

(2019) 02 DEL CK 0188

In the Delhi High Court

Case No : Civil Writ Petition No. 4929 Of 2017, Civil Miscellaneous No.21314 Of 2017

P S Rajput

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 12-02-2019

Acts Referred:

Constitution Of India, 1950 — Article 14

Citation : (2019) 02 DEL CK 0188

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

Bench : Division Bench

Advocate : P. Sureshan, Amit Mahajan, Randeep Sachdeva

Final Decision : Dismissed

Judgement

1. The present petition has been filed seeking to set aside the office orders dated 02.03.2015 and letter dated 03.09.2015 whereby the respondents have denied the grant of 3rd MACP to the petitioner with effect from 02.01.2015 with a further direction to the respondents to grant him 3rd MACP with effect from 02.01.2015 with interest @18% per annum as well as arrears of pay and other consequential benefits.

2. The facts relevant to the present case are that the petitioner was appointed as a Constable (GD) with the CISF vide order dated 11/15.01.1985 w.e.f. 02.01.1985 in the pay scale 210-4-250-EB-5-270 After initial 6 months of training, he got his first regular posting on 08.07.1985 and was thereafter posted at various other Units of the CISF. Pursuant to direct recruitment taking place for the post of Head Constable (Driver), the petitioner also applied and was selected. He was finally appointed as Head Constable (Driver) on 02.09.1997 in a higher pay scale 975-25-1150-EB-1660.

3. The petitioner claims that no technical resignation was taken from him and for all other purposes, his entire past service from 1985 was counted. He also claims

that as against the six months training which the other direct recruits were made to undergo, he was required to undergo only 28 days of training as he was already serving as a Constable with CISF.

4. He further claims that even the Force Number given to him at the time of appointment as Constable (GD) was continued for the post of Head Constable (Driver).

5. On 19.05.2009, the DOPT introduced the Modified Assured Career Progression Scheme (hereinafter referred to as 'MACP') for the Central Government employees and it was given effect from 01.09.2008. Under the Scheme, three Financial Upgradations were envisaged on completion of 10, 20 and 30 years of service as was provided in para 9 of the Scheme. The said scheme entitles an employee to an upgradation to the next higher Grade Pay. The petitioner completed 10 years of service in the rank of Head Constable (Driver) on 01.09.2007 and was granted first financial upgradation under the MACP vide order dated 15.03.2010, with effect from 01.09.2008 i.e. the date of implementation of the scheme itself. The 10 years period was counted by the respondents from 02.09.1997, taking the appointment of the petitioner from 02.09.1997 in the rank of Head Constable (GD) in CISF and not from 02.01.1985. Accordingly, his pay was fixed in the next higher Grade Pay of Rs.2,800/- in PB-I.

6. On 07.03.2013, the petitioner was promoted in the ordinary course to the post of ASI/ Executive. Since, he was already getting the Grade Pay of Rs.2,800/- , which was also the Grade Pay in the rank of ASI, no change in his Grade Pay was effected by the respondents.

7. On 02.01.2015, petitioner, in his perception, completed 30 years of service, counting the same from the initial appointment as Constable (1985) and therefore, sent a representation on 24.02.2015 seeking further financial upgradation under the MACP Scheme. In response to the said representation, the respondents sent a communication to him on 02.03.2015 stating therein that his 'regular service' for the purpose of MACP would be counted from 29.09.1997 and not from 02.01.1985. Not satisfied with the said response, the petitioner sent another representation on 26.05.2015, seeking further clarification. Vide letter dated 03.09.2015, the respondents reiterated their stand stating that his service in the rank of Constable (GD) could not be counted for MACP benefits as that was in lower Grade Pay. The petitioner was not satisfied even with this response and wrote a letter to the DIG on 09.08.2016, followed by a legal notice dated 25.01.2017. Not getting any favourable response, the petitioner filed the above writ petition praying that his period of service as a Constable with effect from 02.01.1985 to 02.09.1997 should be counted as 'regular service' and accordingly, he should be given his third MACP from 02.01.2015. It is relevant to point out that the above petition was filed on 25.05.2017 and notice was issued by this Court on 30.05.2017.

