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1 o.a. 836 of 2017

CENTRAL ADMINISTRATIVE TRIBUNAL
KOLKATA BENCH, KOLKATA

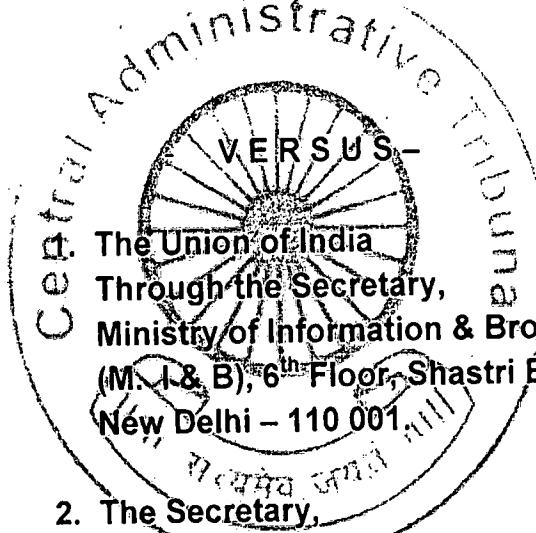
No. O.A. 836 of 2017

Date of order : 5/1/2018

Present : Hon'ble Ms. Bidisha Banerjee, Judicial Member
Hon'ble Dr. Nandita Chatterjee, Administrative Member

Noorul Hoda,
Son of Late Md. Hasan,
Permanent resident of Village – Serhwa,
P.O. – Jogia, P.S. – Ramnagar,
Dist. – West Champaran, Bihar,
Aged about 57 years,
Presently working as
Superintending Engineer (Elect.),
Civil Construction Wing,
All India Radio,
Under Prasar Bharati at Kolkata.

.. Applicant



VERSUS-

1. The Union of India
Through the Secretary,
Ministry of Information & Broadcasting
(M. I. & B), 6th Floor, Shastri Bhawan,
New Delhi – 110 001.
2. The Secretary,
Department of Personnel, Public Grievances &
Pensions, Lok Nayak Bhawan,
Khan Market,
New Delhi – 110 003.
3. The Chief Executive Officer,
Prasar Bharati,
Prasar Bharati House,
Copernicus Marg,
New Delhi – 110 001.
4. The Director General,
Akashvani Bhawan,
Parliament Street,
New Delhi – 110 001.
5. The Chief Engineer,
Civil Construction Wing,
All India Radio,

[Signature]

6th Floor,
Soochna Bhawan,
CGO Complex,
Lodhi Road,
New Delhi – 110 003.

.. Respondents

For the Applicant : In person

For the Respondents : Mr. B.P. Manna, Counsel

ORDER

PER DR. NANDITA CHATTERJEE, ADMINISTRATIVE MEMBER:

The applicant has approached this Tribunal in the third round of litigation in a sequel to O.A. No. 1127 of 2012 and O.A. No. 127 of 2017 seeking relief as under:-

"(1) That your Lordships may be graciously pleased to quash and set aside the impugned speaking order No. V-11/012/7/2017-BA(E) dated 29.5.2017 being illegal in the eyes of law."

(1) That your Lordships may be graciously pleased to direct the Respondent No. 1 to hold screening committee meeting to consider the fitness of the applicant to grant of Grade Pay of 10000/- at SAG Level with effect from 23.12.2013 within a period of 30 days from the date of receipt of order of this Hon'ble Tribunal.

(2) That Your Lordships may further be graciously pleased to direct the Respondent No. 1 to pay compensation for his sorrow and sufferings and cost of the case may please be awarded in favour of the applicant.

(3) That any other order or orders be passed as your Lordships may please deem fit and proper in the interest of natural justice."

2. Heard the applicant in person and Ld. Counsel for the respondents, examined pleadings and documents on record, particularly, DOP&T's Office Memoranda dated 19.11.2009, 14.12.2010 and 18.1.2011 respectively. Ld. Counsel for respondents has submitted written notes of arguments.

