

Reserved
(On 23.08.2018)

CENTRAL ADMINISTRATIVE TRIBUNAL
ALLAHABAD BENCH
ALLAHABAD

Dated: This the **06th** day of **September** 2018

Hon'ble Mr. Gokul Chandra Pati, Member – A
Hon'ble Mr. Rakesh Sagar Jain, Member – J

Original Application No. 330/00656 of 2011

Umakant Jha, S/o Late Ram Autar Jha, R/o 96 Gangotri Havelia, Jhunsi, Allahabad, and at present serving as UDC in Ordnance Depot, Allahabad.

...Applicant
By Adv: Shri Swayambar Lal

V E R S U S

1. Union of India through Defence Secretary, Govt. of India, Ministry of Defence, South Block, New Delhi – 110011.
2. The Director General Ordnance Services (OS-8C), Army Headquarters, DHQ PO, New Delhi – 110011.
3. Officer Incharge, Army Ordnance Corps Records, A.O.C. Records Office, Secunderabad (A.P.).
4. Commandant, Ordnance Depot, Fort, Allahabad – 211005.

... Respondents
By Adv: Shri Himanshu Singh

Alongwith

Original Application No. 330/00545 of 2014

Umakant Jha, S/o Late Ram Autar Jha, R/o 96 Gangotri Havelia, Jhunsi, Allahabad, and at present serving as UDC in Ordnance Depot, Allahabad.

.....Applicant
By Adv: Shri Swayambar Lal

V E R S U S

1. Union of India through Defence Secretary, Govt. of India, Ministry of Defence, South Block, New Delhi – 110011.
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4. Commandant, Ordnance Depot, Fort, Allahabad – 211005.
5. Chief Controller of Defence Accounts (Pension) Draupadighat, Allahabad.

... Respondents

By Adv: Shri N.P. Shukla

O R D E R

By Hon'ble Mr. Gokul Chandra Pati, Member – A

The applicant has filed both the OAs. The OA No. 656/11 challenges the order dated 20.04.2011 by which the second ACP granted to him w.e.f. 05.01.2005 has been challenged and excess amount paid to the applicant is to be recovered. In OA No. 545/14, the applicant's relief is for release of his full retiral dues which have been withheld on account of recovery ordered from the applicant on account of cancellation of second ACP. Since both the cause of action in both the OAs are interlinked, both the OAs were heard together and disposed of by this order.

OA No. 656 of 2011

2. The applicant through this original application (in short OA) before the Tribunal has prayed for the following reliefs:-

- A. To Issue a Writ, Order or direction in the nature of certiorari to quash the Daily Order Part II No. 24/MACP/CLK/CA-6 dated 20 Apr 2011 passed by Respondent No. 3 and communicated by Respondent No. 4 vide letter dated 10 May 2011 (Annexure – A-1 to compilation No. 1).**
- B. To, Issue a Writ, order or direction in the nature of Mandamus directing the Respondents to restore applicant's pay and allowances as was being paid to him in the month of Apr 2011 and if any amount is recovered on account of such reduction of pay the same may be refunded to the applicant alongwith 18% p.a. interest from the date of recovered amount to the date of actual refund.**
- C. To Issue another writ, order or direction in favour of the applicant as deem fit and proper in the circumstances of the case.**
- D. Award the cost of application in favour of the applicant."**

3. The facts in brief are that the applicant was first appointed as a Labourer under the respondents w.e.f. 30.12.1971 and was selected for

the post of the LDC through trade test as per the Recruitment rules. He was appointed as LDC on 5.1.1981. When the scheme of Assured Career Progression Scheme (in short ACP) was launched by the Department of Personnel and Training (in short DOPT) vide the letter dated 9.8.1999 (Annexure A-3), the applicant was allowed first financial upgradation w.e.f 9.8.1999 since he had completed more than 12 years of service without promotion, raising his scale of pay to Rs.4000-6000.

4. Thereafter, the applicant was allowed second upgradation under ACP after he completed 24 years of service on 5.1.2005, counting from the initial date of appointment as LDC on 5.1.1981, raising his pay scale to Rs. 5000-8000. Then he was allowed the revised scale of pay (sixth pay commission) with grade pay of Rs. 4200/- w.e.f. 1.1.2006.

5. The grievance of the applicant is that vide order dated 20.4.2011 (Annexure A-1), the respondents, without issuing any show cause notice, withdrew the second ACP benefit given w.e.f. 5.1.2005, resulting in the reduction in the pay scale from Rs. 9300-34800 with grade pay of Rs. 4200/- to Rs. 5200-20200 with grade pay of Rs. 2800/- w.e.f. 1.1.2006. The applicant had submitted an appeal dated 13.5.2011 (Annexure A-6), stating that the reduction in pay without show cause notice was illegal and is against the principles of natural justice. It was also submitted that the applicant's cadre was changed to LDC w.e.f.5.1.1981 and hence, he was eligible for second ACP w.e.f. 5.1.2005, which was allowed correctly.

