(2008) 08 DEL CK 0241

In the Delhi High Court

Case No : Writ Petition (C) No. 4460 of 2002

Union of India (UOI) and Others APPELLANT

Vs

S.V. Nagarajan RESPONDENT

Date of Decision : 08-08-2008

Acts Referred:

Citation : (2008) 153 DLT 406

Hon'ble Judges : Vipin Sanghi, J;A.K. Sikri, J

Bench : Division Bench

Advocate : Arvind Sharma, for the Appellant; O.P. Gehlaut, for the Respondent

Final Decision : Allowed

Judgement

Vipin Sanghi, J.—This writ petition has been filed by the Union of India, challenging the validity of the order dated 01.05.2002, passed by the Central Administrative Tribunal, Principal Bench, New Delhi, (in short "the Tribunal"), allowing the OA No. 2388/2001 filed by the respondent herein Shri S.V. Nagarajan, whereby the Tribunal has held that the respondent is entitled to the benefit of the upgraded scale of Rs. 22400-24500, retrospectively w.e.f. 1.1.1996, in terms of para 4(a) of the Official Memorandum (O.M.) dated 30.06.1999 bearing No. 6/1/98-ICI issued by the Department of Expenditure, Ministry of Finance, Government of India. As to what this O.M. states would become clear a little later.

2. Briefly stated, the facts of the case are that the respondent was appointed as Joint Director in the Indian Cost Accounts Service (ICAS) w.e.f. 04.09.1982. Thereafter, Sh. M.L. Mehta and Sh. J.K. Puri, were appointed as Dy. Directors (Cost) in the said service. Admittedly, the respondent was senior to both Sh. M.L. Mehta and Sh. J.K. Puri. The respondent was appointed to the Senior Administrative Grade (SAG) of Advisor (Cost) in the pay scale of Rs. 5900-6700 w.e.f. 21.07.1989 and thereafter, as Member (Finance) w.e.f. 31.03.1994 in the Bureau of Industrial Cost and Prices, Ministry of Industry (herein referred to as

BICP). On 1.1.1996, all of them were holding the substantive post of Advisor(Cost). The respondent retired from service on 31.01.1998, on attaining the age of superannuation.

3. On the recommendations of the Fifth Central Pay Commission (FCPC) being accepted, petitioner upgraded one of the posts of Advisor (Cost) to that of Additional Chief Advisor (ACA) and revised its pay scale from Rs. 18400-22400 to Rs. 22400-24500. This upgradation was notified vide notification dated 30.6.1999 bearing No. 6/1/98-ICI issued by the Department of Expenditure, Ministry of Finance, Government of India. The petitioner, in pursuance of the said OM, fixed the pay of Sh. M.L. Mehta at Rs. 22400/- w.e.f. 01.01.1996 to 30.4.1996 (the date of his superannuation) and of Sh. J.K. Puri also at Rs. 22400/- w.e.f. 16.09.1996, respectively, with retrospective effect vide notifications dated 27.7.1999 (and corrigendum dated 4.8.1999), and dated 23.7.1999 respectively. Therefore, both Shri M.L. Mehta and Shri J.K. Puri were given the upgraded pay scale of Rs. 22400-24500 admissible for the post of ACA.

4. Encouraged by the aforesaid act of the petitioner, the respondent filed OA No. 1671/2001 claiming that he being senior to both Shri M.L. Mehta and Shri J.K. Puri in the grade of Advisor (Cost), it is he who should have been given the grade of ACA with effect from 1.1.1996 till the date of his superannuation i.e. 31.1.1998. The said O.A. was disposed of by the Tribunal vide order dated 11.07.2001 with a direction to the petitioner herein to dispose of the representations of the respondent by passing a speaking and reasoned order and communicating the same to the respondent, within one month. Thereafter, the petitioner rejected the claim of the respondent vide their order dated 29.8.2001. The stand of the petitioner was that the orders of retrospective up-gradation in respect of Shri M.L. Mehta and Shri J.K. Puri were issued erroneously, without following the prescribed selection procedure and were not in accordance with para 4(b) of the OM dated 30.06.1999, which stipulated prospective up-gradation and the filling up of the vacancy in accordance with the selection procedure. Accordingly, vide notification No. C-18018/12/2001-Ad.I dated 09.08.2001, the erroneous order of up-gradation in respect of these officers were rescinded and the officers who were advanced the benefit of up-gradation retrospectively, were reverted to the post of Advisor (Cost).