3. The applicant's case, in brief, as submitted by him in person, is that he had joined the Civil Construction Wing, All India Radio under Prasar Bharati as Assistant Engineer (Elect.) on the recommendation of UPSC on 11.7.1988 and was thereafter promoted to the post of Executive Engineer (Elect.) on adhoc basis on 23.12.1996 and on regular basis on 13.4.1998.

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That, thereafter, he was promoted as Superintending Engineer (Elect.) on regular basis on 8.10.2013 and has been enjoying Pay Band – 4 with Grade Pay of Rs. 8700/- since 23.3.2012 as per Order No. 1/2015-BA(E) dated 3.3.2015.

That the applicant had entered Gr. 'A' service on 23.12.1996 and has completed 17 years of regular service on 22.12.2013 including more than one year's service in PB-4 with Grade Pay of Rs. 8700/-, these being the requisite conditions which entitle him to the grant of Grade Pay of Rs. 10,000/-.

That, the distinction between organized Gr. 'A' service as per O.M. dated 18.1.2011 has been declared of no relevance as per judgment of the Hon'ble Apex Court in Civil Appeal No. 793 of 1998 and that he was granted PB-4 with Grade Pay of Rs. 8700/- w.e.f. 23.3.2012 on the basis of judgment in O.A. No. 1127 of 2012 subsequently upheld by the Hon'ble High Court, Kolkata and the Hon'ble Apex Court.

That, the applicant had represented on 19.9.2016 to respondent No.1 and thereafter, not having received any response on the same, had approached the Tribunal with O.A. No. 127 of 2017, which was disposed of directing the respondents that in the event, the applicant was found fit for promotion to the Grade as claimed, he may be granted the said relief.

As the respondents, vide their speaking order dated 29.5.2017 rejected his prayer, the applicant has approached this Tribunal in the instant Original Application, praying for quashing of the said speaking order of the respondent authorities and to direct the respondents to convene a screening committee meeting to consider his eligibility to the Grade Pay of Rs. 10000/- at SAG level.

The applicant has advanced, inter alia, the following grounds in support of his claim:-

- (a) That he is legally entitled for the relief prayed for as because the respondents are bound by the decision of Govt. of India and
- (b) On the basis of the principle of equal pay for equal work, the respondents should grant him the relief prayed for.

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4. Per contra, the respondents, in their counter affidavit as well as in their oral arguments, have argued that the applicant had entered service in the Civil Construction Wing of All India Radio and the recruitment rules of Engineering service in CCW as notified on 20.6.1985 namely, "All India Radio Civil Construction Wing (Group – A and Group B Post) Recruitment (Amendment) Rules, 1995", clarifies that the said service is in the category of General Central Service and not Organized Group – 'A' Engineering service.

That, the DOPT O.M. No. AB.14017/61/2008-Estt. (RR)/Pt. dated 18.1.2011 relates to qualifying service for promotion to SAG/HAG grades in Organized Group 'A' Engineering Service subject to fulfilment of certain conditions i.e. availability of post/vacancy to be granted after following the due process of promotion and not to automatic grant of Grade Pay of Rs. 10000/- As the applicant does not belong to Organized Group 'A' Engineering service, the DOPT O.M. dated 18.1.2011 is not applicable to him and that the contention of the applicant that the distinction between organized Gr. 'A' service and unorganized service has been done away with the judgment of Hon'ble Apex Court in Appeal (Civil) No. 793 of 1998, State of Mizoram & anr. v. Mizoram Engineering Service passed on 6.5.2004 relates to the term 'organized' and 'unorganized' in the literal sense. The Respondents have further contended that the Hon'ble Apex Court had observed that the main reason for dubbing Engineering Service as an unorganized service was absence of Recruitment Rules. The Engineering Service in CCW on the other hand, has well laid down recruitment rules.

