(2019) 05 DEL CK 0523

In the Delhi High Court

Case No : Letters Patent Appeal No. 578 Of 2018, Civil Miscellaneous Application No. 42370 Of 2018

Delhi Urban Shelter Improvement Board APPELLANT

Vs

Anil Kumar Nasa & Ors RESPONDENT

Date of Decision : 08-05-2019

Acts Referred:

Citation : (2019) 05 DEL CK 0523

Hon'ble Judges : G.S. Sistani, J;Jyoti Singh, J

Bench : Division Bench

Advocate : Parvinder Chauhan, M.K. Bhardwaj

Final Decision : Dismissed

Judgement

Jyoti Singh, J

1. The present appeal challenges the judgment dated 30.08.2018 passed by the learned Single Judge whereby the writ petition filed by the respondents herein for grant of third financial upgradation under the MACP Scheme in the Pay Band of Rs. 15600-39100 with grade pay of Rs. 7600/- on completion of thirty years of service has been allowed.

2. Some brief facts relevant to decide the present appeal are that the respondents herein had joined as JEs (Civil) and JEs (Electrical) with the appellant/DUSIB. For a number of years, despite being eligible, they were not promoted for want of vacancies and were stagnating.

3. In order to deal with the issue of stagnation, on the recommendation of the 5th CPC, the Government of India issued an OM dated 09.08.1999. This OM envisaged granting two financial upgradations, to a stagnating employee upon completion of 12 and 24 years of regular service respectively and the scheme was called the Assured Career Progression Scheme (hereinafter referred to as the "ACP scheme").

4. DUSIB, which is the appellant herein, admittedly adopted the said scheme and the respondents were granted first financial upgradation under the ACP scheme on completing 12 years of service. The respondents were placed in a Pay Scale of 6500-10500 from 09.08.1999. As pleaded by the respondents, some of them were granted a look after charge on the Post of AE and the pay was fixed under FR 22. On completion of 24 years of regular service, the respondents became eligible for second financial upgradation in the pay scale of Rs. 10000-15200. On being found fit, the second financial upgradation was granted to the respondents vide order dated 31.03.2009.

5. In the meantime, the 6th CPC recommended grant of three financial upgradations at intervals of 10, 20 and 30 years of regular service by modifying the ACP scheme. The recommendations were accepted and the Government of India i.e. the DoP&T issued an OM dated 19.05.2009 formulating a scheme known as the Modified Assured Career Progression Scheme (hereinafter referred to as the "MACP scheme"). The modalities of the scheme were mentioned in Annexure I to the said OM.

6. Clause 28 of the said Annexure contains certain illustrations which are with the purpose of facilitating a better understanding and interpretation of the MACP scheme. Since one of the illustrations is relevant in the present case, we quote the illustrations hereinunder:

"28. Illustrations

A (i) If a Government servant (LDC) in PB-I in the Grade Pay of Rs. 1900 gets his first regular promotion (UDC) in the PB-I in the Grade Pay of Rs. 2400 on completion of 8 years of service and then continues in the same Grade Pay for further 10 years without any promotion then he would be eligible for 2nd financial upgradation under the MACPS in the PB-1 in the Grade Pay of Rs. 2800 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. 4200 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. 4200 (Asstt. Grade/Grade "C")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.4600.

In the above scenario, the pay shall be raised by 396 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 promotions.

B. If a Government servant (LDC) in PB-I in the Grade Pay of Rs.1900 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. 2000 and 5 years later he gets 1st regular promotion (UDC) in PB-I in the Grade Pay of Rs.2400, 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.2800. On completion of 30 years of service, he will get 3rd ACP in the Grade Pay of Rs.4200. 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 or at 30th year of service, whichever is earlier.

C. If a Government servant has been granted either two regular promotions or 2nd financial upgradation under the ACP Scheme of August, 1999 after completion of 24 years of regular service then only 3rd financial upgradation would be admissible to him under the MACPS on completion of 30 years of service provided that he has not earned third promotion in the hierarchy."

7. It is not disputed between the parties that the MACP Scheme was duly adopted and implemented by DUSIB i.e. the appellant herein.

8. The first round of litigation between the parties started when an Office Order dated 22.03.2012 was issued by the appellant, whereby they sought to withdraw the second financial upgradation granted to the respondents under the ACP scheme. This was in the teeth of para 11 of the OM dated 19.05.2009 which specifically prohibited reopening of the past cases. It is this withdrawal which prompted the respondents to file a writ petition before the Single Judge of this Court bearing W.P.(C) No. 2118/2012. Vide judgment dated 11.02.2015, the Writ petition was allowed. The orders of withdrawal of the ACP benefits were quashed and DUSIB was directed to continue paying the ACP benefits. An LPA filed against the said order was withdrawn by the appellant with liberty to approach the learned Single Judge by way of a Review Petition. The Review Petition was however, dismissed and the record indicates that a Civil Appeal bearing no. 1486-87/2017, DUSIB vs. Shashi Malik and Ors. is presently pending in the Hon"ble Apex Court.

