



CENTRAL ADMINISTRATIVE TRIBUNAL
CALCUTTA BENCH

No.O.A.336 of 2011
M.A.49 of 2013
And
O.A.2010 of 2010

Date of order : 30.3.2016

Present : Hon'ble Justice Shri Vishnu Chandra Gupta, Judicial Member
Hon'ble Ms. Jaya Das Gupta, Administrative Member

SWAPAN KUMAR MONDAL

VS.

UNION OF INDIA & OTHERS
(S.E. Railway)

For the applicant : Mr. A. Chakraborty, counsel
For the respondents : Ms. G. Roy, counsel

O R D E R

The applicant, Sri Swapan Kumar Mondal has filed O.A.336/2011 under Section 19 of the Administrative Tribunals Act, 1985 seeking the following relief:-

"(a) Declaration that the office order dated 18-03-2011 issued by Chief Electrical Engineer(W) Kharagpur, can not be tenable in the eye of law and therefore, the same may be quashed."

An M.A.No.49/2013 has also been filed for amendment.

The applicant has filed another O.A.No.2010 of 2010 seeking the following reliefs:-

"a) An order do issue directing the respondents to grant the benefit of two increments in favour of the applicant and also to refix the pay in the scale of Rs.4500-7000/- and also to pay the arrears;

b) An order do issue directing the respondents to release 60% towards arrears of 6th Pay Commission after fixing the pay on the basis of the scale of pay of Rs.4500-7000/-."

Since both the cases are related to similar issue, both the O.As along with the M.A. are taken up for consideration and are being disposed of by this common order.

2(a) The case of the applicant is that he was appointed as Constable in Railway Protection Force, South Eastern Railway, Nagpur on 10.03.1990. He was subsequently declared medically decategorised in the said post and was posted as Junior Clerk in the scale of Rs.3200-4900/- The said scale was **modified** and the scale of Rs.3050-4590 was granted in favour of the applicant with effect from 29.08.2005(Annexure A-2) Allegedly the applicant was placed in the scale of Rs.4500-7000 w.e.f. September,2006. But no office order was issued separately. It is the submission of the applicant that he is entitled to the scale of Rs.4500-7000 after completion of 12 years of service, from initial date of appointment on 10.03.1990 i.e. w.e.f.10.03.2002. The applicant was regularly promoted to the post of Senior Clerk w.e.f. 12.06.2009.

247

(b) It is the grievance of the applicant that when his pay was refixed as per the recommendation of the 6th Pay Commission, 40% of the arrears was released in the month of September, 2008 on the basis of pay drawn by him in the scale of Rs.4500-7000, but the remaining 60% of the arrears was calculated on the basis of the pay scale of Rs.3050-4590. He was also aggrieved that he did not get increment for two years for the years 2007 and 2008. For the aforesaid reasons he has approached this C.A.T. for redressal of his grievances.

3(a) It is the contention of the respondent authorities that Sri Swapan Kumar Mondal, son of Gobardhan Mondal was initially appointed as a Constable with effect from 10.03.1990 in the scale of Rs.825-1200 (During 4th Pay Commission period). Thereafter he was declared medically decategorised and found fit in C-I and below on 24.02.2005 and was posted in **alternative job as Junior Clerk** in the scale of Rs.3050-4590 (S-5 scale) w.e.f. 30.08.2005 (5th Pay Commission period).

(b) Further, due to introduction of 6th Pay Commission under Estt. Srl. No.158/2008 the basic pay of the applicant was fixed in the pay band of Rs.5200-20200 with Grade Pay of Rs.1900/- w.e.f. 01.01.2006. As per extant rules, Pay Commission arrears were drawn in two phases as 40% and 60%

(c) Subsequently Sri Mondal was granted 1st financial upgradation under MACP scheme as per Estt. Srl. No.120/09 w.e.f. 01.09.2008 in PB-I with Grade Pay of Rs.2,000/-. As per normal procedure he was promoted as Sr. Clerk in the hierarchy in PB-I, Grade Pay of Rs.2,800/- w.e.f. 12.06.2009.

