

(2018) 09 CAT CK 0168

In the Central Administrative Tribunal

Case No : Original Application No. 1729 Of 2016, Miscellaneous Application No. 1692 Of 2016

Kamlendra Prasad

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 06-09-2018

Acts Referred:

Citation : (2018) 09 CAT CK 0168

Hon'ble Judges : L. Narasimha Reddy, J; Aradhana Johri, Member (A)

Bench : Division Bench

Advocate : Vaibhav G.

Final Decision : Dismissed

Judgement

L. Narasimha Reddy, J

1. The applicant is a retired officer of the Indian Police Service of UP cadre, 1981 batch. He held various positions, and in the year 2014, was on deputation to the Central Government. On 04.03.2014, he was given pro forma promotion by the Government of UP to the rank of Director General of Police in the HAG+ pay scale of Rs.75,500-80,000. After he was repatriated to the State Government, his pay was fixed at Rs.80,000/-. Thereafter, the applicant was appointed as Director General of Police/Director, Civil Defence, Lucknow, on 26.12.2014.

2. The applicant and some other officers were empanelled by the Central Government vide order dated 23.12.2014, for being considered for appointment to the posts of the level of Director General of Police.

3. The post of Director General of Police (DGP) of the State holds the apex scale of Rs.80,000/- (fixed). Mr. Jagmohan Yadav, who was junior to the applicant in the cadre, was appointed as the DGP in the apex scale of Rs.80,000/- with effect from 01.07.2015. The applicant attained the age of superannuation on 31.12.2015. He submitted a representation to the respondents with a prayer to extend him the benefit of the apex scale with effect from the date on which Mr.

Jagmohan Yadav had been appointed as DGP. The request was not acceded to. Therefore, this OA is filed with a prayer to direct the respondents to grant the apex scale of pay of Rs.80,000/- to the applicant from the date on which his junior was granted the same, and to revise his pension as a consequence thereof.

4. The applicant contends that once his junior was appointed as DGP and granted the apex scale, he is entitled to be extended the same scale of pay on application of the "Next Below Rule". Several instances of the relief being granted are cited, and reliance is placed upon certain decided cases.

5. The main opposition of the OA is by the first respondent. In their counter affidavit, it is stated that it is only the post of DGP, i.e., the head of the State police administration, that is allowed the apex scale of pay, and since the appointment to that post involves an element of selection, the principle of Next Below Rule does not apply. It is also stated that through notification dated 27.09.2008, substantial amendments were made to the Indian Police (Pay) Rules, 2007, and, in the light of those Rules, the request of the applicant cannot be acceded to.

6. The State Government filed a counter affidavit to the effect that the decision in this behalf is to be taken by the first respondent, i.e., the Ministry of Home Affairs, Government of India, and that they do not have any role to play in the matter.

7. We heard the applicant, who appeared in person, and Mr. Vaibhav G., learned counsel for the respondents.

8. The applicant invoked the principle of Next Below Rule for claiming the apex scale of Rs.80,000/-. The basis for the same is that his junior in the service was promoted and appointed to the post of DGP in the apex scale, and in that view of the matter, he is entitled to the same scale of pay. At this stage itself, it needs to be mentioned that in certain cases, various Benches of this Tribunal have granted the relief by observing that if a junior to an IPS officer is placed in the apex scale, the senior acquires the right for upgradation of his pay scale. The applicant has placed much reliance upon such orders.

9. Had the law remained static, without any change, and any definite principle of law was laid down in the judgments rendered by the Benches of this Tribunal, we would have religiously followed the same. The fact, however, is that a substantial change has taken place in the entire scenario.

10. The Government of India in the Ministry of Personnel, Public Grievances and Pensions (Department of Personnel & Training) issued notification dated 27.09.2008 amending various provisions of the IPS (Pay) Rules, 2007. They include amendment to rule 3(1), which reads as under:

"(1) Pay-Bands and Grade Pays. - The pay bands and grade pays admissible to a member of the Service and the dates with effect from which the said pay bands and grade pays shall be deemed to have come into force, shall be as follows:-

xxx xxx xxx

D. Above Super Time Scale -

xxx xxx xxx

(iii) Apex Scale : Rs.80000 (fixed), Grade Pay : nil (by upgradation of one existing post of Director General of Police as head of police force in the each State cadre); (with effect from the date of issue of notification of the Indian Police Service (Pay) Amendment Rules, 2008);

xxx xxx xxx"

Note 2 appended thereto is also important in this context. It reads:

"Note 2: The post of Director General of Police in the apex scale shall be filled by selection from amongst the officers holding the post of Director General of Police in the State cadre in the HAG+ scale of Rs.75000-(annual increment @ 3%)-80000."

