

CENTRAL ADMINISTRATIVE TRIBUNAL

MADRAS BENCH

OA/310/00330/2018

DATED THIS THE 13 DAY OF JUNE, TWO THOUSAND NINETEEN

PRESENT:

THE HON'BLE MR. P.MADHAVAN, MEMBER (J)
&
THE HON'BLE MR. T. JACOB, MEMBER (A)

V. Santha
3/3, Chitlapakkam Main Road
Gomathy Nagar, Selaiyur
Chennai – 600 073.

...Applicant

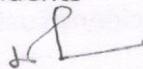
By Advocate: M/s. S. Arun

Vs

1. Union of India
Rep. by Chief Postmaster General
Office of the Chief Postmaster General
Chennai – 600 002.
2. The Postmaster General
Chennai City Region
Chennai – 600 002.
3. The Senior Superintendent of Post Offices
Tambaram Division
Tambaram – 600 045.

...Respondents

By Advocate: Mr. S. Nagarajan



ORDER

(Pronounced by Hon'ble Mr. T Jacob, Member (A))

This OA has been filed by the applicant under Sec.19 of the Administrative Tribunals Act, 1985 seeking the following relief:-

"To set aside Memo No. B1/LSG/Dlgs/2017 dated 28.12.2017 issued by the 3rd respondent and consequently direct the respondents to grant her MACP III benefits with effect from 01.09.2008 with all attendant benefits including interest on arrears at the rate of 12% per annum till the date of actual payment and pass such other orders"

2. The brief facts of the case as submitted by the applicant are as follows:

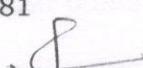
The applicant was regularly appointed as Postal Assistant on 30.07.1974 and was granted Time Bound One Promotion (TBOP) w.e.f. 30.07.1990 and the Biennial Cadre Review promotion (BCR) w.e.f. 01.01.2001. She was offered regular promotion to the post of LSG Supervisor on 02.05.2008. She declined her promotion to the post of LSG Supervisor on 24.02.2009 due to her incapacitation as a result of road accident sustained by her. It is her contention that the MACP came into force from 01.09.2008 and as she had completed 30 years of service on 30.07.2004, she is eligible for 3rd financial upgradation under MACP Scheme w.e.f. 01.09.2008 for which she satisfied all the conditions stipulated. Therefore, she submitted representations to the 2nd respondent seeking MACP III financial upgradation w.e.f. 01.09.2008. Since she did not receive any reply she filed OA No. 8

1641/2017 seeking MACP benefits w.e.f. 01.09.2008. This Tribunal disposed of the OA by directing the applicant to submit fresh representation seeking MACP benefit w.e.f 01.09.2008. In pursuance of the directions of this Tribunal, the 3rd respondent issued impugned order 28.12.2017 rejecting grant of MACP III benefits w.e.f 01.09.2008. Hence this OA seeking the above mentioned relief.

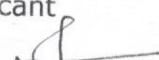
3. The applicant has challenged the impugned order on the following among other grounds:

- a. The action of the respondents in rejecting the request of the applicant for granting MACP III benefits w.e.f. 01.09.2008 on the ground of applicant's earlier refusal to promotion in terms of Para 25 of MACP Scheme is unjust and arbitrary because no one is aware of provisions contained in para 25 of MACP Scheme when applicant refused promotion to LSG Cadre on 24.02.2009.
- b. The inaction of the respondents in granting MACP III benefits to applicant w.e.f. 01.09.2008 in view of Para 25 of MACP Scheme in the present case is nothing but applying a provision with retrospective effect which is impermissible under Law as the MACP Scheme came into effect in Postal Department only by an order of Directorate on 19.09.2009 only with retrospective effect from 01.09.2008.

