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CENTRAL ADMINISTRATIVE TRIBUNAL, PRINCIPAL BENCH

OA No.292/2003

New Delhi this the 4th day of July, 2003.

HON'BLE MR. V.K. MAJOTRA, MEMBER (ADMNV)
HON'BLE MR. SHANKER RAJU, MEMBER (JUDICIAL)

D.P. Sharma,
S/o Sh. K.N. Sharma,
R/o A/176, Gujarawalan Town,
Part-I, New Delhi-110009.

-Applicant-

(By Advocate Shri L.K. Singh)

-Versus-

Union of India through
the Secretary, -
Ministry of Law and Justice,
Department of Legal Affairs,
Shastri Bhawan,
New Delhi.

-Respondent

(By Advocate Shri N.S. Mehta)

O R D E R

By Mr. Shanker Raju, Member (J):

Applicant, substantively holding the post of Additional Secretary to the Government of India, Department of Legal Affairs, Ministry of Law and Justice has impugned memorandum dated 4.2.2003 issued by respondents, rejecting his request for accord of additional remuneration under FR-49. Quashment of the aforesaid has been sought with direction to the respondents to pay to applicant as per FR 49 (iii) and (iv) additional remuneration for the period 26.3.2001 to 20.12.2001 and for the period 21.1.2002 to 12.2.2002.

2. As per Foreign Exchange Management Act, 1994 and the rules framed under the Appellate Tribunal for Foreign Exchange (ATFE), ATFE is headed by a Chairperson and Members, which includes a part time Member. As per the Conditions of Service Rules, 2000, Central Government is the appointing authority on recommendation of the Selection Board, consisting of Hon'ble Judge of the Supreme Court,

Secretary Incharge of the Ministry of Central Government dealing with the Department of Legal Affairs and also DOPT Secretary.

3. Pay of the Chairperson is fixed at Rs.,26,000/- and for a Member it is Rs.24,500/-. As per Rule 13 under the heading of other conditions of service the conditions of service of Chairperson in respect of matters for which there is no provision made under the rules shall be the same as for the time being is applicable to such other persons of corresponding status.

4. Applicant, who was substantively holding the post of Additional Secretary in the Ministry of Law and Justice by an order dated 21.3.2001 issued by the Central Government was appointed as Part Time Member of the ATFE. However, as applicant was having equivalent pay scale as to that of Part Time Member it was stipulated that he shall not be entitled to any remuneration on account of this appointment. The aforesaid appointment was made under Rule 5 of the General Conditions and Recruitment Rules, 2000.

5. Being the seniormost Part Time Member of the Tribunal under Section 26 of the Act ibid as the post of Chairperson fell vacant applicant was directed to act as Chairman on whole time basis with immediate effect until a regular Chairperson is appointed by the Central Government by an order dated 26.3.2001. Applicant discharged statutory functions and other duties and responsibilities of Chairperson till 20.12.2001 and had also discharged similar functions for a period w.e.f. 21.1.2000 till 12.2.2002.

6. Through his representation applicant, on the basis of shouldering additional responsibilities of Chairperson requested for benefit of higher pay of the post of Chairperson as per FR 49, which was regretted by the respondents through the impugned order on the ground that as applicant has not been formally appointed to officiate as Chairperson and in addition to regular post of Additional Secretary has acted as Chairperson on part time basis. Applicant on account of occurrence of vacancy in the office of Chairperson as per Section 26 has only acted as a Chairperson. This does not bring the case of applicant within the ambit of FR 49. This has given rise to the present OA.

7. Learned counsel for applicant Sh. L.K. Singh impugned the order on the ground that Rule 7 of the Rules bid makes no distinction as to pay and allowances payable to a regular Member or a Member who has been appointed to act as a Chairperson. Merely because the word 'appointment' has been omitted in the order dated 26.3.2001 would not take away the right of applicant which is admissible as per FR 49 (iii) to pay and allowances of the post of Chairperson.

8. As according to Sh. L.K. Singh, FR 49 (iii) envisages in case of appointment on officiating basis on whole time basis to another post admissibility of pay of the higher post as such applicant who has been in the pay scale of Rs.22400-24500 is entitled to the pay and allowances in the pay scale fixed, i.e., Rs.26,000/- attached to the post of Chairperson.

