

CENTRAL ADMINISTRATIVE TRIBUNAL
KOLKATA BENCH
KOLKATA

No.O A.350/779/ 2013

Coram : Hon'ble Mrs. Bidisha Banerjee, Judicial Member
Hon'ble Dr. (Ms.) Nandita Chatterjee, Administrative Member

Md. Shahid Jamil
Vs.
Union of India & Others
(Comptroller & Auditor Gen. of India)

For the applicant : Mr.S.K. Datta, counsel
Mr. B. Chatterjee, counsel
For the respondents : Mrs.R. Basu, counsel

Heard on 10.04.2019

Order on : 3.5.19.

ORDER

Bidisha Banerjee, Judicial Member

The applicant has preferred this O.A. in order to seek the following reliefs:-

"a) An order do issue to quash the Decision/Order of the Accountant General dated July 19,2007 at P/66(n) of P.F. of Md. Shahid Jamil, Section Officer communicated to the applicant on or about July 20, 2007 being **Annexure 'A-14'** hereof to the extent that right of pay fixation in the applicant's new post at the same pay which he last drew in his old post i.e. Rs.5676/- with date of next increment on March 1, 1999 has been denied; and also alleged over drawal of pay and allowances to the tune of Rs.8,940/- was ordered to be recovered from the applicant;

b) An order do issue to quash Office Order No.LA/Admn dated January 14,2008 being **Annexure 'A-17'** only in so far as the decision to restrict the benefit from counting past service rendered by the applicant as Assistant in the secretariat of ECI, New Delhi as qualifying service, to "pension only";

c) An order do issue to quash the decision of the respondent No.1 communicated by letter dated February 23, 2011 being **Annexure 'A-23'** denying benefit of pay fixation to the applicant;

d) An order do issue directing the respondents to fix the pay of the applicant at Rs.5675/- with effect from May 18, 1998 with next increment admissible on March 1, 1999 in accordance with fundamental rule 22(I)(a)(2) and restoration of all consequential benefits;

e) An order do issue directing the respondent to restore Rs.8940/- recovered from the applicant's salary under order being **Annexure 'A-14'** hereof;

f) Such further orders be passed and/or directions be given as may afford complete redress to the applicant."

2. In this O.A. the parties have narrated the following facts:-

He joined the Secretariat of the Election Commission of India as Assistant in the scale of pay of Rs.5500-9000/- (5th CPC) and prior to his joining the Election Commission of India on 17.03.1997 he appeared in the examination for appointment to the post of Divisional Accountant/Auditor/Junior Accountant/UDC etc. conducted by Staff Selection Commission held on 26.11.1996. Before completion of his selection and appointment pursuant to the aforesaid examination held in November 1996, the applicant in view of his selection in an earlier selection process, was appointed as Assistant in the Secretariat of the Election Commission in the Scale of pay of Rs.5500-9000/- and while drawing the pay of Rs.5675/- the applicant after tendering technical resignation and on acceptance of the same by the Election Commission of India joined the post of Auditor in the Local Audit Department, Office of the Accountant General (Audit)-I, West Bengal on being selected in the selection held by the Staff Selection Commission in November 1996. He joined as Auditor on 18.05.1998 and his resignation was accepted with effect from 15.05.1998. After joining the Local Audit Department, Office of the Accountant General (Audit)-I, West Bengal, on 18.05.1998 as 'Auditor' the pay of the applicant was fixed at Rs.4000/- in the minimum of the pay scale of 4000-100-6000. The applicant made several representations regarding fixation of his pay at or near Rs.5,675 (last pay drawn). Initially, the demand of the applicant was partially met by granting him one advance increment of Rs.100/- but, when he demanded full pay protection (i.e. fixing his pay at or near Rs.5,675/- instead of Rs.4,100/-), this partial benefit was withdrawn and the monetary benefit to the tune of Rs.8,940/- was recovered from his pay and allowances vide Memoranda No.LA/Admn/PF/SJ/256/6267, 6268-6276 and 6277-6280 all dated 20.07.2007.

Aggrieved by such unjust action he made representation seeking full pay protection. His case was then forwarded to the Assistant Comptroller and Auditor General of India(N). But the Headquarters office rejected the claim vide letter No.164/Staff Entt.-I/92/2011 dated 23.02.2011 which was communicated to the applicant vide letter No.LA/Admn/PF/SJ/215303 dated 11.03.2011.

The applicant, then made repeated representations to the Assistant Comptroller and Auditor General of India (N), New Delhi and then to the Deputy Comptroller and Auditor General of India (N), 9, Deen Dayal Upadhyay Marg, New Delhi-110 120, but to no avail. Vide Memorandum NO.LA/Estt/40/7194 dated 29.11.2012 the applicant has been instructed not to send representation to the Headquarters office directly and regarding the subject matter intimated him to refer to the decision of the office conveyed vide letter No.LA/Admn/PF/SJ/2/15303 dated 11.03.2011 under the authority of HQ's letter No.164/Staff Entt-I-92-2011 dated 23.02.2011.

