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**CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH
KOLKATA**

MACP

OA No.1151 of 2013

Date of hearing : 29.11.2016

Dated of order : 6.12.2016

Present:

**THE HON'BLE MR. JUSTICE V.C.GUPTA, JUDICIAL MEMBER
THE HON'BLE MS. JAYA DAS GUPTA, ADMINISTRATIVE MEMBER**

.....

1. Sri Purnendu Misra, son of Late Tarapada Misra, aged about 50 years, residing at 1/32 (Extn), Chittaanjan Colony, Kolkata-700032.
2. Shri Alope Ranjan Bandopadhyay, Son of Late Bimal Ranjan Banerjee, aged about 50 years, residing at Quarter No. 912, IC Block, Sector-III, Sal Lake City, Kolkata-700106.
3. Shri Prafulla Kumar Sarkar, son of Late Monindra Mohan Sarkar, aged about 49 years, residing at 31A, E. Block (East), Baghajatin, Kolkata-700086.
4. Shri Bibhas Kumar Chatterjee, son of Late Bimalendu Chatterjee, aged about 50 years, residing at 1/39, Chittaranjan Colony, Kolkata-700 032.
5. Shri Debasish Sikdar, son of Late Sudhir Kumar Sikdar, aged about 48 years, residing at 12, Rafi Ahmed Kidwai Road, Kolkata-700 055.
6. Shri Juman Ali Mondal, son of Late Kauser Ali Mondal, aged about 48 years, residing at Brahmapur (Badamtala), Po. Brahmapur, Kolkata-700096.
7. Shri Samarendra Nath Ghosh, son of Late Motilal Ghosh, aged about 48 years, residing at 41/A/19, Murari Pukur Road, Kolkata-700 067.

All the applicants above named are presently working as Group (C posts viz Laboratory Assistant, Regional Office of Health Services, Regional office for Health & Family Welfare, under Directorate of NVBDCP, Ministry of Health and

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Family Welfare, Government of India, 27, JCB block,
Sector-III, Salt Lake, Kolkata-700 098.

.....Applicant s

VERSUS

1. UNION OF INDIA, Service through the Secretary, Government of India, Ministry of Health and Family Welfare, Nirman Bhavan, New Delhi-110108.
2. The Secretary, Ministry of Personnel & Public Grievance, Govt. of India, North Block, New Dehli-110001.
3. The Director General of Health Services, Ministry of Health and Family Welfare, Nirman Bhavan, New Delhi-110108.
4. The Director, National Vector Borne Diseases, Control Programme, 22, Shamnath Marg, New Delhi-110054.

.....Respondents

Counsel for the Applicant :Mr.T.K.Biswas , Advocate
Counsel for the Respondents :Ms.M.Bhattacharyya, Advocate

ORDER

MS.JAYA DAS GUPTA, AM:

The Applicants (seven in number) who are continuing as Laboratory Assistants, Regional Office of Health Services, Regional office for Health & Family Welfare, under Directorate of NVBDCP, Ministry of Health and Family Welfare, Government of India, Salt Lake, Kolkata have jointly filed this Original Application under section 19 of the Administrative Tribunals Act, 1985 seeking the following reliefs:

“(a) An order directing the Respondents to set aside the order dated 15.03.2013 and 5.4.13 and 1.8.13 and 7.8.2013 (Annexure-A/16, 17, and A/18) collectively respectively;

(c) An order directing the respondents to get the benefits under MACP scheme with effect from the date of

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their joining of posts in the entry grade i.e. taking into accounts their services rendered in MOFRS prior to their integration with NMEP (now NVBDCP) in the light of DOP&T' OM dated 09.09.2010 (Annexure-A/12) and departmental letters dated 18.08.2011, 1.9.11 (Annexure-A/13 collectively) and letter dated 9.9.2011 (Annexure-A/14);

(c) An order directing the respondents to continue with the benefits under MACPS to the applicants we.f. 1.9.2008 in terms of office order dated 16.2.2012 (Annexure-A/15);

(d) Leave may be granted to move this application jointly under Rules 4 (5) (a) of the CAT Procedure Rules, 1987;

(e) Any other or further orders which the applicant are entitled to as the Hon'ble Tribunal may deem fit and proper"

