

LIBRARY 1

Nurse
MACP

CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH
KOLKATA

MA No. 350/00196/2015
OA No. 350/00863/2014

Date of Order: 28.09.2016

Present:

The Hon'ble Mr. Justice Vishnu Chandra Gupta, Judicial Member
The Hon'ble Ms. Jaya Das Gupta, Administrative Member

.....

1. Smt. Madhuri Karmakar, daughter of Late Tarapada Karmakar, aged about 63 years, worked as Chief Matron, Orthopaedic Hospital, Eastern Railway, Howrah, residing at Ichapur Dwinpara, PO. Santragachi, Howrah-4.
2. Smt. Dipti Rani Basu, wife of Tapan Kumar Basu, aged about 63 years, worked as Chief Matron, Orthopaedic Hospital, Eastern Railway, Howrah residing at Sagar Dutta Lane (Chowmatha), Po. Chinsurah, Dist. Hooghly, Pin-712101.
3. Smt. Gita Roy, wife of Sri Sangramjit Roy, aged about 63 years, worked as Chief Matron, Orthopedic Hospital, Eastern Railway, Howrah residing at Vill. Ramchandrapur, Po. Bality Durgapur, Howrah-711205.
4. Smt. Swapna Chattapadhyay, wife of Late Kala Chand Chattapadhyay, aged about 61 years, worked as Chief Matron, Orthopaedic Hospital, Eastern Railway, Howrah residing at East Bisalakshnitalala, Po. Khalisani, Dist. Hooghly-712 138.
5. Smt. Ashima Sarkar, wife of Sri Ratan Sarkar aged about 61 years, worked as Chief Matron, Orthopaedic Hospital, Eastern Railway, Howrah, residing t 174 A , H.C.Banerjee Lane, Konnagar, Po. Kannagar, Dist. Hooghly-712235.

sw

6. Smt. Lakshmi Datta wife of Sri Saktimoy Datta, aged about 62 years, worked as Chief Matron, Orthopedic Hospital, Eastern Railway, Howrah residing at Bakshi Bagan, Ram Rajatala, Howrah-4.
 7. Smt. Sadhana Roy, wife of Sri Ajit Kr. Roy, aged about 61 years worked as Assitant Nursing Officer, Liluah, Eastern Railway, Howrah residing at Matancha Housing State (Ambika Kundu by Lane), Po. Santragachi, Howrah-4.
-Applicants

For the Applicants: Mr. A.Chakraborty
Mr.B.Roy,
Counsel.

-Versus-

1. Union of India through the General Manager, Eastern Railway, Fairly Place, Kolkata-700 001.
 2. The Dy. Director, Pay Commission – V, Railway Board, Ministry of Railway, Railway Bhawna, New Delhi-110 001.
 3. The Secretary, Department of Personnel & Training, Ministry of Home, New Delhi-1.
 4. The Assistant Personnel Officer, Eastern Railway, Liluah, Po. Liluah, dist. Howrah.
-Respondents

For the Respondents : Mr. A.K.Guha, Counsel

ORDER

MS. JAYA DAS GUPTA, AM:

This Original Application has been filed under section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:

- “(i) The Railway Board's order dated 13.12.2012 cannot be tenable in the eye of law and as such the same may be quashed;



(ii) The Railway Board's order dated 08.05.2014 as well as office order dated 19.04.2014 issued by the Works Personnel Officer, Eastern Railway, Liluah and Office Order dated 15.05.2014 issued by the Assistant Personnel Officer (3) for Sr. Divisional Personnel Officer, E.Rly, Howrah cannot be tenable in the eye of law as such the same may be quashed;

(iii) Leave may be granted to file the Original Application jointly under Rule 4 (5) (a) of the CAT Procedure Rule, 1987."

2. It is the case of the applicants that they were initially appointed as Staff Nurse and posted under the Chief Medical Director, Eastern Railway, Kolkata. Thereafter they were promoted to the post of Nursing Sister and subsequently to the post of Chief Matron in the grade pay of Rs. 5400/-. The moot point to be decided in this Original Application is as they have already got two promotions in their service career, they were entitled to third MACP which was extended to them. The point in question, is as to whether the Grade Pay as per MACP shall be Rs. 5400/- or Rs. 6400/-. They were initially awarded the GP Rs. 6400/- which was later withdrawn.

3. It is the contention of the Respondents that initially they were wrongly extended the GP Rs. 6400/- which was later on rectified and on rectification the GP of Rs. 5400/- was extended to them with benefit of one increment on MACP benefit. According to the Respondents, the applicants do not have any cause in their favour and the OA is liable to be dismissed. Also the withdrawal

made because of wrong fixation of GP Rs. 6400/- is liable to be recovered.

4. The Applicants also have in their prayer prayed for quashing the Railway Board's orders dated 13.12.2014 and 08.05.2014 and office orders dated 19.04.2014 and the Office Order dated 15.05.2014 issued by the Assistant Personnel Officer (3) for Sr. Divisional Personnel Officer, E.Rly, Howrah which emanated because of the instructions issued by the Railway Board's orders mentioned above.

5. We have heard the learned counsel for both sides and perused the records. We find that the issues involved in this Original Application came up for consideration in a batch of cases namely OA nos. 350/01020/2015 and others filed by Smt. Mitali Ghosh & Others vs Eastern Railway and Others and this Bench of the Tribunal, after examining the matter in great details vide order dated 13.05.2016 dismissed all the cases. The operative part of the order dated 13.05.2016 is extracted here under for ready reference:

"6. The issues that arise in these cases, to be dealt into, are as under:

- (i) What is the nature of movement from Matron to Chief Matron as a result of the implementation of the recommendation of the 6th CPC;
- (ii) Whether movement from Chief Matron to ANO is promotion;
- (iii) Whether up gradation is same as promotion;
- (iv) Whether the benefits of MACP can be extended beyond the hierarchy of the posts in the cadre and can be more than the Grade Pay of promoted post;
- (v) Whether the recovery of overdrawn amount is tenable;

207

7. The case of Smt. Mitali Ghosh has a chequered history. She had earlier approached this Tribunal in OA No. 598 of 2014 (Mitali Ghosh vs Eastern Railway), filed on 29.04.2014, seeking the following reliefs:
 "(i) Railway Board's Circular as well as office order dated 13.12.2012, 30.07.2013 and 16.09.2013 issued by Senior Divisional Personnel Officer, Eastern Railway, Asansol cannot be tenable in the eye of law and the same may be quashed;

- (ii) An order do issue directing the respondents to allow the applicant to draw grade pay of Rs. 6, 600/- as she completed 30 years of regular service;
 (iii) Any other order or orders the Hon'ble Tribunal may deem fit and proper."

8. The aforesaid OA No. 598 of 2014 was dismissed by this Bench vide judgment dated 20.04.2015. The full text of the judgment dated 20.04.2015 given by a Division Bench of this CAT is re produced hereunder for ready reference:

"The Applicant prays for quashing of Railway Board's Circular dated 13.12.2012, 30.7.2013 and 16.09.2013 (Annexure-A/1 series) wherein there was clarification regarding working out of 3rd Financial Up gradation under MACP Scheme. The applicant has further prayed to direct the respondents to allow her Grade Pay of Rs. 6600/- as she has completed 30 years of regular service. The applicant's case in short runs as follows:-

2. The Applicant was initially appointed as a Staff Nurse and was promoted to the post of Nursing Sister and subsequently promoted to the post of Chief Matron in the Grade Pay of Rs. 5400/-. After completion of 10 years of continuous service in the promotion post, the applicant was granted 3rd MACP in the Grade Pay of Rs. 6600/-. The hierarchical structure of the nursing cadre along with respective Grade Pay runs as under:

| Sl. No. | Designation | Pay Band | Grade Pay |
|---------|-----------------------|----------|-------------|
| 1 | Staff Nurse | P B - 2 | Rs. 4 600/- |
| 2 | Nursing Sister | P B - 2 | Rs. 4 800/- |
| 3 | Matron | P B - 3 | Rs. 5 400/- |
| 4 | Chief Matron | P B - 3 | Rs. 5 400/- |
| 5 | Asstt. Nursing Supdt. | P B - 3 | Rs. 5 400/- |

3. Further case of the applicant is that her pay was re fixed in terms of Railway Board's order dated 13.12.2012 and financial up gradation which was granted to her was withdrawn and Grade Pay was fixed to Rs. 5400/-. The grievance of the applicant is that since the MACP Scheme which came into effect from 1.9.2008 provides for 3rd Financial Up gradation counted from direct entry grade on completion of 10, 20 and 30 years of service respectively, the said Grade Pay of Rs. 6600/- was rightly granted to

the applicant after completion of 30 years of regular service and was illegally withdrawn.

