

**CENTRAL ADMINISTRATIVE TRIBUNAL
BANGALORE BENCH**

ORIGINAL APPLICATION NO.170/01705/2018

DATED THIS THE 3rd DAY OF APRIL, 2019

HON'BLE DR. K.B. SURESH, MEMBER (J)

HON'BLE SHRI CV.SANKAR MEMBER (A)

Sri Venkatesh D Joshi,
S/o. Late Dattatreya Joshi,
Aged about 64 years,
retired as Auditor,
O/o. Principal Controller of Defence Accounts,
Lower Agram Road,
Agram Post,
Bengaluru : 560 007
Residing at
H.No.2832/6 "Anugraha", 1st Floor,
SMV.Layout, 4th Block
Behind Doddabasti Bus Stand,
Doddabasti, Bengaluru : 560 110
...Applicant

(By Shri AR.Holla Advocate)

Vs.

1. Union of India
by Secretary,
Ministry of Defence,
South Block,
New Delhi 110 011

2. The Controller General of
Defence Accounts,
Ulan Batar Road Palam,
Delhi Cantt. 110 010

3. The Principal Controller of
Defence Accounts,
No. 107, Lower Agram Road,
Agram Post, Bengaluru : 560 007

...Respondents.

(By Shri MV.Rao.. Sr. Panel Counsel)

ORDER (ORAL)HON'BLE DR K.B.SURESH, MEMBER (J)

1. Heard. Applicant was first appointed as Clerk in the Ministry of Textiles on 21.5.1979. Thereafter, in the same Ministry he was granted 1st ACP at the pay scale of Rs.4000-6000 on 9.8.1999, on 21.5.2003 in the same Ministry he was also granted 2nd ACP at the pay scale of Rs.4500-7000. Thereafter, vide 1.10.2004 the applicant, through proper channel entered the portals of Defence Ministry. At this point of time on 4.4.2007 finding that there is difference in the pay scale of Ministry of Textiles and Ministry of Defence in the stream as now encompassing the applicant. The ACPs granted as early on 9.8.1999 and 21.5.2003 was revisited and a new pay scale of Rs.4500-7000 and 5500-9000 was accorded to the applicant. Thereafter, it was found applicant had got 4 financial upgradation and it was withdrawn on 27.12.2013 which he challenged before us. Thereupon, we passed Annexure-A12 order in OA.97/2014 dated 16.1.2015 which we quote:

“O R D E RPER HON'BLE MR. M. NAGARAJAN, JUDICIAL MEMBER

1. *The main grievance of the applicant in this O.A is as to the refixation of his pay consequent upon cancellation of financial upgradation granted to him under ACP/MACP Scheme vide Annexure*

A-13 dated 27.12.2013 and as to the consequential reduction in a sum of Rs. 2600/- in Grade Pay which results in total reduction of Rs. 13,194/-. The facts leading to his grievances are as under :

2. The applicant is working as Lower Division Clerk in the Office of the Principal Controller of Defence Accounts, Bangalore. Initially he entered the service on 21.5.1979 in the Office of the Development Commissioner (Handicrafts), Ministry of Textiles, Ranebennur in the Pay Scale of Rs.3050-75-3950-80-4590. The pay scale of Rs. 3050-4590 is introduced as per the Fifth Pay Commission pay scale. While he was working in the Ministry of Textiles, on completion of 12 years of qualifying service, he was granted 1st financial upgradation under the ACP Scheme with effect from 9.8.1999 in the pay scale of 4000-100-6000. Thereafter, on completion of 24 years of qualifying service he was granted 2nd financial upgradation in the pay scale of Rs.4500-125-7000 with effect from 21-05-2003. That by availing 2nd financial upgradation in the pay scale of Rs.4500-7000 with effect from 21-05-2003, he was drawing the pay of Rs.5250/-. While drawing the pay of Rs.5250/- in the Ministry of Textiles, pursuant to the notification dated 17.05.2003 published in the Employment News, inviting applications for appointment to the post of Clerks in Defence Accounts Department on inter departmental transfer, the applicant applied for the post of Clerk through proper channel and he was selected for the post of Clerk in the Defence Accounts Department. By order dated 30.09.2004 (Annexure A-2), the applicant was relieved from the post

of Store-keeper cum Accounts Clerk with effect from 30th September 2004 (AN) from the office of the Regional Design and Technical Development Centre, office of the Development Commissioner (Handicrafts), Bangalore, so as to enable him to report to the Office of the Controller of Defence Accounts, Bangalore, on 01-10-2004. On being relieved from the Office of the Development Commissioner (Handicrafts), Bangalore, the applicant reported for duty in the Office of the Principal Controller of Defence Accounts, Bangalore, on 1/10/2004. On reporting in the Office of the Principal Controller of Defence Accounts, Bangalore on 1.10.2004, it seems that the basic pay of the applicant has been fixed at Rs.4590/- i.e. maximum of the scale of pay of Rs.3050-4590.

3. *The applicant claims that though he was inducted in the office of the Principal Controller of Defence Accounts, Bangalore in the pay scale of Rs. 3050-4590 and his pay was fixed at Rs.4590/-, in order to protect his pay as per the terms and conditions and on counting the service rendered in the erstwhile Department, he was accorded 1st and 2nd financial upgradations respectively in the Pay scale of Rs. 4500-125-7000 and Rs.5000-175-7000 being the hierarchy available in the Defence Accounts Department with effect from 01-10-2004 by order dated 04-04-2007 (Annexure-A6). Thereafter, he was granted 3rd financial upgradation under the MACP Scheme on completion of 30 years of service by order dated 12.07.2010 vide Annexure A7 in the grade pay of Rs.4600/-. After availing 3rd financial upgradation*

under the MACP scheme he was drawing a pay of Rs.15160/- with grade pay of Rs.4600/- as per the 6th Central Pay Commission (CPC). When things stood thus, by an order No.Part-II.O.O.No.250 dated 23-07-2013 (Annexure A8) the ACP granted to the applicant with effect from 01.10.2004 vide order dated 04/04/2007(Annexure A6) was withdrawn. Consequent upon the order dated 23-7-2013 (Annexure A8) under which the financial upgradation under the ACP/MACP granted to the applicant was cancelled, the respondents have reviewed and regranted the financial upgradation by the order bearing No. Part-II O.O.No.402 dated 8-11-2013 vide Annexure A-9. By review, his grade pay was reduced from 4600/- to Rs. 2000/-. On receipt of the orders dated 23.07.2013 and 08.11.2013 respectively vide Annexures A8 & A9, the applicant filed his representation dated 5.12.2013 vide Annexure A-10 requesting the respondents to recall the same and restore his pay in Pay Band- 2 , i.e. Rs. 15160/- with grade pay of Rs.4600/-. The applicant submits that the respondents instead of cancelling the said order dated 23.07.2013 and 08.11.2013 respectively at Annexure A8 and A9, vide an order dated 27-12-2013 (Annexure A13) refixed the pay of the applicant as per the statement at Annexure A-13. Being aggrieved by the order dated 23-07-2013 and 8-11-2013 (Annexures A8 & A9), the applicant presented the instant OA with a prayer to quash the same and for a direction to the respondents not to reverse the ACP Scheme benefits already granted in the grade pay of Rs.4600/-.

4. Pursuant to the Notice of the OA, the respondents entered appearance and filed their detailed reply contending that the impugned orders at Annexures A8 & A9 and consequential refixation of his pay do not suffer from any legal infirmity. The respondents in their reply have taken a specific stand that the impugned orders at Annexures A8 & A9 cannot be faulted for the reason that the 1st and 2nd ACP benefits were granted to the applicant while he was working in the Ministry of Textiles itself. It is specifically pointed out by them that the applicant was granted the 1st financial upgradation under the ACP scheme with effect from 9-8-1999 in the pay scale of Rs.4000-6000 and the 2nd financial upgradation with effect from 25.5.2013 in the pay scale of Rs. 4500-7000. It is contended by them that since the applicant has already been granted the 1st and 2nd financial upgradations under the ACP scheme while he was working in the Ministry of Textiles as stated above, once again granting the same with effect from 1.10.2004 by the order dated 4-4-2007 (Annexure A6) is an erroneous one and hence by the impugned order dated 23-7-2003 (Annexure A8) the benefits of ACP/MACP granted to the applicant was withdrawn and consequently by the other impugned order dated 8.11.2003 (Annexure A9) the applicant was granted 3rd MACP with effect from 21.05.2009 in Pay Band-I 5200-20200 with Grade Pay of Rs.2000/-.

5. Heard Mr. Sugumaran, Learned Counsel for the applicant and Shri V Narasimha Holla, learned council for the respondents. Perused the pleadings of both the parties and the documents annexed thereto.

6. The facts are not in dispute. Shri S Sugumaran, learned counsel for applicant contended that though the pay of the applicant was initially fixed at Rs.4590 in the Defence Accounts Department, with a view to protect the pay as per terms and conditions and by counting the past services in Ministry of Textiles, he was accorded 1st and 2nd ACP benefits fixation i.e. Rs.4000-125-7000 and Rs.5500-9000 being the hierarchy available in the Defence Accounts Department retrospectively from 01.10.2004 by order dated 4.4.2007 vide Annexure A6. The argument of Shri Sugumaran is that the order dated 4.4.2007 vide Annexure A6 granting the benefits of 1st and 2nd financial upgradations and the fixation at Rs.4500-7000 and Rs.5500-9000 is done with a view to fix the pay of the applicant in the hierarchy of Defence Accounts Department. Mr. Sugumaran vehemently contended that the reason assigned by the respondents for cancelling the order dated 4-4-2007 (Annexure A6) by the impugned orders at Annexures A8 & A9 on the ground that the order dated 4-4-2007 is an erroneous one, is a misconception on the part of the respondents. By referring to point No.39 of the clarification dated 18/7/2001 and the OM No.35034/3/2008-Estt(D)Vol.II dated 4/10/2012, Shri Sugumaran contended that the interpretations of the respondents regarding

clarification and the consequential action are not at all tenable. He further invited our attention as to the fixation of pay of one Smt. Jayashree and argued that if the interpretations of the respondents are allowed, the same will result in discrimination which is impermissible in law and hence he prayed that the impugned orders at Annexures A8 & A9 be quashed and a direction be issued to the respondents not to reverse the ACP benefits already granted to him in the Pay Band-2, i.e. Rs.15160/- with grade pay of Rs.4600/-.

7. *Per contra, Shri V Narasimha Holla, learned Counsel for the respondents submitted that in view of the admitted fact that the applicant was given 1st and 2nd ACP benefits respectively with effect from 9-8-1999 and 25.5.2003 while he was working in the office of the Development Commissioner (Handicrafts), Ministry of Textiles, the question of granting the same once again with effect from the date on which he joined in the Defence Accounts Department does not arise. He contended that the object of the ACP scheme is to see that a Government Servant shall not stagnate in a particular pay scale for more than 12 years as per the Fifth CPC and ten years as per the 6th CPC. By referring to the date from which the applicant was granted the benefits of the 1st ACP and 2nd ACP while he was working in the Ministry of Textiles and by referring to the provisions of the ACP Scheme and MACP Scheme he argued that the applicant is entitled for the benefits of MACP only with effect from 21-5-2009 on which date he completes a total service of 30 years. He submitted that*

granting benefits of 1st and 2nd ACP twice to a Government Servant is not only impermissible but is also not traceable to any policy/decision of the Government. Therefore, he prayed that the OA deserves to be dismissed.