4. Issues:- Is the applicant's claim for the benefits of ACP/MACP grades in the decategorised pay of Junior Clerk tenable when he had joined as a Constable on 10.03.1990 and he is counting his service from 10.03.1990 for ACP benefits but in the scale of Junior Clerk and not Constable?

5. Heard Id. counsel for both sides and perused the materials available on record.

6. Findings:-

(a) The applicant, Sri Swapan Kumar Mondal joined as Constable on 10.03.1990 in the scale of Rs.825-1200 (4th Pay Commission). On introduction of 5th Pay Commission from 01.01.1996, he becomes entitled to the replacement scale of the 5th Pay Commission which is Rs.2750-4400 (S4). As per the ACP Scheme which came into effect from 09.08.1999, if a person is stagnating in the same pay scale for 12 years, he becomes entitled to one financial upgradation in the immediately next higher pay scale. Therefore, on completion of 12 years

from the initial appointment in a regular posting, Sri Swapan Kumar Mondal became entitled to the first ACP on 10.03.2002 and was entitled to the scale of Rs.3050-4590(S-5). While he was enjoying this scale, he was medically decategorised from B-2 to C-I and below on 24.02.2005 and posted as Junior Clerk w.e.f. 30.08.2005 in the same pay scale. It is to be emphasized on the point that when he was medically decategorised as per Railway Establishment Sl. No.120/1999 dated 27.05.1999, the following paras of Chapter-XIII of Indian Railway Establishment Manual Vol.I, Revised Edition 1989 became applicable to him. Relevant extracts from those provisions are cited below:-

"1303. The railway servants both in group (i) and group(ii) of para 1302 above cease to perform the duties of the posts they are holding from the date they are declared medically unfit for the present post. No officer has the authority to permit the Railway Servant concerned to perform the duties in the post beyond that date. If such a Railway Servant cannot be immediately adjusted against or absorbed in any suitable alternative post he may be kept on a special supernumerary post in the grade in which the concerned employee was working on regular basis before being declared medically unfit pending location of suitable alternative employment for him with the same pay scale and service benefits, efforts to locate suitable alternative employment starting immediately. The special supernumerary post so created will stand abolished as soon as the alternative employment is located.

1308. Fixation of Pay: The pay of the disabled/medically decategorised Railway servants will be fixed on absorption in an alternative post at a stage corresponding to the pay previously drawn in the post held by them on regular basis before acquiring disability/medically decategorisation. For running staff, the fixation will be based on the basic pay plus a percentage of their basic pay, representing the pay element of running allowance as may be in force. If the basic pay so arrived at does not correspond to any stage in the absorbing grade the pay may be fixed at the stage just below and the difference allowed as Personal Pay to be absorbed in future increase in pay. Similarly if the Pay so arrived at exceeds the maximum of the absorbing grade, the Pay may be fixed at the maximum and the difference may be allowed as personal pay to be absorbed in future increments/increase in pay. Other allowances such as Dearness Allowance, City Compensatory Allowance and House Rent Allowance should be allowed on pay plus personal pay, if any, in the absorbing grade.

1309. Benefit of past service to be allowed: A disabled/medically decategorised Railway servant absorbed in alternative post, will for all purposes, have his past service treated as continuous with that in the alternative post.

1310. Fixation of seniority of disabled/medically decategorised staff absorbed in alternative employment: The disabled/medically decategorised staff absorbed in alternative posts should be allowed seniority in the grade of absorption with reference to the length of service rendered on non-fortuitous basis in the equivalent or corresponding grade before being declared medically unfit. This is subject to the proviso that if a disabled/medically decategorised employee happens to be absorbed in the cadre from which he was originally promoted, he will not be placed above his erstwhile seniors in the grade of absorption.

