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**(2019) 02 CAT CK 0162**

**In the Central Administrative Tribunal**

**Case No : Original Application No. 2984 Of 2017**

Bhan Prakash

APPELLANT

Vs

Govt. Of NCT Delhi

RESPONDENT

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**Date of Decision : 20-02-2019**

**Acts Referred:**

**Citation : (2019) 02 CAT CK 0162**

**Hon'ble Judges : Pradeep Kumar, J**

**Bench : Single Bench**

**Advocate : J.S. Mann, Amit Anand**

**Final Decision : Dismissed**

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## **Judgement**

1.The applicant was appointed as a Pharmacist on 30.08.1976 in the Delhi State Industrial Development Corporation (DSIDC). Later on, his services were merged with Delhi State Mineral Development Corporation (DSMDC). On closure of DSMDC his services were absorbed in Government of National Capital Territory of Delhi (GNCTD) on 21.09.1995. In terms of order dated 21.11.2012 he was granted the Grade Pay of Rs.4800/- as MACP benefit w.e.f. 01.01.2006.

2. A Fast Track Committee was appointed to look into the issues relating to Pharmacist and thereafter certain clarifications were issued vide GNCTD orders dated 01.06.2011. The Pharmacists who were recruited in the Grade Pay of Rs.2800/-, were granted the Grade Pay of Rs.4200/- on completion of two years of service. The Fast Tract Committee had also considered the issue how to govern ACP/MACP benefits in respect of Pharmacists. This clarification dated 01.06.2011 reads as under:

"In continuation of the Office letter No. F.3(22)/98/DHS/Estt/HQ/Pt. 1/1404-1413 dated 10/1/11 and its subsequent corrigendum No. F.10/6/2006/MACP/Ph/DHS/Estt/HQ/14484 dated 17.03.11 on the above cited subject. Now it is again clarified that ACP/MACP Scheme to the Pharmacists are to be granted in the following Grades Pay w.e.f. 1.1.2006 :-

Grade pay after completion of 2 yrs of regular service from date of joining on Non-functional basis

Grade Pay under 1st ACP/MACP

Grade Pay under 2nd ACP/MACP

Grade Pay under 3rd MACP

Rs. 4200.00

Rs.4600.00 (After completion of 10 years of regular service w.e.f. date of Joining in the service)

Rs.4800.00 (After completion of 20 years of regular service w.e.f. date of Joining in the service)

Rs.5400.00 (After completion of 30 years of regular service w.e.f. date of Joining in the service)

3. Accordingly, the pay in respect of 12 Pharmacists was fixed vide orders dated 16.05.2012. The applicant's name appeared in this list at serial no.7. He was granted fixation as under:

"7. Mr. Bhan Prakash, Pharmacist

Pay as on 01.01.2006 in the revised pay scale i.e. Rs. 9300/- - 34800/- + G.P. Rs. 4200/-

Rs. 14470/- + 4200/-

Basic pay as on 01.09.2008 in the band of Rs. 9300/- -34800/- and Grade Pay Rs.4600/- after grant of 1st Fin. Up-gradation under MACP

Rs.16830/- + 4600/-

Basic pay as on 01.09.2008 in the band of Rs. 9300/- -34800/- and Grade Pay Rs.4800/- after grant of 2nd Fin. Up-gradation under MACP

Rs.17480/- + 4800/-

Basic pay as on 01.09.2008 in the band of Rs. 9300/- -34800/- and Grade Pay Rs.5400/- after grant of 3rd Fin. Up-gradation under MACP

Rs.18150/- + 5400/-

Date of Next Increment

01.07.2012

Thereafter, all payments including arrears were paid accordingly.

4. Thereafter, another pay fixation was issued vide orders dated 21.11.2012. As per this order the grant of Grade Pay of Rs.4200/- on completion of two years of service was also counted as 1st MACP benefits. Accordingly, the date of

applicability of subsequent MACP benefits was modified as under:

S. No

Name of the Distt./ Schemes

Name/post/ DOB/DOA Pharmacist

Present pay band with GP

1st Financial Upgradation

2nd Financial Upgradation

3rd Financial Upgradation

W&CReport/ Integrity Report

3

North East Distt.

Sh. Bhan Prakash, Pharmacist 15/11/1952 & 21/09/1995

9300- 34800+ 5400

G.P. of Rs. 4200 w.e.f. 01/01/2006

G.P. of Rs. 4600 w.e.f. 01/09/2008

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ROP G.P. of Rs. 4600/- G.P. of Rs. 4800/- w.r.e. dated 01/01/2006 & G.P. of Rs. 5400/- w.r.e. dated 01.09.2008 (to be withdrawn)

The applicant pleaded that with this order dated 21.11.2012, grant of Grade Pay Rs.4800/- and Rs.5400/-already received by him, has been denied and all retiral dues including leave encashment was paid on the basis of Grade Pay of Rs.4600/- only. In support of this contention the applicant has produced the order in respect of leave encashment dated 26.11.2012. Thereafter the applicant retired from service on 30.11.2012.

