

(RESERVED ON 21.06.2018)

**CENTRAL ADMINISTRATIVE TRIBUNAL, ALLAHABAD BENCH
(CIRCUIT SITTING AT NAINITAL)**

This is the 16th day of **July 2018**.

Original Application No. 331/00429 OF 2017

HON'BLE MR JUSTICE DINESH GUPTA, MEMBER (J).
HON'BLE MR GOKUL CHANDRA PATI, MEMBER (A).

1. G.R. Painuly, aged about 59 years, S/o Late Sri Mahanand Painuly, R/o Jain Plot (Barud Factory), Gali No. 54, Vani Vihar, Raipur, Dehradun.

.....Applicant.

VERSUS

1. Union of India through Secretary, Ministry of Defence, New Delhi.
2. The Controller General of Defence Accounts, West Block-V, R.K. Puram, New Delhi-66.
3. The Principal Controller of Accounts (FYS) 10-A, Saheed Khushi Ram Bose, Kolkata-70001.
4. Director (Establishment), Government of India, Ministry of Personnel, Public Grievance and Pension (Department of Personnel & Training), New Delhi-110001.
5. Principal Controller of Defence Accounts (Air Force), 107, Rajpur Road, Dehradun -248001.
6. Controller of Finance & Accounts (FYS), Dehradun Group of Factories, Accounts Office, Opto Electronic Factory, Raipur, Dehradun.

.....Respondents

Advocate for the Applicant : Shri M.C. Pant
Shri D.S. Mehta
Shri Kishor Kumar

Advocate for the Respondents : Shri P K Rai

O R D E R

Delivered by Hon'ble Mr. Gokul Chandra Pati, Member (A)

The present Original Application (in short OA) has been filed by the applicant under Section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:-

"(a) *To issue order or direction to the respondent quashing the impugned communication dated 16.02.2017 (Annexure: 2) in league with orders dated 20.12.2016 (Annexure No. 1), 25.02.2010 (Annexure No. 25), 09.02.2015, 28.01.2015 and 29.08.2016 (Annexures No. 26 (Colly.) respectively) and all consequential orders including reducing the pay scale and any proposed recovery from the applicant after calling the entire records from the respondents along with its effect and operation and also and declare the same unconstitutional, arbitrary and nullity.*

- (b) *To issue order or direction commanding to the respondents to allow the benefit of ACP in the pay scale of Rs. 2400-7000 or Rs. 5500-9000 and to refix his pay along with all consequential benefits together with 18% interest and also to refund the amount salary which is illegally reduced for the month of March, 2017.*
- (c) *To award damages to the applicant in tune of Rs. 5 Lakhs on account of arbitrary and malicious act of the respondent no. 2 any direct to recover the same from the erring officers.*
- (d) *Any other relief which the court deemed fit and proper in the circumstances of the case."*

2. The brief facts of the case, as per the OA, are that the applicant was appointed as Field Assistant on 20.04.1982 in the Seema Suraksha Bal (in short SSB) under the Ministry of Home Affairs and later due to change of cadre, he became Lower Division Clerk (LDC) under SSB in the same scale of pay. The respondent No. 2 i.e. the Controller General of Defence Accounts (in short CGDA) invited applications by way of advertisement dated 17-23 May 2003 (Annexure No. 5 to the OA) for filling up the posts of Clerks in the Defence Accounts Department (in short DAD) under the Ministry of Defence in the pay scale of Rs. 3050-4590 from various offices on the basis of inter-departmental transfer and in pursuance to this, the applicant applied. Vide the order dated 15.04.2004 (Annexure No. 6 to the OA), the applicant was appointed as Clerk in the office of respondent No. 5 in DAD as a fresh entrant and thereafter, vide order dated 29.04.2004 (Annexure No. 7 to the OA), the applicant was relieved from SSB. Thereafter, the respondent no. 5 vide order dated 25.06.2004 (Annexure No. 9 to the OA), re-fixed his pay at Rs. 4350 in DAD in the same pay scale of Rs. 3050-4590 with effect from 05.05.2004 thus, protecting his pay. It is stated in the OA that the applicant was not given the benefit of the ACP by SSB even after completion of more than 12 years of service, although, it was due to him in the year 1999. When the benefit of ACP was given to his juniors in SSB, then, he preferred a representation dated 17.10.2006 to his parent department highlighting his grievances, which was forwarded by the respondent no. 5 vide letter dated 26.10.2006 (Annexure No. 10 to the OA). Thereafter, vide order dated 28.06.2007 (Annexure No. 11 to the OA), he was allowed the benefit of first financial upgradation under ACP retrospectively w.e.f., 09.08.1999 in the pay scale of Rs. 4000-100-6000 vide order dated 28.06.2007 issued by the SSB (Annexure No. 11 to the OA). Thereafter, another consequential order dated 14.08.2007 (Annexure No. 11 to the OA) was passed by the SSB and his pay was fixed by SSB in the pay scale of Rs. 4000-100-6000 with his basic pay at Rs. 4400/- as on 01.08.2003. On 08.10.2007, a second financial upgradation under ACP

