(2019) 02 CAT CK 0115

In the Central Administrative Tribunal

Case No : Original Application No. 2297 Of 2018

Sh. Anil Kumar APPELLANT

Vs

Govt. Of N.C.T. Of Delhi RESPONDENT

Date of Decision : 14-02-2019

Acts Referred:

Citation : (2019) 02 CAT CK 0115

Hon'ble Judges : Sh. Mohd. Jamshed, J

Bench : Single Bench

Advocate : Rashmi Chopra, Sh. Anuj Kumar Sharma

Final Decision : Allowed

Judgement

1. The facts of the case, as evident from the O.A., are as under:

The applicant was appointed as Craft Instructor in the Department of Training & Technical Education, Government of National Capital Territory of Delhi (GNCTD) on 29.01.1996. He was placed under suspension from 21.09.2006 to 04.07.2007. A major penalty charge sheet was issued to the applicant on the charges of loss of a Cutting Torch and false claiming of Leave Travel Concession (LTC). Enquiry report was submitted on 07.09.2009 exonerating the applicant on charges other than that of loss of a Cutting Torch. Disciplinary Authority (DA) imposed the penalty of "Censure" on the applicant vide order dated 18.03.2010.

2. Departmental Screening Committee (DSC) on 05.05.2011 conceded that the applicant is entitled to the grant of 1st financial upgradation under the ACP Scheme on completion of 12 years of service. The applicant was accordingly granted the benefit of 1st financial upgradation under the ACP Scheme on 02.01.2013 w.e.f. 29.01.2008 on completion of 12 years of service.

3. On 20.12.2017, the applicant was issued a show cause notice based on the complaint made before Public Grievance Cell about this ACP benefit and the Review DSC held on 11.10.2017 decided to withdraw the benefit of 1st ACP

granted to the applicant. On 26.12.2017, the applicant requested the respondents to supply certain documents in response to the show cause notice issued to him. However, no documents were supplied to him and no hearing was granted by the respondents and vide impugned order dated 19.02.2018, the respondents have withdrawn the benefit of 1st financial upgradation under the ACP Scheme. Further, directing that the grant of 1st financial upgradation under the MACP Scheme will be applicable w.e.f. 29.01.2010 and consequently recovery of dues for excess payment will be made from the salary of the applicant. The impugned order dated 19.02.2018 is reproduced as under:-

"Reference Show-Cause notice issued by this office dated 20.12.2017 wherein Sh. Anil Kumar, CI Welder was given an opportunity to represent against the recovery of wrongful/excess benefits given to him vide order dated 21.01.2013. Now, in reply of this Show-Cause notice Sh. Anil Kumar vide his letter dated 26.12.2017 has sought certain documents to submit detailed representation.

Keeping in view of the facts that Sh. Anil Kumar was under suspension on the due date of 1st ACP i.e. 29.01.2008 vide letter dated 21.09.2006 and further charge sheeted vide letter dated 4.07.2007 and penalty of "CENSURE" was imposed vide order dated 18.03.2010 and period of suspension (21.09.2006 to 3.09.2009) was treated as spent on duty vide order dated 10.03.2011, the reply of Show-Cause notice examined and observed that it is not satisfactory.

Hence, on the recommendations of review Departmental Screening Committee held on 11.10.2017 and further approval of Competent Authority, the benefits of 1st ACP which were given to him w.e.f. 29.01.2008 vide this office order dated 21.01.2013 on the recommendations of earlier DSC are withdrawn and now he is granted 1st financial upgradation under MACP Scheme from the Pay Scale of 9300-34800 PB-II with GP 4200 to Pay Scale of 9300-34800 PB-II with GP 4600 w.e.f. 19.03.2010 (i.e. the next date of award of penalty of "Censure").

Further , he may be allowed to exercise his option, if any, under FR-22 within one month of the issuance of this order. However, if any recovery, due to wrong fixation under MACP detected at any stage, the same will be recovered from the pay of Sh. Anil Kumar.

Sh. Anil Kumar, CI Welder is informed accordingly."

4. Aggrieved by the above mentioned, the applicant has approached the Tribunal seeking the following relief:-

"(a) Quash the order dated 19.02.2018.

