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

%   *Date of Decision : March 13, 2015*

\+   **W.P.(C) 1339/2013**

ROSHAN LAL   .....Petitioner
Represented by: Mr.Siddhanth Mittal, Advocate with Mr.Sanjeev Sharma, Advocate

versus

UOI & ORS.   ..... Respondents
Represented by: Mr.Anil Gautam, Advocate with Ms.Saahila Lamba, Advocate Mr.S.S.Sejwal, Law Officer

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. Relevant facts necessary to be noted for adjudication of present petition are as follows:-

a) On January 02, 1971 the petitioner was enrolled in the rank of Constable in Constable (GD) in CRPF.

b) On July 30, 1981 the petitioner was re-mustered in the rank of Naik (Radio Operator).

c) The petitioner was required to qualify ROG-II course for being promoted to the next rank of HC (Radio Operator).

d) The petitioner was given three chances to qualify ROG-II course. In the first two chances, the petitioner failed to qualify ROG-II course. In the third chance, the petitioner qualified ROG-II course on March 25, 2006.

e) On successful completion of ROG-II course by him, the petitioner was granted first and second financial upgradation under ACP scheme with effect from March 25, 2006 i.e. the date of successful completion of ROG-II course by petitioner.

f) On February 28, 2009 the petitioner superannuated from service in the rank of HC (Radio Operator).

2. The claim(s) raised by the petitioner in the present petition is two-fold:-

I The petitioner ought to have been granted first and second financial upgradation under ACP Scheme not on March 25, 2006 (as granted by the department) but in the years 1993 and 2005 respectively when he rendered twelve and twenty-four years service, for the reason the ACP scheme envisages first financial upgradation after rendering twelve years service provided promotion is not granted in the meanwhile and the second financial upgradation after rendering twenty four years service. The petitioner was promoted in the rank of Naik (Radio Operator) in the year 1981 and thereafter did not get any promotion in the next twenty four years.

II. The department did not correctly determine the last drawn pay of the petitioner. It was highlighted that the last drawn pay ought to have been determined as ₹16,530/- per month but the department incorrectly determined the same as ₹14,730/- per month. According to the petitioner, the department ought to have taken the basic pay of petitioner as ₹5,500/- for fixation of revised pay of petitioner in terms of recommendations of VI Pay Commission, but the same was not done by the department which led to the error in determination of last drawn pay of the petitioner.

3. The ACP Scheme was notified under OM dated August 09, 1999 and was obviously designed to mitigate hardships in cases of either stagnation or a post being an isolation post. The idea was to grant two in situ upgradations, by paying the incumbent salary in the next above scale after 12 years and 24 years service rendered.

4. A condition stands inserted in Office Memorandum dated August 09, 1999, being condition No.6, which reads as under:-

> *"6. <u>Fulfillment of normal promotion norms (bench-mark, departmental examination, seniority-cum-fitness in the case of Group "D" employees, etc</u>.) for grant of financial upgradations, performance of such duties as are entrusted to the employees together with retention of old designations, financial upgradations as personal to be incumbent for the stated purposes and restriction of the ACP Scheme for financial and certain other benefits (House Building Advance, allotment of Government accommodation, advances, etc) only without conferring any privileges related to higher status (e.g. invitation to ceremonial functions, deputation to higher posts, etc.) shall be ensured for grant of benefits under the ACP Scheme."* ***<u>(Emphasis supplied)</u>***

5. From a perusal of Condition No.6 of the ACP Scheme, it is apparent that the financial upgradation has not to be allowed by a mechanical application of 12 years and 24 years norm. The candidates have to fulfill the eligibility of achieving either the benchmark or fitness as per the promotion norms, meaning thereby, a Screening Committee has

to be constituted to scrutinize individual cases with reference to their service record.

6. Whether or not the requirement of clearing a Departmental Qualifying Exam for vacancy based promotion would be applicable to the ACP Scheme, was a doubt raised by some Ministries or the Departments under some Ministries, and being referred to DOPT a clarificatory Office Memorandum was issued on February 10, 2000, clarifying as under:-

> *"As per the scheme (Condition No.6), all promotion norms have to be fulfilled for upgradation under the Scheme. As such, no upgradation shall be allowed if an employee fails to qualify departmental/skill test prescribed for the purpose of regular promotion." (**Emphasis Supplied)***

7. Thereafter, another clarificatory Office Memorandum was issued on February 24, 2004 on the subject of ACP Scheme, which reads as under:-