scheme was granted to the applicant in DAD after completion of 24 years of service in the pay scale of Rs. 4500-125-7000 w.e.f., 20.04.2006 and accordingly, vide order dated 08.10.2007 (Annexure No. 12 to the OA), his pay was fixed after grant of second ACP in the pay scale of Rs. 4500-7000 with basic pay at 4675/- and by adding increments on 01.08.2007, his pay was shown to Rs. 5000/-. The applicant preferred a representation dated 02.01.2008 (Annexure No. 13 to the OA) to the respondent No. 5 with the request for grant of second financial upgradation under ACP Scheme in the pay scale of Rs. 5500-175-9000 (instead of Rs. 4500-7000) on completion of 24 years of service as the next promotional pay scale in DAD after second financial upgradation under the ACP Scheme is Rs. 5500-175-9000. The applicant submitted in this representation that in his parent department, he was getting the pay scale of Rs. 4000-100-6000 after being allowed first ACP benefit and in DAD, the pay scale of Rs. 4000 – 6000 was upgraded to Rs. 4500 – 7000 and in SSB, next higher grade to Rs. 4000 – 6000 was Rs. 5500 – 9000, not Rs. 4500-125-7000, which was granted to him after second ACP benefit in the DAD.

3. The respondent no. 5 wrote a letter dated 19.02.2008 (Annexure No. 14 to the OA) to the respondent no. 2 and requested to clarify whether the applicant was eligible for grant of second financial upgradation in the pay scale of Rs. 5500-175-9000 or not. In response to this letter, the respondent No. 2 vide his letter dated 07.03.2008 (Annexure No. 15 to the OA), informed that the second financial upgradation under ACP Scheme in the pay scale of Rs. 5500-175-9000 has been referred to the Ministry and as and when the decision is taken in this regard, the same will be intimated. It was also mentioned in the letter of CGDA (respondent No. 2) that the applicant was given pay scale of Rs. 4000-100-6000, whereas he had joined the department in the pay scale of Rs. 3050-4590 on his own accord with pay protection and it was not known how the pay scale of Rs. 4000-6000 was granted to the applicant. CGDA directed to re-examine the issue and to undertake necessary amendment. Thereafter, vide letter dated 22.04.2008 (Annexure No 16 to the OA), CGDA further informed that since the applicant had joined the lower pay scale of Rs. 3050-4590 after getting pay protection, he could not have been placed in the pay scale of Rs. 4000-6000 subsequently in DAD and directed for necessary amendment in pay fixation of the applicant.

4. Taking note of the letter dated 22.04.2008, the applicant preferred a representation dated 07.05.2008 (Annexure No. 17 to the OA) to respondent no. 4, which was duly forwarded by respondent No. 5 vide his forwarding letter dated 13.05.2008 (Annexure No. 17 to the OA) to the respondent No. 2 and the matter was referred to the Ministry. Thereafter, vide letter dated 10.06.2008 (Annexure No. 18 to the OA) the applicant again requested the respondent No. 5 not to amend his pay scale of Rs. 4000-6000 till the clarification is received from the Ministry. The respondent No. 2 vide letter dated 18.06.2008 (Annexure No. 19 to the OA) informed the respondent No. 5 about the clarifications by the Ministry of Defence (Finance) and referred the decision of the Ministry dated 08.02.2007 in which it was clarified that the respective inter departmental candidates are not eligible for the first financial upgradation in the hierarchy existing in Defence Accounts Department. Finally, it was mentioned that the inter departmental candidates (who joined DAD after completing twelve years in their erstwhile department and availing ACP in the scales which are lower than the scales in the hierarchy of our department) may be allowed financial upgradation under ACP in the scales as per the hierarchy in DAD.

5. Thereafter, the respondent No. 5 issued order dated 04.08.2008 (Annexure No. 20 to the OA) allowing the first ACP benefit with the pay scale of Rs. 4500-125-7000 w.e.f. 05.05.2004 when he joined the DAD and also allowed the second ACP benefit w.e.f. 20.04.2006 with the pay scale of Rs. 5500-175-9000 after completion of 24 years of regular service followed by the subsequent order dated 14.08.2008 (Annexure No. 20 to the OA) for fixation of his pay accordingly. The respondent No. 2 issued an order dated 18.01.2010 (Annexure No. 22 to the OA) as per the provisions of CCS (RP) Rules, 2008 for fixation of pay of the officers/staff in their respective bands and pay in the pay band of Rs. 8610/- with grade pay of Rs. 2400/- as on 01.01.2006 as shown in the pay band-II in the pay scale of Rs. 12810/-, based on the revision of pay w.e.f., 01.01.2006 corresponding to the pay scale of Rs. 4500-125-7000. Thereafter, the applicant was granted third financial upgradation under MACP Scheme vide order dated 12.06.2012 (Annexure No. 23 to the OA) and consequential order dated 20.07.2012 (Annexure No. 24 to the OA) and his pay was fixed after this benefit in the pay scale of Rs. 12550+4600 and

accordingly, the same was fixed to Rs. 13,580/- with grade pay of Rs. 4600/-.