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9. In the aforesaid conspectus it is stated that as per the qualifications laid down under Section 21 applicant is qualified to be appointed as a Chairperson as he is qualified to be a Judge of the High Court and was fully eligible to draw the scale of pay of the post of Chairperson during the period he performed not only the ordinary duties and powers but also statutory powers on whole time basis attached to the post of Chairperson.

10. It is further stated by resorting to Section 23 of the Act that on appointment as a Chairperson even on an officiating basis salary and allowances shall not be varied to the disadvantage of the incumbent.

11. Learned counsel relies upon the decision of the Apex Court in Selvaraj v. Lt. Governor of Island, Port Blair and Others, (1998) 4 SCC 291 to contend that if a government servant has shouldered responsibilities of a higher post on the principle of quantum merit he is entitled for the pay and allowances attached to such post.

12. Further relying upon the decision of the Apex Court in Secretary-cum-Chief Engineer, Chandigarh v. Hari Om Sharma and Ors., 1998 (2) SLR 735, it is contended that any condition which deprives pay and allowances in the event of officiation on higher post and discharge of duties would be contrary to the law and against the public policy and consequently be unforceable as per Section 23 of the Contract Act.

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13. It is further stated that applicant has again been asked to perform the duties of Chairperson by an order dated 21.5.2003.

14. On the other hand, respondents' counsel contested the OA and vehemently opposed the contentions. It is stated that applicant who was substantively holding the charge of Additional Secretary was appointed as Part Time Member without any additional remuneration. As the selection of Chairperson was in process, in order to avoid working of the getting adversely affected as per the provisions of Section 26 being the seniormost part time Member has automatically acted as Chairperson for which no additional remuneration is admissible.

15. In so far as provisions of FR 49 are concerned, it is contended that the same have application when applicant is formally appointed to officiate on temporary measure in another independent post. Being only a part time Member of ATFE in addition to his regular post of Additional Secretary applicant has acted as Chairperson.

16. Alternatively, it is further stated that even if there is no formal order of appointment as per FR 49 (v) as applicant has held the current charge of routine duties of another post no additional pay is admissible.

17. However, it is stated by Sh. Mehta that as applicant was holding the charge of Chairperson on part time basis by virtue of Section 26 of the Act his representation was rightly rejected.

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18. Lastly, it is contended that as there has been no regular appointment of applicant as Chairperson on whole time basis, his claim is liable to be rejected.

19. We have carefully considered the rival contentions of the parties and perused the material on record. Appointment whether it is of a Member in the Tribunal or of a Chairperson is to be made on the recommendations of Selection Board by the Central Government.

20. Admittedly, under Section 21 of the Act applicant by virtue of Section 21 (i) (a) having being qualified to be a Judge of the High Court is also qualified for appointment as Chairperson. Applicant was appointed as part time Member by the Central Government on 21.3.2001.

21. Section 26 of the Act is reproduced below:

"Member to act as Chairperson in certain circumstances.

26. (1) In the event of the occurrence of any vacancy in the office of the Chairperson by reason of his death, resignation or otherwise, the seniormost Member shall act as the Chairperson until the date on which a new Chairperson appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.

(2) When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the seniormost Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties."

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22. If one has regard to the above, a Member is to act as a Chairperson in two eventualities. Section 26 (i) of the Act provides seniormost Member to act as a Chairperson in the event of occurrence of vacancy till a new Chairperson is appointed in accordance with the provisions of the Act, whereas Section 26 (ii) provides^h functioning of a senior Member as a Chairperson and to discharge the functions in the event of the illness or absence of Chairperson.

23. Section 23 of the Act is reproduced as under:

"Terms and conditions of service.

23. The salary and allowances payable to and the other terms and conditions of service of the Chairperson, other Members and the Special Director (Appeals) shall be such as may be prescribed:

Provided that neither the salary and allowances nor the other terms and conditions of service of the Chairperson or a Member shall be varied to his disadvantage after appointment."

