

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

No. OA 796 of 2013

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

Akhila Chandra Sahoo, aged about 59+ years, S/o Late Kahnu Charan Sahoo, At- Brajarajpatna, PO - Sukarpada, PS - Nischintakoili, Dist./ - Cuttack, presently working as Sorting Assistant, office of the Head Record Officer, Railway Mail Service (RMS) 'N' Division, Cuttack.

.....Applicant

VERSUS

1. Union of India, represented through its Director General, Deptt. Of Posts, Govt. of India, Dak Bhawan, New Delhi.
2. Chief Post Master General, Odisha Circle, Bhubaneswar GPO, Bhubaneswar, Dist. – Khurda.
3. Senior Superintendent (Postal) RMS 'N' Division, Nuapatna, Cuttack-1.
4. Head Record Officer, Office of the Sr. Superintendent (Postal) RMS 'N' Division, Nuapatna, Cuttack-1.
5. Dy. Auditor (Postal), D.A.(P), At/PO-Mahanadi Vihar, Cuttack-4.

.....Respondents.

For the applicant : Dr.J.K.Lenka, counsel

For the respondents: Mr.L.Jena, counsel

Heard & reserved on : 29.4.2019

Order on : 3.7.2019

O R D E R

Per Mr. Gokul Chandra Pati, Member (A)

The present OA has been filed by the applicant with prayer for the following reliefs :

- "(a) Quash the orders dated 30.9.2013 and 6.9.2013 at Annexures A/5 and A/8 respectively.
- (b) Declare that the financial upgradation under BCR Scheme granted to the applicant as per letter dtd. 3.8.2009 at Annexure A/1 is legal and valid.
- (c) And further declare that paragraph 4 of the Directorate letter No. 4-7(MACPs) 2009 PCC dated 18.9.2009 at Annexure A/3, dtd 28.8.2013 is prospective and not applicable for cancellation of earlier benefits to the applicant as the applicant has got the financial upgradation under the BCR Scheme prior to issue of the said letter dtd. 18.9.2009 and if held that the same is applicable to the applicant having retrospective operation, quash the same being Ultra vires to Articles 14 and 16 of the Constitution of India.
- (d) or, alternatively, direct the respondents to allow the MACP-III to the applicant w.e.f. 1.9.2008 as has been extended to Sri Prahallad Dwibedy & Ratnakar Behera.

(e) And pass any other order(s)/direction(s) which would afford complete relief(s) to the applicant in the facts and circumstances of the case."

2. The applicant was initially recruited as a Mailman w.e.f. 14.4.1978 and subsequently appointed as Mail Guard w.e.f. 13.3.1982. Thereafter he appeared in the departmental examination and after clearing the same he was appointed as Sorting Assistant w.e.f. 17.5.1983 vide order dated 31.5.1983 (Annexure A/1) after undergoing necessary training. He was also promoted to next higher pay scale under Time Bound One Promotion (TBOP) Scheme w.e.f. 20.5.1999. He was also upgraded to the next higher pre-revised pay scale of Rs.5000-8000/- which was revised to Rs.9300-34,800/- in PB-2 with Grade Pay of Rs.4200/- under BCR Scheme after completion of 26 years of service in the cadre of Time Scale Sorting Assistant. The BCR promotion with the GP of Rs.4200/- was given to the applicant w.e.f. 1.7.2009 (Annexure A/2). The Modified Assured Career Progression (in short MACP) Scheme was introduced by the Government w.e.f. 1.9.2008 as per the circular issued on 18.9.2009 (Annexure R/1) and in that it was mentioned that no past cases will be re-opened. Subsequently on recommendation of the Audit the respondents cancelled the upgradation given to the applicant in BCR Scheme w.e.f. 1.7.2009. The applicant is aggrieved by such cancellation.

3. The applicant stated in the OA that before ordering cancellation of his BCR benefit and recovery of excess amount paid, no opportunity was given to the applicant and hence, the action of the respondents violates the principles of natural justice. Moreover, the recovery is also not permissible as per law laid down by the Hon'ble Apex Court in the case of Shyambabu Verma -vs- Union of India [1994 ATT, 260]. It is further stated in the OA that the MACP Scheme as per the guidelines dated 18.9.2009 should be prospective and should not have retrospective effect. It was also stated in the OA that in another case of Niranjan Patnaik who was allowed such similar upgradation under BCR Scheme but his case was not re-opened or cancelled as per para 14 of the MACP guideline. It is also stated that in another case of Prahallad Dwibedy who is similarly placed as the applicant was allowed BCR benefit w.e.f.

