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* IN THE HIGH COURT OF DELHI AT NEW DELHI

Date of Decision:- 15.01.2024

\+ W.P.(C) 514/2024

UNION OF INDIA & ANR. ..... Petitioner

Through: Mr.Balendu Shekhar, CGSC with Ms.Tanisha Samanta, Mr.Rajkumar Maurya, Mr.Krishna Chaitanya, Advs.

versus

SUSHIL KOHLI ..... Respondent

Through:

CORAM:
HON'BLE MS. JUSTICE REKHA PALLI
HON'BLE MR. JUSTICE TUSHAR RAO GEDELA

REKHA PALLI, J(ORAL)

CM APPL. 2311/2024 -Ex. & CM APPL. 2312/2024 -Ex.

1. Exemptions allowed, subject to all just exceptions.

2. The applications stand disposed of.

W.P.(C) 514/2024, CM APPL. 2310/2024 -Stay., CM APPL. 2313/2024 - Addl. doc.

3. The present writ petition under Articles 226 and 227 of the Constitution of India, seeks to assail the order dated 07.03.2023 passed by the learned Central Administrative Tribunal in O.A. No. 737/2016.

4. Vide the impugned order, the learned Tribunal has allowed the O.A. preferred by the respondent, by directing the petitioner to suitably step up

the pay of the respondent to bring the same at par with Mr. Sushil Kumar and Mr. L.N. Sharma, who are admittedly juniors to the respondent in the common seniority list of the All India Cadre of Statistical Investigator Grade III, which list was set up after the merger of State Cadres of Statistical Investigator on 02.12.1999. The learned Tribunal also noticed that while the respondent was initially in the Himachal Pradesh Cadre, Mr. Sushil Kumar and Mr. L.N. Sharma were in the Rajasthan Cadre and it is only upon merger of the State Cadres w.e.f. 02.12.1999 that a common seniority list was issued. In the said list, while the respondent was placed at Serial no. 195, the aforesaid Mr. Sushil Kumar and Mr. L.N Sharma were placed at Serial Nos.283 and 370 respectively.

5. Upon the respondent realising that he was drawing lesser pay than his aforesaid two juniors w.e.f. 01.02.1986, he made representations to the petitioner requesting for stepping up for his pay at par with his aforesaid juniors. This request of the respondent was accepted, resulting in issuance of an OM dated 26.03.2015 granting him notional stepping up of pay, equal to that of Mr. Sushil Kumar and Mr. L.N Sharma, for the period between 01.02.1986 to 01.12.1999 and for stepping up on actual basis w.e.f 02.12.1999.

6. This OM was, however, without any notice to the respondent withdrawn on 04.02.2016 by informing him that upon the matter being re-examined, it was found that the difference between his pay and that of his juniors which existed even before the merger could not be construed as an anomaly, as per the OMs issued by the Department of Personnel and

Training (DoPT). The respondent was also informed that it is only an anomaly that had arisen after the merger of the Cadres, which could be rectified by stepping up of the pay. Being aggrieved, the respondent approached the learned Tribunal by way of the aforesaid OA which came to be allowed vide the impugned order.

7. In support of the petition, learned counsel for the petitioner submits that the impugned order is wholly perverse as the learned Tribunal has directed stepping up of the respondent's pay without considering the effect of OMs dated 04.02.1966 and 04.11.1993 issued by DoPT. He contends that the learned Tribunal has failed to appreciate that as per these aforesaid OMs stepping up of pay of a senior employee to bring the same at par with his junior is permissible only if the anomaly is result of application of Fundamental Rule 22(I)(a)(1). In the present case, the difference in the pay being drawn by the respondent and the aforesaid two employees was not a result of any option having been exercised in the manner as envisaged in Fundamental Rule 22(I)(a)(1). It was infact a result of increments being granted to them in February 1986 that the aforesaid two employees were always drawing higher pay than the respondent. The benefit of this increment was, however, extended to the respondent only in August 1986 and therefore he was all along drawing lesser pay than the two employees, he cannot claim any stepping up of pay. In support of his aforesaid plea, he seeks to place reliance on the decisions of the Apex Court in ***Union of India & Ors. v. Sushil Kumar Paul & Ors.[(1998) 5 SCC 268]*** and in ***Union of India & Anr. v. R.Swaminathan & Ors.[(1997) 7 SCC 690]***. He, therefore,

prays that the impugned order be set aside.

