

CENTRAL ADMINISTRATIVE TRIBUNAL
MUMBAI BENCH, MUMBAI.

ORIGINAL APPLICATION No.162 OF 2014

Dated this Friday, the 01st day of March, 2019

CORAM: DR. BHAGWAN SAHAI, MEMBER (ADMINISTRATIVE)
RAVINDER KAUR, MEMBER (JUDICIAL)

Uttamrao S/o Daulatrao Shinde,
Age – 61 years,
Occup : Retired Lower Division Clerk,
Central Excise I, Division-II, Aurangabad,
C/o Commissioner of Customs & Excise,
Aurangabad (Maharashtra).
R/o H.No.118, Galli No.6, Hussain Colony,
Garkheda Parisar, Aurangabad 431 003 (MS).
(By Advocate Shri S.B.Deshmukh)

... Applicant

VERSUS

1. Union of India, Through Secretary,
Ministry of Finance, Department of Revenue,
North Block, New Delhi 110 001.
2. The Chief Commissioner of Central Excise
& Customs, Pune Zone,
C/o Commissioner of Central Excise, Pune-I,
41A, Ice House, Sasson Road, Pune 411 001.
3. The Commissioner
Customs, Central Excise & Service Tax,
N-5, Town Center, Cidco, Aurangabad 431 003.
4. Pay and Accounts Officer,
Central Excise and Customs,
N-5, Town Center, Cidco, Aurangabad 431 003.
5. The Asstt. Commissioner
Customs, Central Excise & Service Tax,
II-Division, Aurangabad N-5, Town Center,
Cidco, Aurangabad 431 003.

... Respondents

(By Advocates Shri R.R.Shetty and Shri D.A.Dube)

Order reserved on 09.01.2019

Order delivered on 01.03.2019

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O R D E R

Per : Dr. Bhagwan Sahai, Member (Administrative)

This OA has been filed on 03.02.2014 by Shri Uttamrao Daulatrao Shinde, retired as Lower Division Clerk (LDC) from Central Excise, Division-II, Aurangabad seeking declaration that he is entitled for pension and pensionery benefits without any deduction from DCRG, working out of his pension as Rs.11,160/- per month as per the pay fixation order of 11.06.2012 and order dated 12.01.2012 issued by the respondent No.3. He also seeks quashing and setting aside of the impugned pay fixation order dated 29.08.2012 issued by the respondent No.5 i.e. Assistant Commissioner, Customs, Central Excise and Service Tax, Division-II, Aurangabad and awarding of cost of the OA to him.

2. Brief Facts :-

2(a). The applicant states that he joined as Shepoy in Central Excise Department in 1992 against Ex-serviceman quota. After completion of 12 years of service, as per the order dated 01.04.2005 (Annex A-2)

issued by the respondent No.3 i.e. Commissioner, Customs, Central Excise and Service Tax, Aurangabad, he was granted financial upgradation under the ACP Scheme with effect from 20.04.2004 and his pay was fixed at Rs.3,380/- by order dated 12.05.2005 (Annexure A-3).

2(b). Subsequently, he was promoted as Hawaldar in the same pay scale on 22.11.2005 and hence no separate pay order was issued. Thus, from 01.04.2005, his monthly pay was increased to Rs.3,450/-. While implementing VI Central Pay Commission recommendations, his pay was fixed in pay band-I (Rs.5,200-20,200/-) at Rs.6,420/- with Grade Pay of Rs.1,800/- from 01.01.2006. Later on, his Grade Pay was increased to Rs.1,900/- with effect from 01.09.2008 by order dated 18.10.2010 (Annex A-4).

2(c). He was promoted as LDC with retrospective effect from 20.09.2002 on notional basis as per the order dated 22.09.2011 in the revised pay scale of Rs.5,200-20,200/- with Grade Pay of Rs.1,900/-. He was further granted benefit

of second MACP vide order dated 12.01.2012 issued by the respondent No.3 with effect from 30.03.2012 (Annex A-6). However, while issuing this order, the respondent No.3 ignored instructions contained in para 3 of the order issued by the respondent No.3 and partly followed the instructions contained in para 2(i) and (ii) of the order dated 12.01.2012 which resulted in loss of pay and adverse effect on his monthly pension from 01.09.2012.