He has pleaded that the protection of pay was turned down and ground for rejection of his representation was on the basis of FR 27 while FR 27 has no manner of application in his case which is governed by FR22(2) and the said provision is not restricted to any appointment to the new post in the same department as the said provision does not specify that the appointment to the new post should be in the same department for the purpose of application of the said provision and accordingly, the applicant on his appointment to the new post where the minimum of the time scale is lower than the pay drawn by him before his joining the post of Auditor but the maximum of the time scale of the new post is more than the pay drawn by the applicant in the post of Assistant, the applicant was entitled to protection of his pay drawn in the post of Assistant under Election

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Commission of India or at the stage next above if there was no such stage in the time scale of Rs.4000-7000. Therefore, he is entitled to the reliefs prayed for.

3. Per contra the respondents have averred as under:-

The applicant, Md. Shahid Jamil, Audit Officer was initially appointed as an Assistant in the Election Commission of India in the pay scale of Rs.5500-175-9000 on 17.03.1997. Before joining as an Assistant, he had also appeared in an examination for appointment to the post of Accountant/Auditor/UDC conducted by the Staff Selection Commission. Later he was selected for the post of Auditor and after getting release from his previous office, joined his present office (Local Audit Department) on 18.05.1998 as an Auditor in the pay scale of Rs.4000-100-6000. The applicant requested for fixation of pay at or near Rs.5675/- which he was drawing as an Assistant in the office of the Election Commission of India. In view of past service rendered by the applicant in the Election Commission of India, his initial pay as Auditor was fixed at Rs.4100/- in the pay scale of Rs.4000-100-6000 by granting one advance increment in terms of provision of GOI(3) below FR 27 under approval of the Accountant General. The C& AG office vide letter dated 19.06.2000 clarified that powers to grant advance increment under GIO(3) below FR 27 do not rest with the Accountant General as the Accountant General is not competent to create the post of an Auditor. It also asked to confirm from the Election Commission of India whether the employee had resigned to join another department with proper permission and that the benefits under Rule 26(2) of CCS(Pension) Rules would be admissible to him in terms of GOID No.(3) below Rule 26. The pay of Sri Jamil was refixed at Rs.4000/- at the minimum of the pay scale of Rs.4000-100-6000 as on 18.05.1998 in the post of Auditor vide office order dated 20.07.2007 and excess amount paid due to higher

fixation of pay amounting to Rs.8940/- was recovered. The Election Commission of India vide letter dated 04.01.2008 clarified that the applicant's resignation from the post of Assistant may be treated as technical resignation and his services in the Commission would be considered for pensionary benefits under Rule 26(2) of the CCS(Pension) Rules. Subsequently, past service rendered by the applicant as Assistant between 17.03.1997 and 15.05.1998 in the Election Commission of India was counted as qualifying service only under Rule 26(2) of CCS(Pension) Rules vide office order dated 14.01.2008. Rule 26(2) ibid stipulates as under:-

"(2) A resignation shall not entail forfeiture of past service if it has been submitted to take up, with proper permission, another appointment, whether temporary or permanent, under the Government where service qualifies."

The respondents have contended that the applicant was appointed as direct recruit Auditor w.e.f. 18.05.1998 in the pay scale of Rs.4000-100-6000 on probation for two years. He had joined the post of Auditor after submitting technical resignation from the post of Assistant in the o/o the Election Commission of India, New Delhi. He was drawing pay of Rs.5675 in the pay scale of Rs.5500-175-9000 in the post of Assistant. In terms of GIO(4) below FR 22, when a government servant joins a new post in the same or another department after submitting technical resignation from the old post then the benefit of past service may be given for fixation of pay if it is otherwise admissible under the rules and the pay, in such cases, may be fixed under FR 27. The applicant joined the post of Auditor after submitting resignation from the old post of Assistant. Hence, pay of the applicant in the new post is to be fixed in terms of GIO(4) below FR 22 which allows fixation of pay under FR 27 not under FR 22(1)(a)(2). Thus, it is clear that the provision of FR 22(1)(a)(2) is not applicable to the case of the applicant. For fixation of pay of the applicant, it is to be first considered whether

