

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH, CUTTACK**

O.A. No. 869 of 2012

**Present: Hon'ble Mr. Gokul Chandra Pati, Member (A)
Hon'ble Mr. Swarup Kumar Mishra, Member (J)**

1. Mrs. Ramarani Khamurai, aged about 60 years.
2. Shri Subas Chandra Khamurai, aged about 39 years.
3. Shri Sushanta Khamurai, aged about 28 years.
4. Mrs. Subasini Khamurai, aged about 31 years, w/o Debasish Patra and D/o Baidhar Khamurai.

(All the applicants are the wife, son and daughter of Late Baidhar Khamurai, who was the applicant in the aforementioned OA.)

.....Applicant.

VERSUS

1. Union of India represented through comptroller and Auditor General of India, Pocket – 9, Dindayal Upadhyaya Marg, New Delhi – 110124.
2. Principal Accountant General (A&E), Orissa, Bhubaneswar, Dist. – Khurda, Odisha.
3. Senior Deputy Accountant General (Adm.), Office of the Principal Accountant General (A&E) Orissa, Bhubaneswar, Dist. – Khurda, Odisha.
4. Director of Canteen, Department of Personnel & Training, Ministry of Personnel, Public Grievances and Pension, Lok Nayak Bhawan, Khan Market, New Delhi-3.

.....Respondents.

For the applicant : Mr.K.C.Kanungo, counsel

For the respondents: Mr.J.K.Nayak, counsel

Heard & reserved on : 25.2.2019

Order on : 8.3.2019

O R D E R

Per Mr.Gokul Chandra Pati, Member (A)

The Original application (in short OA) was filed under section 19 of the Administrative Tribunals Act, 1985 seeking following reliefs:-

“Your Lordship may be graciously pleased to quash Annexure A/7 for the ends of justice.

AND

Be further pleased to direct the respondents to grant the benefit of upgradation of pay under ACP Scheme fixing the pay of the applicant from the pay scale from Rs.3200-Rs.4900 to Rs.4000/- - Rs.6000/- (pre-revised) with all arrears from dt. 22.12.2004 till dt. 26.09.2007 and to extend second upgradation w.e.f. dt. 26.09.2007 to dt. 30.04.2011 in the

pay scale of Rs.5000/- - Rs.8000/- (pre-revised) with arrears and interest thereon till the actual payment is made for the ends of justice.

AND

Be further pleased to direct all consequential benefits such as pay Revision and other benefits in the new Pay Rules, 2008 (Annexure A/5) prescribing PB-2 Rs.9300/- - Rs.34,800/- with grade pay of Rs.4200/- and arrear thereof till dt. 30.04.2011 and interest thereon till the actual payment is made for the ends of justice.

AND

Be further pleased to quash the order at Annexure A/4 or in the alternate direct the respondents to modify Annexure A/4 to the extent the applicant is concerned by revising/fixing the pay in the pay scale of Rs.4000-6000 w.e.f. dt 22.12.2004 and extending second financial upgradation by revising the pay in the pay scale of Rs.5000-8000 w.e.f. dt. 26.9.2007 to dt 30.04.2011 for the ends of justice.

AND

Be further pleased to issue any other/further order(s) or direction (s) as deemed fit and proper in the circumstances of the case.

AND

For such kind act, the applicant shall as in duty bound every pray."

The OA was initially filed by Late Baidhar Khmurai (referred hereinafter as 'applicant') who was substituted by his legal heirs after his death during pendency of the OA.

2. Briefly stated, the applicant was aggrieved by the order of rejection (dated 27.10.2011, copy at Annexure-A/7) of his request for grant of second financial upgradation under the Assured Career Progression Scheme (in short ACPS) which was made applicable for the Canteen employees vide the Notification dated 10.4.2006 (Annexure-A/3) of the Department of Personnel and Training (in short DOPT). The applicant was also aggrieved by grant of second financial upgradation under the Modified Assured Career Progression Scheme (in short MACPS) in place of the claimed benefit under ACPS vide order dated 1.9.2009 (Annexure-A/4). The applicant was in the Canteen service since 1.2.1968 and was promoted to the post of Clerk w.e.f. 1.3.1981 vide order dated 19.3.1984. The ACPS was made applicable for the Canteen employees vide order dated 25.7.2000 (Annexure-A/1) and vide order dated 9.5.2001 (Annexure-A/2) it was clarified that promotion earned by the Canteen employees prior to 26.9.1983 will be ignored for the purpose of their financial upgradation under ACPS.