8. *On perusal of the pleadings and the documents annexed thereto and upon hearing the learned counsel for both the parties, the points that arise for our consideration are as under :*

1) *Whether order bearing No. Part II O.O. No.153 dated 4-4-2007 at Annexure A6 in which the applicant was granted 1st financial upgradation and 2nd financial upgradation respectively in the pay scale of Rs.4500-125-7000 and 5500-175-9000 with effect from 1-10-2004 is erroneous or not;*

2) *If the answer to the above point is in the affirmative, whether the impugned orders dated 23-07-2013 vide Annexure A8 in which the financial upgradation of ACP/MACP granted to the applicant was cancelled and the order dated 08.11.2003 vide Annexure A-9 under which financial upgradation under the MACP Scheme in Pay Band-1 Rs. 5200-20200 and Grade Pay of Rs. 2000/-was given, are liable to be interfered with or not;*

3) *Whether the Order bearing No. Part-II O.O.No.473 dated 27.12.2013 vide Annexure A-13 in which the pay of the applicant is refixed consequent on cancellation of the financial upgradations can be sustained.*

9. **Regarding point No.1** : *The facts are not in dispute. Admittedly the applicant entered the service as Lower Division Clerk in the Office of the Development Commissioner (Handicrafts), Ministry of Textiles on 21-05-1979. The pay scale of Lower Division Clerk in the Ministry of Textiles is Rs. 3050-75-3950-80-4590. The applicant*

entered service in the Department of Defence Accounts on 1-10-2004 pursuant to the selection against the notification in the Employment News dated 17.05.2003. The post notified to be filled up in the Employment Notice dated 17.5.2003 is the post of Clerk in the scale of Rs.3050-4590. Thus it is clear that the pay scale of the post of Lower Division Clerk in the Ministry of Textiles and the post of Clerk in the Defence Accounts Department are identical. It is an admitted fact that the applicant was relieved on 30.9.2004 from the office of the Development Commissioner (Handicrafts), Ministry of Textiles, Bangalore, and on 1.10.2004 he reported for duty in the Defence Accounts Department. As on the date on which he was relieved from the office of the Development Commissioner (Handicrafts), Ministry of Textiles, Bangalore, the officiating pay drawn by him is Rs.5250/- and the Dearness pay @ 50% is Rs.2625/-, and the same is evident from the Last Pay Certificate at Annexure A3. While the applicant was working in the office of the Development Commissioner (Handicrafts), Ministry of Textiles, Bangalore, on completion of 12 years of qualifying service he got 1st financial upgradation with effect from 9.8.1999 in the pay scale of Rs.4000-6000. Thereafter, on completion of 24 years of qualifying service he was granted 2nd financial upgradation in the scale of Rs.4500-7000 w.e.f. 25.05.2003. It is already observed that the pay scale of the Clerk in the Ministry of Textiles and in the Defence Accounts Department are identical. Even if it were to be assumed that since the entry into service, i.e. on 21.5.1979 , the applicant is

working as Clerk in the Office of the Defence Accounts Department, he is entitled to get the benefits of 1st ACP and 2nd ACP with effect from the same date, i.e. 9.8.1999 and 25.5.2003. This position itself makes it clear that the applicant is not entitled for the financial upgradation in the Defence Accounts Department under the ACP Scheme for the reason that admittedly he availed the benefits of the 1st and 2nd ACPS respectively with effect from 9.8.1999 and 25.5.2003 in the pay scale of Rs.4000-100-6000 and Rs.4500-125-7000. As a consequence of availing the 1st ACP and 2nd ACP, while he was working in the office of the Development Commissioner (Handicrafts), Ministry of Textiles, Bangalore, as a Clerk, the pay drawn by him was higher than the maximum of the pay scale of the post of Clerk in the Ministry of Textiles i.e. 3050-75-3950-80-4590.

10. *The ACP scheme was intended to give relief against continued stagnation on account of the absence of promotional avenues to the employees serving in different cadres. The financial upgradations were to be in the next higher grade in the existing hierarchy. The benefit of pay fixation under FR 22 I (a) (i) was to be given at the time of the financial upgradation but no change in the designation or function accompanied on such upgradations. The scheme does not envisage the status or rank of the employee and continuation in the in the same post but only extended the next higher pay scale available in the hierarchy. By and large the ACP has alleviated the problem of stagnation and allowed higher rate of*

increment in the higher scale extended in it. In view of these principles, by taking into account the fact that the applicant whilst working in the post of Clerk in the office of the Development Commissioner (Handicrafts), Ministry of Textiles, the benefits of 1st ACP and 2nd ACP was extended to him in the hierarchy of the pay scale available in the Ministry of Textiles, as already observed. The applicant while working in the office of the Development Commissioner (Handicrafts), Ministry of Textiles, Bangalore was stagnated in a particular pay scale of the hierarchy of that Department and not stagnated in the hierarchy of the pay scale of the Defence Accounts. Admittedly, he entered into the Defence Accounts Department only on 1.10.2004. Consequently the question of stagnating in the hierarchy of pay scale of the Defence Accounts Department does not arise at all. It is worthy to note that it is not the case of the applicant that he had not availed the benefit of ACP while he was in the Ministry of Textiles. If it is his case that he entered into Defence Department without availing the ACP benefits then the position would be otherwise. But admittedly much prior to the date on which he entered in the Defence Accounts Department, he availed the benefits of both 1st and 2nd ACP. Therefore, grant of 1st and 2nd financial upgradations under the ACP Scheme to the applicant retrospectively with effect from 1.10.2004 vide Order dated 4-4-2007 (Annexure A6) is not at all in terms of the ACP Scheme. Hence we hold that the order bearing No.Part-II O.O.153 dated 4-4-07 vide

Annexure A6 under which the applicant was granted 1st and 2nd Financial upgradations with effect from 1-10-2004, first in the pay scale of Rs.4500-125-7000 and then in the pay scale of Rs.5500-175-9000 is wholly erroneous. Accordingly our answer to point No.1 is in the affirmative.

11. Shri Sugumaran by referring to the clarification to the doubt raised at point No.39 of DoP&T O.M. dated 18.07.2001 (Annexure A-14) argued that the financial upgradation under ACP Scheme is allowed to the applicant in the hierarchy of the new post. The doubt and the clarification at point No. 39 reads as under :

39	<p><i>An employee is appointed to a lower grade as a result of unilateral transfer on personal request in terms of FR 15(2). Will the period of service rendered in the higher post count for the purpose of ACPs?</i></p>	<p><i>Condition No. 14 of the ACPS (DoP&T O.M. dated 9.8.1999), inter alia, states that in case of transfer including unilateral transfer on request, regular service rendered in previous organisation shall be counted alongwith regular service in the new organisation for the purposes of getting financial upgradation under the Scheme. This condition covers cases where a unilateral transfer is to a lower post. However, financial upgradations under the ACPS shall be allowed in the hierarchy of the new post.</i></p>
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In our opinion, the above point has no relevance to the facts and circumstances of the case on hand. The point sought to be clarified is that if a Government servant is appointed by way transfer to a lower

grade post, then whether the past service rendered by such person in a higher grade post of the erstwhile department can be reckoned for the purpose of computing the total period of 12 years and 24 years of service which is the eligibility criteria for grant of 1st ACP and 2nd ACP. The clarification is “yes” . While answering as “yes” it is further clarified that financial upgradations under the ACPs shall be allowed in the hierarchy of the new post. What is to be noted is that point of doubt is not relating to “**whether a Government servant who availed 1st and 2nd ACPs before his transfer is entitled for financial upgradation and if so, which of the hierarchy of the pay is to be taken into account for granting the upgradations, i.e. whether hierarchy of the pay scale of the new post or old post**”. Thus it is clear that above doubt at point No.39 does not deal with a situation where 1st and 2nd financial upgradation was extended before appointment by way of transfer. The fact that the applicant was granted 1st ACP and II ACP while he was holding the post in Ministry of Textiles is an admitted one. The fixation of pay scale is essentially a function of the executive. They are closely interlinked with evaluation of duties and responsibilities attached to the posts and the pay scales are normally linked with conclusions arrived at by Bodies, like the Pay Commission. The degree of skill, strain of work, experience involved, training required, responsibility undertaken, mental and physical requirements, disagreeableness of the tasks, hazard attendant on work and fatigue involved are some of the

*relevant factors which go into the process of fixing the pay scale. Different hierarchy of the pay scale of the post of Clerk in the two departments is fixed depending upon the variance of the said factors. For the foregoing reasons, we are not at all impressed by the argument of Shri Sugumaran that by the order dated 4.4.2007 vide Annexure A-6, the applicant was rightly granted 1st and 2nd ACPs in view of the clarification to point No. 39 (extracted above) and we reiterate our answer to point No.1. **Regarding point No. 2** : We have already held that order dated 4-4-2007 under which the applicant was granted 1st and 2nd financial upgradations in the scale of Rs.4500-7000 and Rs.5500-9000 is an erroneous one. The settled law is that an erroneous order can be withdrawn, of course, by following the principles of natural justice.. Accordingly the erroneous order dated 04.04.2007(Annexure A6) was withdrawn by the impugned order dated 23.07.2013 vide Annexure A-8 and hence the same cannot be faulted upon.*

12. *Pursuant to the orders dated 23.07.2013 (Annexure A-8), by the other impugned order dated 8.11.2013 vide Annexure A9, ACP/MACP granted in respect of the applicant amongst others have been reviewed and regularized. So far as the date with effect from which the applicant is entitled to MACP, there is no dispute. By order dated 12/07/2010 vide Annexure A7 the applicant was granted 3rd financial upgradation under MACP scheme with effect from 21-5-2009 . As on 12.7.2010 the applicant was in Pay Band of Rs.9300-34800*

with grade pay of Rs.4200/- and he was granted MACP in the Pay Band of Rs.9300-34800 with Grade pay of Rs.4600/-. By the impugned order dated 8-11-2013 vide Annexure A9 while reviewing the grant of 3rd MACP, the pay band and the grade pay of the applicant was reduced to Rs. 5200-20200 with grade pay of Rs.2000/-. **Now the question is, whether the reduction of the pay band and the grade pay of the applicant from Rs.9300-34800 with grade pay of Rs.4600/- to Rs. 5200-20200 with grade pay of Rs.2000/- is sustainable?** To answer this question, certain facts are required to be stated though it amounts to repetition. He entered into service as Lower Division Clerk in the office of the Development Commissioner (Handicrafts), Ministry of Textiles, Bangalore on 21.5.1979. The pay scale of the post of Clerk in the Ministry of Textiles is Rs.3050-4590. The pay scale of the post of clerk in the Office of the Defence Accounts Department of is also Rs. 3050-4590. The pay scale of the post of clerk in both the Departments are identical. The applicant entered into the Defence Accounts Department pursuant to the selection against Employment News Notification dated 17.5.2003 (Annexure A1). The applicant availed the benefits of 1st and 2nd ACP while he was working in the Ministry of Textiles. He was relieved from the office of the Development Commissioner (Handicrafts), Ministry of Textiles, Bangalore on 30.9.2004. On being relieved he joined the Defence Accounts Department on 1.10.2004. As on 30.9.2004 his officiating pay was Rs.