5. At this stage it would be useful to extract the relevant portion of the O.M. dated 30.6.199, the interpretation of which is called for in the present petition:

Based on the recommendations of the Fifth Central Pay Commission [FCPC], revised pay scales in respect of certain common categories of staff and certain specified posts in individuals ministries, departments and Union Territories were notified in Parts ''B'' and ''C'' of the first Schedule to the Central Civil Services (Revised Pay) Rules, 1997, promulgated in this Department''s Notification No. GSR 569(E) dated September 30, 1997. This Notification did not include the higher pay scales recommended by the FCPC for certain specified posts in various Organised Group ''A'' services and for Group ''A'' posts in individual ministries and departments not included in any of the Organised Group ''A'' Services. The recommendations in respect of these posts were to be examined separately and necessary orders issued.

2. The FCPC recommendations relating to Group ''A'' posts included in the Organised Group ''A'' Services have now been carefully considered. The FCPC had recommended the upgradation of certain posts in different Services identified and specified by them and their placement in higher replacement scales of pay. These recommendations cover practically all the Organised Group ''A'' Services with a few exceptions. In doing so, the Commission had, Inter alia, taken into account the following factors:

(a) the acute stagnation in most of the Organised Group ''A'' Services;

(b) cadre structure of different Services

(c) non-availability of adequate number of posts in higher levels;

(d) status of cadre reviews

The intention of the Commission was to ensure the upgradation of a limited number of posts at senior levels as an interim measure with the objective of improving the career prospects of the Members of these Services pending detail cadre reviews.

3. Posts in these Services covered by the FCPC recommendations may be broadly categorized as follows:

(a) posts which are to be placed in higher replacement pay scales, without involving the assumption of higher functional responsibilities;

(b) those which are to be encadred in one of the Organized Services and placed in higher replacement pay scales;

(c) posts for which only the normal replacement pay scales will apply but which are to be encadred in one of the Organised Services;

(d) those which are to be upgraded and placed in higher pay scales, necessitating the restructuring of cadres or redistribution of posts;

(e) posts that are to be revived or created and placed higher pay scales.

4. The President is now pleased to decide that the posts listed in Column 1 of Annexure I to this Office Memorandum may be placed in the higher revised FCPC scales of pay indicated in column 3 thereof. Placement of the posts and their incumbents in the higher replacement scales of pay now approved will be subject to the following conditions:

(a) According to the instructions issued by the Department of Personnel and Training in their O.M. Number 22011/10/84-Estt.(D) dated February 14, 1992, where the upgradation of posts involves only the placement of existing incumbents in higher replacement scales without the assumption of any higher responsibilities or changes in eligibility criteria, the suitability of the incumbents to occupy such posts in the higher pay scales is not required to be assessed afresh. They can therefore be appointed to the posts in the higher pay scales with effect from the date notified by the Government giving effect to the recommendations of the Pay Commission. Accordingly, the applicable higher replacement scales of pay will be extended retrospectively w.e.f. January 1, 1996 only in respect of those posts not involving the assumption of higher responsibilities or changes in the eligibility criteria. Some illustrative examples of such posts are those of Members in the Postal Services Board, Members/ Additional Director General in the Ordinance Factories Board, General managers of Zonal Railways, Metro Railway, Railway Production Units, etc. Officers on Special Duty in newly-established Railway Zones, Principal, Railway Staff College, Director General, Research & Development under the Ministry of Railways, etc.

