

In the High Court of Judicature at Madras

Dated: 09.10.2015

Coram:

The Hon'ble Mr. Justice S. MANIKUMAR
and

The Hon'ble Mr. Justice M. VENUGOPAL

W.P.No.32219 of 2015

and M.P.No.1 of 2015

1. The Union of India rep. by
The Chief Commissioner of Customs,
Customs House,
New No.60, Rajaji Salai,
Chennai-600 001.
2. The Deputy Commissioner of Customs (P & V),
Customs House,
New No.60, Rajaji Salai,
Chennai-600 001. ..Petitioners

Vs.

1. D. Chandran
2. The Registrar,
Central Administrative Tribunal
Madras Bench,
Additional City Civil Court Building,
High Court Campus,
Chennai-600 104. .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India for a writ of Certiorari, calling for the records relating to the Second Respondent/Tribunal comprised in O.A.No.374 of 2012 culminating in order dated 26.03.2015 and to quash the same.

For Petitioners : Mr. Rajnish Pathiyil, SCGSC

O R D E R

[Order of the Court was made by
M. VENUGOPAL, J.]

The Petitioners/Respondents have preferred the present Writ Petition as against the order dated 26.03.2015 in O.A.No.374 of 2012 (filed by the First Respondent/Petitioner) passed by the Second Respondent/Central Administrative Tribunal, Chennai.

while passing the impugned order on 26.03.2015 in O.A.No.374 of 2012 filed by the First Respondent/Petitioner at paragraphs 10 & 11 had observed the following:

"10.In the instant case, though the post of Tindal is the next avenue of promotion to the post of Sukhani and when the applicant was promoted from Seaman to Sukhani, he was given the scale of pay of Rs.4000-6000. Incidentally, the post of Tindal also carries the pay scale of Rs.4000-6000. In the said circumstances, while granting the second financial upgradation to the applicant on 01.10.2001, he should be given the next higher scale of Rs.6500-10500 even though the post of Sukhani and Tindal are not merged but in view of the fact that both posts carry the same scale of Rs.4000-6000.

11.For the aforesaid reasons, the stand of the respondents in granting the second financial upgradations in the scale of Rs.4000-6000 to the applicant in accordance with the existing hierarchy is not correct since the issue in this OA is covered by the order of a Bench of this Tribunal in OA.321 of 2007 and following the same, the applicant is also entitled to get the pay scale of Rs.6500-10500. Therefore, we direct the respondents to grant second financial upgradation under the ACP Scheme in the pay scale of Rs.6500-10500 to the applicant with effect from the date on which he is due for such upgradation with consequential attendant benefits as prayed for by the applicant in the OA. The said exercise shall be complied with within a period of three months from the date of receipt of a copy of this order."

and resultantly, allowed the O.A.No.374 of 2012 without costs.

3.The Learned counsel for the Petitioners/Respondents submits that the impugned order dated 26.03.2015 in O.A.No.374 of 2012 passed by the Second Respondent/Tribunal is erroneous, unsustainable and also, against the well established Principles of Law.

4.The Learned counsel for the Petitioners/Respondents urges before this Court that the Second Respondent/Tribunal ought to have considered that the Petitioners had granted Assured Career Progression (ACP) Scheme in favour of the First Respondent in terms of the O.M.No.35034/1/97-Estt.(D) dated 09.08.1999 which clearly stipulates that the Financial Up-gradation shall be given to the next higher grade in

accordance with the existing hierarchy.

5. Advancing his argument, the Learned counsel for the Petitioners contends that the Second Respondent/Tribunal should have considered that the Petitioners had sought clarification from the Ministry as both the post of 'Sukhani' and 'Tindal' got merged and ought to carry the same pay scale, pursuant to the implementation of the V Pay Commission.

6. The plea of the Petitioners is that the Second Respondent/Tribunal should have considered that the Ministry vide its clarification letter F.No.32011/48/2003 Ad. III dated 11.12.2003 had clarified the point that if feeder and promotion grades are placed in same scale as the hierarchy has not been restructured, then point of doubt No.52 of D.O.P & T's O.M. In F.No.35034/1/97-Estt.(D) (Vol.IV), dated 18.07.2001 would apply.

7. The Learned counsel for the Petitioners proceeds to take a stand that the Second Respondent/Tribunal had not considered the point of doubt No.52 of D.O.P & T's O.M. in F.No.35034/1/97-Estt.(D) (Vol.IV), dated 18.07.2001 which clearly enjoins that the Assured Career Progression (ACP) Scheme has to be granted as per the existing hierarchy and as per the Financial Up-gradation cannot be allowed in scale higher than the next promotional grade. Also, it was further clarified in cases as that of the First Respondent/Petitioner shall be fixed as per D.O.P&T, O.M. dated 10.02.2000 which says that the pay shall be fixed under the provisions of FR 22 (1) a (1) subject to the minimum benefit of Rs.100/-.

