

(2006) 03 DEL CK 0029
In the Delhi High Court
Case No : Civil Writ No. 8840 of 2003

Sher Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 07-03-2006

Acts Referred:

Administrative Tribunals Act, 1985 — Section 22(3)(F)
Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Constitution of India, 1950 — Article 226, 311, 311(2)

Citation : (2006) 88 DRJ 468

Hon'ble Judges : Sanjiv Khanna, J;Dr. M.K. Sharma, J

Bench : Division Bench

Advocate : G.K. Aggarwal, for the Appellant; Rajeev Mehra and Arijit Ganguly, for the Respondent

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.—The petitioner Mr. Sher Singh has filed this writ petition against the order dated 11th September, 2003 passed by the Central Administrative Tribunal dismissing the original application being OA NO. 274/2003 and against the order dated 14th October, 2003 dismissing his review application. By the impugned order dated 11th September, 2003 learned Tribunal has, inter alia, held that the petitioner cannot claim back wages or promotion as civilian staff officer on ad hoc basis from 15th May, 1997 to 10th August, 2001 on the basis that a junior to the petitioner was allowed to officiate at the said post during this period.

2. Brief facts of the case relevant for the purpose of the resolving the present controversy are as under.

3. The petitioner joined Armed Forces headquarters as an ad hoc Lower Division Clerk on 7th February, 1964. His services were later on regularised with effect from 21st April, 1965. The petitioner's seniority was fixed on the basis of his date of regularisation.

4. One, Mr. D.P. Sharma along with some others filed a writ petition in this Court, inter alia, contending that their seniority should be counted from the date of their initial appointment on ad hoc basis as Lower Division Clerks and not from the date of their confirmation on regular basis. This writ petition No. 423/1975 was allowed by a single Judge of this Court but the decision was reversed by a Division Bench, which held that the seniority was to be determined on the date of confirmation and not on the basis of length of service. The Division Bench placed reliance upon Armed Forces Headquarters Clerical Service Rules, 1968. The matter was taken to the Supreme Court and by judgment dated 21st February, 1980 in Civil Appeal No. 4133-34/1984 it was held that the seniority of employees who had joined as Lower Division Clerk before 1st March, 1968, the date when the aforesaid Rules became effective, should be determined on the basis of length of service and not on the basis of date of confirmation.

5. It appears that the respondent-Union of India did not correct the seniority of the petitioner with effect from the date of his joining on 7th February, 1964 but he was given seniority with effect from the date of his regularisation on 21st April, 1965.

6. In these circumstances, the petitioner approached the Tribunal by way of an original application being OA No. 526/2000, which was allowed with the following directions:-

(I) The seniority of the applicant as LDC shall be counted w.e.f. 7.2.1964 as per his date of joining as LDC.

(II) We further allow all the consequential benefits flowing from re-fixation of his seniority w.e.f. 7.2.1964 such as consequential antedating of promotions in the grades of UDC, Astt & ACSO with further retrospective effect.

(III) The order shall be complied with within a period of four months from the date of receipt of a copy of this order.

7. This order passed by the Tribunal has been accepted by both the parties and the same has become final and binding.

8. As a result of the aforesaid order, the respondent passed an order dated 7th March, 2002 antedating the dates on which the petitioner became entitled to promotion as an Upper Division Clerk, Assistant and Assistant Civilian Staff Officer, as per details given below:-

Prior to implementation	After implementation of the ibid court order of the court order
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Date of promotion as UDC	24.5.1976	26.02.1974	Date of promotion as Assistant
	16.8.1982	31.07.1980	Date of promotion as ACSO
			01/01/94 01/01/84

9. The petitioner, however, was treated as promoted as Civilian Staff Officer with effect from 10th August, 2001, the date on which his immediate junior pursuant to re-fixation of his seniority was granted regular promotion to the said post.

10. The petitioner vide his letter dated 6th November, 2002, made a representation to the respondent that he should be treated as promoted to the post of Civilian Staff Officer with effect from 15th May, 1997, i.e. the date on which his immediate junior was asked to officiate on the said post. He accordingly prayed that he should be paid arrears of pay and the difference in allowances for the period 15th May, 1997 to 9th August, 2001, when his junior had worked in officiating capacity as a Civilian Staff Officer. This representation of the petitioner was rejected by the respondents holding that it was not possible to ante date the petitioner's promotion as Civilian Staff Officer with reference to the date his immediate junior was asked to officiate on the said post. As per the respondents, the petitioner was to be treated as notionally promoted to the post of Civilian Staff Officer on the date his immediate junior was promoted to the said post on regular basis and not on officiating basis.

