

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

Judgment reserved on: 09.09.2022
% **Judgment delivered on: 01.11.2022**

+ **W.P.(C) 8056/2015 and C.M. No. 25950/2022**

RAJIV SINHA & ORS Petitioners
Through: Mr. Apurb Lal & Ms. Kamalika Samadder, Advocates.

versus

MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES & PENSIONS & ORS Respondents
Through: Mr. Vivekanand Mishra, Senior Panel Counsel with Mr. Aayushmaan Vatsyayana, Advocate.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE YASHWANT VARMA

J U D G M E N T

SATISH CHANDRA SHARMA, C.J.

1. The present Writ Petition has been filed impugning the Order dated 12.12.2013 passed in O.A. No. 2019 of 2012 (hereafter referred as “Impugned Order”) by the Central Administrative Tribunal (hereafter referred as “CAT”) in terms of which the CAT upheld the grant of higher pay on non-functional basis as set out in the Office Memorandum dated 24.04.2009 (hereafter referred as “OM dated 24.04.2009”) issued by Respondent No. 1, i.e., the Ministry of Personnel, Public Grievances and Pensions. The quintessential premise of the Petitioners’ case is that the parity of pay in higher pay scale ought to have been granted in terms of the

recommendations of the 6th Central Pay Commission (hereafter referred as “CPC”) and not as per the OM dated 24.04.2009. Accordingly, by means of the present Petition, the Petitioners have sought that the Impugned Order be set aside and as a consequence the grant of pay parity be made in accordance with recommendations of the 6th CPC.

2. The factual matrix, relevant to the adjudication of the present petition, is set out hereinbelow: -

- (a) The Petitioners (officers of the Organized Group A Services) were selected by the UPSC and appointed to the Indian Broadcasting (Engineering) Services in different years. At the time of filing of the present Petition, they were employed with Doordarshan.
- (b) The associations of the Group 'A' services, made certain demands before the 6th CPC *inter-alia* pertaining to faster and better career progression.
- (c) In March 2008, the 6th CPC issued its Report. As per Para 3.3.12, the recommendations of the 6th CPC accommodated the demands made by the associations of the Group A services in the following terms: -

“whenever any IAS officer of a particular batch is posted in the Centre to a particular grade carrying a specific grade pay in Pay bands PB3 or PB4, grant of higher pay scale on Non Functional basis to the Officer belonging to Organized Group of A services that are senior by 2 years or more should be given by the Government. The higher Non-Functional Grade so given to the Officer of Organized Group of A services will be personal to them and will not depend on the Number of vacancies on the Grade. These officers will continue in their existing post and will get substantial posting in the higher

grade that they are holding on Non-Functional basis only after vacancy arises in that grade”.

- (d) On 29.08.2008, the Ministry of Finance notified the recommendations of the 6th CPC through the Gazette of India. Relevant excerpt of the Gazette Notification is reproduced hereinbelow: -

<i>Sl. No.</i>	<i>Recommendations of the Sixth Pay Commission</i>	<i>Decision of the Government</i>
<i>(i)</i>	<i>Central Services Group ‘A’ Grade Pay Rs. 5400 in PB [Rs. 15600-39100]</i>	<i>Accepted</i>

<i>Whenever any IAS officer of a particular batch is posted in the Centre to a particular grade carrying a specific grade pay in the Pay Bands PB-3 or PB-4 grant of higher pay scale on non-functional basis to the officers belonging to batches of Organized Group A services that are senior by two years or more should be given by the Government.</i>	<i>Accepted. This will also be applicable to the Indian Police Service and the Indian Forest Service in their respective State cadres for which the relevant cadre controlling authorities will issue the orders.</i>
--	---

- (e) On 24.04.2009, Respondent No. 1 issued the OM adopting the recommendations of the 6th CPC, however, prescribing certain conditions which *inter-alia* included an additional stipulation under Clause 3 of Annex I to the OM to the effect that all the prescribed eligibility criteria and promotional norms including 'benchmark' for up-gradation to particular grade pay would have to be met at the time of screening for grant of higher pay-scale under these orders.
- (f) On 21.05.2009, Respondent No. 1 issued the details of the batch of officers belonging to the Indian Administrative Services who have

been posted at the Centre in the various grades of PB-3 and PB-4 w.e.f. 1.1.2006 as well as the date of posting of the 1st Officer belonging to the batch.

