

**CENTRAL ADMINISTRATIVE TRIBUNAL
CUTTACK BENCH**

OA No. 568 of 2016

OA No. 560 of 2016

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

OA No. 568 of 2016

Md.Ahamed Baig, aged about 58 years, S/o Late Mahaboob Baig, At/PO-Berhampur, Dist.-Gajapati, presently working as (Office Assistant) OA staff, in the office of the Railway mail Service (SRM), BG Division, Berhampur-1.

.....Applicant

VERSUS

1. Union of India, represented through its Secretary-cum-Director General (Posts), Dak Bhawan, Sansad Marg, New Delhi – 110116.
2. The Chief Postmaster General, Odisha Circle, PMG Square, Bhubaneswar, Dist-Khurda-751001.
3. Post Master General, Berhampur Region, Berhampur, Dist-Gajapati-760001.
4. Superintendent, Railway Mail Service, BG Division, Berhampur, Dist-Gajapati-760001.
5. Asst. Chief Accounts Officer/ Internal Audit, O/o Director of Accounts (Postal), Mahanadi Vihar, Cuttack-753004.

.....Respondents.

For the applicant : Mr.S.K.Ojha, counsel

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

OA No. 560 of 2016

Ghasiram Naik, aged about 59 years, S/o late Lampa Naik, At/PO/Dist-Berhampur, at present working as Sorting Assistant, Jeypore (K), O/o RMS, BG Division, Jeypore (K), Koraput, residing at Postal Colony, Qr. No.11, Jeypore, Koraput.

.....Applicant

VERSUS

1. Union of India, represented through its Secretary-cum-Director General of Posts, Ministry of Communications, Department of Posts, Dak Bhawan, Sansad Marg, New Delhi – 110001.
2. The Chief Postmaster General, Orissa Circle, Bhubaneswar, Dist-Khurda.
3. Post Master General, Berhampur Region, Berhampur, Ganjam-760001.
4. The Superintendent, RMS, BG Division, Berhampur.
5. Asst. Chief Accounts Officer/ Internal Audit, O/o Director of Accounts (Postal), Mahanadi Vihar, Cuttack-753004.

.....Respondents.

For the applicant : Mr.D.K.Mohanty, counsel

For the respondents: Mr.M.R.Mohanty, counsel

Heard & reserved (for both the OAs) on: 29.8.2019

Order on : 13.9.2019

O R D E R

Per Mr. Gokul Chandra Pati, Member (A)

Both these OAs relate to a common issue regarding eligibility for the benefit of the financial upgradation under the Modified Assured Career Progression Scheme (in short MACP Scheme), introduced w.e.f. 1.9.2008 replacing earlier schemes of financial upgradation for the employees working under the respondent-department. The applicants in both these OAs are aggrieved by the action of the respondents to grant the benefit of the 3rd financial upgradation under the MACP Scheme. Hence, both the OAs were heard together and are being disposed of by this common order, taking the OA No. 568/2016 as the lead OA for the purpose of this order.

2. In the **OA No. 568/16**, the applicant seeks the following reliefs :

- “(i) To allow the Original Application.
- (ii) To quash the order dated 4.4.2016 (Annexure A/11) and order dated 30.6.2016 (Annexure A/14) passed by the Respondent No.3 & 2 respectively holding the same are contrary to the MACP Scheme and judicial pronouncements made from time to time.
- (iii) To quash the consequential order dated 25.7.2016 (Annex. A/15), passed by the respondent No.4.
- (iv) To direct the respondents to restore the order dtd. 21.4.2010 so far as applicant is concerned.
- (v) To pass any further order/orders as deem fit and proper in the facts and circumstances of the case.”

3. In the **OA No. 560/16**, the applicant seeks the following reliefs:-

- “(i) To quash the order dt. 4.4.2016 & dt. 14.7.2016 under Annexure A/11 & A/15.
- (ii) To declare that the benefit under the MACP Scheme granted to the applicant vide Annexure A/4 dt 21.4.2010 w.e.f. 29.3.2010 is not the 3rd MACP, but it is 2nd MACP with grade pay Rs.4200/- granted is just and proper.
- (iii) To hold that any follow up action pursuant to audit report with regard to excess amount is bad in law and not enforceable.
- (iv) To pass any other order(s) as deemed fit and proper.”