11. Before dealing with the impact of these amendments on the case on hand, the purport of "Next Below Rule" needs to be understood. In the ordinary course of things, the pay or emoluments which a member of a service draws, would depend upon the seniority to his credit, and the pay increases as and when the member moves upward in the seniority. Therefore, a senior can never be expected to draw a pay or salary which is less than the one drawn by his junior. However, in the realm of service, there may be circumstances where a junior acquires an advantageous or fortuitous position, enabling him to draw higher scale of pay compared to his senior. For example, if an officer starts drawing a higher salary in deputation post, the pay of the seniors in the cadre is upgraded, subject to certain conditions. The scheme of Non Functional Upgradation (NFU) may belong to this category. Where such position is otherwise than through a process of selection, the pay scale of his senior needs to be stepped up to bring about parity.

12. Where, however, the junior draws higher scale of pay on account of the position which he occupies on the basis of selection, the concept does not get attracted.

13. Way back in 1979, the Hon"ble Supreme Court in its judgment in D. D. Suri v Union of India & another [(1979) 3 SCC 553], explained the concept of "Next Below Rule" as under:

"35. The intention underlying the second proviso to F.R. 30(1) which is commonly known as the "Next Below Rule" is the principle that when an officer in a post (whether within the cadre of his service or not) is for any reason prevented from officiating in his turn in a post on higher scale or grade borne on the cadre of the service to which he belongs, he may be authorised by special order of the appropriate authority pro forma officiating promotions into such scale of pay and thereupon be granted the pay of that scale or grade, if they be more

advantageous to him on each occasion on which the officer immediately junior to him in the cadre of his service draws officiating pay in that scale or grade. The principle behind the so-called rule is evidently that an officer out of his regular line should not suffer by forfeiting acting promotion which he would otherwise have received had he remained in his regular line: *State of Mysore v. M. H. Bellary* [AIR 1965 SC 868 : (1964) 7 SCR 471 : (1965) 1 SCJ 311] .

36. The real implications of the "Next Below Rule" as defined in the Secretary of State for India's ruling clarified by the Government of India, Ministry of Finance by Letter No. 2(25)-Est. III/46, dated April 2, 1974: All India Services Manual, 2nd Ed. pp. 765-66, insofar as they bear upon the claim or right to the benefits thereunder in respect of the petitioner, are extracted below:

"The so-called "rule" is not a rule of any independent application. It sets out only the guiding principles for application in any case in which the Governor-General-in-Council, or the Governor exercising his individual judgment in virtue of the powers conferred on him by the Secretary of State's Rule of April 14, 1942 (published with Home Department Notification 195/40 Ests., dated June 9, 1942), proposes to regulate officiating pay by special orders under the second proviso to Fundamental Rule 30(1). The condition precedent to the application of the "Next Below Rule" must, therefore, be fulfilled in each individual case before action may be taken under this proviso."

It would thus appear that the "Next Below Rule" is not a rule of any independent application. It sets out only the guiding principles for application in any case in which the President or the Governor proposes to regulate an officiating pay by special order under the second proviso to F.R. 30(1). The condition precedent to the application of the "Next Below Rule" must, therefore, be fulfilled in each individual case before any action can be taken under this proviso."

That the rule does not get attracted when the junior in a time scale moves upward on the basis of selection, is evident from the following observations of the Hon"ble Supreme Court:

"37. It was not disputed before the High Court with regard to the "Next Below Rule" that promotion to a post in super-time scale involves an element of selection and not mere seniority...."

"42. It is, therefore, abundantly clear that the petitioner cannot claim as a right the super-time scale merely on the basis of his seniority among the members of the Indian Administrative Service belonging to the Orissa cadre. The process of appointment to the super-time scale is by selection. When the element of selection comes in, this promotion must be subject only to the claims of exceptional merit and suitability, and is not a matter of right: *Union of India v M.L. Capoor* [(1973) 2 SCC 836 : 1974 SCC (L&S) 5] . Promotion to the super-time scale is, therefore, not a matter of course. The officer must stand the test of suitability and his integrity must be beyond doubt. It is not the petitioner's case that his name was ever brought into the select list by the Senior Selection

Committee and approved by the Government of India, Ministry of Home Affairs, for appointment in the selection grade. If the petitioner was "consciously" passed over by the Senior Selection Committee or the Government of India, Ministry of Home Affairs, then there is no question of the applicability of the "Next Below Rule".