8. The grievance of the Petitioners is that the Second Respondent/Tribunal should have considered that the clarification letters and the Office Memorandums which were issued from time to time by the DoPT were followed by the Petitioners in strict o sense and accordingly, the pay of the First Respondent/Petitioner was determined in the same grade in FR 22(1) a (1) while granting Second Financial Up-gradation under the Assured Career Progression (ACP) Scheme.

9. The Learned counsel for the Petitioners submits that the First Respondent/Petitioner had retired from service w.e.f. 20.08.2005 and the order granting the Second Assured Career Progression (ACP) Scheme was challenged by the First Respondent only after a lengthy delay of 8 years without assigning any reasons in O.A.No.374 of 2012 before the Second Respondent/Tribunal.

10. The Learned counsel for the Petitioners contends that if the order of the Second Respondent/Tribunal dated 26.03.2015 is implemented, it would cause huge financial drain of the public money and many such ineligible persons like the First Respondent would also start to claim benefit.

11. At this stage, it is worthwhile for this Court to make
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a relevant mention that the First Respondent/Applicant in O.A.No.374 of 2012 on the file of the Second Respondent/Tribunal had averred that he was initially appointed as Seaman on 03.02.1971 and later, he was promoted as 'Sukani' on 29.01.1996. Further, originally, he was attached to Commissionerate of Tiruchirapalli, on health ground he was transferred to Commissionerate of Chennai w.e.f. 31.07.1998. Moreover, he was permitted to retire voluntarily from service with effect from 28.02.2005 due to health reasons.

12.The stand of the First Respondent/Applicant is that the 'Assured Career Progression (ACP) Scheme' came into force w.e.f. 09.08.1999 and according to the Scheme, two financial up-gradation shall be granted to an employee, if no regular promotions during the prescribed parties (12 & 24 years) were availed off by him. Apart from that, the scheme contemplates that if an employee had already got one promotion, he shall qualify for the Second Up-gradation only on completion of 24 years of regular services from the entry level.

13.According to the First Respondent/Applicant on 03.02.1995, he had completed 24 years of service. He secured one promotion on 29.01.1996 after completion of 25 years of service. In fact, he made a representation to the Second Petitioner/Second Respondent for granting the Second Financial Up-gradation and the Second Petitioner/Second Respondent by means of an order dated 20.01.2004, granted the Second Financial Up-gradation in the scale of 'Tindal' namely, Rs.4000-6000 w.e.f. 01.10.2001.

14.The prime stand taken on behalf of the First Respondent/Applicant before the Second Respondent/Tribunal in O.A.No.374 of 2012 was that prior to V Pay Commission recommendations, pay scale of 'Sukani' [a feeder cadre to Tindal] was Rs.1200-1800 and that of 'Tindal' was Rs.1320-2040. But, the pay scale of 'Sukani' and 'Tindal' in the V Pay Commission got merged in the scale of Rs.4000-6000. In this connection, it is to be pertinently pointed out that the First Respondent/Applicant even before 01.10.2001 was receiving the pay, in the pay scale of Rs.4000-6000 attached to 'Sukani'.

15.When that be the fact situation, the First Respondent/Applicant was shocked by the order in and by which, he was granted the Second Up-gradation in the same pay scale of Rs.4000-6000 attached to 'Tindal'.

16.It comes to be known that the First Respondent/Applicant in O.A.No.374 of 2012 before the Second Respondent/Tribunal had averred that during the year 2003, the Petitioners/Respondents had taken up a similar issue relating to one P.Devadoss with the Board. However, on rejection of

the request made by the said Devadoss, O.A.No.24/2005 was filed by him before the Second Respondent/Tribunal and the Tribunal pointed out that the Petitioners/Respondents had not taken any action to review their cadre structure as mentioned in the clarification namely, the feeder grade and promotional grade are in the same scale, the appropriate course of action is to review the cadre structure.

17.Added further, the Second Respondent/Tribunal directed the Petitioners/Respondents to take immediate action as per the clarification given by the Government and pass orders on the representation made by the First Respondent/Applicant.

18.Later, the said Devadoss filed O.A.321 of 2007 and the Petitioners/Respondents had admitted that in Tiruchirappalli and Cochin Commissionerate, the Second Financial Up-gradation were granted in the scale of Rs.6500-10500 but the said Financial Up-gradation was granted subject to any further clarification issued by the Ministry.