5. Subsequent to retirement, the applicant was given an order dated 19.12.2012 showing therein the calculations in respect of gratuity which also was worked out based upon Grade Pay of Rs.4600/- at the time of retirement. Since the earlier Grade Pay of Rs.4800/- and Rs.5400 were denied even though originally granted as mentioned above, the respondents calculated that certain overpayments had taken place which amounted to Rs.3,15,931/-. This amount was recovered from the applicable gratuity as per the order dated 19.12.2012.

6. The applicant brought out that subsequently vide GNCTD orders dated 29.07.2015 the past services rendered under DSMDC was also allowed to be counted for ACP/MACP benefits. This order reads as under:

"In compliance of decision of Hon'ble High Court, Delhi dated 05-11-2014 WP (C) 1378/2014, C.M. No. 2879/2014 in the matter of GNCT of Delhi and Ors. Vs. Narender Singh & decision of Hon'ble Central Administrative Tribunal (CAT) in MA/2494/2014, OA/1548/2003 & MA/2495/2014 in the matter of Govt. of NCT of Delhi Vs. Sunil Kumar & Ors. and in the light of opinion of Law Department, GNCT of Delhi vide note dated 20/11/2013, Competent Authority has accorded approval vide U.O. No. 1907 dated 14.07.2015 to count the past services, for the purpose of grant of benefits under ACP/MACP Scheme only, to those employees who have rendered services in DEDA/DSMDC and declared surplus and further re-deployed in GNCT of Delhi vide several orders issued by Services - II Department, GNCT of Delhi from time to time.

It is, therefore, requested to forward the ACP/MACP cases accordingly, in the prescribed proforma with IC/VC in respect of those eligible officials who rendered their services in DEDA/DSMDC and further declared surplus and re-deployed in GNCT of Delhi.

In compliance to this instruction, the pay fixation in respect of applicant was subsequently modified again vide orders dated 09.01.2017 as under:

Pay as on 31.08.2008 in the pay scale of Rs. 9300/- - 34800/- and Grade Pay of Rs. 4200/-

Rs. 16210/- + 4200/-

Basic pay as on 01.09.2008 in the band of Rs. 9300/- -34800/- and Grade Pay Rs.4600/- after grant of IInd Fin. Up-gradation under MACP

Rs. 16830/- + 4600/-

Basic pay as on 01.09.2008 in the band of Rs. 9300/- -34800/- and Grade Pay Rs.4800/- after grant of IIInd Fin. Up-gradation under MACP

Rs. 17480/- + 4800/-

Date of Retirement

30.11.2012

7. The applicant is aggrieved that the Grade Pay of Rs.5400/- granted to him vide orders dated 16.05.2012 has been disallowed and he had been finally retired from the Grade Pay of Rs.4800/- w.e.f. 01.09.2008 vide orders dated 09.01.2017. This grievance has been ventilated in the instant OA.

8. The applicant has brought out that two other Pharmacists similarly placed, namely Shri Ravinder Dutt Tiwari, employee code-13499 was working in Lok Nayak hospital. His pay slip for July, 2014 was submitted, which showed that he was drawing the Grade Pay of Rs.5400/- Similarly one Shri K.G. Ahuja (since retired) was also granted 3rd MACP benefits in the Grade Pay of Rs.5400/- as per RTI reply dated 13.12.2016. On this basis the applicant pleaded that he has been discriminated against.

9. The applicant also relied upon a judgment by Hon?ble Apex Court in the case of State of Punjab and others etc. vs. Rafiq Masih (White Washer) and Ors., [(2015) 4 SCC 334], wherein recoveries older than five years have been prohibited. The recoveries from retiring staff and from those who are in Group ? C? and ?D? have also been prohibited.

10. The applicant also relied upon the judgment by the Tribunal in Vinod Kumar Sharma v. GNCTD & Ors., [OA No.3480/2017, decided on 25.10.2018]. Shri Vinod Kumar Sharma was also working as a Pharmacist and had retired on 30.11.2012. He was drawing the Grade Pay of Rs.5400/-. Just before his retirement this Grade Pay was reduced to Rs.4800/- and an amount of Rs.2,37,090/- was recovered from him. In this case the Tribunal was pleased to order as under:

"14. Normally, I would go by the clarification issued by letter dated 20.09.2013 vide which it has been clarified that Pharmacists with entry Rs.2800/- in PB-I and in receipt of NF grade in the GP Rs.4200/- on completion of 2 years of service are eligible for 2nd and 3rd financial upgradation under MACPS in the GPs Rs.4600/- and Rs.4800/- only. The respondents in case of the applicant, have acted according to this clarification which seems to warrant no intervention. However, I cannot help but observe that the respondents have been evasive regarding the allegation made by the applicant about grant of similar benefits to some of his colleagues, named in the OA. In letter dated 15.09.2017 (A-1) - it is simply mentioned that "As regards the non recovery of pay with GP of Rs.5400/- to colleague employees as mentioned in his representation/legal notice, it is intimated that the said colleague employees do not belong to this District for the period mentioned therein." Obviously, a weak and unconvincing reply - which does not explain the contradictory stance of the respondents qua the applicant. Admittedly, the benefit denied to the applicant has been granted to three of his colleagues i.e. Ravinder Dutt Tiwari, Shri K.G. Ahuja and Shri Krishan Gopal Ahuja. If all the said pharmacists are similarly placed like the applicant (as alleged in the OA) then the circumstances/reasons due to which the retirement dues were paid to them on a higher grade pay and denied to the applicant, tantamount to discrimination and needs to be looked into.

15. In view of the foregoing, I direct the respondents to refund the amount of Rs.2,37,090/- recovered from the gratuity of the applicant within a span of three months from the date of issue of a certified copy of this order. Simultaneously, the respondents are directed to constitute a Committee to look into the allegations of the applicant that similarly situated persons/colleagues have been granted benefits denied to him. This Committee must submit its report to the competent authority to ensure that no discrimination was/is meted out to the applicant. The entire exercise (of the refund and constitution of the committee and its report) must be completed within three months from the date of receipt of a certified copy of this order including rectification (in case of pay fixation etc.), if any. No costs."

11. In keeping with the above, the applicant, who also retired on 30.11.2012, had sought relief in the form of refund of Rs.3,15,931/- recovered from the gratuity along with interest. The applicant has also pleaded for pay fixation dated 09.01.2017 to be quashed and pay fixation granted on 16.05.2012 to be restored. No interim relief has been sought.

12. The respondents opposed the OA pleading that the same is time barred as the applicant retired on 30.11.2012 whereas the OA has been preferred in the year 2017.

13. It was further brought out that the judgment by the Hon'ble Apex Court in Rafiq Masih (White Washer) (supra) is not applicable as this judgment came on 18.12.2014, whereas the applicant had already retired on 30.11.2012. It was brought out that the Hon'ble Apex Court in another case of Chandi Prasad Uniyal v. State of Uttarakhand, [(2012) 8 SCC 417] had gone into the question of recoveries and made the following observations and the judgment:

"The question that arises for consideration in this appeal is whether over-payment of amount due to wrong fixation of 5th and 6th pay scale of teachers/principals based on the 5th Pay Commission Report could be recovered from the recipients who are serving as teachers. The Division Bench of the High Court rejected the writ petition filed by the appellants and took the view that since payments were effected due to a mistake committed by the District Education Officer, the same could be recovered. Aggrieved by the said judgment, this appeal has been preferred.

Appellants in the appeal will not fall in any of these exceptional categories, over and above, there was a stipulation in the fixation order that in the condition of irregular/wrong pay fixation, the institution in which the appellants were working would be responsible for recovery of the amount received in excess from the salary/pension. In such circumstances, we find no reason to interfere with the judgment of the High Court. However, we order the excess payment made be recovered from the appellant's salary in twelve equal monthly installments starting from October 2012."

14. It was argued that it was the DoPT OM dated 06.02.2014, which is applicable in the instant case and not the OM dated 02.03.2016 which was issued subsequent to the judgment in Rafiq Masih (White Washer) (supra).

15. It was pleaded that while issuing the pay fixation dated 21.11.2012, which the applicant has now pleaded to be restored, an express provision was also made to the following effect:

"However, the grant of higher Pay Scale is subject to the undertaking that in the event of over payment, which may be detected at a later stage, the same will be recovered from their pay."

16. The applicant was thus fully aware that grant of the Grade Pay of Rs.4600/- Rs.4800/- and Rs.5400/- was subject to the undertaking that in case of over-

payment excess will be recovered. In view of this express undertaking and decision by the Hon'ble Apex in Chandi Prasad Uniyal (para 13 supra) the recoveries effected from the gratuity are admissible.

17. The respondents relied upon the doctrine of prospective over-ruling as has been laid down by the Hon'ble High Court of Kerala in the case of V.N. Naryanan Nair v. State of Kerala, [AIR 1971 Ker. 98] and by the Hon'ble Apex Court in the case of Golaknath v. State of Punjab, [1967] 2 S.C.R. 762].