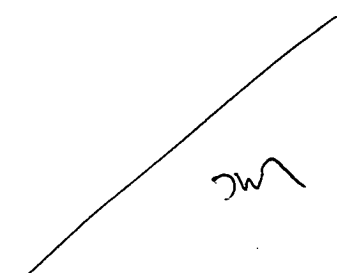
2. It is the contention of the Applicants that they were initially appointed as Laboratory Assistant on different dates ranging from 1986 to 1989. They were recruited through a regular process of selection. But in the letters of appointment issued to them it was mentioned that the appointments were on temporary basis. They were initially engaged under the Malaria Operational Field Research Scheme (MOFRS) run by the Indian Council of Medical Research (ICMR). It has been stated that subsequently the said Malaria Operational Field Research Scheme (MOFRS) was merged with the National Malaria Eradication Programme (NMEP) vide order No. T. 14011/4/93/MAL dated 29.9.1995 issued by the Government of India, Ministry of Health and Family Welfare. In the said order,

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sanction was conveyed for 156 nos of temporary posts under the NMEP which includes 14 posts of Junior Stenographers, **99 posts of Laboratory Assistants**, 15 posts of Driver and 13 posts of Gr. D category and due to the merger, the services of the applicants stood transferred from MOFRS to NMEP (Now NVBDCP).

As per the letter dated 15.09.1998 of the Government of India, National Malaria Eradication Programme, the MOFRS staff were entitled to GPF contribution, CGEIS deduction w.e.f. 1.1.1986 and CGHS facility after they **were integrated with NMEP w.e.f. 29.9.1995.**

The Government of India, Ministry of Personnel, Public grievance and pensions, New Delhi introduced the ACP Scheme vide Office Memorandum dated 09.08.1999 making provision for grant of two financial up gradation to all Gr. B, C and D employees on completion of 12 & 24 years of **regular service** in case of stagnation either in a cadre or in an isolated post or where there is no promotional avenues available to the employees concerned. It has been alleged by the Applicants that although they were eligible for getting the first financial up gradation under ACP scheme after completion of 12 years of service they were not granted the said benefit on the pretext that the service rendered under MOFRS cannot be counted for the purpose of counting the period of 12 years regular service.



Further case of the Applicants is that similarly situated Laboratory Assistants namely Shri C.B.Gangadharaiah and Others, filed OA No. 595 of 1999 before the Central Administrative Tribunal, Bangalore Bench praying for a direction to extend the benefits of ACP by counting their past service rendered under MOFRS prior to their integration/absorption in NMEP. The Bangalore Bench of the Tribunal passed order in their favour on 18.10.2000. The said order was challenged by the Respondents in WP No. 2722/2001 and WP No. 12391-96/2001 before the Hon'ble High Court of Karnataka which was dismissed on 20.04.2001. Thereafter, the Respondents filed Civil Appeal Nos. 444-450 of 2002 in Hon'ble Apex Court challenging the aforesaid order of the Hon'ble High Court of Karnataka which was disposed of on 10th September, 2003. It has been alleged that though the decision rendered in the aforesaid case was in their favour, the Respondents granted the benefits of first financial up gradation under ACP after counting 12 years from 29.09.1995 i.e. when they were regularly absorbed in NMEP and not from their initial engagement in MOFRS.

It has further been stated that after introduction of the MACP scheme, the Director General of Health Services vide letter date 18.08.2011 informed that the benefits of MACP to the Ex MOFRS staff working in NVBDCP (earlier NMEP) would be given from the date of their joining which was subsequently amended vide corrigendum dated 01.09.2011 by stating that the employees will be

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entitled to get benefits from the date of actual joining of the post in the entry grade. Accordingly, 2nd financial up gradation under MACP was granted vide order dated 14.02.2012 to 08 employees of MOFRS including the applicants posted at Calcutta on completion of 20 years of service counting their service from the date of their actual joining in the entry grade of MOFRS i.e. earlier to the date of absorption on 29.09.1995.