OA No. 568/2016

4. The applicant was initially appointed against a Group D post of Mail Man under the respondent-department on 17.1.1984 and was promoted to Group C post of Sorting Assistant (in short SA) on 21.3.1990. The applicant, on

completion of 16 years of service from 21.3.1990, got the benefit under the Time Bound One Promotion (in short TBOP) scheme w.e.f. 3.4.2006. The scheme of Modified Assured Career Progression Scheme (in short MACP Scheme) was introduced by Government w.e.f. 1.9.2008 vide order dated 18.9.2009 (Annexure-A/1) for the postal employees, replacing the similar schemes of the TBOP and Biennial Cadre Review (in short BCR) which were in operation for the postal department employees. The applicant was granted the benefit of 3rd MACP raising his Grade Pay (in short GP) to Rs. 4200/- vide order dated 21.4.2010 (Annexure-A/7) w.e.f. 3.4.2010.

5. The internal audit of the respondents pointed out that the applicant was wrongly given the benefit of the 3rd MACP benefit as he is to get such benefit after completion of 30 years of service w.e.f. 7.2.2014 taking into account his initial appointment as Mail Man w.e.f. 7.1.1984. Accordingly, recovery of excess payment made to the applicant was recommended by the audit. The applicant filed a representation on 14.8.2015 (Annexure-A/9) claiming that his appointment as SA w.e.f. 21.3.1990 was a direct recruitment and not as a promotion and he was entitled for the benefit under the MACP Scheme granted to him w.e.f. 3.4.2010 as his 2nd financial upgradation after 20 years of service from the date of appointment as SA on 21.3.1990. When no action was taken by the respondents, he filed the OA No. 60/2016 which was disposed of directing the respondents to consider and dispose of his representation and till that decision, no recovery was to be undertaken. The respondent no.3, in compliance of the said direction of the Tribunal, have passed the order dated 4.4.2016 (Annexure-A/11) and rejected the representation of the applicant stating that the MACP benefit granted earlier was 3rd MACP instead of 2nd, as claimed by the applicant and subsequently, the date from which the third MACP benefit was to be allowed was found to be 7.2.2014 and not 3.4.2010.

6. The applicant filed an appeal against the order dated 4.4.2016 and when no action was taken on the said appeal, he filed the OA No. 349/16, which was disposed of with a direction to the respondent No.2 to dispose of the said appeal and till that date, not to effect any recovery. The respondent No. 2 passed the order dated 30.6.2016 (Annexure-A/14), rejecting the appeal, reiterating the views of the respondent no.3. Thereafter, the consequential order dated 25.7.2016 (Annexure-A/15) has been passed modifying the date of 3rd MACP benefit to 7.2.2014. The applicant has challenged all three orders at Annexure-A/11, A/14 and A/15 in this OA.

7. Grounds advanced in support of the OA are as under:-

(i) Recovery orders were illegal in view of the law laid down by Hon'ble Apex Court in the case of State of Punjab vs. Rafiq Masih (White Washer) in the Civil Appeal No. 11527/2014, (2015) 4 SCC 334.

(ii) The applicant is entitled for the benefit of 3rd MACP benefit w.e.f. 3.4.2010 which was originally allowed by the respondents.

(iii) The respondents have not taken into consideration the legal provisions while passing the impugned orders, which are not as per the judgment of Hon'ble Apex Court in the case of UOI & Ors. vs. Atul Shukla.

8. The Counter filed by the respondents stated that the applicant had got one promotion from Mail Man to SA and had got the financial upgradation benefit under TBOP w.e.f. 3.4.2006, for which he was not eligible for 2nd MACP benefit. It is stated that the benefit of 3rd financial upgradation was granted wrongly to him w.e.f. 3.4.2010, which has been rectified as per the recommendation of the respondent no. 5. It is further stated that the respondents have applied their mind and rejected the representation of the applicant.

9. Rejoinder has been filed by the applicant, stating that the matter has been already settled in different cases before the Tribunal which have also been implemented by the respondents, treating the appointment of the applicant as SA as a direct appointment and not a promotion. The applicant has enclosed copy of the orders passed in OA No. 200/213 (A/16) and OA No. 1088/2011 (A/17) by Madras Bench of the Tribunal, which were upheld by Hon'ble Madras High Court and the SLP filed was dismissed. It was stated that the period of eligibility of service for MACP Scheme should be counted from the date of appointment of the applicant in the SA cadre.