(b) Restore the benefit of 1st ACP granted to the Applicant w.e.f. 29.01.2008 as was due and already granted to the Applicant prior to passing of the order dated 19.02.2018; and/or

(c) Direct the grant of benefit of 1st MACP it"s due w.e.f. 29.01.2006 as applicable."

5. The applicant has further submitted that the order of "Censure"

is based on no evidence and could not be a ground to withdraw the 1st ACP benefit granted to him. It is also stated that action of the respondents in holding review DSC is wrong. The period of suspension of the applicant was treated as spent on duty and the charges against the applicant could not be proved and also that the penalty of censure has no effect and thus the ACP correctly granted cannot be withdrawn. The applicant in his submissions has also relied on the decision of Hon"ble Supreme Court in the case of Union of India and Ors. Vs. Balbir Singh Turn and Ors. (CA No. 3744/2016) dated 08.12.2017, which categorically affirmed that the recommendations of the 6th CPC as modified by the Central Government will apply w.e.f. 01.01.2006.

6. The respondents in their counter affidavit filed on 07.08.2018 have stated that the applicant is working in the Department of Training and Technical Education, GNCTD as Craft Instructor. The 1st ACP was due to the applicant on 29.01.2008. But as he was placed under suspension vide letter dated 21.09.2006 and further charge sheeted vide letter dated 04.07.2007, a penalty of "Censure" was imposed on him. At the same time, he was also charge sheeted in two other cases vide orders dated 23.05.2001 and 22.03.2002. The DSC meeting was held for grant of benefit of ACP on 05.05.2011 and it was informed that the applicant has remained under suspension and a penalty of "Censure" was imposed on him vide order dated 18.03.2010. The DSC, after considering the facts of this case and the previous cases decided to keep the recommendations in sealed cover. Further, the applicant was exonerated in two cases vide orders dated 31.12.2012 and 02.01.2013. Thereafter, on 21.01.2013 with the approval of the competent authority, sealed cover was opened and the applicant was granted 1st ACP w.e.f. 29.01.2008. It is also submitted by the respondents that "at this stage, inadvertently the penalty of "Censure" was overlooked". Later on, a complaint was received by the respondents regarding grant of ACP to the applicant during currency of penalty of "Censure" through Public Grievance Commission (PGC). The matter in regard of grant of 1st ACP to the applicant was re-examined and put up before the Competent Authority. It was decided that review DSC may be called, which may consider the earlier recommendations of grant of 1st ACP to the applicant in view of the factum of penalty of "Censure" imposed on the applicant vide order dated 18.03.2010.

7. Accordingly, review DSC was held on 12.05.2017 wherein the Committee considered all the facts placed before it and decided that it would be appropriate to refer the matter to Services Department, GNCTD for their expert opinion. Based on the opinion of the Services Department of GNCTD that the "official is eligible for grant of ACP/MACP benefits w.e.f. 19.03.2010 i.e. the next date of imposition of penalty of Censure", the review DSC considered all facts and documents placed before it and recommended to withdraw the benefit of financial upgradation under the 1st ACP Scheme, which was granted earlier w.e.f. 29.01.2008 and recommended that the applicant may be granted 1st financial

upgradation under MACP Scheme w.e.f. 19.03.2010 i.e. the next date of award of penalty of "Censure" in light of opinion of Services Department, GNCTD. After the review DSC, in order to give adequate opportunity to the applicant, the respondents issued a show cause notice dated 20.12.2017 to the applicant as under:-

"Whereas the 1st ACP benefits under Assured Carrier Promotion Scheme were granted vide this office order No.F.24(3)ACP-C.I/Trg. Admn./2010/52 dated 21/01/2013 on the recommendation of Departmental Screening committee held on 05.05.2011 in the pay scale of PB-II Rs.9300-34800 + 4600 Grade pay (Rs. 6500-200-10500 pre-revised) w.e.f. 29.01.2008.

