

IN THE HIGH COURT OF TRIPURA
AGARTALA

W.P(C) No.71 of 2010

Shri Pantha Das,
son of Shri Chunilal Das,
a resident of Dhaleswar, P.S. East
Agartala, District – West Tripura.

..... **Petitioner**

- V e r s u s -

- 1. The State of Tripura,**
through the Secretary to the
Government of Tripura,
Department of Higher Education,
Agartala.
- 2. The Director of Higher Education,**
Government of Tripura, Agartala.
- 3. The Principal,**
Tripura Institute of Technology,
Government of Tripura,
Narsingarh, West Tripura.

.....**Respondents**

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the petitioner : Mr. S.M. Chakraborty, Sr. Advocate
Ms. P. Sen, Advocate.

For the respondents : Mr. S. Chakraborty, Addl. G.A.

Date of hearing : 20.01.2015

Date of delivery of Judgment & Order : **26.02.2015**

Whether fit for reporting:

YES	NO
√	

JUDGMENT & ORDER

By means of this writ petition, the petitioner has challenged the action of the respondents depriving him the benefits of Career Advancement Scheme, the CAS in short, on completion of 4(four) years of service in terms of the notification No.F.6(1)-FIN(PC)/98 dated 24.03.2000, Annexure-7/A to the writ petition and the consequential orders dated 28.03.2007, Annexure-8 to the writ petition, dated 07.04.2008, Annexure-9/2 to the writ petition, dated 07.08.2009, Annexure-11 to the writ petition, the decision communicated under No.F.10(391)-LA/DHE/09 dated 10.12.2009, Annexure-13 to the writ petition, as well as the further communication of even No. dated 13.01.2010, Annexure-15 to the writ petition.

[2] The facts are mostly admitted. The petitioner was appointed initially in the post of the Junior Engineer under the Rural Development Department, Government of Tripura by the order dated 27.08.1998 on fixed pay basis after he graduated in Bachelor in Mechanical Engineering. He was brought in the regular scale of pay of Rs.6500-12300/- w.e.f. 01.05.2002 by the order dated 14.11.2002. The petitioner's scale of pay was upgraded to Rs.7450-13000/- w.e.f. 01.05.2002 in terms of the Tripura State Civil Services (Revised Pay) (Amendment) Rules, 2004 which was published on 17.11.2004. When the petitioner was serving in the post of Junior Engineer he applied for the post of Fore-man Instructor in the Tripura Engineering College, now Tripura

Institute of Technology in response to an employment notice published by the Tripura Public Service Commission. With due permission from the competent authority, he appeared in the selection process and was selected. On terms of the recommendation made by the Tripura Public Service Commission, he was appointed in the post of Fore-man Instructor in the scale of pay of Rs.7800-15100/- by the notification dated 17.09.2004, Annexure-5 to the writ petition.

[3] When Tripura Engineering College was converted into the National Institute of Technologyh (NIT) under the Ministry of Human Resource Development, Government of India, the petitioner opted to remain under the Government of Tripura. Thus, the petitioner was absorbed in the Tripura Institute of Technology by the notification dated 13.07.2007. The petitioner was given the pay protection as per provisions of FR 22 (I) (a) (2) as would be evident from the communication dated 28.03.2007, Annexure-8 to the writ petition. On fixing the pay in the post of the Fore-man Instructor, the petitioner by several representations and notices claimed that in terms of the notification dated 24.03.2000, Annexure-7 to the writ petition, he is entitled to fixation under provisions of FR 22 (I)(a)(1). For that purpose, the petitioner has referred the Clause (ii)b of the Tripura State Civil Services (Revised Pay) (5th Amendment) Rules, 1999, Annexure-7 to the writ petition, which provides that:

"The substituted provision of FR 22(I)(a)(1) shall be applicable in cases of promotion/appointment to another post(a) with higher/same pay scale, provided such posts carry duties and responsibilities of greater importance than those attached to the post held by him before promotion as per Recruitment Rules Date of Next Increment (DNI) along with the scope for exercising option shall be regulated as per provisions of FR 22(I)(a)(1)."

The petitioner has also referred to the Para-3 of the said 5th Amendment Rules published vide notification dated 24.03.2000, Annexure-7 to the writ petition, which reads as under:

"The post outside cadre services who were directly recruited in the unrevised pay scale of Rs.2100-3000(SL)-5000/- revised to Rs.7800-15100/- shall get the revised pay scale of Rs.10000-15100/- as CAS-1 after completion of 4(four) years of service in the respective post as applicable to the cadre service."