(b) Implementation of the FCPC recommendations relating to posts which are to be upgraded and placed in higher pay scales will, however, necessitate the redistribution of posts presently in lower pay scales in the recommended higher scales, involving restructuring of the cadres. Besides, incumbents of posts in identical scales of pay being interchangeable, it is not unlikely that juniors may be presently occupying posts that are to be placed in higher scales of pay in terms of the FCPC recommendations. The recommended higher pay scales cannot therefore be extended in situ to the present incumbents of such posts without duly observing the prescribed selection processes. In the circumstances, upgradation of posts involving the redistribution of posts or cadre restructuring will be effective only prospectively. Eligible officers will also be placed in the higher scales of pay only on completion of the formalities prescribed by the Department of Personnel and Training for appointments to posts in the applicable higher replacement pay scales and on their fulfilling the prescribed residency requirements. Financial benefits will consequently accrue to those appointed against these posts only from the date(s) that they are so appointed on observance of the prescribed selection processes.

ANNEXURE-I TO DEPARTMENT OF EXPENDITURE O.M NO.6/1/98-IC-I DATED JUNE 30, 1999

DETAILS OF POSTS IN ORGANISED GROUP `A'' SERVICES WHICH ARE TO BE PLACED IN HIGHER SCALES OF PAY ON ACCEPTANCE OF THE RECOMMENDTIOINS OF THE 5TH CENTRAL PAY COMMISSION.

Particulars of Posts Pre-Revised Revised Paragraph No. Scale Scale in Report 1 2 3 4 Rs. Rs.

A. CENTRAL CIVIL SERVICES (GROUP `A'') 1. INDIAN CIVIL ACCOUNTS SERVICE

xx xx xx xx xx xx xx xx

2. INDIAN COST ACCOUNTS SERVICE

Chief Advisor(Cost) 7300-7600 Cost Accounts Branch, Department of Expenditure (22400-24500) 26000(Fixed) 48.44

Advisor (Cost), Cost Accounts Branch 5900-6700 (To be upgraded as Additional Chief Advisor) (18400-22400) 22400-24500 48.46(i)

6. From the aforesaid, it is, therefore, evident that if the upgradation for a post involves only the placement of the existing incumbents in higher replacement scales without assumption of any higher responsibilities or change in eligibility criteria, there is no need for a fresh assessment of the suitability of the incumbents to place them in the upgraded post and such an upgradation would be given retrospective effect i.e. w.e.f. January 1, 1996. However, where the upgradation of a post necessitates redistribution of posts presently in lower pay scales in the recommended higher scales, and involve restructuring of the cadre and assumption of higher responsibilities in the upgraded post, or a change in the eligibility criteria in respect of the upgraded post, in such situations the upgradation cannot be granted in situ to the present incumbents without duly observing the prescribed selection process and the upgradation of posts is to be only prospective. The issue therefore that arises for consideration is whether the upgradation of one post of Advisor (Cost) to the post of ACA in the Cost Accounts Branch falls under para 4(a) or within para 4(b) of the aforesaid OM.

7. The case of the respondent was that the up-gradation in question did not involve any redistribution of posts and restructuring of the cadre, as a specific post of Advisor (cost) in the Cost Accounts Branch had been upgraded, and the discretion for deciding upon the up-gradation of any of the three posts was not left to the petitioners. The senior most Advisor (Cost) automatically stood upgraded as ACA with effect from 1.1.1996. The scale of the upgraded post also already existed, in that the scale of pay which was earlier prescribed for the Chief Advisor (Cost) was now given to the ACA. It was argued that the upgradation of one post of ACA did not involve the assumption of higher responsibilities by the incumbent who was upgraded as ACA, as the duties and responsibilities remain the same. Hence, it was contended that the said up-gradation was covered under para 4(a) and not under para 4(b) of the OM dated 30.06.99. Thus, the respondent claimed to be entitled to promotion to the grade of ACA with retrospective effect.