OA No. 560/2016

10. The applicant was initially appointed in Group D cadre on 9.1.1981 and then he was appointed to the cadre of Assistant in Group C w.e.f. 15.3.1990. Then like the applicant in the OA No. 568/16, he was allowed the TBOP benefit on 18.7.2006 after completion of 16 years of service as Assistant. He was allowed 3rd MACP benefit w.e.f. 29.3.2010 with the GP of Rs. 4200/-, although the applicant claims that it should have been 2nd MACP benefit. Like in OA No. 568/16, the internal audit pointed out the mistake in allowing the MACP benefit to the applicant, stating that the applicant would be entitled for 3rd MACP benefit after completion of 30 years of service starting from his date of his initial appointment on 9.1.1981. Hence, order was passed to recover the additional pay allowed to the applicant during the period from 3.4.2010 to

9.1.2011, when the audit found the applicant to be eligible for the 3rd MACP to the GP of Rs. 4200/-. Like the other OA, the applicant submitted the representation and also went through two rounds of litigation before his representation was rejected vide impugned order dated 4.4.2016 (Annexure-A/11) and the appeal filed by him was also rejected vide order dated 14.7.2016 (Annexure-A/15) passed by the respondent No.2.

11. The grounds taken in the OA are similar to the OA No. 568/16. Additional ground taken in this OA is that the applicant is going to retire within 9 months and no opportunity of hearing was given to the applicant before deciding to recover the excess payment. It is therefore stated that no recovery is permissible. The order passed by Principal Bench of the Tribunal in OA No. 3756/2011, S.A. Burney vs. UOI & others was referred in which it was held that the posting as Assistant from Group D was a direct appointment and not a promotion.

12. The Counter filed by the respondents averred mainly the same grounds as in the OA No. 568/16. The Rejoinder filed by the applicant did not raise any new issue.

13. We heard learned counsels for the applicants in both the OAs, who also submitted their written submissions. The arguments by the applicants' counsel included the contention that as per the ratio of past judgments in similar cases, the appointment of the applicants in Group C cadre is to be taken as a direct recruitment and not a promotion from Group D post, for which, the order to cancel the MACP benefit already allowed to the applicants was not sustainable. It was also argued that the order of recovery of excess payment made to the applicant was not sustainable in view of the judgment in the case of Rafiq Masih (supra). It was also submitted that had the posting at Group C been treated as promotion, then completion of 16 years of service would not have been counted from the date of appointment to Group-C, but from the date of initial appointment from Group-D in which case, the applicant would have been allowed the BCR benefit instead of TBOP. Learned counsels for the applicants submitted the following judgments/orders to strengthen their arguments:-

- i) Manager, national Insurance Company Limited –vs- Saju P.Paul & Another [(2013) 1 SCC (L&S) 399]
- ii) Union of India & Others –vs- Dev Karan Mahala & Others [CW 18488/2016 of High Court of Judicature for Rajasthan, Bench at Jaipur]
- iii) D.Sivakumar –vs- Union of India & Others [OA 1088/2011, CAT, Madras Bench]

- iv) Union of India & Others –vs- D.Sivakumar [WP No. 30629/2011 of High Court of Judicature at Madras]
- v) Union of India & Others –vs- D.Sivakumar [SLP (C) No. 4848/2016]

14. Learned counsels for the respondents were heard and they also filed written note of submissions. It was submitted that as per the clarification of the DOPT on MACP, whether the appointment to the Group-C cadre through LDCE is to be treated as promotion or direct recruitment is to be decided as per the provisions of the respective Recruitment Rules. It was submitted that in all the cases cited on behalf of the applicants, the Recruitment rules in question were not considered and these rules clearly provided that the appointment of Group-D employee to Group-C cadre through LDCE is to be treated as promotion as per the Rules, copy of which has been enclosed to the written note of submissions in OA No. 568/16. It is further stated that the order of the Tribunal in OA No. 3756/2011 (Shakeel Ahmed Burney vs. UOI), cited by the applicant, has been challenged by the respondents in WPC No. 2806/2016 in which the said order has been stayed by Hon'ble Delhi High Court. The order dated 21.6.2017 passed in OA No. 200/2013 of Cuttack Bench has been set aside by Hon'ble High Court vide order dated 11.5.2018 in the case of UOI vs. Gatikrushna Das in WPC No. 21962/2017. It is also stated that the order passed in the case of Shiv Kumar would be inapplicable since the Recruitment Rule was not considered by the Tribunal while passing the order. The order dated 17.11.2015 passed by Ahmedabad Bench of the Tribunal in OA No. 219/2015 has been referred in which a similar claim was dismissed. The judgment dated 23.1.2019 in the case of Sr. Superintendent of post offices Karnal and others vs. Nand Kishore and others in CWP No. 4829/2015 of Hon'ble High Court of Punjab and Haryana has also been cited in which it was held that the selection and appointment as Postal Assistant through a departmental test was a promotion and not direct recruitment. The judgment of Hon'ble Rajasthan High Court in the case of Ramkaran Kumhar vs. UOI & others has held that if the rules provide for filling up of a post through LDCE on promotion quota, it has to be treated as a promotion. The SLP filed against the judgment was dismissed by Hon'ble Apex Court. It is also stated that vide order dated 10.5.2019 of Jabalpur Bench of the Tribunal in OA No. 603/16, OA No. 675/16 and OA No. 1066/2017, the matter has been referred to be placed before the larger Bench for consideration.

