**IN THE HIGH COURT AT CALCUTTA**

**CONSTITUTIONAL WRIT JURISDICTION**

**APPELLATE SIDE**

**Present:**

**THE HON'BLE JUSTICE HARISH TANDON**
**&**
**THE HON'BLE JUSTICE PRASENJIT BISWAS**

**W.P.C.T. 118 of 2019**

**Rajeev Ranjan**

**Vs.**
**The Comptroller and Auditor General of India & Ors.**

***<u>Appearance:</u>***

For the Petitioner (in-person) : **Mr. Rajeev Ranjan, Adv.**

For the Respondent Nos. 1, 2 & 4 : **Mr. Sandip Bhattacharyya, Adv.**

**Mr. Suman Basu, Adv.**

For the Respondent Nos. 3 & 5 : **Mr. Dhiraj Trivedi, Ld. DSG.**

**Mr. Shailendra Mishra, Adv.**

Judgment On : **31.03.2023**

***<u>Harish Tandon, J.:</u>***

The present appeal raises an important and significant issue pertaining to the powers of the Comptroller and Auditor General (CAG) under Article 148 (5) of the Constitution of India *vis-à-vis* the power of the President under Article 309 of the Constitution of India.

Before we proceed to decide the aforesaid point the salient facts of the case are required to be adumbrated hereinafter. The petitioner herein was appointed as a Junior Hindi Translator on 26.9.2000 in the office of the Director-General of Commercial Audit & Ex-Officio Member Audit Board-II, Kolkata under the Indian Audit and Accounts Department. Subsequently, the writ petitioner was offered promotion as Hindi Officer in the Grade Pay of Rs. 4800 in PB-2 on the basis of an Office Order no. 132 dated 17.10.2011 and was made permanent in the said posts. The petitioner started raising the dispute immediately thereafter being promoted to the post of Hindi Officer at the Grade Pay of Rs. 4800 in PB-2 by making a representation on 3.11.2011 claiming that the post of the Hindi Officer is equivalent and identical to the post of the Assistant Director (OL) for which a Grade Pay of Rs. 5400 at PB-3 has been granted *vide* Office Memorandum dated 24.11.2008 and its corrigendum dated 27.11.2008 issued by the Director (IC) of Government of India, Ministry of Finance, Department of Expenditure. Therefore, the petitioner should also be extended the said Grade Pay as well as the Pay Band. According to the writ petitioner all the Ministries/ Departments have been granted revised pay scale approved for various posts in the Central Secretariat Official Language Service (hereinafter referred to as “CSOLS”) cadre in various subordinate offices of the Central Government. The petitioner thus, claimed that the moment the post of the Hindi Officer is re-designated as the Assistant Director (OL) and placed at the higher Grade Pay and the Pay Band, the post of the Hindi Officer becomes obliterated and to be re-designated as the Assistant Director (OL) at the Grade Pay and the Pay Band attached to such re-designated post. Various Circulars, office Memorandums and the Orders issued by the Central Government and the Ministry of Expenditure including the Office Memorandum as well as the recommendations of the CAG have been relied upon by both the parties which we will deal with in seriation for the purpose of its applicability and extending the benefits so claimed by the writ petitioner.

Before we embark our journey upon the facts emanate from the record, it is first and foremost to ascertain the powers of the CAG and its subordination to the Central Government under the provisions of the Constitution of India.

Article 148 of the Constitution of India incorporated in Chapter 5 thereof relates to the CAG of India where the appointment can be made by the President by warrant under his hand and seal and can also be removed from the office in the similar manner as that of the Judge of the Supreme Court. Sub-Article 5 of Article 148 bestowed the administrative powers upon the CAG in relation to the condition of service of the persons serving in the Indian Audit and Accounts Department on the basis of the Rules prescribed by the President after consultation with him subject to the provisions of the Constitution or any law made by the Parliament. Article 309 of the Constitution of India, more particularly, proviso inserted thereto confers power upon the President or such person as he may direct in relation to services and posts in connection with the affairs of the Union in relation to services and the posts to make Rules regulating the recruitment and the condition of service of such person until the provision in that behalf is made by or under an act or legislation.