6. Then vide order dated 09.02.2015 (Annexure No. 26 to the OA), without giving any opportunity of hearing to the applicant, the benefit of ACP allowed to the applicant as per the order dated 04.08.2008 was cancelled in the upgraded pay scale of Rs. 4500-7000 w.e.f., 05.05.2004 and Rs. 5500 – 9000 w.e.f. 20.04.2006 and his pay was re-fixed in the pay scale of Rs. 3050-4590 with pay protection of pay, on the basis of a speaking order dated 28.01.2015 (Annexure No. 26 to the OA). It was also mentioned in the aforesaid order that the over payment made to Sri Painuly may be kept on hold till the finalization of the OA No. 97-103/2014 pending before this Tribunal. After receiving the aforesaid orders, the applicant moved a representation dated 19.02.2015 (Annexure No. 27 to the OA) highlighting his grievances and mentioned that since he was not granted any promotion till the completion of 30 years of regular service, thus, he is fully entitled for upgradation under ACP/MACP and also mentioned that he is at the verge of retirement and the matter may be reconsidered. On 25.06.2015 (Annexure No. 29 to the OA), the respondents informed that the issue has been examined by the headquarters and the case is treated as closed. As the aforesaid order was never communicated to the applicant, the applicant sought information under the RTI Act on 30.06.2015 (Annexure No. 30 to the OA). In response, the PIO vide letter dated 10.07.2015 (Annexure No. 31 to the OA) supplied a copy of clarification. As per the para-X of the aforesaid clarification, if an individual has got 1st promotion/ACP and joined the office on inter departmental candidate as clerk before 31.08.2008, then the individual should not be entitled for first financial upgradation under ACP Scheme of August, 1999 as the individual has already availed the benefits of 1st promotion/ACP and the individual would be entitled for 2nd MACP on completion of 20 years of continuous service. Service rendered in previous department shall be counted alongwith the regular service in new organization for the purpose of MACP.

7. Thereafter, applicant vide his letter dated 23.07.2015 (Annexure No. 32 to the OA), represented to the grievance cell of the respondent No. 2 and mentioned that above clarification given by the DOP&T was not applicable to him and relied upon the earlier direction of the DOP&T on

18.07.2001. He further mentioned that one of his colleagues who is 10 years juniors to him, serving as clerk in the parent department along with the applicant and joined with the applicant in 2004 in the present department was granted first ACP w.e.f. 2004 in the pay scale of Rs. 4500-7000 on completion of 12 years of service. Thereafter the applicant again sent a letter dated 18.12.2015 (Annexure No. 34 to the OA) to the respondent No. 3 enclosing a copy of the order dated 04.02.2010 by which the benefit of ACP was granted to his juniors. The applicant again furnished a detailed representation dated 12.09.2016 (Annexure No. 39 to the OA) through proper channel, however, the same was returned back by him. The respondent No. 3 also issued the order on 20.12.2016 as well as dated 16.02.2017 refixing the pay scale of the applicant in accordance with the order dated 28.01.2015.

8. The respondents filed counter affidavit in which the facts were not disputed. It is stated that the applicant on his own accord, submitted representation for appointment as an inter department transferee in Defence Accounts Department for the post of Clerk on compassionate ground. Accordingly, on acceptance of technical resignation by his previous office he was appointed in this organization as Lower Division Clerk (LDC) on 05.05.2004 in the pay scale of 3050-4590 (pre revised). He had been provided with pay protection of the pay drawn allowing the benefit of earned financial upgradation under Assured Career Progression (ACP) Scheme by this department. He was granted first financial upgradation by his erstwhile department respectively under the ACP Scheme applicable w.e.f., 09.08.1999 in the next promotional hierarchy i.e., UDC in pay scale of Rs. 4000 - 6000 w.e.f., 09.08.1999. On the basis of guidelines of DOP&T, the headquarters had issued letter dated 18.06.2008, stating that the inter departmental transferee candidates who joined the defence account department after completion of 12 years service in their previous department and availing ACP in the pay scales which are lower than the scales in the hierarchy of defence accounts department, may be allowed first financial upgradation under ACP Scheme in the pay scale of 4500 - 7000 (pre revised) or 5500 - 9000 (pre revised) as the case may be, from the date of their joining in the defence accounts department. Therefore, the applicant was allowed the pay scale of Rs. 4500 - 7000 (pre revised) from his date of joining in DAD in accordance with provisions of aforesaid guidelines. However, by means of the communication dated

25.02.2010 issued by the headquarters, it was again clarified that if any individual after getting first promotion/first financial upgradation under ACP Scheme in his/her previous department, joined the defence accounts department as clerk before 31.08.2008, the individual would not be entitled for getting first financial upgradation under ACP Scheme as the individual has already availed benefits of first promotion/first financial upgradation under ACP Scheme. However, the individual would be entitled for second financial upgradation under MACP Scheme on completion of 20 years of continuous service.

9. It is further stated in the counter reply that since, the aforesaid clarifications dated 18.06.2008 and 25.05.2010 were contradictory, therefore, the matter was referred to the Ministry which in turn, in consultation with DOP&T, clarified that all such cases should be finalized as per criteria laid down in the circular dated 25.02.2010 issued by headquarters and the same was communicated vide communication dated 04.06.2012 issued by the headquarters' office. After careful consideration of the guidelines contained in the aforesaid orders, the competent authority i.e., the respondent No. 3 passed reasoned and speaking order dated 28.01.2015 directing that the pay scale of Rs. 4500-7000 (pre revised), as already provided to the applicant from 05.05.2004 should be withdrawn through notification of cancellation. Further, the applicant was to be placed again in the pay scale of Rs. 3050-4590 (pre revised), from his date of joining in the present department with protection of pay with the pay he was drawing in SSB. In the aforesaid order dated 28.01.2015 it was also directed to keep recovery of the over payment made to the applicant on hold till the finalization of the OA No. 97-103/2014 pending before CAT Bangalore Bench.

