
(2017) 06 CAL CK 0021
In the Calcutta High Court
Case No : 98 of 2015

Mitali Ghosh & Ors.

APPELLANT

Vs

Union of India & Ors.

RESPONDENT

Date of Decision : 14-06-2017

Acts Referred:

Citation : (2017) 06 CAL CK 0021

Hon'ble Judges : Nishita Mhatre, Tapabrata Chakraborty

Bench : DIVISION BENCH

Advocate : Ashok Chakraborty, S. K. Dutta, Chiradip Sinha, Barun Chatterjee, Arpa Chakraborty, Partha Sarathi Bose, Swapan Banerjee, Arunava Ganguly, Kunal Ganguly, Subrata Dasgupta, Aparna Banerjee

Judgement

1. The primary bone of contention among the warring litigants is whether the benefits of Modified Assured Career Progression Scheme (hereinafter referred to as MACPS) can be extended beyond the hierarchy of the posts of the cadre and can be of a quantum more than the grade pay of the promotional post.

2. Initially one Mitali Ghosh (Sarkar) approached the learned Tribunal by an original application being O.A. 350/00589/2014 challenging the railway board's circulars dated 13th December, 2012, 30th July, 2013 and 16th September, 2013 by which it was sought to be clarified that the financial upgradation under Assured Career Progression Scheme (hereinafter referred to as ACPS) and MACPS cannot be a higher grade than what can be allowed to an employee on his normal promotion and a decision was adopted to deduct the alleged excess amount already paid to the applicant. The contention of the applicant in the said original application was that she was initially appointed as a Staff Nurse and that thereafter promoted to the post of Nursing Sister. Subsequent thereto, she was promoted to the post of Chief Matron in the grade pay of Rs. 5,400/-. After completion of 10 years of continuous service in the promotional post she was granted the third financial upgradation under MACPS in the grade pay of Rs. 6,600/- with effect from 1st September, 2008. After about five years thereafter

the fixation of pay was modified/rectified and the applicant was placed in the grade pay of Rs. 5,400/- and thereafter the respondents proceeded to recover the excess payment made. In support of the decision towards modification of grade pay, the respondents placed reliance upon a clarificatory memorandum issued on 13th December, 2012 (RBE No.142 of 2012) in which it was, inter alia, clarified that the grade pay would be admissible under MACPS to an employee holding feeder post in a cadre where promotional post is in the same grade pay. It was the contention of the respondents that employees earn promotion as per their cadre hierarchy and even in the event the promotional post is in the same cadre it cannot be construed that the employees have been stagnated. By an order dated 20th April, 2015 the learned Tribunal dismissed the claim of the applicant therein by observing that the post of Assistant Nursing Superintendent/ Officer is a promotional post for an incumbent holding the post of Chief Matron and that a Chief Matron not getting promotion to the post of Assistant Nursing Superintendent cannot on the basis of the MACPS be placed in a grade pay higher than that which is enjoyed by an incumbent in the promotional post of Assistant Nursing Superintendent. The learned Tribunal also observed that the applicant had not challenged the 6th Pay Commission Report and that the recommendation of the Commission is not mandatorily binding upon the Government and its department. The said order dated 20th April, 2015 passed in O.A. 350/00589/2014 has been challenged in the writ petition being WPCT 98 of 2015 and during pendency of the same, employees similarly situated with Mitali Ghosh (Sarkar) also approached the learned Tribunal by filing O.A. No.350/00804/2014 (Martha Xalxo & Others -vs- Union of India & Others), O.A. No.350/00675/2014 (Bhut Nath Verma & Others -vs- Union of India & Others) and O.A. No.350/00678/2014 (Kamalesh Kumar Pandey & Others -vs- Union of India & Others) and 25 others. In the original application being O.A. No.350/00804/2014 the claim of the applicants therein pertaining to grant of grade pay of Rs. 6,600/- was rejected by an order dated 13th May, 2016. In original applications being O.A. No.350/00675/2014 and O.A. No.350/00678/2014 the applicants while working as Loco Pilots were granted financial upgradation under MACPS in the grade pay of Rs. 4600/- which was sought to be withdrawn by an order dated 9th April, 2014. The said original applications were dismissed by orders dated 7th December, 2016 and 23rd December, 2016 respectively observing, inter alia, that the benefits of MACPS cannot be extended beyond the hierarchy of the posts in the cadre and cannot be more than the grade pay of promoted post. It further needs to be mentioned that all the applicants in the said original applications also prayed for a restrain order upon the respondents not to recover the payments already disbursed in favour of the applicants.

