into account the special pay of Rs.90/- which he was in receipt for more than

three years, approached the Bangalore Bench of the Tribunal by filing OA No.296/2002. The ground for reduction of pay was that after the 5th CPC, the special pay had been re-designated as 'special allowance' w.e.f. 01.08.1997 and, therefore, the applicant in that case had not completed three years period when he drew special pay. This is because he joined as Accountant on 01.11.1994 and got his higher scale on 05.11.1997 and in between w.e.f. 01.08.1997 special pay became 'special allowance' and the period between 01.11.1994 to 31.07.1997 was less than three years. The Tribunal held that change of nomenclature from special pay to special allowance was given retrospective effect from 01.08.1997 vide OM dated 22.04.1998, and on the ground that vested rights cannot be divested with retrospective effect by an executive order, the OA was allowed. This was challenged before the High Court of Karnataka in Writ Petition No.7593 of 2003 (S-CAT), which was dismissed vide order dated 18.11.2010.

6. The Department of Posts thereafter, vide letter dated 10.01.2013, informed all Chief Post Masters General about the outcome of the litigation. The operative portion of the instructions, as contained in para 4, reads thus:-

"4. The aforesaid benefit of pay fixation on promotion/financial upgradation (TBOP/BCR) shall also be extended in all similarly placed cases of the PO&RMS Accountants where the special pay/allowance @ Rs.90/- per month was

drawn continuously for three years before 22.04.1998. In cases where the promotion/financial upgradation (TBOP/BCR) has taken place on or after 01.08.1997 but before 22.04.1998, special pay/allowance of Rs.90/- will only be reckoned for this purpose.”

7. The case of the applicant is, therefore, that in view of the order of Bangalore Bench of the Tribunal passed in OA No.296/2002 (supra) and upheld by the High Court of Karnataka in Writ Petition No.7593/2008 (supra), reduction of pay with retrospective effect and recovery ordered is illegal and the same should be set aside.

8. It was further argued that in view of the ratio laid down by the Apex Court in **State of Punjab & Ors. Etc. V/s. Rafiq Masih (White Washer) Etc.** [2014 (4) SCALE 300], no recovery can be made in the applicant's case. The relevant portion of the judgment is extracted hereunder:-

“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 that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few stipulations, 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."*

9. It is stated by the learned counsel for the applicant that the applicant's case is covered under item no.(iii) above and, therefore, no recovery can be made from him.

10. The learned counsel for the respondents argued that the order of the Bangalore Bench in OA No.296/2002 (supra) and judgment of High Court of Karnataka (supra) have already been implemented by the respondents through letter dated 10.01.2013. However, the key issue is that the benefit of pay fixation on promotion/financial upgradation (TBOP/BCR) was extended in cases of Accountants who drew special pay continuously for three years before 22.04.1998 (i.e. before the change of nomenclature from special pay to special allowance was notified vide OM dated 22.04.1998). It was further ordered that in cases where the promotion/financial upgradation has

taken place on or after 01.08.1997 but before 22.04.1998, the special pay/allowance of Rs.90/- would only be reckoned for that purpose. However, the applicant was granted financial upgradation under TOBP Scheme on 18.06.1999 i.e. after 01.08.1997 and not before 22.04.1998. The applicant, therefore, neither completed three years of service as PO&RMS Accountant before 22.04.1998 nor he got promotion before 22.04.1998 and, thus, he is not covered under these provisions. The learned counsel further relied upon the judgment in the case ***U.T. Chandigarh & Ors. V/s. Gurcharan Singh & Anr.*** [Civil Appeal No.9873/2013 decided on 01.11.2013] in which the Supreme Court has held as under:-

“12. Though a submission had been made on behalf of the respondent that no amount should be recovered from the salary paid to the respondent, the said submission cannot be accepted because if any amount had been paid due to mistake, the mistake must be rectified and the amount so paid in pursuance of the mistake must be recovered. It might also happen that the employer might have to pay some amount to the respondent as a result of some mistake and in such an event, even the appellant might have to pay to the respondent. Be that as it may, upon settlement of the account, whatever amount has been paid to the respondent employee or to the appellant employer shall be paid and the account shall be adjusted accordingly.”

It is, therefore, contended that the present OA is liable to be dismissed in view of the aforesaid judgment of the Hon'ble Supreme Court.

11. We have heard learned counsel for the parties and perused the judgments cited by both sides.

12. It would be clear from the order dated 22.10.2002 of the Bangalore Bench passed in OA No.296/2012 and upheld by the High Court of Karnataka vide order dated 18.11.2010 passed in Writ Petition No.7593 of 2003 (S-CAT) that basically the issue before the Tribunal was retrospective application of executive order dated 22.04.1998 and the OA was, therefore, allowed and upheld by the High Court of Karnataka. When the order dated 10.01.2013 was issued, it was clarified that those who had completed three years of service as Accountant before 22.04.1998, in their cases special pay would be included and in cases of promotion/financial upgradation (TBOP/BCR) has taken place on or after 01.01.1997 but before 22.04.1998, special pay/allowances of Rs.90/- will only be reckoned for this purpose. Therefore, the date of 22.04.1998 is crucial. Admittedly, the applicant got his promotion from 18.06.1999 i.e. after 22.04.1998 and, thus, he has not completed three years of service as PO&RMS Accountant before 22.04.1998. Therefore, in his case, the order dated 22.10.2002 passed by the Bangalore Bench in OA No.296/2012 and upheld by the High Court of Karnataka vide order dated 18.11.2010 as well as the provisions of letter dated 10.01.2013 will not apply and the prayer of the applicant cannot be admitted on this count.

13. Insofar as the question of recovery is concerned, there is no doubt that the case of the applicant is squarely covered by the decision in ***State of Punjab & Ors. Etc. V/s. Rafiq Masih (White Washer) Etc.*** (supra) and no recovery can be made from the applicant. The instant Original Application, therefore, stands disposed of with a direction to the respondents not to make any further recovery from the applicant and also to refund the amount of recovery, if any, made so far on this account to the applicant within a period of one month from the date of receipt of certified copy of this order. It is, however, made clear that the order of reduction in pay in case of the applicant will continue undisturbed. There shall be no order as to costs.

(P.K. Basu)
Member (A)

(V. Ajay Kumar)
Member (J)

/Ahuja/