10. As stated in the counter reply, the aforesaid OA No. 97/14 was decided by this Tribunal vide order dated 16.01.2015, by which direction was issued to the department to recover excess payment made to all similarly situated persons. Accordingly, in compliance of the order dated 16.01.2015 passed by CAT Bangalore Bench, the headquarters' office issued an order dated 29.04.2016 directing to recover excess payment made to the applicant consequent upon grant of financial upgradation under ACP/MACP Scheme and further direction was issued to re-fix the pay scale of the applicant by fixing in the time scale with pay protection as per existing rules.

Thereafter, fresh Part-II office order for grant of ACP/MACP and promotion in respect of application was promulgated vide O.M. part -II officer order No. 1252 dated 29.08.2017 and on the basis of the aforesaid necessary re-fixation was done vide MO Part-II office order No. 310 dated 16.02.2017 for rectification of erroneous pay fixation and recovery of over payment.

11. Heard learned counsel for the applicant who reiterated the averments in the OA. He also submitted that the applicant is entitled to the relief as prayed for in the OA as per the existing rules applicable for grant of ACP as the ACP granted to the applicant has been cancelled illegally without giving any opportunity to the applicant of being heard. Hence, the impugned orders cancelling the benefits of ACP to the applicant violates the principles of natural justice. He also argued that as per the judgment of Hon'ble Supreme Court in the case of State of Punjab and other vs. Rafiq Masih reported in 2015 vol 4 SCC 334, the impugned order for recovery of the amount already paid to the applicant is not tenable. Learned counsel subsequently submitted a written synopsis with comparative chart of his pay fixation before and after the cancellation of the impugned order. Learned counsel for the applicant also submitted copy of the following judgments in support of his case:-

- i. ***Shri Venkatesh D Joshi vs. The Controller General of Defence Accounts and others - Original Application No. 97/14 - CAT Bangalore Bench.***
- ii. ***Sushil Kumar Singhal vs. Pramukh Sachiv Irrigation Department and others - (2014) 16 SCC 444***
- iii. ***Union of India & Anr. Vs. All India Postal Account Employees & Anr - Hon'ble Supreme Court in SLP (Civil) No. 4295 of 2014***

12. Heard learned counsel for the respondents who submitted that the re-fixation of pay of the applicant has been done by the respondents as per the clarification dated 04.06.2012 of the Ministry of Defence in consultation of the DOP&T clarified that the case of the applicant's pay should be fixed as per the circular dated 25.02.2010 (Annexure No. 25 of the OA). It was submitted that the competent authority has rightly re-fixed the pay of the applicant vide the impugned order dated 28.01.2015 (Annexure No. 26 of the OA) and the order dated 16.02.2017 (Annexure No. 2 of the OA) re-fixing the applicant's pay in the pay scale of Rs. 3050 - 4590 (pre revised) as on the date of appointment in DAD w.e.f. 05.05.2004

(instead of the scale Rs. 4500-7000 fixed earlier) and at the pay scale of Rs. 4500 – 7000 (pre revised) after second up-gradation under ACP (instead of the pay scale Rs. 5500-9000 fixed earlier).

13. We have considered the pleadings and submissions of the parties. Recollecting the undisputed facts, the applicant was first appointed in the SSB under the Ministry of Home Affairs on 20.04.1982 and then was posted on 05.05.2004 in the DAD on transfer from this parent department i.e. SSB. Vide order dated 15.04.2004 (Annexure No. 6 to the OA), the applicant was appointed as a clerk in DAD in the pay scale of Rs. 3050 – 4590 (pre revised) as a fresh employee. The counting of his past service was not allowed for the purpose of seniority in the DAD, but it was allowed for fixation of pay, pension and leave etc. Thereafter, the applicant was relieved from SSB vide order dated 19.04.2005 (Annexure No. 7 to the OA) and he joined in the DAD on 05.05.2004 in the office of respondent No. 5. After joining in DAD, the applicant submitted a representation dated 17.10.2006 to his previous employer i.e. SSB for grant of financial up-gradation under ACP Scheme on completion of 12 years of regular service in SSB where he was appointed as Field Assistant on 20.04.1982 (Annexure No. 10 to the OA). The said representation was considered and the SSB sanctioned the first financial up-gradation under ACP in favour of the applicant vide order dated 28.06.2007 (Annexure No. 11 to the OA), allowing the up-gradation of his pay scale to Rs. 4000 – 6000 (pre revised) w.e.f. 09.08.1999. Vide order dated 14.08.2007 (Annexure No. 11 to the OA) issued by SSB, the applicant's pay was re-fixed at a higher level till his transfer to DAD.

14. Thereafter, the applicant was allowed second financial up-gradation under ACP Scheme in DAD with effect from 20.04.2006 after completion of 24 years of regular service and his pay scale was upgraded to Rs. 4500 – 125 – 7000 vide order dated 08.10.2007 (Annexure No. 12 to the OA). The applicant objected to this fixation of pay scale after second upgradation under the ACP Scheme and submitted a representation dated 02.01.2008 (Annexure No. 13 to the OA) claiming the benefit after second upgradation under the ACP Scheme by stating as under:-

".....

