

**CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH, ERNAKULAM**

Original Application No. 294/2013

THURSDAY, this the 18th day of June, 2015.

CORAM :

**HON'BLE MR. U.SARATHCHANDRAN, JUDICIAL MEMBER
HON'BLE MRS. P.GOPINATH, ADMINISTRATIVE MEMBER**

A.R.Mohandas, 57 years

s/o G.Raghavan Pillai,
Upper Division Clerk,
Central Public Works Department,
Office of Superintending Engineer,
Trivandrum Central Circle,
CGO Complex,
Thiruvananthapuram -695 522.

..... Applicant

(By Advocate Mr.U.Balagangadharan)

versus

- 1 Union of India represented by
The Director General,
Central Public Works Department,
Nirman Bhavan, New Delhi -110 001.
- 2 The Superintending Engineer (Co-ord),
SR, Central Public Works Department,
Chennai -600 003.
- 3 The Superintending Engineer (E)/P&A,
Office of Chief Engineer (E)/SR
Central Public Works Department,
3rd Floor, G Wing Rajaji Bhavan,
Beasant Nagar, Chennai -600 033.
- 4 The Chief Engineer (SZ) III,
Central Public Works Department,
D-Wing, 6th Floor,
Bangalore – 20.
- 5 The Executive Engineer, TCD,
Central Public Works Department,
Thiruvananthapuram -695 014.
- 6 The Superintending Engineer,
Trivandrum Central Circle,
Central Public Works Department,
Thiruvananthapuram -695 014.



7 The Assistant Engineer (HQ),
 Central Public Works Department,
 Thiruvananthapuram Central Circle,
 Thiruvananthapuram -695 014. Respondents

(By Advocate Mr.N.Anil Kumar, Sr.PCGC)

This Original Application having been heard on 20.05.2015, this Tribunal on
~~....18:06:2015~~ delivered the following:

O R D E R

HON'BLE MR.U.SARATHCHANDRAN, JUDICIAL MEMBER

Grievance of the applicant is that he has been denied the 3rd financial upgradation under the MACP scheme on account of wrong interpretation of paragraph 25 of that scheme by the respondents and thereby taking a view that as he has declined the promotion granted to him in 2007, he is not entitled to receive the financial upgradation.

2. The short undisputed facts relating to this case are given below:

Applicant joined the service as LDC on 28.12.1981 in the Ministry of Works & Housing, Delhi. He was transferred to Trivandrum in 1984. He was promoted as UDC in 1998. He was given the 2nd financial upgradation under the erstwhile Assured Career Progression (ACP) scheme and was placed in the scale of Rs. 5000 -8000 on 28.12.2005. Respondents vide Annexure- A/2 Office Memorandum called for application in Annexure- A2/2 proforma from the willing and eligible UDCs for the departmental competitive examination for promotion to the post of Head Clerk under MERIT QUOTA. Applicant applied for the said examination. He became successful and was offered the post of Head Clerk at Madurai vide Office Order No.139/2007 marked as Annexure -A/3. However, he declined the promotion due to his family encumberances at Trivandrum. Therefore, respondent No.2 issued Annexure -A/4 office Order debarring him from promotion for one year from the date of issue of promotion order i.e. from 26.10.07 and postponing the ACP upgradation. On 28.12.2011 he became eligible



for the 3rd financial upgradation under the Annexure -A/5 MACP Scheme with effect from 01.09.2008. He submitted application for grant of 3rd financial upgradation but Respondent No.7 rejected it vide Annexure -A/6 communication dt. 2/04/2012 stating that he is not eligible for the 3rd financial upgradation as per condition No. 25 of Annexure -A/5 MACP scheme as he has declined promotion granted to him on 26.10.2007.

3. According to applicant, his debarment for promotion as per Annexure A/4 order was only for one year from 26.10.2007 and the said embargo ended on 25.10.2008. He states that Annexure- A/3 promotion was the result of the departmental competitive examination for the post of Head Clerk. As per Annexure -R/5 recruitment rules the post of Head Clerk has to be filled up by 50% through departmental examination and 50% from seniority-cum-fitness. Applicant contends that the promotion granted to him vide Annexure- A/3 was the result of his taking part in a departmental competitive examination which exercise was optional for an employee unlike the other mode of recruitment, i.e. Seniority-cum-fitness - which is a promotion granted on the basis of seniority. According to applicant taking part in the departmental competitive examination was optional for him and hence the promotion he has been granted was earned by him facing the competitive examination; not by way of an offer to him by the department as per seniority-cum-fitness.