5250/-.

In service jurisprudence the expressions 'pay' and 'pay scale' are conceptually different connotations. Pay is essentially a consideration for the services rendered by an employee and is the remuneration which is payable to him. Remuneration is the recurring payment for services rendered during the tenure of employment.

Public service comprises different grades and, therefore, different pay scales are provided for different grades. The pay of an employee is in that background fixed with reference to pay scale. This is necessary to be done because the pay of an employee does not remain static. An employee starts with a particular pay which is commonly known as 'initial pay' and the periodical increases obtained by him are commonly known as 'increment'. When the higher point is reached, the employee concerned becomes entitled to what is known as 'ceiling pay'. It is, therefore, a graded upward revision. Each stage in a scale commonly is referred to as 'basic pay'. The emoluments which an employee gets is not only a basic pay at a particular stage but also an additional amount to which he is entitled as allowances, e.g. DA etc. The fitment into a particular scale has to be considered in the background of the policy decision to ensure the payment of an amount not less than a last pay drawn. The fitment of pay is regulated under Rule 22 of Fundamental Rules and Supplementary Rules (FRSR). The term "pay" is defined under sub clause (a) of sub Rule (21) of the Rule 9 of FRSR. It reads as under:

"(21) (a) Pay means the amount drawn monthly by a Government servant as –

- (i) *the pay, other than special pay or pay granted in view of his personal qualifications , which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre; and*
- (ii) *overseas pay, special pay and personal pay; and*
- (iii) *any other emoluments which may be specially classed as pay by the President. “*

13. *Provisions of F.R. 22 deals with regulation of pay on appointment/promotion from one post to another. F.R.22(1)(a)(2) regulates fixation of pay where appointment is made to the post with the same or identical time scale of the post held earlier. It reads as under :*

“(2) when the appointment to the new post does not involve such assumption of duties and responsibilities of greater importance, he shall draw as initial pay, the stage of the time scale which is equal to his pay in respect of the old post held by him on regular basis, or, if there is no such stage, the stage next above his pay in respect of the old post held by him on regular basis :

Provided that where the minimum pay of the time-scale of the new post is higher than his pay in respect of the post held by him regularly, he shall draw the minimum as the initial pay;

Provided further that in a case where pay is fixed at the same stage, he shall continue to draw that pay until such time as he would have received an increment in the time scale of the old post in cases where pay is fixed at the higher stage , he shall get his next increment on completion of the period when an increment is earned in the time scale of the new post.

On appointment on regular basis to such a new post, other than to an ex-cadre post on deputation, the Government servant shall have the option, to be exercised within one month from the date of such

appointment, for fixation of his pay in the new post with effect from the date of appointment to the new post or with effect from the date of increment in the old post."

14. F.R. 22(l)(a)(3) provides for regulating the pay when appointment to the new post is made on his own request, the same reads as under :

"(3) When appointment to the new post is made on his own request under sub rule (a) of Rule 15 of the said rules, and the maximum pay in the time scale of that post is lower than his pay in respect of the old post held regularly, he shall draw that maximum as his initial pay.

(b) If the conditions prescribed in clause (a) are not fulfilled, he shall draw as initial pay on the minimum of the time scale :

Provided that, both in cases covered by clause (a) and in cases, other than the cases of reemployment after resignation or removal or dismissal from the public service, covered by clause (b), if he –

(1) has previously held substantively or officiated in

- (i) the same post, or*
- (ii) a permanent or temporary post on the same time scale, or*
- (iii) a permanent post or a temporary post (including a post in a body, incorporated or not, which is wholly or substantially owned or controlled by the Government) on an identical time scale; or*

(2) is appointed subject to the fulfillment of the eligibility conditions as prescribed in the relevant recruitment rules to a tenure post on a time scale identical with that of another tenure post which he has previously held on regular basis:

then the initial pay shall not be less than the pay, other than special pay or any other emoluments which may be classed as pay by the President under Rule 9(21)(a)(iii) which he drew on the last occasion, and he shall count the period during which he drew that

pay on a regular basis on such last and any previous occasions for increment in the stage of the time scale equivalent to that pay. If, however, the pay last drawn by the Government servant in a temporary post had been inflated by the grant of premature increments, the pay which he would have drawn but for the grant of these increments shall, unless otherwise ordered by the authority competent to create the new post, be taken for the purposes of this proviso to be the pay which he last drew in the temporary post which he had held on a regular basis.....”

15. *By the order dated 15.10.2004 vide Annexure A-5, the applicant was appointed as Clerk and as fresh entrant in the pay scale of Rs. 3050-75-75-3950-80-4590 in the office of the Controller of Defence Accounts, Bangalore. The order of appointment is subject to certain terms and conditions. Condition No.5 attached to the order of appointment reads as “counting of past service for fixation of pay, pension, carry forward of leave etc. will be considered as per extant orders”. At condition No.3 of the order, it is provided that the applicant will not get the benefit of his past service for the purpose of seniority. A combined reading of the condition No.3 read with condition No. 5 of the order of appointment vide Annexure A-5 manifestly reveal that the past service rendered in the post of Clerk by the applicant in the Ministry of Textiles shall be reckoned for all the purposes except for the purpose of seniority. Since the condition No.5 specifically provides for counting of past service for fixation of pay as per extant rules, it is necessary for the respondents to fix the pay of the applicant*

in terms of F.R. 22 (I)(a)(2). In the reply statement, the respondents have taken a stand that the pay of the applicant is fixed in terms of F.R. 22(I)(a) (3). We are not satisfied with the respondents for invoking F.R. 22(I)(a)(3) in view of the fact that the applicant entered into the department pursuant to his selection against the notification published in the Employment Notice dated 17.05.2003 (Annexure A-1). The respondents cannot invoke F.R.22(I)(a)(3) for fixation of pay of the applicant. On the other hand, we are of the opinion that the respondents should invoke the provisions of F.R.22(I)(a)(2) for fixation of pay of the applicant. Even otherwise, if the pay of the applicant is fixed by invoking F.R.22(I)(a)(3) also, the same can make no difference. The proviso (1)(i) and proviso (1)(ii) of F.R. 22(I)(a) (3) makes it clear that the initial pay shall not be less than the pay, other than special pay or any other emoluments which may be classed as pay by the President under Rule 9(21)(a)(iii) which he drew on the last occasion, and he shall count the period during which he drew that pay on a regular basis on such last and any previous occasions for increment in the stage of the time scale equivalent to that pay.

16. *It may be useful for us to refer to the Government of India Orders issued under F.R. 22 vide G.I., F.D, Letter No.14 (12) R.I/31 dated 15th May, 1931, and O.M. No. F.1(25)E.III (A)/64 dated 23.07.1968, which respectively reads as under :*

Letter dated 15.07.1931 :

"(2) Identical time-scales.- A question arose whether identical time scales- one attached to posts whose pay is governed by the Civil Service Regulations and the other subject to conditions prescribed by the Fundamental Rules could be treated as identical for the purpose of the Pay Chapter in the Fundamental Rules. It has been decided with the concurrence of the Auditor General that when two posts are on identical time scales it is reasonable to hold that the duties and responsibilities to the posts are not very different in nature, irrespective of the fact whether the pay of the post is governed by the Civil Service Regulations or the Fundamental Rules, and that duty rendered in one of them may, therefore, be allowed to count towards increment in the other."

O.M. dated 23.07.1968 :

"(6) Counting of Service in a scale higher than or identical with the parent cadre.- 1. Doubts having expressed as to whether the benefits of proviso (1)(iii) to F.R.22 in respect of protection of pay and period of increment would be admissible to Government servants on their appointment directly or on transfer from a post carrying an identical time-scale of pay without fulfillment of the conditions prescribed in that proviso, it was clarified that in such cases the benefit mentioned above will be admissible without fulfillment of those conditions subject to paragraph 2 below.

2. This benefit will not be admissible to an individual who enters Government service for the first time from a post in a body, incorporated or not, which is wholly or substantially owned or controlled by the Government.

3. xxxxx “

17. A plain reading of the F.R. 22(I)(a)(2) and the aforesaid letter and O.M. of the Government of India makes it clear that on entry into the Defence Accounts Department, the applicant shall draw as initial pay, the stage of the time scale which is

equal to his pay in respect of the old post held by him on regular basis. The old pay held by him on regular basis is reflected in the Last Pay Certificate vide Annexure A-3.

18. *In para 2 of the reply statement, the respondents have stated as “Applicant had joined on 01.10.2004 as Clerk in the pay scale of Rs. 3050-4590 with pay protection in the office of the Principal Controller of Defence Accounts, Bangalore.” On perusal of the documents either annexed to the O.A or in the reply, we find no material to show that while fixing the pay of the applicant in the Defence Accounts Department, the pay drawn by him in the Ministry of Textiles was protected. Neither the applicant nor the respondents have produced any material to show that on joining the Defence Accounts Department, the pay of the applicant was fixed in the stage of time scale which is equal to his pay in respect of the old post held by him on regular basis in the Office of the Development Commissioner (Handicrafts), Ministry of Textiles. Therefore, we are of the opinion that it is imperative on the part of the respondents to fix the pay of the applicant on his entry in the Defence Accounts Department by protecting his pay, i.e. fixing in a stage of the time scale which is equal to his pay in respect of the old post held by him in the Office of the Development Commissioner (Handicrafts), Ministry of Textiles, Bangalore, and if there is no such stage, then fix his pay in the*

stage next above the pay drawn by him as on 30.09.2004 in the Ministry of Textiles and, thereafter, to grant the benefit of 3rd MACP depending upon the outcome of such fixation with effect from 21.05.2009. In view of our findings relating to pay fixation, we hold that the impugned order dated 08.11.2013 vide Annexure A-9 for regularisation cannot be faulted upon, but the Annexure-I to the same (Annexure-I to PCDA, Bangalore, PART.II O.O. No. 402 dated 08.11.2013) is liable to be interfered and to be quashed. Accordingly we quash the same so far as it relates to the applicant. Therefore, our answer to the point No.2 is that the order dated 23.07.2013 vide Annexure A-8 is not liable to be interfered with and the order dated 08.11.2013 vide Annexure A-9 so far it relates to the Annexure A-1 to the same is bad and to be interfered with.