2(d). The respondent No.5 wrongly proposed recovery of Rs.18,083/- from DCRG payable to the applicant and thereafter, the respondent No.5 issued the pay fixation order dated 29.08.2012 (Annexure A-1), when he was not informed about the recovery of Rs.18,083/- from his DCRG. Thereafter, he represented on 23.04.2013 and 06.08.2013 and also personally met respondent No.3 for his grievance. Thereafter, he received a letter dated 17.12.2013 informing him that certain clarification had been sought from Central Board of Excise and Customs (CBEC), New Delhi vide letter dated 28.10.2013 (Annex

A-10).

2(e). It is claimed that the respondent No.5 intentionally ignored the establishment order dated 12.01.2012 (Annex A-6) issued by the respondent No.3 and so the action of respondent No.5 is wrong and unjustified. Therefore, the applicant is entitled for financial benefit of pay fixation with effect from 01.01.2006 onwards till 31.08.2012 and refund of Rs.18,083/- with 12% interest.

3. Contentions of the parties -

The applicant has contended that -

3(a). as per the implementation of VI Central Pay Commission recommendations, pension is to be worked out based on pay drawn by an employee during last ten months of service or 50% of the last pay drawn whichever is higher. However, the respondents Nos.4 and 5 failed to implement these instructions of respondent No.1 i.e. Secretary, Department of Revenue, Ministry of Finance;

3(b). the instructions contained in the DOPT OM of 09.09.2010 for allowing 3% pay

fixation at every stage in three successive grade pays has also not been followed and as per the provision of Rule 73 of CCS (Pension) Rules, 1972 and Government of India decision at serial No.7, the recovery of excess payment of pay and allowances from pension is restricted. The respondents ought to have restricted to the period of 24 months prior to his date of retirement for verification of pay fixation, etc as per the Rule 59 (1)(d)(ii) of CCS (Pension) Rules, 1972;

3(c). the respondents have violated his Fundamental Rights as provided under Articles 14, 16 and 21 of Constitution of India. The promotion order dated 22.09.2011 (Annex A-11) issued by the Chief Commissioner, Customs and Central Excise, Pune, has been enclosed by the respondents with the reply but para Nos.3 and 4 of that order do not mention any condition of loss of pay, etc. On promotion whenever appointment to higher post involves assumption of higher duties and responsibilities and personal scale of pay

and pay scales of the higher posts are identical, the pay has to be fixed under Fundamental Right 22 as laid down in the case of **A.G. Paranjape Vs. Union of India, reported in 1194 (27) ATC 788.** His promotion order did not have any clear idea about loss of pay on accepting such promotion, hence the applicant as a layman accepted the same under bonafide belief that it would result in increase in monetary benefits and status. The respondents have not produced a copy of any such departmental instructions in this regard;

3(d). based on the promotion order dated 22.09.2011 in the Grade Pay of Rs.1,900/- with effect from 01.09.2008 and his pay fixation was done by applying the provisions of FR 22(I)(a)(1) to ensure the benefits of higher responsibility for the applicant, which has also been upheld by the Ministry of Finance in letter dated 21.06.2013 (para No.3);

3(e). as per the clarification sought on 28.10.2013, no specific reply has been received from the respondent No.1 and in

absence of any such reply, the decision of respondent No.5 is in violation of principles of natural justice. Therefore, the OA should be allowed. In the order of Ernakulam Bench of this Tribunal dated 23.01.2012 and in the CBEC letter dated 21.06.2013, similar other cases have been mentioned, which should be considered to appreciate case of the applicant;

3(f). the stand taken by the respondents in paragraph Nos.9 and 10 in the reply of 24.09.2015 are not acceptable as PAO, Aurangabad carries out pre-check of salary bills before payment and it was his duty to point out the irregularity / difference in pay on joining as LDC. The respondents should not point out such irregularity / difference in pay at the time of retirement of the applicant; and

3(g). the applicant has also cited DOPT OM dated 02.03.2016 issued after the Supreme Court decision in the case of State of Punjab and others Vs. Rafiq Masih (White Washer) in Civil Appeal No.11527 of 2014 dated 18.12.2014 specifying the cases in

which recovery is not permissible.