- (g) On 25.09.2009, Respondent No. 1 issued O.M stating that for the purposes of non-functional upgradation, the term Batch referred to the year of joining the service.
- (h) On 11.12.2009, Respondent No. 1 issued another O.M in response to references received from Officers of the Organized Group A services stating that the term 'Batch' refers to the year of joining of service by the officer irrespective of seniority. On 10.06.2019 another O.M. was issued clarifying that "batch" for direct recruit officers in the induction grade shall be the year following the year in which the competitive exam was held.
- (i) In 2010, Petitioner No. 1 had filed an O.A. being O.A. No 3622 of 2010 before the CAT seeking grant of pay parity on the basis of the recommendation of the 6th CPC. On 01.11.2010, CAT disposed of the O.A. directing Respondent No. 1 to implement the recommendations of the 6th CPC in view of the OM dated 24.04.2009.
- (j) (h) On 10.06.2011, Respondent No. 2 granted higher pay scale on non-functional basis as per the terms and condition mentioned in the O.M dated 24.4.2009 to 212 persons including the Petitioners vide an Order.
- (k) Aggrieved by the eligibility conditions prescribed for the grant of higher pay on the basis of the OM dated 29.04.2009, the Petitioners approached the CAT seeking the following reliefs: -

“(i) set aside the eligibility condition imposed by the Respondent No. 1 in terms of clause 3 of Annexure – 1 of the OM dated 24.4.2009 in granting Non-Functional grade on the basis of pay parity as recommended by the 6th Central Pay Commission;

(ii) declare the eligibility conditions imposed by the respondent no. 1 in granting pay parity to the applicants (officers of Organized Group A Services) which is not in consonance with the recommendation of 6th Central Pay Commission as null and void;

(iii) order for grant of pay parity on non-functional basis in higher pay scale of PB-4 with Grade pay Rs.8700 to the applicants no. 1 w.e.f. 08.08.2007 instead of 01.04.2008, applicant no.2 w.e.f. 01.07.2009 instead of 01.04.20.11, applicant no.4 w.e.f. 01.07.2006 instead of 01.04.2008, applicant no.5 w.e.f.01.07.2010 instead of 01.04.2011 and applicant no.6 w.e.f. 01.07.2008 instead of 01.04.2011. Similarly, the applicant nos. 3 and 4 should be accorded the grade of SAG (PB-4 with Grade Pay Rs. 10,000) w.e.f. 21.02.2011 and 04.04.2012 respectively in terms of recommendations of the 6th CPC duly recommended by the Govt.of India.

(iv) pass such other or further order(s) as may deem fit and proper for the ends of justice.”

3. By way of the Impugned Order, CAT dismissed O.A. No. 2019 of 2012 filed by the Petitioners holding as follows: -

“14. Heard. We have given our anxious consideration to the facts of this case. As even the applicants have accepted, the recommendations of the 6th CPC are not mandatory in nature, and the Government can accept the recommendations of Pay Commission with any modifications or deviations, in view of the executive powers vested in it, and can issue instructions or policy decisions. The respondents have no doubt implemented the core of the recommendation of the 6th CPC while issuing the impugned Circular dated 24.04.2009. The Applicants had laid a challenge to this entire O.M. earlier, No.3622/2010 with O.A.

No.3623/2010, on which were passed on 01.11.2010. At that time the applicants had not separately challenged the Condition No.3 of Annexure-I of the said O.M. dated 24.04.2009, which they have now done by way of the prayer at Para-8(i) as reproduced above, from which the prayer at Para-8(ii) follows, and the prayer at Para-8 (iii) is the resultant the applicability of that Condition No.3.