19. Regarding point No. 3 : *The ultimate grievance of the applicant is as to reducing his pay from Pay Band-2 i.e. Rs. 15160/- with Grade Pay of Rs. 4600/- to Rs. 11790/- with Grade Pay of Rs. 2000/-. On perusal of the refixation order dated 27.12.2013 vide Annexure A-13, we find that as on 01.10.2004, the pay of the applicant is fixed in the PB of Rs. 4590/-, i.e. the maximum of the pay scale Rs. 3050-4590 whereas on perusal of the Last Pay Certificate vide Annexure A-3, we find that the last pay drawn by the applicant in the office of the Development Commissioner (Handicrafts), Ministry of Textiles, is higher than*

Rs. 4590/- (i.e. Rs. 5250/- as per LPC). On entry into the Defence Accounts Service, the pay of the applicant is to be fixed in the stage of the time scale which is equal to his pay in the post of Clerk held by him in the office of the Development Commissioner (Handicrafts), Ministry of Textiles, Bangalore, and if there is no such stage, the stage next above his pay in respect of the post held by him in the said office. Therefore, we hold that the order Annexure A-13 dated 27.12.2013 is not sustainable. Though the said order at Annexure A-13 is not impugned in the O.A, to meet the ends of justice and to redress the ultimate grievance of the applicant, we are constrained to quash the same. Accordingly, the same is quashed.

20. With regard to the reliance placed by the applicant upon clarification no.23 in Swamysnews February 2005, we may observe that clarification has no application to the facts and circumstances of the case on hand. We may observe that the question sought to be clarified under the said point no.23 is as to how pay of an official has to be regulated after joining the new Department. By referring to condition no.14 in Annexure to OM dated 9.8.1999 it was clarified that in case of transfer including unilateral transfer on request, regular service rendered in the previous organisation shall be counted along with regular service in the new organisation for the purposes of ACP. It is further clarified that as per the condition no.8 financial

upgradation under ACP is personal to the employees and shall have no relevance to the seniority position. Having said so, if we clarified that an employee who was transferred and joined in a new department is entitled to draw his/her pay in the ACP scale even after his/her transfer to the Department. The clarification sought and given is strictly in terms of the policy of ACP/MACP. It has no relevance to the issue involved in the case on hand.

21. *Shri S.Sugumaran contended that after an expiry of considerable time already pay fixed, granted and enjoyed shall not be re-fixed and no recovery can be made consequent thereto. To appreciate this submission we may usefully refer to the judgement in Sh. Bhopal Singh Dhaka vs Director Of Education, of the Principal Bench of the Central Administrative Tribunal on 26 March, 2007 wherein the Tribunal referred to the Full Bench (Hyderabad) judgement in the case of BL.Somayajulu and ors vs. Telecom Commissioner and ors wherein it was held*

"5. To our mind, every claim must be based on an enforceable legal right. A right arises by conferment, not by comparison. Broad notions of equity cannot be equated or assimilated to legal rights. There is also the further question whether the Tribunal can exercise a jurisdiction in equity. We are inclined to think that a

jurisdiction in equity does not inhere in the Tribunal. If authority is needed for this proposition, it is found in [Joginder Singh v. Union of India](#) 1989 (11) ATC 474, [Union of India v. Deokinandan Aggarwal](#) (1992) 19 ATC 219 (SC). The Tribunal is to be guided by law in its adjudicatory process, and not by considerations of equity alone. It cannot travel into regions of equity and innovate remedies. Perhaps the observation of Benjamin Cardozo that a Judge is not free to seek his own ideal, it is more appropriate in the cases of Tribunals.

x x x

7. If a junior gets a higher pay that does not mean that the senior also should necessarily get it without a foundation for such a claim in law. Fortuitous events are part of life. Fixation of pay is generally with reference to an individual. Various reasons may account for the grant of a higher pay to a junior.

22. *In Raghunath Rai Bareja & Anr. vs. Punjab National Bank & ors. It has been held that when there is a conflict between law and equity, it is the law which has to prevail, in accordance with the Latin maxim 'dura lex sed lex', which means 'the law is hard, but it is the law'. Equity can only supplement the law, but it cannot supplant or override law. In that case, their Lordships quoted the observation of the Apex Court in the case of [Madamanchi Ramappa vs. Muthaluru Bojjappa](#) that "what is administered in Courts is justice according to law, and considerations of fair play and equity however important they*

may be, must yield to clear and express provisions of the law.". Their Lordships quoted the observations of the Apex Court in the case of Council for [Indian School Certificate Examination vs. Isha Mittal](#) to the effect that "Considerations of equity cannot prevail and do not permit a High Court to pass an order contrary to the law." In view of the above principle, we are not impressed by the argument of Shri S.Sugumaran that after considerable time the pay fixed, granted and enjoyed cannot be refixed and no recovery can be made on the ground of equity.

23. *Yet another argument of Shri S.Sugumaran is that the cancellation of ACP benefits by the impugned orders will be leading to a glaring discrimination. He submits that if the person who has put in 11 years and 11 months service before being transferred unilaterally, he would be entitled for ACP benefits within a month from joining new post in the hierarchy post of new organisation and would be entitled for grade pay of Rs.2800/- whereas the person is already in receipt of ACP by virtue of long service and stagnation would be placed in the lower grade of pay of Rs.2000/- which at any given angle will not be the intention and purported of rule making authority. To illustrate the same he had shown a comparative statement in respect of interdepartmental transfer in respect of Sri Venkatesh D Joshi and Ms.Jayashree one who had got ACP promotion prior to transfer and the other who got ACP promotion subsequently in*

the new organisation. We are not impressed by this argument also. Shri S.Sugumaran failed to appreciate the position that the benefit in the ACP/MACP scheme shall be purely personal to the employees and shall have no relevance to his seniority position and the same is explicit at paragraph 20 of the MACP scheme. paragraph 20 of the MACP scheme reads as under:-

“20. Financial upgradation under the MACPS shall be purely personal to the employee and shall have no relevance to his seniority position. As such, there shall be no additional financial upgradation for the senior employees on the ground that the junior employee in the grade has got higher pay/grade pay under the MACPS.”

The validity of the aforesaid paragraph 20 of the MACP scheme was challenged in OA.No.1103/2011 before the Ernakulam Bench of this Tribunal. The prayer in the said OA.No.1103/2011 is “To declare that para 20 of Annexure 1 of Modified Assured Career Progression Scheme is illegal”.

24. The Full Bench (Ernakulam Bench) of this Tribunal at paragraph 14 of the order held as under:

14.The above provision specifies that the financial upgradation under the MACPS shall be purely "personal to the employees". The reason is that it is subject to fulfilment of the stipulated conditions of (a) non promotion and (b) completion of stipulated years of service that the

benefit of financial upgradation under the scheme is admissible. If a senior does not fulfill any of/both the conditions, obviously, the benefit under the scheme is not admissible to him. It is for this reason that the scheme stipulates that the financial upgradation has no relevance to the seniority position. Once seniority has no role to play, the question of senior claiming financial upgradation under the scheme at par with junior does not arise. Hence, the legal validity of clause 20 of the Scheme cannot be assailed. Of course, we hasten to add here that the restriction imposed under this clause is only to the extent the claim relates to financial upgradation at par with that granted to juniors under the MACP Scheme. The restriction cannot extend to any other arena, whereby, under any other specific rules or Government of India Decisions, a person not granted the financial upgradation under the MACP Scheme claims parity in pay such as stepping up of pay under FR 22 or otherwise. “

(underlining by us)

By following the decision of the Ernakulam Bench of this Tribunal, we decline to appreciate the contention of Shri S.Sugumaran that the impugned order results in glaring discrimination.

25. *For the foregoing reasons, we hold and conclude that the order dated 23.07.2013 (Annexure A-8) is in accordance with policy of grant of ACPS and valid. The order dated 08.11.2013 (Annexure A-9) though required to be sustained and not liable to be interfered with, Annexure-I to the same, i.e. Annexure-I to the PCDA, Bangalore, PART.II O.O. No. 402 dated 08.11.2013 is quashed, qua the applicant. Consequently, the order bearing No. PART.II O.O.No. 473 dated 27.12.2013 is liable to be quashed and accordingly, the same is quashed in so far as it relates to the applicant. As a consequence of quashing Annexure-I of the impugned order dated 08.11.2013 and the order dated 27.12.2013 vide Annexure A-13, the pay of the applicant has to be refixed.*

26. *The O.A is partly allowed. Consequent upon cancellation of financial upgradations granted to the applicant under ACP/MACP Scheme vide order dated 04.04.2007 (Annexure A-6) with effect from 01.10.2004, the respondents are directed to take necessary steps to refix the pay of the applicant by fixing his initial pay at the stage of the time scale which is equal to his pay in respect of the post of Clerk held by him in the office of the Development Commissioner (Handicrafts), Ministry of Textiles on regular basis and if there is no such stage, the stage next above his pay in respect of the old post held by him on regular basis, and to see that the initial*

pay shall not be less than the pay drawn by him as on 30.09.2004 as per Last Pay Certificate dated 13.09.2004 vide Annexure A-3. This exercise shall be completed within three months from the date of receipt of the copy of this order. We make it clear that the applicant is at liberty to seek appropriate remedy available to him, if he feels that he is aggrieved by the refixation of pay to be undertaken by the respondents pursuant to this order.

27. *With the above observation, the O.A is disposed of. No order as to costs."*

2. This OA was partly allowed. Allowing the respondents to refix the pay. But then aggrieved by the order the applicant filed RA.No.14/2015. Vide order dated 1.6.2015 we had rejected the RA.

3. Against which the applicant preferred a WP.No.23020/2016 which was disposed off by Hon'ble High Court vide order dated 9.12.2016 which we quote:-

"THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO SET ASIDE THE ORDER DTD: 16.1.2015 IN O.A NO.97/2014 PASSED BY THE HON'BLE CAT AT ANNEXURE-A AND ETC.

***THIS PETITION COMING ON FOR ORDERS THIS DAY,
JAYANT PATEL J., PASSED THE FOLLOWING:***

ORDER

Rule.

2. *Mr.S.Ismail Zabiulla, learned CGC appears for respondents and waives notice of Rule.*

3. *With the consent of learned Counsel appearing for both the sides, the petition is finally heard.*

4. *The present petition is directed against order dated 16,01.2015 passed by the Central Administrative Tribunal (hereinafter referred to as 'the Tribunal' for the sake of convenience), whereby the Tribunal for the reasons recorded in the order has partly allowed the application and did not grant the relief fully as prayed by the petitioner.*

5. *The only question to be considered is that whether reduction in the payscale could be ordered by respondent No.3 without giving any opportunity of hearing to the petitioner or not?*

6. *As such, when we considered the matter for the first time on 15.06.2016, we had passed the following order:*

"We have heard Sii. Sugumaran, learned counsel for the petitioner and learned counsel for the respondents.

Prima-facie it appears that no opportunity of hearing was given to the petitioner before the impugned, order before the Tribunal whereby pay- scale was reduced and the benefit granted were withdrawn. Hence, the matter deserves consideration.

Rule returnable on 14.07.2016.

