

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P. (C.) No. 757/2007**

% **Date of Reserve: 17.08.2010**
Date of Decision: 20.08.2010

ANIL KUMAR GUPTA Petitioner

Through Mr.Ravinder Singh, Mr.Saundarya
Singh, Advs.

Versus

N.C.T. OF DELHI AND ORS. Respondents

Through Ms.Zubeda Begum, Ms. Sana
Ansari, Advs.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE MOOL CHAND GARG

1. Whether reporters of Local papers may be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest?

MOOL CHAND GARG, J.

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1. FR 22(23) reads as under:

“(23) Removal of anomaly by stepping up of pay of Senior on promotion drawing less pay than his junior.- (a) As a result of application of FR 22-C. (Now FR 22 (I)(a)(1)).-In order to remove the anomaly of a Government servant promoted or appointed to a higher post on or after 1.4.1961 drawing a lower rate of pay in that post than another Government servant junior to him in the lower grade and promoted or appointed subsequently to another identical post, it has been decided that in such cases the pay of the senior officer in the higher post should be stepped up to a figure equal to the pay as fixed for the junior officer in that higher post. The stepping up should be done with effect from the date of promotion or

appointment of the junior officer and will be subject to the following conditions, namely:-

- (a) Both the junior and senior officers 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 post in which they 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, the above provisions will not be invoked to step up the pay of the senior officer.

The orders refixing the pay of the senior officers in accordance with the above provisions shall be issued under FR 27. The next increment of the senior officer will be drawn on completion of the requisite qualifying service with effect from the date of refixation of pay.

2. Before the Tribunal it was pleaded on behalf of the petitioner that despite Shri Rohtash Singh Yadav being his junior, he is getting higher pay than as is being given to the petitioner and therefore there is an anomaly which needs to be taken care of in view of the provisions of FR-22(23) as aforesaid. He also prayed for direction to the respondents to pay all consequential benefits along with cost.

3. It was his case that he was initially appointed as TGT in the Directorate of Education on 08.10.1983 and was recruited directly as PGT since 22.10.1991. His counter-part Mr. Rohtash Singh Yadav who was appointed as TGT on 27.10.1983 and was promoted as PGT on 19.07.1996 was getting higher pay. It was stated that Rohtash Singh Yadav was junior to the petitioner at every stage. It was submitted that he had been writing to the Department to upgrade his pay but his claim was rejected by the Department by saying "his stepping up case had not been found in order since he is a direct recruit and stepping up is not allowed with a promotee teacher". It was also submitted by the petitioner that his case was also not being

considered even though in the case of one N.L.Sharma who was also PGT of G.B.S.S.S. Kidwai Nagar Delhi and whose case was similar to that of petitioner, & who was also a directly recruited officer, his pay was stepped up by the respondent after he made a representation that he was senior to Rohtash Singh Yadav. To clarify the position the petitioner has given the following chart which explain the position of the petitioner viz-a-viz respondent Rohtash Singh Yadav.

Name	Applicant	Rohtash Singh Yadav
Cadre	Admn. Cadre	Admn. Cadre
Date of Birth	15.07.1957	08.04.1955
Date of Appt. As TGT	08.10.1983	27.10.1983
Seniority No. In SL of TG For the period 81085	852	866
Date of joining As PGT	22.10.1991	19.07.1996
Seniority No. In SL of PGT	256	1,273

Pay Fixation

Applicant			Rohtash Singh Yadav		
Date	Pay Scale as	Pay	Date	Pay Scale as	Pay
8.10.83	440-750 TGT	440	27.10.83	440-750 TGT	440
1.10.84		460	1.10.84		460
1.10.85		480	1.10.85		480
1.1.86	1400-2600 TGT	1,480	1.1.86	1400-2600 TGT	1,480
1.10.86		1,520	1.10.86		1,520
1.10.87		1,560	1.10.87		1,560
1.10.88		1,600	1.10.88		1,600
1.10.89		1,650	1.10.89		1,650
1.10.90		1,700	1.10.90		1,700
1.10.91		1,750	1.10.91		1,750
22.10.91	1640-2900 PGT	1,820	22.10.91	1400-2600 TGT	1,750
1.10.92		1,880	1.10.92		1,800