18. The respondents also relied upon a judgment by the Tribunal in OA No.3078/2017, pronounced on 19.12.2018 in Dr. Yogendra Prakash v. Commissioner, NDMC & Anr., wherein the applicant was promoted on ad hoc basis on 14.09.1989 as General Duty Medical Officer-II to the pay scale of Rs.12000-16500. Thereafter, he was selected as a Specialist and joined the same organization on 14.06.2000 in the pay scale of Rs.10000-15200. After joining as Specialist his erstwhile pay in the scale of Rs.12000-16500 was protected while fixing in the scale of Rs.10000-15200 as a Specialist, by giving him a notional increment of Rs.375/- p.m. subject to audit objections. Subsequently, on receipt of audit objection his pay was reduced and recovered were ordered vide order dated 23.12.2016. Feeling aggrieved, the applicant approached the Tribunal, relying upon the judgment by the Hon'ble Apex Court in Rafiq Masih (White Washer) (supra). However, recoveries were held to be admissible as he was fully aware that pay was fixed subject to audit objections.

19. In view of the foregoing, the respondents pleaded that the present OA is not maintainable and is required to be dismissed.

20. The matter has been heard at length. Applicant's case was represented by Shri J.S. Mann, learned counsel and respondents' case was argued by Shri Amit Anand, learned counsel.

21. The initial pay fixation dated 16.05.2012 was in follow up of the GNCTD, orders dated 01.06.2011, which were based upon the Fast Track Committee's recommendations. Subsequently, the clarifications were issued by the GNCTD vide their letter dated 20.09.2013 where it was clarified that Pharmacist with entry Grade Pay of Rs.2800 in PB-1 and in receipt of Non-Functional Selection Grade (NFSG) in the Grade Pay of Rs.4200/- on completion of two years' service shall be eligible for 2nd and 3rd financial upgradation under MACP Scheme in the Grade Pay of Rs.4600/- and Rs.4800/- only. This upgradation to GP Rs.4800, was also denied earlier as his past services were not counted. It has only now been granted to the applicant vide orders dated 09.01.2017 which has been impugned in the instant OA. Further, the higher GP of Rs.5400 which was also granted earlier, has also now been denied, which is also a grievance in this OA.

22. In view of the express clarification by the GNCTD vide their letter dated 20.09.2013 and provision in the pay fixation wherein any excess payment was required to be recovered, the pleas put-forth by the applicant for restoration of the Grade Pay of Rs.5400/- are not acceptable.

23. At the time the applicant retired in the year 2012 and recoveries were made the judgment of the Hon<sup>ble</sup> Supreme Court in the case of Rafiq Masih (White Washer) (supra) was not available and as such it was the judgment of the Hon<sup>ble</sup> Supreme Court in the case of Chandi Prasad Uniyal (supra) which was applicable. This judgment permitted recoveries if an employee was made well aware that any excess payments are to be recovered.

24. The applicant had brought out the issue of discrimination with respect to certain other employees who were similarly placed (para 8 & 10 supra). However, it is the Tribunal's view that the applicant's case has to stand on its own merit and if there was some error in some other case and they were benefitted, that error cannot be made a basis to perpetuate the error in another case.

25. It is further noted that judgment of the Hon<sup>ble</sup> Apex Court in the case of Rafiq Masih (White Washer) (supra), is in the context of the instances wherein payment at higher level had taken place more than five years earlier and thereafter recoveries were ordered. In the instant cast, the said payment at higher level with Grade Pay of Rs.5400/- would have been made in the year 2012 only after pay fixation was done as per letter dated 16.05.2012. The recoveries were ordered from the gratuity as calculated on 19.12.2012. It was within three weeks of the superannuation of the applicant. It is the Tribunal's view that in view of this circumstance, the ratio of the judgment of the Hon<sup>ble</sup> Apex Court in the case of Rafiq Masih (White Washer) (supra) of causing undue distress while ordering recoveries, is not attracted in the instant case.

26. Keeping in view the above, the instant OA is not gaining acceptability. The same is dismissed being devoid of merit.

27. The Tribunal however notes that applicant was retired on 30.11.2012 from GP Rs.4600/- and his gratuity was calculated on this basis (para 5 supra). However, he has now been granted GP Rs.4800/- w.e.f. 01.09.2008 vide orders dated 09.01.2017 after counting past service (para 6 supra). This counting ought to have been done to start with itself as this was very well known at the time of retirement. Accordingly, all payments while he was in service and thereafter all retiral dues of this applicant, e.g. gratuity, leave 14 OA No.2984/2017 encashment and pension, if admissible, are required to be worked out on the basis of GP Rs.4800/- w.e.f. 01.09.2008 (para 7 supra). The respondents are directed to do this correction now and release due payments, if not done so far, within a period of eight weeks of receipt of certified copy of these orders. In case these payments were not made earlier, these will also carry interest at GPF rate. In such an event, a detailed statement of calculation showing due and drawn of these items along with interest, shall also be supplied to applicant within this period.

There shall be no order as to costs.