

**CENTRAL ADMINISTRATIVE TRIBUNAL
MADRAS BENCH**

OA/310/00609/2014 to OA/310/00613/2014

Dated the 28th day of September Two thousand Eighteen

P R E S E N T

**Hon'ble Mr. P.Madhavan , Member(J)
&
Hon'ble Mr.T. Jacob , Member(A)**

- | | |
|------------------|-----------------------------|
| 1. R.Sengottaian | .. Applicant in OA 609/2014 |
| 2. R.Susila | .. Applicant in OA 610/2014 |
| 3. N.Ayyavoo | .. Applicant in OA 611/2014 |
| 4. K.Kuppamuthu | .. Applicant in OA 612/2014 |
| 5. K.Sengottaian | .. Applicant in OA 613/2014 |

By Advocate M/s.R.Malaichamy

Vs.

- | | |
|---|---------------------------|
| 1. Union of India, rep by the
Chief Postmaster General,
Tamilnadu Circle, Anna Salai,
Chennai 600 002. | |
| 2. The Postmaster General,
Western Region(TN),
Coimbatore 641 002. | |
| 3. Superintendent of Post Offices,
Namakkal Division,
Namakkal 637 001. | .. Respondents in all OAs |

By Advocate Mr. M. Kishore Kumar

Reserved on :12.09.2018

Pronounced on : 28.09.2018

ORDER(OAs.609-613/2014)
(Pronounced by Hon'ble Mr.T.Jacob, Member(A))

The question for consideration is whether refusal of promotion prior to introduction of Financial Upgradation scheme would deprive an appropriate employee to the benefit of financial upgradation.

2. According to the applicants, they entered the services under the respondents department as Postal Assistants on various dates. In accordance with the rules relating to the Time Bound Promotions, they were granted TBOP (Time Bound One Time Promotion) and BCR (Biennial Cadre Review) financial upgradation on completion respectively of 16 years and 26 years of service. Thereafter, the applicants were offered Lower Selection Grade (LSG) as under :

Sl No.	Name	Year of offering LSG and response thereto
1	R.Sengottaian	2008(Declined)
2	R.Susila	2007(Declined)
3	N.Ayyavoo	2007(Declined)
4	K.Kuppamuthu	2008(Declined)
5	K.Sengottaian	2007(Declined)

3. The Government has introduced the Modified Assured Career Progression (MACP) Scheme effective from 1.9.2008 as per which 3rd financial upgradation is admissible on completion of 30 years of service subject to certain conditions. Since the applicants had declined the promotion, the respondents denied to them the said financial upgradation under MACP.

4. All the applicants on attaining the age of superannuation retired. The applicants made representations to the respondents for grant of 3rd MACP benefit since they had completed 30 years of service in the years 2004, 2003, 2002, 2005, 2002 respectively. But the request of the applicants were rejected by order dt. 12.11.2013 on the ground that they declined LSG. Hence, they had moved this Tribunal claiming financial upgradation under the MACP scheme w.e.f 1.9.2008 as declining of promotion (LSG) cannot disentitle them to enjoy the benefit of MACP w.e.f 1.9.2008 as all of them had completed 30 years of service by that date. The relief sought is as under:

"(1) To call for the records of the 3rd respondent pertaining to his order which is made in No.B1/MACP/Dlgs dated 12.11.2013, respectively and set aside the same, consequent to,

(2) direct the respondents to grant 3rd MACP benefits and further direct to pay the difference of arrears of pay and allowances to the applicant on account of granting the 3rd MACP benefits to him."

5. The respondents contest the claim of the applicants on the ground that the applicants got two financial upgradations, the 1st one TBOP on completion of 16 years of service and the 2nd one BCR on completion of 26 years of service and since these two financial upgradations covered the two MACPs in the new scheme effective from 1.9.2008, they were entitled to get the 3rd MACP after completion of total continuous service of 30 years from the initial appointment date but they became ineligible for the same as promotion offered to them had been declined.