1.7.2009 and was also allowed MACP benefit vide order dated 21.12.2011 (Annexure A/4) after his retirement on 30.11.2009. Prahallad Dwibedy got 3rd MACP benefit w.e.f. 1.9.2008 to the Grade pay of Rs.4200 in PB-2. The applicant stated that similar benefit of 3rd MACP should have been allowed to the applicant also. It is further stated that the authority did not consider the stipulation in MACP guideline that no past cases would be re-opened. Hence his contention is that both recovery and cancellation of BCR benefit of the applicant is illegal, arbitrary and discriminatory and it is contrary to law as laid down by Hon'ble Apex Court in the case of Shyam Babu Verma (supra).

4. The respondents have filed counter stating that vide order dated 18.9.2009 (Annexure R/1) launching the MACP Scheme, all the Units were instructed to cancel the promotions under TBOP/BCR scheme granted after 1.9.2008 vide order dated 28.8.2013. Accordingly, the applicant's BCR promotion w.e.f. 1.7.2009 was cancelled. The applicant had filed OA 696/2013 which was disposed of giving liberty to the applicant to file representation to be considered by the respondents. It is stated that the representation of the applicant was received by the respondents on 15.10.2013 and the same was considered as per para 4 of the order dated 18.9.2009 (Annexure R/1) and was rejected vide order dated 6.11.2013 (Annexure A/8). It is further stated that there is no provision in the guideline to give opportunity before any recovery and this cancellation was done as per the instruction at Annexure R/3 of the CPMG i.e. respondent No.2 on the basis of recommendation of the Audit. Regarding the case of Prahallad Dwibedy and Niranjan Pattnaik the counter in para 16 has stated as under :

"That in reply to the averments made in para 4(xiii) of the OA it is humbly submitted that the cases of Shri Prahallad Dwibedy and Shri Niranjan Pattnaik are not similar to the applicant. It is humbly submitted that Shri Niranjan Nayak, Ex-Sorting Assistant was retired from the government service w.e.f. 31.7.2009 but Directorate letter dated 18.9.2009 was received on 24.9.2009. As the official had already been retired from the government service3 w.e.f. 31.7.2009, no recovery has been made against the official till date. Similarly no such case of Shri Prahallad Dwibedy, Ex-Postal Assistant, Returned Letter Office has yet been pointed out by the Director of Accounts (Postal) Cuttack since his case is not identical to the applicant's case, MACP has been allowed in favour of Shri Dwibedy by the Screening Committee met on 2.11.2011 after his retirement on superannuation on 30.11.2009 vide Circle Office, Bhubaneswar memo dated 21.12.2011 (Annexure R/4 series)."

5. Rejoinder has been filed by the applicant. It is stated that the cases of Prahallad Dwibedy and Niranjan Pattnaik are identical. Hence the contention in the counter that the applicant is not similarly placed with these two persons is not correct. It is also stated that another employee Ratnakar Behera has also got the benefit of 3rd MACP w.e.f. 1.9.2008. It is stated that the persons who were directly recruited as Sorting Assistant, after completion of 30 years of service are getting Grade Pay of Rs.4600, although the applicant has completed 31 years of service he was not extended the benefit of Grade pay of Rs.4600.

6. We have heard the learned counsel for the applicant. Besides reiterating the contentions in the OA, has also filed a written note of submission in which a copy of the order dated 22.5.2012 in OA 382/2011 of Jodhpur Bench of the CAT has been enclosed in support of the case of the applicant. At the time of oral hearing learned counsel also had referred to judgment of Hon'ble Delhi High Court dated 20.11.2017 in WP(C) No.9537/2016 in the case of Hari Ram & Anr. -vs- Registrar General, Delhi High Court. He also has filed a copy of the judgment dated 14.2.2017 of Hon'ble madras High Court in the case of Union of India & Ors. -vs- S.Ranjit Samuel & Ors. He also submitted a copy of order dated 3.11.2015 passed by the Principal Bench of this Tribunal in OA No. 3756/2011 in the case of Shakeel Ahmad Burney -vs- Union of India & Ors.

