(2021) 08 CAL CK 0039

In the Calcutta High Court

Case No : W.P.C.T. No. 3, 4 Of 2019

Commissioner Of Central Excise, Kolkata - II APPELLANT

Vs

Ranjit Kumar Biswas & Ors. RESPONDENT

Date of Decision : 09-08-2021

Acts Referred:
Constitution Of India, 1950 — Article 14, 16, 309

Citation : (2021) 08 CAL CK 0039

Hon'ble Judges : Hiranmay Bhattacharyya, J;Soumen Sen, J

Bench : Division Bench

Advocate : K. K. Maiti, Asit Kumar Manna, Niladri Saha, Partha Ghosh, Anirban Mitra

Final Decision : Disposed Of

Judgement

Two separate writ petitions have arisen out of a common order dated November 30, 2018 passed by the Central Administrative Tribunal in Original

Application No. 651 of 2015.

The applicants, who are fifteen (15) in numbers, have challenged the withdrawal of Modified Assured Career Progression Scheme introduced on May

19, 2009 as recovery proceedings were initiated by their employer, Central Excise Department, on a plea that the original applicants were not entitled

to the Modified Assured Career Progression benefits. The Central Administrative Tribunal was approached in the year 2015 and the original

application was disposed of on November 30, 2018.

All the original applicants as on date have retired from services. The basis of withdrawal of the Modified Assured Career Progression benefits was by

reason of Office Memorandum dated October 20, 2014 read with corrigendum dated October 22, 2014, which was issued by way of clarification to its earlier letter dated March 11, 1988. The said letter dated October 20, 2014 states that the placement of existing incumbents to the extent of

upgradations involved, in the upgraded post will also be treated as promotion/ upgradation and offset against entitlements under ACPS. This was in

precinct of the modified assured career progression scheme claimed to be introduced on May 19, 2009.

Two issues arose before the tribunal for consideration, firstly, the entitlement of the departmental letter dated October 20, 2014 read with corrigendum

dated October 22, 2014 and secondly, withdrawal of Modified Assured Career Progression benefits granted to the applicants. The tribunal, in deciding

the matter, has relied upon the aforesaid circulars including the contentions of the applicants with regard to their status in the establishment and the

letter dated August 6, 2004 issued by the Department of Revenue, Government of India. What emerged from the pleadings and documents before the

tribunal are (i) the original applicants joined the department of Central Excise as Lower Division Clerks between 1982-83. (ii) They were promoted to

upper division clerks on diverse dates in the year 1990. (iii) When one-third of upper division clerk posts were upgraded to that of tax assistants

pursuant to fourth CPC recommendation, the original applicants were placed/ promoted/upgraded to the post of Tax Assistants between 1993-94 on

diverse dates, to a higher scale of pay; at the material point of time, the hierarchy was lower division clerk - upper division clerk â?" Inspector â?

Deputy Office Superintendent (Level II); the tax assistant was an intermediate scale created between upper division clerk and inspector in the manner

as LDC-UDC-TA-Inspector-Dy. OS (Level II) and the tax assistants were also eligible for pormotion to Inspectors and accordingly it formed a

feeder grade to that of Inspector. (iv) Even after they were promoted to the post of Inspector, the original applicants were granted the Modified

Assured Career Progression benefits as Inspector in Pay Band 2 Grade Pay Rs.4,600/- and moved to Pay Band 2 Grade Pay Rs. 4,800/- with effect

from September 1, 2008. The chart showing upgradation from time to time and the financial upgradation extended under the Modified Assured Career

Progression scheme were given in the order impugned. The Modified Assured Career Progression order would show that the original applicants got

three promotions, namely, (i) as Upper Division Clerk on January 30, 1990 from Lower Division Clerk, (ii) as Tax Assistant on August 16, 1993 from

Upper Division Clerk and (iii) as Inspector on February 15, 1995 from Tax Assistant. However, they were extended the benefit of modified assured

career progression scheme in Pay Band 2 Grade Pay Rs. 4,800/-, which they would not have earned in normal course as only three modified assured

career progressions could be availed of by a government servant in the entire service career and each promotion earned would offset one such

modified assured career progression. Their advancement in career was taken thrice and as they were never stagnated in a scale for more than ten

years. The tribunal observed that the Modified Assured Career Progression was granted erroneously to them. The tribunal in paragraph 8 of its

judgment illustrated the said facts.