After this development, it is the grievance of the Applicants that subsequently, the impugned order dated 15.03.2013 was issued by the Respondents in consultation with the DoP&T that as per the provision of the MACP scheme regular service for the purpose of grant of MACP benefits is to be counted from the date of joining of a post in direct entry grade on a regular basis either on direct recruitment basis or absorption/re employment and not from any previous date. In pursuance of the aforesaid order dated 15.03.2013, the Respondents department issued order for re fixation of the pay of the applicants and recovery of the excess payment made towards granting the benefit of financial up gradation under ACP/MACP. Hence they have approached this Bench for redressal of their grievance asking for the reliefs mentioned above.

3. Per contras, it is the contention of the respondents that up gradation benefits under ACP/MACP Scheme can only be counted

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from the date of regular appointment and not from any previous date. Hence they have prayed for dismissal of the cases.

4. Heard both. Consulted the records.

5. The core issue that arises for our consideration in this Original Application is as to whether the service rendered by the applicant prior to their regularization/absorption in the erstwhile project under MOFRS shall be counted towards grant of ACP or of that matter MACP?.

6. It is the contention of the Applicants that the impugned orders are not sustainable as the same are opposed to law as well as issued without giving them any opportunity of being heard. The impugned orders are extracted herein below:

(1)

"F No.

DIRECTORATE GENERAL OF HEALTH SERVICES

PH (CDL) Section ..

.....

DATED 15.3.13

To,
The Director,
NVBDCP,
22-Sham Nath Marg,
Delhi – 110054.

Sub:- Grant of MACP to Malaria Operational Field Research Scheme (MOBPS) Staff working at NVBDCP, and various ROH&FW under NVBDCP, Delhi.

Sir,

I am directed to refer to this Directorate's letter of even number dated 18.08.2011, as amended vide corrigendum on even number dated 01.09.2011 on the subject cited above and to say that the issue

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has again been examined in consultation with DoP&T, who have clarified that as per the provision of the MACP scheme regular service for the purpose of grant of MACP benefits, is counted from the date of joining of a post in direct entry grade on a regular basis either on direct recruitment basis or on absorption/re-employment.

In view of the above, DoP&T have advised to regulate the eligibility of erstwhile MoFRS employees, who were absorbed in the Directorate of NVBDCP, for grant of MACP benefits counting their service with effect from their date of absorption in the Government service i.e., w.e.f. 29/09/1995 only.

You are requested to take further action in the matter in accordance with aforesaid advice of DoP&T.

Yours faithfully,
Sd/-
(VEENA VERMA)
Dy. DIRECTOR ADMN."

.....

(2) "F.No.-1-52/2012-NVBDCP(Admn-I)
Government of India
National Vector Borne Disease Control Programme
Dte G.H.S. Ministry of Health & Family Welfare,
22-Shamnath Marg, Delhi-110 054
Telephone No. 23967780, Fax No. 23968329
Website: www.invbdcg.gov.in

Dated:05 APR 2013

The Sr. Regional Directors/Regional Directors,
Regional Office for Health & F.W.
(Ahmedabad, Chandigarh, Jaipur, Kolkatta,
Bhubaneswar, Patna, Bhopal, Shillong, Bangalore,
Hyderabad, Thiruvananthapuram, Chennai,
Srinagar/Jammu, Lucknow, Imphal and Pune)

Subject:- Grant of MACP to Malaria Operational Field
Research Scheme (MOFRS) staff working at

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**NVBDCP and various ROH&FW under NVBDCP
- regarding.**

Sir,

This is with reference to Letter No. F.No.A. 12026/10/2011-PH(CDL) dated 15-03-2013 on the above cited subject. Vide said letter it has been clarified that as per the provision of the MACP scheme, regular service for the purpose of grant of MACP benefits is counted from the date of joining of a post in direct entry grade on a regular basis either on direct recruitment basis or on absorption/re-employment. DOP&T have advised to regulate the eligibility of erstwhile MOFRS employees, who were absorbed in the Directorate of NVBDCP, for grant of MACP benefits counting their service with effect from their date of absorption in the Government service i.e. w.e.f. 29-09-1995 only.

In view of above, I am directed to withdraw all the MACP scheme granted w.e.f. 01-09-2008 onwards to the erstwhile MOFRS employees of this Dte. w.e.f. 15-03-2013 i.e. date of issued of above said DteGHS letter. All the Sr. Regional Director/Regional Directors are requested to kindly re-fix the pay of all Ex-MOFRS Staff working in their Regional Offices accordingly. Regarding recovery of the arrears the issue is under process with Dte.GHS and will be communicated later on.