11. The petitioner again approached the Tribunal by filing Original Application No. 274/2003. The matter was heard on 28th August, 2003 and the following order was passed:-

Arguments heard. OA is partly allowed. No interest. Reasons to be recorded separately.

12. On the same day itself the Bench, which had reserved the order, recalled its earlier order and listed the case for further arguments on 29th August, 2003. The second order passed on 28th August, 2003, is also reproduced below:-

After hearing the parties OA was partly allowed. While recording reasons it has transpired that though a prayer has been made in para-1 of the OA to assail the order dated 18.11.2002 but the corresponding relief to set it aside has not been incorporated in para 8 of the OA. In this view of the matter we recall our above order and list this case "for being spoken to" tomorrow, 29.8.2003.

13. The matter was reheard and by the impugned order dated 11th September, 2003 the original application filed by the petitioner herein was dismissed on the ground that the principle of No work, no pay was applicable to the present case and even if the petitioner was deemed to be promoted on notional basis to the higher post, he was not entitled to back wages as he had not worked at the post of Civilian Staff Officer. The Tribunal also pointed out a technical defect in the original application as in the prayer clause the petitioner had not prayed for setting aside and quashing of the order dated 23rd January, 2003 passed by the respondent rejecting his request to antedate the date of his promotion as Civilian Staff Officer with effect from 15th May, 1997 in stead of 9th August, 2001. A review application was also filed by the petitioner but the same was also dismissed.

14. We have heard the learned counsel appearing for the parties. The counsel for the petitioner submitted that the Tribunal having already allowed the original application vide the first order after the hearing held on 28th August, 2003, could not have recalled its earlier order and reheard the matter and then taken a

contrary decision. On merits, it was submitted that the Tribunal adopted a rather hyper-technical approach as in the relevant paragraph of the original application the petitioner had referred to the impugned order dated 23rd January, 2003 passed by the respondent denying the petitioner, re-fixation of pay as Civilian Staff Officer with effect from 15th May, 1997. Learned counsel had also drawn our attention to the prayer clause, which for the sake of convenience is reproduced below:-

Declare and order that the Applicant shall be given the pay scale, pay, arrears in the Civilian Staff Officer grade ever since 15.5.1997 qua his junior, say, Mr. Ram Prasad, with interest at 18% till date of payment, with costs and any other relief.

15. The counsel for the respondent however, submitted that the immediate junior of the petitioner was promoted as Civilian Staff Officer only on 10th August, 2001 and Therefore the petitioner was rightly treated as promoted to the said post with effect from 9th August, 2001. He relied upon two judgments of the Supreme Court in the case of Union of India and another Vs. R. Swaminathan, and Union of India and Others Vs. M. Suryanarayana Rao, . It was further submitted that the petitioner was not entitled to increased/higher pay scale merely because a junior was appointed on ad hoc/officiating basis as Civilian Staff Officer on 15.5.1997. He contended that promotion always has prospective effect and under the service rules the respondent was entitled to make local officiating arrangements, if the select list or an officer in the select list was not available for appointment. Regarding fixation of pay of the petitioner, it was submitted that there was no anomaly merely because pay and allowances of the immediate junior to the petitioner was fixed on the basis of increments earned by him while officiating on the post of Civilian Staff Officer from 15 the May, 1997 to 10th August, 2001.

16. Before considering the arguments, we may note that the petitioner has retired from service on 31st March, 2003 as a regular Civilian Staff Officer in the Armed Forces Headquarters service.

17. The present writ petition involves two issues which are required to be adjudicated upon and decided. Firstly, whether the petitioner is entitled to pay and allowances as Civilian Staff Officer with effect from 15th May, 1997 to 10th August, 2001, when his junior as per the redrawn seniority list was officiating at the said post. We entirely agree with the Tribunal in this regard and hold that the petitioner is not entitled to higher pay and allowances as Civilian Staff Officer for the aforesaid period. It may be relevant to state here that the officer who was immediately junior to the petitioner was merely asked to officiate on the said post of Civilian Staff Officer for the above-mentioned period and he was not entitled to higher pay and allowances. Appointment to a post on officiating or temporary basis is not a regular appointment and a government servant acquires no right to the officiating post. It is of transitory nature. Reversion from a higher but temporary or officiating rank to the lower substantive rank do not always result in reduction of rank within the meaning of Article 311. In such cases, it has