4. Per contra the respondents in their reply have stated that in the year 2008, the applicant was granted promotion to the cadre of LSG, which she declined and the declination was also accepted by the competent authority. It is submitted that as per OM No.22034/3/81



Estt(D) dated 1.10.1981, if a Government servant does not want to accept the promotion, acceptance of the refusal of promotion by the competent authority is subject to the condition that no fresh offer of appointment on promotion shall be made for a period of one year from the date of refusal or till the next vacancy arises whichever is later and that on the eventual promotion to the higher grade, such Government servant will lose seniority vis-a-vis his juniors promoted to the higher grade earlier irrespective of the fact whether the posts in question are filled up by selection or otherwise. It is further submitted that MACP scheme was implemented by the Department of Posts w.e.f. 01.09.2008 in letter No. 4-7(MACPS)/2009 PCC dated 18.9.09 of Postal Directorate, New Delhi. The applicant has completed 30 years of service in the year 2004 itself and therefore, as per MACP Scheme she was due for MACP w.e.f. 01.09.2008 in the normal course. However since the applicant has declined the regular promotion to the cadre of Lower Selection Grade offered vide 1st respondent memo dated 2.5.2008, her case for grant of MACP w.e.f. 01.09.2008 was not considered by the Departmental Screening Committee as per Para 25 of the guidelines on MACP, according to which, the official will be eligible for considering financial upgradation only when she agrees to be considered for promotion again. In the meantime the promotion to LSG cadre was again offered to the applicant vide No. STA/5-21/2010 dated 08.04.2010 of 1st respondent and the applicant has accepted the promotion and joined the LSG post on 02.06.2010. Since the applicant



has accepted the promotion ordered by the 1st respondent, her case of grant of MACP w.e.f. 03.06.2010 was considered by the Review Departmental Screening Committee and the benefit extended to the applicant. According to the respondents as per clarification issued by Directorate in letter no. 4-7/MACP/2009-PCC(Pt.II) dated 14.08.2012, in case an employee has refused promotion, no financial upgradation is allowed under MACP Scheme. Para 25 of the MACP guidelines, which is a policy decision of the Government with regard to the effect of refusal of regular promotion and therefore any relaxation in the matter cannot be possible in deviation of the provisions of the scheme.

5. Further, it is submitted that the respondent is not entitled to claim MACP-3 as she refused regular promotion before becoming entitled to a financial upgradation and as such, she had not been stagnated due to lack of promotional opportunities. The respondents have relied on the following orders of the Tribunal in support of their submissions.

I. Order dated 26.08.2014 of the Tribunal commonly passed in OAs 1098/2011 & 1466/2011 filed by Shri Cathavarayan and Shri. Alphonsa Martin

II. Order dated 01.08.2014 of the Tribunal in OA No. 884/2011

III. Order dated 08.07.2014 of the Tribunal, Madras Bench in OA No. 2/2012 filed by Smt. S. Chinnusamy Vs SPOs, Namakkal

IV. Order dated 07.08.2013 of the Tribunal in OA No.1096/2011 filed by Shri. V. Prabhakaran. The order of the Tribunal was also confirmed by the Hon'ble High Court in the Judgment dated 03.01.2017 in WP 24316/2014.

6. Learned counsel for the applicant would contend that the applicant had completed 30 years of service in the year 2004 itself and



hence the applicant is entitled for grant of 3rd MACP benefit. Her declining the promotion in the year 2009 cannot be a ground for rejection of her claim for 3rd MACP benefit w.e.f 1.9.2008. It is also submitted that similar issues were dealt with by this Tribunal which were allowed. He has relied on the following decisions of the Hon'ble High Court :-

(I) Order dated 16.04.2018 in WP No.10095 of 2014 of Hon'ble High Court of Bombay in the case of Union of India & Ors Vs Ganesh B. Shrote

(ii) Order dated 10.02.2014 in Special Civil Application No. 18318 of 2013 of Hon'ble High Court of Gujarat at Ahmedabad in the case of Union of India & Ors Vs Paulbhai. Further the SLP filed by the UOI was also dismissed on merits.

7. Learned counsel for the respondents would submit that as per Paragraph 25 of MACP guidelines indicated in Postal Directorate's letter dated 18.09.2009, if a regular promotion was offered, but refused by the employee, before becoming entitled to a financial upgradation, no financial upgradation shall be allowed as such, the employee has not stagnated due to lack of opportunities. He has relied on the decision of the Hon'ble High Court of Madras in WP No.24316 of 2014 dated 03.01.2017 in the case of V. Prabakaran Vs Chief Postmaster General and Ors in support of his submissions.