8. On the other hand, according to the petitioners, Vide OM dated 30th June 1999 issued in pursuance of the recommendations of the FCPC, one out of three posts of Advisor(Cost) in ICAS was upgraded as Additional Chief Advisor in the pay scale of Rs. 22,400-24,500/- in Cost Account Branch. Since only one of the three posts had to be upgraded, thus the up-gradation of the post involved re-distribution of posts and cadre restructuring and such cases were governed by para 4(b) of the O.M. dated 30.6.1999 and the up-gradation could only be effective prospectively. Further, it was averred that the upgraded post is at the

level of Additional Secretary and involves assumption of higher responsibilities including the cadre administration of the Indian Cost Accounts Service, administration of the Cost Accounts Branch and looking after the duties of the Chief Advisor (Cost) in his absence. Hence, the placement for the said post could only be prospective after observing the procedure prescribed by the Department of the Personnel & Training (DOP&T), in accordance with the instructions contained in para 4(b) of the O.M. dated 30.06.99. The higher post of ACA was not intended to be filled up by merely on the basis of seniority from amongst the Advisor (Cost), and even a junior could be appointed to the said post in supersession of a Senior Advisor (Cost).

9. It was further averred on behalf of the Petitioners that since the respondent went on deputation pursuant to an advertisement and his due selection to a higher post in BICP, and was functioning as member (Finance) BICP w.e.f. 31.3.94 till the date of his retirement i.e. 31.1.1998, Sh. M.L.Mehta, the senior most officer, who was holding the post of Advisor(Cost) as on 1.1.96 was erroneously granted the scale of pay of ACA retrospectively, without following the prescribed procedure under para 4(b) of the said OM dated 30.6.1999. Similarly, Shri J.K. Puri was also given the same benefit by treating the case as falling under para 4(a) of the O.M. dated 30.6.1999. Thereafter, the matter was examined and considered carefully by the Department and it was found that the aforesaid orders of retrospective up-gradation in respect of these two officers were issued erroneously without following the procedure, and the same was not in accordance with para 4(b) of the O.M. date 30.06.99 which stipulated prospective up-gradation in accordance with the selection procedure. Thus, Vide Notification No. C-18018/12/2001-Ad.I dt. 9.8.2001, the erroneous orders of up-gradation were rescinded and the officers who were extended the benefit of the up-gradation were reverted to the post of Advisor(Cost).

10. The Tribunal, by its impugned order allowed the original application filed by the respondent and the reasons given by the Traibunal are the following:

(i) The petitioners herein had admitted that the respondent/applicant was the senior-most Adviser(Cost) and that the orders of upgradation in respect of S/ Sh.Mehta and Puri were erroneously issued.

(ii) The notifications dated 27.7.1999 and 23.7.1999 giving retrospective effect to upgradation in respect of S/Sh. Mehta and Puri were rescinded and withdrawn only on 9.8.2001. i.e after a lapse of more than two years - that too after directions were given by the Tribunal in OA No. 1671/2001 filed by the applicant/ respondent herein.

(iii) When one post of Adviser(Cost) in the pay scale of Rs. 18,400-22400 was upgraded as ACA in the pay scale of Rs. 22,400-25500 on 30.6.1999, no recruitment rules for the post of ACA were in existence.

(iv) From the conduct of the petitioner herein in giving retrospective upgradation to S/Shri Mehta & Puri, it appears that the petitioners had taken a decision that the suitability of the incumbents to occupy such post in the higher pay scale is not required to be assessed afresh. It is for this reason that S/Shri Mehta and Puri were upgraded to the post of ACA w.e.f. 1.1.1996 and 16.9.1996 respectively as per procedure laid down in para 4(a) of the O.M dated 30.6.1999;

(v) The applicant/respondent herein had made a representation to the petitioner on 18.8.1999 i.e. immediately after the upgradation of S/Shri Mehta & Puri to the post of ACA in July 1999 pointing out that he was the senior most Adviser (Cost) and that he ought to have given the higher pay scale of ACA w.e.f.1.1.1996. If the said post were not to be filled under para 4(a) of the O.M dated 30.6.1999, the petitioner would have immediately reverted S/Shri Mehta and Puri to SAG and considered all the eligible officers including the applicant for promotion to the upgraded post under para 4(b) of the O.M. dated 30.6.1999. The reversion of S/Shri Mehta and Puri was done only after the judgment and order dated 11.7.2001 of the Tribunal vide notification dated 9.8.2001.