4. Respondents have contested the case by filing a written statement. According to the respondents the applicant who was appointed as a Staff Nurse on 27.2.89 was promoted as Nursing Sister w.e.f. 15.12.1995 and was subsequently posted as Matron. Further case of the respondents is that the applicant was granted 3rd Financial Up gradation in the next higher Grade Pay of Rs. 6600/- along with similarly circumstanced Chief Matrons on completion of 10 years of regular service in the same Grade Pay of Rs. 5400/- in PB-3. According to the respondents, in terms of para 8 of Board's policy on MACP Scheme dated 10.6.2009 (Annexure R-1), promotions earned in the post carrying same Grade Pay in the promotional hierarchy as per recruitment rules shall be counted for the purpose of MACP Scheme. Further case of the respondents is that since employees earn promotions as per their cadre hierarchy and though promotional post is in the same Grade Pay is not a case of stagnation but a case of promotion in the same Grade Pay and, therefore, not entitled for financial up gradation under the Scheme. Further case of the respondents is that receiving references from different Railways, the Railway Board in consultation with DOP&T the nodal Department of the Government, on MACP scheme issued a clarification on 13.12.2012 (Annexure R-2) clarifying how Grade Pay in feeder cadre and promotional cadre is to be made and clarified that financial up gradation under ACP/MACP Schemes cannot be to higher Grade Pay than what to be allowed to an employee on his normal promotion and in such financial up gradation under MACP Scheme same Grade Pay would be granted. According to the respondents that under MACP for the cadre of Chief Matron having Grade Pay of Rs. 5400/- in PB-3 her pay should be fixed by adding one increment @ 3% in the same Grade Pay of Rs. 5400/- since promotional hierarchy in the next Grade Pay of Chief Matron being Assistant Nursing Officer, which has the same Grade Pay of Rs. 5400/- (PB-3). Further case of the respondents is that on receipt of clarification notices were issued to Chief Matrons vide Office Order dated 30.7.2013 (R/3) along with applicant, Smt. Mitali Ghosh, who were allowed higher Grade Pay of Rs. 6600/- on a wrong interpretation of financial up gradation though they were actually eligible for financial up gradation in the Grade Pay of Rs. 5400/-. Further case of the respondents is that pay of the applicant was re fixed in the Grade Pay of Rs. 5400/- by granting one increment @3% on her pay and since substantial amount have been paid to her along with other Chief Matrons in the Division recovery of the excess amount was effected from the month of November, 2013 in suitable equal increments with a view to reduce their hardship. Further case of the respondents is that some other Chief Matrons had filed OA No. 350/00129/2014 wherein this Tribunal vide order dated 25.2.2014 (Annexure R/6) had directed to refer the matter to the Railway Board which is the Apex Body for suitable clarification and the Railway Board vide letter dated 8.5.2014 (Annexure-R/7) concluded that the case of the applicant's category is not a case of merger of grades of Chief Matrons and Assistant Nursing Officer but a feeder and promotional post lying in the same Grade Pay as per their promotional hierarchy and their case is covered by instructions covered in Para 8 of Board's letter dated 10.6.2009 and instructions dated 13.12.2012. The main contention of the respondents is that benefit under MACP Scheme cannot be allowed in a higher Grade Pay which one would not have got even on getting promotion and since inadvertently due to wrong fixation of paying excess amount was paid to the applicant, it was suitably deducted.

5. Before delving into the contentious issue the clarifications given by Government of India, Ministry of Railways (Railway Board dated 13.12.2012 need to be quoted.

The General Manager/OSDs/CAO(R)
All Indian Railways & Pus
(As per mailing list)

Sub: Grant of financial up gradation under MACP Scheme-
Clarification reg.

Handwritten signature

References have been received from Zonal Railways seeking clarification as to what Grade Pay would be admissible under MACP Scheme as an employee holding feeder post in a cadre where promotional post is in the same Grade Pay. The matter has been examined in consultation with Department of Personnel & Training (DoP&T), the nodal department of the Government on MACP Scheme and it is clarified that ACP/MACP schemes have been introduced by the Government in order to mitigate the problems of genuine stagnation faced by employees due to lack of promotional avenues. Thus, financial up gradations under ACP/MACP Scheme CANNOT be to higher Grade Pay than what will be allowed to an employee on his normal promotion. In such cases financial up gradation under MACP Scheme would be granted to the same Grade Pay.

6. Ld. Counsel for the applicant has placed reliance on a decision of the Hon'ble High Court of Allahabad dated 19.7.2013 passed in Writ Application No. 18244 of 2013 wherein their Lordship's observed that "Post of Senior Goods Guard and Passenger Guard have the same grade of pay and movement of a Senior Goods Guard to the post of Passenger Guard is only a lateral induction and not a promotion, all the private respondents would be taken to have got only one financial up gradation and as per MACPs, they were entitled to two more financial up gradations."

7. Here the case is completely different. There is no dispute about the fact that the post of Assistant Nursing Superintendent is a promotion from Chief Matron. Had it not been so both the posts would have been merged as had been done in the case of Chief Matron cadre earlier. The clarification that financial up gradation under the MACP Scheme cannot be a higher Grade Pay than what can be allowed to an employee on his normal promotion. After the 6th Pay Commission there was never any challenge why there was same Pay Band and same Grade Pay for Chief Matron and Assistant Nursing Superintendent. It is for the Government and the Department to accept or not to accept such recommendations. If Chief Matrons will be granted Grade Pay of Rs. 6600/- as claimed by the applicant in that even persons who are promoted to the post of Assistant Nursing Superintendent will get Rs. 5400/- whereas persons not getting promotion would get higher Grade Pay. This is not a desirable situation. To make it even simpler, it may be stated at the cost of repetition that since there is no promotional avenues or ladder after the post of Assistant Nursing Superintendent, no higher Grade Pay is admissible to Chief Matron what is offered to Assistant Nursing Superintendent. This Tribunal neither create a cadre nor a Pay Scale or Pay Band or Grade Pay. Since there is nothing wrong in the approach of the DoP&T or Railway Board in giving such circular no interference is called for. It is further clarified that this Tribunal cannot direct the respondents to give higher Pay Band or Grade Pay to a particular post as it is the prerogative of the employer.

8. Coming to the question of recovery it may be clarified that the Hon'ble Supreme Court in the case of **Chandi Prasad Uniyal v. State of Uttarakhand** reported in AIR 2012 SC 2351 have succinctly observed that "when payments are being effected in many situations without any authority of law, the same can always be recovered barring few exceptions of extreme hardship. And when it is not payers or payees money, it is tax payers money, as it neither belonging to the officers who had effected overpayment nor that of the recipient, and once an excess payment has been made due to bonafide mistake, the Government Officer have every right to recover the same.

9. The O.A. being devoid of merits is dismissed. No costs."

9. There is nothing on record that the above judgment has been reversed, in review, by this Bench or set aside by any higher forum and the above order has become final. Judicial Discipline does not permit us to change the above order which decided that MACP benefits cannot be more than Rs. 5400/- as Grade Pay as it has been established that ANO is the promotional post to Chief Matron and also overdrawals can always be recovered.

10. Smt. Mitali Ghosh, Chief Matron Smt. Sikha Lahiri, Assistant Nursing Officer, and Smt. Dipti Chakraborty, Chief Matron had again filed OA No. 1480 of 2014 in this Bench on 12.11.2014 seeking the following reliefs:

mc

"(i) The Order No. E/Med/Bunching facilities/Nursing/Eastern Railway, Asansol dated 16.10.2014 cannot be tenable in the eye of law and as such same may be quashed;

(ii) Leave may be granted to file the Original Application jointly under Rule 4 (5) (a) of the CAT Procedure Rule, 1987."

This Bench, without going into the merit of the matter, disposed of the said OA on 20.04.2015. The relevant portion of the order reads as under:
".....The Respondents are directed to issue a fresh show cause notice to the applicants giving them one month's time for their reply and only after receipt of reply they are to pass a reasoned and speaking order if in fact there has been wrong fixation of pay and if recovery is necessary and permissible under the law. No costs.

11. Thereafter, the respondents issued a speaking order dated 19.06.2014 (A/9) and such order has been challenged by the applicants in the instant OA No. 1020 of 2015 filed on 01.07.2015.

12. Before delving into the matter, it would be worthwhile for the purpose of taking a view in the matter, to extract the instructions issued by the Railway Board in three orders which read as under:

(i) GOVERNMENT OF INDIA,
MINISTRY OF RAILWAY
(Railway Board)
RBE No. 142/2012

No.PC.VI/307

New Delhi dated 13.12.2012

No.PC-V/2009/ACP/2

The General Manager/OSDs/CAO(R)
All Indian Railways & Pus
(As per mailing list)

Sub: Grant of financial up gradation under MACP Scheme-Clarification reg.

