

OA No. 291/14/2016

CENTRAL ADMINISTRATIVE TRIBUNAL
JAIPUR BENCH, JAIPUR

ORIGINAL APPLICATION NO. 291/14/2016

Order reserved on 03.03.2021

DATE OF ORDER: 08.03.2021

CORAM

HON'BLE MR. DINESH SHARMA, ADMINISTRATIVE MEMBER
HON'BLE MRS. HINA P. SHAH, JUDICIAL MEMBER

Mahesh Prasad Sharma son of Shri Radha Vallabh aged about 64 years resident of 90, Sarti Nagar, Janpath Shyam Nagar, Sodala Jaipur 302139 Rajasthan. Retired as Asstt. Registrar, Deptt. of ITAT Agra.

....Applicant

Shri Amit Mathur, counsel for applicant (through Video Conferencing).

VERSUS

1. Union of India through Secretary, Ministry of Law and Justice, Department of Legal Affairs, Shastri Bhawan, New Delhi.
2. President, Income Tax Appellate Tribunal through its Registrar, 101, Old CGO Building, 4th Floor, Maharshi Karve Marg Mumbai-400020.

....Non Applicant / Respondents

Shri A.S. Shekhawat, counsel for respondents (through Video Conferencing).

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ORDER

Per: Hina P. Shah, Judicial Member

The present Original Application has been filed by the applicant under Section 19 of the Administrative Tribunals Act, 1985 for the following reliefs:-

- i) The impugned communication dated 9th July 2015 be quashed and set aside being illegal and detrimental to fundamental rights of the applicant.
- ii) By further appropriate order or direction the respondents be directed to Grant the benefit of 3rd Financial upgradation of MACP which could not have been denied to him in the facts and circumstances as stated in this O.A. and also to pay arrears of Salary and allowances along with interest @ 12% from the date it become due.
- iii) By further appropriate order or direction the respondents be directed to revise the PPO and also calculate and pay the arrears of retirement benefit i.e. gratuity, leave encashment and any other benefit along with interest @ 12% from the date it become due.
- iv) By further appropriate order or direction the respondents be directed to expunge the Adverse remarks from the service dozier of the applicant being illegal and unsustainable in the eyes of law.
- v) The Cost of the O.A may also be allowed in favour of the applicant.
- vi) Any other order or relief may also be granted in favour of the applicant which Hon'ble Tribunal deems fit and equitable to be granted in favour of the applicant."

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2. The brief facts of the case, as stated by the applicant, are that he was appointed as a Translator w.e.f. 26.07.1980 and, thereafter, promoted as Assistant Registrar as on 16.08.1998. The applicant completed 30 years of service as on 26.07.2010 and, thus, became eligible for 3rd MACP from this date. He made an application for grant of 3rd MACP vide his application dated 09.08.2010 which was forwarded by the controlling authority to the competent authority. Thereafter, he made several reminders as he was to attain superannuation as on 31.03.2012. Vide communication dated 06.08.2014, the applicant was informed that the bench mark for grant of 3rd MACP is "Very Good" for consecutive five years and the applicant's ACRs for the year 2005-06, 2006-07 and 2007-08 have been rated as "Good" which is below the bench mark. It was also revealed that the APARs for the year 2009-2010 have been rated as below average by the same authority who for the year 2008-09 had rated the applicant as 'Very Good'. As per communication dated 06th August 2014, the applicant was given the copy of ACRs and APARs for the impugned period vide letter dated 28th August 2014, (Annexure A/3), with a direction to make

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representation against the adverse remarks. Accordingly, applicant made a representation for upgradation of adverse remarks for the year 2005-06, 2006-07 and 2007-08 and expunction of adverse remarks for the year 2009-2010 vide his two representations dated 09th September 2014 and 12th September 2014, which were also forwarded to the competent authority for consideration vide office letter dated 07th November 2014 (Annexure A/6). The competent authority declined to effect any change in the gradings, which was communicated to the applicant vide letter dated 09th July 2015 (Annexure A/1). It is further stated that as per O.M. dated 04th October, 2012, (Annexure A/7), it is clarified that the bench mark of Very Good is not applicable for the grant of financial upgradation under the MACP Scheme. Thus, aggrieved by the action of the respondents, the applicant has filed the present Original Application for non-consideration of MACP on account of his bench mark criteria, which is illegal, arbitrary and unsustainable in the eyes of law.