8. Before dealing with the submissions of the learned counsel for the petitioner, it may be apposite to note the relevant extracts of the impugned order, which read as under:-

> *"11. The respondents had relied upon the DoP&T"s O.M. dated 04.11.1993 (Annexure-A6), which clearly stipulates that stepping up of pay would be considered when both the junior and senior belong to the same cadre and posts in which they have been promoted or appointed should be identical and in the same cadre. It is also mentioned in this O.M. that anomaly should be directly as a result of the application of FR 22-C. For example, if even in the lower post the junior officer draws from time to time a higher rate of pay than the senior by virtue of grant of advance increments or on any other account, the above provisions will not be invoked to step up the pay of senior officer.*
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> *12. Be that as it may, a detailed exercise was undertaken by Respondent No.1 and the issue of stepping up of applicant's pay was examined in detail, as is evident from the order dated 06.05.2015 and that of 26.03.2015. Vide O.M. dated 26.03.2015, a certain course of action was also advised for stepping up of the pay of the applicant at par with his juniors. It was clearly stated that the pay of the applicant shall be stepped up equal to that of Shri Sushil Kumar and Shri L.N. Sharma w.e.f. 01.02.1986 to 01.12.1999 on notional basis. It was also stated that he may be allowed to re-exercise his option at the time of 1st ACP as well as on subsequent events till date, if he so desires, so that his pay may be fixed at par with Shri Sushil Kumar and Shri L.N. Sharma. From the letter issued on 04.02.2016, it is observed that the reason for withdrawing this O.M. has been given as the difference in pay not being a "Technical Anomaly", as this was on account of DNIs being different in each individuals case consequent to exercising of option.*
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> *13. This also brings us to the fundamental point of the principle*

underlying the stepping up of pay. The DoP&T O.M. No. F.2(78)-EIII(A)/66 dated 04.02.1966 reads as under:

> *"In order to remove the anomaly of a Government servant promoted or appointed to a higher post on or after 1-4-1961 drawing a lower rate of pay in that post than another Government servant junior to him in the lower grade and promoted or appointed subsequently to another identical post, it has been decided that in such cases the pay of the senior office in the higher post should be stepped up to a figure equal to the pay as fixed for the junior officer in that higher post. The stepping up should be done with effect from the date of promotion or appointment of the junior officer and will be subject to the following conditions, namely:-*
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> *(a) Both the junior and senior officers should belong to the same cadre and the posts in which they have been promoted or appointed should be identical and in the same cadre;*
> *(b) The scales of pay of the lower and higher posts in which they are entitled to draw pay should be identical;*
> *(c) The anomaly should be directly as a result of the application of FR 22-C. For example, if even in the lower post the junior officer draws from time to time a higher rate of pay than the senior by virtue of grant of advance increments, the above provisions will not be invoked to step up the pay of the senior officer. The orders refixing the pay of the senior officers in accordance with the above provisions shall be issued under FR-27. The next increment of the senior officer will be drawn on completion of the requisite qualifying service with effect from the date of refixation of pay."*
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> *(Emphasis underlined)*

This also differentiates between the anomaly or disparity having been caused due to the dates of increment.

14. In a catena of judgments, it has been held that the pay disparity or anomaly in the salary of a senior vis-a-vis his juniors, who are getting higher pay, has to be removed. This was precisely the decision taken in the order dated 26.03.2015, which has been subsequently withdrawn.

15. It is evident that the juniors of the applicant even in the integrated seniority list are getting higher pay. This may be by virtue of their date of increment, however, the same needs to be set right. For this, the applicant may be allowed to re-exercise his option at the time of 1st ACP as well as on subsequent events till date, if he so desires, so that his pay could be brought at par with his juniors, viz. Shri Sushil Kumar and Shri L.N. Sharma and this disparity, if not anomaly, can be resolved.

