

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL,
JAIPUR BENCH, JAIPUR.

ORIGINAL APPLICATION No. 141/2010

Jaipur, the 24th day of January, 2013

CORAM :

HON'BLE MR.JUSTICE K.S.RATHORE, JUDICIAL MEMBER
HON'BLE MR.ANIL KUMAR, ADMINISITRATIVE MEMBER

Madan Lal Saini son of Shri Kajod Mal Saini, aged 59 years, resident of D-20, Ashok Vihar, Nandpuri Colony, Gaitore, Jagatpura, Jaipur. Presently posted as Sr. Accountant in the PAG (A&E), Rajasthan, Jaipur.

... Applicant

(By Advocate : Mr. Vinod Goyal)

Versus

1. Union of India through the Comptroller & Auditor General of India, 10, Bahadur Shah Zafar Marg, New Delhi.
2. The Principal Accountant General (A&E) Rajasthan, AG Office Janpath, Near Statue Circle, Jaipur.
3. The Deputy Accountant General (Admn.), AG Office Janpath, Near Statue Circle, Jaipur.

... Respondents

(By Advocate : Mr. D.C. Sharma)

ORDER (ORAL)

The applicant has filed this OA praying that the benefit of third upgradation under Modified Assured Career Progression Scheme (MACPS) be given to the applicant w.e.f. 01.09.2008 because his junior employees have been given the benefit of the upgradation under the MACP Scheme w.e.f. 01.09.2008. He has further prayed that the respondents be directed to re-convene the screening committee and it should be directed to consider the case of the applicant for giving financial upgradation under the

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MACP Scheme by ignoring the un-communicated remarks of the year 2005-06 and 2006-07 given by the Reporting Officer.

2. This OA was disposed of by this Tribunal vide its order dated 10.08.2011. This order of the Tribunal dated 10.08.2011 was challenged by the respondents before the Rajasthan High Court (Jaipur Bench) by filing a DB Civil Writ Petition No. 553/2012. The Hon'ble Rajasthan High Court (Jaipur Bench) vide its order dated 29.03.2012 set aside the order dated 10.08.2011 of this Tribunal and directed the Tribunal to consider the contentions raised by the respondents that the applicant has earned ACR grades below the prescribed bench mark for the year 2005-06 and 2006-07, as such the benefit of MACP Scheme could be not extended to the applicant. The Hon'ble Rajasthan High Court (Jaipur Bench) also directed this Tribunal to take decision afresh in accordance with the law by a reasoned order.

3. Heard the rival submissions of the parties and perused the relevant documents on record.

4. Learned counsel for the applicant argued that the applicant has completed more than 30 years of regular service on 01.09.2008. Therefore, he is entitled to the MACP Scheme w.e.f. 01.09.2008. The benefits of MACP Scheme have been extended w.e.f. 01.09.2008 to the similarly situated junior employees to the applicant vide order dated 09.10.2009 but the same benefit has not been extended to the applicant.

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5. The learned counsel for the applicant further submitted that not a single disciplinary proceeding has been initiated against the applicant. In the whole span of service tenure, not a single adverse entry has been made in the ACR dossier as much as the applicant had never received any communication from the Administration in this regard.

6. That the applicant inspected his ACR on 19.11.2009. On perusal of the aforesaid dossier, it was revealed that the Reporting Officer has downgraded the ACR of the year 2005-06 and 2006-07 below the bench mark prescribed for the benefit of MACP Scheme. The applicant was never communicated the adverse remarks or downgrading of the ACR by the Reporting Officer at the relevant time, as such the same could not have been taken into consideration by the Screening Committee. He referred to Para No. 17 of the MACP Scheme

7. The learned counsel for the applicant further submitted that the applicant submitted a representation on 20.11.2009 stating therein that the downgrading of his ACR by the Reporting Authority from 'Very Good'/'Good' to 'Average' and maintained by the Reviewing Officer without providing any opportunity of hearing and without communicating the same, is arbitrary, unjustified and unconstitutional. To support his averment, he also referred to the DOPT OM dated 14.05.2009.

