THE HIGH COURT OF SIKKIM: GANGTOK

(Civil Extra Ordinary Jurisdiction)

SINGLE BENCH: MR. JUSTICE BHASKAR RAJ PRADHAN, JUDGE

W. P. (C) No. 67 of 2017

1. Alok Kumar Singh,
GS-185067H, LDC,
Presently posted at HQ CE (P) SWASTIK,
C/o 99 APO
PIN - 931717.

2. Anil Singh,
GS-186002F, OPTR. COMMN.
Presently posted at SIGNAL SECTION,
HQ CE (P) SWASTIK,
C/o 99APO,
PIN - 931717.

3. Master Baitha, OPTR. COMMN.
GS-182276P,
Presently posted at SIGNAL SECTION,
HQ CE (P) SWASTIK,
C/o 99APO,
PIN - 931717.

4. Surjit Singh,
GS-185223F, DVR/MT,
Presently posted at SIGNAL SECTION,
HQ CE (P) SWASTIK,
C/o 99APO,
PIN - 931717.

5. Vinod D,
GS-182268W, OPTR. COMMN.,
Presently posted at SIGNAL SECTION,
HQ CE (P) SWASTIK,
C/o 99APO,
PIN - 931717. .... Petitioners

versus

1. The Union of India,
Principal Controller of Defence,
Account (Border Roads) Seema Sadak Bhawan,
Ring Road, Delhi Cant,
New Delhi.

2. Headquarter,
Director General Border Roads,
Seema Sadak Bhawan,
Ring Road, Delhi Cant,
New Delhi-110010.

3. The Pay Account Office,
GREF Centre, Dighi Camp-Pune-15,

4. Office of the Account Officer
Project Swastik,
C/o 99 APO
PIN - 931717.

5. Headquarter Project Swastik,
C/o 99 APO
PIN - 931717.

.... Respondents

Writ Petition under Article 226 of the Constitution of India.

Appearance:

For Petitioners	:	Mr. Zangpo Sherpa and Mr. Jushan Lepcha, Advocates.
For Respondent Nos. 1 to 5.	:	Mr. Karma Thinley, Central Government Counsel. Mr. Karma Thinley Gyatso, Advocate.
Date of hearing	:	28.02.2020
Date of Judgment	:	17.03.2020

J U D G M E N T
(17.03.2020)

Bhaskar Raj Pradhan, J

1. The present writ petition involves the interpretation of Fundamental Rule 22. Is only a promotee entitled to the benefit of one notional increment or even a government servant re-appointed to a post carrying duties and responsibilities of greater importance?

2. The petitioners who were appointed as Pioneers (PNRs) appeared for a departmental examination in which they were successful and appointed in the following manner under the respondents:

Sl. No.	**Particulars**	**Date of appointment as PNRs**	**Date of appointment in different capacities**
1.	Alok Kumar Singh, Petitioner No.1	03.07.2002	01.01.2009 as LDC
2.	Anil Singh, Petitioner no.2	02.11.2002	23.12.2009 as telephone operator
3.	Master Baitha, petitioner no.3	28.03.2001	04.08.2010 as radio operator
4.	Surjit Singh, petitioner no.4	19.07.2002	09.12.2008 as driver (mechanical transport)
5.	Vinod D. petitioner no.5	20.03.2001	24.06.2009 as radio operator

3. The petitioners are presently posted/stationed at Headquarter, Project Swastik at Gangtok.

4. The petitioners seek the benefit of fundamental Rule 22 applicable to them and have been pursuing their cause before different authorities.

5. The petitioners contend that they are entitled to the notional increment as envisaged in Fundamental Rule 22 as the duties and responsibilities now attached to them carry duties and responsibilities of greater importance than those attached to the post of Pioneer initially held by them.

6. The petitioners also contend that many similarly placed had approached the High Court of Delhi pursuant to which the High Court disposed Writ Petition (C) 4462/2015 by an order dated 05.05.2015 with a direction that the writ

petition would be treated as a representation to the Principal Controller of Defence Accounts (Border Roads Organization) the respondent no.1 herein and that a reasoned decision would be taken and conveyed. On 11.01.2017 the office of the respondent no.1 issued a letter to the respondent no.2 directing them to give the benefit of one notional increment to one of the petitioners i.e. Abhimanyu Kumar. A perusal of the said letter dated 11.01.2017 (Annexure P-3) reflects that the case of Abhimanyu Kumar who was also a Pioneer and later re-appointed as Lower Division Clerk (LDC) was considered by the competent authority and it was decided that his pay should be fixed by increasing one notional increment in the lower post. The respondents admit these facts as matters of record.