15. No doubt the respondents have implemented the system of grant of Non-Functional Upgradation based on empanelment and posting of particular batches of IAS officers at the centre, and have also provided with such upgradation in respect of all other Group 'A' services, without linking them to vacancies in their respective grades. While such upgradations are Non-Functional upgradations, personal to the officers concerned, and do not bestow any right upon the officers to subsequently claim promotion and deputation benefits, but it appears to us that the respondents were fully within their rights to prescribe that the eligibility criteria, and promotional norms, including "'Benchmark' for upgradation to particular grade of pay, would have to be met by the individual officers concerned, at the time of screening for grant of higher pay scale under such a Scheme. The Appellants cannot be allowed to claim the benefit of grant of Non-Functional upgradation, and the difference of grade pay to their basic pay, without their meeting the eligibility criteria, and promotional norms, including the 'Benchmark' prescribed for their substantive promotion.

16. As is clear from the structure of the Scheme notified, such a grant of Non-Functional Upgradation is only by way of advance grant of the financial benefit, which would have otherwise accrued later to the officer concerned, when he is considered for regular promotion, as per the DPC guidelines, based on the provisions of the Recruitment Rules. This grant of Non-Financial Upgradation cannot, therefore, be considered to be in a vacuum, and cannot be granted without fulfilling any eligibility criteria whatsoever, and other conditions like Vigilance clearance etc. The two years' lagged parity with I.A.S. Batches has been recommended by the 6th CPC, and adopted by the Govt. of India, only to eliminate the possibility

of a very great difference and distinction in between the pay scales of IAS officers posted with the Central Government on deputation from their respective State cadres, and Central Government's own organized Group 'A' Service Officers, who have to be considered for grant of higher Pay Band/Grade Pay with such lagged parity.

17. The respondent-Union of India is fully within its rights to consider such eligibility of service and other conditions, and Vigilance clearance etc., before granting such higher pay. The other aspects of the 6th CPC recommendations that such Non-Functional upgradation should not have any linkage with the availability of vacancies in the respective cadres of an organized Group services, has been fully incorporated, and has been already upheld by this Bench, in its order dated 01.11.2010 also (supra). Therefore, we do not find that the applicants cannot now have a case only against the Condition No.3 of Annexure-I to the impugned OM dated 24.04.2009 being prescribed as a matter of policy, which is fully in the domain of the Executive, and cannot be set aside by this Tribunal in the process of judicial review, unless it is mala fide, or abhorrent in the eyes of law, and is violative of the fundamental rights, and other constitutional safeguards available to civil services.

18. Also, there is merit in the contention of the respondents that when once in the previous OA Nos.3622/2010 with 3623/2010, in which orders were passed on 01.11.2010, the same applicants had assailed the entire OM dated 24.04.2009, and had failed in their attempt, the principles of res-judicata would fully apply in their picking out a particular paragraph of the Annexure to that OM, and assailing it separately once again through this OA, as if this was not the subject matter of consideration by this Tribunal in their previous OAs No.3622/2010 mid 3623/2010.

19. It is trite law that the employer can prescribe eligibility criteria for grant of financial and other benefits to its employees, and, on that touchstone also, the Condition No.3 of the Annexure-I to the said OM dated 24.04.2009 passes muster,

and does not call for any interference from this Tribunal. In any case, when a concurrent Bench has upheld the full OM dated 24.04.2009 while passing the order dated 01.11.2012 in OA Nos. 3622/2010 and 3623/2010, we are bound by those orders of a concurrent Bench.

20. In the result, the present OA does not survive, and therefore, rejected. But there shall be no order as to costs.”

4. The main thrust of the Petitioner's argument is that the recommendation of the 6th CPC ought to have been taken and notified as is, and no additions ought to have been made in the OM dated 24.04.2009. Counsel for the Petitioner has argued that the rider added by virtue of Clause 3 of Annexure I to the OM dated 24.04.2009 has rendered the recommendations of the 6th CPC redundant and is therefore arbitrary and unreasonable. The Petitioners' grievance is that due to the conditions imposed by the Respondent No. 1, the Petitioners have been granted upgradation from a later date. The counsel for the Petitioner contended that if the regular promotional criteria is applied in case of Non-functional Grade to the Organised Group A Services, the officers who have not completed regular service in a particular Grade for a period as prescribed for a regular promotion will not get higher pay scale on Non-functional basis to batches of Organised Group A services that are senior by 2 years. Essentially, if an Officer has not been given regular promotion to a particular grade, he will not be given Non-Functional Grade with pay parity of an IAS Officer who is 2 years his junior.