By interim order, the status-quo as prevailing pending the matter before the Tribunal shall continue to remain in operation. "

7. *In response to the notice, when the learned Counsel Mr.S.Ismail Zabiulla, has appeared for the respondents and we*

enquired as to whether any opportunity of hearing was given to the petitioner before the order dated 23.07.2013 Annexure A8' was passed by the concerned authority or not.

8. *Mr.S.Ismail Zabiulla, learned Counsel appearing for the respondents had taken time to enquire the said aspect and today he is unable to show that any opportunity of hearing was given to the petitioner before the order dated 23.07.2013 was passed.*

9. *It is well settled position of law that if any order adverse to the person concerned was to be passed, an opportunity of hearing was required to be given. In the present case, the benefits of the scheme were granted and the payscales were upgraded. By the impugned order, the payscale of the petitioner is sought to be reduced and the benefits were modified. In our view, if the effect of the order was to put the petitioner in reduced pay scale or even withdrawal of the benefit or cancellation of the benefit already granted earlier, such could not be done without observance of the principles of natural justice. As no opportunity of hearing has been given to the petitioner, the impugned order dated 23.07.2013 which was subject matter before the Tribunal so far as it relates to the petitioner cannot be sustained and deserves to be set aside.*

10. *However, Mr.S.Ismail Zabiulla, learned CGC appearing for the respondents contended that such a contention was never raised before the Tribunal by the petitioner and therefore this Court may decline the entertainment of such contention.*

11. *In our view, observance of principles of natural justice though is based on facts but the requirement is by law. Had there been a dispute with regard to observance of principles of natural justice, it may result into mixed question of law and fact. But when it is an admitted position that no opportunity of hearing has been given, it would only result into a pure question of law which can be permitted to be agitated even for the first time in a petition under Article 227 of the Constitution. Hence the contention raised on behalf of the respondents cannot be accepted.*

12. *In view of the aforesaid, the order dated 23.07.2013 Annexure 'A8' so far as it relates to the petitioner is set aside with the further direction that it would be open to the competent authority including respondent No. 3 to give an opportunity of hearing to the petitioner by issuing formal notice and thereafter appropriate order may be passed in accordance with law within a period of three months from the date of receipt of a certified copy of this order. Until the appropriate order is passed by the concerned respondent-authority, the interim relief granted earlier shall continue to remain in operation. The impugned order of the Tribunal is set aside.*

12. *Writ Petition is allowed to the aforesaid extent. Rule made absolute accordingly. No order as to costs.*

In view of the above, I.A.No.2/2016 does not survive for consideration and shall stand disposed of."

4. Apparently, Hon'ble High Court found that before refixing the pay and taking away the benefit the applicant had not been granted opportunity to be heard. Therefore, Hon'ble High Court felt that applicant must be heard and then only appropriate order must be passed.

5. Thereafter, Annexure-A15 notice was issued to the applicant as part of grant of an opportunity and impugned orders were issued which the applicant now challenges.

6. The applicant rests his case on paragraph 15 of the order of the Tribunal in Annexure-A12 which we quote:

*"15. By the order dated 15.10.2004 vide Annexure A-5, the applicant was appointed as Clerk and as fresh entrant in the pay scale of Rs. 3050-75-75-3950-80-4590 in the office of the Controller of Defence Accounts, Bangalore. The order of appointment is subject to certain terms and conditions. Condition No.5 attached to the order of appointment reads as "**counting of past service for fixation of pay, pension, carry forward of leave etc. will be considered as per extant orders**". At condition No.3 of the order, it is provided that the applicant will not get the benefit of his past service for the purpose of seniority. A combined reading of the condition No.3 read with condition No. 5 of the order of appointment vide Annexure A-5 manifestly reveal that the past service rendered in the post of Clerk by the applicant in the Ministry of Textiles shall be reckoned for all the purposes except for the purpose of seniority. Since the condition No.5 specifically provides for counting of past*

service for fixation of pay as per extant rules, it is necessary for the respondents to fix the pay of the applicant in terms of F.R. 22 (I)(a)(2). In the reply statement, the respondents have taken a stand that the pay of the applicant is fixed in terms of F.R. 22(I)(a) (3). We are not satisfied with the respondents for invoking F.R. 22(I)(a)(3) in view of the fact that the applicant entered into the department pursuant to his selection against the notification published in the Employment Notice dated 17.05.2003 (Annexure A-1). The respondents cannot invoke F.R.22(I)(a)(3) for fixation of pay of the applicant. On the other hand, we are of the opinion that the respondents should invoke the provisions of F.R.22(i)(a)(2) for fixation of pay of the applicant. Even otherwise, if the pay of the applicant is fixed by invoking F.R.22(I)(a)(3) also, the same can make no difference. The proviso (1)(i) and proviso (1)(ii) of F.R. 22(I)(a)(3) makes it clear that the initial pay shall not be less than the pay, other than special pay or any other emoluments which may be classed as pay by the President under Rule 9(21)(a)(iii) which he drew on the last occasion, and he shall count the period during which he drew that pay on a regular basis on such last and any previous occasions for increment in the stage of the time scale equivalent to that pay.”

7. In this we have said that “ **counting of past service for fixation of pay, pension, carry forward of leave etc., will be considered as per extant orders.**

8. Shri AR.Holla submits that according to rules when past services are counted and carry forwarded all the benefits are accrued

to him will also be carried forward to him except seniority. Therefore, according to him the question is what is the meaning of the word “ **all benefits**”. He would say except for seniority all other benefits will thus be carried forward. We will come to the findings on this a little later.

9. Shri MV.Rao relies on Annexure-R9 of the judgement of this Bench itself which we quote:-

“O R D E R

PER HON'BLE MR. M. NAGARAJAN, JUDICIAL MEMBER

1. *The main grievance of the applicant in this O.A is as to the refixation of his pay consequent upon cancellation of financial upgradation granted to him under ACP/MACP Scheme vide Annexure A-12 dated 27.12.2013 and as to the consequential reduction in a sum of Rs. 2600/- in Grade Pay which results in total reduction of Rs. 6,878/- The facts leading to his grievances are as under :*

2. *The applicant is working as Lower Division Clerk in National Savings Organisation, Government of India, Ministry of Finance. Initially he entered the service on 07.01.1991 in the said organisation, Ministry of Finance, in the Pay Scale of Rs.3050-75-3950-80-4590. The pay scale of Rs. 3050-4590 is introduced as per the Fifth Pay Commission pay scale. While he was working in the Ministry of Finance, on completion of 12 years of qualifying service, he was granted 1st financial upgradation under the ACP Scheme with effect*

from 07.01.2003 in the next hierarchical pay scale of 4000-100-6000. That by availing 1st financial upgradation in the pay scale of Rs.4000-7000 from 07.01.2003, he was drawing the pay of Rs.4,100/-.

While drawing the pay of Rs.4,100/- in the Ministry of Finance, pursuant to the notification dated 17.05.2003 published in the Employment News, inviting applications for appointment to the post of Clerks in Defence Accounts Department on inter departmental transfer, the applicant applied for the post of Clerk through proper channel and he was selected for the post of Clerk in the Defence Accounts Department. By order dated 26.10.2004 (Annexure A-2), the applicant was relieved from the Coast Guard on 26.10.2004 so as to enable him to join as Lower Division Clerk at the office of the LAO (AF), Coimbatore. On being relieved from the office of the Coast Guard, Chennai, the applicant joined on 27.10.2004 in the office of the Principal Controller of Defence Accounts. On reporting in the office of the Principal Controller of Defence Accounts on 27.10.2004, it seems that the basic pay of the applicant has been fixed at Rs.4110/- in the scale of pay of Rs.3050-4590.

3. The applicant claims that though he was inducted in the Defence Accounts Department, Bangalore in the pay scale of Rs. 3050-4590 and his pay was fixed at Rs.4110/-, in order to protect his pay as per the terms and conditions and on counting the service rendered in the erstwhile Department, for the purpose of ACP benefits, the pay of the applicant was fixed in the minimum of the pay

scale of Rs. 4500-125-7000 being the hierarchy available in the Defence Accounts Department with effect from the date of joining the Defence Accounts Department, i.e. on 27.10.2004, by the order dated 11.06.2009 (Annexure A-5). Thereafter, he was granted 2nd financial upgradation under the MACP Scheme on completion of 20 years of service by order dated 07.02.2011 vide Annexure A-6 in the grade pay of Rs.4200/- . After availing 2nd financial upgradation under the MACP scheme he was drawing a pay of Rs.12220/- with grade pay of Rs.4200/- as per the 6th Central Pay Commission (CPC). When things stood thus, by an order No. Part-II. O.O.No.250 dated 23-07-2013 (Annexure A-7) the 1st ACP granted to the applicant with effect from 27.10.2004 and the 2nd MACP with effect from 07.01.2011 was withdrawn. Consequent upon the order dated 23-7-2013 (Annexure A-7) under which the financial upgradations under the ACP/MACP granted to the applicant was cancelled, the respondents have reviewed and regranted the financial upgradation by the order bearing No. Part-II O.O.No.402 dated 8-11-2013 vide Annexure A-8. By review, his grade pay was reduced from 4200/- to Rs. 2000/-. Pursuant to the orders dated 23.07.2013 and 08.11.2013 respectively vide Annexures A7 & A8, the applicant filed his representation dated 5.12.2013 vide Annexure A-9 requesting the respondents to recall the same and restore his pay in Pay Band- 2 , i.e. Rs. 9300-34800 with grade pay of Rs.4200/-. The applicant submits that the respondents instead of cancelling the said order dated 23.07.2013 and 08.11.2013

respectively at Annexure A7 and A8, vide an order dated 27-12-2013 (Annexure A12) refixed the pay of the applicant as per the statement at Annexure A-12. Being aggrieved by the order dated 23-07-2013 and 8-11-2013 (Annexures A7 & A8), the applicant presented the instant OA with a prayer to quash the same and for a direction to the respondents not to reverse the ACP Scheme benefits already granted in the grade pay of Rs.4200/-.

4. Pursuant to the Notice of the OA, the respondents entered appearance and filed their detailed reply contending that the impugned orders at Annexures A7 & A8 and consequential refixation of his pay do not suffer from any legal infirmity. The respondents in their reply have taken a specific stand that the impugned orders at Annexures A7 & A8 cannot be faulted for the reason that the 1st ACP benefits were granted to the applicant while he was working in the Ministry of Finance itself. It is specifically pointed out by them that the applicant was granted the 1st financial upgradation under the ACP scheme with effect from 07.01.2003 in the pay scale of Rs.4000-6000. It is contended by them that since the applicant has already been granted the 1st financial upgradation under the ACP scheme while he was working in the Ministry of Finance as stated above, once again granting the same with effect from 27.10.2004 by the order dated 07.02.2011 (Annexure A6) is an erroneous one and hence by the impugned order dated 23-7-2003 (Annexure A7) the benefits of 1st ACP granted to the applicant was withdrawn and consequently by

the other impugned order dated 8.11.2003 (Annexure A8), it is rectified.