References have been received from Zonal Railways seeking clarification as to what Grade Pay would be admissible under MACP Scheme as an employee holding feeder post in a cadre where promotional post is in the same Grade Pay. The matter has been examined in consultation with Department of Personnel & Training (DoP&T), the nodal department of the Government on MACP Scheme and it is clarified that ACP/MACP schemes have been introduced by the Government in order to mitigate the problems of genuine stagnation faced by employees due to lack of promotional avenues. **Thus, financial up gradations under ACP/MACP Scheme CANNOT be to higher Grade Pay than what will be allowed to an employee on his normal promotion. In such cases financial up gradation under MACP Scheme would be granted to the same Grade Pay.**

This issues with the concurrence of the Financial Directorate of the Ministry of Railways.

Hindi version is enclosed.

Sd/- (N.P. Singh)
Dy. Director/Pay Commission-V,
Railway Board,
New Delhi dated 13.12.2012.

(ii) GOVERNMENT OF INDIA,
MINISTRY OF RAILWAY
(Railway Board)

No.PC.V/2014/CC/13/ER

New Delhi dated 8.5.2014

The General Manager (P)
Eastern Railway,
Kolkata

(For Attn: Shri U.Lahri, Dy. CPO/HR)

Sub: OA N. 350/00130/2014 filed by Ms. SWAPNA Roy & Ors Vs UOI & Ors; OA No. 350/00129/2014 filed by Smt. Dipti Chakraborty & Ors Vs UOI & Ors; OA No. 350/00112/2014 filed by Smt. Martha Xalxo & Ors Vs UOI & Ors regarding 3rd financial up gradation under MACP Scheme.

Ref: Eastern Railway's letter Nos. E367/MD/CC/Nursing dated 20.03.2014 & 28.03.2014.

The matter referred vide Eastern Railways letters under reference has been considered by the Board (MS) in the light of Policy objective behind MACP scheme and relevant of instruction issued for the purpose of implementation of the scheme and observed as under:

(v) The instructions regarding grant of financial up gradation under the Scheme in respect of an employee in feeder grade of a cadre/category where promotional post also happens to be in same Grade Pay, has been issued vide Board's letter dated 13.12.12 which stipulates that financial up gradation under ACP/MACP scheme cannot be to a higher Grade Pay than what can be allowed to an employee on his normal promotion. In such cases financial up gradation under the ACP/MACP scheme would be granted in same Grade Pay. Reasoning of this instruction to the fact that the ACP/MACP scheme has been introduced as device to mitigate the stagnation and hardship faced by the employees due to lack of adequate promotional avenue and therefore logically the benefit allowed under the ACP/MACP scheme cannot be more than what would accrue to employee on normal promotion in view of the clarifications issued by Board's letter dated 13.12.2012 is complimentary to the instructions in para 8 of the Annexure to Board's policy instructions on MACP dated 10.5.2009 and in consonance with the policy perspective and scope of MACP scheme.

(vi) Based on the recommendations of 6th CPC an expert body for the purpose of determining pay scales in respect of various categories of Govt. Employees, the Chief Matron and Assistant Nursing Officer has been allowed Grade Pay of Rs. 5400/- of PB-3. These posts continue as a distinct grade of nursing cadre, carries distinct designation duties and responsibilities and procedure for appointment to these posts. These bare facts establish in categorical terms, the said two grades of Nursing cadre viz. Chief Matrons and Assistant Nursing Officer has not been merged and as per their recruitment rule lies as feeder and promotion post in their promotional hierarchy. Evidently, the case of Nursing cadre to which applicants belong is covered with para 8 of Annexure to Board's instructions dated 10.6.2009 and Board's Instructions dated 13.12.12.

(vii) With the merger of two grades/posts of cadre the distinction between the said two grades vanishes and they become one and same and carry same designation, duties and responsibilities etc. To illustrate - Prior to implementation of VI CPC pay structure posts of JE II and JE I were two distinct grades in Engineering department having pay scale of Rs. 5000-8000/- and Rs. 5500-9000/- and JE II was feeder grade for PB I. With the implementation of VI CPC these posts were placed in the same Grade Pay of Rs. 4200/- of PB 2 the distinction of JE I and JE II have vanished and they have been given same designation viz. Junior Engineer. This illustration is that of a merger for classification in terms of para 5 of Board's policy circular dated 10.6.2009. The instances where the two grades of a cadre has been merged as a consequence of implementation of 6th CPC pay structure are contained in Board's letter No. PC-VI/2008/1/1/1 dated 14.9.2010.

(viii) Evidently, the case of applicants 'category is not of merger because they (viz. Chief Matron and ANO) continue as distinct grades of cadre carrying distinct designation, duties and responsibilities and procedure for appointment. Thus, their case is not merger of grades/posts and therefore is not covered by para 5 of Board's instructions dated 10.6.2009.

From the above observations it is clear that the case of applicant's category is not a merger of grades/posts of Chief Matron & Assistant Nursing Officer but of feeder and promotional post lying in same Grade

DM

Pay as per their promotional hierarchy. As such their case is covered by instruction contained in para 8 of Annexure to Board's letter dated 10.06.2009 and instruction dated 13.12.12.

In view of the above, the Board (MS) has concluded that the applicants are entitled for grant of 3rd financial up gradation in the same Grade Pay of Rs. 5400/PB-3 as available for their promotional post of Assistant Nursing Officer.

It is, therefore, advised that further necessary action may please be taken accordingly.

Sd/-(N.P.Singh)
Deputy Director, Pay Commission-V,
Railway Board."

(iii) RBE No. 172/2008
Subject: Fixation of pay in the pay bands where posts have been upgraded as a result of recommendations of Sixth CPC – Clarification regarding.
(No.PC-VI/2008/II/RSRP/I dated 11.11.2008)

Note 2 A below Rule 7 of the RS(RP) Rules, 2008 states as under:-

"Note 2 A Where a post has been upgraded as a result of the recommendations of the Sixth CPC as indicated in the Schedule to these Rules, the fixation of pay in the applicable pay band will be done in the manner prescribed in accordance with Clause (A)(i) and (ii) of Rule 7 by multiplying the existing basic pay as on 01.01.2006 by a factor of 1.86 and rounding the resultant figure to the next multiple of ten. The grade pay corresponding to the upgraded scale will be payable in addition. Illustration 4/A in this regard is in the Explanatory Memorandum to these Rules".

2. Accordingly, in cases of upgradation of posts as a result of recommendations of Sixth CPC, the fitment table attached with the letter of even number dated 11.09.2008 corresponding to the pre-revised scale shall be used for the purpose of determination of pay in the pay band. To the pay in the pay band so determined, the grade pay corresponding to the upgraded post is to be added. This will be the revised pay of the Railway Servant who has been upgraded as a Result of Sixth CPC recommendation.

3. To illustrate, RPF/RPSF Constables (Combatised) have been upgraded from pre-revised scale of Rs.3050-4590 to the pay scale of Rs.3200-4900 corresponding to the grade pay of Rs.2000 in PB-1. In the case of a RPF/RPSF Combatised Constable drawing the basic pay of Rs.3575 as on 01.01.2006, his pre-pay in the pay band will be fixed in accordance with the fitment table of the pre-revised scale of Rs.3050-4590. Hence, his revised pay in the pay band will be Rs.6650 as per the table corresponding to the pre-revised scale of Rs.3050-4590. To this, the Grade Pay of Rs.2000 corresponding to the upgraded pay scale Rs.3200-4900 will be added. Consequently, his revised basic pay would be Rs.8650 as on 01.01.2006.

4. The above procedure is to be adopted in all cases where pay scales have been upgraded by the Pay Commission, including Constabulary and other Combatised ranks in the RPF/RPSF, Assistants and Section Officers in the Railway Board, Accounts staff and the common category cadres of Teachers and Nurses etc. This list is illustrative and not exhaustive. Similar procedure is to be adopted for Running Staff subject to the condition that in their case fitment tables circulated vide Board's letter of even number dated 12.9.2008 will be used for determination of pay in the pay band.

5. All Zonal Railways/Production Units are directed to ensure that in no case is there any deviation from the above (subject to other provisions of RS(RP) Rules, 2008). Pay fixed in the case of up gradations in any manner other than the above, will be rectified."