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(Authority : Section 47(1) of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1995 and Board's letter No.E(NG)/96/RE3/9(2) dated 29.4.1999)"

- (b) As the applicant has already got one upgradation on 13.03.2002, the next upgradation under ACP will come after 24 years from the initial appointment i.e. 10.03.2014, but as the

MACP has already come into force from 01.09.2008, there is no question of his getting 2nd upgradation under ACP. In the meantime, he has got promotion as Senior Clerk on 12.06.2009 in the appropriate scale. As he had got the upgraded scale of S-5 during 5th Pay Commission in scale of Rs.3050-4590 on 13.03.2002 his replacement scale during the 6th Pay Commission from 01.01.2006 will be Rs.5200-20200 with G.P. of Rs.1900/-. The respondent authorities are correct in giving this scale of pay to the applicant on introduction of 6th Pay Commission's pay scale as is evident from their reply at para 7 which runs as follows:-

"Further due to introduction of 6th Pay Commission under Estt. Srl. No.158/08 the basic pay of the applicant was fixed in the pay band Rs.5200-20,200 with grade pay Rs.1,900/- w.e.f. 01-01-2006."

He will not be entitled to 2nd MACP from 01.09.2008 as he has not completed 20 years of service and has received one upgradation of ACP already.

(c) Therefore, we find that as per rules the applicant's claim of getting the ACP benefits in the pay scale of Junior Clerk, counting the service from 10.03.1990 when he joined as Constable is not tenable. The above findings are in consonance with the Division Bench's judgment of the Hon'ble High Court of Calcutta dated 12.08.2014 in WPCT.No.258/2009 (**Upendra Nath Sahoo vs. Union of India**) wherein it has been observed as under:-

"But for reasons beyond control the matter remained incomplete. The changes in the circumstances leading to the petitioner's medical de-categorisation and absorption in an alternative employment with pay protection could not, however, entitle him to a three-stage higher ACP benefit to which he would not have been entitled as a railway servant eligible and suitable for the benefit as back as October 1, 1999.

The respondents erroneously giving the petitioner the pay-scale S-8 discovered their mistake and took the necessary corrective measures without any delay. There is absolutely nothing that can entitle the petitioner to the ACP benefit in the pay-scale S-8 (Rs. 4500-7000) with effect from July 12, 2000. It is not that as junior clerk on July 12, 2000 the petitioner had acquired the eligibility for the ACP benefit like a junior clerk serving as such for the length of service required for acquiring the eligibility."

The complete judgment of the Hon'ble High Court is set out below:-

Jayanta Kumar Biswas:- The petitioner in the WPCT under Article 226 of the Constitution of India dated November 3, 2009 is questioning an order of the Central Administrative Tribunal Calcutta Bench dated March 31, 2009 dismissing his OA No.39 of 2006.

The petitioner was working in the South Eastern Railway as an RPF constable. He was appointed as such on January 5, 1983. Having been declared medically unfit for the post, he was de-categorised and given an alternative job as a junior clerk on June 19, 2000. At this date as constable he was in the pay-scale Rs. 3050-4590. He was appointed to the post of junior clerk in Mechanical Department in the same pay-scale. He joined the post of junior clerk on July 12, 2000.

By a letter dated October 1, 1999 the Railway Board circulated the Assured Career Progression (ACP) Scheme recommended by the fifth Central Pay Commission. The Security Department authority issued an order dated August 28, 2000 that the petitioner was one of the de-categorised constables who were eligible for the 1st ACP benefit. The matter was sent to the appropriate authority for issuing the benefit order.

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In December 2004 the Personnel Branch authorities again took steps for ascertaining the petitioner's suitability for the 1st ACP benefit. At that date he was working in the post of junior clerk. By an order dated January 6, 2005 the petitioner's new department gave him the 1st ACP benefit in pay-scale Rs. 4500-7000 with effect from July 12, 2000.