6. Learned counsel for the applicants would contend that the applicants had completed 30 years of service in the year 2002/2003/2004/2005 itself and hence

the applicants are eligible for grant of 3rd MACP benefit. Their declining of promotion in the years 2007 & 2008 cannot be a ground for rejection of their claim for 3rd MACP benefit. At the time of offering of LSG promotion, they were drawing higher pay in the scale of Rs.9300-34800 with GP Rs.4200 whereas, the pay scale for LSG promotional posts was Rs.5200-20200/- with GP Rs.2800/-. Therefore, declining of LSG promotion is of no relevance to the MACP Scheme. Further, he would contend that declining of promotion would operate only for one year or till arise of next vacancy in the cadre, whichever is later. Since the MACP came to be implemented on 19.5.2009 with retrospective effect from 1.9.2008, the ban imposed in the said scheme should be applicable only to the officials who declined their LSG promotion on or after 19.5.2009. It is also submitted that similar issues have been dealt with by this Tribunal in various OAs which were allowed.

7. Learned counsel for the respondents reiterated the contents as contained in the counter filed by the respondents.

8. Arguments were heard and documents perused.

9. It is not in dispute that the applicants have completed 30 years of service in the years well before 1.9.2008 and thus the eligibility condition of completion of 30 years has been fulfilled by them. The sole ground of rejection of their claim for the grant of financial benefit under 3rd MACP is that they had earlier declined their promotion to LSG and MACPs are granted only where there was no promotional prospect for a prescribed number of years. Admittedly, there was no inquiry on

1.9.2008 pending or contemplated. As on dates of the applicants declining the LSG promotion in the years 2007 and 2008 the MACP scheme was not in force as it came into effect from 1.9.2008. The applicants did not decline promotion after MACP Scheme came into effect and, therefore, refusal of promotion posts cannot be a ground for denying the benefit under MACP Scheme. Even if their refusal was considered it would be a debarment of one year and after completion of debarment period, they would be entitled to claim benefits under the MACP scheme.

10. Further, in terms of para 25 of Annexure I to the letter of the Department of Posts No.4-7/(MACPS)/2009-PCC dated 18.9.2009 as extracted in Annexure R-7 Communication referred to in the reply, in the event of refusal of promotion, upgradation already granted shall not be withdrawn. It can only act as a bar to further upgradation till the employee agrees for promotion. However, in this case there is no further upgradation to be granted after 2002/2003/2004/2005 and the refusal of promotion in 2007 & 2008 cannot come in the way of what was due earlier.

11. The issue whether an employee who has refused promotion prior to the implementation of MACP Scheme is entitled for benefit under the scheme came up for consideration before the Bombay Bench of Central Administrative Tribunal in OA 91/2011. It has been held that refusal of promotion when there is no expectation of some beneficial order and denial of benefit because of refusal of promotion cannot be justified. For better appreciation we may refer to para 8 of the order passed by the Bombay Bench of the Central Administrative Tribunal dt.

05.08.2013 in OA 91/2011 and it is thus:-

"8. The learned counsel for the applicant heavily relied on the judgment of Bombay Bench of the Tribunal. The learned counsel has annexed Swamy's News of July 2008 to the Rejoinder, wherein the judgment of the Bombay Bench passed in OA 129/2003 has been discussed. It appears from the said Annexure that the Bombay Bench of the CAT held that "if an employee has refused the promotion before the enforcement of the ACP Scheme, the facts would remain that he has actually not been given any financial upgradation which he could have been by a regular promotion. He remains on the scale of pay still stagnated." In view of the clear observation of the CAT Bench of the Bombay, the respondents clarification cannot be accepted. The Ernakulam Bench of this Tribunal in OA No. 768 of 2005 considered Condition No. 10 of the Scheme and held that "Condition No. 10 makes it amply clear that if an employee is accepting ACP benefit, he is deemed to have given unqualified acceptance for regular promotion on occurrence of vacancy subsequently". That precludes factoring of past refusals while giving ACP benefit. In that view, the refusal of an employee for regular promotion earlier to 09.08.1999 has no effect in the grant of promotion under ACP Scheme. The Bench subsequently considered clarification given by the DOPT under clarification of Doubt No. 38. It has been held by the Bench that the refusals were all made by the applicant at such a time when there was no anticipation of the intended benefits under the ACP Scheme. The refusals should have had their injurious effect on the applicant on both the occasions, though it was all self invited by the applicant himself. But one they have been suffered, allowing them to continue in future also would amount to punish them for the second time. The employee is not aware of the ACP Scheme when he refused promotion earlier to the introduction of ACP Scheme. The decisions of the Mumbai, Ernakulam Bench of the Tribunal and the High Court of Bombay state that when promotions were declined, there was no ACP Scheme and also there was no offer of promotion on 09.08.1999. In view of the above decisions, the eligibility for benefits under the ACP Scheme has to be reckoned on the actual date namely 09.08.1999. The applicants refused regular promotion earlier to 09.08.1999 is not sustainable. Hence, a direction was given to respondents to grant the applicants benefit under the ACP Scheme irrespective of the fact of their refusal of promotion earlier to 09.08.1999. Six weeks' time was given for implementation of the order."