3. The applicant was granted first upgradation under ACPS w.e.f. 9.8.1999 to the pay scale of Rs. 3200-4900/-. Vide order dated 10.4.2006 (Annexure-A/3), the pay scales of the Canteen employees were revised w.e.f 22.12.2004 and for Clerks, the first upgradation under ACPS was specified to be in the

scale of Rs. 4000-6000/- in place of Rs.3200-4900/- which was granted to him. The applicant had accordingly claimed the pay scale of Rs. 4000-6000/- w.e.f. 22.12.2004 under first ACPS upgradation in place of Rs. 322-4900/-.

4. The applicant had also claimed that after 24 years of service from 26.9.1983 i.e. from 26.9.2007 he should have been granted second financial upgradation under ACPS to the next higher scale of Rs. 5000-8000/- (pre-revised) in place of second upgradation allowed by the respondents w.e.f. 1.9.2008 to the Grade Pay of Rs. 2400/-. Being aggrieved, the applicant had filed OA No. 493/2011 which was disposed of vide order dated 3.8.2011 (Annexure-A/6) directing the respondents to dispose of the representation, without going into the merits of the case. Accordingly, the respondents have considered the representation of the applicant and rejected it vide order dated 27.10.2011 (Annexure-A/7), which is impugned in this OA. The applicant retired from service on 30.4.2011.

5. The respondents no. 1 to 3 and respondent no. 4 have filed Counters opposing the claim of the applicant for the pay scale of Rs. 4000-6000/- (which is the pay scale for Manger Gr. II) on the ground that as per the promotional norms as per the Recruitment rules, 2001, which are applicable for ACPS upgradation as per the guidelines, the applicant should have had at least five years of service experience in the Grade of Cashier/Store Keeper/Manager Gr. III at pay scale of Rs. 3200-4900/-. Since the applicant did not have minimum experience of 5 years, he was not found eligible for being considered for promotion to the pay scale as upgradation under ACPS. Regarding revision of pay scale w.e.f. 22.12.2004 vide order dated 10.4.2006 (Annexure-A/3) of the DOPT has not been implemented by the respondents and the old Recruitment Rules of 2001 was in force, as stated in the Counters filed by the respondents no.1 to 3 and respondent no.4.

6. The applicant had filed Rejoinder rebutting the averments in the Counter. In reply to the contention about the eligibility of the applicant for upgradation as per promotional norms, it was stated in the Rejoinder that the Recruitment rules have not been enclosed by the respondents with the Counter. It was stated that the benefit on account of the revision of the pay scale for upgradation under ACPS for clerks had not been granted by the respondents. The requirement of incumbency period for ACPS is misconceived and there was no promotional channel for a clerk to higher post.

7. The OA was filed with the MA No. 1011/2012 to condone the delay in filing the OA on the following grounds:-

(i) The OA challenged the order dated 27.10.2011 (A/7) by which the respondents had rejected the claim of the applicant for second financial

upgradation under ACPS and counting from 27.10.2011, there is a delay of 13 days which may be condoned.

(ii) The matter pertains to pay fixation which is a continuing cause of action and hence, there is no delay.

(iii) The delay is on account of ill health who was suffering from GERD EVERTIGO for which he could not take steps in time.

8. We heard learned counsels for the rival parties and gone through the pleadings on record. Before proceeding further, we will first consider the MA No. 1011/2012 which was yet to be considered. The respondents have filed a counter to the MA No. 1011/2012 stating that the applicant was not eligible for the second ACPS upgradation and that the grounds in the MA are not sustainable in the eye of law.

9. From the order dated 3.8.2011 of the Tribunal passed in the first OA No. 493/2011 filed by the applicant, it is seen that the applicant's representations from Annexure-A/6 to A/8 were referred to in the order dated 3.8.2011 which was passed without considering merits of the case. It was stated in para 4.12 of the present OA that the applicant's representation dated 6.4.2010, 12.5.2010 and 23.9.2010 were pending which were disposed of by the respondents by order dated 27.10.2011 (A/7). The relief sought for by the applicant pertained to the implementation of the revised pay scale for Canteen employees w.e.f. 22.12.2004 (A/3) vide the OM dated 10.4.2006 (A/3) of the DOPT, which was not implemented by the respondents pending modification of the Recruitment Rules as stated in the Counter. It is the stand of the respondents that for none of the Canteen employees, the revised pay scales as per the OM dated 10.4.2006 was implemented.