The importance of appointing a Comptroller General was always felt necessary even at Pre-Independence Era to control and regulate the expenditure of any money from the treasury; even under the Government of India Act, 1935 contained the provision relating to the appointment of the Auditor General to be in-charge of the Audit of the Government of India holding an office of the State under the authority of the Crown. The status of the Auditor-General was also kept at par with the status of the judge of the Federal Court as the removal can only be secured in the same manner. After the promulgation of the Constitution of India in Post-Independence Era, Dr. Ambedkar pointed out in the Constituent Assembly the importance and the significant role to be played by the CAG and its independence. At the time of consideration of the draft Articles before the Constituent Assembly, Mr. T. T. Krishnamachari moves several amendments one of such relates to changing the designation of the Auditor-General to CAG as his duty is not confined to mere audit but also exercising control over the spending of the ruling Government. Mr. B. Das also moved an amendment suggesting that the appointment of the CAG should be made by the President by warrant under his hand and seal in order to maintain the integrity of the Government and its employees in relation to a public expenditure of the Auditor-General. The aforesaid amendments were accepted in principal on a debate in the Constituent Assembly which led to the several amendments to be brought in the draft which can be seen from Article 148 to 151.

Article 309 was also incorporated in the Constitution in contemporaneous time and a point arose whether the appointment and condition of service of the Department of CAG can be regulated by Article 148 (5) or under Article 309 before the Supreme Court in case of ***Accountant General & Anr. Vs. S. Doraiswamy, reported in (1981) 4 SCC 93.*** It is held that proviso to Article 309 of the Constitution confers power upon the President to make Rules regulating the recruitment and condition of service of person appointed to the post in connection with the affairs of the Union; simultaneously, the similar power is given to the Governor in relation to the affairs of the State unless an appropriate legislation to regulate such recruitment and services of a person appointed to public services and the post in connection with the affairs of the Union or of the State is made by the appropriate Government. It is further held that there is a manifest distinction and division marked by circumstances in relation to a recruitment or condition of service of the persons appointed in the Indian Audit and Accounts Department and the persons appointed under the Union and/or the State and the CAG being a Constitutional Authority or the functionary holding a special position under the Constitution enjoins an independent powers by virtue of an Article 148 (5) of the Constitution in relation thereto in the following:

> ***"6. Article 309 provides for legislation by the appropriate Legislature to regulate the recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State, and the proviso to Article 309 declares that until such legislation is enacted by the***

***appropriate Legislature the President is empowered in the case of services and posts in connection with the affairs of the Union, and the Governor of a State in the case of service and posts in connection the affairs of a State, to make rules regulating the recruitment and the conditions of service of persons appointed to such services and posts. There is a clear dichotomy in the power conferred by Article 309, a division of power between the Parliament or President, as the case may be, on the one side and the State Legislature or Governor on the other. The division is marked by the circumstance that under Article 309 services and posts in connection with the affairs of the Union are dealt with by a separate authority from the services and posts in connection with the affairs of a State. That dichotomy, it seems, is not possible in the power employed for appointing persons in the Indian Audit and Accounts Department and for prescribing their conditions of service. The Comptroller and Auditor General of India, who is the head of that Department, is a constitutional functionary holding a special position under the Constitution. Under Article 149, he performs duties and exercises powers in relation to the accounts of the Union and also of the States. Clause (1) of Article 151 requires him to submit a report relating to the accounts of the Union to the President, who causes them to be laid before each House of Parliament. Likewise, clause (2) of Article 151 requires him to submit a report relating to be accounts of a State to the Governor of***

***the State, who causes them to be laid before the Legislature of the State. It cannot be said, in the circumstances, that the persons serving in the Indian Audit and Accounts Department are holding office in connection with the affairs of the Union exclusively. It may be pointed out that when the Constitutional Adviser prepared the Draft Constitution for consideration by the Constituent Assembly the document contained separate provisions for the appointment of the Auditor General of the Federation and Auditors General for the Provinces. The Auditor General for the Federation was to be appointed by the President and his functions extended to the accounts of the Federation as well as of the Provinces. But it was open to a Provincial Legislature to provide by law for the appointment of an Auditor General for the Province and the appointment to that office was to be made by the Governor. The Expert Committee on the financial provisions of the Union Constitution favoured the continuance of a single Auditor General for the Government of India as well as for the Provincial Governments and hoped that the provincial Governments would refrain from using their power of appointing separate Auditors General of their own. When the matter came before the Drafting Committee, it decided that the persons performing the functions of the Auditor General in a State should be designated Auditor-in-Chief in order to distinguish him from the Auditor General of India, and that the salaries and allowances of the staff of these officers***

