

* IN THE HIGH COURT OF DELHI AT NEW DELHI

% Decided on: 3rd March, 2011

+ WRIT PETITION (CIVIL) NO. 1386 OF 2011

CENTRAL POLLUTION CONTROL BOARD & ORS. Petitioners
Through: Mr.Anurag Sharma with
Mr.Prashant Kumar, Advocates
versus

DHARMENDRA GUPTA & ORS. Respondents
Through: Mr. T.D.Yadav, Advocate for
Respondents 1-2.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether reporters of the local papers be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

DIPAK MISRA, CJ

Invoking the jurisdiction of this Court under Articles 226 and 227 of the Constitution of India, the petitioners, Central Pollution Control Board and its functionaries, have called in question the legal validity of the order dated 9th November, 2010 passed by the Central Administrative Tribunal, Principal Bench, New Delhi (for short 'the tribunal') in OA No. 1403/2010.

2. The respondents knocked at the doors of the tribunal contending, *inter alia*, that one Shri Y.N. Mishra was initially

appointed as Data Entry Operator (DEO) and was brought in as Senior Lab Assistant on change of his cadre but his pay was not fixed in that quota. He was appointed on ad-hoc basis as Junior Scientific Assistant (JSA). Being grieved by the inter se seniority determination, the respondents had preferred the OA No. 1568/2002, which was decided by the tribunal on 1st August, 2003. In the said case, Shri Y.N. Mishra was the respondent No.4. The relief that was claimed in the said original application was that they should be treated senior to the respondent No.4 therein. The tribunal adverting to the facts and the contentions held as follows: -

“The applicants as well as the respondent no.4 have been promoted to the post of Junior Scientific Assistant w.e.f. 23.07.2001 in the scale of Rs.5000-150-8000 as per the order dated 21.09.2001 (Annexure A-1). The only grievance of the applicants, which appears to be relevant, is the seniority of the applicants, vis-a-vis respondent no.4 in the cadre of Junior Scientific Assistants. The applicants have been placed junior to the respondent no.4 in the seniority list of Junior Scientific Assistant as on 1.1.2002 as circulated vide letter dated 14.3.2002 Annexure A-4. Respondent no.4 is shown at serial no.8 whereas applicant no.1 is at serial no.10, applicant no.2 at serial no.11 and applicant no.3 at Serial no.13 of this seniority list. The official respondents have placed a copy of the minutes of the meeting of the Board held on 18.04.2001. Item no. 3.16 clearly states that the conversion of the post of Data Entry Operator into Senior Lab Assistant has been approved in order to consider the promotion of respondent no.4 as Junior Scientific Assistant through the DPC which was held on 23.07.2001. In our opinion,

the change of cadre of respondent no.4 may be permissible under the power of relaxation provided in the Recruitment Rules, however, he (respondent no.4) cannot be allowed to gain seniority to the detriment of the applicants after their promotion to the next higher grade. Therefore, the placement of respondent no.4 in the senior list above the applicants was not justified. We, therefore, direct the official respondents to place the respondent no.4 below the names of the applicants. The respondents are accordingly directed to carry out the correction in the seniority list as circulated vide letter dated 14.3.2002 in the cadre of Junior Scientific Assistants in so far as the applicants and respondent no.4 are concerned. This correction of seniority of the applicants vis-a-vis respondent no.4 should be carried out within a period of two months from the date of receipt of a copy of this order under intimation to the applicants."

3. The said order was given effect to vide Office Memorandum dated 29th September, 2003 which reads as follows: -

"In compliance of the order of Hon'ble Administrative Tribunal, Principal Bench dated 1st August 2003 in O.A. No. 1568 of 2002, the seniority issued as on 01.01.2002 and 01.01.2003 under the Office Memorandum of even number dated 14/20.03.2002 and 07.04.2003, are hereby modified partially in respect of Junior Scientific Assistant. The modified seniority list of Junior Scientific Assistant is enclosed herewith."