Based on the said provision, the petitioner advanced a further claim for upgrading his scale to Rs.10000-15100/- on completion of 4(four) years of service as the CAS-1, but the respondents denied that scale. Hence, this petition.

[4] Mr. S.M. Chakraborty, learned senior counsel appearing for the petitioner has submitted that by means of Tripura State Civil Services (Revised Pay) (5th Amendment) Rules, 1999 it has been categorically provided that the posts, outside the cadre services, which were filled up by direct recruitment on the unrevised pay scale of Rs.2100-3000/- (SL)-5000(revised to Rs.7800-15100) shall carry revised pay scale of Rs.10,000-

15000/- as the CAS after completion of 4(four) years of service in the respective post, as applicable in the cadre services. He has further submitted that since the petitioner has been appointed in the post which carries higher pay scale, duties and responsibilities of greater importance vis-à-vis the post held by him before his recruitment, his pay shall be regulated as per provision of FR 22 (I)(a)(1), not under FR 22(I)(a)(2) as provided to the petitioner.

[5] Mr. S.M. Chakraborty, learned senior counsel appearing for the petitioner has submitted that the decision of the respondents is tantamount to take away the vested right created by the said Tripura State Civil Services (Revised Pay) (5th Amendment) Rules, 1999. By the reply dated 10.12.2009, Annexure-13 to the writ petition, the petitioner has been informed as under:

5. In reply to the averment made in Para-5 and 6 of the Demand Notice, it is informed that the question of deprivation of your client for allowing CAS is not acceptable as the revision of pay of the State Government employees has notionally come into force with effect from 01.01.2006, wherein, Sri Das, Fore-man Instructor now re-deployed at Tripura Institute of Technology, had opted to come under purview of revised ROP Rules, 2009 and hence his benefit of ACP in place of CAS required to be considered according to the provision of ROP Rules, 2009.

6. In reply to the averment made in Para-7 of the Demand Notice, it is informed that the representation of your client for getting CAS benefit on completion of 4(four) years of services as Fore-man Instructor dated 15.01.2009 has been examined by the Department in due course and reply has also been communicated to the Principal (I/C), Tripura Institute of Technology vide letter No.12(204)-DHE/CONF/09 dated 07.08.2009 stating that your client is not eligible for

providing ACP-1 according to the provision of ROP Rules, 2009. Aforesaid decision has been taken by the Directorate of Higher Education on the basis of his option to come under purview of ROP Rules, 2009 and enjoying the benefits of pay revision according to the said pay Rules.

[6] The said decision has not been reviewed by the respondents on the face of the further notice dated 22.12.2009, Annexure-14 to the writ petition. By the reply dated 13.01.2010, Annexure-15 to the writ petition, it has been categorically communicated to the petitioner that there is no scope for providing further benefit as sought by the said notice dated 22.12.2009. In support of his contention, Mr. Chakraborty, learned senior counsel has relied on a decision of the Gauhati High Court in **Kirba Lomi & Anr. vs. State of Arunachal Pradesh**, reported in **2012 (5) GLT 524** that the vested right has been crystallised in favour of the petitioner and hence, that right cannot be taken away by the subsequent amendment in the rule. The proposition of law as projected is well settled but the question which falls for consideration whether the petitioner had got any vested right in getting up-gradation of the scale under CAS-1 as contended by Mr. Chakraborty, learned senior counsel. In **Union of India and others vs. Tushar Ranjan Mohanty**, reported in **(1994) 5 SCC 450**, the apex court has held as under:

12. In *T.R. Kapur and Ors. vs. State of Haryana : 1986 Supp SCC 584*, three petitioners *T.R. Kapur, Mahinder Singh and V.D. Grover*, who were diploma-holders, were working as Sub-Divisional Officers on regular basis under the unamended Rule 6(b) of the Punjab Service of Engineers, Class I, Public Works Department

(Irrigation Branch) Rules, 1964. They were eligible for promotion as Executive Engineers in Class I service despite the fact that they did not possess a degree in engineering. By the Notification dated 22-6-1984, Rule 6(b) was amended and it was provided that a degree in engineering was an essential qualification for promotion of Assistant Engineers (Irrigation Branch) to Class I service and thereby the petitioners were rendered ineligible for promotion to the post of Executive Engineer in Class I service. The Amendment was challenged in this Court by way of a petition under Article 32 of the Constitution of India. This Court came to the conclusion that the retrospective effect given to the amendment was violative of Articles 14 and 16 of the Constitution of India on the following reasoning:

It is well settled that the power to frame rules to regulate conditions of service under the proviso to Article 309 of the Constitution carries with it the power to amend or alter the rules with a retrospective effect: *B.S. Vadera v. Union of India* : (1968) 3 SCR 575, *Raj Kumar v. Union of India* : (1975) 4 SCC 13, *K. Nagaraj vs. State of A.P.* : (1985) 1 SCC 523 and *State of J & K vs. Triloki Nath Khosa* : (1974) 1 SCC 19. It is equally well-settled that any rule which affects the right of a person to be considered for promotion is a condition of service although mere chances of promotion may not be. It may further be stated that an authority competent to lay down qualifications for promotion, is also competent to change the qualifications. The rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively. This rule is however subject to a well recognised principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Article 309 which affects or impairs vested rights.

13. Finally this Court considered the effect of retrospective legislation on the vested rights of the affected persons in *P.D. Aggarwal and Ors. v. State of U.P.* : [1987] 3 SCC 622. Under the U.P. Service of Engineers (Buildings & Roads Branch) Class II Rules, 1936, the Assistant Engineers substantively appointed against

temporary vacancies became members of the service and were entitled to seniority on the basis of continuous length of service. The rules were amended in the years 1969 and 1971 wherein it was provided that the Assistant Engineers would only become members when they are selected and appointed against the quota meant for them and their seniority would be determined only from the date of order of appointment in substantive vacancies. These amendments were made with retrospective effect thereby taking away the vested rights of the Assistant Engineers appointed against temporary posts. The High Court held the retrospective amendment of the rules to be arbitrary and unconstitutional. This Court upheld the judgment of the High Court on the following reasoning:

It has been urged that Government has the power to amend rules retrospectively and such rules are quite valid. Several decisions have been cited of this Court at the bar. Undoubtedly, the Government has got the power under proviso to Article 309 of the Constitution to make rules and amend the rules giving retrospective effect. Nevertheless, such retrospective amendments cannot take away the vested rights and the amendments must be reasonable, not arbitrary or discriminatory violating Articles 14 and 16 of the Constitution.... As has been stated hereinbefore, the Assistant Engineers who have already become members of the Service on being appointed substantively against temporary posts have already acquired the benefit of 1936 Rules for having their seniority computed from the date of their becoming member of the service. 1969 and 1971 Amended Rules take away this right of these temporary Assistant Engineers by expressly providing that those Assistant Engineers who are selected and appointed in permanent vacancies against 50 per cent quota provided by Rule 6 of the Amended 1969 Rules will only be considered for the purpose computation of seniority from the date of their appointment against permanent vacancies. Therefore the temporary Assistant Engineers who are not only deprived of the right that accrued to them in the matter of determination of their seniority but they are driven to a very peculiar position inasmuch as they are to wait until they are selected and appointed against permanent vacancies

in the quota set up for this purpose by the Amended Rule 6.... These amendments are not only disadvantageous to the future recruits against temporary vacancies but they were made applicable retrospectively from 1-3-1962 even to existing officers recruited against temporary vacancies through Public Service Commission. As has been stated hereinbefore that the government has power to make retrospective amendments to the Rules but if the Rules purport to take away the vested rights and are arbitrary and not reasonable then such retrospective amendments are subject to judicial scrutiny if they have infringed Articles 14 and 16 of the Constitution.

[Emphasis added]

[7] From a very simple reading of **Union of India and others vs. Tushar Ranjan Mohanty** it would be apparent that the power to frame rules to regulate the conditions of service under the proviso to Article 309 of the Constitution carries with it the power to amend or alter the rules even with retrospective effect. Any rule which affects the right of a person for promotion, not mere chances of promotion, may not be sustained. The rule prescribing qualification and suitability for promotions even though conditions of service, those can be changed by way of amendment retrospectively. However, it is well recognised principle that the benefit acquired under the extant rules cannot be taken away by an amendment with retrospective effect, that is to say that there is no power to make such a rule under the proviso to Article 309 which affects or impairs the vested right. Therefore, unless the benefit is acquired under the extant rules,

nothing prevents any amendment to come into effect for taking away any benefit, which is engrafted in the rule, retrospectively.

[8] There is no dispute that by the ROP Rules, 2009 those who have not got the benefit even though they are entitled to get the benefit, their cases would be governed by sub Rule 4 of Rule 10 of the Tripura State Civil Services (Revised Pay) Rules, 2009 which provides that:

"Those Government employees who had completed 10 years of service before 01.01.2006 but had not got or consumed any benefit of promotion/scale upgradation under revised pay rules framed in the past by the State Government from time to time, they will now be provided the benefit of 1st ACP from the date of his coming over to the revised pay structure under the said sub Rule...."