Yours faithfully,
Sd/-

(G.D. Khulbe)
Administrative Officer"

.....

(3)

**"F.No.-1-20/2013-NVBDCP(Admn.-1)
Government of India
National Vector Borne Disease Control Programme,
Dte.G.H.S. Ministry of Health & Family Welfare,
22-Shamnath Marg, Delhi-110 054.
Telephone No. 23967780, Fax No. 23968329
Website: www.nvbdc.gov.in**

Dated:01 AUG 2013

DM

The Sr. Regional Directors/Regional Directors,
Regional Office for Health & F.W.
(Ahmedabad, Chandigarh, Jaipur, Kolkatta,
Bhubaneswar, Patna, Bhopal, Shillong, Bangalore,
Hyderabad, Thiruvananthapuram, Chennai,
Srinagar/Jammu, Lucknow, Imphal and Pune)

Subject:- Withdrawal of Granted MACP to MOFRS
Staff- representations – regarding.

Sir,

This is with reference to various representations received from Sr. Regional Director/Regional Director and Individuals regarding withdrawal of Granted MACP to erstwhile MOFRS Staff. In this context, it is mentioned that the issue is subjudice in various Hon'ble Central Administrative Tribunals. Further, it is to mention that Dte.GHS vide letter No.A.12026/10/2011-PH(CDL) dated 23-05-2013 is of the opinion that where Hon'ble CAT ordered for status quo the same may be implemented and where no such status quo is allowed/individual has not filed the petition the granted MACP may be withdrawn w.e.f. 01-09-2008 onwards to the erstwhile MOFRS employees of this Dte. w.e.f. 15-03-2013 i.e. issue of above said Dte.GHS letter. Regarding recovery of the arrears the issue is under process at Dte.GHS and will be communicated late on.

This is for your information and necessary action please. It is also requested that the above facts may be brought to the notice of all employees of Ex-MOFRS please.

Yours faithfully,
Sd/-
(G.D. Khulbe)
Administrative Officer"

.....
"GOVERNMENT OF INDIA

REGIONAL OFFICE FOR HEALTH & FAMILY WELFARE
 Ministry of Health & Family Welfare
 DIRECTORATE GENERAL OF HEALTH SERVICES
 27 JC Block, (Block-C) Sector-III, Salt Lake, Kolkata – 700098
 Telegram : 'PARISWASTH'
 Telephone : (033) 2335-5380
 Telefax : (033) 2335-5378
 e-mail : rohfw.kolkata@gmail.com
 Ref. No. 11/1/95/Estt./Part.II/0681 Dated: 07/8/13

ORDER

This is for the information of the staff of Pf Monitoring Wing (Erstwhile MOFRS) that Dte. of NVBDCP, Delhi vide letter No.1-20/2013-NVBDCP(Admn.-1) dated 01.8.2013 has communicated the policy regarding withdrawal of granted MACP to erstwhile MOFRS staff(Copy enclosed).

As per the directives of Dte. of NVBDCP, Delhi the MACP scheme granted w.e.f. 01.09.2008 onwards to the erstwhile MOFRS employees will be withdrawn w.e.f. 15.03.2013 i.e. the date of issue of Dte.G.H.S. letter A.12026/10/2011-PH(CDL) dated 15.3.2013. The re-fixation of Pay of the staff of Pf Monitoring Wing (Erstwhile MOFRS) will be issued, separately, in this regard.

Sd/-

For SR. REGIONAL DIRECTOR (HFW)"

7. It is pertinent here to mention that the relevant portion Office Memorandum No. 35034/1/97-Estt(D) dated 9th August, 1999 of the DoP&T for grant of financial up gradation under ACP Scheme which extracted herein below:

3.2 'Regular Service' for the purpose of the ACP Scheme shall be interpreted to mean the eligibility service counted for regular promotion in terms of relevant Recruitment/Service Rules. "

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Similarly, the relevant portion of the OM No. 35034/3/2008-Estt. (D), dated 19th May, 2009 for grant of MACP is quoted herein below:

10. Past service rendered by a Government employee in a State Government/statutory body/Autonomous body/Public Sector organisation, before appointment in the Government shall not be counted towards Regular Service.