(iv) *On recommendation of the screening committee held on 28.09.2007 at PCDA (AF) Dehradun I have granted second financial upgradation under ACP scheme in the pay scale of Rs. 4500 – 125 – 7000 vide Part II office order No. 516 dated*

08.10.2007 (photo copy attached). Whereas I were to be granted second financial upgradation under ACP scheme in the pay scale of Rs. 5500 - 175 - 9000 which is next higher from the scale of Rs. 4000 - 100 - 6000 in my parent department. But I have been granted second financial upgradation in the scale of pay Rs. 4500 - 125 - 7000 which is a corresponding scale of Rs. 4000 - 100 - 6000.

(v) *It is, therefore, requested that I may kindly be granted second financial upgradation in the scale of pay Rs. 5500 - 175 - 9000 on completion of 24 years of regular service. Being a low paid employee it will save me from a great financial loss, I shall remain grateful to you for this act of kindness."*

15. The matter was referred to the Ministry of Defence and the CGDA (Respondent No. 2) issued an order dated 22.04.2008 (Annexure No. 16 to the OA) stating that the applicant could not have been placed in the pay scale of Rs. 4000 - 6000 at the time of joining in the DAD as he had joined at the lower pay scale of Rs. 3050 - 4590. No reason or reference to any rules has been mentioned by the CGDA except that the applicant had given the option to be absorbed in DAD in pay scale of Rs. 3050 - 4590. CGDA directed that amendment may be carried out accordingly in fixation of pay of the applicant. The applicant in representation dated 07.05.2008 (Annexure No. 17 to the OA) requested for certain clarifications and stated as under:-

".....

11. *The CGDA, New Delhi has denied to accept my First Financial Upgradation granted to me by my erstwhile Department vide their letter No. AN/XI/11051/ACP/Corr. Vol.-XI dated 22.04.2008 (photocopy enclosed) stating that I am an Inter-Departmental Transferee.*

Hon'ble Sir, in the circumstances explained above, I am compelled to seek your clarification in the matter that I have completed 26 years of regular service under Govt. of India without any promotion: Kindly clarify:-

- (a) *Whether I am eligible for grant of two Financial Upgradation under ACPS or not?*
- (b) *If yes, in which scales of pay?*

I may also mention that the pay scale of Rs. 4000 - 6000 does not exist in the Accounts cadre of this Department, which has been upgraded to Rs. 4500 - 7000 w.e.f. 19.02.2003."

16. On this issue, the clarification was issued by the respondents vide letter dated 18.06.2008 (Annexure No. 19 to the OA) stating that the upgradation of pay scale under ACP Scheme will be allowed in the hierarchy in the new post as per the clarification issued by the DOP&T. Accordingly, the applicant was allowed first ACP in the pay scale of Rs. 4500 - 7000 as first ACP with effect from 05.05.2004 i.e. for the date of joining in the DAD and second ACP from 20.04.2006 after completion of 24 years of service in the pay scale of Rs. 5500 - 9000 vide order dated 04.08.2008 and dated

14.08.2008 (Annexure No. 20 to the OA). In these orders, the first up-gradation of pay scale allowed by the parent department of the applicant i.e. SSB to the pay scale of Rs. 4000-6000 with effect from 09.08.1999 was ignored and the benefit of up-gradation of pay scale under the ACP Scheme was allowed to the applicant as per the hierarchy of his post in DAD in line with the letter dated 18.06.2008.

17. Thereafter, the applicant was allowed the benefit of third up-gradation under MACP Scheme after completion of 30 years of service i.e. w.e.f. 20.04.2012 raising his grade pay from Rs. 4200/- to Rs. 4600/- per month vide order dated 20.7.2012 (Annexure No. 24 to the OA). In the meantime, based on another clarification issued by the respondent No. 2 vide letter dated 25.02.2010 (Annexure No. 2 to the OA), the Respondent No. 6 issued the order dated 28.01.2015 communicated by the order dated 09.02.2015 (Annexure No. 26 to the OA) stating inter-alia the following:-

“.....
WHEREAS, since the clarification issued dated 18.06.08 and dated 25.02.10 are contradictory, accordingly, the matter was referred to the Ministry and the Ministry in turn, in consultation with DOP&T has clarified that all such cases should be regularized as per criteria laid down in the HQs office circular dated 25.02.10 and the same was communicated vide HQs officer letter No. AN/XI/11051/MACP/2011/IDT dated 04.02.12.

And therefore, the undersigned after careful consideration of the guidelines contained in aforesaid orders on the issue has come to the considered conclusion that the pay scale of Rs. 4500 - 7000 (pre revised), as already provided to Shri Painuly from 05.05.04 i.e. the date of his appointment in this department, should be withdrawn through notification of cancellation Part II office order for withdrawal of extra benefit. Further, he would again be placed in the pay scale of Rs. 3050 - 4590 (pre revised) from his date of joining in this department with pay protection. However, the over payment made to Shri Painuly may be kept on hold till the finalization of the CAT case, pending in CAT Bangalore in OA No. 97-103/2014.”

18. Above decision was implemented vide order dated 16.02.2017 (Annexure No.2 to the OA) re-fixing the pay of the applicant after cancelling the earlier pay fixation vide order dated 04.08.2008 (Annexure No. 20 to the OA) fixing his pay in the pay scale of Rs. 4500 – 7000 on first up-gradation after joining in DAD and 5500 – 9000 on second up-gradation under the ACP Scheme and the applicant was allowed the following pay scales vide the impugned order at Annexure No. 2:-

- i. Pay scale of Rs. 3050 – 4590 with basic pay protected at Rs. 4315/- w.e.f. 05.05.2004 with pay protection of the applicant.