19.In the counter filed before the Tribunal, the Petitioners/Respondents had averred that the First Respondent/Petitioner joined the Department as Seaman on regular basis w.e.f. 01.10.1977 and completed 24 years of service as on 20.09.2001 and therefore, he was granted the Second Assured Career Progression (ACP) Scheme w.e.f. 01.10.2001. In fact, as per the ACP Scheme, the Financial Up-gradation shall be given to the next higher grade in accordance with the existing hierarchy. The next higher grade is 'Tindal' in the pay scale of Rs.4000-6000 and according to the First Respondent/Petitioner, he was fixed in that scale after implementation of recommendations of V Pay Commission. The post of 'Sukani' and 'Tindal' carry the same scale of pay, since there was no financial benefits out of the Second ACP Scheme awarded to the First Respondent/Applicant, the matter was taken up to the Ministry, for a similar case which clarify through Letter No.F.No.A32011/48/2003 Ad.III dated 11.12.2003 as where a feeder and promotion grade are placed in the same scale but the hierarchy has not been restructured then clarification to point of doubt No.52 of O.M. dated 18.07.2011 applies."

20.Insofar as one Devadoss was concerned, he was granted Second ACP in the scale of pay of Rs.6500-200-10500 based on the order dated 27.06.2008 passed in O.A.No.321 of 2007 passed by the Second Respondent/Tribunal since so far no general orders were issued by the DoPT. The case of other officers who were not covered by any Court cases were not considered. Further, the claim of the First Respondent/Applicant is untenable either in Law or on Facts. A Financial Up-gradation cannot be considered as criteria in determining a scale higher than the next promotional grade. But the pay in such cases shall be fixed in terms of ingredients of FR22 (1) a (1) subject to minimum benefit of R.100/-. The claim of the First

Respondent/Applicant is liable to be rejected.

21. Pursuant to the direction issued by the Tribunal in O.A.No.24 of 2005, denying the same benefit to him is highly arbitrary, discriminatory and violative under Art. 14 & 16 of the Constitution of India. For a fuller and better appreciation, this Court cites the relevant portion of the Order in O.A.No.24 of 2005, the subject matter in issue namely, where the First Respondent/Applicant is entitled to be awarded Second Financial up-gradation in the pay scale of Rs.6500-10500/- and the Second respondent/Tribunal in O.A.24 of 2005 had inter-alia passed the following order:

"... In this connection, the clarification issued by the Government of India while implementing the ACP Scheme is relevant to decide the present case. The clarification for doubt No.52 (Compilation of Orders regulating ACPS by S.K.Dey Roy published in the Law) reads as follows:

Doubt 52-Following the recommendations of the Pay commission feeder and promotional posts have been placed in the same scale. Consequently, hierarchy of a post comprises of Grades "A", "A", and "C" i.e., the entry level and the first promotional grade are in the same scale. What shall be his entitlements under the ACPS?

Clarification-Normally, it is incorrect to have a feeder grade and a promotional grade in the same scale of pay. In such cases, appropriate course of action is to review the cadre structure. If as a restructuring feeder and promotional posts are merged to constitute one single level in the hierarchy, then in such a case, next financial upgradation will be in the next hierarchical grade above the merged levels and if any promotion has been allowed in the post in grades which stand merged, it will have to be ignored as already clarified in reply to point out of Doubt No.1 of OM dated 10.02.2000. However, if for certain reasons, it is inescapable to retain both feeder and promotional grades as two distinct levels in the hierarchy though in the same scale of pay thereby making a provision for allowing promotion to a higher post in the same grade, it is inevitable that benefit of financial upgradation under ACPS has also to be allowed in the same scale. This is for the reasons that under the ACPS, financial

upgradation has to be allowed as per the 'existing hierarchy'. Financial upgradation cannot be allowed in a scale higher than the next promotional grade. However, as specified in Condition No.9 of the ACP Scheme (vide DOP & T, OM dated 10.02.2000), pay in such cases shall be fixed under the provisions of FR 22 (1)(a)(1) subject to a minimum benefit of Rs.100."

A reading of the above clarification issued by the Government of India regarding grant of ACP makes it clear that feeder grade and promotional grade should not be in the same scale and if posts are merged due to restructure then in such cases the next financial upgradation will be for next hierarchical grade. This is a normal rule to be followed in case of second upgradation given where the feeder post and the promotion post carries the same scale of pay. In this connection, it may be mentioned that only under extraordinary circumstances a departure can be made. The facts and circumstances put forward before us in the present OA does not indicate any such unavoidable circumstances not to follow the normal rule. An exception thought of for extraordinary circumstances cannot be invoked in the cases of normal grant of second ACP. Moreover, it is submitted by the respondents that the scale of pay of Rs.6500-10500 has been granted to the neighbouring Commissionerate of Trichy and Cochin for similarly placed persons. Therefore, we see no reason as to why the applicant should be discriminated in granting the second ACP.

6. In view of the position narrated above, we are of the considered opinion that the action of the respondents in denying the grant of second upgradation in the scale of pay of Rs.6500-10500 to the applicant cannot stand before the eye of law and hence, we quash the impugned order dated 12.02.2007 and direct the respondents to grant second financial upgradation under the ACP Scheme in the pay scale of Rs.6500-10500 with all consequential benefits within a period of 2 months from the date of receipt of a copy of this order. No costs."