1.10.93		1,940	1.10.93		1,850
1.10.94		2,000	1.10.94		1,900
1.10.95		2,060	1.10.95		1,950
1.10.95		2,060	27.10.95	1640-2900 TGT	
				Sr.Scale	2,000
1.1.96	6500-10500 PGT	6,900	1.1.96	6500-10500 TGT	6,900
			19.7.96	6500-10500 PGT	6,900
1.10.96		7,100	1.10.96		7,100
			1.10.96	Opted Fixation	7,500
1.10.97		7,300	1.10.97		7,700
1.10.98		7,500	1.10.98		7,900
1.10.99		7,700	1.10.99		8,100
1.10.2000		7,900	1.10.2000		8,300
1.10.2001		8,100	1.10.2001		8,500
1.10.2002		8,300	1.10.2002		8,700
1.10.2003		8,500	1.10.2003		8,900
1.10.2004		8,700	1.10.2004		9,100
1.10.2005		8,900	1.10.2005		9,300

4. It has also been submitted that FR-22(23), inter alia, provides that if as a result of application of FR-22(C) now FR-22(1)(a) Sub-clause(1), if a senior gets a lesser pay than a junior Government servant, the pay of the senior needs to be stepped up to a figure equal to pay fixed for junior officer and that stepping up should be done w.e.f. the date of promotion of the junior officer subject to the following three conditions:

- (a) Both the junior and senior officers 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 they are entitled to draw pay should be identical.
- (c) The anomaly should be directly as a result of the application of FR 22-C.

5. It has been submitted that the petitioner fulfills all these conditions and thus there is no reason as to why the same should be denied to the applicant.

6. Before the Tribunal it was the case of the respondents that the petitioner and Shri Rohtash Singh were from two different cadre inasmuch as petitioner became PGT as a direct recruit while Shri Rohtash Singh was promoted. Thus taking into consideration sub-clause (a) of FR-22(23), the petitioner was not entitled to stepping up of his pay.

7. Respondents also stated that:

“Rohtash Singh Yadav was given a senior scale after completing twelve years of service and his scale was fixed on 2000/- as his basic pay. On 1.1.96 because of the 5th Pay Commission, both were the teachers at 6900/-. There was no anomaly on that fixation. However, the petitioner was well aware that he was a PGT and Sh. Rohtash Singh Yadav was TGT on 1.1.96. As the petitioner became a PGT as direct recruit he did not remain TGT for 12 years like Rohtash Singh Yadav. Rohtash Singh Yadav got senior scale consequent to which the re-fixation in higher scale. The petitioner on his direct recruitment got his pay elevated and revised from 1750 to 1820. Rohtash Singh Yadav became PGT on 17.7.1996 on departmental promotion and he got benefit of advancement of increment as per rules.”

8. Vide impugned order dated 23.11.2006 the Tribunal accepted the case of the respondent and dismissed OA No.425/2006 filed by the petitioner. The observation made by the Tribunal in bringing out a distinction in the case of the petitioner and Shri Rohtash Singh Yadav is reproduced hereunder:

“In order to attract FR 22-C, on which reliance was placed, it is necessary that both junior and senior should belong to same cadre and draw identical pay scale in same cadre. Such are not the facts in hand. A perusal of DOP&T OM dated 04.11.1993, relevant excerpts of which are

reproduced herein below, would show that in cases where a person is promoted from a 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 direct appointee and the senior direct recruit cannot claim parity with juniors based on seniority alone, which had not been termed as anomaly. Therefore, stepping up of pay is not admissible. The said OA, in our considered view, is squarely attracted in the facts and circumstances of present case. Relevant excerpts read as under:"

9. According to the Tribunal, in view of the Office Memorandum dated 04.11.1993 issued by the DOP&T, the case of the petitioner was not a case of anomaly which require stepping up of pay with reference to his junior. Some of the instances which have been taken note of in the Office Memorandum by quoting as sub-para 2 & 3 of the aforesaid memorandum are reproduced hereunder:

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

- (a) xxxxxxxxxxxxxxxxxxxx
- (b) xxxxxxxxxxxxxxxxxxxx
- (c) xxxxxxxxxxxxxxxxxxxx
- (d) xxxxxxxxxxxxxxxxxxxx
- (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 F.R. 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 F.R. 22-C with reference to the pay drawn in the post of UDC, whereas the pay of Assistant (DR) is fixed normally at the minimum under F.R. 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) xxxxxxxxxxxxxxxxxxxxxx

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]"

10. Aggrieved by the impugned order it has been submitted by the petitioner that the Tribunal went wrong in holding that the petitioner was not entitled to stepping up of pay on the basis of sub-Rule 23 of FR-22. It is also submitted that the claim of the respondent that the petitioner was a direct recruit was also not correct. In any event the interpretation of sub-rule (a) of sub-rule (2) of FR-22 was not correctly done by the Tribunal inasmuch as whether it be a case of promotees or be it a case of direct recruit because the opening Clause of FR-22(C) starts with the words "to remove the anomaly of a Government servant promoted or recruited to a higher post"; he therefore submits that whether respondent may treat him as a direct recruit or a promotee it would not make a difference and he would be still entitled to the benefit of equalization.