3. After issue of notices, the respondents have filed their reply stating that the applicant has rightly been

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denied grant of 3rd MACP as he was not having Very Good bench mark in his ACRs relating to the period 2005-06, 2006-07, 2007-08 and 2009-10 as per the original Scheme of MACP and that OM dated 04.10.2012 is not applicable in case of the applicant. The remarks were returned by the concerned authority after following due procedure. As such, there is no illegality and infirmity in the writing of the ACRs of the applicant as the same has been returned after adopting proper and correct procedure. Also the applicant has not exhausted all the departmental remedies available to him. Therefore, the present Original Application deserves to be dismissed.

4. The applicant has filed a rejoinder stating that the applicant was not granted 3rd MACP and he was permitted to superannuate as on 31.03.2012 on the retirement benefits much below his entitlement. He had requested for his 3rd financial upgradation to the next grade pay of Rs. 7600/- w.e.f. 26.10.2010 when the applicant has completed 30 years of service. The ACRs for the year 2005-06, 2006-07, 2007-08 which were below benchmark, should have been ignored as the ACRs for the years 2005-06, 2006-07, 2007-08

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were not communicated to the applicant during his entire service period. The uncommunicated remarks which are below the benchmark for promotion or MACPs are to be ignored while considering a Govt. servant for upgradation or granting MACPs as per several judgments of the Hon'ble Apex Court including the judgments in the cases of **Dev Dutt vs. Union of India Ors.**, reported in (2008) 8 SCC 725 and **Sukhdev Singh vs. Union of India & Ors.**, (Civil Appeal No. 5892 of 2006, decided on 23rd April, 2013), reported in (2014) 1 SCC (L&S) 279 : (2013) 9 SCC 566. Also similar view has been taken by the Hon'ble Apex Court in the case of **Abhijit Ghosh Dastidar vs. Union of India & Ors.**, (Civil Appeal No. 6227 of 2008, decided on 22nd October, 2008), reported in (2009) 16 SCC 146. It is clear that the APARs were communicated to the applicant only in 2015 after his retirement, therefore, the submissions made by the respondents that the 'Reviewing Officer' as well as the 'Accepting Officer' had demitted the office has no significance as the same were informed to the applicant belatedly. Also towards the remarks for the year 2009-10, the same are incomplete as the same are neither reviewed by the Reviewing Officer

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nor accepted by the Accepting Officer. No remarks have been offered by the then 'Reviewing and Accepting Officer' as the respective columns are blank and, therefore, incomplete APAR could not have been taken into consideration for refusal to grant benefits of 3rd MACP to the applicant. The applicant further states that he is, therefore, entitled for benefits of 3rd MACP w.e.f. 26.07.2010 on completion of 30 years of his service since the inception of MACP Scheme.

5. Heard learned counsels for the parties through Video Conferencing and perused the material available on record including the judgments on the issue.

6. The applicant as well as respondents reiterated their stand as stated earlier.

7. The question which requires to be considered is whether an employee can be denied promotion and/or financial upgradation on the basis of his below benchmark ACRs, which have not been communicated to him and the same were not reviewed because the Reporting/Reviewing Officers are not in service.

8. The factual matrix of the case of the applicant is that while he was working as Assistant Registrar,

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ITAT, it was found that his gradings in ACRs were below the benchmark for the year 2005-06, 2006-07, 2007-08 and 2009-10 as his gradings were shown as 'Good' instead of 'Very Good' and 'therefore' he was not granted benefits of 3rd MACP. He had made his request for grant of benefits of 3rd MACP as he had completed 30 years on 26.07.2010 and, thus, became eligible for 3rd MACP from the said date. He applied for grant of 3rd MACP vide his application dated 09.08.2010, which was forwarded by the controlling authority to the competent authority. Thereafter, again he made several representations along with several reminders. In the meanwhile, the applicant superannuated on 31.03.2012. On receipt of communication dated 06.08.2014, the applicant was given copy of ACRs and APARs for the impugned period vide office letter dated 28.08.2014 with a direction to make representation against adverse remarks. Accordingly, the applicant submitted his representation dated 09.09.2014 (Annexure A/4) and dated 12.09.2014 (Annexure A/5) against his grading below the benchmark for the year 2005-06, 2006-07, 2007-08 and 2009-10 in his ACRs. His representation was, accordingly, forwarded to the

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competent authority and Shri R.S. Syal, Accountant Member, ITAT, observed in his Note that "*I do not propose any change in the ACRs of Shri. M.P. Sharma, already given.*" The decision of the competent authority was forwarded to the applicant vide letter dated 09.07.2015 (Annexure A/1), which is the impugned order in challenge.