6. The main grounds in the OA are the following:-

- The applicant's date of first appointment as LDC be treated as 5.1.1981, which was the initial appointment as LDC. Hence, he was eligible for second ACP w.e.f. 5.1.2005, which was rightly granted.
- Reduction of pay and order for recovery are illegal as the same have been issued without any show cause notice, which also violated the principles of natural justice.

7. In the counter affidavit (in short CA), the respondents opposed the OA, mainly on the following grounds:-

- The applicant's appointment as LDC was against 10% departmental quota. Hence, it is a promotion from Labourer to the post of LDC. Hence, this will be counted as promotion, for which he will not be eligible for second upgradation under ACP.
- His date of appointment is to be treated from 30.12.1971, hence, he will be eligible for third MACP, which is granted to him with the pay band of Rs. 5200-20200 with the grade pay of Rs. 2800 w.e.f. 1.9.2008 vide order dated 18.9.2010.
- His second ACP benefit was granted wrongly, as the first promotion from labourer to the LDC.
- The recovery of the excess payment made to the applicant has been withheld due to the interim order of this Tribunal dated 23.5.2011.

8. We have heard the learned counsel for both the parties who broadly reiterated their respective stand in the Counter and considered the material on record. The main dispute is regarding eligibility of the applicant for the second ACP w.e.f. 5.1.2005, treating his first appointment date to be 5.1.1981 and whether withdrawal of such benefit by the respondents vide order dated 20.4.2011, was legally sustainable or not. Learned counsel for the applicant, at the time of hearing, also submitted copy of the judgments in following cases:-

- i. **(2015) 2 SCC (L&S) 33 – State of Punjab and others vs. Rafiq Masih (White Washer) and others.**
- ii. **2004 (1) ATJ 432 – B. Aboobhakar and Ors. vs. General Manager South Central Railway, Secunderabad & Ors.**
- iii. **2003 (3) ATJ 325 – Sri Kapil Devram Rampati Yadav vs. The Union of India and Ors.**

9. The respondents have submitted in the CA that the appointment of the applicant as LDC was a promotion from Labourer to LDC in the 10% departmental quota, for which a limited departmental competitive examination (in short LDCE). Hence, it was clearly not a direct recruitment. The appointment as LDC was clearly a promotion. Hence, on 9.8.1999, the date when the ACP Scheme was launched, the applicant

was eligible for second ACP w.e.f. 9.8.1999 as he had completed 24 years counting his service from the appointment as Labourer on regular basis.

10. Learned counsel for the applicant has filed written arguments, enclosing copy of three judgments as mentioned in para 8 above and reiterating the averments in the OA, stating that his appointment as LDC w.e.f. 5.1.1981 should be treated as first appointment.

11. In the case of Sri Kapil Devram Rampati Yadav (supra), cited by learned counsel for the applicant, the petitioner was recruited as Assistant Store Keeper from LDC under direct recruitment as mentioned in the order, which was not a recruitment through LDCE under 10% departmental promotion quota. Hence, the cited case is distinguishable.

12. We are unable to agree with the contentions of the applicant that his appointment as LDC should be treated as first appointment. As discussed at para 11 above, the facts of the case of Shri Kapil Devram Rampati (supra) are different. In this OA, the applicant was admittedly appointed under 10% promotion quota for Group 'D' through LDCE as contended by the respondents. No rule has been cited by the applicant to show that his appointment as LDC through 10% promotion quota be treated as first appointment.

13. The argument of issue of the applicant's counsel regarding the show cause notice does not have much force, as the order granting the second upgradation benefit w.e.f. 5.1.2005 to the applicant was not in accordance with the guidelines of the DOPT dated 9.8.1999 for ACP Scheme. Even if a show cause notice would have been issued, the decision would not have been different as the second ACP was not permissible. In the case of B. Aboobhakar (supra), cited by the learned counsel for the applicant, the pay scale at which the petitioner in that case was appointed was reduced on his transfer to another post. It was not the case where the higher pay scale was granted illegally against the rules/guidelines. Hence, issue of show cause notice and adhering to the principles of natural justice was required in the cited case. The facts in the present OA are different for which, the judgment cited will not apply to the present OA.

14. In the case of Rafiq Masih (supra), it is held by Hon'ble Apex Court that if a Class III or Class IV employee was granted a higher benefit due to a mistake of the employer/government, then the recovery due to excess payment from these employees will not be permissible. In this case, the applicant being a Class III employee was allowed the benefit of second ACP due to a mistake committed by the respondents for which the applicant was not responsible. Further, the applicant was very near to his retirement on 31.10.2013 when the second ACP was cancelled vide order dated 20.04.2011. Hence, the case of Rafiq Masih (supra) squarely covers his case and the applicant is also entitled to the similar relief in respect of recovery.