(vi) The newly created post of ACA is in the rank of Additional Secretary to the Government of India and "the approval for appointing S/Shri Mehta and Puri to this post must have been taken at the highest level in the government and that too after having due consideration and consultation with the concerned departments of the Government.

(vii) The plea of the Government that the appointment of S/Shri Mehta and Puri were made retrospectively without following the prescribed procedure does not stand to logic.

(viii) The petitioners, in order to justify their wrong and arbitrary action have now decided to cancel the appointment of S/Shri Mehta and Puri from 1996 and to fill up the upgraded post in terms of para 4(b) of the O.M dated 30.6.1999 and have accordingly notified the recruitment rules for the post of ACA on 19.10.2001.

(ix) The petitioner had failed to satisfy as to whether any follow up action had been taken to reduce the retrial benefits of S/Shri Mehta and Puri in pursuance of the notification dated 9.8.2001.

11. The contention of the petitioner based on the decision of the Supreme Court in ICAR and Anr. v. T.K. Suryanarayan and Ors. AIR 1997 SC 1318, that the grant of an incorrect promotion erroneously by the department upon a misreading of the service rules or the grant of promotion pursuant to judicial orders contrary to service rules cannot be a ground to claim erroneous promotion by perpetrating infringement of statutory rules, was rejected by the Tribunal by holding that the applicant/respondent herein is not praying for extending the benefit of a wrong committed by the petitioners. He only wants upgradation of his pay scale with retrospective effect from 1.1.1996 to 31.1.1998 in terms of para 4(a) of O.M dated 30.6.1999 as the same was applicable during the relevant period.

12. The petitioner Union of India assails the impugned order of the Tribunal on

the ground that the Tribunal has proceeded on the basis of various assumptions which have no foundation to stand on. It is argued that the upgradation of only one of the posts of Advisor (Cost) constitutes not a mere upgradation, but involves redistribution and restructuring of the cadre. The number of posts of Advisor (Cost) was reduced by one with the creation of a higher post of ACA. There was, therefore, restructuring of the cadre. Had it been the intention to merely upgrade the post of Advisor (Cost), all the posts would have been upgraded and not merely one of those posts, leaving the other posts untouched in the grade of Advisor (Cost). It is also argued that the post of ACA has to shoulder higher responsibilities, it being a position equivalent in rank to that of Additional Secretary in the Government of India. It is, therefore, contended that the upgraded post of ACA fell under para 4(b) and not para 4(a) of OM dated 30.6.1999. Counsel for the respondent has, however, supported the decision of the Tribunal and made the same submissions as are reflected in the impugned order.

13. We had reserved judgment in this case on 25.10.2007 and in W.P.(C) No. 9903/2006 U.O.I. v. M.L. Mehta arising out of O.A. No. 3160/2003 on 11.10.2007. Both these matters raised the same issues. However, erroneously, in the order dated 11.10.2007 passed in W.P.(C) No. 9903/2006 it was recorded "Dismissed. Order to be dictated later." When this mistake was realized we placed W.P.(C) No. 9903/2006 for directions and the aforesaid order was corrected. Further hearing took place and it was contended by learned Counsel for the respondent in this case, as well as the counsel for the respondent in W.P.(C) No. 9903/2006 that the post of Additional Chief Advisor (Cost) being a Secretary level post, it is not possible that the upgradation was made in the case of Sh. M.L. Mehta without the approval of the Cabinet and, therefore, there must have been due application of mind by the petitioner to the issue as to whether the case is covered under para 4(a) or under para 4(b) of the O.M. dated 30.06.1999. Accordingly, we required the petitioner to produce the original records to show the consideration of the case of Sh. M.L. Mehta at the time of grant of the upgraded pay to him. The file has been produced and we have perused the same. It appears from the file that the said issue was not examined at all and the upgradation was granted on the assumption that the post of Advisor (Cost) had been upgraded to that of Additional Chief Advisor (Cost) in the scale of Rs. 22400/- - Rs. 24500/- w.e.f. 01.01.1996.