Hence, the Apex Court's judgment was specific to the application of pay scale to State Engineers of Mizoram and not to Engineers belonging to General Central Service including the engineers of CCW, DG, AIR. The respondents have also cited the Hon'ble Apex Court's decision in *Ashwani Kumar Singh v. Public Service Commission & ors. JT 2003 (6) SC 184* and *ONGC Ltd. V. Official Liquidator of M/s. Ambika Mills Co. Ltd. & ors. AIR 2014 SC 3011* to establish

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that it is a well settled principal of law that judicial pronouncements are to be applied in accordance with the factual situation of case concerned..

ISSUE

The point of determination in this Original Application is whether the applicant is entitled to the Grade Pay of Rs. 10000/- in terms of DOPT O.M. No. AB.14017/62/2008-Estt (RR) IPT dt. 18.1.2011.

FINDINGS

(i) At the outset, we refer to the Office Memorandum dated 18.1.2011 which arises from DOPT O.M. of even No. dated 15.12.2009 whereby guidelines were issued for amendment of Recruitment Rules for incorporating the eligibility requirement for promotion to SAG and HAG levels in organized Gr. 'A' services. DOPT's O.M. No. AB. 14017/64/2008-Estt. (RR), dated 24.4.2009 had first introduced the scope of non-functional upgradation for Officers of Organized Group 'A' Services in PB-3 and PB-4. The same is reproduced below:-

"G.I. Dept. of Perf & Trg. O.M. No. AB.14017/64/2008-Estt. (RR), dated 24.4.2009"

Non-Functional upgradation for Officers of Organized 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 Organized 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 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 corrections would be with effect from 1.1.2006, wherever due and admissible."

(emphasis supplied)

Reb

Presently, DOP&T, vide No. I-11019/5/2017-CRD dated 3.4.2017 has defined the concept of organized services and, on the basis of inputs received from cadre controlling authorities as well as records available with DOP&T, a list of 52 services has been declared as organized 'A' services. According to the said circular "(i) An Organised Group 'A' Service is one which is constituted consciously as such by the Cadre Controlling Authority concerned and such a service can be constituted only through the established procedure. The procedure of declaring a service as Organized Service is same as that of Cadre Review."

The attributes of such organized services as notified vide DOP&T's O.M. dated 20.11.2009 (Annexure A-1 to the O.A.) have been reiterated.

The Prasar Bharati (Broadcasting Corporation of India) Act, 1990 in para 11(2), as substituted w.e.f. 5.3.2012, states that all officers and employees recruited during the period on or after the appointed date till the 5th day of October, 2007 shall be on deemed deputation to the Corporation w.e.f. 1.4.2000 or the date of their joining service in the Corporation, whichever is later and until their retirement.

As the applicant, by his own admission, joined the All India Radio and Prasar Bharati in July, 1988, his service conditions and recruitment rules will be that as applicable to the Civil Construction Wing of All India Radio/Prasar Bharati subject to consequent amendments.

Hence, the applicant's service namely in CCW, AIR is not one which has been constituted consciously, as such, by the cadre controlling authority concerned which is a basic requirement to be treated as organized Gr. 'A' service in terms of DOPT's O.M. dated 3.4.2017 (Annexure R-2 of written notes of arguments of the respondents).

(ii) The next issue is parity of work between the Engineers of Civil Construction Wing of All India Radio (Prasar Bharati) and that of the Engineers in

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the Organized Gr. 'A' services. The applicant has nowhere averred that the functional responsibilities discharged by him and that discharged by Engineers in the Organized Gr. 'A' services are uniform. Herein, we refer to the principle of reasonable classification wherein the Hon'ble Apex Court have upheld classification of employees for the purpose of pay scale having regard to diverse criteria. The charge of discrimination, if any, may also fail if the employees belong to different units. In *Central Railway Audit Staff Association v. Director of Audit, Central Railway* AIR 1993 SC 2467 and in *Ajit Singh Cheema v. The Punjab Agricultural University* 1992 (8) SLR 70 (PH) it was noted as a settled principle that the claim for parity in pay has been rejected where it was demonstrated that the employees were not functionally equivalent.