- ii. Pay as on 01.01.2006 under 6th CPC (revised scale) Rs. 8390 + GP of Rs. 1900/- in the revised pay scale of Rs. 5200 – 20200.
- iii. After grant of 2nd ACP with effect from 20.04.2006, the pay of Rs. 8390 + GP of Rs. 2800/- in the revised pay scale of Rs. 5200-20200.
- iv. Pay after grant of 3rd MACP w.e.f 20.04.2012 Rs. 10920 + GP 4200/-.

19. This order dated 16.02.2017 has been challenged by the applicant in this OA mainly on the following grounds:-

- i. The impugned orders have been passed without giving any opportunity of hearing to the applicant.
- ii. Juniors to the applicant have been allowed the benefit of up-gradation under ACP at higher pay scale i.e. the pay scale of Rs. 4500-7000 after first upgradation and pay scale of Rs. 5500-9000 after second upgradation under ACP, which have been denied to the applicant.
- iii. Impugned orders have been passed in utter disregard to the law laid down by Hon'ble Apex Court in the case of Abdul Rafiq Masih reported in 2017 Vol. 4 SCC 334.

20. Based on the pleadings and submissions of the learned counsels of the parties, the following issues are required to be considered and decided by us:-

- (i) Whether withdrawal of the benefit of pay scale of Rs. 4500 – 7000 with effect from 05.05.2004 allowed to the applicant on first ACP vide order dated 4.8.2008 (Annexure No. 20 to the OA) and re-fixing his pay in the pay scale of Rs. 3050-4590 with effect from 05.05.2004 with pay protection is correct.
- (ii) Whether withdrawal of second up-gradation benefit of ACP to the pay scale of Rs. 5500 – 9000 allowed to the applicant vide order dated 04.08.2008 is correct.

21. Regarding the issue (i) above, it is undisputed that the applicant has been allowed the first up-gradation of the ACP w.e.f. 09.08.1999 by his

previous employer i.e. SSB, vide order dated 28.06.2007 (Annexure No. 11 to the OA) upgrading his pay scale to Rs. 4000 – 6000 after submission of representation dated 17.10.2006 (Annexure No. 10 of the OA) of the applicant. This was allowed when the applicant was already transferred to DAD and it was not objected by the applicant, who accepted the same and the benefit of same pay scale was allowed to the applicant in the DAD from 05.05.2004 as stated in the representation dated 02.01.2008 (Annexure No. 13 to the OA), in which the applicant objected to granting of pay scale of Rs. 4500 – 7000 in second up-gradation on the ground that this pay scale is of the same level of the pay scale of Rs. 4000 – 6000 in the DAD. However, subsequently the respondents allowed the benefit of Rs. 4500 – 7000 w.e.f. 05.05.2004 vide order dated 04.08.2008 (Annexure No. 20 to the OA). As per the order dated 15.04.2004 appointing the applicant in DAD, it was stated that past service will be counted for the purpose of pay fixation, implying protection of pay for the applicant after transfer to DAD. In the representation dated 02.01.2008, the applicant did not claim the pay scale of Rs. 4500 – 7000 w.e.f. 05.05.2004, but claimed the benefit of second upgradation under ACP to the pay scale of Rs. 5500 – 9000 with effect from 20.04.2006. It is clear that the applicant did not object to the pay scale of Rs. 4000 – 6000 by SSB after the benefit of first ACP.

22. As per the guidelines of the Government for ACP Scheme, the applicant was not eligible for first up-gradation again in the DAD after availing the first up-gradation under ACP by his previous employer. The order dated 20.06.2007 of SSB granting first ACP to the pay scale of Rs. 4000 – 6000 w.e.f. 09.08.1999 (Annexure No.11) has not been challenged in this OA. Moreover, the first ACP to the applicant was sanctioned by the SSB on the basis of the applicant's representation dated 17.10.2006, which has been duly forwarded by the DAD authorities. Granting of the first ACP benefit to the applicant to the pay scale of Rs. 4000 – 6000 by the aforesaid order cannot be refused by the applicant now since it is not challenged in the OA. In other words, the applicant will be treated to be enjoying the pay scale of Rs. 4000 – 6000 with his pay as fixed by the SSB vide order dated 14.08.2007 (Annexure No. 11) at the time of joining DAD. Hence, after being allowed first ACP by SSB, the applicant's pay scale was rightly fixed by the respondents in the pay scale of Rs. 4000 – 6000 with pay protection w.e.f. 05.05.2004, which was wrongly enhanced subsequently to the pay scale of Rs. 4500 – 7000 by allowing first ACP to

the applicant again in the DAD, which is not permissible as per the government guidelines on ACP Scheme. Hence, the benefit of the pay scale of Rs. 4500 – 7000 on first upgradation under ACP w.e.f. 05.05.2004 has been rightly withdrawn by the respondents, but the applicant is entitled to the pay scale of Rs. 4000 – 6000 (pre revised) w.e.f 05.05.2004 with admissible increments as per the rules, which was allowed to the applicant by the SSB after being allowed the benefit of first ACP by SSB as this was the pay scale the applicant was deemed to be enjoying at the time of joining in the DAD and as per the order dated 15.04.2004 of the respondents appointing the applicant in DAD, benefit of past services will be allowed for pay fixation. In the pleadings or in the impugned orders, the respondents have not furnished any reason or cited any rules for not allowing the pay scale of Rs 4000-6000 to the applicant and fixing his pay scale of Rs. 3050 – 4590 w.e.f. 05.05.2004 after the benefit of first ACP was allowed to the applicant by his previous employer (i.e. SSB) with effect from 09.08.1999. Therefore, while withdrawal of the benefit of the pay scale of Rs. 4500-7000 w.e.f. 05.05.2004 is correct as the applicant was not eligible for first ACP in DAD again, but after approval of first ACP benefit to the applicant raising his pay scale to Rs. 4000-6000, he is entitled to the benefit of the same pay scale of Rs. 4000-6000 with pay protection (not the pay scale of Rs. 3050-4590 with pay protection as allowed to the applicant as per the impugned order) after joining in DAD with effect from 05.05.2004. The issue No. (i) in para 20 is answered accordingly.