to be ascertained whether the officer concerned had a right to a post from which he was reverted and whether it has resulted in penal consequences like forfeiture of pay and allowances or loss of seniority etc.(Refer State of U.P. and Others Vs. Sughar Singh,). Similarly in the case of Union of India (UOI) and Another Vs. Gajendra Singh, etc., etc., it was held that Article 311(2) is not violated merely because juniors are allowed to retain their officiating post while a senior is reverted. It was further held that there is no loss of seniority in the substantive position because juniors are acting on officiating posts, which as per the terms of employment are terminable at any time. In the case of State of Haryana Vs. R.K. Aggarwal, , Supreme Court has held that an officer is not entitled to pay scale applicable to a higher post during the period he was holding current duty charge. In the case of Bharat Beedi Works (Pvt.) Ltd. and another etc. Vs. Commissioner of Income Tax, it has been held that no one has right to ask for or stick to current duty charge. Admittedly, in the present case, the petitioner was treated as promoted on the basis of next below rule, on the date his immediate junior pursuant to re-fixation of his seniority was granted regular promotion. The petitioner is not entitled to be considered as promoted from the date his junior was asked to officiate as a Civilian Staff Officer. Mere officiation will not give any right to the petitioner.

18. Secondly, the petitioner has also prayed for stepping up pay on the basis that his immediate junior was drawing a higher pay as Civilian Staff Officer. The respondents have admitted that the immediate junior to the petitioner namely, one Mr. Ram Prasad was drawing a higher pay than the petitioner as Civilian Staff Officer but this was on account of the fact that the said officer had earned increments during the period 15th May, 1997 till 10th August, 2001, while officiating as Civilian Staff Officer. The petitioner's pay and allowances of Civilian Staff Officer have been calculated treating him to have been promoted on 9th August, 2001.

19. Fixation of pay scales is provided in Fundamental Rule, 22 which for the sake of convenience is reproduced below:-

22.i)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) Where a Government servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity, as the case may be, subject to the fulfillment of the eligibility conditions as prescribed in the relevant Recruitment Rules, to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time-scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued or rupees twenty-five only, whichever is more.

Same in cases of appointment on deputation to an ex-cadre post, or to a post on ad hoc 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 refixed 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:

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 twenty-five, whichever is more.

20. It is admitted by the petitioner that his pay scale in the post of Civilian Staff Officer has been calculated in terms of Fundamental Rule 22. There is no dispute in this regard. The learned counsel for the petitioner, however, submitted that he was/is entitled to stepping up of his pay on the ground that his junior was drawing a higher pay.

21. Sometimes, anomalies can arise while fixing pay under Fundamental Rule, 22 and to deal with such a situation the Department of Personnel and Training has taken out O.M. No. 4/7/92 dated 4th November, 1993, specifying the cases in which pay and allowances of seniors can be stepped up to that of the juniors. The said OM also states cases in which a junior drawing more pay than a senior would not constitute an anomaly requiring stepping up of pay and allowances. The relevant extract of the said O.M. is reproduced below:-

27. Instances which do not constitute an anomaly for stepping up of pay with reference to juniors.- Cases for stepping up of the pay of seniors in a pay scale to that of juniors are generally considered if the following conditions are satisfied:-

(a) both the junior and senior officer should belong to the same cadre and the posts in which they have been promoted or appointed should be identical and in the same cadre;

(b) the scales of pay of the lower and higher posts in which the junior and senior officer are entitled to draw pay should be identical;

(c) the anomaly should be directly as a result of the application of FR 22-C. For example, if even in the lower post the junior officer draws from time to time a

higher rate of pay than the senior by virtue of grant of advance increments or on any other account, the above provisions will not be invoked to step up the pay of senior officer.

2. Instances have come to the notice of this Department requesting for stepping up of pay due to the following reasons:-

(a) where a senior proceeds on Extraordinary Leave which results in postponement of Date of Next Increment in the lower post, consequently he starts drawing less pay than his junior in the lower grade itself. He, Therefore, cannot claim pay parity on promotion even though he may be promoted earlier to the higher grade;

(b) if a senior forgoes/refuses promotion leading to his junior being promoted/appointed to the higher post earlier, junior draws higher pay than the senior. The senior may be on deputation while junior avails of the ad hoc officiating/regular service rendered in the higher posts for periods earlier than the senior, cannot, Therefore, be an anomaly in strict sense of the term;

(c) if a senior joins the higher post later than the junior, for whatsoever reasons, whereby he draws less pay than the junior in such cases, senior cannot claim stepping up of pay at par with the junior;

(d) if a senior is appointed later than the junior in the lower post itself whereby he is in receipt of lesser pay than the junior, in such cases also the senior cannot claim pay parity in the higher post though he may have been promoted earlier to the higher post;

(e) where a person is promoted from lower to a higher post, his pay is fixed with reference to the pay drawn by him in the lower post under FR 22 C and he is likely to get more pay than a direct appointee whose pay is fixed under different set of rules. For example, an UDC on promotion to the post of Assistant gets his pay fixed under FR 22C with reference to the pay drawn in the post of UDC, whereas the pay of Assistant (DR) is fixed normally at the minimum under FR 22-B (2). In such cases, the senior direct recruit cannot claim pay parity with the junior promoted from a lower post to higher post as seniority alone is not a criteria for allowing stepping up;

(f) where a junior gets more pay due to additional increments earned on acquiring higher qualifications.