Further, the Principal Bench of Central Administrative Tribunal, in O.A. No. 3404 of 2011, while relying on the orders of the Hon'ble Apex Court in *Deb Narayan Shyam v. State of West Bengal* rejected the claim of the applicant, namely the Superintending Engineer (Civil) in SSB, on the grounds that the applicant has not been able to produce any tangible evidence in support of parity and held that different services have different job requirements and profiles and parity cannot be granted on certain superficial similarities.

(iii) The applicant has cited, in his support, the ratio upheld in *State of Mizoram & anr. v. Mizoram Engineering Service Association & anr.* delivered on 6.5.2004 [Appeal (Civil) No. 793 of 1998], wherein the Hon'ble Apex Court had held as follows:-

".... For failure of the State Government to frame recruitment rules and bring Engineering Service within the framework of organized service, the engineers cannot be made to suffer. Apart from the reason of recruitment rules of Engineering service, we see hardly any difference in organized and unorganized service so far as Government service is concerned."

While holding that nothing has been pointed out as sought to be conveyed by use of words 'organized service' and 'unorganized service', the Hon'ble Apex

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Court, however, had restricted the scale only to the posts of Chief Engineer and Additional Chief Engineer. This Tribunal also, in an earlier O.A. bearing No. 1127 of 2012, issued an order dated 30.8.2013 in favour of the applicant, placing reliance on the above mentioned judgement in Civil Appeal No. 793 of 1998 (supra) with the observations that since the post of Superintending Engineers (Elect.) of the Construction Wing of AIR had earlier been given the pay scale in Pay Band 4 with Grade Pay of Rs. 8700/-, denial of the same to the present applicant is abundantly unfair.

It is seen, however, while that the Hon'ble Apex Court's judgment is of 2004, the DOP&T has issued Office Memoranda clearly stating what should be the concept and attributes of Organized Gr. 'A' Central Service vide their O.M. dated 3.4.2017 and that dated 20.11.2009 respectively, thereby distinguishing Organized service from Unorganized service.

Secondly, the Tribunal in its earlier orders had categorically referred to the fact that the PB-4 i.e. Grade Pay of Rs. 8700/- had been given to Superintending Engineers of CCW, AIR in the past. There is no averment made before us by the applicant that a Grade Pay of Rs. 10000/- had been accorded to Superintending Engineers in CCW, AIR in the past.

Hence, the perspective in which the orders were passed by this Tribunal in O.A. No. 1127 of 2012 differs from the present context.

(iv) The applicant has challenged the speaking order dated 29.5.2017 (Annexure A-1 to the O.A.) and the operational paragraph of the said speaking order is reproduced below:-

"11. Whereas, Shri Hoda belongs to General Central Service and governed by specific Recruitment Rules namely "**All India Radio Civil Construction Wing (Group -A and Group-B post) Recruitment (Amendment) Rules, 1995**". Further, as stated herein above at para 6, as per All India Radio Chief Engineer (Civil) (Level-II) Recruitment (Amendment) Rules, 1995, the promotional post of Superintending Engineer (Electrical) is Chief Engineer (Civil) (Level-II), whose sanctioned strength is one. For promoting to the post of Chief Engineer (Level-II), the method of recruitment is by promotion from Superintending Engineer (Civil)/(Elect.) with 7 years' regular service in the grade failing which by transfer on deputation. However, the post of CE (L-II) at present is filled

Hoda

up. Therefore, no vacancy of CE (L-II) exist as on date. For want of a vacancy, the case of Sh. Noorul Hoda does not have any merit for consideration of granting him grade pay of Rs. 10000/- and the same is hereby rejected."

The relevant extracts of DOPT's O.M. dated 18.1.2011 is reproduced below for better understanding of the issue at hand. The following is inferred from

DOPT's O.M. dated 18.1.2011:-

No. AB.14017/61/2008-Estt. (RR)/Pt.
Government of India
Ministry of Personnel, Public Grievances & Pensions
Department of Personnel & Training
New Delhi

Dated: 18th January, 2011

OFFICE MEMORANDUM

Sub: Qualifying service for promotion to SAG/HAG Grades in Organised Group 'A' Engineering Service - regarding

This Department vide O.M. of even No. dated 15.12.2009 had issued guidelines for amendment of Service Rules for incorporating the eligibility requirements for promotion to SAG and HAG level in Organized Group A services.