5. *Per contra*, it is the submission of the Respondents that they have accepted the core of the recommendation of the 6th CPC which are not mandatory in nature and the Govt. can accept the recommendation of Pay

Commission with any modification or deviation, in view of the executive powers vested in it and can issue instructions or policy decisions. It was further argued that the Condition No. 3 of Annexure-I to the OM dated 24.04.2009 being prescribed as a matter of policy which is fully in the domain of the Executive cannot be set aside by the Tribunal in the process of judicial review, unless it is mala-fide or abhorrent in the eyes of law and violative of fundamental rights, and other constitutional safeguards available to Civil Servants. It has also been submitted that the two years lagged parity should not be construed as absence of any criteria or conditions for grant of NFU scheme with those IAS who have been posted in a particular grade after fulfilling eligibility criteria / conditions. For example, for posting as DS level at Centre, an officer including IAS officers have to complete 9 years of Group-'A' Service (this is the promotion norms for the IAS officer to hold post at DS level/JAG). The recommendation of 6th CPC, to have modified parity between IAS and other Central Group-'A' Services have not recommended that the promotion norms should not be applied while the officers are considered for grant of the higher Pay Band / Grade Pay under NFU Scheme. The 6th CPC has observed that such up-gradation should not have the linkage with availability of vacancies. This observation has been incorporated in the NFU Scheme.

6. At the outset, upon perusal of the Order of the CAT dated 01.11.2010 which in terms of the Impugned Judgment hit the proceedings with *res-judicata*, it may be noted that O.A. No. 3622 of 2010 dealt with the issue of the inaction on part of the Respondents in granting pay parity. In fact, the Order dated 01.11.2010 was disposed of directing Respondent No. 1 to

implement the recommendations of the 6th CPC in view of the OM dated 24.04.2009. There was no question as to the legality of the OM dated 24.04.2009 as is the case in the present proceedings and the Impugned Judgment.

7. It is well settled proposition of law that the policy framed by the government within the domain of its executive powers cannot be interfered with unless it is contrary to the provisions of the Constitution or statutory provision or is manifestly arbitrary. It is evident from the record of the matter that even the Petitioners have accepted that the recommendations of the 6th CPC are not mandatory in nature, and the Government can accept the recommendations of Pay Commission with any modifications or deviations, in view of the executive powers vested in it, and can issue instructions or policy decisions. On a perusal of the Gazette Notification dated 29.08.2008 issued by the Ministry of Finance and the subsequent OM dated 24.04.2009, it cannot be inferred that Respondent No. 1 deviated from the directions of the Ministry of Finance. The crux of the recommendations of the 6th CPC along with the MOF's directions have been implemented which is that whenever an IAS officer two years junior to an Organized Group A officer is posted in Centre to a particular grade carrying grade pay in PB-3/4, the government ought to pay the Group A officer in higher pay scale on a non-functional basis. The conditions imposed for eligibility in terms of OM dated 24.04.2009, which are uniformly applicable to all employees, are in addition to the key recommendations of the 6th CPC and MOF's direction. Therefore, there is no reason to warrant the Court's interference with the said policy.

8. There is nothing in law that precludes Respondent No. 1 from qualifying the grant of upgradation with eligibility criteria as applicable to promotions. As rightly pointed out by the CAT, the two years' lagged parity with I.A.S. Batches has been recommended by the 6th CPC, and adopted by the Govt. of India, only to eliminate the possibility of a very great difference and distinction in between the pay scales of IAS officers posted with the Central Government on deputation from their respective State cadres, and Central Government's own organized Group 'A' Service Officers, who have to be considered for grant of higher Pay Band/Grade Pay with such lagged parity.