23. Regarding the issue No. (ii) of para 20 relating to the pay scale admissible to the applicant on second upgradation under ACP, it is stated in para 4.12 of the OA that the pay scale of Rs. 4000 – 6000 does not exist in the DAD as the same has been upgraded to Rs. 4500 – 7000 w.e.f. 19.02.2003. This averment of the applicant in para 4.12 of the OA has not been contradicted by the respondents as would be seen from para 24 of the counter reply, which stated that the applicant's pay has been protected while fixing in the lower post of clerk in DAD at a lower pay scale he was actually drawing from his earlier department i.e. SSB. Hence, in absence of any contradiction of the averment in the para 4.12 of the OA, that the post carrying pay scale of Rs. 4000 – 6000 in the SSB under Ministry of Home Affairs is equivalent to the post carrying the pay scale of Rs. 4500 – 7000 in DAD after upgradation of pay scale in DAD w.e.f. 19.02.2003, the

pay scale of Rs 4500 – 7000 cannot be said to be the promotion post for the post carrying pay scale of Rs. 4000 – 6000, since these posts are similar or equivalent post after upgradation of the pay scale in the DAD as stated above. Under the ACP Scheme, the applicant is entitled for upgradation of pay scale in the next hierarchy of promotional post in DAD. Since after first upgradation under ACP by SSB, the applicant was enjoying the pay scale of Rs. 4000 – 6000 and this pay scale was equivalent to the pay of Rs. 4500 – 7000 in DAD after upgradation w.e.f. 19.02.2003 as stated above, it was incorrect in the part of the respondents to allow second upgradation benefit under ACP to the pay scale of Rs. 4500 – 7000 (pre revised) as the said pay scale cannot be said to be a promotional grade for the post with pay scale of Rs 4000 – 6000. Under the ACP, the pay scale for which the applicant is entitled for second upgradation under the ACP Scheme on completion of 24 years of service i.e. w.e.f. 20.04.2006, is the next promotional grade for the pay scale of Rs. 4000 - 6000 and this pay scale is not Rs. 4500-7000.

24. It is also seen from the order dated 02.08.2001 (Annexure 21 to the OA) enclosing the clarification of DOP&T on ACP Scheme that the financial upgradation under ACP shall be allowed in the hierarchy of the new post for the employees who have been transferred from one department to another. This provision has been reiterated in letter 18.06.2008 (Annexure No. 19 to the OA). Whereas, the letter dated 25.02.2010 (Annexure No. 25 to the OA) relates to second MACP after completion of 20 years if an employee on transfer had availed first ACP in previous department. This letter is not applicable for the applicant who had completed 20 years of service on 20.04.2002 when he was in service under SSB. This letter is not applicable for sanction of second ACP benefit after completion of 24 years of service, for which the relevant letter is the letter dated 18.06.2008 (Annexure No. 19 to the OA), according to which, the applicant shall be entitled for second upgradation to a pay scale which is applicable for the promotional post in the DAD for post carrying pay scale Rs. 4000 – 6000 or equivalent in SSB, for which the equivalent post in DAD is with pay scale of Rs. 4500-7000 after upgradation of pay scale in DAD w.e.f. 19.02.2003 as stated in para 4.12 of the OA which has not been specifically denied by the respondents. Hence, the applicant is entitled for pay scale of Rs. 5500 -9000 after second upgradation under ACP w.e.f. 20.04.2006 after completion of 24 years of regular service, which was

allowed to him vide order dated 04.08.2008 (Annexure No. 20 to the OA). Hence, fixation of his pay scale after second upgradation at pay scale Rs. 4500 -7000 as per the impugned order dated 16.02.2017 (Annexure No. 2) is not tenable with reference to the guidelines relating to the ACP Scheme. Hence, the issue No. (ii) of para 14 is answered accordingly in favour of the applicant.

25. Vide letter dated 25.02.2010 (Annexure No. 25), it has been clarified that if an employee has availed first promotion / ACP before joining in the Ministry of Defence before 31.08.2008, then he would not be entitled for first upgradation under ACP scheme. However, second MACP benefit on completion of 20 years of regular service would be available to the employee concerned. Applying this circular to the case of the applicant, he is not eligible for first ACP with the pay scale of Rs. 4500-7000 in DAD, as he had already availed first ACP benefit in his previous department raising his pay scale to Rs. 4000-6000 w.e.f. 09.08.1999. The MACP Scheme replacing the ACP scheme came into effect from 01.09.2008 and by that time, the applicant had already completed 24 years service on 20.04.2006, for which he was entitled for the benefit of second ACP w.e.f. 20.04.2006. As explained in the preceding paragraph, the applicant is entitled for the benefit of second ACP w.e.f. 20.04.2006 (after completion of 24 years of regular service) to the pay scale of Rs. 5500 – 9000 and his re-fixation of pay at the pay scale of Rs. 4500- 7000 w.e.f. 20.04.2006 is not sustainable under the guidelines of the Government for the ACP Scheme. Applicant is also entitled for the revised pay scale (6th CPC) equivalent to the pay of Rs. 5500 – 9000 (pre revised) w.e.f. 20.04.2006, since the revised pay scales under the sixth CPC were implemented w.e.f. 01.01.2006.