In addition to the above, in yet another case, the Ernakulam Bench on OA 499/2010 dt. 26.3.2012 had considered the issue and held as under:

"5. The crux of the issue in this O.A is whether the refusal of promotion by the applicant in the year 1997 prior to the notification of the ACP Scheme on 09.08.1999 is a bar to his getting the 1st financial upgradation under the said scheme with effect from 03.07.1992 or not. The ACP Scheme was introduced on 09.08.1999 by the Government of India to mitigate the suffering of the employees due to lack of promotional avenues. The 1st financial upgradation was to be granted on completion of 12 years service to those employees who though eligible for promotion, did not get promotion during the period of 12 years. The applicant was eligible to get the 1st financial upgradation with effect from 03.07.1992 and the same was granted to him vide Annexure A-1 order 08.03.2000. However, it was withdrawn subsequently on the ground that the

applicant had declined vacancy based promotion in August, 1997. The applicant had become eligible for the 1st financial upgradation on completion of 12 years from 1980 to 1992 without any promotion. The respondents have no case that he was offered promotion during the period from 1980 to 1992. He was offered promotion only in 1997, i.e. 5 years after his becoming eligible for the 1st financial upgradation which he declined. The refusal of the promotion after 1992 can impact adversely his eligibility for the 2nd financial upgradation in 2004 only. The relevant part of Para 10 of the Annexure to ACP Scheme is extracted as under:

"10. Grant of higher pay scale under the ACP Scheme shall be conditional to the fact that an employee, while accepting the said benefit, shall be deemed to have given his unqualified acceptance for regular promotion on occurrence of vacancy subsequently....."

(emphasis supplied)

6. An employee has to first accept the financial upgradation on completion of 12 years of regular service without promotion. His acceptance of the financial upgradation is deemed to be his unqualified acceptance for regular promotion on occurrence of vacancy subsequent to availment of the financial upgradation. In the present case, the refusal of the applicant to accept promotion on occurrence of vacancy subsequent to availment of the 1st financial upgradation with effect from 03.07.1992 can affect his eligibility for the 2nd financial upgradation only on completion of 24 years. As per the provisions of the ACP Scheme, the refusal of promotion subsequent to availment of financial upgradation can affect his 2nd financial upgradation only.

There is no provision in the scheme to withdraw the 1st financial upgradation granted to the applicant. When regular promotion is refused, the penalty is debarment from promotion for one year only. The period of debarment will not count for the 2nd financial upgradation. On upgradation under the ACP Scheme, the financial benefit allowed is final. Therefore, the forfeiture of the 1st financial upgradation granted to the applicant with effect from 03.07.1992 is illegal. In the result, the O.A. succeeds."

