

**IN THE CENTRAL ADMINISTRATIVE TRIBUNAL
HYDERABAD BENCH : HYDERABAD**

Original Application No.021/1278/2015

Date of C.A.V. : 01.11.2017

Date of Order : 29.01.2018

Between :

C.A.Vijay Kumar, S/o Late C.Appa Rao,
Aged about 63 years, Occ : Retd Data Entry Operator,
Office of the Director of Census Operations,
Kendriya Sadan, Koti, Hyderabad, Telangana.

... Applicant

And

1. Office of the Director of Census Operations,
Kendriya Sadan, Koti,
Hyderabad, Telangana.

2. The Joint Director,
O/o the Director of Census Operations,
Kendriya Sadan, Koti,
Hyderabad, Telangana.

3. Asst. Director,
O/o the Director of Census Operations,
Kendriya Sadan, Koti, Hyderabad, Telangana.

4. Asst. Director,
O/o the Director of Census Operations,
Kendriya Sadan, Koti,
Hyderabad, Telangana.

5. Statistical Asst. Gr II,
O/o the Director of Census Operations,
Kendriya Sadan, Koti,
Hyderabad, Telangana.

... Respondents

Counsel for the Applicant	...	Mr.G.Pavana Murthy, Advocate
Counsel for the Respondents	...	Mr.V.Vinod Kumar, Sr.CGSC

CORAM:

Hon'ble Mr.Justice R.Kantha Rao ... Member (Judl.)
Hon'ble Mrs.Minnie Mathew ... Member (Admn.)

ORDER

{ As per Hon'ble Mr.Justice R.Kantha Rao, Member (Judl.) }

The brief facts of the case as stated by the applicant are that he was appointed as Data Entry Operator in 1993 and retired as Data Entry Operator Gr.'B'. He filed the OA for a direction to the respondents to grant 2nd MACP w.e.f. 01.09.2008 along with others. He filed the OA with a delay of 1080 days and also a separate application i.e. M.A.No.441/2015 to condone the delay. On going through the rival contentions as regards the delay in filing the OA, condoned the same and allowed M.A.No.441/2015 by order dated 22.09.2015.

2. The grievance of the applicant is that the below bench mark gradings recorded in his ACRs for the years 2002-03, 2003-04, 2004-05, 2005-06, 2006-07 and 2007-08 were only communicated to him belatedly vide DCO, AP Memo No.A.28017/1/2010-Estt, dated 30.04.2012 and the said entries cannot be taken into consideration for denying the 2nd MACP as they were not communicated to him at appropriate time calling for his remarks. Therefore, he sought to quash the memo dated 30.04.2012 and also the memo dated 21.03.2013 and to grant him the 2nd ACP from the date on which it had actually become due. Admittedly the below bench mark gradings recorded in the ACRs for the aforementioned years

were communicated to the individual by memo dated 30.04.2012 giving him an opportunity to submit his representation, if any. The applicant submitted his representation dated 15.05.2012 against the said memo.

3. The contention of the respondents is that in the ACRs for the above mentioned years the applicant was given the grading of "Average" by the concerned reporting / reviewing officer, since the grading of "Average" was not an adverse remark, they were not communicated to the applicant at appropriate time. Therefore, the respondents admit the fact that the grading "Average" was not communicated to the applicant during the relevant periods mentioned above, but were only communicated vide memo dated 30.04.2012.

5. It is submitted by the respondents that the minimum bench mark for promotion/MACP to the next post/higher grade in respect of the applicant is "Good". The grading "Average" achieved by the applicant was considered as below bench mark and therefore the grant of MACP was differed in case of the applicant and also some others. They also submit that the applicant retired from service on 30.06.2012 and after a lapse of 2 years 9 months, he cannot file the present OA, seeking direction to the respondents to grant the MACP. They submit that on introduction of ACP Scheme w.e.f. 09.08.1999 to the Central Government employees, the case of the applicant for grant of first financial upgradation was considered along with all other eligible employees of Directorate. He was not granted the first financial upgradation w.e.f. 09.08.1999 as the Departmental Screening Committee did not recommend his name for such benefit from the said date. However, the DPC which met on 24.10.2000 has again considered his case

and recommended his name for grant of 1st financial upgradation under ACP w.e.f. 24.10.2000 along with some others. Thus there was a deferment period of 1 year 2 months and 14 days in granting 1st ACP to him.

