(2018) 02 DEL CK 0279

In the Delhi High Court

Case No : Civil Writ Petition No. 6684 Of 2016

Vinoy Kumar APPELLANT

Vs

Union Of India And Ors RESPONDENT

Date of Decision : 09-02-2018

Acts Referred:

Citation : (2018) 02 DEL CK 0279

Hon'ble Judges : Hima Kohli, J;P.S.Teji, J

Bench : Division Bench

Advocate : R.K.Shukla, Anjana Gosain, Rabiya Singh Thakur, Shalini Nair

Final Decision : Dismissed

Judgement

1. The petitioner is aggrieved by the judgment dated 11.09.2015 passed by the Central Administrative Tribunal dismissing OA No.4008/2013 filed by

him praying inter alia for quashing/setting aside the order of reduction in pay, issued by the respondents/Postal Department as also the order directing

recovery of an excess amount of Rs. 53,181/- from him.

2. The brief facts of the present case are that the petitioner was appointed to the post of a Postal Assistant in the Department of Posts on 15.06.1983.

He had successfully qualified in the accounts examination in the Post Office and Railway Mail Service (in short â??PO&RMSâ??) in August, 1995

and was appointed as PO&RMS Accountant on 22.9.1995. At that point in time, the petitioner was granted a special pay of Rs. 90. The relevant

provision in respect of treatment of such special pay for the purpose of fixation of pay on promotion, has been set out in para no. 18 of FR&SR, which

is reproduced herein below for ready reference:-

(18) Transfer of special pay for purpose of fixation of pay on promotion. (A)

When the special pay is in lieu of a separate higher scale. -

In cases where a Government servant is in receipt of a special pay in a post, his pay on promotion to a higher post may be fixed after taking

into account the special pay drawn in the lower post subject to the conditions mentioned below-

(i) The special pay in the lower post should have been granted in liew of separate higher scale (e.g. special pay granted to steno, typist,

clerk-in-charge, etc.);

(ii) If the special pay has been drawn in the lower post continuously for a minimum period of three years on the date of promotion, the pay

in the higher post will be fixed, under the normal rules, treating the special pay as part of basic pay. In other cases, the pay in the time-scale

of the higher post will be fixed, under the normal rules, treating the special pay as part of basic pay. In other cases, the pay in the time-

scale of the higher post will be fixed, under the normal rules, with reference to the basic pay drawn in the lower post (excluding the special

pay); where this results in drop in emoluments, the difference between the pay so fixed and the pay plus special pay drawn in the lower post

will be allowed in the form of personal pay to be absorbed in future increases of pay;

Clarification (1) - It is clarified that where such special pay has been drawn for a minimum period of three years without break in more than

one post within the same cadre or department, the total period will be taken into account. In cases where the quantum of special pay varies

in different posts, the least of the special pay drawn in different posts should be taken into account for the purpose of fixation of pay in the

higher post. (GI, MF, OM No.F.6(1)-E.II(B)/68 dated the 8th January, 1968).

3. When the recommendations of the 5th Central Pay Commission were implemented, the special pay granted to PO&RMS Accountants like the

petitioner herein was re-designated as 'special allowance'. Since, special pay was redesignated as a special allowance and made effective from

1.8.1997, in terms of OM dated 22.4.1998 issued by the DOPT the said allowance could not be treated as a part of the pay, resultantly, it was not

merged with the pay of PO&RMS Accountants on promotion.

4. On completion of 16 years of service on 18.06.1999, the petitioner was

granted a financial upgradation in the pay-scale of Rs. 4500-6000, under the

one time bound promotion scheme (in short â??TOBP schemeâ??). Thereafter, the petitioner's pay was fixed under FR 22(1)(a)(i) with the special

pay being enhanced from Rs. 90 to Rs. 180. As a consequence, the pay of the petitioner was fixed at Rs. 5125/-, with effect from 18.06.1999. Then

came the recommendations of the 6th Central Pay Commission whereunder the petitionerâ??s pay-scale was revised upto Rs. 5200-20200, with

grade pay of Rs. 2400/-.

5. The petitioner claims that he was not communicated the order dated 08.04.2013 and without issuing any show cause notice to him, the respondents

had reduced his basic pay retrospectively, with effect from 18.6.1999 and had ordered recovery of a sum of Rs. 53,181/- from him.