In Annexure-I to the Railway Board letter dated October 1, 1999 on ACP for the railway servants the terms and conditions for the grant of the benefits were specified. In para. 7 of the annexure the following was provided:-

"7. Financial upgradation under the Scheme shall be given to the next higher grade in accordance with the existing hierarchy in a cadre/ category of posts without creating new posts for the purpose. However, in case of isolated posts, in the absence of defined hierarchical grades, financial upgradation shall be given in the immediately next higher (standard/ common) pay scales as indicated in Annexure-II which is in keeping with Part-A of the First Schedule annexed to the Ministry of 'Railway's Notification No. PC-V/97/II/RSRP/ 1 dated 8.10.97 (RBE No. 133/97, PC-V/1)."

While working as constable until de-categorisation, the petitioner was in the pay-scale S-5 mentioned in Annexure-II referred to in para.7 of Annexure-1 to the Railway Board letter dated October 1, 1999. The pay-scale S-5 was Rs. 3050-75-3950-80-4590. The petitioner was given alternative job as junior clerk maintaining this pay-scale Rs. 3050-4590 with effect from July 12, 2000.

In view of the ACP benefit order dated January 6, 2005 the petitioner was given the pay-scale S-8 (Rs. 4500-125-7000). The two pay-scales S-6 and S-7 were Rs. 3200-85-4900 and Rs. 4000-100-6000. Had the petitioner remained a constable on January 6, 2005, when the ACP benefit order was issued, according to the provisions of the Scheme, he would have been entitled to the pay-scale S-6 (Rs. 3200-85-4900). The order dated August 28, 2000 was also to that effect.

Detecting the mistake, the authorities initiated a process for taking the corrective measures; and in the process they issued an order dated July 7, 2005 stating that the ACP benefit previously given erroneously would stand modified according to a memo dated June 29, 2005. The modified ACP benefit was given in the scale S-6 (Rs. 3200-4900) with effect from October 1, 1999. Consequent steps were taken for recovery of the overpayment caused by the erroneous grant of the benefit.

The petitioner submitted a representation dated August 1, 2005 that he was entitled to the ACP benefit given by the order dated January 6, 2005. By a letter dated August 26, 2005 the authority concerned informed him that he had been duly granted 1st ACP benefit with effect from October 1, 1999 at which date he had been holding the post of constable in the RPF. He was also informed that he was duly granted the pay protection on appointment to the post of junior clerk with effect from July 12, 2000.

Feeling aggrieved, the petitioner filed the OA. The respondents contested the OA by filing a Reply. The petitioner filed a Rejoinder. The Tribunal extensively considered the petitioner's grievances and held that he had been rightly given the ACP benefit with effect from October 1, 1999 in the pay-scale S-6 (Rs. 3200-4900).

Mr. Sanyal appearing for the petitioner has submitted as follows. In view of the provisions of para.7 of Annexure-1 to the Railway Board letter dated October 1, 1999, the petitioner was entitled to the ACP benefit granted by the order dated January 6, 2005, because his suitability for the benefit was examined only in 2004, when he was holding the post of junior clerk and hence he was entitled to the ACP benefit ordinarily available to a railway servant holding the post of junior clerk.

Mr. Bandopadhyay appearing for the respondents has submitted that the respondents initially committing a mistake in granting the petitioner ACP benefit granted him the correct benefit, and that since it was a bonafide mistake and steps for correction were taken without any unreasonable delay, the respondents were entitled to recover the overpayment. In support of his contention that, in any case, the respondents could not recover any overpayment, Mr. Sanjal has relied on *Sahib Ram v. State of Haryana & Ors.*, 1995 Supp (1) SCC 18.

The petitioner was entitled to the 1st ACP benefit according to the terms and conditions of the Railway Board letter dated October 1, 1999. In view of the letter, if he was eligible for the benefit, in that case he was to be given the benefit with effect from

October 1, 1999. At this date he was holding the post of constable in the RPF and he was actually working as such. He was screened for the purpose and found eligible and proposal was sent to the authority on August 28, 2000 for the order.