9. It is trite law that an employee cannot be granted financial upgradation without fulfilling the requisite qualification prescribed by the executive policy. In ***Bhakra Beas Management Board vs. Krishan Kumar Vij & Anr.***, (2010) 8 SCC 701, the Hon'ble Supreme Court considered the following issue: -

“2. Precisely, we are required to consider whether in light of the order/circular issued by the Appellant Bhakra Beas Management Board (hereinafter shall be called as “Board”), Respondent 1 employee would be entitled to benefit of higher scale of pay/upgradation/stepping up of salary sans prerequisite qualification for the grant of the same.”

10. In the facts and circumstances of the said case, the Hon'ble Supreme Court proceeded to hold the following: -

“22. We have already mentioned hereinabove with regard to Clause 2 of the 1990 Order read with Regulation 9 which restricts the benefit only to directly recruited Assistant Engineers/Assistant Executive Engineers, meaning thereby that one must possess the requisite qualification as prescribed under

the Regulations, then only the benefit would accrue to the employee, not otherwise. The Note appended thereto clearly stipulates that even those employees who were promoted under Regulation 7(a)(ii) read with Regulation 10(4) shall be deemed to have been appointed by direct recruitment. This legal fiction is limited. It is applicable only to those employees who have been promoted in conformity with the provisions contained in Clause 4. Thus, the employees who had passed both Parts (A) and (B) of the AMIE examination and were promoted against 9% posts reserved for that class were fictionally treated as direct recruits. Thus, it clearly stipulates that only those Assistant Engineers who were either directly recruited or had acquired the requisite qualifications prescribed for direct recruitment were chosen to be granted higher scale if they had been promoted against the post falling within the quota of 9% of the cadre strength of the said post.

23. The 1990 Order contemplates that it is to be followed as per regulation which provides that only such persons as have been promoted under Regulation 7(a)(ii) read with Regulation 10(4) shall be treated as direct recruits. In other words, it does not apply to the promotees irrespective of their academic qualifications nor can they be treated on a par with the direct recruits. There was a purpose for treating them so, otherwise, it would have the effect of violating the constitutional mandate contained in Articles 14 and 16 of the Constitution of India, on the premise that unequals have been treated as equals. It is with that intention, to avoid criticism and future litigation that such persons who possessed qualifications for direct recruitment and could be promoted against the posts falling vacant, would become entitled to claim the benefit. Since Respondent 1 did not fall in this category, obviously, he was not entitled to the higher scale.

24. Thus, there appears to be no illegality committed by the Board in rejecting Respondent 1's representation. So, in our considered opinion, the High Court has clearly erred in setting aside and quashing the same.

25. *The critical examination of the impugned judgment passed by the Division Bench of the High Court completely defeats primary purpose of the 1990 Order and provisions applicable to the employees of the Board. No doubt, it is true that the 1990 Order was issued only with an intention to remove the stagnation but this would not give blanket or absolute right to any employee to be entitled to higher pay scale even if he does not fulfil prerequisite qualifications for holding the higher post. In other words, if he possesses the required qualifications but is unable to get the higher post on account of non-availability of such post, then only he can be categorised as suffering from stagnation as per Order of 23-4-1990.* 26. *Obviously, an employee who does not fulfil the qualification as per Regulation 10(4) for the higher post would be ineligible for promotion and/or higher pay scale. In that eventuality, such an employee cannot complain of stagnation. Moreover, even while adopting the 1990 Order, it was made clear by the Board vide its Order dated 26-6-1992 that the time-bound promotional/devised promotional scales after 9/16 years' service are admissible only in respect of the posts in which the initial induction is through direct recruitment.*

x x x x x x x

31. *If the interpretation of the High Court to the 1990 Order is to be implemented, then it would lead to unsustainable consequences. It would then mean that every Assistant Engineer irrespective of his conduct, qualifications, performance or behaviour would become entitled to the higher scale on completion of particular length of service. If that be so, then even those employees with poor service record and doubtful integrity would also become entitled to claim higher scale merely because they had completed a particular length of service. If such an interpretation is to be given to the 1990 Order, then it would not only be improper but would also be against public policy and interest of the Board. It is too well settled that a statute or any enacting provision must be so construed as to make it effective and operative. Any such construction which reduces the statute to a futility has to be avoided.*