3. In the instances referred to in Para.2 above, a junior drawing more pay than the senior will not constitute an anomaly. In such cases, stepping up of pay will not, Therefore, be admissible.

[G.I., Dept. of Per. & Trg., O.M.No.4/7/92-Estt.(Pay-I), dated the 4th November, 1993.]

22. The Fundamental Rule 22 and the principle of stepping up of pay has been examined and considered by the Supreme Court in several cases. In the case of

Union of India and Others Vs. Sushil Kumar Paul and Others, almost an identical question had arisen. It was held that principle of stepping up of pay was not applicable when a junior was getting higher pay scale because he had benefit of working on ad hoc officiating post before regular promotion. It was held that the OM dated 4/11/93 did not permit stepping up in such cases and there was no anomaly as such. Therefore, a junior at times can draw higher pay than a senior because of advance increments and on other accounts but such cases cannot always be regarded as an anomaly on the basis of which a senior can claim stepping up of pay at par with his junior. In this case, the Supreme Court had relied upon its earlier decision in the case of Union of India and others Vs. O.P. Saxena and Others, . This was a case relating to Railway employees and Rules 1316 and 1313, which are/were equivalent to Fundamental Rule 22 had come up for consideration. In another case Union of India and another Vs. R. Swaminathan, a question arose whether a senior employee who should get regular promotion earlier than his junior, was entitled to get his pay stepped up because his juniors pay had been fixed at a higher stage as he had worked on local ad hoc promotion, while the senior did not get any such opportunity. Reference was made to Fundamental Rule 22(1) and Fundamental Rule 26(8). The said Rules recognise that service rendered on ad hoc promotion would be counted for pay fixation/increment on regular promotion though such period cannot be counted for seniority on promotion post. It was further held that the difference in pay of a junior and a senior was not a case as a result of application of FR 22(I)(a)(1). It was opined that difference in pay does not result any anomaly requiring stepping up of pay of the senior. Reference in this judgment was specifically made to the Office Memorandum dated 4.11.93 in which it has been clarified that higher pay drawn by a junior either due to ad hoc officiating service rendered in higher post for periods earlier than the senior, cannot, Therefore, be considered to be an anomaly in the strict sense of the term.

23. In view of the above, it cannot be held that the petitioner is entitled to stepping up of pay.

24. The petitioner had also raised a contention that the learned Tribunal had by an earlier order dated 28th August, 2003 partly allowed the O.A. and Therefore had no jurisdiction to recall its earlier order and list the case for fresh arguments. There is merit in the contention of the learned counsel for the petitioner. It is well settled that there is no inherent power of review and the same has to be explicitly granted by under statute (see Patel Narshi Thakershi and Others Vs. Shri Pradyumansinghji Arjunsinghji,). The Tribunal has limited power of review as specified in Section 22(3)(F) of the Administration Tribunal Act, 1985 read with Order 47 Rule 1 of the Code of Civil Procedure, 1908 (see in this regard judgment of Supreme Court in the case of K. Ajit Babu and others Vs. Union of India and others,). Admittedly, no ground as specified in Order 47 had been made out and in any case the learned Tribunal has exercised its power to recall an order. Power to recall is distinct and separate from power of review and can be exercised under certain limited circumstances.(See Budhia Swain and Others

Vs. Gopinath Deb and Others, .

25. However, in spite of above findings, we are not inclined to allow present writ petition in view of our findings on merits that the petitioner is not entitled to stepping up of pay or appointment on officiating basis on the date his junior was asked to officiate as Civilian Staff Officer. Further, we find that vide order dated 28th August, 2003 learned Tribunal had recorded that the OA was partly allowed, without specifying to what extent the same was allowed. We cannot today presume what relief was in the mind of the said members, when they passed the said order. In any case the petitioner has invoked discretionary power of this Court under Article 226 of the Constitution of India and in view of our findings on merit, we are not inclined to allow the present writ petition on the basis that the Tribunal could not have recalled the order dated 28th August, 2003. By way of abundant caution, we may mention that these observations should not be treated and regarded as a precedent in all cases. Whether or not discretionary power and relief under Article 226 should be exercised/granted in a particular case will depend on its own facts and circumstances.

26. In view of above, we do not find any merit in the present writ petition and the same is dismissed. However, in the facts and circumstances of the case, there will be no order as to costs.