16. In my considered view, such decisions cannot be arrived at all of a sudden after detailed order passed. Within one year re-examination had been undertaken and the withdrawal order had been passed by the respondents without issuing any show cause notice to the applicant.

17. In light of above, the O.A. is allowed and the order dated 04.02.2016 is set aside, with a direction to the respondents to take effective steps for re-examining the case of pay disparity between the applicant and his juniors, Shri Sushil Kumar and Shri L.N. Sharma, and to consider stepping up of the pay of the applicant equal to that of Shri Sushil Kumar and Shri L.N. Sharma by allowing him to re-exercise his option. If such an exercise is concluded, the applicant shall be entitled for step up of his pay notionally for the period from 01.02.1986 to 01.12.1999 and financially w.e.f. 02.12.1999, with all consequential benefits. This exercise shall be completed within a period of three months from the date of receipt of a copy of this order.

There shall be no order as to costs."

9. From the aforesaid extracts of the decision of the learned Tribunal,

what emerges is that the learned Tribunal has duly examined the effect of OM dated 04.11.1993, which OM it is claimed by the petitioner is *para materia* with the OM dated 04.02.1966. Since it is the petitioner's claim that the learned Tribunal has failed to appreciate the effects of these OMs, it would be apposite to note hereinbelow the OM dated 04.11.1993 in its entirety. The same reads as under:-

No. 4/7/92-Estt.(Pay-I)
GOVERNMENT OF INDIA,

DEPARTMENT OF PERSONNEL & TRAINING

New Delhi

Dated:0 4-11-1993

OFFICE MEMORANDUM

Subject- Stepping up of pay

Cases for stepping up of the Pay of Seniors in a pay scale to that of Juniors are generally considered if the following conditions are satisfied : –

(a) both the junior and senior officer should belong to the same cadre and the posts in which they- have been promoted or appointed should be identical and in the same cadre ;

(b) the scales of pay of the lower and higher posts in which the junior and senior officer are entitled to draw pay should be identical;

(c) the anomaly should be directly as a result of the application of FR 22-C. For example, if even in the lower post the junior officer draws from time to time a higher rate of pay than the senior by virtue of grant of advance increments or on

any other account the above provisions will not be invoked to step up the pay of senior officer.

2. Instances have come to the notice of this Department requesting for stepping up of pay due to the following reasons :-

a) Where a senior proceeds on Extra Ordinary Leave which results in postponement of Date of next Increment in the lower post, consequently he starts drawing less pay than his junior in the lower grade itself. He, therefore, cannot claim pay parity on promotion even though he may be promoted earlier to the higher grade;

(b) If a senior foregoes/refuses promotion leading to his junior being promoted/appointed to the higher post earlier, junior draws higher pay than the senior. The senior may be on deputation while junior avails of the ad-hoc promotion in the cadre. The increased pay drawn by a junior either due to ad-hoc promotion in the cadre. The increased pay drawn by a junior either, due to ad-hoc officiating/ regular service rendered in the higher posts for periods earlier than the senior, cannot therefore, be as anomaly in strict sense of the term.

(c) If a senior joins the higher post later than the Junior for whatsoever reasons, whereby he draws less pay than the junior, in such cases senior cannot claim stepping up of pay at par with the Junior.

(d) If a senior is appointed later than the Junior in the lower post itself whereby he is in receipt of lesser pay than the junior, in such cases also the senior cannot claim pay parity in the higher post though he may have been promoted earlier to the higher post.

(e) Where a person is promoted from lower to a higher post his pay is fixed with reference to the pay drawn by him in the

lower under FR 22-C and he is likely to get more pay than a direct appointee. For example a UDC on promotion to the post of Assistant gets his pay fixed under FR 22-C with reference to the pay drawn in the post of UDC, whereas the pay of Assistant (DR) is fixed normally at the minimum under FR 22-B(2). In such cases the senior direct recruit cannot claim pay parity with the Junior promoted from a lower post to higher post as seniority alone is not a criteria for allowing stepping up.