6. Nextly it is contended that the Government of India introduced MACP Scheme in place of ACP Scheme effective from 01.09.2008. Consequent on merger of the posts in the pre revised pay scales of Rs.5000-8000, 5500-9000 w.e.f. 01.01.2006, the department has taken up the issue of granting 2nd MACP to all eligible employees w.e.f. 01.09.2008. The case of the applicant was considered by the Departmental Screening Committee for grant of 2nd financial upgradation under MACP Scheme to the Grade Pay of Rs.4600/- w.e.f. 01.09.2008 along with other similarly placed employees i.e. in whose case there was a deferment of 1 year 2 months and 14 days in granting 1st ACP benefit. But the applicant was not granted 2nd MACP with effect from the said date i.e. from 01.09.2008 along with others. The Registrar General of India vide letter dated 15.10.2012 informed that the proposal for grant of 2nd MACP in respect of the applicant was considered by the Screening Committee constituted as per the provisions of the MACP Scheme. The applicant was not found fit for grant of the 2nd MACP till 30.06.2012, his case shall be considered for 2nd MACP in 2013. Since the applicant retired from service on 30.06.2012 on attaining the age of superannuation, his case for grant of 2nd MACP was not considered further. Contending as above the respondents sought to dismiss the OA.

7. Being aggrieved by the order of the respondents dated 30.04.2012 and 21.03.2013 in connection with below bench mark ACRs and for grant of 2nd

MACP benefit the applicant approached this Tribunal by filing the present OA in person. The Tribunal following the judgement of the Hon'ble Supreme Court in ***Dev Dutt Vs. Union of India and others (2008) 8 SCC 725 and Sukhdev Singh Vs. Union of India and others (2013) 9 SCC 566***, took the view that even the grading "Average" shall be communicated to the applicant at appropriate time and as the same gradings of "Average" were not communicated to the applicant at appropriate time so as to enable him to offer his objections or to improve his performance during the relevant period, and the remarks were communicated to him in the year 2012, deprived him of the opportunity of making the representation against the adverse entries at appropriate time and therefore they cannot be taken into consideration by the authorities to defer the MACP to the applicant to a future date. The Tribunal also followed the order passed in OA. 1067/2014 which came up for consideration on identical facts. Ultimately the Tribunal by order dated 03.03.2016 quashed and set aside the Memo No. 28017/1/2010-Estt. Dated 30.04.2012 and Memo No.32/23/2009-Estt. Dated 21.03.2013. In consequence thereof directed the respondents to grant 2nd MACP to the applicant from the date of his entitlement, besides pro-rata increase in pension and release of resultant arrears within two months from the date of receipt of a copy of the order.

8. Against the order passed in OA.1278/2015 dated 03.03.2016, the respondents filed W.P.No.36231/2016 before the Hon'ble High Court of Judicature at Hyderabad for the State of Telangana and the State of Andhra Pradesh. The Division Bench of the Hon'ble High Court disposed of the Writ

Petition by an order dated 20.06.2017. The Division Bench took the view that the Tribunal disposed of the OA.1278/2015 relying on the order passed by the Tribunal in OA.1067/2014 dated 31.08.2015. The said order was also challenged by the respondents in W.P.No.1612/2016 and the Division Bench allowed the Writ Petition quashing the order passed in OA.1067/2014 and therefore reliance placed by the Tribunal on the aforesaid OA is contrary to the order passed by the Division Bench of the Hon'ble High Court in W.P.1612/2016. Arriving at the said conclusion the Division Bench in W.P.36231/2016 quashed the order dated 03.03.2016 passed by this Tribunal in the present OA. The Division Bench of the Hon'ble High Court though set aside the order dated 03.03.2016 passed by this Tribunal, remitted the matter back to the Tribunal with a direction to decide the matter afresh on merits, after giving opportunity of hearing to both parties. Thus the present OA is again before us.

9. The Division Bench did not go into the merits of the case and advertent to the submissions made by the learned counsel appearing for the applicant to remand the matter to the Tribunal for fresh disposal on merits which was unopposed by the counsel appearing for the respondents (the petitioners in the Writ Petition), remitted the matter back to the Tribunal and specifically directed that the Tribunal shall decide the matter afresh on merits after giving opportunity of hearing to both parties. Therefore, the Division Bench while disposing of the Writ Petition No.36231/2016 was obviously of the view that notwithstanding the judgement rendered by the other Division Bench in Writ Petition No.1612/2016 the matter requires fresh consideration.