the benefit of past service is otherwise admissible under rules or not. If it is considered admissible only then his pay in the new post may be fixed under FR. 27. FR 22(B)(1) read with GIO(1) below the rule provides that if a temporary government servant joins as probationer in another service or cadre shall draw pay at the minimum of the time scale of pay. At the time of appointment in the post of Auditor on probation, the applicant was a temporary government servant. Hence benefit of past service is not admissible to the applicant for fixation of pay and he shall draw pay at the minimum of the time scale of pay. Further, GIO(5) below FR 22 provides that protection of pay under proviso 1(iii) of FR 22 is admissible only on appointment to an identical or higher post. Since the applicant had joined the lower post of Auditor the benefit of pay drawn in the cadre of Assistant is not admissible to him. The respondents have also pleaded that in terms of GIO(4) below FR 22 benefit of past service may be given for fixation of pay after condoning the resignation from post as technical formality if otherwise admissible under rules. While FR 22(B) read with GIO(1) below the rule provides that pay of a temporary government servant joined as probationer in another service or cadre should be fixed at the minimum of the time scale of pay. Thus fixation of pay of the applicant who joined as Auditor with a probation period of two years at a higher stage by granting advance increment under FR 27 is not admissible. Therefore, the respondents contend that rules and orders do not permit providing benefit of protection of pay which the applicant has claimed in the present O.A.

4. We heard Id. counsels and perused the materials on record.

5. Id. counsel for the respondents had submitted that pay protection benefit is available to a Government servant who tenders 'technical resignation' to join

another Government department on identical post with identical or higher scale of pay but not otherwise. The applicant having joined Central Government post for the first time, from the Election Commission, was not entitled to protection of his erstwhile pay.

6. Our factual revelations are as under:

(i) Vide order dated 19.03.1997 the applicant was appointed as Assistant, in a temporary capacity in the Secretariat of the Election Commission of India in the scale of pay of Rs.1640-60-2300-EB-75-3500 w.e.f. the forenoon of 17th March, 1997 and until further orders.

(ii) While he was in receipt of pay of Rs.5675/- in the scale of Rs.5500-9000/- in the erstwhile organisation, he tendered resignation from the post of Assistant to join the post of Auditor in the office of the Accountant General (Audit)-I, West Bengal, Local Audit Department and was appointed as such to a post in the scale of Rs.4000-100-6000 plus usual allowances sanctioned by the Government of India from time to time with effect from 18.05.1998 (FN) vide appointment order dated 18.05.1998.

(iii) Vide communication dated 04.01.2008, of the Under Secretary, Election Commission of India to the Sr. Deputy Accountant General (LBI), Indian Audit And Accounts Department, his resignation from erstwhile organisation was allowed to be treated as his 'technical resignation' and according to the CCS(Pension) Rules 26(2) his services in this Commission was considered for pensionary benefits.

(iv) Vide letter dated 14.01.2008 the interruption in service on 16.05.1998 to 17.05.1998 due to the two appointments being at different stations was condoned under 26(3) of the Central Civil Services(Pension) Rules, 1972.

(v) But, request for protection of pay of erstwhile organisation was turned down as per communication dated 23.02.2011 of the Administrative Officer/Entt.I, Office of the Comptroller and Auditor General of India.

7. To discern whether the rejection was legal, FR 22 as reproduced hereunder, is required to be looked into. FR 22 enjoins :-

"F.R. 22. (1) The initial pay of a Government servant who is appointed to a post on a time-scale of pay is regulated as follows:-

(a) (1) * (Not printed – see GID (1) below this Rule).**

Substituted by GI., Dept. of Per. & Trg., Notification No. 13/6/95-Estt. (Pay-I), dated the 10th August, 2000. [Save in cases of appointment on deputation to an ex cadre post, or to a post on ad hoc basis or on direct recruitment basis], the Government servant shall have the option, to be exercised within one month from the date of promotion or

appointment, as the case may be, to have the pay fixed under this rule from the date of such promotion or appointment or to have the pay fixed initially at the stage of the time-scale of the new post above the pay in the lower grade or post from which he is promoted on regular basis, which may be revised in accordance with this rule on the date of accrual of next increment in the scale of the pay of the lower grade or post. In cases where an ad hoc promotion is followed by regular appointment without break, the option is admissible as from the date of initial appointment / promotion, to be exercised within one month from the date of such regular appointment : (see also GID (1-A) below this Rule).

**Provided that where a Government servant is, immediately before his promotion or appointment on regular basis to a higher post, drawing pay at the maximum of the time-scale of the lower post, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post held by him on regular basis by an amount equal to the last increment in the time-scale of the lower post or rupees one hundred, whichever is more.*

(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.