3. Records would reveal that placing reliance upon the order passed in the case of Mitali Ghosh & Others Vs. Union of India & Others in O.A. No.350/00589/2014, the other original applications filed subsequent thereto were dismissed and it was, inter alia, observed that "this contention advanced by the applicant in the

present OA was also the contentions before this Bench in the earlier O.A. No.598 of 2014 but this Bench of the Tribunal had rejected this issue in O.A. No.598 of 2014. So, issue is settled that movement from Chief Matron to ANO is promotion". While dismissing the original applications being O.A. No.350/00675/2014 and O.A. No.350/00678/2014, the learned Tribunal observed, inter alia, that "we have also taken this view in OA no.1020 of 2015 where with reference to OA No.598 of 2014 we have held that as the order in OA No.598 of 2014 has not been challenged, we cannot take any view other than the view taken earlier on 20.0.2015 by the same Bench".

4. In the said factual backdrop it needs to be decided as to whether the respondents who have been granted the benefits of MACPS to the petitioners by placement in a higher grade pay can be brought down to a lower grade pay on the basis of a reasoning that the financial upgradation under ACPS/MACPS cannot be to higher grade pay than what is allowed to an employee on his normal promotion. In the event the said issue is answered in the affirmative, there would be no necessity to decide the issue of recovery.

5. Mr. Chakraborty, learned advocate appearing for the petitioners submits that under the 5th Pay Commission, ACPS was in operation and the same was converted into MACPS because there were certain shortcomings in the ACPS which was required to be streamlined. Accordingly, the 6th Pay Commission in its recommendation at Para 6.1.15 had proposed certain alteration of the ACPS because uneven benefit to employees was granted under the same. To eradicate such infirmities the MACPS was introduced. The MACPS was introduced by Railway Board in terms of RBE No.101 of 2009 dated 10th June, 2009 wherein Para 1 provides for financial upgradation at intervals of 10, 15 and 30 years of regular service and Para 2 provides that MACPS envisages merely placement in the immediate next higher grade pay in the hierarchy of recommended revised pay bands and grade pay as given in Section 1, Part A of the first schedule of Railway Services (Revised Pay) Rules, 2008 being RBE No.103/2008 dated 4th November, 2008. A perusal of the grade pay structure as highlighted in RBE 103/2008 (first schedule, part A, Section 1) would reveal that the immediate next higher grade pay of Rs. 5,400/- is Rs. 6,600/- (in case of petitioners of WPCT 258/2016 and 98/2015) and the immediate next higher grade pay of Rs. 4200/- is Rs. 4600/- (in case of petitioners of WPCT 8/2017 and 12/2017) and as such MACPS was rightly granted to the petitioners in the grade pay of Rs. 5400/- and Rs. 4600/ respectively. MACPS has been introduced in order to mitigate stagnation and it has no relation and bearing with promotion.

6. He further argues that by way of an administrative order dated 8th May, 2014, the provisions of MACPS, as circulated by railway board in terms of RBE 101/2009, cannot be supplanted. RBE 142/2012 issued by Railway Board and relied upon by the respondent authorities has not been given a retrospective effect and nowhere in the said circular it has been directed to reopen the past issues where financial upgradation under the MACPS has been granted much

prior to issuance of RBE 142/2012. There is also no direction in RBE 142/2012 to refix the pay and to make recovery. In support of his arguments, Mr. Chakraborty has placed reliance upon a judgment delivered by the Hon''ble Delhi High Court in the case of Govt. of NCT of Delhi and Anr. - vs- S. K. Saraswat and Ors.

7. Mr. Partha Sarathi Bose, learned advocate appearing for the respondents submits that the object of the ACPS/MACPS is to provide incentive by granting financial upgradation to the employees who have been stagnated in a post for a particular period. However, the grant of benefits under the said schemes cannot be interpreted to favour a contention that the employees becoming entitled to the financial upgradation under the said schemes can be given grade pays higher than the grade pay of the promotional post. Indisputably, on the basis of the recommendations of the 6th Pay Commission there has been merger of the posts of Matron and Chief Matron. With such merger the distinction between the said posts vanished and they became one and the same. However, the categories of Chief Matron and Assistant Nursing Officer have not been merged and as per the recruitment rules the promotion from the feeder post of Chief Matron would be to the post of Assistant Nursing Officer. Evidently, the nursing cadre to which the petitioners belonged is covered under Para 8 of RBE 101/2009. Chief Matrons are promoted to the post of Assistant Nursing Officer through the process of selection (written test and viva voce) and the status of the said posts and the duties and responsibilities pertaining to the said post are also different.