2. The matter has been examined in respect of the Organized Engineering Services where the functional JAG is at Grade Pay of Rs. 8700/- and the eligibility requirement for SAG level is 3 years in the JAG grade. Accordingly for promotion to SAG (PB 4 Grade Pay Rs. 10000/-) level in Organized Engineering Services, the eligibility requirement shall be

"Officers in the grade of Superintending Engineer and equivalent (PB & Grade Pay of Rs. 8700/-) with 3 years regular service in the grade or officers in the grade of Superintending Engineer/equivalent with 17 years regular service in Group A posts in the service out of which at least 1 year of regular service should be in the PB-4 Grade Pay of Rs. 8700/-."

- (a) The DOPT O.M. dated 18.1.2011 is subject to fulfilment of certain conditions i.e. availability of posts/vacancy and subject to following the due process for selection. Hence grant of Grade Pay of Rs. 10000/- is not automatic.
- (b) The title of the O.M dated 18.1.2011 is "Qualifying service for promotion to SAG/HAG Grades in Organized Group 'A' Engineering service - regarding."

(emphasis supplied)

Hence, it is undisputed that the O.M. of DOPT dated 18.1.2011 refers to promotion and not automatic upgradation.

b.r.h.

We seek the guidance of the decision of Hon'ble Apex Court in this regard who has held in *T.R. Kapur v. State of Haryana AIR 1987 SC 415*, that although promotion is a normal incident of service, the true effect of the condition would depend on the nature of the right created which would in its turn ultimately depend on a proper interpretation of the relevant rules or norms of promotion applicable to the service. Such rules or norms almost invariably preserve the employer's prerogative of choice and therefore it has been repeatedly said that it is a condition of service in the sense that the employee has only a right to be considered for promotion and not a right to be promoted.

In *N.G. Prabhu v. Chief Justice (Kerala), 1973 (2) SLR 251*, promotion has been distinguished from upgradation in the sense that main purpose of upgradation of a post is to confer financial benefits and promotion is an appointment to a different post carrying a higher scale of pay in the service.

Relying on the above mentioned ratio, it is axiomatic that promotion being appointment to a different post, the post to which an incumbent is to be promoted has to exist in the first place, meaning thereby, that promotions are dependent on the availability of vacancies in the promotional post. The speaking order does not debar the applicant to be placed in the zone of consideration for promotion but only states that such promotions would be actuated on availability of vacancies.

In his pleadings, the applicant has stated as follows:-

"This application is preferred for challenging impugned Speaking Order No. V-11012/7/2017-BA(E) date 29.5.2017 passed in compliance of direction of Hon'ble CAT, Kolkata in O.A. No. 350/00127 of 2017 of the applicant, declining right of consideration to the promotion to SAG level i.e. Grade Pay of Rs. 10000/- even after fulfilment of all criteria by the applicant."

(emphasis supplied)

The applicant has claimed the benefits in terms of the Office Memorandum dated 18.1.2011 which obviously refers to promotion to SAG/HAG grades. It has been admitted by the applicant that his basic prayer is for consideration for promotion to the post of SAG Grade and not upgradation to the SAG grade and logically, to merit promotion to the SAG level, a vacancy has to exist.

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During his oral arguments, the applicant has produced the pay slip of the Chief Engineer, CCW, CDO, AIR for the month of May, 2018 proving thereby that the post of Chief Engineer, CCW, CDO, AIR is occupied confirming the contentions of the speaking order that no vacancy exists.

Accordingly, the applicant has to wait his turn according to seniority and service rules to be promoted to the post of Chief Engineer and thereafter to the SAG Grade Pay of Rs. 10000/-.

We, therefore, dispose of the O.A. by directing the respondent authorities to consider the applicant's claim for promotion as and when vacancies made available and in accordance with the various policy guidelines in this regard.

There will be no orders on costs.