14. Having considered the arguments advanced on behalf of both the parties and perused the material on record, in our view, the Tribunal has erred in concluding that the post of ACA is a mere upgradation of one post of Advisor (Cost) and that the case is covered by para 4(a) and not 4(b) of the OM dated 30.6.1999.

15. There is force in the contention of the petitioners that the upgradation of one post of Advisor (Cost) to the post of ACA falls within the ambit of para 4(b) of the O.M. dated 30.06.1999, as there is "restructuring of cadre" and "assumptions of higher responsibilities" as contemplated by para 4(b) of the said O.M. It is also

important to note that only one post was upgraded. Hence, it can not be said that the upgradation is a mere change in nomenclature of the post. The fact that only one post of Advisor (Cost) has been upgraded shows that one post of Advisor (Cost) stood simultaneously abolished. This is nothing but restructuring of the cadre. Had all the three posts of Advisor (Cost) been upgraded there might have been some force in the respondents submission that it is just a change of nomenclature. We have called for the FCPC and perused Para 48.46 thereof, which deals with the upgradation of one post of Advisor(Cost) and makes a specific reference as to readjustment of hierarchy at the top, implying thereby, that the post of ACA would be at a higher hierarchical level than Advisor(cost) and thus would necessarily mean assumption of greater/higher responsibilities. The relevant extract of the FCPC, Para 48.46 reads as follows:

Upgradation and encadrement of some key posts

48.46 To streamline the cost accounting work of various Departments/ Ministries of Govt. of India, officers of this service have been specifically posted and attached in ten different Departments. The Cost accounting work pertaining to the other Departments/Ministries /Undertakings is being looked after by the Cost Accounts Branch, Ministry of Finance. We feel it appropriate to partially re-adjust the hierarchy at the top. This would not only help in better and systematic working of the officials but provide an umbrella for the middle level ICAS officers posted in other Departments as well. In view of the changed economic scenario, entry of multi-nationals are being proposed and made in the sectors like Railways, Telecommunications, Posts, Steel & Mines, Power, Coal Defence, Fertilizer. There is a strong need from the national point of view to monitor the profitability aspect of such huge Investments being made in these sectors. Accordingly, we recommend the following:

(i) Upgradation of one cadre post of Advisor (Cost), Cost Account Branch, Ministry of Finance as Addl. Chief Advisor (Cost) in the replacement scale of pay corresponding to the pre-revised scale of Rs. 7300-7600.

(ii) Upgradation of the posts of Member (Finance, Bureau of Industrial Cost and Prices, Ministry of Industry in the replacement scale of pay corresponding to the pre-revised scale of Rs. 7300-7600 and its encadrement in the ICAS Cadre.

(iii) ...

16. From the aforesaid, it is clear that the new post of ACA is at a higher level than the post of Advisor (cost), as it would amount to a partial readjustment of the hierarchy at the top and would "help in better and systematic working of the officials". The new post of ACA is seen as providing "an umbrella for the middle level ICAS officers posted in other department as well." The need to create, inter alia, the post of ACA was felt in view of the changed economic scenario and the entry of multinationals in sectors like railways, telecommunications, posts etc and because it was felt that there was strong need from the national point of view to monitor the profitability aspects of huge investments being made in

these sectors. Assumption of higher duties and responsibilities is therefore writ large from the reasons given by the FCPC justifying the creation of, inter alia, the post of ACA.