10. It is seen from the record that the applicant did not object to non-implementation of the revised pay scale of the Canteen employees vide OM dated 10.4.2006 till he submitted the representation on 6.4.2010 and in the OA no earlier representation was mentioned. Since a copy of the representation was not enclosed, we are unable to know if the applicant had raised the issue of revised pay scale in the representations since the order dated 27.10.2011 did not mention anything about the claim of revised pay scale w.e.f. 22.12.2004 as per the OM dated 10.4.2006. It is also seen that no order of the respondents was produced by the applicant to show that the revised pay scaled w.e.f. 22.12.2004 were implemented by the respondents. It was not the case of the applicant that the benefit of the revised scale was allowed to any of the Canteen employees under the respondents. The issue cannot be said to be a continuing cause of action as it was not the dispute related to fixation of pay, but implementation of the revised pay scale w.e.f. 22.12.2004, which was not

raised earlier in the representation by the applicant. Hence, the delay in raising the issue of non-implementation of the OM dated 10.4.2006 has not been explained in the MA No. 1011/2012, for which the delay in raising the claim of revised pay scale as per the OM dated 10.4.2006 cannot be condoned. Hence, the relief sought for by the applicant for implementation of the revised pay scale w.e.f. 22.12.2004 was barred by limitation which is liable to be dismissed.

11. Learned counsel for the applicant had cited the order dated 12.12.2017 of this Tribunal in the case of Sri Bansidhar Chhatoi vs. Principal Accountant General (A&E) & another in OA No. 682/2011. In the OA No. 682/2011, the case involved the similar issue of grant of second ACPS benefit to a Canteen employee who was a Tea & Coffee mahar in Group D. It is seen from the order dated 12.12.2017 that there is no claim for the revised pay scale as per the OM dated 10.4.2006 which was clearly not implemented by the respondents. It was held by the Tribunal in that case (OA No. 682/2011) as under:-

" 5.....Since there is no promotional avenue for the incumbents of isolated posts such as Tea & Coffee Makers, it is meaningless to insist on fulfilling of eligibility conditions."

From the order cited before us, it is clear that the revised pay scales w.e.f. 22.12.2004 as per the OM dated 10.4.2006 have not been implemented by the respondents since there was no such claim in the OA No. 682/2011.

12. The other relief sought for by the applicant was the claim for second ACPS benefit to the pay scale of Rs. 4000-6000/- w.e.f. 26.9.2007 after completion of 24 years. It is noted that the claim for second ACPS benefit to pay scale Rs. 4000-6000/- was rejected by the respondents vide order dated 27.10.2011 (Annexure-A/7). The explanation given in the MA No. 1011/2012 for delay in respect of the claim for second ACPS benefit w.e.f. 26.9.2007 to pay scale of Rs. 4000-6000/- which was rejected vide order dated 27.10.2011 (A/7), is found to be satisfactory. Hence, the MA No. 1011/2012 is allowed for the relief with regard to the second ACPS benefit w.e.f. 26.9.2007 and delay in filing the OA is condoned in respect of the above relief.

13. Vide the order dated 27.10.2011, the reason for not allowing the second ACPS benefit to the applicant was that he did not fulfil the promotional norms of having 5 years of service at the Grade of Cashier/Manager Gr. III for whom the pay scale applicable was Rs. 3200-4900/-. Since the applicant had been granted this pay scale w.e.f. 9.8.1999 as first ACPS benefit, it cannot be said that the applicant did not have the service experience in the rank of Manager Gr. III with scale of pay of Rs. 4000-6000/-. The respondents have not enclosed the rules specifying the eligibility norms for promotion to the grade of Manager

Gr. II and in absence of the provisions, it is clear that the applicant, having enjoyed the pay scale of Rs. 3200-4900/- from 9.8.1999 after grant of first ACPS benefit, the applicant. prima facie, was eligible for promotion to the scale of Rs. 4000-6000/-. From another angle, if there is no other promotional prospects for clerk, then it would be treated as an isolated post and applying the order of the Tribunal in OA No. 682/2011, the applicant in the present OA was entitled for the second ACPS benefit w.e.f. 26.9.2007.

14. In view of the above, the impugned order dated 27.10.2011 (Annexure-A/7) is set aside and quashed and the respondents are directed to consider/reconsider the case of the applicant for grant of second financial upgradation benefit under ACPS to the pay scale of Rs. 4000-6000 w.e.f. 26.9.2007, since it was the next promotional grade as per the Recruitment rules. In case the applicant would be found suitable for the second ACPS benefit as above, then he is to be allowed the consequential benefits including the arrear differential pay after deducting the pay already drawn by him after grant of the benefit of second MACPS w.e.f. 1.9.2008 which would be inadmissible after grant of second ACPS benefit to the applicant. This OA is allowed accordingly in part with no order as to cost.

(SWARUP KUMAR MISHRA)
MEMBER (J)

(GOKUL CHANDRA PATI)
MEMBER (A)

I.Nath