11. 'Regular service' shall include all periods spent on deputation/foreign service, study leave and all other kind of leave, duly sanctioned by the competent authority."

(EMPHASIS SUPPLIED)

8. Based on the aforesaid provision under ACP and MACP, it has been contended by the Respondents that ACP scheme postulates that 'Regular service' for the purposes of the ACP shall commence from the date of joining of a post in direct entry grade on a regular basis either on direct recruitment basis or on absorption/re-employment basis. Service rendered on adhoc/contract basis before regular appointment on pre-appointment training shall not be taken into reckoning. Accordingly placing reliance on the above provisions of ACP/MACP Scheme and also on the decision of the Hon'ble Apex Court dated 10th September, 2003 in Civil Appeal Nos. 444-450 of 2002, the Respondents have issued the impugned orders. The order of the Hon'ble Apex Court is mentioned in a subsequent para.

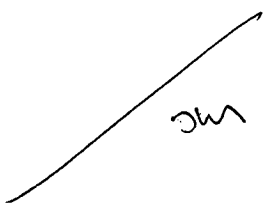
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9. The applicants relied on the order of the Bangalore Bench of the Tribunal in the case of Shri C.B.Gangadharaiah and Others, (OA No. 595 of 1999 disposed of 18.10.2000). The relevant portion of the order in the aforesaid case is extracted herein below:

"In view of these decisions it has to be held that the contention of the respondents that the applicants cannot be permitted to count their past service in the previous scheme prior to the absorption cannot be upheld. They are entitled for counting the past service prior to the date of absorption and all other benefits that arise from the absorption as per law. Though the records would show that subsequent to the filing of this OA, a representation was given for consideration of this request which the Government of India is still considering but since this was done after the OA was admitted we do not proper to defer the decision in view of the legal position quoted above.

10. Hence, the OA is accordingly allowed directing the respondents to count the past service of the applicants from the date of their initial appointment and give them all other benefits to which they are entitled as per law because of the absorption. Necessary orders shall be passed in this record within a period of three months from the date of receipt of a copy of this order. No order as to costs."

It is a fact that the aforesaid order of the Bangalore Bench of the Tribunal was challenged by the Respondents in WP No. 2722/2001 and WP No. 12391-96/2001 before the Hon'ble High Court of Karnataka which was dismissed on 20.04.2001. Thereafter, the Respondents filed Civil Appeal Nos. 444-450 of 2002 challenging the aforesaid order of the Hon'ble High Court of Karnataka before the Hon'ble Apex Court and the Hon'ble Apex Court disposed of the matter vide order dated 10th September, 2003. The Full text of the



decision of the Hon'ble Apex Court, referred to above, is quoted herein below for ready reference:

"We have heard the learned counsel for the parties.

These appeals arise out of the judgment and order dated 20th April, 2001 in W.P. Nos. 2722/2001 and 12391-12396/2001 passed by the High Court of Karnataka at Bangalore.

We have considered the reasons recorded by the High Court as well as the order dated 12th March, 1996 passed by the Regional Director absorbing the respondents which reads as follows:

"Consequent upon the merger of the Malaria Operational Field Research Scheme (MOFRS), known as P. falciparum Monitoring Scheme as per Govt. of India, Ministry of Health & F.W. Letter No. T. 14011/4/93- MAL dated 29th September, 1995, Shri P. EKANTHAM Designation LABORATORY ASSISTANT in the MOFRS attached to this office is transferred on the strength of NMEP, which is presently approved upto the end of 8th Five Year Plan period w.e.f. 29.09.1995 (F.N.) in the same pay scale of Rs. 975-25-1150-EB-30-1540/- in a temporary capacity at the same duty station. He will draw the same pay and allowances as admissible prior to his transfer on the strength of NMEP.

The above transfer of Shri K. EKANTHAM, to the post of Laboratory Assistant is subject to the Medical Examination Certificate of Fitness as well as the character and antecedents verification certificate from the appropriate authority, if not done already.