257

In the case of the **Railway Board and Others Vs P.R.Subramaniyam and others**, reported in 1978 Vol.I SCC 158, the Hon'ble Apex Court declared that the orders issued by the Railway Board are of general application to non gazetted railway servants and **are treated as rules having provision to Article 309 of the Constitution of India**. It is further clarified in para 3, which reads as under:

"3. In the Indian Railway Establishment Code Vol.I are the Rules framed by the President of India under Article 309 of the Constitution. Contained in the said Code is the well known Rule 157 which authorises the Railway Board, as permissible under Article 309, to have "full powers to make rules of general application to non gazetted railway servants under their control. Railway Board have been framing Rules in exercise of this power from time to time. No special procedure or method is prescribed for the making of such Rules by the Railway Board. But they have been treated as rules having the force of rules framed under Article 309 pursuant to the delegated power to the Railway Board...."

Hence the above three RBEs have the sanctity of provision to **Article 309 of the Constitution**.

13. **ISSUE (i)** [What is the nature of movement from Matron to Chief Matron, as a result of the implementation of the 6th CPC] -

(a) The Learned Counsel for the Applicant submitted that the movement from Matron to Chief Matron is not promotion but up gradation. On being asked by this Bench to clarify the nature of up gradation i.e. movement from which pay scale to which pay scale, he left the question to be decided by the Bench. The hierarchy of the Nursing cadre in the Eastern Railway is as under:

| Sl.No. | Designation | Pay Scale before 6 th Pay Commission | Pay scale after 6 th Pay Commission other than Nursing Cadre | Pay scale after 6 th Pay Commission to Nursing Cadre (Upgraded). |
|--------|------------------------|---|---|---|
| 1 | Staff Nurse | 5000-8000/- (S-9) | 9300-34800/-+4200/-(GP) | PB-2, 9300-34800/-+4600/-(GP) |
| 2 | Nursing Sister | 5500-90/-(S-10) | 9300-34800/-+4200/-(GP) | PB-2, 9300-34800/-+4800/-(GP) |
| 3 | Matron & Ch. Matron | 6500-10500/-(S-12) 7450-11500/-(S-13) | 9300-34800/-+4600/-(GP) | PB-3, 15600-39100/-+5400/-(GP) (merge) |
| 4 | Asstt. Nursing Officer | 7500-12000/-(S-14) | 9300-34800/-+4800/-(GP) | PB-3, 15600-39100/-+5400/-(GP) |

The Applicant Ms. Mitali Ghosh was earlier promoted twice i.e. from Staff Nurse in PB-2 with GP Rs. 4600/- to Nursing Sister, PB-2 with GP Rs. 4800/- and then from Nursing Sister to Matron PB-3 with GP Rs. 5400/- on 14.03.2000. The post of Matron and Chief Matron, as per the recommendation of the 6th CPC were merged and became designated as Chief Matron, PB-3 with GP Rs. 5400/- with effect from 01.01.2006. It is clear that the post of Matron did not exist from 01.01.2006 and was re designated as Chief Matron from 01.01.2006. Therefore the movement from Matron to Chief Matron is neither promotion nor up gradation but only re designation of post of Matron to Chief Matron. After stagnating for 10 years as promotional post of ANO was not available, the applicant was given the benefit of financial up gradation under MACP in the scale of ANO, PB-3, GP Rs. 5400/- by way of granting one extras increment in the existing scale of pay.

The contention of the applicant that the movement from Matron to Chief Matron is up gradation is not correct. There are only two schemes for financial up gradation of the Government of India namely ACP and MACP as applicable to Central Government Employees. The movement from Matron to Chief Matron was occasioned w.e.f. 1.1.2006 when the ACP scheme was in vogue as MACP scheme came into effect only w.e.f. 01.09.2008. The ACP scheme envisages two financial up gradation after completion of 12 and 24 years of regular service provided the person concerned is stagnating in a scale of pay for 12/24 years. Here Ms. Mitali Ghosh had already availed two promotions before 01.01.2006. Therefore, the movement from Matron to Chief Matron being considered as up gradation is not correct at all and it is simply re designation.

(b) **ISSUE – (ii) [Whether movement from Chief Matron to ANO is promotion] -**

In paragraph 4.7 of the Origin Application, the applicants had raised a question that "the sole question is to be decided whether the movement from the Chief Matron to the ANO is a promotion". It would be crystal clear that the movement from the post of Chief Matron to ANO is a promotional movement as has been established by (i) the communication of the Ministry of Railway, Railway Board, New Delhi dated 08.05.2014 (A/23) (supra). (ii) This view is also fortified in paragraph 12 of the reply filed by the Respondents which is reproduced herein below:

"12. That with regard to the statements made in paragraph 4.7 of the said application it is stated that the categories of Chief Matron and Assistant Nursing Officer have not been merged and as per their recruitment rules lie as feeder and promotional post in their promotional hierarchy. Evidently the case of Nursing Cadre to which applicants belong is covered with para 8 of RBE No. 101/209 to Boards instruction dated 10.6.2009 and subsequent clarification dated 13.12.12 circulated vide RBE No. 142/2012. Chief Matron are being promoted to ANO through the process of selection (Written test and Viva voce). Moreover status of these two posts are different Chief Matron is a non gazetted post where ANO is a Gazetted post."

(iii) This was also the finding given by this Bench in OA No. 598 of 2014 (Mitali Ghosh Vs Eastern Railway). Therefore, the observation that the ANO is a promotional post from the post of Chief Matron has reached its finality.

The learned counsel for the applicants drew our attention to the fact that relying on the order of the Ernakulam Bench of the Tribunal (A/4), the Allahabad Bench passed an order against which a writ petition was filed which was dismissed by the Hon'ble High Court of Allahabad (A/5). His contention was that movement from Senior Goods Guard to Passenger Guard is not promotion. But it should be noted that the said case is related to horizontal movement of Senior Goods Guard and Passenger Guards while in the present case we are dealing with the vertical movement during the process of promotion. This contention advanced by the applicant in the present OA was also the contentions before this Bench in the earlier OA No. 598 of 2014. But this Bench of the Tribunal had rejected this issue in OA No. 598 of 2014. So the issue is settled that movement from Chief Matron to ANO is promotion.

(c) **ISSUE (iii) - [Whether up gradation is same as promotion]**

The learned counsel for the applicants in paragraphs 4.13 and 4.14 of the OA submitted that up gradation means promotion. This is entirely wrong. Promotion is functional while up gradation is non functional. For promotion higher responsibilities have to be borne by the promotees whereas for up gradation no such higher responsibilities are imposed on the employees. Because the applicants are stagnating in a specific post and no post was available for promotion, up gradation was offered in the same post but with higher grade pay without assuming any higher responsibilities.

(d) **ISSUE – (IV) - [Whether benefits of MACP can be extended beyond the hierarchy of the posts in the cadre] –**

The answer is no. This Bench of this CAT have held in OA No. 598 of 2014 (supra) that MACP benefit cannot be given at a Grade Pay higher than the promotional posts or beyond the promotional hierarchy available in the cadre. This view was upheld by the Hon'ble Delhi High Court in WP (C) No. 3420/2010 (R.S. Sengar and others vs. Union of India and others) dated 04.04.2011 wherein it has been held "to put it pithily the MACP Scheme requires the hierarchy of Grade Pay to be adhered to and not the Grade Pay in the hierarchy of posts". Also in para 3 of the MACP Scheme clarifies as under:

"2. The MACPS envisages merely placement in the immediate next higher grade pay in the hierarchy of the recommended revised pay bands and grade pay as given in Section 1, Part-A of the first schedule of the CCS (Revised Pay) Rules, 2008. Thus, the grade pay at the time of financial up gradation under the MACPS can, in certain cases where regular promotion is not between two successive grades, be different than what is available at the time of regular promotion. In such cases, the higher grade pay attached to the next promotion

23

post in the hierarchy of the concerned cadre/organization will be given only at the time of regular promotion."

Further in paragraph 8 and 8.1 of the said MACPS scheme provides as under:

8. Promotions earned in the post carrying same grade pay in the promotional hierarchy as per Recruitment Rules shall be counted for the purpose of MACPS.

8.1. Consequent upon the implementation of Sixth CPC's recommendations, grade pay of Rs. 5400 is now in two pay bands viz. PB-2 and PB-3. The grade pay of Rs. 5400 in PB-2 and Rs. 5400 in PB-3 shall be treated as separate grade pays for the purpose of grant of up gradations under MACP Scheme."