7. The petitioners have also highlighted various instances where other government servants similarly placed have been given the benefit of one notional increment. The petitioners contends that on the basis of letter dated 08.02.2017 of the office of the respondent no.1 the fixation of pay on re-appointment from Pioneer to LDC/operator communication/driver (mechanical transport) was implemented in all the projects under Headquarter, Director General, Border Road. The petitioners have annexed photocopies of the relevant pay fixation pro forma with audit report of Shine Kumar U and Shamsher Kumar who had earlier held the posts of Pioneer and later been re-appointed

as LDC and various others who have been given the benefit of one notional increment. The respondents admit these facts as matter of record.

8. The petitioners further contend that pay fixation has already been approved of two officers - Hari Kumar P (Border Task Force stationed at Chandmari, Gangtok, Sikkim) and Rajpal Singh Rawat (Border Task Force stationed at Kalimpong, West Bengal) both Pioneers who were re-appointed as Radio Operators. Hari Kumar P's pay was fixed on his re-appointment by granting two increments, one annual increment and second on account of promotion to Radio Operator. Rajpal Singh Rawat was granted one notional increment in the scale of lowest post on re-appointment. In the counter-affidavit the respondents have not denied that the above orders have been passed and in fact admit the same as matters of record.

9. The respondents are not too clear about the position they desire to take. In the initial affidavit filed by respondent nos.2 and 5 it is stated that the grant of notional increment is under the domain of the respondent nos.1, 3 and 4. It is stated that the respondent no.4 has concurred and audited pay fixation of the petitioners on 26.12.2017; processed the matter to the office of the respondent no.3 in the year 2017 itself; on receipt of the same the respondent no.3 would process the pay fixation of the petitioner and *"shall*

accordingly credit the increment amount due to the petitioners in their respective statement of accounts." It was also stated that the process of pay fixation of one notional increment has already been initiated by the concerned authorities at Project Swastik. However, in the counter-affidavit filed subsequently on 21.03.2018 and additional affidavit dated 08.04.2019 the position the respondents collectively took was slightly different. The respondents now contend that the petitioners were not promoted but were re-appointed in various categories of Group C and as such they would not be entitled to the benefit of Fundamental Rule 22. The respondents contend that since the respondent no.1 have clarified that cases of re-appointment after qualifying open competitive examination should be treated as fresh appointment and pay in such re-appointment cases were to be fixed by giving pay protection.

10. The respondents admit that there is a difference in opinion between the offices of different executive authorities. A reading of the counter-affidavit gives an indication that the concerned authorities have not been able to take a firm decision in the matter and therefore, the file is being processed from one authority to the other without any concrete decision. It may not be necessary to enumerate and detail all the communications exchanged except the important ones, as it seems imperative to give a quietus to the issue by a judicial pronouncement.

11. On 08.02.2017 the office of the respondent no.1 wrote to the respondent no.2 that as per *"paragraph 12"* of RPR 2008 the pay on re-appointment after 01.01.2006 shall be fixed as per Fundamental Rule 22 and Swamy's interpretation of service rules also clarify that pay should be fixed by increasing one notional increment in the lower posts. It was clarified at the bar that *"RPR, 2008"* referred to in the communication is short for the Central Civil Services (Revised Pay) Rules, 2008. Hence, the respondent no.1 advised the respondent no.2 to review all such type of cases pointing out that pay has been fixed granting one notional increment. On 20.02.2017 the respondent no.2 wrote to all project Swastik and other offices advising them to review all such type cases as the office of the respondent no.1 vide letter dated 08.02.2017 had advised increase of one notional increment in the lower posts on re-appointment. However, on 22.03.2017 the respondent no.4 opined in its communication to Controller of Defence Accounts (BR), (CDA (BR)) Guwahati that it was of the considered view that individuals re-appointed after passing competitive examination is treated as fresh recruits and are not entitled for grant of notional increment on pay fixation on re-appointment. On 30.05.2017 the office of the CDA (BR) wrote to respondent no.5 stating that the case regarding re-appointment of Pioneer to Operator (communication) has

been examined and that cases of re-appointment after qualifying open competitive examination should be treated as fresh appointment and pay in such cases were to be fixed by giving pay protection. It was also commented that in view of the clarification issue by the main office vide letter dated 08.02.2017 fixation on re-appointment to higher post from lower post should be fixed by granting one notional increment as per Fundamental Rule 22 and Swamy's interpretation of service rules. On 25.07.2017 the Chief Engineer of respondent no.5 wrote to the office of the respondent no.1 stating that in spite of its clear position in letters dated 11.01.2017 and 08.02.2017 his task force was still not given the benefit. The Chief Engineer further pointed out that it had come to his knowledge that the pay fixation had been complied with in all projects as also two of his task forces but there was an inhibition with respondent no.4 and the increments of seven persons named in the appendix including the petitioners were pending in spite of repeated communications. The intervention of the respondent no.1 was solicited. He pointed out otherwise the pay fixation had been implemented across the board and so it was unfair to limit restrictions to troupes of only his headquarters. On 13.02.2018 the respondent no.1 wrote to various authorities under it stating that a clarification has been received from the respondent no.2 in which it has been clearly mentioned that as per paragraph 6 (a) of the policy letter dated