9. In the interregnum the respondents completed 30 years of regular service and since now the MACP scheme was in operation, they became eligible for a third financial upgradation under the said scheme. The appellants, however, did not grant the said benefits to the respodnents herein and when the representations made by them did not elicit any favourable response, they approached the Court by filing a writ petition bearing WP(C) No. 7460/2016.

10. After a detailed hearing, the learned Single Judge allowed the writ petition. The main controversy raised in the petition was the entitlement of the respondents to third financial upgradation on completion of 30 years of regular service. The learned Single Judge held that the petitioners therein would be entitled to third financial upgradation under the MACP scheme on completion of 30 years of service, without having to wait for 10 years in the grade pay drawn

by them consequent to the second financial upgradation. The grant of the upgradation was, however, made subject to the petitioners therein being found "suitable" in terms of the other provisions of the MACP scheme.

11. Learned counsel for the appellant principally contends that in view of clause 1 of Annexure I to the MACP scheme, the respondents would be entitled to third MACP only after they have spent 10 years continuous service in the grade pay presently being drawn by them pursuant to second financial upgradation under the MACP scheme. Since the respondents came into the present grade pay only on 31.03.2009, they cannot be given the third MACP as they have yet to complete 10 years in the said grade pay. Simply put, the argument is that while the respondents have completed 30 years of regular service but the 10 years service in the present grade pay is yet to be completed and the conditions of completing 30 years and 10 years in the last grade pay cannot be read in the alternative. Per contra, learned counsel for the respondent submits that the interpretation being put by the appellants to clause I of Annexure I to the MACP scheme is erroneous. The third financial upgradation under the MACP scheme becomes entitled to an employee on completion of 30 years of service or 10 years in the present grade pay, whichever is earlier. It is submitted that if an employee has completed 30 years of regular service, it is enough to grant him the third MACP benefit even though he may not have completed 10 years in the present grade pay.

12. We have carefully examined the rival submissions of the parties and perused the MACP scheme as well as the record. While the argument of the learned counsel for the appellant may appear convincing at the first blush, but a close analysis of the MACP scheme shows that the interpretation being placed by the appellant is incorrect. No doubt, clause I of Annexure I to the MACP Scheme mentions that financial upgradation will be granted whenever a person has spent 10 years continuously in the same grade pay but the interpretation being given by the appellants is negatived by illustration (c) in clause 28 of the Scheme, which we have extracted above. We also extract herein clause I as it is the interpretation of this clause which is involved in the present case. The said clause is as under:

"1. There shall be three financial upgradations under the MACPS, counted from the direct entry grade on completion of 10, 20 and 30 years service respectively. Financial upgradation under the Scheme will be admissible whenever a person has spent 10 years continuously in the same grade pay."

13. On a bare reading of this illustration, we find that this illustration alludes to a Government servant who has been granted second financial upgradation on completion of 24 years of regular service under the ACP and he would be then entitled to third financial upgradation on completion of 30 years of service, provided he has not earned a third promotion in the hierarchy. This clearly fortifies the stand of the respondent that clause I of the MACP cannot be construed so as to postpone the third financial upgradation even after the

employee has completed 30 years to a further period when he completes the 10 years in the grade pay held by him.

14. In fact, when we read clause I along with the other provisions of the MACP including the aim and objective of the scheme, which is to help a stagnating employee, we find that the conditions which stipulate 10, 20 and 30 years of regular service for grant of financial upgradations and the one requiring 10 years in the grade pay actually operate independently and in the alternative. Whenever any of the two alternative conditions are satisfied, the benefit under the Scheme should be available. Interpreting thus, the financial upgradation under the MACP scheme would be available in two different set of circumstances viz. either on completion of 10, 20 and 30 years of continuous regular service respectively and secondly, whenever an employee would complete 10 years of continuous service in the same grade pay. This would mean that if an employee has not rendered 10 years" service in the grade pay held by him but has completed 30 years of regular service, he would be entitled to third MACP benefit. Likewise, the converse would also be true, i.e. an employee will be entitled to third financial upgradation on completion of 10 years of service in the present grade pay, from the date of second promotion or second financial upgradation under the ACP or the MACP, even though he may not have 30 years of regular service to his credit.

15. In fact, we are fortified in our view by a clarification issued by the DoP&T on 01.04.2011 and which we extract below:

"The MACPS is effective w.e.f. 01.09.2008 or on completion of 10, 20 & 30 years of continuous regular service, whichever is later. Financial upgradation will also be admissible whenever a person has spent 10 years continuously in the same grade pay."