8. The counter affidavit filed by the respondents reveals in para 8 at page 55 of the paper book that after the filing of the petition, petitioner has been granted the second MACP benefits with effect from 02.09.2017 vide order dated 22.02.2017 in the next higher Grade Pay of Rs.4,200/-, on completion of 20 years of service counting the same from his appointment as a Head Constable on 02.09.1997.

9. The narrow controversy that needs to be adjudicated in the present writ petition is whether the 'regular service' envisaged in the MACP Scheme is to be counted from 02.01.1985, i.e. when the petitioner was initially appointed in the rank of Constable (GD) in CISF or from 02.09.1997 when he was appointed as Head Constable (Driver) in CISF itself. If the service is counted as 'regular service' from 02.01.1985, the petitioner would be entitled to the first and the second MACP w.e.f. 01.09.2008 and would, thus, be entitled to the third MACP w.e.f. 02.01.2015. If the service is, however, counted from 02.09.1997, the effect would be that the petitioner would be entitled to the second MACP benefit from 2017 (as already given by respondents) and the third MACP would only accrue in the year 2027.

10. The contention of the learned counsel for the petitioner is that he had joined CISF as a direct recruit in the rank of a Constable on 02.01.1985. This was a 'Regular Appointment' as opposed to adhoc/contractual. His further appointment on 02.09.1997 to the rank of Head Constable was on account of his clearing a competitive examination, purely was on merit basis. If the respondents are denying the counting of his 'regular service' prior to 1997, it indirectly amounts to penalising him for being meritorious and qualifying in a competition. He further argued that the personnel appointed alongwith him in the year 1985, who have either not appeared or not cleared any competitive examination for a higher rank have already been granted 3rd MACP prior to the petitioner and this is clearly violative of Article 14 of the Constitution of India. Another argument advanced by the learned counsel for the petitioner was that he cannot be treated at par with a Head Constable, who is freshly recruited in the CISF in 1997 as the respondents cannot ignore that the petitioner infact had rendered 12 years of unblemished and 'regular service' more than those recruited in 1997, even though it was in a lower rank. He also contended that the MACP envisaged completion of 'regular service' and by no stretch of imagination, it can be said that the service rendered by the petitioner from 1985 to 1997 was not a 'regular service'.

11. Per contra, learned counsel for the respondent contended that the petitioner was initially recruited as a Constable in GD Cadre but in 1997 when he was appointed as Head Constable, it was a direct recruitment and his appointment was in a higher scale. As per the MACP Scheme, 'regular service' only commenced from the date of joining on a post in a direct entry grade on a regular basis either on direct recruitment or on absorption/ re-employment. It is the contention of the respondents that past continuous service can only be taken

into account, if the post held earlier carried the same Grade Pay but in the case of the petitioner, the past service from 1985 to 1997 was in a lower Grade Pay in the rank of a Constable and thus cannot be counted for MACP benefits. In so far as the personnel who joined along with the petitioner in 1985 are concerned, the argument advanced is that most of these personnel are only serving in the rank of Head Constable, while the petitioner is now in the rank of ASI and has stood to gain by getting direct recruitment as a Head Constable in 1997. It is also argued that the petitioner will be entitled to third financial upgradation in 2027 while those who had joined as Constables alongwith him, have already exhausted their third financial upgradation in 2015 and will not get any benefit hereinafter.

12. We have heard learned counsel for the parties as well as perused the MACP Scheme. In order to adjudicate the issue involved in the present case, a little background to the MACP Scheme is necessary. Prior to MACP Scheme, the DOPT had formulated the ACP Scheme on 09.08.1999. There was stagnation in the various departments of the Government and employees were not being promoted due to lack of vacancies, though they were eligible. The 5th pay Commission recommended financial upgradations without linkage to vacancies, as a safety net or motivation to the employees, so that even if there was no promotion, some financial upgradation could lead to career progression. The 6th Pay Commission recommended the MACP Scheme which replaced the ACP Scheme with certain variations. The purpose, however, of the MACP Scheme was also the same, i.e. providing financial upgradation to motivate the employees as there was stagnation due to lack of vacancies. Under the MACP Scheme, an employee is entitled to three financial upgradations on completion of 10, 20 and 30 years of service counted from the Direct Entry Grade. The service which has to be counted has to be 'regular service' and the same has been defined in the Scheme itself. A reading of the Scheme clearly shows that the purpose of the Scheme is to encourage and motivate employees in their career with financial upgradations for the hard work and the unblemished service that they render.