4. After the seniority was determined, the respondents submitted many a representation contending, inter alia, that the said Mr.Y.N. Mishra was junior to them but he was getting more salary than his seniors. The said prayer was not dealt with and in the

meantime, the respondents were promoted as Senior Scientific Assistants on 1st January, 2007 in the pay-scale of Rs.5500-9000 and their pay was fixed at Rs.6025/- whereas that of their junior Mr.Y.N.Mishra was fixed at Rs.7250/-. Because of this anomalous situation, the affected respondents again approached the tribunal.

5. It was contended by the employer before the tribunal that the increment earned by Shri Y.N. Mishra was taken into consideration under FAR 22-C to deny the applicants the pay fixation at par with their junior and hence, the principle of step-up of pay would not be invoked.

6. Resisting the said stand it was urged by the applicants before the tribunal that the increment that was earned by the said Mr.Y.N.Mishra was only a normal increment and not an advance increment so that the claim of the applicants under FAR 22-C could not be attracted to create an exception for the purpose of denying pay fixation. Be it noted, before the tribunal on behalf of the respondent therein (the employer and the present petitioner), reliance was placed on the decision rendered in *E.S.I. Corporation and another v. P.K. Srinivasmurthy and another*, (1997) 11 SCC 533.

7. The tribunal considering the rivalised contentions came to hold that the pay of Shri Y.N. Mishra was not even fixed in the pay-

scale to the post of which he was absorbed on the change of cadre. He was brought in on ad-hoc basis and continued to draw the normal increment, in a routine manner. In the absence of advance increment, the pay-scale held by the applicants and Shri Y.N. Mishra being same and they hold the same promotional post, the benefit of pay-scale cannot be denied to the applicants who were senior to him.

8. In this regard, we may refer to the decision in *Union of India and others v. O.P. Saxena*, (1997) 6 SCC 360, which has been placed reliance upon by learned counsel for the petitioner. In the case of *O.P. Saxena* (supra) the controversy related to stepping up pay of the respondents therein who were promoted as Loco Running Supervisors prior to 1st January, 1986. Both the employees belonged to the Railway Administration. As the Apex Court has observed, there is category of staff called the 'running staff' which is involved in the running trains and the said category includes drivers, guards, firemen, shunters and brakesman. The running staffs are entitled to an allowance called the 'running allowance' in view of the nature of their duties pertaining to the running of trains. The pay-scales of the running staff are considered to be incommensurable with the ordeal of their duty and, therefore, to balance that element the

running allowance is given to encourage greater efficiency in the running staff. The locomotive drivers are eligible for promotion, amongst other posts, to those of Loco Supervisors. Shri Kareer, the respondent before the tribunal and O.P. Saxena at one time were holding the running post of driver Grade 'C'. Shri Kareer was senior to the respondent in the grade of Driver Grade 'C'. However, the respondent thereafter opted to be promoted to the stationary post of the Loco Supervisor directly from the post of Driver Grade 'C' but Shri Kareer chose to remain in the running staff and he was promoted as Driver Grade 'B' and thereafter he was promoted as Driver Grade 'A' in the pay-scale of Rs.550-700. At the time the pay revision came on 1st January, 1986, the employees were working on the post of Loco Supervisor while Shri Kareer was working on the running post of Driver Grade 'A'. It was brought to the notice of the Apex Court that pay of running staff on promotion to Loco Supervisor posts is fixed under Rule 1316 of the Indian Railway Establishment Code after fixation of an additional component of 30% of basic pay last drawn in the running cadre, which represents the pay element in the running allowance. On introduction of the revised pay-scale, the said special pay being added, it resulted in the higher fixation of pay of running staff appointed as Loco