6. Aggrieved by the said decision, the petitioner submitted a representation dated 04.06.2013, stating inter alia that his basic pay may be protected and

the amount of Rs. 53,181/- proposed to be recovered from him, may not be recovered. The said representation was, however, rejected by the

respondents vide letter dated 05.09.2013. Aggrieved by the said rejection order, the petitioner approached the Tribunal for relief.

7. In the impugned judgment, the Tribunal observed that the issue raised by the petitioner had stood settled vide order dated 22.10.2002, passed by the

Bangalore Bench in O.A. No.296/2002 in the case of one S.Mohan Kumar, duly upheld by the High Court of Karnatka vide order dated 18.11.2010,

passed in the W.P. No.7593/2003, S.Mohan Kumar's pay had been similarly reduced after he had been offered placement in the higher scale of the

TOBP scheme, on completion of three years' posting as an Accountant and his pay in the higher scale was fixed after taking into account his special

pay of Rs. 90, that he had been receiving for over three years.

8. Aggrieved by the decision taken by the Department, S.Mohan Kumar had approached the Bangalore Bench of the Central Administrative Tribunal

by filing OA (OA No.296/2002) stating inter alia that he had joined as an Accountant on 01.11.1994 and got his higher scale on 05.11.1997 and in that

duration, with effect from 11.08.1997, his special pay was converted into special allowance and the period between 01.11.1994, the date when he

joined as an Accountant to 31.07.97, was less than three years. In the captioned case, the Tribunal allowed the OA filed by S.Mohan Kumar vide order dated 22.10.2002, by holding that in terms of OM dated 22.04.1998, the change of nomenclature from 'special pay' to 'special allowance' was

given a retrospective effect from 01.08.1997, and vested rights could not be divested with retrospective effect by issuance of an executive order.

9. Aggrieved by the order dated 22.10.2002, the respondents therein had approached the High Court of Karnataka by filing W.P.(C) No.7593/2003,

which was decided by the Division Bench vide judgment dated 18.11.2010. The operative part of the said judgment is reproduced herein below for

ready reference:-

5. From the aforesaid facts it is very clear, on the day the special pay of Rs.90/- was granted to the respondent under the rules prevailing

then, he was entitled to the same. He has worked for three years continuously and he is entitled to the said special pay. When in pursuance

of the V Pay Commission pay was sought to be fixed, certainly that special pay also has to be taken into consideration. In fact it was taken

into consideration and his pay is properly fixed. It is on a wrong understanding that merely because in the V Pay Commissioner they have

issued direction to discard such practice, on the assumption that it is applicable to the respondent also, now an attempt is made to refix the

pay excluding the special pay and to recover the excess pay. As rightly observed by the Tribunal, once a vested right had accrued in favour

of the employee in terms of the Rules which governed him on the day the said benefit was extended and he has worked continuously for

three years and drawn the said amount, merely because some recommendations were made in the V Pay Commission, that would not have

the effect of taking away a vested right in him. In so far as the respondent is concerned, those recommendations have no effect. Therefore,

the fixation of pay taking into consideration the special pay is valid and legal and on that basis if his salary is refixed in pursuance of the

recommendations of the V Pay Commission, it is not open to the authorities to seek for refund on the ground that some excess amount is

paid. We do not see any merit in this petition. Accordingly, it is dismissed."" (emphasis added)

10. As can be seen from the aforesaid decision, the Karnataka High Court had upheld the order of the Tribunal by holding that merely because some

recommendations had been made by the 5th Central Pay Commission, cannot be a ground to take away a vested right of an employee and it would not

be open for the Department to seek refund on the ground that some excess amount had been made to him. The said decision was challenged by the

Department by filing an appeal before the Supreme Court (SLP No.CC 10080/2012), that was dismissed. This was followed by issuance of an

executive order dated 10.01.2013 by the Ministry of Communication and I.T. Department of Posts, declaring that the benefit of pay fixation on

promotion/financial upgradation shall be extended in all similarly placed cases of PO&RMS Accountants where the special pay/allowance @ Rs. 90/-

per month was drawn continuously for three years before 22.04.1998 andÂ in cases where the promotion/financial upgradation had taken place on or

after 01.08.1997, but before 22.04.1998, special pay/allowance of Rs. 90/- will only be reckoned for the said purpose. The relevant extract of the

executive order dated 10.01.2013 is as follows:

â??2. Following dismissal of SLP No.CC 10080/2012 by Apex court filed by the Union of India against the judgment of Karnataka High