He will be entitled for other benefits as applicable to other employees of Govt. of India as per the locality of his posting. Other conditions regarding the counting of past service and other retirement benefits and carry forward of leave is under consideration."

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We see no reason to interfere with the judgment impugned herein. The appeal is disposed of accordingly. There shall be no order as to costs.

However, it is made clear that with regard to Assured Career Progression respondents would be entitled to get benefit only from the date of absorption."

Hence, by no stretch of imagination it can be held that the Respondents have committed any wrong in issuing the orders, impugned in this OA, for granting the benefits of up gradation under the ACP/MACP by counting the service only from the date of regularization/regular absorption and not from the date the applicants entered to the project under MOFRS. We, therefore, find that the impugned orders have been issued as per the direction of the Hon'ble Apex Court.

10. Before proceeding further, it is worthwhile to quote the order dated 29th September, 1995 at Annexure-A/1 in OA No. 1151 of 2013 through which the applicants joined on regular basis, which reads as under:

"Annexure – A-1
No.T.14011/4/93-MAL
Govt. of Indian
Ministry of Health & Family Welfare

.....

Nirman Bhawan, New Delhi
Dated the 29th Sept, 1995

To
The Director General Health Services
Nirman Bhawan,

DM

New Delhi.

Subject :- NMEP – Integration of the Malaria Operational Field Research Scheme (MOFRS) with the National Malaria Eradication Programme (NMEP).

Sir,

I am directed to refer to the correspondence resting with the Dte. of NMEP's U.O.No.40-4/88-NMEP (R)/R.P. dated 13th June, 1991 on the above subject and to convey the approval of the President for merging of Malaria Operational Field Research Schemes (MOFRS) presently being continued under the auspices of Indian Council of Medical Research with the National Malaria Eradication Programme (NMEP).

2. I am also directed to convey the sanction of the President to the creation of the following 156 temporary posts under the Directorate of National Malaria Eradication Programme and Regional Offices of Health and Family Welfare for 8th Plan period :-

S.No.	Designation	No. of Posts	Scale of Pay
1.	Senior Research Officer (Non-Medical)	1 (One)	Rs. 3000-4500
2.	Research Officer (Medical)	11 (Eleven)	Rs. 2200-4000 + NPA
3.	Asstt. Research Officer (Non-Medical)	1 (One)	Rs. 2000-3200
4.	UDC-Cum-Computer	2 (Two)	Rs. 1200-2040
5.	Junior Stenographer	14 (Fourteen)	Rs. 1200-2040
6.	Laboratory Assistant	99 (Ninety nine)	Rs. 950-1540
7.	Driver	15 (Fifteen)	Rs. 950-1500
8.	Category 'D'	13 (Thirteen)	Rs. 750-940
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3. The above posts will be filled up by transfer of the existing incumbents working under the Malaria Operational Field Research Schemes.

4. This is subject to the conditions that :-

(i) the present number of posts of the MOFRS will be frozen

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(ii) no new recruitment would be made against any of these 156 posts being created under NMEP falling vacant due to any reasons including death, retirement, resignation, dismissal etc;

(iii) the states would be encouraged to carry out operational research activities from the existing staff; and

(iv) the Dte. of NMEP would collect data from state government and would develop mechanism to take appropriate strategies from the existing staff.

5. The expenditure involved will be met from the sanctioned budget grant of National Malaria Eradication Programme under Demand No.39-Department of Health (Plan).

6. This issues with the approval of the Ministry of Finance (Deptt. Of Expenditure) vide their U.O.No.3771/E.Coord/95 dated 15.9.95.

Yours faithfully,

Sd/-

(P.K. CHAKRABARTI)
DESK OFFICER(MAL)"

It is clear from the record that the impugned orders were issued by the Respondent- Department in consultation with the DoP&T. It is not in dispute that the Applicants were regularized as Laboratory Assistant based on the order dated 29.09.1995, referred above. The orders issued by the DoP&T for grant of ACP and MACP to the employees are very clear on the point that for up gradation benefits under ACP or MACP only regular service shall be counted for the purpose of grant of financial up gradation under the aforesaid Scheme.