The Learned Counsel appearing for the Respondents has also taken support of the order of the Madras Bench dated 29th June, 2015 in OA No. 310/00514/2014 & MA 310/00445/2014 and MA 310/00315/2015 (V. Subhashini and another vs Union of India and others). In the above case, the Madras Bench of the Tribunal have held that the third financial up gradation to the Grade Pay of Rs. 6600/- is not permissible. The relevant portion of which is extracted herein below:

"10. On perusal of the records, it is seen that the applicants were at the first instance granted the 3rd Financial Upgradation in Pay Band Rs.15600-39100(PB-3) with Grade Pay of Rs.6600/- under MACP Scheme w.e.f. 01.09.2008 by the 3rd respondent and under a wrong notion, the same has been withdrawn by order dated 12.07.2013 which is impugned in this OA and the applicants' Grade Pay has been revised downward and recovery of overpayment ordered. We are in agreement with the contention of the respondents that for Chief Matrons with GP-5400/- in PB-3 (Non-Gazetted) the next promotional post is Assistant Nursing Officer in same Grade Pay of Rs.5400/PB-3(Gazetted) and hence the concerned employees have to be considered for 3rd Financial Upgradation to the same Grade Pay Rs.5400 in PB-3 in terms of Board's letter dated 13/12/2012 and increase in pay by 3 percent as is applicable in the normal promotions. Hence the decision in the OA No.141/2012 of the Principal Bench is not applicable in the present case, apart from that the Hon'ble Supreme Court has also not gone into the merits of the case and at the admission stage itself rejected the SLP filed by the concerned department and the same cannot be cited as precedence. Further, it is submitted that as per the policy framed by the Ministry of Railways through letter No.PC-VI/2008/1/RSRP/1 dated 22.09.2008 (RBE No.124/2008) and subsequent clarifications, the Chief Matrons are placed in PB-3 with Grade Pay Rs.5400 and their next promotional post, as per Annexure R-2 documents, is to the post of Assistant Nursing Officers in PB-3 with Grade Pay Rs.5400. The MACP Scheme has been introduced in order to mitigate the problems of genuine stagnation faced by employees due to lack of promotional avenues and therefore Financial Upgradations under this Scheme is to be given either in the next Grade Pay in the hierarchy of Grade Pays or to the next promotional post and in no case it can be given beyond the next promotional post. Granting of benefit higher than their promotional post amounts to grant of double benefit. Therefore, granting of MACPS benefit to the applicants Chief Matrons in PB-3 with Grade Pay Rs.5400 to PB-3 with Grade Pay Rs.5400 is in order and needs no revision. The respondents relied on the citation in (2015) 1 SCC (L&S) 384 (2014) 13 SCC 296 Secretary, Government (NCT of Delhi) & Others vs. Grade-I DASS Officers' Association & Others, wherein para 14 reads as follows:-

"14. In view of the stipulations and conditions in the ACPS noticed above, it can be safely concluded that the financial upgradation under the ACPS is not only in lieu of but also in anticipation of regular promotion. In such a situation, the contention advanced on behalf of the appellants that financial upgradation claimed by the respondents cannot be granted because the same would be much in excess of what the officer would gain on actual promotion in the hierarchy, is found to have substance. As a corollary, such claim of the respondents must be rejected on the ground that persons having better claims on actual promotion could be fitted only in the promotional post of Grade II (Group B) of DANICS i.e. Rs.6500-200-10,500 whereas the

MC

respondents, on their claims being accepted, would get much higher pay scale of Rs.10,000-325-15200 available only to Grade I (Group A) in DANICS. Such a situation would be violative of rules of fairness and Articles 14 and 16 of the Constitution of India. The claim of the respondents had to be rejected as was done by the Tribunal in view of Clause 7 of the ACPS read with other relevant clauses as well as on the basis of the afore noticed ground. Fairness on the part of the State is a constitutional obligation and hence a pay scale, which regularly promoted employee earlier belonging to Grade I (DASS) could not get due to established hierarchy for promotion, cannot be granted to those like the respondents on the plea that the financial upgradation to which they are found entitled as per existing hierarchy is too meagre. In case the respondents' claim was to be allowed on the ground accepted by the High Court that financial upgradation must be real and substantial, in case of regular promotion in future, employees like the respondents would have to be reduced in their pay scale because actual or functional promotion as per established hierarchy can be only on a post in Grade II (Group B) in DANICS."

The above citation relied on by the respondents squarely applies to the case on hand. Hence, in view of the above, we are of the opinion that the OA is liable to be dismissed."

The counsel for the applicants at this juncture pointed out that the Apex Court considered the ACP Scheme and not the MACP Scheme. However, it is clear that the spirit of the judgment is that financial benefit in up gradation cannot be more than that of promotional benefit.

In order to strengthen the arguments, the learned counsel for the Applicants has taken the support of the decision of the Hon'ble High Court of Delhi dated 24.08.2012 rendered in the case of **Union of India vs. Delhi Nurses Union (Regd.) & Anr**, in WP (C) No. 5146/2012. The direction in the above judgment cannot be taken assistance of in the present cases because in the hierarchy in Nursing Cadre for the Delhi Nurses Union, the Nurses of which are employed in the Central Government Hospitals is different from the hierarchy of the Nurses of the Eastern Railway. The promotional hierarchy of the Railway Nursing cadre of Medical Department consists of the following:

| | |
|---------------------------|----------------|
| Staff Nurse | :GP Rs. 4600/- |
| Nursing Sister | :GP Rs. 4800/- |
| Chief Matron | :GP Rs. 5400/- |
| Assistant Nursing Officer | :GP Rs. 5400/- |

There are no other designation of Nursing Personnel in the Eastern Railways. But in Government Hospitals in Delhi there are two other designations carrying GP Rs. 6600/- and 7600/-. The designations of structure of Nursing Staff as per Finance Department's Notification dated 29.08.2008 is as under:

| | |
|--------------------------|----------------|
| Staff Nurse | :GP Rs. 4600/- |
| Nursing Sister | :GP Rs. 4800/- |
| Assistant Nursing Sister | :GP Rs. 5400/- |
| Deputy Nursing Sister | :GP Rs. 5400/- |
| Nursing Superintendent | :GP Rs. 6600/- |
| Chief Nursing Officer | :GP Rs. 7600/- |

Thus, from the post of Assistant Nursing Superintendent and Deputy Nursing Sister, higher posts are available in the hierarchy with Grade Pay of Rs. 6600/- and Rs. 7600/- whereas, in the present cases hierarchy ends with the post of ANO carrying the GP of Rs. 5400/- and, as discussed earlier, the benefits of financial up gradation cannot be higher than the benefit available on normal promotions. At the cost of repetition, as per spirit of Delhi High Court's order in WP (C) No. 3420/2010 delivered on 04.04.2011 and para 8 of MACP Scheme, the movement from Assistant Nursing Sister to Deputy Nursing Sister is promotion and grade pay will be Rs. 5400/- and not Rs. 6600/-.

(e) **ISSUE (v)** - [Whether recovery of overdrawal amount is tenable]-

In OA No. 1480 of 2014 the order impugned was dated 16.10.2014 (A/5). The order dated 16.10.2014 is also impugned in the present OA. The impugned order dated 16.10.2014 (A/5) is set out below:

"To
Smt. Mitali (Sarkar) Ghosh,

owm

Chief Matron/CMS/ASN.

Sub: Revision of pay and recovery of over payment.

Ref: CPO/KKK's L/No.E367/MD/Nursing/RTI dated 25.6.2014.

You are aware that you had been extended the bunching facilities on provisional basis in scale Rs. 15600-39100/-+5400/- since 01.01.06.

In term's of CPO/KKK's letter under reference it is pointed out that you are not eligible for getting the bunching facilities in view of provision of rule.7(1)(A) (ii) of RSRP rules 2008 (RBE No. 87/2008) as per subsequent instruction contained in RBE No. 172/2008 circulated vide CPO/KKK's Sl.No.144/2008.

As such administration is going to revise y our basic pay from 01.01.2006 including revision of MACP which granted earlier.

Due to such inadvertence some over payment in salary has also been made.

In the light of the above, it is intimated that the basic pay which are enjoying now due to such inadvertence will be revised and re fixed to Rs. 28250/- in PB-III, Rs. 15600-39100/-+5400/- (GP) w.e.f. 01.10.14 in terms of RBE No. 172/2008 circulated vide CPO/KKK's Sl.No. 144/2008 and as such you are requested to deposit the excess amount of over payment Rs. 286756/- upto Sep-2014 (Two Lakhs eighty six thousand seven hundred and fifty six) at booking office/Assansol and submit the original money receipt to this office within 15 days from the date of receipt of this letter otherwise the same will be deducted on suitable instalment from regular salary.

This is for your information and necessary action please.

For Sr. Divisional Personnel Officer
Eastern Railway/Asansol"

Thereafter, in compliance of the order of this Tribunal dated 20.04.205 in OA No. 1480 of 2014, a speaking order was passed on 19.06.2014 (A/9) which is set out below: (This order dated 19.6.2014 is also impugned in the present OA).