(f) Where a Junior gets more pay due to additional increments earned on higher qualifications.

The DoPT order on Stepping up of Pay in 7th CPC is given here [Read DoPT Guidelines 26.10.2018]

3. In the instances referred to in paragraph 2 above, a junior drawing more pay than the senior will not constitute an anomaly. In such cases, stepping up of pay will not , therefore , be admissible.

4. In so far as persons serving in the Indian Audit and Accounts Department are concerned, these orders have been issued after consultation with the comptroller and Audit general of India.

5. Hindi version will follow

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Deputy Secretary to the Govt."

10. From a bare perusal of the aforesaid OM, it is evident that the stepping up of pay of a senior at par with the pay being drawn by his junior is the norm. This stepping up can, however, be refused in certain cases as referred to in Clauses 2(a) to 2(f) of the aforesaid OM, which deals with

situations where the junior is drawing higher pay on account of special circumstances like having acquired an higher education or in a case where the junior is appointed on a date later than the senior. In the present case, it is an admitted position that none of the eventualities referred to in paragraph nos.2(a) to 2(f) are applicable to the respondent. The reason why the respondent is drawing lesser pay than his aforesaid two juniors is on account of the increments being received by these two persons from February 1986, the benefit of which increments was extended to the respondent only on August 1986. This difference in the release of the increments in favour of the respondent *vis-a-vis* his juniors remained a non-issue as they were in two different Cadres i.e. the Himachal Pradesh Cadre and the Rajasthan Cadre. However, it is only after the merger of these two cadres, when the respondent was placed in the same seniority list as the aforesaid Mr. Sushil Kumar and Mr. L.N. Sharma, that this anomaly was noticed, and it is then that the respondent sought upgradation of his pay at par with the aforesaid two employees.

11. Having given our thoughtful consideration to this plea, we are unable to agree with the learned counsel for the petitioner that this anomaly does not fall within the ambit of paragraph no.1 of the OM dated 04.11.1993. It is not even the petitioner's case that the aforesaid two persons were drawing higher pay than the respondent on account of any of the situations envisaged in paragraph no.2 of the aforesaid OM. We are in fact of the view that taking into account the admitted position that the respondent has been placed at a much higher position in the seniority list *vis-a-vis* the aforesaid two persons

namely Mr. Sushil Kumar and Mr. L.N. Sharma, it will be grave injustice to the respondent if his pay is not stepped up to be at par with his two juniors. Once the petitioner chose to merge the State Cadres, which had been existing for years, it was incumbent upon them to ensure that no senior draws lesser pay than persons placed lower than him in the seniority list, unless it is a case of special circumstances like those covered under Clauses 2(a) to 2(f) of the OM dated 04.11.1993.

12. We have also considered the decisions in ***Sushil Kumar Paul & Ors.(supra)*** and ***R.Swaminathan & Ors.(supra),*** relied upon by the petitioner, but find that the same are not applicable to the facts of the present case. In both these cases, the Apex Court was dealing with a situation where the junior was drawing more pay than his senior on account of his enjoying *ad-hoc* officiating promotion before regular promotion to the post governed by the common seniority list. In the present case, it is not even the petitioner's plea that Mr.Sushil Kumar and Mr.L.N.Sharma were ever officiating on any higher post. We are, therefore, of the view that merely because the aforesaid two juniors of the respondent were in the Rajasthan Cadre, granted increments few months before the grant of the same increments to the respondent in the Himachal Pradesh Cadre, cannot be a ground to deny the benefit of stepping up of pay to the respondent.

13. Before we conclude, we may also note that the petitioner had itself granted the benefit of stepping up of pay to the respondent on 26.03.2015 which benefit was withdrawn vide OM dated 04.02.2016 without even putting him to any notice. This in itself was in violation of principles of

natural justice. We, therefore, find absolutely no infirmity in the impugned order.

14. The writ petition being meritless is, along with all pending applications, dismissed.

(REKHA PALLI)
JUDGE

TUSHAR RAO GEDELA
(JUDGE)

JANUARY 15, 2024
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