5. Heard Mr. Sugumaran, Learned Counsel for the applicant and Shri V Narasimha Holla, learned council for the respondents. Perused the pleadings of both the parties and the documents annexed thereto.

6. The facts are not in dispute. Shri S Sugumaran, learned counsel for applicant contended that though the pay of the applicant was initially fixed at Rs.4110/- in the Defence Accounts Department, with a view to protect the pay as per terms and conditions and by counting the past services in Ministry of Finance for the purpose of ACP benefits, his pay was fixed in the scale of Rs. 4500-125-7000 being the hierarchy available in the Defence Accounts Department retrospectively from 27.10.2004 by order dated 11.06.2009 vide Annexure A5. The argument of Shri Sugumaran is that the change of scale by order dated 11.06.2009 vide Annexure A5 on grant of the benefits of 1st financial upgradation and the fixation at Rs. 4500-125-7000 is done with a view to fix the pay of the applicant in the hierarchy of Defence Accounts Department. Mr. Sugumaran vehemently contended that the reason assigned by the respondents for cancelling the order dated 11.06.2009 (Annexure A5) by the impugned orders at Annexures A7 & A8 on the ground that the order dated 11.06.2009 is an erroneous one, is a misconception on the part of the respondents. By referring to point No.39 of the clarification dated 18/7/2001 and the OM No.35034/3/2008-Estt(D)Vol.II dated

4/10/2012, Shri Sugumaran contended that the interpretations of the respondents regarding clarification and the consequential action are not at all tenable. He further invited our attention as to the fixation of pay of one Smt. Jayashree and argued that if the interpretations of the respondents are allowed, the same will result in discrimination which is impermissible in law and hence he prayed that the impugned orders at Annexures A7 & A8 be quashed and a direction be issued to the respondents not to reverse the ACP benefits already granted to him in the grade pay of Rs.4200/-.

7. *Per contra, Shri V Narasimha Holla, learned Counsel for the respondents submitted that in view of the admitted fact that the applicant was given 1st ACP benefits with effect from 07.01.2003 while he was working in the Ministry of Finance, the question of granting the same once again with effect from the date on which he joined in the Defence Accounts Department does not arise. He contended that the object of the ACP scheme is to see that a Government Servant shall not stagnate in a particular pay scale for more than 12 years as per the Fifth CPC and ten years as per the 6th CPC. By referring to the date from which the applicant was granted the benefits of the 1st ACP while he was working in the Ministry of Finance and by referring to the provisions of the ACP Scheme and MACP Scheme he argued that the applicant is entitled for the benefits of 2nd MACP only with effect from 07.01.2011 on which date he completes a total service of 20 years. He submitted that granting*

benefits of 1st ACP twice to a Government Servant is not only impermissible but is also not traceable to any policy/decision of the Government. Therefore, he prayed that the OA deserves to be dismissed.

8. On perusal of the pleadings and the documents annexed thereto and upon hearing the learned counsel for both the parties, the points that arise for our consideration are as under :

1) Whether order bearing No. Part II O.O. No.167 dated 11.06.2009 at Annexure A5 in which the pay of the applicant has been refixed in the scale of Rs. 4500-125-7000 with effect from 27.10.2004 and the order bearing No. Part-II O.O.No. 55 dated 07.02.2011 vide Annexure A-6, the 2nd MACP granted with effect from 07.01.2011 in Pay Band-2 Rs. 9300-34800 with Grade Pay of Rs. 4200/- is erroneous;

2) If the answer to the above point is in the affirmative, whether the impugned orders dated 23-07-2013 vide Annexure A7 in which the financial upgradation of ACP/MACP granted to the applicant was cancelled and the order dated 08.11.2003 vide Annexure A-8 under which financial upgradation under the MACP Scheme in Pay Band-1 Rs. 5200-20200 and Grade Pay of Rs. 2000/-was given, are liable to be interfered with;

3) Whether the Order bearing No. Part-II O.O.No.473 dated 27.12.2013 vide Annexure A-12 in which the pay of the applicant is refixed consequent on cancellation of the financial upgradations can be sustained.

9. **Regarding point No.1** : The facts are not in dispute. Admittedly the applicant entered the service as Lower Division Clerk in the National Savings Organisation, Ministry of Finance on 07.01.1991.

The pay scale of Lower Division Clerk in the Ministry of Finance is Rs. 3050-75-3950-80-4590. The applicant entered service in the Department of Defence Accounts on 27.10.2004 pursuant to the selection against the notification in the Employment News dated 17.05.2003. The post notified to be filled up in the Employment Notice dated 17.5.2003 is the post of Clerk in the scale of Rs.3050-4590. Thus it is clear that the pay scale of the post of Lower Division Clerk in the Ministry of Finance and the post of Clerk in the Defence Accounts Department are identical. It is an admitted fact that the applicant was relieved on 26.10.2004 from the office of the Coast Guard, Chennai, and on 27.10.2004 he reported for duty in the Defence Accounts Department. As on the date on which he was relieved from the office of the Coast Guard, Chennai, the pay drawn by him is Rs.4110/-.

While the applicant was working in the Ministry of Finance, on completion of 12 years of qualifying service he got 1st financial upgradation with effect from 07.01.2003 in the pay scale of Rs.4000-6000. It is already observed that the pay scale of the Clerk in the Ministry of Textiles and in the Defence Accounts Department are identical. Even if it were to be assumed that since the entry into service, i.e. on 07.01.1991 , the applicant is working as Clerk in the Office of the Defence Accounts Department, he is entitled to get the benefits of 1st ACP only with effect from the same date, i.e. 07.01.2003. This position itself makes it clear that the applicant is not entitled for the financial upgradation in the Defence Accounts

Department under the ACP Scheme for the reason that admittedly he availed the benefits of the 1st ACP with effect from 07.01.2003 in the pay scale of Rs.4000-100-6000. As a consequence of availing the 1st ACP, while he was working in the Ministry of Finance as a Clerk, the pay drawn by him was Rs. 4110/- in the pay scale of the post of Clerk in the Ministry of Finance, i.e. 3050-75-3950-80-4590.

10. *The ACP scheme was intended to give relief against continued stagnation on account of the absence of promotional avenues to the employees serving in different cadres. The financial upgradations were to be in the next higher grade in the existing hierarchy. The benefit of pay fixation under FR 22 I (a) (i) was to be given at the time of the financial upgradation but no change in the designation or function accompanied on such upgradations. The scheme does not envisage the status or rank of the employee and continuation in the same post but only extended the next higher pay scale available in the hierarchy. By and large the ACP has alleviated the problem of stagnation and allowed higher rate of increment in the higher scale extended in it. In view of these principles, by taking into account the fact that the applicant whilst working in the post of Clerk in the earlier department, Ministry of Finance, the benefits of 1st ACP was extended to him in the hierarchy of the pay scale available in the Ministry of Finance, as already observed. The applicant while working in the National Savings Organisation, Ministry of Finance, was stagnated in a particular pay scale of the hierarchy of that*

Department and not stagnated in the hierarchy of the pay scale of the Defence Accounts. Admittedly, he entered into the Defence Accounts Department only on 27.10.2004. Consequently the question of stagnating in the hierarchy of pay scale of the Defence Accounts Department does not arise at all. It is worthy to note that it is not the case of the applicant that he had not availed the benefit of ACP while he was in the Ministry of Finance. If it is his case that he entered into Defence Department without availing the ACP benefits then the position would be otherwise. But admittedly much prior to the date on which he entered in the Defence Accounts Department, he availed the benefits of both 1st ACP. Therefore, the question of seeking clarification regarding grant of ACP in the hierarchical pay scale prevalent in the Defence Accounts Department does not arise at all. Consequently, refixation of his pay in the scale of Rs. 4500-125-7000 with effect from the date on which he joined the Defence Accounts Department, i.e. 27.10.2004 vide order dated 11.06.2009 (Annexure A-5) is not at all in terms of the ACP Scheme. Hence we hold that the order bearing No. Part-II O.O.167 dated 11.06.2009 vide Annexure A5 under which the applicant's pay was refixed retrospectively with effect from 27.10.2004 in the pay scale of Rs.4500-125-7000 and then grant of 2nd MACP with effect from 07.01.2011 in P.B. Rs. 9300-34800 with Grade Pay of Rs. 4200/- in the pay scale of Rs.5500-175-9000 by the order dated 07.02.2011(Annexure A6) is wholly erroneous. Accordingly our answer to point No.1 is in the affirmative.

11. *Shri Sugumaran by referring to the clarification to the doubt raised at point No.39 of DoP&T O.M. dated 18.07.2001 (Annexure A-13) argued that the financial upgradation under ACP Scheme is allowed to the applicant in the hierarchy of the new post. The doubt and the clarification at point No. 39 reads as under :*

39	<p><i>An employee is appointed to a lower grade as a result of unilateral transfer on personal request in terms of FR 15(2). Will the period of service rendered in the higher post count for the purpose of ACPs?</i></p>	<p><i>Condition No. 14 of the ACPS (DoP&T O.M. dated 9.8.1999), inter alia, states that in case of transfer including unilateral transfer on request, regular service rendered in previous organisation shall be counted alongwith regular service in the new organisation for the purposes of getting financial upgradation under the Scheme. This condition covers cases where a unilateral transfer is to a lower post. However, financial upgradations under the ACPS shall be allowed in the hierarchy of the new post.</i></p>
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In our opinion, the above point has no relevance to the facts and circumstances of the case on hand. The point sought to be clarified is that if a Government servant is appointed by way transfer to a lower grade post, then whether the past service rendered by such person in a higher grade post of the erstwhile department can be reckoned for the purpose of computing the total period of 12 years and 24 years of service which is the eligibility criteria for grant of 1st ACP and 2nd ACP. The clarification is “yes” . While answering as “yes” it is further

clarified that financial upgradations under the ACPs shall be allowed in the hierarchy of the new post. What is to be noted is that point of doubt is not relating to “**whether a Government servant who availed 1st ACP before his transfer is entitled for financial upgradation and if so, which of the hierarchy of the pay is to be taken into account for granting the upgradations, i.e. whether hierarchy of the pay scale of the new post or old post**”. Thus it is clear that above doubt at point No.39 does not deal with a situation where 1st financial upgradation was extended before appointment by way of transfer. The fact that the applicant was granted 1st ACP while he was holding the post in Ministry of Finance is an admitted one. The fixation of pay scale is essentially a function of the executive. They are closely interlinked with evaluation of duties and responsibilities attached to the posts and the pay scales are normally linked with conclusions arrived at by Bodies, like the Pay Commission. The degree of skill, strain of work, experience involved, training required, responsibility undertaken, mental and physical requirements, disagreeableness of the tasks, hazard attendant on work and fatigue involved are some of the relevant factors which go into the process of fixing the pay scale. Different hierarchy of the pay scale of the post of Clerk in the two departments is fixed depending upon the variance of the said factors. For the foregoing reasons, we are not at all impressed by the argument of Shri Sugumaran that by the order dated 11.06.2009 vide Annexure A-5, the pay of the

applicant was rightly fixed in view of the clarification to point No. 39 (extracted above) and we reiterate our answer to point No.1.