Court in WP No.7593/2003 in the matter of Union of India vs. S.Mohan Kumar; the issue of reckoning Special Pay termed as special

allowance for the purpose of pay fixation on promotion/financial upgradation (TBOP/BCR) has been examined in consultation with

Department of Expenditure, Ministry of Finance. The nodal Ministry vide ID No.202660/E-III(A)/2012 dated 21.12.2012 has accorded its

concurrence to the implementation of the judgment of CAT Bangalore Bench in OA No.296/2002 dated 22.10.2002 upheld by Karnataka

High Court in WP No.7593/2003 in respect of Shri S Mohan Kumar and other similarly placed persons, who were promoted after

completing three years of service as PO & RMS Accountants before 22.04.1998, and in whose cases, the special pay was Rs.90/- at the time

of promotion.

3. I am accordingly directed to convey that the judgments of CAT Bangalore Bench in OA 296/2002 in the matter of S Mohan Kumar, CAT

Ernakulam Bench in OAs No.691/2005 & 347/2006 in the matter of Ms.K. Rajeshwari and Ms.Anita K.Alexander respectively and CAT

Madras Bench in OA 773/2010 in the matter of Ms.Jayalaxmi may be implemented by reckoning the special pay termed as special allowance

as part of basic pay for the purpose of pay fixation of the above the then PO& RMS Accountants. The recovery, if any, made from their pay

and allowances on this account shall be refunded to them immediately and compliance reported.

4. The aforesaid benefit of pay fixation on promotion/financial upgradation (TBOP/ BCR) shall also be extended in all similarly placed cases

of the PO & RMS Accountants where the special pay/allowance @ Rs.90/- per month was drawn continuously for three years before

22.04.1998. In cases where the promotion/financial upgradation (TBOP/BCR) was has taken place on or after 01.08.1997 but before

22.04.1998 special pay/allowance of Rs.90/- will only be reckoned for this purpose.â??

11. Before the Tribunal, the respondents had cited the judgment of the Supreme Court in the case of U.T.Chandigarh & Ors. Vs. Gurcharan Singh &

Anr., reported as (2013) 13 SCALE 393 to claim that the petitioner is not covered under the said executive order. In the judgment impugned in the

present case, the Tribunal had observed that the petitioner had neither completed the period of three years of service as a PO&RMS Accountant

before 22.04.1998, and nor did he get a promotion before the said date. Upholding the submission made by learned counsel for the respondents, the

Tribunal held as follows:-

12. Though a submission had been made on behalf of the respondent that no amount should be recovered from the salary paid to the

respondent, the said submission cannot be accepted because if any amount had been paid due to mistake, the mistake must be rectified and

the amount so paid in pursuance of the mistake must be recovered. It might also happen that the employer might have to pay some amount to

the respondent as a result of some mistake and in such a event, even the appellant might have to pay to the respondent. Be that as it may,

upon settlement of the account, whatever amount has been paid to the respondent employee or to the appellant employer shall be paid and

the account shall be adjusted accordingly.

12. As regards recovery of the amount allegedly paid in excess to the petitioner, the Tribunal rightly restrained the respondents from making any

recovery by applying the law laid down by the Supreme Court in the case of State of Punjab & Ors. vs. Rafiq Masih (White Washer) & Ors.,

reported as 2015 (4) SCC 334.

13. In the course of arguments addressed by learned counsel for the petitioner to assail the impugned judgment, we had indicated that the present case

is squarely covered by the decision in the case of S.Mohan Kumar (supra), the fact situation being the same and therefore, no useful purpose would

be served in pressing the present petition. Learned counsel for the petitioner had sought a pass over to obtain instructions from his client, and

thereafter insisted that an order be passed on merits.

14. The contention of the learned counsel for the petitioner that the Office Memorandum dated 10.01.2013 is in-applicable to the present case, is

found to be devoid of merits. We are of the opinion that the order dated 10.01.2013 passed by the respondents had only clarified that the Department

proposes to implement the decision of the Central Administrative Tribunal, Bangalore Bench in OA No.296/2002, regarding treatment of special pay

and allowance for fixation of pay on promotion/financial upgradation, tested before the Tribunal and the High Court and upheld right upto the Supreme

Court. In fact, on perusing the grounds taken by the petitioner in the present petition, it is clear that he is only trying to re-agitate an issue that has

attained finality in the captioned case.

15. This being the position, we see no reason to interfere in the impugned judgment passed by the Tribunal. The present petition is accordingly

dismissed with costs of Rs. 10,000/-, to be paid to the respondents through counsel within four weeks.