14. Dealing with the plea of fixation or determination of pay parity, though not in the context of the Next Below Rule, the Hon"ble Supreme Court in *State of Haryana & another v Haryana Civil Secretariat Personal Staff Association* [(2002) 6 SCC 72], held as under:

"10. It is to be kept in mind that the claim of equal pay for equal work is not a fundamental right vested in any employee though it is a constitutional goal to be achieved by the Government. Fixation of pay and determination of parity in duties and responsibilities is a complex matter which is for the executive to discharge. While taking a decision in the matter, several relevant factors, some of which have been noted by this Court in the decided case, are to be considered keeping in view the prevailing financial position and capacity of the State Government to bear the additional liability of a revised scale of pay. It is also to be kept in mind that the priority given to different types of posts under the prevailing policies of the State Government is also a relevant factor for consideration by the State Government. In the context of the complex nature of issues involved, the far-reaching consequences of a decision in the matter and its impact on the administration of the State Government, courts have taken the view that ordinarily courts should not try to delve deep into administrative decisions pertaining to pay fixation and pay parity. That is not to say that the matter is not justiciable or that the courts cannot entertain any proceeding against such administrative decision taken by the Government. The courts should approach such matters with restraint and interfere only when they are satisfied that the decision of the Government is patently irrational, unjust and prejudicial to a section of employees and the Government while taking the decision has ignored factors which are material and relevant for a decision in the matter. Even in a case where the court holds the order passed by the Government to be unsustainable then ordinarily a direction should be given to the State Government or the authority taking the decision to reconsider the matter and pass a proper order. The court should avoid giving a declaration granting a particular scale of pay and compelling the Government to implement the same. As noted earlier, in the present case the High Court has not even made any attempt to compare the nature of duties and responsibilities of the two sections of employees, one in the State Secretariat and the other in the Central Secretariat. It has also ignored the basic principle that there are certain rules, regulations and executive instructions issued by the employers which govern the administration of the cadre."

15. It is by keeping these principles in mind, that the legal regime obtaining as of now, needs to be examined. The notification dated 27.09.2008 made it

abundantly clear that the apex scale is admissible for only one existing post of DGP, as the head of the police force in a State cadre. The scope of this provision cannot be expanded through the process of interpretation or comparison. The apex scale is attached exclusively to the post of DGP, not just by nomenclature, but the one which happens to be the head of the police force of the State. When the rule-making authority has made this aspect succinctly clear, the granting of the apex scale to a post which is not the head of the police force, would amount to re-writing the rule. It results in bringing the post, which is not the head of the police force, within the ambit of the provision, apart from breaking the ceiling kept on the apex scale to only one post in a State. It is fairly well settled that the process of interpretation process cannot be taken to such levels.

16. Another serious impediment that comes in the way of the applicant is that with effect from the date of the Annexure-I notification, i.e., 27.09.2008, the appointment to the post of DGP in the apex scale shall be by selection from amongst the officers holding the post of DGP in the HAG+ scale of Rs.75500-80000. Even according to the applicant, there were four officers holding the post of DGP in the HAG+ scale in the State cadre, and Mr. Jagmohan Yadav was appointed as the DGP. It means that the appointment of Mr. Yadav, who was junior to the applicant, was by way of selection. Once, there exists an element of selection for upward movement of an officer from a grade, his senior cannot embark upon an exercise of comparison, much less, can claim the benefit under the principle of "Next Below Rule".

17. Various orders passed by the Tribunal, cited before us, were passed at a time when the notification dated 27.09.2008 was not in force. Even in cases which were decided subsequent to that date, the purport of the said notification was not taken into account. Added to that, the judgment rendered by the Tribunal in one of such cases, i.e., R. N. Ravi v Union of India (OA No.823/2012), is now pending scrutiny by the Hon"ble Supreme Court.

18. In view of the discussion undertaken above, we find it difficult to grant the relief prayed for in this OA. The OA is accordingly dismissed. There shall be no order as to costs.