22.10.1974 re-appointment means fresh appointment and hence all re-appointment cases may be treated as fresh appointments. On 04.04.2018 the respondent no.1 wrote to its various authorities stating that all previous circulars like letter dated 08.02.2017 regarding re-appointment are superseded by letter dated 13.02.2018. A perusal of the letter dated 22.10.1974 shows that it sought to deal with re-appointment of serving gref personnel to various trades. The said letter enumerates the circumstances which may necessitate re-appointment of serving individuals to another trade. It deals with pre-requisites for re-appointment; it elaborates what should be informed to the individuals in writing and acknowledgement obtained; the procedure for re-appointment and the fixation of seniority on re-appointment. However, it does not deal with fixation of pay. Paragraph 6 thereof which is relied upon is quoted under:

> ***"6***. *Re-appointment more than once:*
>
> *(a) Every re-appointment means a fresh appointment.***"**

12. The dispute has arisen primarily due to lack of cohesive interpretation of the Fundamental Rule 22 by the respondents and whether it would apply to the petitioners who were initially appointed as Pioneers in a substantive capacity and later appointed as LDC, telephone operator, radio operator and driver again in a substantive capacity. Although from the communications that have come on

record it seems that the respondent no.1 has in fact held that Fundamental Rule 22 must be applied to the case of the petitioners but it is the respondent no.4 and CDA (BR) Guwahati which holds the view that cases of re-appointment should be treated as fresh appointment and therefore not entitled to the notional increment.

13. Fundamental Rule 22(I)(a)(1) reads as under:

> *"F.R. 22 (I) The initial pay of a Government servant who is appointed to a post on a time-scale of pay is regulated as follows:-*
>
> *(a) (1) Where a Government servant holding a post, other than a tenure post, in a substantive or temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity, as the case may be, subject to the fulfillment of the eligibility conditions as prescribed in the relevant recruitment Rules, to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the time scale of the higher post shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued or [rupees one hundred only], whichever is more. ..."*

14. The Supreme Court had occasion to examine Fundamental Rule 22(I)(a)(1) in ***Government of India and Ors. v. B. Anil Kumar & Ors.***[1] in a case relating to promotion to a post. It was held:-

> ***"19.*** *A plain reading of FR 22(I)(a)(1), quoted above, would show that where a government servant holding a post is promoted to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, "his initial pay in the timescale of the higher post" shall be fixed at the stage next above the notional pay arrived at by increasing his pay in respect of the lower post held by him regularly by an increment at the stage at which such pay has accrued. Thus, on promotion to a post*

[1] **(2010) 6 SCC 419**

> *carrying duties and responsibilities of greater importance, a government servant is entitled to his initial pay "in the timescale of the higher post". In the present case, the higher post to which the respondents were promoted after 1-1-1986 was the post of Assistant Superintendent. If, therefore, the special pay of Rs 75 as has been awarded by the Board of Arbitration is for the higher post of Assistant Superintendent, the respondents would be entitled to the benefit of special pay, but if the special pay was only for the Assistant Superintendents then serving, and not for the post of Assistant Superintendent, the respondents would not be entitled to the benefit of special pay having been promoted after 1-1-1986.***"***
>
> *xxxxxxxxx*
>
> ***"22.** In our considered opinion, the 1986 Rules and FRs 22 and 25 have to be read consistently with the equality clauses in Articles 14 and 16 of the Constitution and so read, all the Assistant Superintendents who are performing the same nature of duties and responsibilities would be entitled to the special pay and to deny such benefit of special pay to the respondents, who have been promoted to the post of Assistant Superintendents after 1-1-1986, would violate Articles 14 and 16 of the Constitution. ……."*

15. However, the cases relating to the petitioners do not involve promotion.

16. The Supreme Court in ***Syed Abdul Qadir v. State of Bihar***[2] held:

> ***"37**. FR 22-C, which was substituted even prior to the issuance of the Resolution dated 18-12-1989, and was replaced by FR 22(I)(a)(1) and FR 22(I)(a)(2), read thus:*
>
> *"22-C.Notwithstanding anything contained in these Rules, where a government servant holding a post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him, his initial pay in the timescale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post by one increment at the stage at which such pay has accrued:*
>
> *Provided that the provisions of this Rule shall not apply where a government*