15. We have considered the submissions by all the parties and perused the pleadings on record. In both the OAs, the applicants were granted the benefit of 3rd MACP benefit by the respondents vide order dated 21.4.2010 (Annexure-A/7 in OA No. 568/16 and Annexure-A/4 in OA No. 560/16). In both the OAs,

the order dated 21.4.2010 has not been challenged. In the OA No. 560/16, the prayer in para 8(ii) of the OA is to declare the 3rd MACP as 2nd MACP sanctioned w.e.f. 29.3.2010 vide order dated 21.4.2010 and this prayer cannot be allowed without challenging the order dated 21.4.2010. Even if the prayer as para 8(ii) of OA No. 560/2016 is treated as a challenge of the order dated 21.4.2010, the same is not admissible as it is debarred on account of limitation and no application for condonation of delay has been filed with the OA No. 560/2016. Hence, the prayer in para 8(ii) of the OA No. 560/16 has to be rejected at the first place. It is also a fact that after passing of the order dated 21.4.2010, granting 3rd MACP benefit, none of the applicants had challenged the same to modify the same by treating it as 2nd MACP benefit in place of 3rd, till the respondents moved to cancel the said benefit granted on the basis of the audit recommendation. Hence, the following relevant issues are required to be decided in both these OAs:-

(i) Whether the decision of the respondents to withdraw the benefit of 3rd MACP benefit granted to the applicants by the order dated 21.4.2010 is legally sustainable?

(ii) Whether the order dated 4.4.2016 and order dated 14.7.2016, rejecting the representation of the applicants are legally sustainable?

16. The applicants have averred that as per the decision of the Tribunal, which have been upheld in higher forum, their appointment in the Group-C cadre should be treated as direct appointment and not promotion. In support of the averment, the order of the Principal Bench of the Tribunal in OA No. 3756/2011 and the order passed by Cuttack Bench in OA No. 200/2013 have been cited. It has been pointed out by the respondents' counsels that the order passed by this Bench of the Tribunal in OA No. 200/2013 has been set aside by Hon'ble High Court vide order dated 21.5.2018. In OA No. 3756/2011, it was held by the Tribunal that posting as postal assistant through LDCE was direct recruitment and this order was upheld by Hon'ble Delhi High Court vide order dated 5.8.2014. But it was submitted by the respondents' counsel in OA No. 568/16 that the matter has been reconsidered in CM No. 11808/2016 by Hon'ble Delhi High Court in which the impugned order has been stayed.

17. In OA No. 200/2013 before Cuttack Bench of the Tribunal, the order dated 21.6.2017 (Annexure-A/16 of the OA No. 568/16) was passed by the Tribunal allowing the OA. In that OA, the applicant had joined in Group-D post w.e.f. 21.2.1983 and was appointed as Sorting Assistant after his success in the LGO examination w.e.f. 9.5.1989. He was allowed TBOP benefit w.e.f. 1.6.2005 on completion of 16 years of service as SA. He was allowed the benefit

of 3rd MACP w.e.f. 27.5.2009. In that case, the CPMG had reviewed the matter and modified the order by which the MACP benefit was granted to the applicant w.e.f. 27.5.2009 to direct that he will be entitled for such MACP benefit w.e.f. 11.3.2013 i.e. after completion of 30 years from the initial appointment of the applicant in that OA. It was also directed that the extra amount paid be recovered from the applicant. The challenge in OA No. 200/13 was the decision of the CPMG to modify the order granting 3rd MACP benefit with effect from a date subsequent to the date which was originally allowed and not to refund the amount that was recovered. The question as to whether the appointment as SA from Group-D is to be treated as a promotion or direct recruitment was not raised in that OA. The Tribunal in that OA held that the applicant does not have to complete 30 years of service from the entry grade of Mailman to avail the benefit of 3rd MACP, which he can get after completion of 20 years from the date of appointment as SA, even though the applicant was not directly recruited as SA.