17. We reject the reasoning given by the Tribunal while arriving at its impugned decision. Merely because the orders granting upgradation to S/Shri Mehta and Puri were rescinded after about two years and after directions had been given by the Tribunal in OA No. 1617/2001 filed by the respondent, it does not follow that the submission of the petitioner that the post of ACA carried higher responsibilities and required a process of selection could not be believed. We also do not agree that the mere absence of recruitment rules for the post of ACA on 30.6.1999, when the said post was created upon upgradation of one post of Advisor (Cost), leads to the assumption that the post of ACA is a mere upgradation of one of the post of Advisor (Cost) or that it does not tantamount to restructuring of the cadre or that the upgraded post did not carry higher responsibilities. There is no foundation or basis for the Tribunal to conclude that the respondents had, while erroneously upgrading the post held by S/Shri Mehta and Puri retrospectively, concluded that there was no need to assess the suitability of the incumbent afresh before upgrading them from the post of Advisor (Cost) to that of ACA. Similarly, the observation of the Tribunal that the approval for appointing S/Shri Mehta and Puri "must have been taken at the highest level in the Government and that too after having due consideration and consultation with the concerned Departments of the Government" is also a mere assumption made by the Tribunal. Once the petitioner had itself come out with the stand on record that the retrospective upgradation of S/Shri Mehta and Puri was erroneous, and had further taken corrective steps by withdrawing the benefit of upgradation given to the said officers, it was incorrect for the Tribunal to base it conclusions on assumptions contrary to the stand taken by the petitioner. The observation of the Tribunal that petitioners "in order to justify their wrong and arbitrary action have now decided to cancel the appointment of S/Shri Mehta and Puri from 1996 and fill up the upgraded post in terms of para 4(b) of the OM dated 30.6.1999 and have accordingly notified the recruitment rules for the post of ACA (Rs.22000-24500) on 19.10.2001" is too far-fetched and without any foundation. It was not even the respondent''s case that any particular office in the department of the petitioner was enemical towards him and was bent upon denying the benefit claimed by the respondent. It is also highly far-fetched for the Tribunal to conclude that to deny the benefit claimed by the respondent, the petitioner would go to the extent of adversely effecting the interest of two other officers who had also retired. We disapprove of this line of reasoning adopted by the Tribunal as the same borders on perversity. The Tribunal has attributed motivated conduct to the petitioner in withdrawing the benefit earlier given to S/ Shri Mehta and Puri and in notifying the recruitment rules for the post of ACA (Cost) on 19.10.2001, only with a view to deny similar benefit to the respondent. This approach of the Tribunal is most unfortunate and we reject the same. The Tribunal has also fallen in error in observing that if the petitioner had not decided

to fill up the post of ACA under para 4(a) of the OM dated 30.6.1999, they would have considered all the eligible officers including the respondent for promotion to the upgraded post under para 4(b) of the said OM. The Tribunal has, while making this observation, forgotten the fact in respect of upgraded posts covered by para 4(b), there is no question of consideration of the candidature of officers who have verified prior to the issuance of the notification dated 30.6.1999.

18. In our view the Tribunal also erred in concluding that the present case was not covered by the decision of the Supreme Court in I.C.A.R. and another Vs. T.K. Suryanarayan and others, . Since para 4(b) of the OM dated 30.6.1999 was squarely applicable in respect of the upgraded post of ACA, the retrospective promotion granted to S/Shri Mehta and Puri was erroneous and the same could not have been the foundation of a claim by the respondent.

19. The respondent has relied on an order passed by the Supreme Court, reported as All India Non-SC/ST Employees Association (Railway) v. V.K. Agarwal and Ors. 2002 SCC (L & S) 688. The said short order cannot be said to lay down any general principle of law that in all cases of upgradation, where the total number of posts remain the same, there is no question of restructuring of the cadre. In fact, the aspect of assumption of higher responsibilities has not even been addressed in the said order of the Supreme Court. The same is therefore of no avail to the respondent.

20. For our aforesaid reasons, we set aside the order of the Tribunal and hold that the original application filed by the respondent was devoid of merit and liable to be dismissed. The writ petition is accordingly allowed leaving the parties to bear their respective costs.