13. In order to get benefit of financial upgradations under the Scheme, an employee should have worked in a particular grade pay for the requisite number of years as envisaged under the scheme, MACP scheme is not meant to grant dual benefit of getting financial upgradation through promotion or direct recruitment as well as financial upgradation under MACP Scheme for the same period.

14. In the present case, the petitioner was appointed as a Constable on 02.01.1985 in pay scale of 210-4-250-EB-5-270. It is undisputed that he was appointed as a Head Constable on 02.09.1997 through the process of direct recruitment and thus, came into a higher scale of 975-25-1150-EB-1660. When the MACP scheme came into effect on 19.05.2009 w.e.f. 09.08.2008, the petitioner had completed 10 years from the date of his appointment as Head Constable and was accordingly granted first MACP w.e.f. 01.09.2008 and got grade pay of 2800.

15. The petitioner's claim that he should be granted 2nd MACP also from 01.09.2008 as he had completed over 20 years in 2005 is based on his submission that his service as a Constable from 02.01.1985 be reckoned towards counting of 20 years for 2nd MACP. This claim of the petitioner is without any basis as the service of the petitioner between 1985 upto 02.09.1997 was in the rank of Constable (GD) which was not only in a different cadre but also in lower pay-scale. In 1997, the petitioner came into higher pay scale on a different post. Counting of the earlier service would be in the teeth of the criteria laid down in the MACP scheme under which requisite service has to be reckoned on a particular grade pay and not in the lower grade pay. The respondent have, therefore, rightly counted the 20 years period from 02.09.1997 and have granted him 2nd MACP w.e.f. 02.09.2017. By this analogy, the petitioner will now be entitled to grant of 3rd MACP in 2027 as pointed out by the respondent, subject of course to fulfillment of other norms under MACP scheme. A reading of para 9 of the MACP scheme fortifies this interpretation of the scheme inasmuch as even when an employee moves from one government department to another, past continuous regular service is only counted in case the post in earlier department was carrying the same grade pay.

16. It is relevant also to point out a DoPT OM dated 10.02.2000 which was issued to clarify certain doubts which had arisen under the ACP Scheme. The relevant part of the OM is extracted below:

4. In a case where a person is appointed to a post on transfer (absorption) basis from another post, whether 12 years and 24 years of service for the purpose of ACPS will count from the initial appointment or otherwise.

The benefits under ACPS are limited to higher pay scale and do not confer designation, duties and responsibilities of the higher post. Hence, the basic criterion to allow the higher pay scale under ACPS should be whether a person is working in the same pay scale for the prescribed period of 12/24 years.

Consequently, so long as a person is in the same pay scale during the period in question, it is immaterial whether he has been holding different posts in the same pay scale. As such, if a Government servant has been appointed to another post in the same pay scale either as a direct recruit or on absorption (transfer) basis or first on deputation basis and later on absorbed (on transfer basis), it should not make any difference for the purpose of ACPS so long as he is in the same pay scale. In other words, past promotion as well as past regular service in the same pay scale, even if it was on different posts for which appointment was made by different methods like direct recruitment absorption (transfer) deputation, or at different places should be taken into account for computing the prescribed period of service for the purpose of ACPS. Also, in case of absorption (transfer) /deputation in the aforesaid situation, promotions earned in the previous/present organization, together with the past regular service shall also count for the purpose of ACPS. However, if the appointment is made to higher pay scale either as on direct recruitment or on absorption

(transfer) basis or first on deputation basis and later on absorbed (on transfer basis), such appointment shall be treated as direct recruitment and past service/promotion shall not count for benefits under the ACPS. Needless to say, in case of transfer on administrative ground involving only change of station within the same department, service rendered in grade at two stations may count for ACPS, as such transfers are within the same organization, ordered generally for administrative/personal consideration and the service rendered in the earlier station counts as eligibility service for promotion.

