

(2021) 06 AFT CK 0006
In the Armed Forces Tribunal
Case No : O.A. No. 1466 Of 2016

Ex Hav Saudan Singh

APPELLANT

Vs

Union of India & Ors

RESPONDENT

Date of Decision : 03-06-2021

Acts Referred:

Armed Forces Tribunal Act, 2007 — Section 14

Citation : (2021) 06 AFT CK 0006

Hon'ble Judges : Sunita Gupta, Member (J); B.B.P. Sinha, Member (A)

Bench : Division Bench

Advocate : Rajesh Nandal, Prabodh Kumar

Final Decision : Allowed

Judgement

1. The present application has been filed under Section 14 of the Armed Forces Tribunal Act, 2007 seeking, inter alia, the relief of setting aside the impugned order dated 06.08.2016 with prayer for a specific relief i.e. to direct the respondents to grant the benefit of first, second and third MACPS on completion of 8, 16 and 24 years of service respectively.
2. In brief, the facts of the case are that the Applicant was enrolled in the Army Education Corps as a direct entry Havildar on 20.04.1990 and was discharged from service on 31.08.2009 under Rule 13 (3) III (iv) of the Army Act, 1950, i.e. before fulfilling the conditions of enrolment/service on his own request on extreme compassionate grounds. The total service rendered by the Applicant was about 19 years and four months of service.
3. Learned counsel for the Applicant submitted that the Government had introduced Assured Career Progression (ACP) Scheme on recommendation of V Central Pay Commission (CPC) in 2003. However ACP was not applicable to direct entry Havildars. The said Scheme was improved upon and

revised as Modified Assured Career Progression Scheme (MACPS) in VI CPC with three financial up-gradations i.e. after 8 years, after 16 years

and after 24 years of service which was also made applicable to direct entry Havildars/JCOs. The Scheme though announced in May 2011, was

retrospectively effective from 01.09.2008. The crux of grievance of the Applicant is that the Applicant has been denied the benefits of the said

scheme on the erroneous ground that he had expressed unwillingness on 16.10.2007 to undergo the criteria course 'Certificate in Educational

Technology Course Serial No. 27â??. It is further submitted by learned counsel for the Applicant that despite executing the undertaking, the right of

the Applicant to receive benefits conferred by MACPS did not extinguish for the reason that the Applicant did not get any opportunity of promotion till

his discharge.

4. Â Learned counsel for the Applicant further submitted that MACP Scheme had not been introduced when the Applicant had given his

unwillingness undertaking forgoing the promotion criteria course as the new scheme was implemented by a policy letter dated 30.05.2011 though

w.e.f. 01.09.2008. In essence, submission of learned counsel for the Applicant is that an undertaking given prior to implementation of MACP Scheme

would not create a hurdle in granting benefits of the Scheme which may accrue to him. It is also submitted that the Applicant approached the

respondents for benefits of the MACP Scheme on 06.08.2016 but the same was rejected by the respondents citing non-applicability of the scheme to

him.

5. Â Per Contra, the contentions advanced by learned counsel for the respondents is that, subsequent to issue of MACP, detailed administrative

instructions for grant of MACP were issued by the Army Headquarters in June 2011 vide letter dated 13.06.2011. Para 21 of the Instructions clarified

that if an individual refuses promotion, MACP will also be denied. Para 15 of the Appendix to the Instructions clarified that unwillingness to attend

promotion cadre amounts to unwillingness or refusal for promotion. It is also contended that the Applicant had been detailed to undergo promotion

criteria course â??Certificate in Education Technology Course Serial No : 27â? in the year 2007, however he opted to sign the unwillingness

certificate and refused to undergo the course. It is also contended that had the

applicant qualified the mandatory course and remained in service, he would have been eligible for promotion to next higher rank and all the benefits accruing under MACP Scheme would have also been extended to him.

The Ld counsel concluded by pleading for the OA to be dismissed.

6. ^ After hearing both the counsels and going through the records, the short question which we need to answer is as to whether the applicant is eligible for the benefit of MACP scheme as claimed ?

7. ^ We have noted that the applicant has not claimed any benefit from earlier ACP Scheme introduced in the year 2003 as being a direct entry

Havildar he was not eligible for the scheme. The MACP was brought into force in VI CPC with effect from 01.09.2008 and direct entry Havildars

were eligible for the same. The Applicant was discharged from service with effect from 31.08.2009 after completing about 19 years and 04 months of

service. In the circumstances, there appears to be substance in the submission that the applicant be made eligible for MACPs as per new MACP

scheme, effective from 01.09.2008.