Paragraph 8 of the judgment of the tribunal reads as under :-

â??8. It would be worthwhile to quote MACP provisions, MACP scheme explicitly and unambiguously illustrates the following :

28. Illustrations :

(A(i) if a Government servant (LDC) in PB-I in the Grade Pay of Rs. 1,900 gets his first regular promotion (UDC) in the PB-I in the Grade Pay of

Rs. 2,400 on completion of 8 years of service and then continues in the same Grade Pay of further 10 years without any promotion, then he would be

eligible for 2nd financial upgradation under the MACPS in the PB-I in the Grade Pay of Rs. 2,800 after completion of 18 years (8+10 years).

(ii) In case he does not get any promotion thereafter, then he would get 3rd financial upgradation in the PB-II in Grade Pay of Rs. 4,200 on completion

of further 10 years of service, i.e., after 28 years (8+10+10).

(iii) However, if he gets 2nd promotion after 5 years of further service in the pay PB-II in the Grade Pay of Rs. 4,200 (Asstt. Grade/Grade â??Câ??)

i.e. on completion of 23 years (8+10+5 years), then he would get 3rd financial upgradation after completion of 30 years i.e. 10 years after the 2nd

ACP in the PB-II in the Grade Pay of Rs. 4,600.

In the above scenario, the pay shall be raised by 3% of the total pay in the Pay Band and Grade Pay drawn before such upgradation. There shall,

however, be no further fixation of pay at the time of regular promotion if it is in the same Grade Pay or in the higher Grade Pay. Only the difference

of grade pay would be admissible at the time of promotion.

(B) If a Government servant (LDC) in PB-I in the Grade Pay Rs. 1,900 is granted 1st financial upgradation under the MACPS on completion of 10

years of service in the PB-I in the Grade Pay of Rs. 2,000 and 5 years later he gets 1st regular promotion (UDC) in PB-I in the Grade Pay of Rs.

2,400, the 2nd financial upgradation under MACPS (in the next Grade Pay w.r.t. Grade Pay held by Government servant) will be granted on

completion of 20 years of service in PB-I in the Grade Pay of Rs. 2,800. On completion of 30 years of service, he will get 3rd ACP in the Grade Pay

of Rs. 4,200. However, if two promotions are earned before completion of 20 years, only 3rd financial upgradation would be admissible on completion

of 10 years of service in Grade Pay from the date 2nd promotion of at 30th year of service, whichever is earlier.â??

The learned advocate appearing on behalf of the applicants has submitted that the post of tax assistant is not a promotional post and in this regard he

has relied upon paragraph 12 of a decision, rendered on June 6, 2001, of the division bench of Andhra Pradesh High Court in the case of Central

Board of Excise & ors. vs. Madhava Rao & ors. Paragraph 12 of the said decision reads thus :-

â?It is now axiomatic that Rules framed in exercise of power under proviso to Article 309 of the Constitution of India cannot be supplanted by

administrative orders. The vacuum in the Rules can be filled up by an administrative order if the same is not ultra vires the statutory Rules. When the

statutory Rules provided for certain feeder categories, by an administrative order another feeder category cannot be created â??though for the

purpose of removing stagnation and minimising discontent among the UDCsâ?? it is always permissible for the appellants to create a non-cadre post

of Tax Assistants within the cadre of UDCs. The distinction between â??appointment to serviceâ? and â??appointment to a postâ? cannot be lost

sight of (see Dingra S. N. v. Union of India). All the Tax Assistants and UDCs are appointed to a service as UDCs, and all of them are entitled to

count their service from the date of such appointment to the service. The mere circumstance of getting posted as Tax Assistants, may be after

acquiring qualifications, cannot result in denying the entire service as UDC. Such denial of service as UDC for the purpose of reckoning seniority in

the category of Tax Assistants would, in our opinion, violate the principles of equality enshrined in Articles 14 and 16 of the Constitution of India. The

Tribunal, in our considered opinion, has come to a correct conclusion in rejecting the contention of the appellants herein.â??