5. Whether a Government servant, who is direct recruit in one grade and subsequently joins another post again as direct recruit, is eligible for first financial upgradation under ACPS after completion of 12 years of service counted from the first appointment or from the subsequent second appointment as direct recruit?

6. An employee appointed initially on deputation to a post gets absorbed subsequently, whether absorption may be termed as promotion or direct recruitment. What will be the case if an employee on deputation holds a post in the same pay-scale as that of the post held by him in the present cadre? Also, what will be the situation if he was holding a post in the parent cadre carrying a lower pay-scale?

17. The issue on which a doubt that had arisen under the ACP is, in fact, the fact situation and controversy arising in the present petition and, therefore, this OM of DoPT is very significant in deciding the present petition. The doubt raised under the ACP Scheme was that when a government servant is appointed on a direct recruitment in one grade and subsequently joins another post again as a direct recruitment, whether for the first financial upgradation under ACP, his service has to be counted from his first appointment or from the second appointment. DoPT issued a detailed clarification as mentioned above.

18. A reading of the clarification shows that if a government servant joins second post again on direct recruitment, but the pay scale does not change then his past regular service in the same pay scale, even if on appointment of different post will be counted, for computing the requisite period for the purpose of ACP. However, if the appointment is made to a higher pay scale in the second direct recruitment post, the past service will be not counted for the purpose of ACPs.

19. This is exactly the controversy we have to decide in the present case. The petitioner was appointed as a Head Constable on direct recruitment but the pay scale had changed inasmuch as pay scale of Head Constable as pointed out above, was higher. Thus, applying clarification issued by the DoPT, the petitioner would not be entitled to count his past service as Constable.

20. We may clarify that while this clarification is for doubts under the ACP Scheme but the same logic and analogy will apply even for interpreting and applying the MACP Scheme.

21. We are further supported in our view by recent judgment of Division Bench of this Court in Suresh Chand Garg vs. Chief Secretary, Government of NCT of Delhi & Ors, decided on 19.05.2016 in W.P.(C) No.5789/2015. That of course was a case where facts were reverse, inasmuch as the petitioner therein was appointed as TGT in the pay scale Rs.1640-2900/- and was subsequently appointed by way of direct recruitment as PGT, but in the same pay scale of Rs.1640-2900/-. The question that fell for consideration was whether service rendered by the petitioner therein as TGT was to be counted for the grant of ACP benefits. Division Bench of this court held that since direct recruitment to the second post viz. PGT had been in the same pay scale and there was no increase or enhancement in the pay scale, the service rendered as TGT will be computed for the grant of ACP benefit. It was, however, categorically held, that in case the petitioner had enjoyed financial upgradation or increase in the pay scale on appointment as PGT, legal position would have been different.

22. We reproduce the relevant paras of the said judgment as under:

"3. The petitioner was appointed to the post of Trained Graduate Teacher (TGT) on 21st November, 1973. He retired as Vice-Principal on 28th February, 2011. During his service career spreading 37 years and 3 months, the petitioner was granted senior scale payable to TGTs Rs.1640-2900 with effect from 1st January, 1986. He was subsequently selected and appointed by way of direct recruitment, without break in service, as Post Graduate Teacher (Maths) (PGT) on 15th February, 1992 in the same pay scale of Rs.1640-2900, which was earlier granted to him as senior scale TGT with effect from 1st January, 1986. On enforcement of the ACP Scheme with effect from 9th August, 1999, the petitioner was granted financial upgradation applicable to the post of Vice-Principal in the scale of Rs.7500-12000 as he had completed 24 years of continuous service. Subsequently, the petitioner was promoted to the post of Vice-Principal with effect from 8th January, 2008 in the pay scale of Rs.7500-12000, i.e., the pay scale granted to him on financial upgradation under the ACP Scheme since 9th August, 1999. Thus, the promotion to the post of Vice-Principal in the pay scale of Rs.7500-12000 did not entail any financial benefit or further upgradation.

6.