11.1. The Ernakulam Bench had in OA No. 947 of 2010 decided on 01-08-2012 had referred to a decision of this Bench in OA. No. 1158 of 2009. The relevant part of the order dated 24.09.2010 in the aforesaid O.A No. 1158 of 2009 is extracted as under:

"6. It is seen that the said issue has already been discussed by this Tribunal in detail in the O.A. 162 of 2007 filed by one P.C. Revathy and Others (to which one of us was a party). This Tribunal after taking into consideration the Mumbai and Ernakulam Bench of this Tribunal and also the Hon'ble High Court of Mumbai came out the following flow:

When the promotions were declined there was no ACP Scheme envisaged at all, b. There was no offer of promotion when the Scheme came into being on 09.08.1999.

In the above decisions, it was held that the past refusals of promotion should not be held against the future grant of ACP benefits. The refusals were all made by the applicants at such a time when there was no anticipation of the intended benefits under the ACP Scheme. Ultimately, the Tribunal agreed with the ratio of the above decisions and held in the O.A. 162 of 2007 to the following effect :

"For all these reasons, the respondents' stand, which they are now trying to reverse in their reply to this O.A, namely that applicants' declining promotion earlier to implementation of the ACP Scheme viz., 9.8.1999 will have impact cannot be sustained and the grant of the first ACP as on 9.8.1999 is legally sound and in accordance with the ACP which became effective from 9.8.1999, subject to their fulfilling other conditions for grant of ACP, without taking into consideration their declining prior to the introduction of the scheme namely 9.8.1999 and any benefit flowing thereafter after the grant of such first ACP with effect from 9.8.1999 will be conditioned by all other stipulations of the ACP Scheme and issue necessary orders to that effect within a period of six weeks from the date of receipt of a copy of this order."

Further, we have also seen that the order passed by this Tribunal in O.A. 162 of 2007 has been upheld by the Hon'ble High Court in W.P. No. 35 of 2008 and finally confirmed in S.L.P. No. 21475 of 2008 by the Hon'ble Supreme Court.

7. In the said circumstances, we are of the view that the case of the present applicants are also covered by the decision rendered by this Tribunal in O.A. 162 of 2007 which has attained a finality by the judgement of the Hon'ble Supreme Court in 21475 of 2008. Accordingly, the respondents are directed to consider and grant the first financial upgradation under the ACP Scheme to the applicants as on 9.8.1999, subject to their fulfilling other conditions for grant of the said benefit, without taking into consideration their declining promotion prior to the introduction of the ACP Scheme and any benefit flowing thereafter after the grant of such first ACP with effect from 9.8.1999 will be conditioned by all other stipulations of the ACP Scheme and issue necessary orders to that effect within a period of six weeks from the date of receipt of a copy of this order.

8. With the above directions, the O.A. is allowed. No order as to costs."

12. Thus as on the date of refusal of promotion by the applicants, MACP Scheme was not conceived. MACP Scheme came into effect from 01.09.2008. The applicants did not deny promotion after the scheme was conceived. Their denial of offer of promotion when there was no expectation of MACP cannot be a ground to deny the benefit under the scheme. We totally agree with the view expressed by

the Bombay Bench in the above referred case. In a similar case of UoI Vs S.Thangavel (Diary No. 1662/2018) the Hon'ble Supreme Court dismissed the SLP on merits and thus the decision of Madras High Court in WP 16/2014 reached finality wherein the Hon'ble High Court had held that the petitioner was entitled to get all benefits claimed by him.

13. The issue is no longer res integra as the entitlement to the financial upgradation has been crystalised by the Mumbai Bench as also Ernakulam Bench and further this Bench of the Tribunal has also dealt with the such issue and confirmed the same. Hence, the OA deserves to be allowed.

14. In such view of the matter, the order of the 3rd respondent dated 12.11.2013 is liable to be set aside. We order accordingly. It is declared that the applicants are entitled to the grant of 3rd MACP w.e.f 1.9.2008 or the date they completed 30 years of service whichever is later. The respondents are directed to grant 3rd MACP benefits to the applicants, if they are otherwise eligible and pay consequential difference of arrears of pay and allowances to the applicants on account of granting the 3rd MACP benefits to them. The OA is allowed accordingly. No costs.

(T.Jacob)
Member(A)

(P.Madhavan)
Member(J)

28.09.2018

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