There is no quarrel with the proposition that an administrative order cannot alter the statutory rules. The incumbent joins his service and his service

conditions are governed by statutory rules and it cannot be altered by issuance of an administrative order. The creation of a feeder post as Tax

Assistant is not in violation of certain rules but facilitates another avenue for progression to the post of Inspector so as to avoid any stagnation.

Accordingly, we are of the view that paragraph 12 of the cited judgment has no manner of application in the instant case.

However, the fact remains whether the posts of Upper Division Clerk and Inspector are all upgraded posts or promotional posts. The clarification was

made only on October 20, 2014 when in relation to the departmentâ??s letter dated March 11, 1988 a clarification was issued on October 20, 2014

with a corrigendum dated October 22, 2014. In between there is a circular dated August 6, 2004, which clearly states that the Tax Assistants retain

their basic seniority in the grade of Upper Division Clerk and the grade of Tax Assistant cannot be treated as promotion grade in the normal hierarchy

of Upper Division Clerk. Hence, under ACP Scheme Upper Division Clerk including the Tax Assistants are to be allowed financial upgradation in the

normal hierarchical grade, namely, DOSL-II, DOSL-I. Accordingly, Upper Division Clerk and Tax Assistant are eligible for financial upgradation

under ACP Scheme in the scale of DOSL-II and DOSL-I. Thus, the contention that tax assistant was not a promotional post is not tenable. Even the

letter dated October 20, 2014 shows that tax assistant was a promotional post.

However, the fact remains that only after the clarification was issued on October 20, 2014, the department proceeded on the basis that the original

applicants may continue to avail entitlements under the ACP in complete remise of the 2009 MACP circular. Financial benefits were extended to the

original applicants erroneously. There is nothing on record to show that the original applicants have manipulated any record or had played any role in

receiving such financial benefits. After receiving such financial benefits for almost five years, the department noticed the anomaly and the mistake

committed and, as such, tried to recover the amount from the original applicants. The innocence of the original applicants are not being disputed.

However, the fact remains whether they would be allowed to retain the said amount or the Government would be entitled to recover the amount paid

in excess. The Government stopped paying such excess amount soon after discovery order issued on February 26, 2015 and initiated a recovery

proceeding. The tribunal in its judgment relied upon a decision of the Supreme Court in the case of State of Punjab & ors. vs. Rafiq Masih (White

Washer) & ors. reported in (2015) 2 S.C.C. (L& S) 33 and taking note of DOPT office memorandum dated March 2, 2016 directed the authorities to

consider stoppage of further recovery and refund of recovered amount in terms of the said decision and office memorandum within a period of four

weeks.

We feel that the tribunal was justified in disposing of the original application with the aforesaid direction having dealing with the facts and materials

available before it. The discretion in favour of the original applicants having regard to the facts stated in the judgment of the tribunal, we do not find

any reason to interfere with the same. However, no recovery should be made till the parties concerned take a decision in this regard including refund

of the recovered amount. In addition to the aforesaid decision of Rafiq Masih (supra) and the office memorandum dated March 2, 2016 the

respondent authorities shall also take into consideration the division bench judgment in MAT 320 of 2018 (The Director of Pension, Provident Fund &

Group Insurance, Government of West Bengal vs. Basudev Jana & ors.) and the decision of this court in WPCT 18 of 2020 (Union of India vs.

Sunhas Hansda rendered on July 6, 2021.

The entire exercise shall be completed within a period of eight weeks from date.

The writ petitions are, thus, disposed of without, however, any order as to costs.

Photostat certified copy of this order, if applied for, will be made available to the applicant within a week from the date of putting in the requisites.