10. The respondents however in the written arguments filed before the Tribunal contended that the Division Bench in the Writ Petition No.36231/2016 observed that the present OA filed by the applicant was allowed by the Tribunal saying that the issue involved in this case is purely covered by the order dated 31.08.2015 passed in OA.1067/2014 and therefore set aside the order dated 03.03.2016 passed in the present OA. It is further contended that against the order passed in W.P.1612/2016 the respondents therein filed an SLP before the Hon'ble Supreme Court, the Hon'ble Supreme Court dismissed the SLP and therefore the identical issue involved in the instant case has finally been adjudicated and it cannot be reconsidered in the present OA.

11. We do not exceed to the contentions raised by the learned standing counsel for the respondents. Though the issue is identical in both the cases, the facts or the delay and laches are not one and the same in both the cases. Therefore, the Division Bench of the Hon'ble High Court specifically directed this Tribunal to decide the case afresh on merits.

12. In the other case Division Bench of the Hon'ble High Court allowed the Writ Petition No. 1612/2016 by setting aside the order passed by this Tribunal mainly on the ground of delay and laches. The Division Bench observed that from 24.10.2000, the respondents 1 to 5 waited for nearly 14 years without taking recourse to legal remedies and also that the Tribunal did not even look into the question of delay and laches on the part of the respondents in seeking the relief.

It is further observed that the Original Application ought to have been dismissed even on the ground of long delay of 14 years. Therefore, the main ground of setting aside the order of the Tribunal while allowing the Writ Petition is delay and laches on the part of the respondents therein.

13. The Division Bench also observed that the very contention of the Union of India before the Tribunal was that the Departmental Screening Committee did not find the respondents fit for the grant of 1st financial upgradation from 09.08.1999. Unless the Tribunal had called for the records of Departmental Screening Committee and examined the same, the Tribunal could not have reached the conclusion that there were uncommunicated adverse remarks as against the respondents 1 to 5 leading to the non-grant of 1st financial upgradation to them.

14. Turning to the facts of the case on hand, they are entirely different. The present OA is filed along with an application to condone the delay of 1080 days. The period of delay is not disputed by the respondents. The Tribunal condoned the delay and registered the OA under sub-section 3 of Section 21 of Administrative Tribunals Act finding sufficient cause for not making the application within the prescribed period. The other important aspect in the instant case is that there is no dispute about inordinate delay on the part of the respondents in communicating adverse remarks to the applicant. Admittedly the adverse remarks in the ACRs for the years 2002-03 to 2007-08 were communicated to the applicant on 30.04.2012 i.e. just 2 months before his retirement. Subsequently the applicant's representation dated 15.05.2012 against the memo dated

30.04.2012 was disposed of by the competent authority vide memo dated 16.07.2012 stating that no intervention is required in the matter. After his retirement the applicant submitted another representation dated 08.02.2013 to the DCO, AP, Hyderabad for granting 2nd MACP. The said representation was disposed of vide memo dated 21.03.2013 conveying him the position stated by the Registrar General of India in their letter dated 15.10.2012. In the instant case the applicant has been pursuing the matter constantly and though there is some delay in filing the OA, it cannot be said that the claim made by him suffers from laches. As already stated in the instant case the entire information regarding the entries made in the ACRs of the applicant concerning the relevant period are communicated belatedly is available by way of admission by the respondents themselves before the Tribunal. Keeping all these entries in view the Division Bench of the Hon'ble High Court directed the Tribunal to dispose of the present OA afresh on merits.

15. The short question remains to be addressed is whether the grading "Average" is required to be communicated and if so the consequences of its non-communication.

16. In the instant case the grading of "Average" in ACRs for the years 2002-03 to 2007-08 were communicated to the applicant on 30.04.2012 i.e. just two months before his retirement. The contention of the applicant is that had the grading "Average" been communicated to him at appropriate time i.e. when his

case of ACP / MACP fell for consideration before the Departmental Screening Committee either he would have improved his performance or he would have raised objection about the said grading.