24. As per the aforesaid the salary and allowances payable to the Chairperson are prescribed under the rules of 2000 ibid. This is also stated that on appointment the same cannot be varied to the disadvantage.

25. Section 7 of the Act ibid stipulates^h as under:

"7.(1) Pay of the (a) the Chairperson shall be Rs.26,000 per month (fixed). (b) Member shall be in the scale of Rs.22,400-525-24,500 per month.

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(2) The pay will be fixed in accordance with the prevailing orders, i.e., pay minus pension wherever applicable.

26. If one has regard to the aforesaid rules Chairperson has a fixed pay of Rs.26,000/- whereas for a Member the scale is Rs.22,400-24,500, which is equivalent to that of Additional Secretary held by applicant on substantive basis.

27. FR 49, which is relevant for our consideration in the present case is reproduced as under:

"F.R.49. The Central Government may appoint a Government servant already holding a post in a substantive or officiating capacity to officiate, as a temporary measure, in one or more of other independent posts at one time under the Government. In such cases, his pay is regulated as follows:-

(i) where a Government servant is formally appointed to hold full charge of the duties of a higher post in the same office as his own and in the same cadre/line of promotion, in addition to his ordinary duties, he shall be allowed the pay admissible to him, if he is appointed to officiate in the higher post, unless the competent authority reduces his officiating pay under Rule 35; but no additional pay shall, however, be allowed for performing the duties of a lower post;

(ii) where a Government servant is formally appointed to hold dual charges of two posts in the same cadre in the same office carrying identical scales of pay, no additional pay shall be admissible irrespective of the period of dual charge;

Provided that if the Government servant is appointed to an additional post which carries a special pay, he shall be allowed such special pay;

(iii) where a Government servant is formally appointed to hold charge of another post or posts which is or are not in the same office, or which, though in the same office, is or are not in the

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same cadre/line of promotion, he shall be allowed the pay of the higher posts, or of the highest post, if he holds charge of more than two posts, in addition to ten per cent of the presumptive pay of the additional post or posts, if the additional charge is held for a period exceeding 39 days but not exceeding 3 months:

Provided that if in any particular case, it is considered necessary that the Government servant should hold charge of another post or posts for a period exceeding 3 months, the concurrence of the Ministry of Finance shall be obtained for the payment of the additional pay beyond the period of 3 months;

(iv) where an officer is formally appointed to hold full additional charge of another post, the aggregate of pay and additional pay shall in no case exceed Rs.8,000;

(v) no additional pay shall be admissible to a Government servant who is appointed to hold current charge of the routine duties of another post or posts irrespective of the duration of the additional charge;

(vi) if compensatory or sumptuary allowances are attached to one or more of the posts, the Government servant shall draw such compensatory or sumptuary allowances as the Central Government may fix:

Provided that such allowances shall not exceed the total of the compensatory and sumptuary allowances attached to all the posts."

28. As per the aforesaid rule a government servant holding a post in substantive capacity when is appointed formally to hold charge of another post in the same office and not in the line of promotion he is to be allowed the pay of the higher post if he holds charge of more than two posts in addition to the charge of the additional post and if this charge is held for period exceeding 39 days and not exceeding three months the concurrence of the Ministry of Finance is to be obtained.

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29. The contention put-forth by Sh. Mehta as to non-applicability of Selvaraj's case (supra) in the facts and circumstances on the ground that although therein the petitioner had been asked to look after the duties of Secretary with a stipulation to draw salary to the post under GFR 77 the case of applicant is distinguishable as he has been asked to act as Chairperson by virtue of Section 26 without any additional remuneration as stipulated in the order.

30. Sh. Mehta also attempts to distinguish the decision in Hari Om Sharma's case (supra) by stating that therein the respondent was promoted on ad hoc basis whereas applicant herein has not been promoted.

31. In Selvaraj's case (supra) the aforesaid stipulation to the salary to be drawn for the post on which the higher responsibility has been discharged the principle of quantum merit had been applied by the Apex Court for admissibility of higher pay scale even the petitioner therein had worked on officiating basis.