The respondents have contended that -

3(h). the applicant was granted financial upgradation under ACP Scheme vide order dated 01.04.2005 with effect from 20.04.2002 and based on that, the order of 12.05.2005 was issued by the respondent No.3 fixing his monthly pay as Rs.3,380/-. Then on 22.11.2005, the applicant was promoted as Hawaldar in same pay and hence, no separate pay order was issued;

3(i). with implementation of VI Central Pay Commission recommendations, his pay was fixed in Pay Band-I i.e. Rs.5,200-20,200/- at Rs.6,420/- with Grade Pay of Rs.1,800/-. The respondent No.5 vide letter dated 27.08.2012 without issuing pay fixation order by mistake intimated compliance of the above instructions proposing a recovery of Rs.18,083/- from DCRG of the applicant;

3(j). however, subsequently, the respondent No.5 issued pay fixation order on 29.08.2012 (Annex A-1) though inadvertently the applicant was not informed of it;

3(k). on representation of the applicant, a

clarification was sought from CBEC by letter dated 28.10.2013 and he was informed accordingly. The actual recovery made from the applicant is only of Rs.3,299/- and not of Rs.18,083/-. The respondent No.5 has not ignored the instructions contained in paragraph No.3 of establishment order dated 12.01.2012. In fact the pay of the applicant was fixed in terms of para No.5 of DOPT OM dated 19.05.2009 and as per the clarification issued by the Ministry in letters dated 11.06.2010 and 12.07.2010;

3(1). the clarification given at point No.11 in DOPT OM dated 09.09.2010 was followed and the applicant was promoted as LDC with retrospective effect from 20.09.2002 on notional basis by order of 22.09.2011. Accordingly, the applicant joined as LDC on 23.09.2011 in the revised pay scale of Rs.5,200-20,200/- with Grade Pay of Rs.1,900/-. This was unconditionally accepted by the applicant and, therefore, he cannot make grievance about it now;

3(m). as per the order of 22.09.2011, the respondent No.5 fixed his pay by order of

29.08.2012 with effect from 20.09.2002 i.e. from the date of notional promotion of the applicant as LDC. As a result of implementation of the pay fixation order of 29.08.2012 for the applicant, a recovery of Rs.3,299/- has been made from the DCRG. Therefore, the contention of the applicant that the respondent No.5 has intentionally overlooked the establishment order of 12.01.2012 is not correct;

3(n). the applicant retired on 31.08.2012 and his pay at the time of retirement has been considered for working out of his pension which is higher as compared to the average pay of last ten months of his service;

3(o). the applicant has wrongly interpreted the excess amount paid to him as Government dues. In fact the amount recovered from the DCRG is the difference of pay which arose while fixing his pay on notional promotion as LDC and hence, it cannot be equated with Government dues;

3(p). as per the letter of Ministry of Finance dated 23.07.1992 addressed to the

Department of Pension and Pensioners Welfare, all Government dues need to be recovered from retiring government servants from salary or retirement gratuity and other than arrears of licence fee cannot be recovered from dearness relief of the retired person;

3(q). as per para 3 of the order dated 12.01.2012, the applicant has also been granted 3% pay fixation at every stage in three successive grade pays. Since no clarification has been received from CBEC with reference to the letter of 28.10.2013, the action of the respondents is correct in not taking any further action in this regard. The applicant was also granted second MACP vide order dated 31.08.2012 which resulted in increase of his Grade Pay to Rs.2,000/-.