(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 re-employment 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 fulfilment 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, except in cases of reversion to parent cadre governed by proviso (1) (iii), be less than the pay, other than special pay, personal 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. The service rendered in a post referred to in proviso (1) (iii) shall, on reversion to the parent cadre count towards initial fixation of pay, to the extent and subject to the conditions indicated below-

- (a) the Government servant should have been approved for appointment to the particular grade or post in which the previous service is to be counted;*
- (b) all his seniors, except those regarded as unfit for such appointment, were serving in posts carrying the scale of pay in which benefit is to be allowed or in higher posts, whether in the Department itself or elsewhere and at least one junior was holding a post in that Department carrying the scale of pay in which the benefit is to be allowed; and*
- (c) the service will count from the date his junior is promoted on a regular basis and the benefit will be limited to the period the Government servant would have held the post in his parent cadre had he not been appointed to the ex cadre post.*

(II) The President may specify posts outside the ordinary line of service the holder of which may, notwithstanding the provisions of this rule and subject to such conditions as the President may prescribe, be given officiating promotion in the cadre of the service which the authority competent to order promotion may decide, and may thereupon be granted the same pay whether with or without any special pay attached to such posts as they would have received if still in the ordinary line.

(III) For the purpose of this rule, the appointment shall not be deemed to involve the assumption of duties and responsibilities of greater importance, if the post to which it is made is on the same scale of pay as the post, other than a tenure post, which the Government servant holds on a regular basis at the time of his promotion or appointment or on a scale of pay identical therewith.

(IV) Notwithstanding anything contained in this rule, where a Government servant holding an ex cadre post is promoted or appointed regularly to a post in his cadre, his pay in the cadre post will be fixed only with reference to his presumptive pay in the cadre post which he would have held but for his holding any ex cadre post outside the ordinary line of service by virtue of which he becomes eligible for such promotion or appointment.

For orders regarding treatment of special pay for fixation of pay on promotion see Appendix-8 in this compilation"

8. The applicant has inarguably sought for benefit in terms of FR22(1)(a)(2) proviso to which is explicit that "(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:

9. While, Government of India's instructions 5 and 6 & 7 below FR 22 specify the following :-

"(5) Condonation of resignation for purposes of fixation of pay. - The question whether the benefit of past service for purposes of fixation of pay can be given to a Government servant who resigns his post before taking up appointment in the new post in the same or another Department, has been under the consideration of the Government of India. Normally, the benefit of past service is given only in those cases where such service has not been terminated by resignation/ dismissal. The President is, however, pleased to decide that in cases where Government servants apply for posts in the same or other Departments through proper channel and on selection, they are asked to resign the previous posts for administrative reasons, the benefit of past service may, if otherwise admissible under rules, be given for purposes of fixation of pay in the new post treating the resignation as a 'technical formality'. The pay in such cases may be fixed under FR 27.

[G1, M.F., OM. No. 3379-E. III (B)/65, dated the 17th June, 1965.]

A question has now been raised as to whether the above benefit is admissible to Government servants who applied for posts in the same or other Departments before joining Government service and on that account the application was not routed through proper channel. The matter has been examined and it is now decided that the benefit of past service subject to the same conditions as incorporated in O.M., dated 17-6-1965 above, may be allowed in such cases also, subject to the fulfilment of the following conditions:-

- (i) the Government servant at the time of joining should intimate the details of such application immediately on their joining;
- (ii) the Government servant at the time of resignation should specifically make a request, indicating the dated that he is resigning to take up another appointment under the Government/ Government Organization for which he applied before joining the Government service and that his resignation may be treated as 'technical' resignation;
- (iii) the authority accepting the resignation should satisfy itself that had the employee been in service on the date of application for the post

mentioned by the employee, his application would have been forwarded through proper channel.

[G1, Dept. of Per & Trg. O.M. No. 13/24/92-Estt.(Pay-I), dated the 22nd January, 1993.]

(6) Counting service in a scale higher than or identical with the parent cadre – 1. Doubts having been expressed as to whether the benefits of proviso (1) (iii) to FR 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 fulfilment of the conditions prescribed in that proviso, it was clarified that in such cases the benefit mentioned above will be admissible without fulfilment 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 Government.

3. In cases of reversion from an ex cadre to a cadre post on an identical time-scale of pay, the benefit of proviso (1)(iii) to FR 22 shall be admissible subject to the fulfilment of all the conditions mentioned under the said proviso.

[G1., M.F., O.M. No. F. 1(25)-E, III (A)/64, dated the 23rd July, 1968.]

(7) Fixation of pay in case of employees who seek transfer to a lower post under FR 15(a) – Clarification – [See GIO below FR 15 (a)].”

10. In our considered opinion, having delved into the explicit provisions of FR as enumerated supra and having noticed that the applicant joined a Government service for the first time after having resigned from the service of Election Commission, an autonomous constitutional authority and having, with open eyes, accepted his appointment against an entirely different post carrying a lower scale of pay and, therefore, neither on identical time scale nor to an identical post, in absence of specific provisions supporting his cause, is not entitled to claim pay protection. His claim being as such untenable, this O.A. is dismissed. However, no order is passed as to costs.

(Dr. Nandita Chatterjee)
Administrative Member

(Bidisha Banerjee)
Judicial Member