12. **Regarding point No. 2** : We have already held that order dated 11.06.2009 under which the applicant was granted 1st financial upgradation in the scale of Rs.4500-125-7000 with effect from 27.10.2004 is an erroneous one. The settled law is that an erroneous order can be withdrawn, of course, by following the principles of natural justice.. Accordingly the erroneous order dated 11.06.2009 (Annexure A5) was withdrawn by the impugned order dated 23.07.2013 vide Annexure A-7 and hence the same cannot be faulted upon.

13. Pursuant to the orders dated 23.07.2013 (Annexure A-7), by the other impugned order dated 8.11.2013 vide Annexure A8, MACP granted in respect of the applicant amongst others have been reviewed and regularized. So far as the date with effect from which the applicant is entitled to MACP, there is no dispute. By order dated 07.02.2011 vide Annexure A6 the applicant was granted 2nd financial upgradation under MACP scheme with effect from 07.01.2011. As on 07.01.2011, the applicant was in Pay Band of Rs.5200-20200 with grade pay of Rs.2800/- and he was granted 2nd MACP in the Pay Band of Rs.9300-34800 with Grade pay of Rs.4200/-. By the impugned order dated 8-11-2013 vide Annexure A8 while reviewing the grant of 2nd MACP, the pay band and the grade pay of the applicant was reduced to Rs. 5200-20200 with grade pay of

Rs.2000/- **Now the question is, whether the reduction of the pay band and the grade pay of the applicant from Rs.9300-34800 with grade pay of Rs.4200/- to Rs. 5200-20200 with grade pay of Rs.2000/- is sustainable?** To answer this question, certain facts are required to be stated though it amounts to repetition. He entered into service as Lower Division Clerk in the Ministry of Finance on 07.01.1991. The pay scale of the post of Clerk in the Ministry Finance is Rs.3050-4590. The pay scale of the post of clerk in the Office of the Defence Accounts Department of is also Rs. 3050-4590. The pay scale of the post of clerk in both the Departments are identical. The applicant entered into the Defence Accounts Department pursuant to the selection against Employment News Notification dated 17.5.2003 (Annexure A1). The applicant availed the benefits of 1st ACP while he was working in the Ministry of Finance. He was relieved from the office of the Coast Guard, Ministry of Finance, Chennai, on 26.10.2004. On being relieved he joined the Defence Accounts Department on 27.10.2004. On reporting in the office of the Principal Controller of Defence Accounts, the basic pay of the applicant was fixed at Rs. 4110/- in the pay scale of Rs. 3050-4590. In service jurisprudence the expressions 'pay' and 'pay scale' are conceptually different connotations. Pay is essentially a consideration for the services rendered by an employee and is the remuneration which is payable to him. Remuneration is the recurring payment for services rendered during the tenure of employment. Public service comprises

different grades and, therefore, different pay scales are provided for different grades. The pay of an employee is in that background fixed with reference to pay scale. This is necessary to be done because the pay of an employee does not remain static. An employee starts with a particular pay which is commonly known as 'initial pay' and the periodical increases obtained by him are commonly known as 'increment'. When the higher point is reached, the employee concerned becomes entitled to what is known as 'ceiling pay'. It is, therefore, a graded upward revision. Each stage in a scale commonly is referred to as 'basic pay'. The emoluments which an employee gets is not only a basic pay at a particular stage but also an additional amount to which he is entitled as allowances, e.g. DA etc. The fitment into a particular scale has to be considered in the background of the policy decision to ensure the payment of an amount not less than a last pay drawn. The fitment of pay is regulated under Rule 22 of Fundamental Rules and Supplementary Rules (FRSR). The term "pay" is defined under sub clause (a) of sub Rule (21) of the Rule 9 of FRSR. It reads as under:

"(21) (a) Pay means the amount drawn monthly by a Government servant as –

(i) the pay, other than special pay or pay granted in view of his personal qualifications, which has been sanctioned for a post held by him substantively or in an officiating capacity, or to which he is entitled by reason of his position in a cadre; and

- (ii) overseas pay, special pay and personal pay; and
- (iii) any other emoluments which may be specially classed as pay by the President. “

14. Provisions of F.R. 22 deals with regulation of pay on appointment/promotion from one post to another. F.R.22(1)(a)(2) regulates fixation of pay where appointment is made to the post with the same or identical time scale of the post held earlier. It reads as under :

“(2) when the appointment to the new post does not involve such assumption of duties and responsibilities of greater importance, he shall draw as initial pay, the stage of the time scale which is equal to his pay in respect of the old post held by him on regular basis, or, if there is no such stage, the stage next above his pay in respect of the old post held by him on regular basis :

Provided that where the minimum pay of the time-scale of the new post is higher than his pay in respect of the post held by him regularly, he shall draw the minimum as the initial pay;

Provided further that in a case where pay is fixed at the same stage, he shall continue to draw that pay until such time as he would have received an increment in the time scale of the old post in cases where pay is fixed at the higher stage , he shall get his next increment on completion of the period when an increment is earned in the time scale of the new post.

On appointment on regular basis to such a new post, other than to an ex-cadre post on deputation, the Government servant shall have the option, to be exercised within one month from the date of such appointment, for fixation of his pay in the new post with effect from the date of appointment to the new post or with effect from the date of increment in the old post.”

15. *By the order dated 05.07.2004 vide Annexure A-4, the applicant was appointed as Clerk and as fresh entrant in the pay scale of Rs. 3050-75-75-3950-80-4590 in the office of the LAO (AF), Coimbatore). The order of appointment is subject to certain terms and conditions. Condition No.8 attached to the order of appointment reads as “counting of past service for fixation of pay, pension, carry forward of leave etc. will be considered as per extant orders”. At condition No.8 of the order, it is further provided that the applicant will not get the benefit of his past service for the purpose of seniority. A reading of the condition No.8 of the order of appointment vide Annexure A-4 manifestly reveal that the past service rendered in the post of Clerk by the applicant in the Ministry of Finance shall be reckoned for all the purposes except for the purpose of seniority. Since the later portion of the condition No.8 specifically provides for counting of past service for fixation of pay as per extant rules, it is necessary for the respondents to fix the pay of the applicant in terms of F.R. 22 (I)(a)(2).*

16. *It may be useful for us to refer to the Government of India Orders issued under F.R. 22 vide G.I., F.D, Letter No.14 (12) R.I/31 dated 15th May, 1931, and O.M. No. F.1(25)E.III (A)/64 dated 23.07.1968, which respectively reads as under :*

Letter dated 15.07.1931 :

“(2) Identical time-scales.- A question arose whether identical time scales- one attached to posts whose pay is

governed by the Civil Service Regulations and the other subject to conditions prescribed by the Fundamental Rules could be treated as identical for the purpose of the Pay Chapter in the Fundamental Rules. It has been decided with the concurrence of the Auditor General that when two posts are on identical time scales it is reasonable to hold that the duties and responsibilities to the posts are not very different in nature, irrespective of the fact whether the pay of the post is governed by the Civil Service Regulations or the Fundamental Rules, and that duty rendered in one of them may, therefore, be allowed to count towards increment in the other."

O.M. dated 23.07.1968 :

"(6) Counting of Service in a scale higher than or identical with the parent cadre.- 1. Doubts having expressed as to whether the benefits of proviso (1)(iii) to F.R.22 in respect of protection of pay and period of increment would be admissible to Government servants on their appointment directly or on transfer from a post carrying an identical time-scale of pay without fulfillment of the conditions prescribed in that proviso, it was clarified that in such cases the benefit mentioned above will be admissible without fulfillment of those conditions subject to paragraph 2 below.

2. This benefit will not be admissible to an individual who enters Government service for the first time from a post in a body, incorporated or not, which is wholly or substantially owned or controlled by the Government.

3. xxxxx " "

17. A plain reading of the F.R. 22(I)(a)(2) and the aforesaid letter and O.M. of the Government of India makes it clear that on entry into the Defence Accounts Department, the applicant shall draw as initial pay, the stage of the time scale which is equal to his pay in respect of the old post held by him on regular

basis. The old pay drawn by him in respect of the post held by him on regular basis is Rs. 4110/-.

18. In para 2 of the reply statement, the respondents have stated as "**Applicant had joined on 01.10.2004 as Clerk in the pay scale of Rs. 3050-4590 with pay protection in the office of the LAO (AF), Coimbatore, under the jurisdiction of Principal Controller of Defence Accounts (AF), Deharadun and that his pay was fixed at Rs. 4110/-.** Fixing his initial pay is in terms of F.R.22(1)(a)(2) .” Since the pay fixation is in terms of F.R.22(1)(a)(2), we hold that the impugned order dated 08.11.2013 vide Annexure A-8 for regularisation cannot be faulted upon and is entitled to be sustained. Therefore, our answer to the point No.2 is that the order dated 23.07.2013 vide Annexure A-7 and the order dated 08.11.2013 vide Anneuxe A-8 is not at all liable to be interferred with in so far it relates to the applicant.

19. **Regarding point No. 3 :** The ultimate grievance of the applicant is as to reducing his Grade Pay from Rs. 4200 to the Grade Pay of 2000/. On perusal of the refixation order dated 27.12.2013 vide Annexure A-12, we find that as on 27.10.2004, the pay of the applicant is fixed in the pay of Rs. 4110/-, i.e. the last pay drawn by him in the Ministry of Finance in the pay scale Rs. 3050-4590. On entry into the Defence Accounts Service, the pay of the applicant is to be fixed in the stage of the time

scale which is equal to his pay in the post of Clerk held by him in the office of the Coast Guard, Ministry of Finance, and if there is no such stage, the stage next above his pay in respect of the post held by him in the said office. Admittedly, he was in the pay scale of Rs. 3050-4590 and was drawing Rs. 4110/-.
Therefore, we hold that the order Annexure A-12 dated 27.12.2013 is perfectly in order.

20. *With regard to the reliance placed by the applicant upon clarification no.23 in Swamysnews February 2005, we may observe that clarification has no application to the facts and circumstances of the case on hand. We may observe that the question sought to be clarified under the said point no.23 is as to how pay of an official has to be regulated after joining the new Department. By referring to condition no.14 in Annexure to OM dated 9.8.1999 it was clarified that in case of transfer including unilateral transfer on request, regular service rendered in the previous organisation shall be counted along with regular service in the new organisation for the purposes of ACP. It is further clarified that as per the condition no.8 financial upgradation under ACP is personal to the employees and shall have no relevance to the seniority position. Having said so, if we clarified that an employee who was transferred and joined in a new department is entitled to draw his/her pay in the ACP scale even after his/her transfer to the Department. The*

clarification sought and given is strictly in terms of the policy of ACP/MACP. It has no relevance to the issue involved in the case on hand.