32. In Hari Om Sharma's case (supra) though ad hoc promotion was ordered the stipulation in the contract as to denial of additional emoluments has been deprecated treating the government as a modal employer and as unforceable under Section 23 of the Contract Act.

33. What has been derived from the aforesaid ratio is the principle of quantum merit that in the event a person is asked to discharge functions of a higher post shouldering higher responsibilities the pay and allowances

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for the post cannot be denied which is also a cardinal principles settled by the Apex Court as equal pay for equal work.

34. In so far as issue of appointment is concerned, there is no denial from the fact that applicant is qualified to be appointed as Chairperson and an order has been passed by the competent authority, i.e., Central Government, asking applicant to act as a Chairperson. In our considered view what has been provided in Section 26 in so far as a seniormost Member acting as Chairperson in the event of occurrence of any vacancy and discharge of functions of a Chairperson by a seniormost Member in case of illness are two different situations. May be under Section 26 (ii) where the person is unable to discharge his functions the senior Member discharges the functions but in the event of occurrence of any vacancy deputation to seniormost Member to act as a Chairperson is a formal appointment as Chairperson with discharge of not only functions but also statutory duties of the Chairperson. Merely because the words "to act as a Chairperson" are provided would not bring beyond the ambit of appointment/deputation of seniormost Member to act as a Chairperson. All the components of a formal appointment exist in the order passed by the respondents. Applicant being qualified to become a Chairperson Central Government has issued an order asking him to act as Chairperson till a regular Chairperson is appointed. Apex Court while dealing with a similar situation in a case relating to Central Administrative Tribunal in Mohd. Swaleh v. Union of India, (1997) 6 SCC 200 observed as under:

A reading of Fundamental Rule 49 makes it clear that the Central Government can appoint a government servant to "officiate" in another post and in such a case where he is formally appointed to hold full charge of the duties of a higher post in the same office as his own and in the same cadre/time of promotion-in addition to his ordinary duties-he shall be allowed pay admissible to him, as if he is appointed to officiate in the higher post. Under sub-clause (i) of Rule 49, it is, therefore, for the Central Government of appoint a government servant already holding a post to officiate in another independent post and when he is formally appointed to hold full charge of the duties of the higher post in the same office as his own and in the same centre/line of promotion (here, the Registrar) only then he shall be allowed the pay admissible to him, as if he was appointed to officiate in the higher post. In the present case, there is no order of the Central Government appointing the appellant in an officiating capacity in the higher post. Therefore, in terms, Rule 49 of the Fundamental Rules is not satisfied."

35. In the aforesaid case as the orders of appointing authority, i.e., Central Government have not been issued entrusting higher responsibilities of the post of Registrar to the Deputy Registrar the claim was rejected. In the present case the contention put-forth that Section 26 provides automatic exercise of powers and duties of Chairperson by a seniormost Member would not be a formal appointment and as the letter dated 26.3.2001 has been issued in the light of provisions of Section 26 ibid the same shall not be a formal appointment order, cannot be countenanced. Merely because respondents have taken resort to Section 26 in issuing the aforesaid order the fact that no formal order is needed in case of Section 26 if a seniormost Member is to act as a Chairperson by appointing the applicant to act as Chairperson is nothing but a formal order of appointment.

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36. Another contention which belies the stand of the respondents that applicant was asked to perform duties on part time basis as Chairperson is concerned, during the interregnum when the applicant had performed the duties shouldered the higher responsibilities to the office of the Chairperson he had not performed his duties as part time Member and on whole time basis discharged statutory as well as non-statutory functions, ^h duties attached to the office of Chairperson. While the government pitted with a similar situation issued guidelines vide OM dated 24.1.63 for additional charge of current duties, which is reproduced as under:

"(3) Guidelines on additional charge of the current duties of another post under FR 49. - As per 49 (iv) no additional pay is admissible to a Government servant who is appointed to hold current charge of the routine duties of another post irrespective of the duration of the additional charge. In practice it is observed that in a number of cases, officers are appointed to hold additional charge of current duties of another post but the duties are not defined in the order and therefore, the officer performs all the functions of the other post including even some statutory function. However, no additional remuneration is paid to him in view of the specific language of the order of his appointment. In certain other cases, an officer is asked to hold additional charge of another post (which implies full charge of the other post), but he is not formally appointed to that post and, therefore, no additional remuneration is paid to him under FR 49. These have led to representations and litigations.