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8. Learned counsel for the applicant further submitted that the representation submitted by the applicant has been rejected by the respondents vide order dated 19.02.2010 (Annexure A/1).

9. He further argued that it is a settled preposition of law that the un-communicated adverse remarks cannot be taken into consideration by the DPC/Screening Committee and admittedly the ACRs for the year 2005-06 and 2006-207 were not communicated to the applicant. To support his averment, he referred to the judgment of the Hon'ble Supreme court in the case of **Dev Dutt vs. Union of India**, 2008 (8) SCC 725. He also referred to the order of the Central Administrative Tribunal, Principal Bench, New Delhi in OA No 1335/2008 decided on 16.02.2009 [**Mahesh Kumar Gupta vs. Union of India & Others**]. Therefore, he argued that in view of the legal position, the applicant is entitled for financial upgradation under MACP Scheme w.e.f. 01.09.2008.

10. On the contrary, the learned counsel for the respondents argued that the impugned order dated 19.02.2010 against which this OA lies, is in perfect consonance to Para 17 to 20 of Annexure-1 of Government of India, Ministry of Personnel, Public Grievances and Pension, Department of Personnel and Training OM No. 35034/3/2008-Estt. (D) dated 19.05.2009, Para No. 17 and 20 are quoted below:-

"17. The financial upgradation would be on non-functional basis subject to fitness, in the hierarchy of grade pay within

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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."

"20 Financial upgradation under the MACP shall be purely personal to the employees and shall have no relevance to his seniority position. As such, there shall be no additional financial upgradation for the senior employees on the ground that the junior employee in the grade has got higher pay/grade pay under the MACPS."

11. Learned counsel for the respondents further argued that the applicant has earned ACR grade below the prescribed bench mark for the year 2005-06 and 2006-07, as such the benefit of MACPS could not be extended to the applicant. Therefore, the action of the respondents cannot be termed as arbitrary or against the rules invoked in this regard.

12. He further argued that the benefits of the MACPS 2009 can be given on individual basis and hence it is not material whether an employee is senior or junior in any particular cadre. The financial upgradation under the MACP 2009 has no relevance to the seniority position of an employee.

13. Learned counsel for the respondents further argued that the Government of India, DOPT OM No. 21011/1/2005-Estt.(A)(Pt-II) dated 14.05.2009 regarding communication of APARs is prospective in its application. Accordingly, copy of the Annual Appraisal Report for the year 2008-09 are to be made available to the employees. The copy of the APAR for the year 2008-09 has been made available to the applicant, Shri Madan Lal Saini on

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05.03.2010. Earlier as per the rules, only adverse entries in the ACRs were required to be communicated. Average grading is not treated as adverse for the communication purpose.

14. Learned counsel for the respondents further argued that the case of the applicant was also considered by the Screening Committee but was not found suitable in terms of the Para 17 of Annexure 1 of MACP 2009 dated 19.05.2009.,

15. With regard to the judgment of the Hon'ble Supreme Court in the case of Dev Dutt vs. Union of India (supra) referred to by the learned counsel for the applicant, learned counsel for the respondents submitted that the DOPT has issued the OM No. 21011/1/2010-Estt. (A) dated 27.04.2010 enclosing a copy of Hon'ble Supreme Court order dated 29.03.2010, passed in Civil Appeal No. 2872/2010, **Union of India vs. A.K. Goel**, wherein the Hon'ble Supreme Court after noticing the apparent conflict between the judgment in Dev Dutt vs. Union of India & others, 2008 (8) SCC 725, on one hand and **Satya Narain Shukla vs. Union of India**, 2006 (9) SCC 69 and **K.M. Mishra vs. Central Bank of India & Others**, 2008 (9) SCC 120, on the other, has referred the matter to the Larger Bench. The judgment in case of Dev Dutt vs. Union of India (supra) is, hence, not final and the matter is sub-judice before the Hon'ble Supreme Court. Therefore, he argued that the OA has no merit and it should be dismissed with costs.