22. In the light of the aforesaid order, it is to be noted that a feeder grade and promotional grade ought not to be the

same scale of pay, if posts are merged due to restructure. In that event, in respect of such case, the next financial up-gradation will be for next hierarchal grade and this aspect was taken into account by the Second Respondent/Tribunal.

23.As far as the present case is concerned, it cannot be brushed aside that the post of 'Tindal' also carries the time scale of pay of Rs.4000-6000/-. As such, while awarding the Second Financial up-gradation to the First Respondent/Applicant on 01.10.2001, he should be given the next higher scale of Rs.6500-10500/- even though the post of 'Sukani' and 'Tindal' were not merged.

24.Looking at from that angle, the plea taken on behalf of the Petitioners/Respondents in awarding the Second Financial up-gradation in the scale of Rs.4000-6000/- to the First Respondent/Applicant in terms of existing hierarchy is legally untenable one in the eye of Law because of the latent and patent reason that the issue involved in O.A.No.374 of 2012 is squarely covered by the order of the Second Respondent/Tribunal in O.A.No.321 of 2007. Therefore, we unhesitatingly hold that the First Respondent/Applicant is legally entitled to receive the time scale of Rs.6500-10500/-. At this juncture, on going through the order dated 26.03.2015 in O.A.No.374 of 2012 passed by the Second Respondent/Tribunal directing the Petitioners/Respondents to award Second Financial Up-gradation under ACP Scheme in the time scale of Rs.6500-10500/- to the First Respondent/Applicant from the date on which he was due to receive the same for such up-gradation with consequential attendant benefits, within a period of three months from the date of receipt of copy of the order does not suffer from any vice or legal infirmities or material irregularities in the eye of Law. Consequently, the Writ Petition is devoid of merits.

25.In the result, the Writ Petition is dismissed without costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

True Copy

Sub Assistant Registrar

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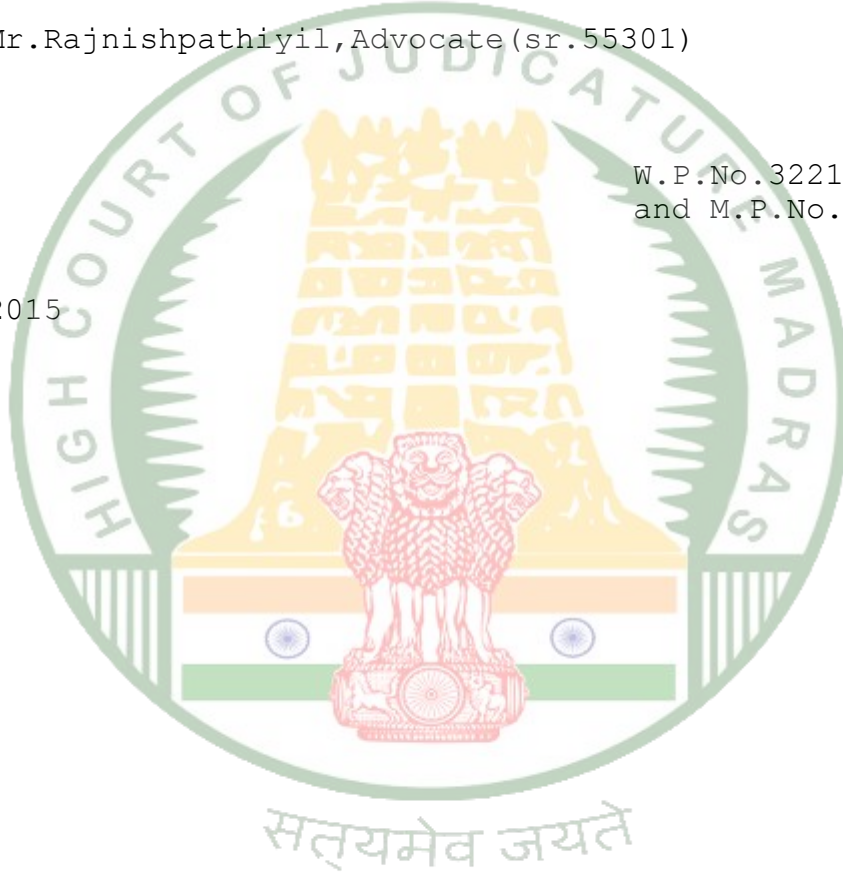
To

1. The Registrar,
Central Administrative Tribunal
Madras Bench,
Additional City Civil Court Building,
High Court Campus,
Chennai-600 104.

+1 cc to Mr.Rajnishpathiyil, Advocate (sr.55301)

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