"SPEAKING ORDER

In compliance with the Hon'ble CAT/Calcutta's order dated 20.04.2015 in OA No. 350/01480/2014Smt. Mitali Ghosh & 02 Ors Vrs U.O.I. & Others. I being the respondent No.4 have gone through the replies of dt. 05.06.2015 of the show cause notices which were issued vide t his office letter No. E/Med/C Matron/Recaste/15 dated 07.05.2015 and all the papers and relevant records available in this office and observed as under:

1. In terms of CPO/KKK's Serial Circular No. 87/2008, Rule 7 (1) (A) (i) & (ii) (RBE No. 103/08) the pay of Chief Matrons/Matrons was earlier fixed taking into account the benefit of bunching i.e. to say get fixed i the revised pay structure at the same stage in the pay band for every two stages so bunched, benefit of one increment @ of 3% was given. For th is purpose, the increment is calculated on the pay in the pay band , Grade pay would not be taken into account.

2. Subsequently, a clarification was received from CPO/E.Rly vide letter No. E. 367/MD/Nursing/RTI dated 25.6.2014. It has been explain that the pay fixation of Nursing cadre in Medical department has to be done as per RBE No. 172/2008 (CPO's Sl.No.144/08) and the benefit of bunching will not be admissible. As per RBE No. 172/08, it is clearly mentioned that where post have been up graded as a result of 6th Central Pay Commission, fixation of pay will be done in the manner prescribed in accordance with clause (A) (i) and (ii) of Rule 7 by multiplying the exiting basic pay as on 01.01.06 by a factor of 1.86 and rounding the resultant figure to the next multiple of ten. The grade pay corresponding to the up graded scale will be payable in addition. The above procedure is adopted in all aces where pay scales have been upgraded by the 6th Central Pay Commission including common category of Nurses.

The Chief Matrons are enjoying up graded scale in GP 5400/-, hence not entitled for the facility of bunching.



Accordingly pay of the Chief Matron was rectified and the facilities of bunching was withdrawn.

3. The pay structure of Nursing Cadre which is up graded in VIth Pay Commission in comparison to other cadre along with their respective grade pay is shown as under:

| Sl.No. | Designation | Pay scale on 5 th Pay Commission | Pay scale on 6 th Pay Commission other than Nursing Cadre | Pay scale on 6 th Pay Commission to Nursing Cadre (up graded) |
|--------|----------------|---|--|--|
| 1 | Staff Nurse | 5000-8000/- | 9300-34800/- +4200(GP) | 9300-34800/- +4600/- (GP) |
| 2 | Nursing Sister | 5000-9000/- | 9300-34800/- +4200/- (GP) | 9300-34800/- +4800/- (GP) |
| 3 | Matron | 6500- 10500/- | 9300-34800/- +4600/- (GP) | 15600- 39100+5400/- (GP) |
| 4 | Chief Matron | 7450-11500/- | 9300- 34800+4600/- (GP) | (merge into unified Grade Pay) |

In view of the above it is clear that Pay & Grade Pay of Nursing Cadre has been up graded in comparisons to the other cadre of Indian Railway.

4. On going through the above clarification, the basic pay of Chief Matrons/Matrons of this division are correctly re fixed/revised in term's of RBE No. 172/08 by multiplying the existing basic pay as on 01.01.06 by a factor of 1.86 and rounding the resultant figure to the next multiple of ten. The grade pay corresponding to the up graded scale is paid in addition.

5. After fixation by the above method the pay is reduced in all cases and since a substantial excess amount had been paid to yours in earlier fixation along with other 27 no's of Chief Matrons in this division due to such inadvertence, recovery of the excess amount was effected in suitable equal instalments with a view to reduce your hardships.

6. Coming to the question of recovery it may be clarified that the Hon'ble Supreme Court in the case of Chandi Prasad Uniyal v. State of Uttarkhand reported in AIR 2012 SC 2951 have succinctly observed that "when payments are being effected in many situations without any authority of law, the same can always be recovered barring few exceptions of extreme hardship, as it neither belonging to the officers who had effected overpayment nor that of recipient, and once an excess payment has been made due to bona fide mistake, the Government Officer have every right to recover the same."

Hence, on scrutiny in every aspect it is found that no irregularity or anomaly has been done in regard to re fixation/revision of pay in terms of subsequent clarification issued by Railway Board's vide RBE No. 172/2008 and excess payment already made stands recoverable.

Sd/-18.6.2015

Sr. Divisional Personnel Officer
Eastern Railway/Asansol
(Respondent No.4)

Paragraph 3 of the speaking order clearly brings out the fact that Nurses of the Nursing cadre are not getting the normal replacement scale while fixing their pay as per the recommendation of the 6th CPC but they are awarded further upgraded pay in the form of enhanced grade pay. In such a situation, as per the recommendation of the 6th CPC, RBE No. 172/2008 (Supra) came into existence. Hence pay fixation made otherwise have to be corrected.

As per the direction of this Bench, Respondents produced an order dated 28.07.2010 regarding the pay fixation giving the following details:

"Sub: Bunching of pay of Ch. Matron and Matron of Medical Deptt and CPO/KKK's L/No.E/SPC/2008/Policy/Pt.II dated 5.11.2009"

MC

whereby the advantage of bunching and MACP was given to the applicants from 1.1.2006. Relevant portions re extracted herein below:

| | Name of Staff | Designation | Existing pay on 1.1.06 | Pay already fixed on 1.1.06 (Vith PC) | Pay to be charge after bunching as on 1.1.06. |
|--|---------------|-------------|------------------------|--|---|
| | Xxxxx | Xxxxxx | Xxxxxx | Xxxxxxx | Xxxx |
| | Mitali Sarkar | -do- | 7500/-(6500-10500/-) | 21000/(15600-39100/-+5400) 21630/- (do)w.e.f.1.7.06 22280/- (do)w.e.f.1.7.07 22950/-(do) w.e.f. 1.7.08 23640/- (do) w.e.f. 1.7.09 24350/- (do) w.e.f.1.7.10 25080/-(do) w.e.f.1.7.11 25840/- (do) w.e.f. 1.7.12 26620/- (do) w.e.f.1.7.13 17420/- (do) w.e.f. 1.7.14 | 21960/-(15600-39100/-+5400/-) w.e.f. 1.1.06 22620/-(do) w.e.f. 1.7.06 23300/- (do) w.e.f. 1.7.07 24000/-(do) w.e.f. 1.7.08 24720/-(do) w.e.f. 1.7.09 25920/-(15600-39100/- +6600/-w.e.f. 14.3.10 under MACP scheme. 27440/-(15600-39100/-+6600/-) w.e.f. 1.7.10 |

14. From the above, it is abundantly clear that this pay fixation has not been done as per RBE No. 172/08 and hence this mistake has to be corrected and the overdrawal, if any, has to be recovered. An order dated 29.08.2014 corrected the earlier order. Relevant portion of the order is reproduced herein below:

" EASTERN RAILWAY

No. E/Med/MACP Scheme/14 Asansol, dt.29th Aug.14.

OFFICE ORDER

In terms of CPO/KKK's SL.No.87/2008 (Vith Pay Commission) Rule 7(1) (A) (i) & (ii) the pay of the following serving Chief Matron, which was earlier fixed provisionally taking into account the benefit of bunching is now recasted ad re fixed as per instructions contained in RBE No. 172/20078 circulated vide CPO/KKK's SL No. 144/2008 and CPO/KKK's L/No.E.367/MD/Nursing/RTI dt. 25.6.2014.

| | | | Pay as on 1.1.06 (Vth PC) | Pay already fixed taking into account the benefit of bunching as on 1.1.2006 (Vith PC) | Pay to be fixed in terms of RBE No. 172/2008 circulated vide CPO/KKK's SL No. 144/2008 as on 1.1.06. |
|--|--|--|---------------------------|--|--|
| | | | | | |

SW

| | | | | | |
|--|--|--|----------------------|---|--|
| | | | 7500/-(6500-10500/-) | 22460/-(15600-39100+5400)w.e.f. 1.1.06 23140/-(do)w.e.f. 1.7.06 23840/-(do)w.e.f.1.7.07 24560/-(do) w.e.f. 1.7.08 25300/- (do) w.e.f. 1.7.09 26850/- (do) w.e.f. 1.7.10 (MACP on 14.3.10 27660 (do) w.e.f.1.7.11 28490/- (do) w.e.f.1.7.12 29350/-(do) w.e.f. 1.7.13 30230/- (do) w.e.f.1.7.14 | 21000/-(15600-39100/- + 5400/-) w.e.f. 1.1.06 21630/- (do) w.e.f. 1.7.06 22280/-(do) w.e.f. 1.7.07 22950/-(do) w.e.f. 1.7.08 23650/- (do) w.e.f. 1.7.09 25080/- (do) w.e.f. 1.7.10 (MACP on 14.3.10@ 3%) 25840/-(do) w.e.f. 1.7.11 26620/- (do) w.e.f. 1.7.12 27420/- (do) w.e.f. 1.7.13 28250/- (do) w.e.f. 1.7.14 |
|--|--|--|----------------------|---|--|

15. This Bench in OA No. 598 of 2014 Ms.Mitali Ghosh Vs Eastern Railway has already held as under:

"8. Coming to the question of recovery, it may be stated that the Hon'ble Supreme Court in the case of Chandi Prasad Uniyal v. State of Uttarkhand reported in AIR 2012 SC 2951 have succinctly observed that "when payments are being effected in many situations without any authority of law, the same can always be recovered barring few exceptions of extreme hardship. And when it is not payers or payees money, it is tax payers money, as it neither belonging to the officers who had effected over payment nor that of the recipient, and once an excess payment has been made due to bona fide mistake, the Government Officer have every right to recover the same."