Similar coverage has been made in regard to the CAS-2, now ACP-2. The said rule is not under challenge in this writ petition. Moreover, the petitioner was due to complete his 4(four) years of service in the grade of Fore-man Instructor on 16.09.2008. Prior to that date, Tripura State Civil Services (Revised Pay) Rules, 2009 has come into effect by repealing the effects of all previous rules including Tripura State Civil Services (Revised Pay) Rules, 1999. Thus, it is clear that even if the petitioner is covered by the said amendment rules, no vested right would have crystallized in his favour when the said Revised Pay Rules, 2009 had come into effect. For giving retrospective operation of the Revised Pay Rules, 2009 no vested right of the petitioner was been taken away in view of the law enunciated in

Union of India vs. Tushar Ranjan Mohanty. Now the petitioner shall be governed by the Rule 10(4) of the Revised Pay Rules, 2009.

[9] But a larger question that is still unanswered is that whether the petitioner would at all be entitled to benefits of the said Tripura State Civil Services (Revised Pay) (5th Amendment) Rules, 1999. It is unambiguously clear that the Para-3 of the said Amendment Rules published by the notification dated 24.03.2000 does not cover the post of the Fore-man Instructor as held by the petitioner. This provision deals with the posts which are outside the cadre service and are directly recruited in the unrevised pay scale of Rs.2100-3000/(SL)-5000(revised to 7800-10000/- and those would be upgraded to Rs.10000-15100/- as CAS-1 after completion of 4(four) years of service having regards to the comparable post in the cadre service. The petitioner has nowhere in the writ petition averred that the post of Fore-man Instructor are also available in the cadre service and thus, against the comparable post in the cadre service, he is also entitled to get the up-gradation in the scale as provided in the said amendment rules after 4(four) years of service. This Court cannot make any other interpretation inasmuch as it has been categorically provided that such up-gradation would be made 'in the respective post' as applicable to the cadre service, meaning thereby, the pay scale of Rs.10000-15100/- is for the said post outside the cadre, having a respective post in the cadre. If such post is not available in the

cadre obviously this provision will have no effect for a post even though it is borne in the scale of pay of Rs.7800-15100/- as revised.

[10] The other point as raised by the petitioner that since he has been appointed in a post of greater importance than his previous post, the Junior Engineer (Mechanical), his pay should be fixed in terms of the provision of FR 22(I)(a)(1). This claim is not sustainable inasmuch the petitioner has been directly recruited as the Fore-man Instructor under a different establishment of the Government on the recommendation of Tripura Public Service Commission as would be reflected from the notification dated 17.09.2004, Annexure-5 to the writ petition. The writ petitioner has nowhere asserted that the Tripura Public Service Commission has recommended that he should be given the benefit of fixation under FR 22(I) (a) (1). It is well known that the FR 22-C has been deleted and the provisions thereof have been to a greater extent, accommodated in FR 22(I)(a). The Government of India, Ministry of Finance by their Notification No.F.2(9)-E.III/61 dated 20.03.1961 and F.2(72)-E.III/62 dated 06.12.1962 has provided that '*FR 22-C, now FR 22 (I)(a)(1) will not apply to cases of Government servants appointed to higher posts through the Union Public Service Commission and in whose cases the Commission have not made a specific recommendation regarding the pay to be given.*'

It has been further clarified as available from the Swamy's Compilation of FR SR (Part-1) General Rules 23rd Edition 2015 in page-53 that the intention behind the provision is that, in a case where the Union Public Service Commission recommended a specific pay to be given to the Government servant, the person concerned should be eligible for that rate of pay. If, on the contrary, the Commission recommended that the pay should be fixed "under the normal rules", then the pay may be fixed under FR 22-C, now FR 22 (I)(a) (I) subject, of course, to the condition that the post is higher than the post previously held by the Government servant.

[11] Whether a post is higher or not cannot be measured unless those are in the same hierarchy. On the touchstone of the pay scale the higher position of the post cannot be universally determined. Thus, according to the considered opinion of this Court, the petitioner's pay in the post of Fore-man Instructor has been correctly fixed under FR 22(I)(a)(2). Hence, the writ petition does not merit any further consideration. Accordingly, the same is dismissed.

However, there shall be no order as to costs.

JUDGE