21. *Shri S.Sugumaran contended that after an expiry of considerable time already pay fixed, granted and enjoyed shall not be re-fixed and no recovery can be made consequent thereto. To appreciate this submission we may usefully refer to the judgement in Sh. Bhopal Singh Dhaka vs Director Of Education, of the Principal Bench of the Central Administrative Tribunal on 26 March, 2007 wherein the Tribunal referred to the Full Bench (Hyderabad) judgement in the case of BL.Somayajulu and ors vs. Telecom Commissioner and ors wherein it was held*

“5. To our mind, every claim must be based on an enforceable legal right. A right arises by conferment, not by comparison. Broad notions of equity cannot be equated or assimilated to legal rights. There is also the further question whether the Tribunal can exercise a jurisdiction in equity. We are inclined to think that a jurisdiction in equity does not inhere in the Tribunal. If authority is needed for this proposition, it is found in [Joginder Singh v. Union of India 1989 \(11\) ATC 474, Union of India v. Deokinandan Aggarwal \(1992\) 19 ATC 219 \(SC\)](#). The Tribunal is to be guided by law in its

adjudicatory process, and not by considerations of equity alone. It cannot travel into regions of equity and innovate remedies. Perhaps the observation of Benjamin Cardozo that a Judge is not free to seek his own ideal, it is more appropriate in the cases of Tribunals.

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7. If a junior gets a higher pay that does not mean that the senior also should necessarily get it without a foundation for such a claim in law. Fortuitous events are part of life. Fixation of pay is generally with reference to an individual. Various reasons may account for the grant of a higher pay to a junior.

22. *In Raghunath Rai Bareja & Anr. vs. Punjab National Bank & ors. It has been held that when there is a conflict between law and equity, it is the law which has to prevail, in accordance with the Latin maxim 'dura lex sed lex', which means 'the law is hard, but it is the law'. Equity can only supplement the law, but it cannot supplant or override law. In that case, their Lordships quoted the observation of the Apex Court in the case of [Madamanchi Ramappa vs. Muthaluru Bojjappa](#) that "what is administered in Courts is justice according to law, and considerations of fair play and equity however important they may be, must yield to clear and express provisions of the law.". Their Lordships quoted the observations of the Apex Court in the case of Council for [Indian School Certificate Examination vs. Isha Mittal](#) to the effect that "Considerations of equity cannot prevail and do not permit a High Court to pass an order contrary to the law." In*

view of the above principle, we are not impressed by the argument of Shri S.Sugumaran that after considerable time the pay fixed, granted and enjoyed cannot be refixed and no recovery can be made on the ground of equity.

23. *Yet another argument of Shri S.Sugumaran is that the cancellation of ACP benefits by the impugned orders will be leading to a glaring discrimination. He submits that if the person who has put in 11 years and 11 months service before being transferred unilaterally, he would be entitled for ACP benefits within a month from joining new post in the hierarchy post of new organisation and would be entitled for grade pay of Rs.2800/- whereas the person is already in receipt of ACP by virtue of long service and stagnation would be placed in the lower grade of pay of Rs.2000/- which at any given angle will not be the intention and purported of rule making authority. To illustrate the same he had shown a comparative statement in respect of interdepartmental transfer in respect of Sri Venkatesh D Joshi and Ms.Jayashree one who had got ACP promotion prior to transfer and the other who got ACP promotion subsequently in the new organisation. We are not impressed by this argument also. Shri S.Sugumaran failed to appreciate the position that the benefit in the ACP/MACP scheme shall be purely personal to the employees and shall have no relevance to his seniority*

position and the same is explicit at paragraph 20 of the MACP scheme. paragraph 20 of the MACP scheme reads as under:-

“20. Financial upgradation under the MACPS shall be purely personal to the employee and shall have no relevance to his seniority position. As such, there shall be no additional financial upgradation for the senior employees on the ground that the junior employee in the grade has got higher pay/grade pay under the MACPS.”

The validity of the aforesaid paragraph 20 of the MACP scheme was challenged in OA.No.1103/2011 before the Ernakulam Bench of this Tribunal. The prayer in the said OA.No.1103/2011 is “To declare that para 20 of Annexure 1 of Modified Assured Career Progression Scheme is illegal”.

24. The Full Bench (Ernakulam Bench) of this Tribunal at paragraph 14 of the order held as under:

14.The above provision specifies that the financial upgradation under the MACPS shall be purely "personal to the employees". The reason is that it is subject to fulfilment of the stipulated conditions of (a) non promotion and (b) completion of stipulated years of service that the benefit of financial upgradation under the scheme is admissible. If a senior does not fulfill any of/both the conditions, obviously, the benefit under the scheme is not admissible to him. It is for this reason that the scheme

stipulates that the financial upgradation has no relevance to the seniority position. Once seniority has no role to play, the question of senior claiming financial upgradation under the scheme at par with junior does not arise. Hence, the legal validity of clause 20 of the Scheme cannot be assailed. Of course, we hasten to add here that the restriction imposed under this clause is only to the extent the claim relates to financial upgradation at par with that granted to juniors under the MACP Scheme. The restriction cannot extend to any other arena, whereby, under any other specific rules or Government of India Decisions, a person not granted the financial upgradation under the MACP Scheme claims parity in pay such as stepping up of pay under FR 22 or otherwise. “

(underlining by us)

By following the decision of the Ernakulam Bench of this Tribunal, we decline to appreciate the contention of Shri S.Sugumaran that the impugned order results in glaring discrimination.

25. *For the foregoing reasons, we hold and conclude that the order dated 23.07.2013 (Annexure A-7) is in accordance with policy of grant of ACPS and valid. The consequential orders dated 08.11.2013 and 27.12.2013 respectively at Annexures A-8 and A-12 are also valid and are required to be*

sustained and not liable to be interfered with. Consequently, the order bearing No. PART.II O.O.No. 473 dated 27.12.2013 is also not liable to be interfered with.

26. *For the foregoing reason, we do not find any reason to interfere with any of the orders impugned in the O.A and the same deserve to be dismissed. Accordingly, the O.A. is dismissed. There shall be no order as to costs. "*

10. In a similar case we had apparently explained this matter. Shri MV.Rao will also point out several other judgements of the same stream. Shri MV.Rao would rely on paragraph 11 where he had explained that in this matter.

11. Therefore, what does the term benefit means in the respect? The benefit can only be noted as benefit accrued or accruable at that point of time. Merely by changing positions within governance system, if we have to hold that accruable benefits will include all benefits then the difference in salary and difference in positioning promotional opportunities will have to be taken into accounts. The rules obviously do not canvass such a point. When a person transfers himself from one entity to another he becomes part of the 2nd entity and what is allowable to him is only that part and nothing more. Therefore, the ACP which he had obtained prior to coming into Defence cannot in any way be affected by the change over by counting the past service. It will be putting too much of an expression into the word benefit and the rule obviously do not canvass that. The

word consideration of past service means that that service will be taken into account for allowing his pay scale to be fixed at the right scale at the right time. That does not mean that if the pay scales were different in the earlier post now on changing over to a 2nd entity that the whole of earlier system may have to be revisited. That is not the purpose and purport of the rule. Therefore, we hold that the revisiting on 4.4.2017 was done correctly as the earlier grant of 1st and 2nd ACP once again was patently wrong and illegal. Therefore, the OA lacks merit. OA is dismissed. No order as to costs.

12. At this point Shri AR.Holla raises another issue that when they had corrected their mistake they had taken away the earlier MACP of Rs.4600 and Rs.4500-7000 also. But then contrary to what was said in para 11 of the reply, the effect of that would be relating to the earliest point of time. If it had been taken away, it will be restored from 9.8.1999 and 21.5.2003 respectively. But OA in relation to 3rd and 4th MACPs granted we uphold the order of the respondents.

13. We heard Shri AR.Holla and Shri MV.Rao on another aspect also. It appears that the 3rd MACP which would have befallen him on 2009 had not been granted . Without any doubt applicant is eligible for it. Even while holding that the revisit of the 3rd and 4th ACPs was correct and we dismiss the OA. We make it clear that applicant is eligible for 3rd MACP in 2009 which will be granted to him with all consequences.

14. Shri AR.Holla and Shri MV.Rao have a dispute at this point. Therefore, we had examined it. Since applicant was eligible for Rs.4200 GP at the level of UDC at the point when MACP scheme came into force then without any doubt the applicant is eligible for Rs.4600/- GP on grant of MACP in the year 2009. This benefit will be granted to him with all consequences within one month next without interest and thereafter at a rate of GPF to be paid within next 2 months thereafter at the rate of 12%. Since the applicant had already retired his last drawn pay will now be modulated in accordance with this declaration and appropriately all benefits will be modulated and paid to him in the same parameter. On the question which arose first , OA is dismissed. No order as to costs.

(CV.SANKAR)
MEMBER (A)

(DR. K.B. SURESH)
MEMBER (J)

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Annexures referred to by the applicant in OA.No.1705/2018

Annexure A1: Copy of advertisement in Employment News dt.17.5.2003

Annexure A2: Copy of the relieving order dtd. 30.9.2004

Annexure A3: Copy of LPC . Dtd.13.9.2004

Annexure A4: Copy of certificate Dtd.14.7.2005

Annexure A5: Copy of order Part II OO No.440 dtd. 15.10.2004

Annexure A6: Copies of Part II OO No.153 dtd. 4.4.2007

Annexure A7: Copy of the Part II OO No.234 dtd. 12.7.2010

Annexure A8: Copy of the Part II OO No.250 dtd. 23.7.2013

Annexure A9: Copy of the Part II OO No.402 dtd. 8.11.2013

Annexure A10: Copy of applicant's representation dtd. 5.12.2013

Annexure A11: Copy of the Part II OO No.473 dtd. 27.12.2013

Annexure A12: Copy of order dtd. 16.1.2015 in OA.97/2014

Annexure A13: Copy of order dtd. 1.6.2015 in RA.14/2015

Annexure A14: Copy of order dtd. 9.12.2016 in WP.23020/2016

Annexure A15: Copy of notice dtd. 19.6.2017 in WP.23020/2016

Annexure A16: Copy of applicant's reply dtd. 30.8.2017

Annexure A17: Copy of order dtd. 23.4.2018

Annexure A18: Copy of order dtd. 9.7.2018

Annexure A19: Copy of order dtd. 18.7.2018

Annexure A20: Copy of order dtd. 8.8.2018

Annexure referred to by the Respondents in the reply

Annexure R1: Copy of R-2 letter dtd. 18.6.2018

Annexure R2: Copy of R-2 letter dtd. 25.2.2010

Annexure R3: Copy of R-2 letter dtd. 4.6.2012

Annexure R4: Copy of the Part II OO No.282 dtd. 21.7.2015

Annexure R5: Copy of the Part II OO No.394 dtd. 7.10.2015

Annexure R6: Copy of R-2 letter dtd. 23.5.2014

Annexure R7: Copy of DOPT OM dtd.14.2.2006

Annexure R8: Copy of DOPT OM dtd.4.1.2007

Annexure R8: Copy of CAT order dtd. 16.1.2015 in OA.98/2014

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