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16. From the perusal of record and from the arguments of the learned counsel for the parties, it is not disputed that the ACRs of the applicant for the year 2005-06 and 2006-07 were below the prescribed bench mark. The case of the applicant was considered by the Screening Committee for the financial upgradation but he was not found suitable because he was graded below the bench mark.

17. With regard to the averment of the learned counsel for the applicant that in view of the Government of India, DOPT, OM NO. 21011/1/2005-Estt.(A)(Pt-II) dated 14.05.2009, the applicant's uncommunicated bench mark ACRs should have been ignored. We are of the view that this OM dated 14.05.2009 is prospective in nature. As per this OM, the new system of communicating the new system of communicating the entries in the APAR shall be made applicable prospectively only with effect from the reporting period 2008-09 which is to be initiated after 1st April, 2009. It is clear from the perusal of this provision that OM is effective for report period 2008-09 initiated after 01.04.2009 whereas in the present case, the below bench mark ACRs were for the year 2005-06 and 2006-07. Therefore, the provisions of OM dated 14.05.2009 (Annexure R/2) are not applicable in the present case.

18. With regard to the submission of the learned counsel for the applicant that the ratio decided by the Hon'ble Supreme Court in the case of Dev Dutt vs. Union of India (supra), the learned counsel for the respondents submitted that Hon'ble Supreme

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Court vide order dated 29.03.2010 passed in 2872/2010 in the case of **Union of India vs. A.K. Goel & Others** has referred the matter to the Larger Bench after noticing apparent conflict in the judgment in Dev Dutt's case (supra) and Satya Narain Shukla's case, 2006 (9) SCC 69 and K.M. Mishra vs. Central Bank of India & Others, 2008 (9) SCC 120. Therefore, he argued that this matter is sub-judice before the Hon'ble Supreme Court. We are inclined to agree with the averments made by the learned counsel for the respondents that the ratio decided by the Hon'ble Supreme Court in the case of Dev Dutt (supra) is, therefore, not final. The order of the CAT, PB, New Delhi in OA NO. 1335/2008 decided on 16.02.2009 [Mahesh Kumar Gupta vs. Union of India & Others] is also based on the judgment of the Hon'ble Supreme Court in the case of Dev Dutt (supra).

19. This Tribunal has also decided the similar controversy in OA No. 80/2010 (Govind Prasad Goyal vs. Union of India & Others) and OA No. 220/2010 (Pokar Mal vs. Union of India & Others) vide its order dated 22.01.2013. In this order dated 22.01.2013, this Tribunal has observed that the provisions of DOPT OM dated 14.05.2009 are applicable prospectively only w.e.f. the reporting period 2008-09, which is to be initiated after 01.04.2009. Therefore, the instructions as contained in DOPT OM dated 14.05.2009 are not applicable under the facts in that OA. In the present case also, the instructions of DOPT OM dated 14.05.2009 are not applicable because the ACRs of the applicant are for the

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period from 2005-06 and 2006-07, which is prior to the reporting report 2008-09.

20. In the said order dated 22.01.2013, this Tribunal has also held that since the average ACRs are not adverse, and therefore, they were not required to be communicated to the applicant as per the instructions applicable at that point of time. In the present OA also, the entries in the ACRs are for the period 2005-06 and 2006-07 are below the bench mark but not adverse, hence they are not required to be communicated to the applicant as per the instructions applicable at that point of time.

21. Thus considering the facts of the case, documents on record and the case law referred to by the learned counsel for the applicant, we are of the opinion that the applicant has failed to make out any case for our interference in this OA. We find no infitmity/illegality in the decision taken by the respondents in not giving him the benefit of MACPS to the applicant w.e.f. 01.09.2008. We are of the considered opinion that the present OA has no merit.

22. Thus the OA being devoid of merit is dismissed with no order as to costs.

Anil Kumar
(Anil Kumar)
Member (A)

K. S. Rathore
(Justice K.S.Rathore)
Member (J)

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