The aforesaid paragraph clarifies that the term 'regular service', for the purpose of MACP Scheme, means the entire time/period commencing from the date of joining the post in direct entry grade on regular basis by different modes like direct recruitment/absorption/re-employment, etc. Pertinently, it stipulates that past continuous regular service in another Government Department, in a post carrying the same grade pay, prior to regular appointment in the new department without any break, shall be counted towards qualifying regular service for the purpose of MACP Scheme. It is clarified that the said regular service in the Government in the same grade pay may or may not be eligible and counted for regular promotions. The service rendered on ad hoc/contractual basis

before regular appointment or re-appointment or training is not to be reckoned. As noticed from the factual matrix mentioned above, the petitioner, on appointment after selection as PGT (Maths) on 15th February, 1992 was granted pay scale of Rs.1640-2900, which was identical to the pay scale given to him on grant of senior scale, TGT with effect from 1st January, 1986. The two posts, i.e, the posts of TGT (senior scale) and PGT (Maths) were carrying the same pay scale, i.e, Rs.1640-2900. There was no increase or enhancement of pay scale pursuant to selection by the process of direct recruitment to the post of PGT (Maths). Therefore, in the case of the petitioner, he would be entitled to count and include previous regular service from 1st January, 1986 till 14th February, 1992, when he had worked in the post of TGT (senior scale). In case the petitioner had enjoyed financial upgradation or increase in pay scale on appointment as PGT (Maths) on 15th February, 1992, the legal position would have been different. In other words, the petitioner had more than 25 years of continuous regular service from 1st January, 1986 till his retirement on 28th February, 2011. During this period, the petitioner was granted only one financial upgradation to the grade payable to Vice-Principal in 1999. He was subsequently also promoted as Vice-Principal, but without any additional financial upgradation.

23. Arguments of the petitioner is that his 12 years service as a constable would be wiped out in case it is not counted for purpose of MACP is without merit. Whilst it is true that the petitioner has rendered 12 years of regular and unblemished service of constable, but the fact of the matter is that he had himself chosen this path, of applying for direct recruitment to be appointed as Head Constable and this peculiar fact cannot enure to his advantage to count his service as Constable in the lower pay scale, since scheme itself does not permit this service to be counted.

24. It is also to be noted that it is not as if the petitioner is in a totally disadvantageous position having been appointed as a Head Constable in 1997, because actually he did move ahead of his batchmates in terms of his rank and got higher pay of Head Constable. Further on account of this, he quickly moved up in the ladder in the hierarchy and got promoted as ASI in 2013.

25. The contention of the learned counsel for the petitioner that he is being penalized for having cleared competitive examination for Head Constable inasmuch as batchmates of petitioner, who came with him as Constables have already got 3rd MACP, is no doubt appealing at the first blush but sympathy and empathy cannot entitle petitioner to a benefit which the MACP scheme does not permit.

26. The other reason why this court cannot agree with the contention of the petitioner is the principle of estoppel. MACP scheme was introduced on 19.05.2009. At this stage, the petitioner knew that he had completed over 20 years of service. However, when the benefit of only the first MACP was given to him by an order dated 15.03.2010, he silently accepted the same without agitating his claim for 2nd MACP. In fact, he kept silent till year 2015 when he

made a representation for the grant of 3rd MACP as by now according to his wisdom he had completed 30 years of service. Having acquiesce to the order dated 15.03.2010, he cannot now reopen this issue. Respondents are also right in their submission that the petition is barred by delay and latches inasmuch as cause to agitate for counting of past service arose in 2009, if any. Submission is that at stage the petitioner had known that his service for the MACP benefit was being reckoned from 1997 only and thus the benefit for 2nd MACP would accrue only in 2017 and likewise for 3rd MACP in 2027. He still chose to sleep over his right till 2015, when he first represented. There is no explanation whatsoever given by the petitioner as to why he did not raise any grievance between 2009 and 2015 and quietly accepted the position in 2009.

27. The impugned orders passed by the respondent denying 2nd MACP to the petitioner from 2008 and the 3rd MACP from 2015 on the ground that his service as constable, being in the lower pay scale cannot be counted are, thus, in accordance, with the provision of MACP scheme and no illegality can be found in the said orders.

28. There is, thus, no merit in the writ petition and the same is, accordingly dismissed, with no orders as to costs. The pending application also stands dismissed.