*should be fixed by the Auditor General of India and the Auditor-in-Chief in consultation with the President and the Governor respectively. Thereafter, the Drafting Committee reconsidered the desirability of permitting a multiplicity of audit authorities, one for the Union and one for each State. On August 1, 1949 Shri T. T. Krishnamachari moved an amendment deleting the draft articles enabling the State Legislatures to create their own Auditors-in-Chief. He pointed out that since the Constituent Assembly had already adopted articles whereby the auditing and accounting would become 'one institution, so to say, under the authority of the Comptroller and Auditor General, it was not necessary to have separate provision for the State. Accordingly, he proposed the addition of a new article [now clause (2) of Article 151] about the Comptroller and Auditor General, requiring him to submit the reports of the accounts of a State to the Governor for being laid before the State Legislature. These amendments were adopted by the Constituent Assembly. It is evident that the authority vested in the Comptroller and Auditor General ranges over functions associated with the affairs of the Union as well as over functions associated with the affairs of the States. It is a single office, and the Indian Audit and Accounts Department, which it heads, is a single department. They cannot be said to be concerned with the affairs of the Union exclusively. Consequently, the regulation of the recruitment and conditions of service of persons serving in the*

***Indian Audit and Accounts Department cannot be regarded as a matter falling within the domain of the President within the terms of the proviso to Article 309. A special provision was necessary to entrust the President with that power, and that provision is Clause (5) of Article 148. The power contained in Clause (5) of Article 148 is not related to the power under the proviso to Article 309. The two powers are separate and distinct from each other and are not complementary to one another. In our opinion, the reference to the proviso under Article 309 in the recital of the notification publishing the Rules of 1974 is meaningless and must be ignored.”***

The aforesaid proposition has been reiterated in a subsequent decision of the Supreme Court rendered in case of ***Union of India & Anr. Vs. Amrik Singh & Ors., reported in (1994) 1SCC 269*** in the following :

***“9. This question relates to competence of the Comptroller and Auditor General of India to issue Instructions dated March 21, 1978. As has been held by us in dealing with Question 1, the matter for which the provision under consideration is made in the Instructions of March 21, 1978, is not a matter covered by any provision in the Rules. If so, was it not competent for the Comptroller and Auditor-General of India to make such provision is the point which now needs our examination. As is held by this Court in Accountant General v. S. Doraiswamy the Comptroller and Auditor-General of India has the necessary competence to issue Departmental Instructions on matters***

***of conditions of service of persons serving in his Department as its Head, even after Rules are made by the President on conditions of service of such persons in exercise of his powers under Article 148 (5) of the Constitution. It is no doubt true that the administrative Instructions so issued on matters relating to conditions of service of persons in the Department cannot prevail over the Rules issued by the President under clause (5) of Article 148 of the Constitution, if the same comes in conflict with any provision made in the Rules on such matter. As already pointed out by us in dealing with Question 1, the provision in the Instructions under consideration does not come in conflict with, nor is it inconsistent with, provisions in the Rules, for the matters dealt with in them are altogether different. On the other hand, the aforesaid provision in the Instructions provides for an essential matter relating to service conditions of persons in the Indian Audit and Accounts Department in respect of which no provision is made in the Rules. Hence, we hold that the provision in Instructions under consideration has been made with the required competence by the Comptroller & Auditor-General of India and that is our answer to Question 2."***

It is held in the above noted decision that once the Rules are framed by the President in exercise of power under Article 148 (5) of the Constitution any administrative instruction issued in relation to the matters covered therein cannot prevail over the said Rules. What can be seen that there is no lack of authority to issue administrative instructions by the CAG in connection with the recruitment or condition of service of its employees provided it does not override or offend any of the provision or Rules framed by the Governor under Article 148 (5) of the Constitution. It is thus apparent that a constitutional autonomy has been given to the CAG in relation to a matter concerning the recruitment or service of condition unless the Rule is framed by the President under Article 148 (5) of the Constitution and therefore, does not act as an attached or the subordinate Office or the Ministry or the other Departments.

Such being the position of law let us see whether the claim of the petitioner is sustainable on the basis of the Office Order issued by the Department of Expenditure, the Ministry of Finance dated 24th November, 2008 issued on the recommendation of the said 6th Central Pay Commission The said Office Memorandum would indicate that several queries have been received by the said departments from various Ministries/Departments regarding the revised pay structure applicable in case of Official Language posts existing in the subordinate offices of the Central Government. The Ministry of Finance noticed that various subordinate offices of the Central Government were granting the same pay scale in relation to a similarly designated posts existing out of the Central Secretariat Official Language Service (CSOLS) cadre and therefore, communicated the decision to grant revised pay scale approved for various posts in the CSOLS to similarly designated official language posts existing in their subordinate officers. The said Office Memorandum does not indicate the post of the Hindi Officer but of the Assistant Director (OL) which according to the petitioner is similar and identical to the post of the Hindi Officer.