8. Heard the learned counsel for the parties and perused the pleadings and documents on record.

9. The question for consideration is whether refusal of promotion prior to introduction of Financial Upgradation scheme would deprive an



appropriate employee to the benefit of financial upgradation.

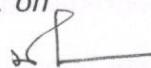
10. It is not in dispute that the applicant has completed 30 years of service in the year well before 01.09.2008 and thus the eligibility condition of completion of 30 years has been fulfilled by him. The sole ground of rejection of her claim for the grant of financial benefit under 3rd MACP is that she had earlier declined her promotion to LSG and MACPs are granted only where there was no promotional prospect for a prescribed number of years. Admittedly, there was no inquiry on 1.9.2008 pending or contemplated. As on 24.02.2009 of the applicant declining the LSG promotion the MACP scheme was not in force as it was notified on 19-05-2009. The applicant did not decline promotion after MACP Scheme came into effect and, therefore, refusal of promotion posts cannot be a ground for denying the benefit under MACP Scheme. Even if her refusal was considered it would be a debarment of one year and after completion of debarment period, she would be entitled to claim benefits under the MACP scheme.

11. Further, in terms of para 25 of Annexure I to the letter of the Department of Posts No.4-7/(MACPS)/2009-PCC dated 18.9.2009 as extracted in Annexure R-3 Communication referred to in the reply, in the event of refusal of promotion, upgradation already granted shall not be withdrawn. It can only act as a bar to further upgradation till the employee agrees for promotion. However, in this case there is no further upgradation to be granted after 2004 and the refusal of promotion in 2009 cannot come in the way of what was due earlier.



12. The issue whether an employee who has refused promotion prior to the implementation of MACP Scheme is entitled for benefit under the scheme came up for consideration before the Bombay Bench of Central Administrative Tribunal in OA 91/2011. It has been held that refusal of promotion when there is no expectation of some beneficial order and denial of benefit because of refusal of promotion cannot be justified. For better appreciation we may refer to para 8 of the order passed by the Bombay Bench of the Central Administrative Tribunal dated 05.08.2013 in OA 91/2011 and it is thus:-

"8. The learned counsel for the applicant heavily relied on the judgment of Bombay Bench of the Tribunal. The learned counsel has annexed Swamy's News of July 2008 to the Rejoinder, wherein the judgment of the Bombay Bench passed in OA 129/2003 has been discussed. It appears from the said Annexure that the Bombay Bench of the CAT held that "if an employee has refused the promotion before the enforcement of the ACP Scheme, the facts would remain that he has actually not been given any financial upgradation which he could have been by a regular promotion. He remains on the scale of pay still stagnated." In view of the clear observation of the CAT Bench of the Bombay, the respondents clarification cannot be accepted. The Ernakulam Bench of this Tribunal in OA No. 768 of 2005 considered Condition No. 10 of the Scheme and held that "Condition No. 10 makes it amply clear that if an employee is accepting ACP benefit, he is deemed to have given unqualified acceptance for regular promotion on occurrence of vacancy subsequently". That precludes factoring of past refusals while giving ACP benefit. In that view, the refusal of an employee for regular promotion earlier to 09.08.1999 has no effect in the grant of promotion under ACP Scheme. The Bench subsequently considered clarification given by the DOPT under clarification of Doubt No. 38. It has been held by the Bench that the refusals were all made by the applicant at such a time when there was no anticipation of the intended benefits under the ACP Scheme. The refusals should have had their injurious effect on the applicant on



both the occasions, though it was all self invited by the applicant himself. But one they have been suffered, allowing them to continue in future also would amount to punish them for the second time. The employee is not aware of the ACP Scheme when he refused promotion earlier to the introduction of ACP Scheme. The decisions of the Mumbai, Ernakulam Bench of the Tribunal and the High Court of Bombay state that when promotions were declined, there was no ACP Scheme and also there was no offer of promotion on 09.08.1999. In view of the above decisions, the eligibility for benefits under the ACP Scheme has to be reckoned on the actual date namely 09.08.1999. The applicants refused regular promotion earlier to 09.08.1999 is not sustainable. Hence, a direction was given to respondents to grant the applicants benefit under the ACP Scheme irrespective of the fact of their refusal of promotion earlier to 09.08.1999. Six weeks' time was given for implementation of the order."