In evident ignorance of the Security Department order dated August 28, 2000, the petitioner's new department took up the question of 1st ACP benefit in 2004. The Scheme entitled a railway servant to the 1st ACP benefit to the next higher scale. Hence in ordinary course the petitioner would have been entitled to the 1st ACP in the pay-scale S-6 (Rs. 3200-4900). But thinking that he would get the benefit of the next higher post, he was erroneously given the pay-scale S-8 (Rs. 4500-7000).

If his service as constable from January 5, 1983 till his medical de-categorisation was not taken into consideration, then as a junior clerk from July 12, 2000, in 2004 he would not have been at all eligible for the 1st ACP benefit. In view of the length of his service as constable, he had actually become eligible for consideration right on October 1, 1999 and steps were taken for ascertaining his suitability.

But for reasons beyond control the matter remained incomplete. The changes in the circumstances leading to the petitioner's medical de-categorisation and absorption in an alternative employment with pay protection could not, however, entitle him to a three-stage higher ACP benefit to which he would not have been entitled as a railway servant eligible and suitable for the benefit as back as October 1, 1999.

The respondents erroneously giving the petitioner the pay-scale S-8 discovered their mistake and took the necessary corrective measures without any delay. There is absolutely nothing that can entitle the petitioner to the ACP benefit in the pay-scale S-8 (Rs. 4500-7000) with effect from July 12, 2000. It is not that as junior clerk on July 12, 2000 the petitioner had acquired the eligibility for the ACP benefit like a junior clerk serving as such for the length of service required for acquiring the eligibility.

On these facts, we are unable to accept that the respondents were wrong in rescinding the order granting the petitioner the 1st ACP benefit with effect from July 12, 2000 and granting him the modified benefit with effect from October 1, 1999. On the facts, in our opinion, the principle applying which Sahib Ram was decided does not apply to the petitioner's case. Here the overpayment was recovered long ago.

For these reasons, we dismiss the WPCT. No costs. Certified xerox.

(Jayanta Kumar Biswas, J.)

(Ishan Chandra Das, J)"

- (d) The Id. counsel for the applicant has cited the orders passed in O.A.820 of 2005 on 05.05.2009 wherein he brought our attention to para 14 of the order which states as follows:-

"14. The statement, therefore, made by the respondents that the applicants had already been given one promotion as Head Constable and, therefore, could avail of the 2nd ACP benefit only was, therefore, not correct. When they were appointed as Junior Clerk in the lower pay scale Rs.3050-4590/- after medical de-categorisation their earlier promotion to the grade of Head Constable had been in effect annulled. **Therefore, Estt. Sri. No.83/2002 would become applicable.** Therefore, they would be entitled to the two. ACP benefits in their new employment i.e. in their alternative employment as Junior Clerk. The ACP benefit of Rs.4500-7000/- given to them on 10.3.2002 and 6.1.2002, therefore, is correct.

14. Attention is also drawn to the memo of the Chief Personnel Officer No.p/5th/PC/21/PT-II dated 27.11.2006 regarding re-deployment of medically de-categorised staff in lower grade. Para 2 of the memo reads as follows:-

" As per extant instructions, the benefit of financial upgradation under the ACP Scheme has to be given in the existing hierarchy of the new organization. Subsequent to medical de-categorisation the concerned employee should be given the benefit of ACP in the existing hierarchy with reference to his initial appointment grade. Hence, a medically de-categorised RPF Head Constable(Rs.3200-4900) absorbed as Junior Clerk in the scale Rs.3050-4590/-

should be given first Financial Upgradation under the ACP Scheme in the grade of Rs.4500-7000/- which is the next higher grade in the ministerial cadre."

(e) However, the Estt. Srl. No.83/2002 which deals with the issues of employees medically decategorised and posted in a lower grade does not apply to the present case as the applicant is placed in the same scale of Rs.3050-4590 as Junior Clerk.

(f) Going by the above facts and supported by the findings of the Hon'ble Calcutta High Court (supra), the case of the applicant is dismissed in both the O.As and consequently the M.A. No cost.

(J. Das Gupta)
Administrative Member
s.b

(Justice V.C. Gupta)
Judicial Member