The respondents have also submitted a comparative chart of pay of Hawaldar and LDC from 01.04.2002 and 20.04.2009 (page 63-64). The chart indicates that if he had retired only as Hawaldar on 01.07.2012, his pay would have been Rs.8,980/- plus Grade Pay of

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Rs.2,000/- after grant of second MACP. But consequent upon the acceptance of retrospective promotion as LDC from 20.09.2002, on his date of retirement, his pay came to be fixed (after grant of second MACP) as Rs.8,800/- plus Grade Pay of Rs.2,000/-. Therefore, the contention of the applicant is not acceptable. The contention of the applicant that the posts of Hawaldar and LDC carried the same Grade Pay is also not correct;

3(r). the case laws cited by the applicant are not applicable in his case as they pertained to period prior to 20.09.2002 i.e. the date when the applicant was promoted as LDC. Therefore, the OA should be dismissed;

3(s). the respondents have also relied upon the Apex Court decision in Civil Appeal No.5899 of 2012 i.e. **Chandi Prasad Uniyal and others Vs. State of Uttarakhand and others** dated 17.08.2012 holding that any amount paid or received without authority of law can always be recovered, barring few exceptions of extreme hardships but not as a matter of right. In such situations, the

law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment. Therefore, in the present case, neither any hardship has been caused to the applicant by refixation of his pay on his retrospective promotion nor such excess amount came to be paid over a long period of time before ordering the recovery. Here the recovery has been made at the time of refixation of pay on grant of retrospective promotion to the applicant. Therefore, the OA has no case.

4. Analysis and conclusion -

We have perused the OA memo and its annexes, rejoinder of the applicant, reply and sur-rejoinder filed by the respondents, various case laws cited by the parties and considered the arguments advanced by both of them on 09.01.2019.

4(a). In paragraph No.4.6 of the OA (page 6) while the applicant has claimed that the respondent No.5 did not follow fully the instructions contained in the Establishment order dated 12.01.2012, the respondents have clarified that those instructions have been

observed fully and properly. While granting the applicant financial upgradation under MACP and fixing his pay. We find this clarification of the respondents convincing.

4(b). As explained by the respondents, the actual recovery from DCRG of the applicant was only of Rs.3,299/- and not of Rs.18,083/- which had been erroneously worked out earlier. Hence, the apprehension of the applicant about recovery of Rs.18,083/- from his DCRG is not correct.

4(c). The letter of Ministry of Finance dated 21.06.2013 is in relation to promotion of Senior Tax Assistants to Deputy Office Superintendents and, therefore, it is not relevant with the case of the applicant. While revision of his pay fixation took place based on his retrospective promotion order issued dated 22.09.2011, the recovery made was in 2012 and, therefore, it is not a case in which the applicant had drawn higher amount of salary as LDC before the amount of recovery was worked out and ordered.

4(d). As contended by the respondents, it is true that the order of 22.09.2011 related to

retrospective promotion of the applicant with effect from 20.09.2002 was unconditionally accepted by him and he actually joined as LDC on 23.09.2011.

4(e). The claim of the applicant that his pay has not been fixed as per the directions contained in the establishment order of 12.01.2012, issued by the respondent No.3 is not correct. As explained by the respondents, fixation of his pay was actually done as per that order only. Therefore, the relief sought by the applicant in this regard also does not survive. In fact the pay fixation order dated 29.08.2012 was issued by cancelling the earlier order of 14.08.2012 which contained error.

4(f). The case law cited by the applicant i.e. the decision of the Ernakulam Bench of this Tribunal is also strictly not applicable to this case as it pertains to promotion of Senior Tax Assistants as Deputy Office Superintendents.

4(g). The claim of the applicant that grant of financial upgradation under MACP was for

higher duties and responsibilities is not correct. Paragraph No.5.5 of the order dated 12.01.2012 clearly mentions that it is in situ and may not involve assumption of higher duties and responsibilities and hence the pay shall be fixed under FR 22(I)(a)(1).

4(h). Since a recovery of amount only of Rs.3,299/- has been made from the applicant at the time of his retirement only because of refixation of his pay on retrospective promotion, we are convinced that it has not caused any hardship to him. In view of the above conclusions, the OA fails.

5. Decision -

OA No.162/2014 is dismissed.

(Ravinder Kaur)
Member (Judicial)

(Dr. Bhagwan Sahai)
Member (Administrative)

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18/3/19