The aforesaid notion has been derived from the Office Memorandum dated 5.4.1989 where the Assistant Director (OL) was shown after the Hindi Officer to contend that the Hindi Officer is equivalent and identical to the Assistant Director (OL). The petitioner was communicated the decision on the representation that the head quarter office has decided to continue with the post of the Hindi Officer at a Grade Pay of Rs. 4800 in PB-2 and therefore, such claim is not accepted. The aforesaid stand of the respondent is further disclosed in the affidavit-in-opposition filed before us and the stand has been taken that since the post of the Hindi Officer in the Office of IA & AD was not created under the $4^{th}$ Central Pay Commission at the pre-revised pay scale of 2200 to 4000 and under the $5^{th}$ CPC to Rs.8000 to 13500 and therefore, the said post was not placed under the PB-3. Because of the aforesaid stand having taken the Tribunal directed the affidavit to be filed indicating whether the other departments which had a post of Hindi Officer including the CSOLS are similar and identical. The affidavit of compliance would reveal that the duties of the Hindi Officer in CSOLS and in IA&AD are distinct and no parity can be seen therefrom. It is further disclosed that traditionally the post of Hindi Officer is held equivalent to the post of Assistant Audit/Account Officer of the main cadre of the Department and therefore, in order to maintain the parity they are put under PB-2.

In course of hearing, we have been taken to various Office Memorandum issued by the various departments where on the basis of the said recommendation the post of the Hindi Officer was re-designated as the Assistant Director (OL) in order to contend that the moment, those departments have accepted such position it is unreasonable that the office of the CAG shall not follow the same path. There is a fallacy in the aforesaid submission for the simple reason that the Office Memorandum issued by the Department of Expenditure, Ministry of Finance in relation to the attached or subordinate officers has no binding effect on the CAG which is a Constitutional Authority and enjoins the independent powers in relation to the recruitment and condition of service of its employee. It is one thing to say that the CAG has decided to accept the recommendation in restructuring the designation and extending the benefits on the basis of such recommendation but there does not appear to be any compulsion under the provision of the Constitution or in view of the Law declared by the Supreme Court in ***S. Doraiswamy*** and ***Amrik Singh & Ors.*** **(*Supra*).** We have no hesitation in our mind that the CAG is neither an attached or a subordinate office of the Union Government but a Constitutional Authority being independent and governed by the provisions of the Constitution in relation thereto. It does not appear to us that on the ground of parity the petitioner is entitled to succeed nor on the ground of subordination in office.

However, all interesting facts have been discerned from the record, more particularly, the stand of the CAG. By a letter dated 5th June, 2017, the CAG sought for a special dispensation in re-designating the post of the Hindi Officer as Assistant Director (OL) and conveyed his intention to continue with the post of Hindi Officer with the classification as Group-B. Interestingly, the Ministry of Finance through a Department of Expenditure issued an Office Memorandum dated 14th August, 2017 in reply to a prayer for special dispensation with the assertion that the subject matter of classification of a post comes within the domain of the Department of Personnel and Training and therefore, it is advisable to consult the aforesaid department. Subsequent thereto a proposal was made to the Department of Personnel and Training by the office of the CAG wherein it is indicated that the post of Hindi Officer and the Assistant Director (OL) has been used interchangeably by the Ministry of Home Affairs in its Office Memorandum dated 22.7.2004. The discussion disclosed therein would further reveal that the office of the CAG was considering the up-gradation of the pay scale of the Hindi Officer from PB-2 at Grade Pay 4800 to PB-3 at Grade Pay 5400 but with the classification as Group-B. The paragraph 7 of the same is reproduced as under:

> ***"7. The Ministry of Finance was requested to consider a special dispensation, to continue with the name of the post as 'Hindi Officer' {instead of Asstt. Director (OL), as notified on DoPT model RR}, in the pay scale PB-3, GP 5400 (now pay level 10) with the classification as Group 'B'."***

There is no document forthcoming that the Department of Personnel and Training, the respondent no.4 herein have taken any decision thereupon. Though it was not obligatory on the part of the CAG to abide by the administrative instruction issued by the Ministry or the other Departments but the moment it is decided to have the views to be recommended by the respondent no.4, such respondent cannot sit over it. The respondent no.4 must communicate its decision and the recommendation to the CAG either to accept or not but cannot keep the fate of the litigant indecisive.

The order of the Tribunal is modified to the extent that the respondent no.4 is directed to take decision on the basis of the letter issued by the CAG seeking a special dispensation but extending the higher Grade Pay under PB-3 with the classification under Group-B within 4 weeks from the date of the communication of this order. The moment the recommendation is received by the CAG, informed decision must be taken within 4 weeks from the date of receipt thereof and it goes without saying that the same must be communicated to the writ petitioner immediately.

With these directions, the writ petition is disposed.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree. **(Harish Tandon, J.)**

**(Prasenjit Biswas, J.)**