15. In this OA, vide order dated 23.5.2011, the respondents were directed not to initiate recovery in pursuance to the impugned order withdrawing the benefit of second ACP. However, as would be seen in the OA No. 545/14, the respondents have withheld the amount paid to the applicant towards second ACP from his retiral dues.

16. In the circumstances as discussed above, there is no justification to interfere with the order dated 10.05.2011 (Annexure A-1) by which the second ACP benefit granted to the applicant on completion of 24 years of service w.e.f. 05.01.2005 has been cancelled. In this case, the counter affidavit and also in the written argument filed by the learned counsel for the applicant, the MACP benefit has been already allowed to the applicant vide order dated 18.09.2010.

17. Taking into consideration the law laid down by Hon'ble Apex Court in the case of Rafiq Masih (supra) and the fact that the applicant is a Class III employee who had retired on 31.10.2013 and he had no role in erroneous grant of second ACP to him w.e.f. 05.01.2005, the respondents are directed not to effect any recovery on account of excess amount paid to the applicant on account of such erroneous grant of second ACP and the order dated 10.05.2011 shall be implemented from prospectively from the date of issue of the said order. It is made clear that the applicant is

not entitled to any other relief prayed for in the OA No. 656/2011. The OA No. 656/2011 is allowed partly as above.

OA No. 545 of 2014

18. In this OA, the applicant has prayed for the following reliefs:-

- A. To Issue, a Writ, order or direction in the nature of mandamus directing the Respondents to pay the Pension, Gratuity, Commutation, CGEIS and Leave encashment alongwith interest @ Rs. 18% p.a. from 1/11/2013 to the date of actual payment.***
- B. To Issue another writ, order or direction in favour of the applicant as deem fit and proper in the circumstances of the case.***
- C. Award the cost of application in favour of the applicant.”***

19. It is the case of the applicant that after his retirement the retiral dues have not been released in time. In the CA filed by the respondents on 09.09.2014 in this OA, it is stated in para 22 of the CA as under:-

- “22. That, the contents of paragraph no. 4.9 of the original application are not admitted. The final pension, gratuity GPF has been paid and Commutation is under process for payment before the PCDA (P) Allahabad. CGEGIS & Leave Encashment will be paid on receipt of NDC from PCDA (CC) Lucknow after withholding Rs. 2,05,547.00.***

20. In reply to para 22 of the CA, the applicant in para 24 of the RA have stated that the respondents have paid final pension and gratuity, GPF and commutation has also been released after sometimes. However, recovery of Rs. 2,05,547/- has been made from the leave encashment of the applicant inspite of the interim order passed in OA No. 656/11.

21. From the above it is clear that the only surviving claim in this OA relates to amount of Rs. 2,05,547/- withheld by the respondents on account of the amount paid to the applicant second ACP granted to him erroneously as mentioned in para 24 of the CA. Learned counsel for the applicant has filed written argument in this OA, confirming that Rs. 2,05,547/- has been withheld from his retiral benefits for which interest has also been claimed in the light of judgments in the case of Vijay L Mehhotra vs. State of U.P. and others – 2002 SCC (L&S) 278, copy of which is filed at Annexure A-5 to the OA.

22. Vide order passed in OA No. 656/11 in para 17 above, the respondents have been directed not to effect any recovery from the applicant on account of the order dated 20.04.2011 by which second ACP benefit granted erroneously to the applicant was cancelled. Hence, the withheld amount of Rs. 2,05,547/- is required to be released by the respondents as per para 17 of this order. In view of the interim order dated 20.04.2011, this amount should not have been withheld from the settlement dues of the applicant without leave of this Tribunal. Withholding this amount from the retirement benefit is, therefore, considered to be an illegal act for which the applicant is entitled to be compensated.

23. Accordingly, the respondents are directed to release this amount of Rs. 2,05,547/- to the applicant within a period of 04 months from the date of receipt of a certified copy of this order alongwith an interest at the rate of 8% per annum from the date three months after the date of the applicant's retirement till the date of actual payment of this amount to the applicant. In case it is not released within the time as stated above, the respondents will be liable to pay the interest at a penal rate of 12% per annum on the amount of Rs. 2,05,547/- from the date three months after retirement of the applicant till the date of actual payment to the applicant. Accordingly, the respondent No. 2 shall also pay the interest @ 12% per annum as above and in that case the respondents shall fix the responsibility for withholding of this amount from retirement benefits of the applicant inspite of an interim order and for payment of penal interest the officials dealing with this matter and found responsible for the lapse and take appropriate disciplinary action against them as per rules.

24. In view of the above, the OA No. 545/14 is allowed in terms of paragraph 23 above. The OA No. 656/11 is also partly allowed in terms of the paragraph 17 above.

25. Both the OAs are disposed of as above. There shall be no order as to costs.

(**Rakesh Sagar Jain**)
Member – J
/pc/.

(**Gokul Chandra Pati**)
Member – A