7. On the other hand, learned counsel for the respondents controverted the submission and arguments advanced by the learned counsel for the applicant. He also filed a written note of submission explaining the stand of the respondents as stated in the counter. He has referred to the judgment of Hon'ble Apex Court in the case of Union of India & Anr. -vs- International Trading Co. & Anr. [AIR 2003 SC 3983] in his written note. He argued that the applicant had already got three promotions i.e. from mailman to Mail Guard, then from Mail Guard to Sorting Assistant and then has availed TBOP upgradation as stated in the counter. Therefore, he is not eligible for any further financial upgradation under MACP Scheme.

8. The applicant's counsel has filed copy of the following judgments at the time of hearing and alongwith his written note of argument submitted by him after hearing:-

- (i) Judgment dated 14.02.2017 of Hon'ble Madras High Court in the case of The Union of India & others vs. S. Ranjit Samuel & others
- (ii) Order dated 3.11.2015 in the OA No. 3756/2011 by the Principal Bench of the Tribunal in the case of Shakeel Ahmad Burney vs. UOI & Ors.
- (iii) Order dated 22.5.2012 of Jodhpur Bench of the Tribunal in the case of Bhanwar Lal Regar vs. Union of India & others in a batch of OAs.

In the case of S. Ranjit Samuel (supra), a batch of Writ Petitions with similar issues, the employees involved in those writ petitions were aggrieved as they were not allowed the benefit of 2nd upgradation under the Assured Career Progression (in short ACP) Scheme after completion of 24 years of service between January to April, 2009. When their claim for the ACP Scheme was pending, the Modified ACP (in short MACP) Scheme was introduced replacing the ACP Scheme with retrospective effect i.e. from 1.9.2008. The applicants claimed that since on the date of completion of their 24 years of service, the ACP Scheme was in force, they should be allowed 2nd upgradation under the ACP scheme instead of the MACP Scheme in which the benefit would be less. In the present OA before us, the dispute relates to withdrawal of the BCR benefit granted w.e.f. 1.7.2009 and sanction of the MACP benefits in addition to the benefits allowed under the BCR Scheme, which was withdrawn from 1.9.2008 with introduction of the MACP Scheme vide the circular dated 18.9.2009 (Annexure-R/1 to the Counter). In the OA, the decision to withdraw the BCR Scheme w.e.f. 1.9.2008 has not been challenged. In case of the ACP Scheme, it stood modified w.e.f. 1.9.2008 after introduction of the MACP Scheme. It is clear that the facts of the cited case and the issues involved in the cited case are different from the OA before us.

9. In the case of Bhanwar Lal Regar (supra) decided by Jodhpur Bench of the Tribunal, the applicant was promoted from Group D to postman cadre and then he was promoted as Postal Assistant after qualifying in a LDCE for the same. He was allowed the TBOP benefit after 16 years of service as Postal Assistant. Then he was sanctioned the benefit under the MACP to the Grade Pay of Rs. 4200/- w.e.f. 31.3.2010, which was cancelled subsequently on the ground that he had already availed three promotion/upgradation. The cancellation of the MACP benefit was challenged in that OA. The Tribunal (Jodhpur Bench) held in that case as under:-

"In a similar manner, while being Postmen, the three applicants in these three OAs faced the Limited Departmental Competitive Examination (LDCE in short) and qualified to become Postal Assistants. Their joining as Postal Assistants was not in the nature of promotion in their earlier existing service or cadre, but

was a career advancement through a process of selection. Therefore, for the purpose of grant of TBOP/BCR financial upgradations earlier, and MACP financial upgradation now, the only dates which are relevant to be taken into account for the purpose of counting the periods of their stagnation is the period spent by the applicants as Postal Assistant. In that sense, the clarification issued by the Pay Commission Cell of the Department of Posts, Ministry of Commissions & IT on 25.4.2011 through file No. 4-7/MACPS/2009 /-PCC, as cited in para 8 above, is correct. The only problem with that clarification is that it stopped at the point of clarifying that when the GDS first joined in a Group D post, and was later declared as successful in the Postman examination, the regular service for the purpose of MACP would be deemed to commence from the date of his joining as a Postman in the main cadre on direct recruit basis. But it is obvious that thewould follow, and when the Postman appears at the LDCE and gets selected to a new Cadre as a Postal Assistant, then it is start of a new innings for him, and for the purpose of counting his stagnation, if any, the date of his joining as Postal Assistant alone would be relevant, and his previous career advancements cannot be called to be promotions within the definition of the word 'promotion', as is required for the grant of TBOP/BCR benefit consideration, and for consideration for eligibility for financial upgradation on account of stagnation under the MACP Scheme."