[2] **(2009) 3 SCC 475**

> *servant holding a Class I post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity to a higher post which is also a Class I post.*
>
> *A reading of FR 22-C makes it clear that benefit of an additional increment would be extended to a government servant in the event of his being promoted or appointed to a substantive, temporary or officiating capacity to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him.* **"**
>
> *[emphasis supplied]*

17. Admittedly, the petitioners were initially appointed as Pioneers in Group D category under the respondents. Thereafter, they went through a recruitment process through proper channel and having been successful in the departmental examinations, were appointed in different capacities in Group C category. The posts of Pioneer as well as the new Group C posts the petitioners hold are posts under the respondents. There is also no dispute that by this process the petitioners migrated from Group D posts to Group C posts. A perusal of Fundamental Rule 22 reflects that the incumbent must be a government servant holding a post other than a tenure post. It is not the case of the respondents that the petitioners are not government servants and that they were not holding any post other than a tenure post. Fundamental Rule 22 provides that the government servant could be holding the post in a substantive or temporary or officiating capacity. It is also not the case of the respondents that the petitioners were not holding the post of Pioneer in substantive, temporary or

officiating capacity. In fact it is admitted that the petitioners were holding the posts in substantive capacity. In such a situation if the incumbent government servant is appointed and is otherwise eligible under the recruitment Rules to another post he is entitled to the notional increment as per Fundamental Rule 22. The only condition thereafter would be that the post to which he is promoted or appointed must carry duties and responsibilities of greater importance than those attached to the post held by him. It is also not the case of the respondents that the petitioner were not otherwise eligible under the recruitment Rules. Suffice it to say that the respondents admit the petitioners' appointments.

18. The petitioners have categorically asserted that the post now held by them carry higher duties and responsibilities of greater importance as compared to the post of Pioneers. The respondents do not dispute this fact and in fact admit the same as matters of record. There is also no dispute that Fundamental Rule 22 is applicable in the present case. The fact that various similarly placed government servants have been given notional increment does show that the respondents have applied Fundamental Rule 22 for them. Normally this Court would hesitate to examine a claim of parity when such officers have not been made a party. However, the orders passed in their favour granting one notional increment have not been considered bad by the

respondents in spite of the position they take in the counter-affidavit. The respondents also do not deny the assertion of the petitioners that those officers who have been granted one notional increment were similarly placed. The admitted records also reveal that they were in fact similarly placed.

19. However, the respondents contend that the petitioners' appointments are rather *"re-appointments"* and therefore, it should be treated as *"fresh appointments"* disentitling the petitioners to the notional increment. It is the respondents' contention that on being re-appointed to the new posts held by the petitioners, the petitioners have relinquished all their rights to the post of pioneers which was earlier held by them. In fact the respondents submit that in the reappointment letter the petitioners had to submit discharge certificate relinquishing their rights whatsoever to the post they were holding and the petitioners were not promoted but reappointed. The petitioners admit this fact as matters of record. However, this Court is of the view that respondents cannot be permitted to rely upon such relinquishment of rights granted under law to deprive the petitioners what is legally permissible. Fundamental Rule 22 includes cases of promotion as well as appointment to a post. Otherwise there was no reason for the words *"or appointed"* to be used after the words *"is promoted"* in Fundamental Rule 22. Fundamental Rule 22 seeks to regulate the initial pay of a government servant who is appointed to a post on a time

scale of pay. Thus the relinquishment of rights of post of Pioneer by the petitioners would not change the purpose of Fundamental Rule 22 or its application to the petitioners on their subsequent appointment. It envisages a situation where a government servant holding a post is either promoted or appointed to another post carrying duties and responsibilities of greater importance than those attaching to the post held earlier. The word used in Fundamental Rule 22 is *"appointed".* The word appointment would include re-appointment or fresh appointment and therefore, the difference sought to be drawn in the appointment of the petitioners and thereby to deprive them of the benefit seems lame. If the rule making authority had desired to draw such a difference it would have done so in the rule itself. It may not be correct to read into the clear language of Fundamental Rule 22 what is not there. If the other conditions as envisaged in Fundamental Rule 22 stand satisfied failure to grant the benefit envisaged would be illegal. Further, on their own admission the respondents have extended the benefit of notional increment under Fundamental Rule 22 to various government servants identically placed. It is not the case of the respondents that the benefit so granted to them has been reversed. Consequently, the failure to grant similar benefit to the petitioners who otherwise fulfill all the requirements under

Fundamental Rule 22 would also violate Article 14 and 16 of the Constitution of India.

20. Resultantly, the writ petition is allowed. The respondents are directed to grant the petitioners the benefits under Fundamental Rule 22 from the date and in the manner they are entitled to.

21. No order as to costs.

(Bhaskar Raj Pradhan)
Judge
17.03.2020

Approved for reporting: yes.
Internet: yes.
to/