x x x x x x x

39. *At the cost of repetition, we may reiterate that the effect of the 1990 Order read with the Regulations would be that only those employees who fulfilled the prerequisite qualification for further promotion along with certain length of service as required would only be entitled to the benefit as per the 1990 Order. The other Assistant Engineers, even though they had completed the requisite length of service would not be entitled to claim the benefit, unless they had fulfilled the basic qualifications and minimum experience as required.*”

11. Thereafter, in ***Punjab State Power Corporation Limited and Anr. vs. Bal Krishan***, (2022) 1 SCC 322, the Hon’ble Supreme Court reiterated its stance in ***Bhakra Beas*** (Supra). The operative Paragraphs of the Judgment read as under:

“19. *This Court in Bhakra Beas Management Board case [Bhakra Beas Management Board v. Krishan Kumar Vij, (2010) 8 SCC 701 : (2010) 2 SCC (L&S) 694], after considering the aims and objects of the office order dated 23-4-1990 issued by the PSEB, and also the entire scheme of time bound benefit of promotional/devised promotional scale as envisaged in the said office order, observed as under : (Bhakra Beas Management Board case [Bhakra Beas Management Board v. Krishan Kumar Vij, (2010) 8 SCC 701 : (2010) 2 SCC (L&S) 694] , SCC pp. 710-12, paras 25 & 31)*

“25. *The critical examination of the impugned judgment [Krishan Kumar Vij v. State of Punjab, CWP No. 19306 of 2003, order dated 6-12-2004 (P&H)] passed by the Division Bench of the High Court completely defeats primary purpose of the 1990 Order and provisions applicable to the employees of the Board. No doubt, it is true that the 1990 Order was issued only with an intention to remove the stagnation but this would not give blanket or absolute right to any employee to be entitled to higher pay scale even if he does not*

fulfil prerequisite qualifications for holding the higher post. In other words, if he possesses the required qualifications but is unable to get the higher post on account of non-availability of such post, then only he can be categorised as suffering from stagnation as per Order of 23-4-1990.

31. If the interpretation of the High Court to the 1990 Order is to be implemented, then it would lead to unsustainable consequences. It would then mean that every Assistant Engineer irrespective of his conduct, qualifications, performance or behaviour would become entitled to the higher scale on completion of particular length of service. If that be so, then even those employees with poor service record and doubtful integrity would also become entitled to claim higher scale merely because they had completed a particular length of service. If such an interpretation is to be given to the 1990 Order, then it would not only be improper but would also be against public policy and interest of the Board. It is too well settled that a statute or any enacting provision must be so construed as to make it effective and operative. Any such construction which reduces the statute to a futility has to be avoided.”

20. In view of the above, it was made clear by this Court in Bhakra Beas Management Board case [Bhakra Beas Management Board v. Krishan Kumar Vij, (2010) 8 SCC 701 : (2010) 2 SCC (L&S) 694] that an employee could be said to be suffering from stagnation as per the office order dated 23-4-1990 only if he possessed the requisite qualification for the next higher post and was unable to get the higher post on account of non-availability of such post.”

12. The executive instructions (Office Memorandum dated 24.04.2009) issued by Respondent No. 1 makes it very clear that an employee shall be

entitled for financial upgradation subject to fulfillment of all prescribed eligibility criteria and promotional norms including bench-mark upgradation to a particular Grade Pay, and it also provides for screening. In terms of the OM dated 24.04.2009, the Petitioners cannot be granted upgradation in the manner desired by them. Since the manner in which the Petitioners have been granted upgradation on a non-functional basis is correct, no basis for interference with the Impugned Order is made out. The petition is, accordingly, dismissed.

(SATISH CHANDRA SHARMA)
CHIEF JUSTICE

(YASHWANT VARMA)
JUDGE

NOVEMBER 01, 2022

नित्यमेव जयते