17. To decide this issue it would be relevant to refer to the following judgements of the Hon'ble Supreme Court :

(2008) 8 SCC 725 {Dev Dutt Vs. Union of India and others}, wherein the Hon'ble Supreme Court held as follows :

“Whether an entry is adverse or not, depends upon its actual impact on employee's career and not on its terminology – so even a “good” entry can be adverse in the context of eligibility for promotion.

All grading whether “very good”, “good”, “average” or “poor” required to be communicated to employees working in government offices, statutory bodies, public sector undertakings, or other State instrumentalities where constitutional obligations and principles of natural justice and fairness apply – Gradings to be communicated within a reasonable period so that employee concerned gets an opportunity of representation for improvement of his grading and the representation has to be decided fairly within a reasonable period by an authority higher than the one which made the entry. This requirement flows from constitutional obligations of fairness, non-arbitrariness and natural justice. The Hon'ble Supreme Court made a recommendation for conveyance of outstanding grading also as it would boost morale of a meritorious employee.”

18. The case before the Hon'ble Supreme Court relates to non-

communication of the grading “Good” in the ACR. The Hon'ble Supreme Court directed the respondents that the appellants promotion shall be reconsidered after giving him an opportunity of representation against entry in confidential reports. A further direction was issued for back wages and interest in case the appellant found fit for promotion from due date.

19. The law laid down in the case of ***Dev Dutt*** (supra) has been reiterated by the Hon'ble Supreme Court in ***(2009) 16 SCC 146 {Abhijit Ghosh Dastidar Vs. Union of India and others}***. In the case before the Hon'ble Supreme Court grading “Good” was below the bench mark and “Very Good” was prescribed for promotion. The grading “Good” was not communicated to the petitioner at appropriate time, the Hon'ble Supreme Court held that the grading “Good” ought to have been communicated to the applicant particularly when the grading awarded to him in the preceding year was “Very Good”. The Hon'ble Supreme Court further held that since “Good” grading was not communicated to the appellant, this grading should not have been taken into consideration for promotion. The Hon'ble Supreme Court in this case took the view that the appellant was wrongly denied promotion in violation of law relating to communication of gradings in confidential reports. The appellant therein retired from service during the pendency of litigation. The Hon'ble Supreme Court held that he is entitled for promotion from the date his junior was promoted, the promotion has to be granted on notional basis for the purpose of pension and other retiral benefits as per rules.

20. From the ratio laid down in the above referred two judgements of the

Hon'ble Supreme Court it is clear that the grading "Average" whether amounts to adverse remark or not has to be communicated to an employee at appropriate time so as to enable him to submit his objections regarding the said grading. In the instant case the adverse remarks in the ACRs of the applicant for the years 2003-03 to 2007-08 containing the grading of "Average" were communicated to him on 30.04.2012 i.e. just two months before his retirement. His representation dated 15.05.2012 against the memo dated 30.04.2012 was disposed of by the competent authority vide memo dated 16.07.2012 stating that no intervention is required in the matter. After his retirement also the applicant submitted another representation dated 08.02.2013 to the DCO, AP, Hyderabad for granting 2nd MACP. The said representation was disposed of vide memo dated 21.03.2013 conveying him the position stated by the Registrar General of India in their letter dated 15.10.2012. Therefore, this is a clear case wherein the applicant was denied the opportunity of either improving his performance or making a valid objection to the adverse remarks against him at the time when his case fell for consideration for granting MACP.

21. Thus in the present case failure on the part of the respondents to communicate the adverse remark "Average" to the applicant at appropriate time, considering the said uncommunicated remark for the purpose of not granting 2nd MACP benefit is not valid in the eye of law in view of the above referred two judgements of the Hon'ble Supreme Court. The applicant is, therefore, entitled for the relief prayed for in the OA.

22. In the result, the Memo No.A.28017/1/2010-Estt. dated 30.04.2012

and Memo No.32/23/2009-Estt., dated 21.03.2013 are hereby quashed and set aside. The respondents are directed to grant 2nd MACP to the applicant from the date of his entitlement, besides prorata increase in the pension and release the relevant arrears within a period of two months from the date of receipt of a copy of this order.

23. O.A. is allowed accordingly. There shall be no order as to costs.

(MINNIE MATHEW)
MEMBER (ADMN.)

(JUSTICE R.KANTHA RAO)
MEMBER (JUDL.)

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