> *"Subject : ACP Scheme for Central Govt. Employees The question as to whether the requirement of passing departmental examination/skill tests prescribed in the relevant recruitment rules for vacancy-based promotion is to be insisted upon or not for granting upgradation under the ACP Scheme was referred to the DOP&T for clarification. It has since been clarified by the DOP&T that if in accordance with the applicable recruitment rules, one has to qualify in a departmental examination as a prerequisite for promotion to the next higher grade, the same will also have to be followed for grant of ACPs. Condition No.6 of ACPs read with the clarification issued under DOP&T"s orders dated 10.02.2000 (Sl.No.16) is also relevant.*
>
> *2. All affected cases may please be regulated accordingly." **(Emphasis Supplied)***

8. The issue which we are required to decide is: Whether the petitioner was entitled to first and second financial upgradation under

ACP Scheme with effect from the date when he completed 12 and 24 years service notwithstanding the fact that the petitioner did not clear the promotional course on the dates when he completed 12 and 24 years service but on a subsequent date.

9. It was urged by learned counsel for the writ petitioner that the clearance of the examination in question is a sine qua non for promotion as per the applicable Recruitment Rules and not for purposes of in situ promotion under the ACP Scheme.

10. The argument overlooks the fact that the ACP Scheme has a Condition No.6 which we have quoted above in paragraph 4 which mandates that fulfillment of normal promotional norms shall be ensured for grant of benefits under the ACP Scheme. What more clarity of language could be used by the Executive? We think none.

11. The vires of the policy has not been challenged before us. Even if it was, we do not find it to be an unreasonable condition that if a person stagnates due to paucity of promotional posts and he is to be granted an in situ promotion, the same should be subject to the person otherwise being found fit for promotion. The object of the ACP Scheme is to mitigate the hardship due to stagnation and not to confer a financial benefit to the lazy and the laggards or the inefficient, who do not qualify for promotion as per the applicable promotion norms. We see no ambiguity in Condition No.6 of the Policy and thus the clarifications issued on February 10, 2000 and February 24, 2004 to the applicability of Condition No.6, which we have noted in paragraph 4 above, is really surplus. But we need not quibble with said aspect for the reason it seeks to clarify what even otherwise is clearly stated in the original policy.

12. In this view of the matter, the action of the department of granting first and second financial upgradations to the petitioner with effect from the date he i.e. the petitioner qualified in promotional course (ROG-II course) is legal and valid.

13. On the aspect of last drawn pay of petitioner, the stand of the department in their counter affidavit is that the basic pay of petitioner which was required to be taken for fixation of revised pay of petitioner I terms of recommendations of VI CPC was ₹4,730/- and not ₹5,500/- as claimed by the petitioner. In fact, the department stated that the fixation of last drawn pay of petitioner as ₹14,730/- made by them i.e. the department was on higher side. The fixation of last drawn pay of petitioner has now been corrected by the audit department of CRPF and the correct last drawn pay of the petitioner is ₹14,550/- i.e. ₹180/- less than earlier (incorrect) fixation of pay of ₹14,730/-. As such, the department is entitled to recover excess payment made to the petitioner on account of incorrect fixation of his last drawn pay.

14. In rejoinder, the petitioner has failed to give any justification as to why the department ought to have taken the basic pay of petitioner as ₹5,500/- for fixation of revised pay of petitioner in terms of recommendations of VI Pay Commission as claimed by him. In fact, a perusal of rejoinder filed by the petitioner goes to show that the emphasis of petitioner in his rejoinder is not upon incorrect fixation of his pay by the department but upon the fact that it is not open to the department to recover any excess payment made to the petitioner pursuant to a correction made in the last drawn pay of the petitioner after the retirement of petitioner from service.

15. In view of the fact that no justification has been given by the petitioner to show as to how the fixation of his last drawn pay by the petitioner was incorrect, we find no reason to conclude that the claim made by the petitioner with respect to his last drawn pay is correct.

16. On the issue of recovery of excess payment made to the petitioner, suffice would it be to note the following dictum of law laid down by the Supreme Court in the decision reported as (2012) 7 SCR 307 _Chandi Prasad Uniyal & Ors vs. State of Uttarakhand & Ors_:-

> *"We are not convinced that this Court in various judgments referred to hereinbefore has laid down any proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or on the verge of retirement or were occupying lower posts in the administrative hierarchy.*
>
> *We are concerned with the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness, collusion, favouritism etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but*

not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.

We are, therefore, of the considered view that except few instances pointed out in Syed Abdul Qadir case (supra) and in Col. B.J. Akkara (retd.) case (supra), the excess payment made due to wrong/irregular pay fixation can always be recovered."

17. In view of above discussion, we find no merit in the present petition. The same is accordingly dismissed.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

MARCH 13, 2015
mamta