16. We also find that the DoP&T, while interpreting the MACP scheme had rendered an opinion and we quote para 4 of the said opinion hereinunder:

"3. The basic concept of MACP Scheme is to provide 1st, 2nd and 3rd financial upgradations to an employee in consideration of completion of 10/20/30 years of regular service in the same scale/Grade Pay respectively. Regular service for grant of benefits commence from the direct entry grade. Regular service for grant of benefits commence from the direct entry grade. The Scheme also provides for grant of financial upgradation whenever a person has spent 10 years continuously in the same grade pay.

4. Even though the illustrations No. (i), (ii) and (iii) of para 28 of the Scheme suggest that while 2nd MACP could be given after overall 18 years and the 3rd one after overall 28 years, the fact remains that in both the cases the crucial 2nd and 3rd MACPS is being given only after the mandatory 10 years residency for the 2nd and 3rd MACP respectively. Thus, the 3rd MACP is intended to be given based on either 10 years from the 2nd MACP/Promotion or 30 years of the overall service. Either of these two conditions needs to be fulfilled. In this case, neither of these is fulfilled. The 2nd MACP is rightly given on 1.9.2008-the date

of effect of the MACPS itself. Now either 10 years from 01.09.2008 or overall 30 years service will need to be fulfilled for grant of the 3rd MACP. Hence, the proposal of the referring Department is not found to be covered within the parameters of the MACP Scheme."

17. Para 3 of the opinion as extracted above shows that the Scheme is intended to give three financial upgradations on completion of 10, 20 and 30 years of service, counted from the direct entry grade. In this part of the scheme, there is no mandate that the 10, 20 or the 30 years must be in the same scale or grade pay. The second part of para 3 clearly stipulates that upgradation will be given when a person has spent 10 years continuously in the same grade pay. But what has to be noticed in the said part of the para is that the word used is "also". The word "also" connotes that this eligibility condition is in the alternative to the first eligibility criteria. If the intention of the scheme was to entitle an employee to the third MACP on completion of 30 years of service and also having 10 years in the same grade pay, in our opinion, the clarification would not have used the word "also" and the clause I of Annexure I, referred to above, would have clearly used the word "and" between the two eligibility conditions.

18. If the interpretation given by the appellants is accepted, it would perhaps lead to great absurdity and anomaly. If it is held that the third MACP can only be granted if an employee has 10 years of service in the same grade pay, this would have the effect in our view of treating unequals as equals and adversely effecting those who have rendered longer period of service before the grant of second upgradation as in such a case the period of regular service rendered by an employee who joined earlier, beyond this 10 years period will be nullified. Thus, if two employees have been appointed initially with a gap of 4-5 years then both would perhaps get entitled to the third MACP in the same year as they may have completed 10 years in the same grade pay but in such a case the additional service rendered by the employee appointed earlier would be washed away. The other effect of the interpretation given by the appellant would be that while an earlier appointed employee would have completed 30 years of regular service but lacked the 10 years in the same grade pay, he would have to wait for a few more years to complete the 10 years period to receive the third MACP. Thus, the only interpretation that can be given and should be given to clause I of Annexure I to the MACP Scheme is that the condition of completing 30 years and the condition of having completed 10 years in the same grade pay have to be read as mutually exclusive and in the alternative. One cannot be read into the other. In fact, during the course of arguments, learned counsel for the respondent has drawn the attention of this court to a memorandum dated 27/28.09.2016 issued by the DoP&T. The said memorandum has been issued pursuant to the recommendations of the 7th CPC. The DoP&T has, in fact, gone by the same interpretation as we have given above to clause I of Annexure I to the MACP Scheme and has in fact, modified clause I to read as under:

"There shall be three financial upgradations under the MACPS as per 7th CPC recommendations, counted from the direct entry grade on completion of 10, 20 and 30 years services respectively or 10 years of continuous service in the same level in Pay Matrix, whichever is earlier."

19. We are not at the moment, concerning ourselves with the date from which the said modification and the said OM would take effect, since we have ourselves given this interpretation to clause I as it stood prior to the modification. The purpose of referring to the said OM is only with a view that the DoP&T itself understands and interprets clause I in the manner as we have interpreted, but unfortunately, the clarification has been issued several years after the scheme was notified. In view of the interpretation given above by us, the respondent would be entitled to the third financial upgradation under the MACP scheme on completion of 30 years of regular service from the entry grade and this would not depend on whether or not they have completed 10 years in the grade pay presently held by them.

20. The learned Single Judge has rightly allowed the writ petition and there is no infirmity in the same. However, we do agree with the learned counsel for the appellant that the benefits would only be granted once the respondents satisfy the other provisions of the MACP with regard to suitability and fitness.

21. We thus direct the appellants to consider the case of the respondents for grant of third financial upgradation under the MACP from the date when they have completed 30 years of regular service, respectively, as per the provisions of the MACP scheme, within a period of four weeks from today and in case the respondents are found "suitable", the benefits would be disbursed within a period of two weeks thereafter.

22. There is thus no merit in the appeal and the same is accordingly dismissed along with all pending applications.