8. ^ We have noted that the contentions of the respondents in denying MACP are two-folds; firstly, that the Applicant had been discharged before

completion of terms of engagement on his own request; and, secondly that he was ineligible for promotion due to his submission of an unwillingness

certificate to undergo a criteria course. The respondents specifically drew the attention of the Tribunal to Para 15 of Appendix ^?A^? to Army

Headquarters Administrative Instructions which postulates that unwillingness to attend promotion cadre course also amounts to unwillingness/refusal

for promotion.

9. ^ It is worthy of notice here that at the time of submission of certificate containing his unwillingness, there was no MACP Scheme which was

applicable to the applicant. The earlier ACP scheme which was introduced in August 2003, was not applicable to direct entry Havildars like the

Applicant and the eligibility to MACP in VI CPC ab-initio originated from a policy letter which was first issued in May 2011.

10. ^ The issue of grant of MACP to direct entry Havildars of Army Education Corps is no more RES INTEGRA. The AFT, Regional Bench at

Kochi examined a similar case where the issue was about eligibility to MACP after rendering unwillingness certificate for a criteria course by a direct

entry Havildar of Education Corps. In the case of Ex Hav Zubair P Vs. Union of India and others [O.A. No. 170 of 2016] decided on 22.05.2013

the AFT, Regional Bench, Kochi observed as under:

As observed, the applicant had given unwillingness certificate on 20th Jun 2003, in accordance with the provisions of AEC Record Office Instructions

specifying mandatory criteria courses for promotion and impact of unwillingness to undergo such courses. The ROI specified that an individual who is

unwilling to attend criteria course/promotion cadre, relinquishes his claim for next higher rank as he has not qualified the necessary promotion course. At the

stage of signing such a certificate, there was no MACP Scheme which was introduced only in May 2011 to be effective from 01 Sept 2008. Even the earlier ACP

was Scheme introduced in August 2003, which, as such was not applicable to direct entry Havildars like the applicant. The ACP Scheme of 2003 as well as the

MACP Scheme of 2011 merely envisaged grant of financial benefits to Personnel Below Officer Rank (PBOR) of the three services through placement in a

higher pay scale and was not to be considered as functional or regular promotion.

It is also observed that the unwillingness certificate rendered in accordance with ROI is not really irrevocable as there were provisions to apply for withdrawal

of unwillingness certificate and for subsequent detailment of the course provided the individual made such an application to obtain the sanction of Additional

DG AE. The Additional DG AE could then consider the submission made by the individual and grant necessary waiver. The aspect of whether a person who had

refused to undergo promotion course or had given permanent unwillingness for promotion was eligible for MACP is no more res integra as this Bench had

examined the issue in O.A. No. 73/14 and connected cases and more recently in O.A. Nos.26 and 40 of 2015 and O.A. No. 25/2016 and connected cases. In our

view, the question to be considered is whether the applicants had any opportunity for promotion based on vacancies available from the date of coming into

effect of MACP till their retirement. If the applicants had no opportunity for promotion for want of vacancy in the next higher rank, then their claim for MACP

could not be denied only on the basis of the undertaking executed by them. While the respondents have also contended that unwillingness to undergo

mandatory/criteria course for promotion amounts to unwillingness/refusal for promotion, it is observed that there is no such provision in the Government

letters

at Annexures A2 and A4 or in the Administrative Instructions issued by Army Headquarters (Annexure RI). The provisions of Para 15 quoted by the respondents is only in Appendix A' to the Administrative Instructions which is essentially a compilation of frequently asked questions on MACPS. While the answer to question No. 15 states that unwillingness to attend promotion cadre amounts to unwillingness/refusal for promotion, since there are no enabling provisions in the Policy letters governing the issue, a mere question/ answer in the Appendix cannot be claimed as a provision to deny the benefit of MACPS. Therefore, we do not see any merit in such a contention and the benefit of MACP Scheme could not be denied to the applicant merely on the basis of an unwillingness certificate given by him prior to the introduction of the Scheme, if he had no opportunity for promotion for want of vacancy in the next higher rank.