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

"5. The crux of the issue in this O.A is whether the refusal of promotion by the applicant in the year 1997 prior to the notification of the ACP Scheme on 09.08.1999 is a bar to his getting the 1st financial upgradation under the said scheme with effect from 03.07.1992 or not. The ACP Scheme was introduced on 09.08.1999 by the Government of India to mitigate the suffering of the employees due to lack of promotional avenues. The 1st financial upgradation was to be granted on completion of 12 years service to those employees who though eligible for promotion, did not get promotion during the period of 12 years. The applicant was eligible to get the 1st financial upgradation with effect from 03.07.1992 and the same was granted to him vide Annexure A-1 order 08.03.2000. However, it was withdrawn subsequently on the ground that the applicant had declined vacancy based promotion in August, 1997. The applicant had become eligible for the 1st financial upgradation on completion of 12 years from 1980 to 1992 without any promotion. The respondents have no case that he was offered promotion during the period from 1980 to 1992. He was offered promotion only in 1997, i.e. 5 years after his becoming eligible for the 1st



financial upgradation which he declined. The refusal of the promotion after 1992 can impact adversely his eligibility for the 2nd financial upgradation in 2004 only. The relevant part of Para 10 of the Annexure to ACP Scheme is extracted as under:

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

(emphasis supplied)

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

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

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

[Signature]

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

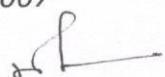
When the promotions were declined there was no ACP Scheme envisaged at all, b. There was no offer of promotion when the Scheme came into being on 09.08.1999.

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

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

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

7. In the said circumstances, we are of the view that the case of the present applicants are also covered by the decision rendered by this Tribunal in O.A. 162 of 2007

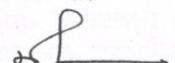


which has attained a finality by the judgement of the Hon'ble Supreme Court in 21475 of 2008. Accordingly, the respondents are directed to consider and grant the first financial upgradation under the ACP Scheme to the applicants as on 9.8.1999, subject to their fulfilling other conditions for grant of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

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

13. Thus as on the date of refusal of promotion by the applicant, MACP Scheme was not conceived. MACP Scheme was notified on 19-09-2009. The applicant did not deny promotion after the scheme was conceived. Her denial of offer of promotion when there was no expectation of MACP cannot be a ground to deny the benefit under the scheme. We totally agree with the view expressed by the Bombay Bench in the above referred case. In a similar case of UoI Vs S.Thangavel (Diary No. 1662/2018) the Hon'ble Supreme Court dismissed the SLP on merits and thus the decision of Madras High Court in WP 16/2014 reached finality wherein the Hon'ble High Court had held that the petitioner was entitled to get all benefits claimed by him. In view of this, the citations relied upon by the learned counsel for the respondent have no relevance.

14. The issue is no longer res integra as the entitlement to the financial upgradation has been crystallised by the Mumbai Bench as



also Ernakulam Bench and further this Bench of the Tribunal has also dealt with the such issue and confirmed the same. Hence, the OA deserves to be allowed.

15. In such view of the matter, the order of the 3rd respondent dated 28.12.2017 is liable to be set aside. We order accordingly. It is declared that the applicant is entitled to the grant of 3rd MACP w.e.f 1.9.2008 or the date she completed 30 years of service whichever is later. The respondents are directed to grant 3rd MACP benefits to the applicant, if she is otherwise eligible and pay consequential difference of arrears of pay and allowances to the applicant on account of granting the 3rd MACP benefits to her. The above exercise shall be complied with by the respondents within a period of three months from the date of receipt of a copy of this order. The OA is allowed to this extent. No costs.