11. However, the learned counsel for the respondent submits that the petitioner being a direct recruit for the post of PGT and the respondent having risen in rank and who was also having the benefit of grant of first ACP while working as TGT after having completed 12 years in service, the petitioner is not entitled for any upgradation because there is no anomaly in the light of FR-22(C) as the condition of sub-Clause (a) of FR-22(23) is not satisfied in the case of the petitioner. It is also submitted that the relief to Shri N.L.Sharma had been granted because he was also promoted and was appointed as PGT through direct recruitment with the approval of Lt. Governor under fundamental Rule 27 the Department is not in a position to reduce the pay of Shri N.L.Sharma but that cannot be a precedent

which may help the petitioner inasmuch as the petitioner is not eligible for upgradation. Reliance has also been placed upon the judgment of the Hon'ble Supreme Court in the case Union of India and Anr. Vs. R.Swaminathan and Ors. 1997 (7) SCC 690. The relevant observation made in the aforesaid judgment which makes a distinction and would not help the case of the respondent are reproduced hereunder:

9. We are, however, in the present case, concerned basically with Fundamental Rule 22(I)(a)(1) and the proviso to Fundamental Rule 22 because, in all these appeals, the junior employees who have got higher pay on promotion than their seniors, had officiated in the promotional post for different periods on account of local ad hoc promotions granted to them. This is because the Department of Telecommunications is divided into a number of Circles within the country. The regular promotions from the junior posts in question to the higher posts are on the basis of all India seniority. The Heads of Circles have, however, been delegated powers for making local officiating arrangements based on Circle seniority to the higher posts in question against short-term vacancies upto 120 days in the event of the regular paneled officers not being available in that Circle. This period of 120 days was subsequently revised to 180 days. Under this provision for local officiation, the senior-most official in the Circle is allowed to hold the charge of the higher post for a limited duration. This is purely out of administrative considerations and is resorted to in order to tide over the exigencies of work. This practice, we are informed, has been followed in all Circles in the Department of Telecommunications since 1970. This is because, at times it is not possible to fill up all the vacancies in a particular Circle for various reasons such as non-joining by a particular person, chain promotions or short-term vacancies arising on account of leave etc. It is submitted before us by the Department that it is not always possible to convene the meetings of the departmental promotion committee for filling up all the posts which are only available for short periods on an All India basis because of administrative problems. To fill up this gap, Government has issued instructions from time to time to allow local officiating arrangements in the interest of work. The department has also pointed out that all the aggrieved employees in these appeals have availed of

such officiating promotions as and when such occasion arose in their Circle and they were eligible. The juniors, therefore, in each of these cases who have received a higher pay on their regular promotion than the seniors, have received this higher pay on account of the application of the proviso to Fundamental Rule 22.

12. As observed by the Hon'ble Supreme Court in that case the junior employee who have got higher pay on promotions than their seniors had officiated on the promotional post on different periods on account of local ad-hoc promotions granted to them which is not the case in hand. The conclusion dawn by the Hon'ble Supreme Court though there is reference of FR-22(C) also in that case but which explains the position is available in para 12 & 13 which are also reproduced for the sake of reference:

12. The aggrieved employees have contended with some justification that local officiating promotions within a Circle have resulted in their being deprived of a chance to officiate in the higher post, if such chance of officiation arises in a different Circle. They have submitted that since there is an All India seniority for regular promotions, this All India seniority must prevail even while making local officiating appointments within any Circle. The question is basically of administrative exigency and the difficulty that the administration may face if even short-term vacancies have to be filled on the basis of All India seniority by calling a person who may be stationed in a different Circle in a region remote from the region where the vacancy arises, and that too for a short duration. This is essentially a matter of administrative policy. But the only justification for local promotions is their short duration. If such vacancy is of a long duration there is no administrative reason for not following the all India seniority. Most of the grievances of the employees will be met if proper norms are laid down for making local officiating promotions. One thing, however, is clear. Neither the seniority nor the regular promotion of these employees is affected by such officiating local arrangements. The employees who have not officiated in the higher post earlier, however, will not get the benefit of the Provision to Fundamental Rule 22.