Supervisors after 1st January, 1986 than those appointed as Loco Supervisors before 1st January, 1986. In this factual backdrop, the pay of Shri Kareer as Loco Supervisor was fixed after taking into account the aforesaid 30% addition, which resulted in his getting higher pay than the respondents. The pay of O.P. Saxena was stepped up but when the department discovered that the benefit had been wrongly given, steps were taken for recovery. He assailed the order before the tribunal which came to hold that the stepping up of the pay was admissible to him. Being of this view, the tribunal directed to step up their pay keeping the pay of Shri Kareer in view. Their Lordships referred to the Rule 1316 of the Indian Railway Establishment Code Volume II, which contains conditions which have to be followed while ordering stepping up. In this context, their Lordships of the Apex Court opined thus –

“It is not in dispute that as Driver Grade-C Sh.Kareer was senior to and was drawing more salary than the respondents. Thereafter while Sh.Kareer remained in the cadre of running staff the respondents by choice opted for being promoted to the supervisory cadre and posted as Loco Supervisors. Thereafter Sh.Kareer on the one hand and the respondents on the other belonged to two different cadres having their own seniority list. The pay of Sh.Kareer was fixed according to the scales which were approved for the running staff including the running allowance. Sh.Kareer was drawing more salary as Driver Grade-A, just before his appointment as a Loco Supervisor, than the respondents. With the revision of

pay scales with effect from 1st January, 1986 Sh.Kareer's pay was fixed at Rs. 2360/- as on 1st January, 1986 while the salary of respondent- O.P. Saxena on the stationary post which he was holding was Rs. 2300/-. The sources of the recruitment to the post of Loco Supervisor in the case of Sh.Kareer vis-a-vis the respondents being different the principle of stepping up of pay would not arise. Whereas the respondents were promoted as Loco Supervisors from Driver Grade-C, Sh.Kareer on the other hand was placed in the cadre of Loco Supervisor after being promoted from the post of Driver Grade-A. When the feeder posts of Sh.Kareer and that of the other respondents were different the applicability of the principle of stepping up cannot apply. The pay of Sh.Kareer had to be fixed with reference to what he was last drawing as Driver Grade-A, a post which was never held by any of the respondents. In our opinion, therefore, the Tribunal was not justified in applying the principle of stepping up and in directing the re-fixation of the pay of the respondents."

9. In *Union of India and others v. Sushil Kumar Paul and others*, AIR 1998 SC 1925, an order of the tribunal stepping up of pay was challenged before the Apex Court by the Union of India. The Apex Court took note of the fact that the tribunal had failed to take into consideration the circular dated 4th November, 1993 issued by the Government of India, Department of Personnel and Training, which clearly provides that the anomaly for granting benefit of stepping up of pay should be directly as a result of the application of Fundamental Rule 22-C and that if a junior officer draws a higher pay in the lower post either because of advance increments or on

any other account, then the provision of stepping up would not apply in such a case. Their Lordships also took note of the fact that in paragraph 2(c) of the circular, it is further provided that if a senior joins the higher post later than the junior, for whatsoever reason, whereby he draws less pay than the junior, in such a case senior cannot claim stepping up of pay at par with the junior. In the said case, the junior in the cadre of Welfare Inspector Grade-III, which was the promotional post, was holding the said post on ad-hoc basis to Grade-II on 1st February, 1981 and worked continuously on the higher post upto 1st January, 1984 on which date the other respondents were promoted. By the time the promotion took effect, he was getting higher pay than the respondents because of his earlier ad-hoc promotion. Their Lordships placing reliance on the decision in *O.P. Saxena* (supra) opined that the seniors were not entitled to the benefit of stepping up.

10. In *P.K.Srinivasmuthy* (supra) the factual matrix was that the respondent No.2 therein was junior to the respondent No.1 became entitled to a higher pay fixation on promotion as Head Clerk, than the respondent No.1 because of the higher scale of pay to which he became entitled in the post of UDC-in-charge by reason of the Memorandum dated 22nd March, 1978. The respondent No.1 therein

never held the post of UDC-in-charge. He had held the post of UDC cashier and hence, was not entitled to the benefit of the Memorandum dated 22nd March, 1978, as a result of which the lower post held by the respondent No.1 carried a different scale of pay than the lower post held by the respondent No.2. In that factual backdrop, their Lordships opined that since the scales of pay in the lower posts held by the two are not identical, the question of stepping up of pay for the purpose of removing any anomaly does not arise. Their Lordships referred to the decision in *D.G., ESI Corporation v. B. Raghava Shetty*, 1995 Supp (2) SCC 681 and opined thus -