10. In the above order, it was held that for availing MACP benefits, the service is to be counted from the stage of Postal Assistant as the employee concerned was selected through the LDCE, for which, the appointment as Postal Assistant is to be treated as direct recruitment and not as promotion. It was argued by the applicant's counsel that the order dated 22.5.2012 also covers the applicant who is similarly situated and therefore, the applicant's appointment as Sorting Assistant is not to be taken as promotion, but as direct recruitment for the purpose of the MACP Scheme. Accordingly, the reliefs sought for under para 8(d) of the OA was amended by the applicant's counsel by filing a Memo to claim the benefits under the MACP Scheme in addition to the BCR benefit which was sanctioned to the applicant w.e.f. 1.7.2009 and then withdrawn subsequently. Thus, the applicant seeks restoration of the BCR benefit w.e.f. 1.7.2009 in the GP of Rs. 4200/-, which was cancelled by the respondents. The applicant also claims the MACP benefit raising his GP to the next higher level.

11. The applicant's counsel had earlier relied on the judgment of Hon'ble Delhi High Court in the case of Hari Ram vs. Registrar General, Delhi High Court. In that case, the petitioner was aggrieved because he was not allowed the benefit of 3rd MACP since the respondents treated his fixation of pay with the GP of Rs. 5400/- as one upgradation where as for similarly situated employees, it was treated differently. Hence, the cited case is factually distinguishable from the present OA, for which the cited judgment would not be helpful for the applicant's case.

12. Learned counsel for the applicant has cited the order dated 3.11.2015 in OA No. 3756/2011 in the case of Shakeel Ahmad Burney (supra). In the said case, the dispute was whether the appointment as Postal Assistant after qualifying in the LDCE is to be treated as promotion or direct recruitment.

After examining the order of Jodhpur Bench of the Tribunal in similar cases and the OM dated 10.2.2000 of the DOPT as well as the circular dated 25.4.2011 of the respondents, it was held by the Tribunal as under:-

10. It is, therefore, clear that in the instant case also, the service rendered by the applicants after the date of their regular promotion, after the due process of their having been declared successful at the respective years LDCE Examinations from 2004 to 2009, has to be counted as non-fortuitous service rendered by them as UDCs, and anybody who is now selected as a UDC in the year 2012, whether on the basis of an LDCE conducted for 25% of the declared 2151 posts, or through SQ quota for 75% of the said declared 2151 posts, would never be able to surmount and overcome the hurdle of the non-fortuitous service as U.D.Cs already put in by the applicants, and other similarly placed persons, and can never become their seniors as UDCs. This also answers the issue raised by the Intervenor Private Respondents, as discussed at para 27/above.

11. However, whether TBOP, or BCR, or MACP, all these Schemes are the Schemes floated by the respondents as a Safety Net Scheme for the purpose of providing relief to the employees who are caught stagnating in the same scale of pay, and, after the introduction of the VI CPC, in the same Grade pay, without being accorded any promotion in the regular course. One very relevant point in this case, which was not stressed even by the learned counsel for the respondents during the course of arguments has been that applicant before us had actually got one more norm-based promotion also, from the pay scale of Postal Assistant, to the LSG, as an Assistant Manager (Outdoor). Having availed of one norm-based promotion from the Postal Assistant cadre to LSG cadre before completion of 30 years of his regular service in the Postal Assistant cadre w.e.f. 02.09.1976, though the grant of 3rd MACP benefit w.e.f. 1.9.2008 through Annexure A/3 order dated 28.06.2011 would otherwise have been held to be correct in the light of the earlier discussion, but his subsequent norm-based promotion ordered through order dated 05.07.2011 (Annexure R/5) would, from that date, disentitle him to the 3rd MACP financial upgradation benefit, which was granted to him w.e.f. 01.09.2008, as the said 3rd MACP financial upgradation benefit would then have to be merged, as the applicant was granted a norm-based promotion on completion of about 35 years of service in the Postal Assistants cadre from 02.09.1976 to 05.07.2011 (Annexure R/5).