4. Respondents refuted these contentions. According to them, all promotions either secured by taking part departmental competitive examination or by way of seniority-cum-fitness are promotions within the scope of paragraph 25 of Annexure -A/5 MACP scheme and as the applicant has refused to accept promotion granted to him vide Annexure - A/3 order, he is not eligible for the 3rd financial upgradation under the MACP scheme.

5. We have heard Shri U.Balagangadharan, learned counsel for the applicant and Shri N.Anil Kumar, Sr.PCGC(R) for the respondents at length. We have perused the exhaustive reply statement filed by the respondent and copies of the records annexured thereto. We have also perused the rejoinder filed by the applicant. Shri Balagangadharan relied on a decision dt. 2.11.2012 in O.A. No. 4111/2011 of the Principal Bench of this Tribunal. Learned counsel for the respondents also relied on the same order, copy of which is annexed as R/12.

6. Relevant portion of the Annexure A/5 MACP Scheme is extracted below for the sake of understanding its import.

"25. If a regular promotion has been offered but was refused by the employee before becoming entitled to a financial upgradation, no financial upgradation shall be allowed as such an employee has not been stagnated due to lack of opportunities. If, however, financial upgradation has been allowed due to stagnation and the employee subsequently refuses the promotion, it shall not be a ground to withdraw the financial upgradation. He shall, however, not be eligible to be considered for further financial upgradation till he agrees to be considered for promotion again and the second the next financial upgradation shall also be deferred to the extent of period of debarment due to the refusal".

7. Assured Career Progression (ACP) scheme which was the forerunner of the MACP scheme was aimed at granting relief to the employees who had been working in the same grade continuously for several years without any promotion, by granting financial upgradation at definite intervals. Annexure -A/5 is the modified form of ACP which again is intended to grant financial upgradation to employees who face stagnation in their career. In the aforequoted portion of the MACP scheme also what has been aimed at is to grant financial upgradation to the employees who have been stagnated due to lack of opportunity. It stipulates that if a promotional opportunity has been given to the employee he should avail of it failing which he will be disentitled to financial upgradations under the MACP Scheme.



8. We have bestowed our thoughtful consideration on the rival contentions of both sides and also on the question as to whether the promotion earned by the applicant by taking part in the departmental examination under the 50% quota is a promotion envisaged in para 25 of the MACP Scheme. Annexure A/2 Office Memorandum was intended to be circulated amongst all eligible UDCs. The relevant portion of Annexure- A/2 is extracted below:

No.9/4/2/COORD/SR/222

Dated: 10.04.2007

OFFICE MEMORANDUM

It is proposed to conduct the Departmental Competitive Examination for Upper Division Clerks for promotion to the post of Head Clerk under the MERIT QUOTA on the following categories during June/ July /2007. All the Upper Division Clerks who have rendered not less than five years of service as regular Upper Division Clerk in Region 'D' as on 31.12.2006 are eligible to appear in the examination.

The following is the current/ resultant vacancies which is required to be filled in under MERIT QUOTA.

1 SC - 3 nos.

2 UR - 11 nos.

Any additional vacancies which may arise against merit quota till 31.3.2008 shall also be filled up from the successful candidates from this departmental examination.

The exact date of the examination will be intimated later on.

The examination comprises of three papers as detailed below and each paper shall carry 100 marks:

PAPER I - Precise writing and drafting
 PAPER II - Office procedure (CPWD Manual Vol.1, II & III)
 PAPER III - General Services and Financial Rules (GFR, FR & SR)
 Portions relating to pay and allowances, joining time,
 Pension Rules, Leave Rules, GPF Rules etc.

Note: For answering Paper III, text books shall be allowed to be taken inside the examination hall.

All the Chief Engineers SZ-I,II, III, Chief Engineer (E) & all the Superintending Engineers/ Superintending Engineers (P) , Executive Engineers (Civil & Elect) as well as Director of Works (SZ), Superintending Engineers (TLQA) in Southern Region are requested to circulate this notification among their Upper Division Clerks and Willingness of the eligible Upper Division Clerks may kindly be sent to this office in the proforma given below so as to enable to reach this office on or before 11.05.2007".