Since this order has not been challenged, we cannot take any view other than the view taken earlier on 20.4.2015 by the same Bench.

However, for the sake of argument, if we consider the prayer of the applicants for not recovering the over drawal amount as per the decision of the Hon'ble Apex Court in the case of **State of Punjab and Others etc. Vs. Rafiq Masih (White Washer) etc.**, Civil Appeal No. 11527 of 2014 (arising out of SLP (C) No. 11684 of 2012 dated 18th December, 2014, it would tantamount to reviewing our earlier order at this distance place of time which is not allowed as per Judicial discipline. For argument's sake, only, let us consider Rafiq Masih' case. The aforesaid decision of the Hon'ble Apex Court reveals that a Division Bench of two Judges of the Hon'ble Apex Court have placed the matter for consideration to a Larger Bench of Three Judges with the following reference: "In view of an apparent difference of views express on the one hand in Shyam Babu Verma and Ors vs. Union of India & Ors, (1994) 2 SCC 521 and Sahib Ram Verma vs. State of Haryana, (1995) Supp. 1 SC 18 and on the other hand in Chandi Prasad Uniyal and Ors vs. State of Uttarakhand & Ors, (2012) 8 SCC 417, we are of the view that the remaining special leave petitions should be placed before a Bench of Three Judges. The Registry is accordingly directed to

place the file of the remaining special leave petitions before the Hon'ble Chief Justice of India for taking instructions for the constitution of a Bench of three Judges, to adjudicate upon the present controversy."

The aforesaid reference was answered by a Division Bench of three Judges on 08.07.2014. While disposing of the reference, the three judges Division Bench recorded the following observations in paragraph - 7:

"In our considered view, the observations made by the Court not to recover the excess amount paid to the appellant-therein were in exercise of its extra ordinary powers under Article 142 of the Constitution of India which vest the power in this Court to pass equitable orders in the ends of justice."

Having recorded the above observations, the reference was answered as under:

"12. Therefore, in our opinion, the decisions of the Court based on different scales of Article 136 and Article 142 of the Constitution of India cannot be best weighed on the same grounds of reasoning and thus in view of the aforesaid discussion, there is no conflict in the views expressed in the first two judgments and the latter judgment.

13. In that view of the above, we are of the considered opinion that reference was unnecessary. Therefore, without answering the reference, we sent back the matters to the Division Bench for its appropriate disposal."

It is evident that a Three Judges Bench of the Hon'ble Apex Court have observed that direction given by the Hon'ble Apex Court in **Shyam Babu Verma and Ors vs. Union of India & Ors**, (1994) 2 SCC 521 and **Sahib Ram Verma vs. State of Haryana**, (1995) Supp. 1 SC 18 were given while exercising the extraordinary power under Article 142 of the Constitution of India. The three Judges Bench of the Hon'ble Apex Court have not held that the decision in the case of **Chandi Prasad Uniyal and Ors vs. State of Uttarakhand & Ors**, (2012) 8 SCC 417 is wrong or iniquitous.

The relevant portion of the decision of the Hon'ble Apex Court in the case of **Rafiq Masih (supra)** is quoted hereunder:

"12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery where payments have mistakenly been made by the employer, in excess of their entitlement. Be it as it may, based on the decisions referred to herein above, we may⁸ as a ready reference, summarize the following few situations wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' Service);

(ii) Recovery from retired employees, or employees who are due to retire within one year of the order of recovery;

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued;

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post and has been paid accordingly even though he should have rightfully been required to work against an inferior post;

(v) In any other case, where the Court arrives at the conclusion that recovery if made from the employee would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recovery."

The pay fixation order for Nursing cadre after the recommendation of 6th CPC made effective from 01.01.2006, was not issued in 2006 but four years later i.e. on 28.07.2010. The arrears of salary was paid from 2006 to 2010 in one lump before starting monthly payment from July/August, 2010. The order dated 28.07.2010 which was wrong was corrected within four years i.e. on 19.06.2014. The above situation will not be covered by the decision of the Hon'ble Apex Court in the case of **Rafiq Masih (supra)**.

SW

It is also noteworthy that while making payments, on the basis of revisions under a Pay Commission, a certificate is invariably obtained from the employee, undertaking to refund any excess drawal. This is a regular practice in dealing with fixation of emoluments on the basis of Pay Commission recommendations. Therefore, the applicants are aware that any overpayment has to be recovered.

This explanation is given only for argument sake and not otherwise as the view to recover the amount has already taken in OA No. 598 of 2014 (supra).

The learned counsel for the applicants has also taken the help of the decision of the Hon'ble Apex Court dated 17th November, 2015 rendered in the case of **B.Radhakrishnan vs. The State of Tamil Nadu & Ors** in Civil Appeal No. 13407 of 2015 and in the case of **K.Padmaraj vs. The State of Tamil Nadu & Ors** in Civil Appeal No. 13409 of 2015 wherein, the Hon'ble Apex Court allowed the cases of the Applicants by way of stopping the recovery from their salary as proposed by the Respondent authorities for recovery of the overdrawal. In those cases, the Hon'ble Apex Court passed the order placing reliance on the principle laid down in the case of **Shyam Babu Verma and Ors vs. Union of India & Ors**, (1994) 2 SCC 521. As discussed earlier, from Rafiq Masih's case (supra) the three Judges Bench of the Hon'ble Apex Court observed that the order of the Hon'ble Apex Court in the case of **Shyam Babu Verma and Ors vs. Union of India & Ors**, (1994) 2 SCC 521 was given in exercise of the exceptional power under Article 142 of the Constitution of India which power is available only with the Hon'ble Apex Court and not to any other Courts/Tribunal in the country. Therefore, court can order recovery of the overdrawals in appropriate cases.

The Learned Counsel for the respondents also placed reliance on the order of the Jabalpur Bench of the Tribunal dated 14th August, 2015 in OA No. 200/00297/2014 (Gyanchand and another vs. Union of India & Others). Relevant portion of the order is reproduced herein below:

4. In the matters of Chandi Prasad Uniyal Vs. State of Uttarakhand, (2012) 8 SCC 417 the Honble Supreme Court has held thus:

(14). We are concerned with the excess payment of public money which is often described as taxpayers money which belongs neither to the officers who have effected overpayment nor to the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situations. The question to be asked is whether excess money has been paid or not, may be due to a bona fide mistake. Possibly, effecting excess payment of public money by the government officers may be due to various reasons like negligence, carelessness, collusion, favouritism, etc. because money in such situation does not belong to the payer or the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without the authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment."

5. On this aspect, the Honble Supreme Court has recently pronounced its judgment in the case of State of Punjab and others etc. Vs. Rafiq Masih (White Washer) etc., (2015) 4 SCC 334. In para 13 of this judgment the Honble Supreme Court has held that payments which have been wrongly made if are detected within five years, it would be open to the employer to recover the same. The relevant portion of this judgment reads as under:-

(11). For the above determination, we shall refer to some precedents of this Court wherein the question of recovery of the excess amount paid to the employees, came up for consideration, and this Court disallowed the same. These are situations, in which High Courts all over the country, repeatedly and regularly set aside orders of recovery made on the expressed parameters.

(12). Reference may first of all be made to the decision in Syed Abdul Qadir v. State of Bihar, (2009) 3 SCC 475, wherein this Court recorded the following observation in para 58:

SW

58. The relief against recovery is granted by courts not because of any right in the employees, but in equity, exercising judicial discretion to relieve the employees from the hardship that will be caused if recovery is ordered. But, if in a given case, it is proved that the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or in cases where the error is detected or corrected within a short time of wrong payment, the matter being in the realm of judicial discretion, courts may, on the facts and circumstances of any particular case, order for recovery of the amount paid in excess. See *Sahib Ram v. State of Haryana*, 1995 Supp. (1) SCC 18, *Shyam Babu Verma v. Union of India*, (1994) 2 SCC 521, *Union of India v. M. Bhaskar*, (1996) 4 SCC 416, *V. Ganga Ram v. Director*, (1997) 6 SCC 139, *B.J. Akkara v. Govt. of India*, (2006) 11 SCC 709, *Purshottam Lal Das v. State of Bihar*, (2006) 11 SCC 492, *Punjab National Bank v. Manjeet Singh*, (2006) 8 SCC 647 and *Bihar SEB v. Bijay Bahadur*, (2000) 10 SCC 99."