12. Therefore, the OA is only partly allowed, and it is held that while the respondents were wrong in counting the applicants selection as a Postal Assistant through LDCE in the year 1976 as promotion/financial upgradation, they would be free to once again examine the case of the applicant, and in case any extra financial benefits, not admissible to him, have been granted to him, for the less than three months period from 05.07.2011, the date of his substantive norm-based promotion to the LSG Cadre, to the date of his superannuation on 30.09.2011, the same may be recovered from his retiral benefits, after giving him a due notice in this regard. Therefore, the OA is only partly allowed, as above, but there shall be no order as to costs.

13. Thus the Principal Bench of the Tribunal in the case referred above held that the appointment as Postal Assistant through a LDCE will be treated as direct recruitment and not as promotion for the purpose of the MACP. In the present OA, the applicant after being promoted as Mail Guard, was appointed as Sorting Assistant after qualifying in the LDCE. Hence, the order dated 3.11.2015 of the Principal Bench of the Tribunal in OA No. 3756/2011 will squarely cover the present OA before us and hence, the appointment of the applicant as Sorting Assistant will be treated as direct appointment for the purpose of the MACP Scheme. It is also noticed that there is nothing in the

pleadings of the respondents to counter this judgment cited by the applicant's counsel.

14. However, we are not inclined to agree with the grounds furnished by the applicant challenging the order of withdrawal of the BCR benefit w.e.f. 1.7.2009 since vide circular dated 18.9.2009 (Annexure-R/1), the BCR Scheme was withdrawn w.e.f. 1.9.2008 after introduction of MACP Scheme and the said circular as far as it withdrew the BCR Scheme w.e.f. 1.9.2008 has not been challenged in this OA. Hence, while we are not able to find fault with the respondents to cancel the benefit of the BCR Scheme on the ground that the said Scheme was withdrawn w.e.f. 1.9.2008, but it was unfair on the part of the respondents for depriving the applicant from the benefit of the MACP Scheme on the ground that he had availed three promotion and upgradation. The assumption that the applicant had availed more than three promotion/upgradation treating his appointment as Sorting Assistant as a promotion, which is incorrect as discussed in para 13 above.

15. Learned counsel for the respondents in his written notes of submissions has cited the judgment of Hon'ble Apex Court in the case of Union of India –vs- International Trading Co. & Another reported in AIR 2003 SC 3983. It is argued by the respondents that Article 14 of the Constitution of India does not envisage negative equality. In this OA, the applicant claims similar benefit as per the order of the Tribunal in the case of Bhanwar Lal Regar (supra) and Shakeel Ahmad Burney (supra). There is nothing on record produced by the respondents to show that the Tribunal's orders in above mentioned cases are patently illegal or these orders have been set aside or modified in higher forum. Hence, the applicant's claim cannot be stated to be claiming parity against a wrong or illegal order and the judgment cited by the respondents will not be helpful for the respondents' case.

16. In view of the discussions above and following the order dated 22.5.2012 of Jodhpur Bench of the Tribunal in the case of Bhanwar Lal Regar (supra) and the order dated 3.11.2015 of the Principal Bench of the Tribunal in the case of Shakeel Ahmad Burney (supra), we are of the view that the applicant's appointment as Sorting Assistant w.e.f. 17.5.1983 is to be treated as direct appointment and not as promotion and that the applicant will be eligible to be considered for the benefit of financial upgradation under the MACP Scheme as per the guidelines, since the applicant after being appointed as Sorting Assistant, had been allowed one TBOP promotion in 1999. Accordingly, the respondents are directed to consider the case of the applicant for 2nd and 3rd MACP benefit as per the guidelines applicable for the MACP Scheme, treating his appointment as Sorting Assistant w.e.f. 17.5.1983 as direct recruitment

and allow all consequential benefits including arrear differential salary if the applicant is found eligible for the financial upgradation under the MACP Scheme as stated above.

17. The OA is allowed in part to the extent as mentioned in para 14 above. There will be no order as to cost.

(SWARUP KUMAR MISHRA)
MEMBER (J)

(GOKUL CHANDRA PATI)
MEMBER (A)

I.Nath