11. When the MACP Scheme was introduced to be effective from 01 September 2008, the applicant, who had been enrolled on 20 Apr 1990, had a little over 18 years of service. Therefore, in accordance with the provisions, he was eligible by requisite service for second MACP with effect from 01 September 2008 as he had more than 16 years of service as on that date provided he did not have any chance for promotion prior to that date. The respondents have submitted that the immediate senior as well as the immediate junior of the applicant were promoted with effect from 01 Feb 2011 i.e. more than 2 years after the date of introduction of MACP Scheme. Therefore, in our view, the applicant did not have any opportunity for promotion to next higher rank for want of vacancy prior to 01 Sep 2008 even if he had qualified in the criteria course. Hence, he was eligible for the benefit of second MACP with effect from 01 Sep 2008 provided he was found fit after due screening in accordance with law.

11. Coming to the present case, we find that the applicant's case and the above mentioned case are similar. In the present case also the applicant was not eligible for ACP scheme in force after Vth CPC introduced in 2003. The applicant has also proceeded on premature retirement on 31.08.2009 i.e. well before the first introduction of MACP (post VI CPC) in May 2011. Though the respondents have stated that the applicant has been denied MACP on the grounds that he has signed an unwillingness certificate to undergo a criteria course in 2007 and thus refused promotion however we have noted that the respondents in their reply have clearly stated that had the

applicant passed the criteria course, and continued in service he would have become eligible for promotion. In other words respondents are admitting that the applicant was not eligible for promotion till the year 2009 when he proceeded on premature retirement, even if he had successfully completed the criteria course. If the Applicant had no opportunity for promotion for want of vacancy in the next higher rank, then his claim for MACP could not be denied only on the basis of the undertaking containing his unwillingness to undergo a criteria course. The contention that unwillingness to undergo mandatory/criteria course for promotion amounts to unwillingness/refusal for promotion, does not impress in as much as there is no such provision in the Administrative instructions issued by Army Headquarters. The provisions of Para 15 quoted by the respondents is only in Appendix A to the Administrative Instructions, as observed in the case of Ex Hav Zubair P (supra), is essentially a compilation of frequently asked questions on MACPS. While the answer to Question No. 15 states that unwillingness to attend promotion cadre amounts to unwillingness/refusal for promotion, since there is no enabling provision in the Policy letters governing the issue, a mere question/answer in the Appendix cannot be claimed as a provision to deny the benefit of MACPS. Additionally we have also noted that submission of unwillingness certificate and refusal for promotion is not final and absolute. There are policy provisions under which such unwillingness certificates can be withdrawn with some checks and balances. Thus there appears to be no substance in the contention that benefits of MACP Scheme were not extended to the applicant on account of an unwillingness certificate submitted by applicant in 2007 even before the introduction of the MACP Scheme in 2011.

12. We have also noted here that when MACP Scheme was introduced in May 2011, to be effective from 01.09.2008, the applicant who had been enrolled in the Army on 20.04.1990 had already completed about 19 years and 4 months of service. Therefore, in accordance with the provisions of MACP, he was eligible by requisite service for second MACP with effect from 01.09.2008 as he had over 16 years of service as on that date and now it is also clear that he did not have any chance for promotion, prior to that date even if he had undergone the promotion criteria course.

13. The next contention advanced by respondents is that the applicant had been

discharged at his own request and that in the circumstances, it might be possible that he had no further motive to serve the organisation. However we are of the opinion that had the applicant continued in service, he would have been entitled to apply for revocation of his adverse career certificate in as much as, such application has to be submitted in prescribed format on similar lines as those who were already in service at that time. As stated supra, in our considered view, there was no enabling provision in the MACP which could disentitle the applicant merely because he was no more in service. Thus we are of the view that if the applicant had no opportunity for promotion for want of a vacancy in the next higher rank till his discharge, then the benefit of MACP could not be denied to him merely on the basis of his unwillingness certificate.

14. As a result of foregoing discussion, the OA is allowed and the respondents are directed to give due consideration to the claim of the applicant for the benefit of second MACP with effect from 01.09.2008 by ignoring the unwillingness certificate given by him for promotion provided he is found fit after due screening in accordance with law. The appropriate decision shall be intimated to the applicant within a period of four months from the date of receipt of a certified copy of this order. However, the arrears of revised pay/pension based on MACP so granted, shall be restricted to a period of three years prior to filing of the OA

15. There is no order as to costs.

Pronounced in open Court on this 3rd day of June, 2021.