9. As per DOPT OM dated 19.05.2009, the required benchmark for financial upgradation to the grade pay of Rs.7600/- and above is "Very Good". Thereafter as per DOPT OM dated 04.10.2012, it was clarified that the benchmark of "Very Good" is not applicable for grant of financial upgradation under the MACP Scheme. Relevant para 2.(ii) of the said OM dated 04.10.2012 is reproduced here as under: -

"2.(ii) Benchmark for MACP Scheme:

Para 17 of Annexure-I of the MACP Scheme provide that the financial upgradation would be on non-functional basis subject to fitness, in the hierarchy of grade pay within the PB-1. Thereafter for upgradation under the MACPS, the benchmark of 'good' would be applicable till the grade pay of Rs. 6600/- in PB-3. The benchmark will be 'Very Good' for financial upgradation to the grade pay of Rs. 7600 and above. This Department's OM No. 35034/3/2008-Estt.(D) (Vol.II) dated 01.11.2010 provides that where the financial upgradation under MACPS also happens to be in the promotional grade and benchmark for promotion is lower than the benchmark for granting the benefit under MACPS as mentioned in para 17 *ibid*, the benchmark for promotion shall apply to MACP also. It is now further clarified that wherever promotions are given on non-selection basis (i.e. on seniority — cum — fitness basis), the prescribed benchmark as mentioned

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in para 17 of Annexure — I of MACP Scheme dated 19.05.2009 shall not apply for the purpose of grant of financial upgradation under MACP Scheme.”

10. The controversy in the present matter has set to rest in view of several judgments of the Hon’ble Apex Court. In the case of **Dev Dutt vs. Union of India Ors.** (supra), the Hon’ble Apex Court has held that “fairness in public administration and transparency require that all entries in the ACRs of a public servant must be communicated within a reasonable period in order to enable the employee to make a representation for upgradation. The view of the Court was that non-communication of entries in the ACRs has civil consequences since it may affect the chances of the employee for promotion and other benefits. A failure to communicate would be arbitrary. The Court held that these directions would apply to employees of statutory authorities, public sector corporations and other instrumentalities of the State, in addition to government servants.” A three Judges Bench of the Hon’ble Apex Court in the case of **Sukhdev Singh vs. Union of India & Ors.** (supra) affirmed the correctness of the view taken in the case of **Dev Dutt vs. Union of India Ors.** (supra) noting that an earlier

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three Judges Bench in the case of **Abhijit Ghosh Dastidar vs. Union of India & Ors.**, (supra) has adopted the same principle. Also as per the latest judgment of the Hon'ble Apex Court in the case of **Anil Kumar vs. Union of India & Ors.** (Civil Appeal No. 888 of 2019 decided on 21.01.2019), reported in (2019) 4 SCC 276, wherein it has been observed that once the law was enunciated in the case of **Dev Dutt vs. Union of India Ors.** (supra), all instrumentalities of the State were bound to follow the principles laid down by the said Court.

11. We observe that under the MACP Scheme, the applicant is to be considered to the Grade Pay of Rs. 7600/- which is immediate higher grade pay in the hierarchy of the recommended revised pay band. Though the benchmark was communicated to the applicant in the year 2015 but the same was done belatedly only after he retired.

12. Considering the entire facts enumerated in the preceding paras, we are of the opinion that there is no sense in remanding the matter back to the respondents for a Review Screening Committee as both the Reviewing Officer as well as the Accepting

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Officer have demitted the office as is evident from the submissions of the respondents themselves. Accordingly, the impugned order dated 09th July, 2015 is quashed and set aside. We direct the respondents to issue orders granting the benefits of 3rd MACP w.e.f 26.07.2010 to the applicant along with arrears of salary and allowances from the said date. The respondents are also directed to issue revised PPO and calculate and pay the arrears of retirement benefits including gratuity, leave encashment and all other such benefits from the date it has become due and grant all consequential benefits thereon within a period of three months from the date of receipt of a certified copy of this order. The Original Application is, accordingly, disposed of with the above directions. No order as to costs.

(HINA P. SHAH)
JUDICIAL MEMBER

(DINESH SHARMA)
ADMINISTRATIVE MEMBER