“In the case of *D.G., ESI Corporation v. B. Raghava Shetty* which deals with a similar situation where the seniors had declined to be posted as UDCs-in-charge and had preferred to remain in the regional office in order to have the benefit of house rent allowance and city compensatory allowance, this Court said that Fundamental Rule 22-C cannot be brought to help for stepping up the pay of the seniors. In the present case, since Respondent 1 did not work as UDC-in-charge at any point of time before his promotion as Head Clerk, and had opted for the post of UDC Cashier, he is not entitled to have his pay stepped up on the basis of the pay fixed under FR 22-C in respect of Respondent 2 on his promotion as Head Clerk on the basis of the pay either earlier drawn by him as UDC-in-charge.”

11. In this context, it is seemly to refer to the conditions which are required to be satisfied for stepping up of pay of a senior to remove

the anomaly in the pay-scale and under what circumstances the senior will not be able to get the benefit. The said conditions are as follows: -

- (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. 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.

12. In the case at hand, Mr.Y.N.Mishra though was allowed to change the cadre yet he was not absorbed. He was given the benefit of one increment, which was a normal increment but not an advance increment in the sense that the respondent was not conferred the said benefit because of any extra educational qualification or anything special done by him. The earning of one more increment was absolutely under the fortuitous circumstance. The said earning of increment had created an anomalous situation in the pay drawn between the senior persons and a junior one. The decisions in *O.P. Saxena* (supra), *P.K.Srinivasmurthy* (supra) and *Sushil Kumar Paul*

(supra) stand on a different footing. The same is discernible as we have analysed the facts and the ratio laid down therein. The present factual matrix, as is manifest, frescoes a different factual scenario. Thus, the contention canvassed by learned counsel for the petitioners that the tribunal has fallen into error by applying the FAR 22-C is not correct as the case of the respondents came within the codification of the said Scheme and, therefore, there was an anomaly. As has been indicated hereinbefore, the codified scheme covers in its sweep an advance increment earned but Mr.Y.N. Mishra had not earned the advance increment. He had only received a normal increment without being absorbed in the cadre.

13. In this context, we may refer with profit to *Gurcharan Singh Grewal and another v. Punjab State Electricity Board and others*, (2009) 3 SCC 94 wherein the question that arose pertained to disparity in the incremental benefit which led to the anomaly of the pay-scale as a consequence of which a senior person was getting a lower salary in the promotional scale. Their Lordships taking note of the submission have opined thus –

“Something may be said with regard to Mr.Chhabra’s submissions about the difference in increment in the scales in which Appellant 1 and Shri Shori are placed, but the same is still contrary to the settled principle of law that a senior cannot be paid a lesser salary than his junior. In such circumstances, even if there was a

difference in the incremental benefits in the scale given to Appellant 1 and the scale given to Shri Shori, such anomaly should not have been allowed to continue and ought to have been rectified so that the pay of Appellant 1 was also stepped up to that of Shri Shori, as appears to have been done in the case of Appellant 2.”

14. We have referred to the aforesaid decision only to highlight that disparity in the incremental benefit cannot be a ground for denial of stepping up of pay but when an advance increment is earned, there would be disparity in view of the codified scheme. But as has been indicated hereinbefore, said Mr.Y.N. Mishra did not earn any advance increment but it was an increment in the normal course. That apart, he was not absorbed in the cadre. Thus, in our considered opinion, the conferment of benefit was not within the scheme and, therefore, the tribunal is absolutely justified in directing the stepping up of pay as far as the seniors are concerned.

15. Ex-consequenti, we do not find any merit in this writ petition and, accordingly, the same stands dismissed without any order as to costs.

CHIEF JUSTICE

MARCH 03, 2011
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SANJIV KHANNA, J