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11. The Applicants have also placed reliance on the decision of the Guwahati Bench of the Tribunal dated 25.06.2015 in OA No. 276 of 2013. Relevant portion of the aforesaid decision is quoted hereunder for ready reference:

"17. In our view, since the applicants were absorbed by way of merger of MOFRS with NMEP (now NVBDCP), the action of the respondents in denying them the benefit of MACP by not counting their past services from the actual date of joining in the entry grade is not sustainable in law.

18. In view of the foregoing discussions and in view of the clarifications on MACP as well as the ratio laid down by the Hon'ble Supreme Court and the Hon'ble Gauhati High Court, we set aside and quash the impugned letters dated 15.03.2013 and 05.04.2013 and direct the respondents to continue extending the benefit of MACP to the applicants by counting their service from the date of their joining of posts in the entry grade i.e. taking into account their services rendered in MOFRS prior to its merger with, NMEP (now NVBDCP).

19. In the result, the O.A. stands allowed. There shall be no order as to costs."

But we find that the above judgment of the Guwahati Bench of the Tribunal has no help to the present case as the same is contrary to the decision of the Hon'ble Apex Court, cited supra.

12. Further we find that the orders impugned in these OAs were the subject matter of consideration before the Bangalore Bench of the Tribunal in OA No. 366 of 2013 to 374 of 2013 filed by Shri C.B.Gangadharaiah and others vs Union of Indi and Others and the

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same was dismissed on 14th August, 2013. The relevant portion of the order is quoted herein below:

"11. The issue for grant of MACP from the date of entry grade as described in para - 4 of the DOPT OM dated 9.9.2010 had been referred to DOPT for clarification. The DOPT clarified that regular service for the purpose of ACP benefit is granted from the date of joining the post in the entry grade on regular basis either on the direct recruitment basis or on absorption basis or absorption/re-employment basis. The service of applicants were considered from the date of their absorption in the department. A clarification has been issued on 15.3.2013, by counting regular service for the grant of MACP benefits from the date of absorption in Government service w.e.f. 29.9.1995. Accordingly, the 3rd respondent has withdrawn the MACP.

12. After careful consideration of the above mentioned orders, it is evident that the applicants are entitled for the benefits of MACP from 29.9.1995 only. We have carefully considered the impugned orders. The decision taken by the respondents under the impugned order is in accordance with the direction of Hon'ble Supreme Court and the clarification issued by the DOPT supra, we find there is no illegality or violation of instructions or orders of this Tribunal. The applicants are not entitled to the benefit of MACP earlier to 29.9.1995. The benefit has been withdrawn from 15.3.2013, accordingly, Pay Band and Grade Pay of the applicants have been revised as per the order dated 17/18-4-2013 (Annexure A11, A2, A13, A14, A15, A16, A17, A18 and A19). The respondents have justified in their reply statement that the impugned order withdrawing the MACP which was granted w.e.f. 1.9.2008 has been withdrawn. We are of the view, the impugned orders are in accordance with direction of the Hon'ble Supreme Court, there is no illegality as contended by the applicants.

13. The applicants further contended that the excess payment paid from 15.3.2013 will be recorded which is violative of principles of natural justice. Before the order of recovery of amount there was no notice or hearing from the applicants. The applicants relied upon the judgments of Hon'ble Supreme Court in the case of

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Ram Pal Malik Vs. State of Haryana and others reported in AIR 1994 SC 2481 and in the case of Syed Abdul Qadir Vs. State of Bihar reported in 2009 LAB.I.C. 1588.

14. We have carefully gone through the above judgments. The said judgments are not applicable to the facts of this case. When the applicants are not legally entitled for the benefits, the amount paid in excess has to be recovered from the salary of the employees. Issue of notice and hearing the applicant is only empty formality. We find nothing wrong to recover the amount paid excess. We rely on the judgment of Hon'ble Supreme Court in the case of Chandi Prasad Uniyal and others Vs. State of Uttarakhand and others reported in (2012) 8 SCC 417. In the said judgment the cases of Syed Abdul Qadir Vs. State of Bihar (2009) 3 SCC 475, Sahib Ram Vs. State of Haryana - 1995 Supp (1) SCC 18, Shyam Babu Verma Vs. Union of India - (1194) 2 SCC 521 and Col. B.J.Akkara Vs. Government of India - (2006) 11 SCC 709 were relied upon. The relevant para extracted here:-

"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 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. 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

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money, otherwise it would amount to unjust enrichment."