26. Learned counsels for both the parties have cited the judgment of Bangalore Bench of this Tribunal dated 16.01.2015 in OA No. 97/14. In that case before Bangalore Bench of this Tribunal, the applicant Shri Venkatesh D. Joshi had joined the DAD after availing two financial upgradation under ACP Scheme duly granted by the previous department in the pay scales of Rs. 4000 – 6000 and Rs. 4500 – 7000. After transfer of Shri Joshi to DAD on 01.10.2004, he was again granted first and second financial upgradation under ACP Scheme in the pay scales of Rs. 4500 – 7000 and Rs. 5500 – 9000 as per the hierarchy of the DAD. Subsequently this order allowing such benefit to Shri Joshi was cancelled by the respondents and this cancellation order was challenged in OA No. 97/14.

This Tribunal in the aforesaid OA did not accept the contention of the applicant and upheld the decision to withdraw the ACP benefit in the higher pay scale in DAD. However, the benefit of pay protection at the time of joining at DAD was allowed by this Tribunal in the said OA. The reasons for the decision of the Tribunal in OA No. 97/14 upholding the decision to disallow the ACP benefit in higher pay scales in DAD would also be applicable to this OA, where the applicant Shri G.R. Painuly was allowed the benefit of first ACP at higher pay scale of Rs. 4500 – 7000 after he had availed the first ACP benefit in the pay scale of Rs. 4000 – 6000 in the previous department. Hence, the benefit of first ACP in the DAD at higher pay scale would clearly not be admissible to Shri Painuly in accordance with the order dated 25.02.2010 and 18.06.2008 and the order dated 16.01.2015 of this Tribunal in OA No. 97/14. Since Shri Painuly did not avail the benefit of second ACP Scheme, such benefit would be available in the new department i.e. DAD as per hierarchy in the DAD. In this respect of availing second ACP, the facts of this OA are different from the facts of the OA No. 97/14.

27. Learned counsel for the applicant cited the judgment of Hon'ble Apex Court in the case of Union of India & Anr. Vs. All India Postal Account Employees & Anr (supra) by which the SLP was dismissed upholding the order dated 27.11.2013 of Hon'ble Delhi High Court. Hon'ble High Court vide order dated 27.11.2013 had upheld order of this Tribunal allowing stepping up of pay of the applicant and that the circumstances of this case are factually different from the present OA which pertains to question of allowing the benefit under first and second ACP for a transferred employee. Hence, the cited case is factually distinguishable. Moreover, the applicant in the present OA cannot get the benefit of stepping up of pay after comparison with his junior who was allowed higher benefit under ACP, since as per the guidelines, the pay fixed under ACP is personal and a senior employee cannot claim parity of pay on account of higher pay fixed under ACP for a junior employee. This ratio has also been reiterated in the order dated 16.01.2015 in the OA No. 97/14 by Bangalore Bench of this Tribunal.

28. Learned counsel for the applicant also cited the judgment of Hon'ble Apex Court in the case of Sushil Kumar Singhal (supra) in which the incorrect fixation of pay which was corrected by the respondents after retirement of the applicant. It was held by Hon'ble Apex Court that

refixation of pay and recovery in this case are not sustainable. This decision would not apply to the present OA where the impugned order was passed by the respondents withdrawing the benefit of ACP granted in DAD while the applicant was in service. Hence, the cited case is factually distinguishable.

29. In view of above discussions, we are of the considered view that the impugned orders dated 28.01.2015 (Annexure No. 26 to the OA) and dated 16.02.2017 (Annexure No. 2 to the OA) are not sustainable under law and hence, these orders are liable to be set aside and quashed. However, there is nothing wrong with the impugned order dated 25.02.2010 (Annexure No. 25 to the OA) which is issued based on the clarifications of DOP&T. Accordingly, the impugned orders dated 28.01.2015 (Annexure No. 26 to the OA) and dated 16.02.2017 (Annexure No. 2 to the OA) are set aside and quashed and the respondents are directed to allow the pay scale of Rs. 4000 – 6000 with protection of pay to the applicant w.e.f. 05.05.2004 i.e. the date of joining of the applicant in DAD and also allow the benefit of second upgradation of ACP Scheme to the applicant with pay scale of Rs. 5500 – 9000 (pre revised) with corresponding revised pay scale under 6th C.P.C. w.e.f 20.04.2006 on completion of 24 years of regular service of the applicant, which was sanctioned as per the order dated 04.08.2008 (Annexure No. 20 to the OA). The applicant is also entitled for the consequent benefit of third MACP w.e.f 20.04.2012 as well as the additional post retiral dues including revised pension as per the rules.

30. The OA is allowed as above. There is no order as to costs.

(GOKUL CHANDRA PATI)
MEMBER (A)

(JUSTICE DINESH GUPTA)
MEMBER (J)

/pc/