2. With a view to avoiding recurrence of such situations, the following guidelines may be followed while considering the question of entrusting additional charge of another post to an officer:-

(i) When an officer is required to discharge all the duties of the other post including the statutory functions,

e.g., exercise of power derived from Acts of Parliament such as Income Tax Act or the Rules, Regulations, By-Laws made under various Articles of Constitution such as FRs, CCS (CCA) Rules, CSRs, DFPRs., etc., then steps should be taken to process the case for getting the approval of the competent authority and formal orders appointing the officer to the additional post should be issued. On appointment, the officer should be allowed the additional remuneration as indicated in FR 49.

(ii) Where an officer is required only to attend to the usual routine day-to-day work of non-statutory nature attached to the post, an office order may be issued clearly stating that the officer will be performing only the routine day-to-day duties of non-statutory nature and that he would not be entitled to any additional remuneration. The office order should also specify what duties he would be discharging or what duties he would not be discharging.

The Law Minister has advised that an officer appointed to perform the current duties of an appointment can exercise administrative or financial powers vested in the full-fledged incumbent of the post but he cannot exercise statutory powers, whether those powers are derived direct from an Act of Parliament, e.g., Income Tax Act or Rules, Regulation and By-Laws made under various Articles of the Constitution, e.g., Fundamental Rules, Classification, Control and Appeal Rules, Civil Service Regulations, Delegation of Financial Powers Rules, etc."

37. If one has regard to the aforesaid in absence of any stipulation in the order passed by the respondents as to performance of only routine duties of non-statutory nature applicant who had performed the statutory functions as Chairperson during the aforesaid period cannot be deprived of the additional pay admissible and the case of applicant is in all fours covered under FR 49 (iii).

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38. In so far as stipulation in the order dated 26.3.2001 as to denial of additional remuneration to applicant the Apex Court in Hari Om Sharma's case (supra) held as follows:

"8. Learned counsel for the appellant attempted to contend that when the respondent was promoted in stop-gap arrangement as Junior Engineer-I, he had given an undertaking to the appellant that on the basis of stop-gap arrangement, he would not claim promotion as of right nor would he claim any benefit pertaining to that post. The argument, to say the least, is preposterous. Apart from the fact that the Government in its capacity as a model employer cannot be permitted to raise such an argument, the undertaking which is said to constitute an agreement between the parties cannot be enforced at law. The respondent being an employee of the appellant had to break his period of stagnation although, as we have found earlier, he was the only person amongst the non-diploma holders available for promotion to the post of Junior Engineer-I and was, therefore, likely to be considered for promotion in his own right. An agreement that if a person is promoted to the higher post or put to officiate on that post or, as in the instant case, a stop-gap arrangement is made to place him on the high post, he would not claim higher salary or other attendant benefits would be contrary to law and also against public policy. It would, therefore, be unenforceable in view of Section 23 of the Contract Act."

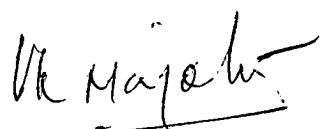
39. If one has regard to the above such a condition is averse^{to} to the public policy and being contrary to law is unforceable in the light of provisions of Section 23 of the Contract Act. If applicant has performed statutory as well as non-statutory functions on being formally appointed as Chairperson he cannot be deprived of the additional remuneration and this cannot be varied to his disadvantage.

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40. In the result, having regard to the aforesaid and in the light of the reasons recorded above, impugned order dated 4.2.2003 cannot be sustained in law and is accordingly quashed and set aside. The OA is allowed. Respondents are directed to pay to applicant higher pay in terms of clause (iii) of FR 49 for the period w.e.f. 26.3.2001 to 20.12.2001 and for the period w.e.f. 21.1.2002 till 12.2.2002 within a period of two months from the date of receipt of a copy of this order. No costs.



(Shanker Raju)
Member (J)



(V.K. Majotra)
Member (A)

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