15. For the forgoing reasons the applicants fail to establish their case for grant of reliefs the impugned orders are passed based on the directions of Hon'ble Supreme Court and on the recommendations of the DPC. The competent authority has issued the order withdrawing the MACP and fixed the MACP in accordance with the clarification issued by the DOPT supra Regarding recovery of excess amount as held by Hon'ble Supreme Court in the case of Chandi Prasad Uniyal supra the order of recovery is in accordance with judgment of Hon'ble Supreme Court. The respondents have justified their action in the impugned order following the orders of Hon'ble Supreme Court and DOPT instructions supra. Accordingly, OAs are liable to be dismissed.

16. OAs are dismissed. No order as to costs."

13. Further, the orders impugned in these OAs were also the subject matter of consideration before the Cuttack Bench of the Tribunal in OA No. 798 of 2013 disposed of on 23rd August, 2016 (Smt. Rashmi Rekha Dash and another v Union of India and others). The relevant portion of the order is quoted herein below for ready reference:

"4. We heard learned counsel of both the parties at length Learned counsel for official respondents drew the attention of this Bench to the Judgment passed by Hon'ble Apex Court in the case of **Union of India & Ors. Vs. C.B. Gangadharaiiah & Ors.** [Civil Appeal No.444.450 of 2002] decided on September 10, 2003. Their Lordships have concluded by observing as follows:

"However, it is made clear that with regard to Assured Career Progression respondents would be entitled to get benefit only from the date of absorption."

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5. Once the Hon'ble Apex Court authoritatively clarified that with regard to ACP, applicant would be entitled to get benefit only from the date of absorption, all roads for further interpretation comes to an end. Learned counsel for the applicant wanted to impress this Tribunal that beneficial orders have been passed by the different Benches of this Tribunal and even some judgments have been upheld by Hon'ble High Court of Kolkata, but with great respect, we must say that once we come across an authoritative pronouncement of the Hon'ble Supreme Court, we are not authorized to pass an order which will make the order of the Hon'ble Apex Court infructuous, sterile or still born. In view of the latest development, we did not notice anything illegal, irrational in the approach of the respondents in granting financial benefit to the employees from the date of their absorption in the department and rightly they have passed orders for recovery of the same, because once an amount does not belong to the payer or payee, it is certainly tax payers money and would amount to unjust enrichment, if not recovered from the employees who are very much in service under Govt. of India. Hence ordered.

6. The OA being devoid of merit, is dismissed.
No costs."

14. It is a well known principle evolved by the DoP&T, as a matter of policy that 'Regular service' for the purposes of the MACPS shall commence from the date of joining of a post in direct entry grade on a regular basis either on direct recruitment basis or on absorption/re-employment basis. Service rendered on adhoc/contract basis before regular appointment cannot be counted towards grant of financial up gradation under ACP/MACP. The impugned orders are absolutely in accordance with the DoP&T OMs which has the sanction of law laid down by the Hon'ble Apex Court

and subsequently reiterated by the Bangalore and Cuttack Benches of the Tribunal.

15. So far as the issue of recovery of arrears is concerned, it is not the case of the applicants that any of the applicants have retired in the meantime. In the above eventuality as to whether recovery of the over drawal to which the applicants were not entitled to came up for consideration in OA No. 1020 of 2015 & Ors V. E.Railway and ors but this Bench vide order dated 13.05.2016 did not inclined to interfere in the order of recovery. Relevant portion of the order in the aforesaid case is extracted hereunder for ready reference:

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

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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

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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 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;
- (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).

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


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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)."

Hence, question of interfering in the recovery of the excess payment made to the applicants to which they were otherwise not entitled to do not arise.

16. In view of the discussions made above, we are not inclined to interfere in the impugned orders and this OA is held to be sans merit and is accordingly dismissed. Consequently, the status quo order dated 21.10.2013 passed by the Single Member stands vacated. There shall be no order as to costs.


(Jaya Das Gupta)
Admn Member


(Justice V.C. Gupta)
Judicial Member