8. He further argues that RBE 142/2012 dated 13th December, 2012 is a clarificatory memorandum and the clarification incorporated therein relates back to the date of issuance of memorandum clarified and as such the issue of retrospectivity, as argued on behalf of the petitioners, is not acceptable.

9. He further argues that in terms of para 8 of the memorandum dated 10th June, 2009 promotions earned in the post carrying same grade pay in the promotional hierarchy as per the recruitment rules shall be counted for the purpose of MACPS and as such the employees earning promotions as per their cadre hierarchy, though the promotional post is in the same grade pay, is not a case of stagnation but a case of promotion in the same grade pay, more so when the petitioners'' category is not of merger of grades/posts of Chief Matron and Assistant Nursing Superintendent but of feeder and promotional post lying in the same grade pay as per their promotional hierarchy. In support of his arguments, Mr. Bose has placed reliance upon a judgment delivered by the Hon''ble Supreme Court in the case of Secretary, Government (NCT of Delhi) and Others -vs- Grade-I Dass Officers'' Association and Others, reported in (2014) 13 SCC 296.

10. Heard the learned advocates appearing for the respective parties and considered the materials on record. Under the ACPS the financial upgradations were to be provided on completion of 12 and 24 years of service in the next higher grade in the existing hierarchy and that there would be no change in designation or functions accompanied with such upgradation. The provisions of the said scheme gave rise to certain problems mainly because the financial

upgradations were required to follow the existing hierarchy which tantamounts to grant of uneven benefits to employees existing in the same pay scale in different organisations with a different hierarchical pattern and in few cases it also led to a situation where the benefit of higher scale of pay was not available because the next post in the hierarchy also existed in an identical pay scale. As such, it was thought fit to bring systematic changes so that all employees, irrespective of the existing hierarchical structure in their organisation/cadre, get the same benefit under it and accordingly the 6th Pay Commission recommended that the existing scheme of ACPS may, in future be continued with two financial upgradations with modifications, inter alia, that "the grade pay shall change at the time of financial upgradation under this scheme. The grade pay given at the time of financial upgradation under ACPS will be the immediate next higher grade pay in the hierarchy of revised pay bands and grade pay being recommended. Thus, grade pay at the time of financial upgradation under ACPS can, in certain cases where regular promotion is not between two successive grades, be different than what is available at the time of regular promotion. In such cases, the higher grade pay attached to the next promotion post in the hierarchy of the concerned cadre/organization will be given only at the time of regular promotion". The government upon considering such recommendations of the 6th Pay Commission for introduction of MACPS, accepted the same with further modification to grant three financial upgradations under the MACPS at intervals of 10, 20 and 30 years of continuous regular service, as would be explicit from the memorandum dated 10th June, 2009 being RBE 101/2009. In the said memorandum it was categorically stated that the MACPS is in supersession of previous ACPS and clarifications issued thereunder and that the same shall be applicable to all regularly appointed Group "A", "B" and "C" railway employees.

11. A perusal of the MACPS would clearly reveal that it envisaged placement in the higher grade pay in the hierarchy of the recommended revised pay bands and grade pay as given in Section 1, Part-A of the first schedule of the Railway Services (Revised Pay) Rules, 2008 (RBE 103/2008). The grade pay structure as highlighted in RBE 103/2008 (first schedule, part A, Section 1) would reveal that the immediate next higher grade pay of Rs. 5,400/- is Rs. 6,600/- (in case of petitioners of WPCT 258/2016 and 98/2015) and the immediate next higher grade pay of Rs. 4200/- is Rs. 4600/- (in case of petitioners of WPCT 8/2017 and 12/2017).

12. If the contention of the respondents is to be accepted, then the petitioners would not earn any financial upgradation in the hierarchy of grade pays given in Section 1, Part-A of the first schedule of the Railway Services (Revised Pay) Rules, 2008 when para 2 of MACPS envisages placement in the immediate next higher grade pay in the hierarchy of the recommended revised pay bands and grade pay as given in Section 1, Part-A of the first schedule of the Railway Services (Revised Pay) Rules, 2008.