13. The employees in question are, therefore, not entitled to have their pay stepped up under the said Government Order because the difference in the pay drawn by them and the higher pay drawn by their juniors is not a result of any anomaly nor is it a result of the application of Fundamental Rule 22(I)(a)(1).

13. Taking note of the aforesaid observation dealing with a case where both the litigants before the Hon'ble Supreme Court were promotees, we find that this judgment is of no help to the case in hand. We may however observe that the anomaly which has been created in this case is the creation of the respondents inasmuch as Shri Rohtash Singh Yadav was in the pay scale of ` 6,500-10500 as on 01.10.1996 after the implementation of 5<sup>th</sup> Pay Commission. He became PGT only on 19.07.1996. The pay scale of PGT was also the same i.e. ` 6,500-10500. For the purpose of fixation of his pay in the promoted scale, the relevant rules which would have governed the situation are sub-Rule (2) of FR-22 which reads as under:

“(2) When the appointment to the new post does not involve such assumption of duties and responsibilities of greater importance, he shall draw as initial pay, the stage of time-scale which is equal to his pay in respect of the old post held by him on regular basis, or, if there is no such stage, the stage next above his pay in respect of the old post held by him on regular basis:

Provided that where the minimum pay of the time-scale of the new post is higher than his pay in respect of the post held by him regularly, he shall draw the minimum as the initial pay:

Provided further that in a case where pay is fixed at the same stage, he shall continue to draw that pay until such time as he would have received an increment in the time-scale of the old post, in cases where pay is fixed at the higher stage, he shall get his next increment on completion of the period when an increment is earned in the time-scale of the new post.”

14. It would also be relevant to take note of sub-Rule (III) of sub-Rule 2 of FR-22 which reads as under:

“(III) For the purpose of this rule, the appointment shall not be deemed to involve the assumption of duties and responsibilities of greater importance, if the post to which it is made is on the same scale of pay as the post, other than a tenure post, which the Government servant holds on a regular basis at the time of his promotion or appointment or on a scale of pay identical therewith.”

15. A reading of sub-rule (III) (supra) along with sub-rule (2) of FR-22 taking into consideration that the pay scale of PGT was also the same i.e. ` 6,500-10500 which was the pay scale available to the respondent as on 01.10.1996 as TGT, the initial pay of the respondent even as PGT has to be fixed at the minimum of pay scale of ` 6,500-10500.

16. In view of the aforesaid two rules, the pay of Shri Rohtash Singh Yadav who became PGT in the pay scale of ` 6,500-10500 and was drawing the pay of ` 6,900 was rightly fixed as ` 6,900 on the day when he became the PGT. However, he was also granted the next increment as on 01.10.1996 which was his normal date of increment. It is however not clear as to how his pay could have been fixed at ` 7,500 with the next date of increment being 01.10.1997.

17. In these circumstances while we do not find fault in the order of the Tribunal in having dismissed the Original Application filed by the petitioner as the petitioner being a direct recruit and Rohtash Singh being a promotee, the petitioner was rightly not entitled to claim upgradation of pay in view of FR-22(23) as quoted above, we find that the anomaly is also being created by the respondents themselves who have wrongly fixed the pay of Shri Rohtash Singh Yadav as on 01.10.1996 at ` 7,500 instead of ` 7,300 without changing the date of his next increment. Had this would have been done, the question of any anomaly and difference of pay scale in the pay scale of the petitioner and Shri Rohtash Singh Yadav would not have arisen.

18. It hardly needs to be emphasized that law does not recognize negative equality. If somebody gets a wrong benefit it would not be a

ground to do a further wrong and extend the wrong benefit to another.

19. In these circumstances, being conscious of the fact that Shri Rohtash Singh Yadav is not a party before us we may only guide the respondents that they may proceed to re-fix the pay of Shri Rohtash Singh Yadav as on 19.07.1996 in accordance with FR-22 (2) read with sub-clause (III) of sub-rule (2) of the aforesaid rule after issuing a notice to Shri Rohtash Singh. But in said circumstances the order would have to be with prospective effect and no recoveries could be made.

20. With these observations the writ petition is disposed of.

MOOL CHAND GARG, J.

AUGUST 20, 2010
'ag'

PRADEEP NANDRAJOG, J.