(13) First and foremost, it is pertinent to note, that this Court in its judgment in *Syed Abdul Qadir's* case (supra) recognized, that the issue of recovery revolved on the action being iniquitous. Dealing with the subject of the action being iniquitous, it was sought to be concluded, that when the excess unauthorised payment is detected within a short period of time, it would be open for the employer to recover the same. Conversely, if the payment had been made for a long duration of time, it would be iniquitous to make any recovery. Interference because an action is iniquitous, must really be perceived as, interference because the action is arbitrary. All arbitrary actions are truly, actions in violation of Article 14 of the Constitution of India. The logic of the action in the instant situation, is iniquitous, or arbitrary, or violative of Article 14 of the Constitution of India, because it would be almost impossible for an employee to bear the financial burden, of a refund of payment received wrongfully for a long span of time. It is apparent, that a government employee is primarily dependent on his wages, and if a deduction is to be made from his/her wages, it should not be a deduction which would make it difficult for the employee to provide for the needs of his family. Besides food, clothing and shelter, an employee has to cater, not only to the education needs of those dependent upon him, but also their medical requirements, and a variety of sundry expenses. Based on the above consideration, we are of the view, that if the mistake of making a wrongful payment is detected within five years, it would be open to the employer to recover the same. However, if the payment is made for a period in excess of five years, even though it would be open to the employer to correct the mistake, it would be extremely iniquitous and arbitrary to seek a refund of the payments mistakenly made to the employee.

Xxxxx

xxxx

xxxx

6. No doubt, in para 18(i) of the judgment in the matters of *Rafiq Masih* (supra) the Honble Supreme Court has held that recovery from employees belonging to Class-III and Class-IV service cannot be made, however, this para would have to be read with para 13 which states that the wrongful payments if detected within five years can always be recovered by the employer.

7. The Honble Delhi High Court in the matters of *Sh. Jagdish Prasad and others Vs. University of Delhi and others*, W.P.(C) No.3583/2007 decided on 15.4.2015, while dealing with the issue of recovery from Class-IV employees have discussed the decision of the Honble Supreme Court in the matters of *Rafiq Masih* (supra), and in para 15 of the order have held thus:

15. No doubt, in para 12 of the judgment in the case of *Rafiq Masih* (supra), the Supreme Court has laid down the categories of persons from whom recoveries cannot be made, however, these observations with respect to whom the recoveries cannot be made have necessarily to be read with the binding ratio in para 11, that if a mistake is discovered within five years then recoveries can be effected and assuming that the mistake was not discovered within five years even thereafter the mistake can be corrected i.e mistake can be rectified by stopping future payments and which were being wrongly made earlier.

8. In the instant case, the applicants got the benefits under the MACP scheme w.e.f. 1.9.2008 by allowing them the grade pay of Rs.2000 plus 3% increment and thereafter they were wrongly granted benefit of pay fixation of 3% on their regular promotion in October, 2010 in the grade pay of Rs.2400/-. Thereafter,

recovery was started with effect from the salary for the month of July 2013. Thus, the wrong payment was detected in July, 2013 i.e. within five years from October 2010. Since the recovery started within five years, the respondents are fully entitled to make recovery against the applicants of the amounts which the applicants were erroneously paid without any authority of law."

16. As discussed earlier, Ms. Mitali Ghosh had earlier approached this Tribunal challenging the recovery also in OA No. 598 of 2014 (Ms. Mitali Ghosh Vs Eastern Railway), whereas, the Division Bench of the Tribunal after taking note of the decision of the Hon'ble Apex Court in the case of **Chandi Prasad Uniyal v. State of Uttarkhand** reported in AIR 2012 SC 2951 have categorically held that when payments are being effected in many situations without any authority of law, the same can always be recovered barring few exceptions of extreme hardship. And when it is not payers or payees money, it is tax payers money, as it neither belonging to the officers who had effected over payment nor that of the recipient, and once an excess payment has been made due to bona fide mistake, the Government Officer have every right to recover the same. This order of the Division Bench of the Tribunal set at rest as no appeal or review has been preferred by any of the parties.

17. We also find that the prayer of the applicants that there shall be no recovery appears to be hit by *res judicata* as it is trite law that once a matter has been decided on merit, successive application with same prayer is not maintainable being hit by the principle of *res judicata*. In the instant case in the earlier OAs filed by Smt. Mitali Ghosh was dismissed and she is seeking the same reliefs in this OA.

18. It is noteworthy that the case of Sikha Lahiri who is a ANO is to be treated similar as per our findings applicable to Chief Matron. Her pay was also wrongly fixed as that of the Chief Matron with effect from 01.01.2006 as ordered on 28.07.2010. Her pay fixation was also corrected from 29.08.2014.

19. On examination of the matter with reference to the facts and law enumerated above, we find that the judicial intervention sought by the applicants in the two impugned orders dated 19.06.2014 and 16.10.2014 is not warranted. Hence OA No. 1020 of 2015 stands dismissed. Consequently, as already stated above, issues in all the cases being same, all the OAs stand dismissed. In view of the dismissal of the OAs, any interim order which may be in force for keeping the recovery in abeyance, till date, shall stand automatically vacated. There shall be no order as to costs."

6. It is not the case of the parties that the aforesaid orders have been quashed or reviewed. Therefore, as per the judicial discipline this order is binding. In view of the above, the applicants are not entitled to get the GP of Rs. 6400/- as third MACP benefit. They have been awarded correctly the GP Rs. 5400/- with one increment extra as MACP benefit.

7. It is the case of the applicants that they have already retired on reaching the age of superannuation on the dates given herein below against each of the applicants:

| Sl.No. | Name | Date of retirement |
|--------|-----------------------|--------------------|
| 1 | Smt. Madhuri Karmakar | 31.01.2011 |

mc

| | | |
|---|------------------------------|------------|
| 2 | Smt. Dipti Rani Basu | |
| 3 | Smt. Gita Roy | 30.11.2011 |
| 4 | Smt. Swapna Chattapadhyay | 31.01.2013 |
| 5 | Smt. Ashima Sarkar | 30.6.2013 |
| 6 | Smt. Lakshmi utta | 30.04.2012 |
| 7 | Smt. Sadhana Roy | 30.09.2012 |

Their fixation of GP of Rs. 6400/- (which was wrong) was issued on 22.05.2010 (Annexure-A/1) and the pay revision order in the case of Smt. Sadhana Roy was issued on 19.4.2014 and for others on 15.5.2014 i.e. well after their retirement. The learned counsel for the Applicants has put forward the direction of the Hon'ble Apex Court in the case of **State of Punjab and Others etc. Vs. Rafiq Masih (White Washer) etc**, Civil Appeal No. 11527 of 2014 (arising out of SLP (C) No. 11684 of 2012 dated 18th December, 2014. The relevant portion of the decision is quoted hereunder:

"12. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery where payments have mistakenly been made by the employer, in excess of their entitlement. Be it as it may, based on the decisions referred to herein above, we may as a ready reference, summarize the following few situations wherein recoveries by the employers, would be impermissible in law:

- (i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' Service);
- (ii) Recovery from retired employees, or employees who are due to retire within one year of the order of recovery;

20/11/14

- (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued;
- (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post and has been paid accordingly even though he should have rightfully been required to work against an inferior post;
- (v) In any other case, where the Court arrives at the conclusion that recovery if made from the employee would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recovery."

8. Admittedly, in this case the applicants are all Gr. C employees and already retired from service when the pay revision orders were issued. The OA does not reflect the date of retirement of Smt. Dipti Rani Basu. Now recovery of the amount from their retirement dues/pension would no doubt cause great hardship to them. Therefore, while holding the rectification of the Grade Pay from Rs. 6400/- to Rs. 5400/- as correct, keeping in mind the yard stick fixed by the Hon'ble Apex Court in Rafiq Masih's case at (i) & ii), we direct that there shall be no recovery of the differential amounts from the pension of the applicants. However, their pension and all other retiral benefits shall be finalized on GP of Rs. 5400/-.

9. This OA is accordingly disposed of. In view of the above, MA filed by the applicant seeking modification of the order

sw

dated 30.7.2014 is also disposed of. Any subsisting interim order is also vacated.

(Ms. Jaya Das Gupta)
Administrative Member

(Justice V.C. Gupta)
Judicial Member

knm