13. In para 2 of MACPS it has further been stated that the grade pay at the time

of financial upgradation under the MACPS can, in certain cases where regular promotion is not between two successive grades, be different than what is available at the time of regular promotion and that in such cases, the higher grade pay attached to the next promotion post in the hierarchy of the concerned cadre/organisation will be given only at the time of regular promotion. The third and the last sentence of para 2 by way of an illustration accepts that the higher grade pay attached to the next promotional post in the hierarchy will be given at the time of regular promotion. The use of word "higher" in the last sentence is for the purpose of demonstration to rule out confusion and ambiguity. If the Government, which had issued the scheme, wanted to restrict financial upgradation and not collate it to the next higher grade pay in the hierarchy, it would have stipulated as such in Section 1, Part-A of the Rules.

14. In para 19 it has further been stated that MACPS contemplates merely placement on personal basis in the immediate higher grade pay/grant of financial benefits only and shall not amount to actual/functional promotion of the employees concerned. A composite reading of MACPS reveals that it refers to the existing grade pay of an employee and the immediate next higher grade and not the grade in the promotional post. The precept and object of MACPS is to grant incentives to those employees who have been stagnated in one particular post for a period of more than 10 years.

15. The petitioners' claim has been rejected by the respondents citing the provisions of para 8 of MACPS and RBE 142/2012. For proper adjudication it would be useful to extract the provisions of para 8 of MACPS and RBE 142/2012. Para 8 of MACPS runs as follows : "8. Promotions earned in the post carrying same Grade Pay in the promotional hierarchy as per Recruitment Rules shall be counted for the purpose of MACPS.

8.1 Consequent upon the implementation of Sixth CPC's recommendations, Grade Pay of Rs.5400 is now in two Pay Bands viz., PB-2 and PB-3. The Grade Pay of Rs.5400 in PB-2 and Rs.5400 in PB-3 shall be treated as separate Grade Pays for the purpose of grant of upgradations under MACPS."

RBE 142/2012 runs as follows :

"Subject: Grant of financial upgradation under MACP SchemeClarification reg.

[No. PC-V/2009/ACP/2, date 13.12.2012]

References have been received from Zonal Railways seeking clarification as to what Grade Pay would be admissible under MACP Scheme to an employee holding feeder post in a cadre where promotional post is in the same Grade Pay. The matter has been examined in consultation with Department of Personnel & Training (DoP&T), the nodal department of the Government on MACP Scheme and it is clarified that ACP/MACP Schemes have been introduced by the Government in order to mitigate the problems of genuine stagnation faced by employees due to lack of promotional avenues. Thus, financial upgradation under

ACP/MACP Schemes CANNOT be to higher Grade Pay than what are be allowed to an employee on his normal promotion. In such cases financial upgradation under MACP Scheme would be granted to the same Grade Pay.

This issues with the concurrence of the Finance Directorate of Railways."

16. The opening words of para 8 are that "Promotions earned in the post carrying same Grade Pay in the promotional hierarchy as per Recruitment Rules". Indisputably, the petitioners are yet to earn any promotion in any post carrying the same grade pay.

17. The reasoning that the petitioners cannot be granted the grade pay of Rs. 6,600/ Rs. 4,600 because the same would be much in excess of what the employee would gain on actual promotion in the hierarchy is fallacious and is not acceptable to this Court. Promotion is dependent upon the seniority of the concerned employee and the status of vacancies in the promotional post whereas financial upgradation under MACPS is granted when an employee is stagnated in a particular post for a period of 10 years. Promotion under the recruitment rules and financial upgradation under MACPS are in two different pedestals and the same cannot be determined upon application of identical yardsticks. The consequential placement of promotees under the recruitment rules and the beneficiaries of the MACPS in different grade pay does not tantamount to any discrimination or violation of the rules of fairness. The judgment delivered in the case of Secretary, Government (NCT of Delhi) and Others (Supra), as relied upon by the respondents, deals with the ACPS which has been superseded by MACPS and as such the same has no manner of application in the instant case.

18. For the reasons discussed above, the writ petitions are allowed and the orders passed by the learned Tribunal in the respective original applications are set aside and quashed and the petitioners in WPCT 98 of 2015 and WPCT 258 of 2016 shall be entitled to the grant of third financial upgradation in the grade pay of Rs. 6,600/- and the petitioners in WPCT 8 of 2017 and WPCT 12 of 2017 shall be entitled to the grant of third financial upgradation in the grade pay of Rs. 4,600/-. The respondents are accordingly directed to refund the amount as withdrawn from the petitioners' salary within a period of four weeks.

19. With the above observations and directions, the writ applications are disposed of.

20. There shall, however, be no order as to costs.

21. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.