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9. Annexure R/5 Recruitment Rule for recruiting Head Clerks is a rule framed under the proviso to Article 309 of the Constitution of India. It prescribes the mode of recruitment of Head Clerks ie. 50% through departmental competitive examination and 50% on the basis of seniority-cum-fitness. Annexure A/2 O.M. extracted above unambiguously is an invitation to eligible UD Clerks to appear for a departmental competitive examination for promotion to the post of Head Clerks. It is mentioned in Annexure-A/2 that the selection process is under the "MERIT QUOTA". It was open to the eligible UDCs to decide whether they should appear in the competitive examination or not. It was not obligatory for them to take part in that examination at all, if one does not prefer to get promoted. On the other hand, if the eligible UDCs are considered by a Departmental Promotion Committee (DPC) for promotion under the 50% seniority-cum-fitness quota, the process of selection is not subject to the volition of the individual employees. If, as per service records, a UDC is found to be eligible on the basis of his seniority, the promotion is axiomatic, of course, subject to the decision of the DPC. In such a selection process, the suitability of a candidate is not being assessed on the basis of a competitive examination, but generally on the basis of the unblemished service and seniority. The recruitment rules for the post of Head Clerk do not prescribe any other mode of selection.

10. Since participation in the competitive examination involves an element of volition on the part of the UDC, the department cannot compel a UDC to take part in the examination. Even if a candidate appears in the competitive examination, he/she cannot be found fault with if he/ she fails to pass in the examination. The vagaries of success and failure do stare at the candidates. Such being the nature of the departmental competitive examinations, promotion secured by participating in the 50% departmental competitive examination cannot, by any stretch of imagination, be treated as a promotion "offered" by the



department. In our considered view, it is a promotion "secured/earned" by the employee by personal efforts and individual merit.

11. According to para 25 of Annexure - A/5 MACP scheme, an employee becomes ineligible for further financial upgradations if he refuses promotion. As noted earlier, the object of financial upgradaton under the MACP scheme is to ameliorate the hardship of employee who suffers stagnation in the same post without getting any promotion. If there are two modes of promotion, one which involves the personal efforts of the employee by appearing in departmental competitive examination and the other being seniority-cum-merit basis, the offer of promotion given to employee under the seniority-cum-fitness alone need to be considered as an offer from the department for overcoming the laggardiness of stagnation. The other mode of promotion ie. by competitive examination being voluntary in nature, if the employee refuses to take part cannot be treated as refusal of promotion in view of the uncertainty and vagaries involved in the outcome of a competitive examination. *A fortiori*, if an employee has taken part in the competitive examination and comes out successful for being promoted to the higher post and later decides not to join the post, the department cannot treat it as a refusal of promotion.

12. It appears from the pleadings in the O.A. that the applicant had retired from service on 31.05.2015. It further appears to us that the applicant had not been given any promotion till his superannuation, although it has come out from the information collected by invoking the RTI Act,2005 that there had been a good number of promotions made in the grade of UDCs to Head Clerks during 2009/2010.

13. Applicant alleges that two similarly situated persons in the same

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department having secured promotion through departmental competitive examination and refused to join the higher post have been given the 3rd financial upgradation under the MACP scheme. However, in the reply statement, respondents submitted that the promotion given to such employees was due to an oversight and that steps have already been taken to recover the financial upgradation granted to them.

14. In view of the foregoing discussion, we are of the view that in the light of the recruitment rules for the post of Head Clerk, if a UDC takes part in the 50% departmental examination and comes out successful and later decides not to join the promotion post, it cannot be treated as a refusal of promotion for the purpose of para 25 of the MACP Scheme. We further hold that since participation in 50% competitive examination involves voluntariness on the part of the employee, it will always be optional for him/her to take part in the departmental competitive examination and yet not to choose the promotion post if s/he becomes successful in the examination. We make it clear that this view taken by us is only for the limited purpose of the applicability of paragraph 25 of Annexure -A/5 MACP scheme.

15. In the light of the above discussion, we hold that the decision of the applicant not to join the promotion post he secured through the 50% departmental competitive examination cannot be treated as a refusal of promotion for invoking the limitations prescribed in paragraph 25 of the MACP scheme. If the promotion was on the basis of seniority-cum-merit by a DPC, the situation would have been different. Such a promotion being the normal escape route from the drudgery of stagnation, one cannot claim the financial upgradation granted in lieu of stagnation by opting out from the seniority-cum-fitness promotion offered to him.



16. In the result, we direct that the respondents shall, in the light of the above discussion, consider granting the the 3rd financial upgradation to the applicant with effect from 28.12.2011 with consequential benefits, limiting the actual payment of arrears only to 3 years prior to the date of his superannuation with interest at the rate of 9% from the date of filing the OA till payment. This exercise shall be completed by the respondents within two months of receipt / presentation of a copy of this order. No order as to costs.

(Dated, this 18th day of June, 2015)


(P. GOPINATH)
ADMINISTRATIVE MEMBER

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(U. SARATHCHANDRAN)
JUDICIAL MEMBER