18. The order of the Tribunal in OA No. 200/13 was challenged by the respondents before Hon'ble High Court in the WP(C) No. 21692/2017 and vide order dated 21.5.2018, Hon'ble High Court set aside the Tribunal's order in OA No. 200/13. It was held by Hon'ble High Court vide the order dated 21.5.2018 as under:-

"7. On going through the above material facts, it is evident that opposite party No.1 entered into the Government service in the year 1983. He got promotion to the next higher post in the year 1989 and got the TBOP in the year 2005 (counting 16 years from 1989). As per SI.No.3 of the clarification dated 18.10.2010, he is off set from the 1st MACP and thereafter since he got TBOP in the year 2005 prior to the introduction of MACP in 2008, he also off set 2nd MACP. Thus taking into consideration his service from the entry level post, in the year 1983, the applicant is entitled to 3rd MACP in the year 2013, i.e. on completion of 30 years after the date of entry into the service instead of 2015, i.e. 10 years from 2005 when he has received TBOP (time Bound One promotion) on completion of 16 years of service from the date of promotion in the year 1989. However, the Tribunal has ignored the conferment TBOP on completion of 16 years from the date of his promotion in the year 1989 and as such granted 3rd MACP on completion of 20 years from the date of promotion in the year 2009. However, the applicant is not entitled to such benefit on completion of 20 years from the date of promotion as prior to introduction of MACP in the year 2008, he has received TBOP in the year 2005 counting 16 years from the date of his promotion in the year 1989.

In view of the above, this Court is of the opinion that the Tribunal has erred in law and fact in appreciating the case in its proper perspective while passing the impugned order. Since there is error apparent on the fact of it, this Court in exercising its jurisdiction conferred under Article 227 of the Constitution of India sets aside the impugned order passed by the Tribunal.

The Writ Petition stands disposed of accordingly."

19. From the discussions above, it is clear that the facts and circumstances in the present OAs are similar as in the OA No. 200/13, since there is no challenge to the order dated 21.4.2010 in the present OAs (as discussed in

para 13 above), by which, the applicants had been initially granted 3rd MACP by the respondents with effect from the date after completion of 20 years of service as SA.

20. Learned counsels for the applicant in these OAs have cited a number of judgments which have held that the appointment of the applicants as SA or as Assistant in Group-C is to be treated as a direct promotion. We are of the view that to decide the reliefs sought for in this OA after taking into account the fact that the order dated 21.4.2010 has not been challenged in these OAs, there is no need to decide that the issue as to whether the appointment of the applicants in Group C is to be treated as direct recruitment or promotion. It is noticed that vide order dated 10.5.2019 passed by Jabalpur Bench in OA No. 603/2016 and other two OAs, this issue has been referred to be considered by a larger Bench (copy of the order dated 10.5.2019 is enclosed with the written note by the respondents' counsel in OA 560/16). It is seen from the said order that the applicants in those OAs had specifically represented to the respondents for being allowed 2nd financial upgradation benefit under MACP on the ground of the judgment of Jodhpur Bench in the case of Bhanwar Lal Regar to treat the appointment to Group C post through LDCE as direct recruitment and the said representation was rejected by the respondents on the ground that the cited judgment is in personam. That decision of the respondents was challenged in the OA before Jablapur Bench.

21. In both the present OA before us, the applicants did not raise the issue by challenging the order dated 21.4.2010 within the time as per the limitation under the Administrative Tribunals Act, 1985 to claim 2nd MACP benefit instead of 3rd MACP benefit allowed by the respondents. Moreover, in view of the order dated 10.5.2019 of Jabalpur Bench of the Tribunal, we are not able to agree with the argument put forth by the learned counsels for the applicants in both the OAs that this issue has already been settled by the judgment of the coordinate Benches of this Tribunal.

22. In view of the discussions above, we are of the considered view that facts and circumstances of both these OAs are squarely covered by the order dated 21.5.2018 of Hon'ble Orissa High Court in WP (C) No. 21692/2017 and following the aforesaid order dated 21.5.2018, we do not find any infirmity in the decision of the respondents in the impugned orders in these OAs. Accordingly, both these OAs are dismissed. There will be no order as to costs.

(SWARUP KUMAR MISHRA)
MEMBER (J)

(GOKUL CHANDRA PATI)
MEMBER (A)

I.Nath