Whereas on the directions issued on 23.01.2017 by the Public Grievances Commission Delhi on the complaint of Sh. G.B. Singh, Ex-Group Instructor, department examined your case and observed that you were under suspension on the due date of 1st ACP i.e. 29.01.2008 vide letter dated 21.09.2006 and further charge sheeted vide letter dated 4.07.2007 and penalty of "CENSURE" was imposed vide letter dated 18.03.2010 and period of suspension (21.09.2006 to 3.09.2009) was treated as spent on duty vide letter dated 10.03.2011.

Keeping in view the above facts, the Department decided to review the benefits given to you under 1st ACP Scheme for which the case was put up before the Review DSC. In the meeting of DSC held on 11.10.2017 it was recommended that 1st financial upgradation under ACP Scheme in respect of Sh. Anil Kumar Craft Instructor (welder) which was recommended by earlier DSC w.e.f. 29.01.2008 may be withdrawn and he may be granted 1st financial upgradation under MACP Scheme from the Pay Scale of 9300-34800 PB-II with GP 4200 to Pay Scale of 9300-34800 PB-II with GP 4600 w.e.f. 19.03.2010 (i.e. the next date of award of penalty of "Censure").

Now you are hereby informed that the wrongful/excess benefits given to you vide order dated 21.01.2013 w.e.f. 29.01.2008 will be withdrawn and recovery will be made. Further, the MACP will be given to you w.e.f. 19.03.2010 which is the next date of imposing the penalty of "CENSURE" vide order dated 18.03.2010. You are hereby given an opportunity to submit your representation within 15 days from the date of issuance of this notice."

8. In this show cause notice, the applicant was given an opportunity to submit his representation within 15 days from the date of issuance of this notice. The applicant vide letter dated 26.12.2017 in response to the show cause notice requested the respondents to supply certain documents required for submitting a representation against the show cause notice. Respondents vide impugned order dated 19.02.2018 passed the final order indicating that the benefits of 1st ACP, which were granted to him w.e.f. 29.01.2008 vide order dated 21.01.2013 on the recommendations of earlier DSC are withdrawn and now he is granted 1st financial upgradation under the MACP Scheme w.e.f. 19.03.2010. It was also indicated in the order that "Further, he may be allowed to exercise his option, if

any, under FR-22 within one month of the issuance of this order. However, if any recovery, due to wrong fixation under MACP detected at any stage, the same will be recovered from the pay of Sh. Anil Kumar (the applicant). They have also submitted that in terms of CCS (CCA) Rules, it is stipulated that when the departmental proceedings against a suspended employee for the imposition of a major penalty finally end with the imposition of a minor penalty, the suspension can be said to be wholly unjustified and the employee concerned should, therefore be paid full pay and allowances for the period of suspension." Accordingly, the suspension period of the applicant was treated as on duty. However, in view of the penalty of "Censure" having been imposed, he should not have been given the benefit of ACP by the DSC, which was an inadvertent mistake.

Respondents have also relied on the decision of Hon"ble Supreme Court in the case of Union of India Vs. K.V. Jankiraman, (1991) 4 SCC 109 wherein it was held that if the employee is completely exonerated meaning thereby that he is not found blameworthy in the least and is not visited with the penalty of "Censure", he has to be given the benefit of the salary of the higher post along with the other benefits from the date on which he would have normally been promoted but for the disciplinary/criminal proceedings. However, they have relied on the decision of Hon"ble Supreme Court in the case of Union of India Vs. A.N. Mohanan, (2007) 5 SCC 425 wherein it has been specifically held that award of "Censure" is a blameworthy factor and that where any penalty is imposed, the findings of the sealed cover are not to be acted upon and the case for promotion may be considered by the next DPC in the normal course.

9. During the course of hearing, learned counsel for the applicant reiterated the contentions made in the O.A. and submitted that the applicant was rightly granted the ACP benefits by the DSC, the 1st ACP Scheme w.e.f. 29.01.2008 i.e. on having completed 12 years of service, which cannot be withdrawn as decided by the review DSC held on 11.10.2017. It was also submitted that "Warning" and "Censure" are not punishments and, therefore, grant of ACP by the earlier DSC was lawful and as per extant rules.

10. It was also argued by the learned counsel for the applicant that in reply to the show cause notice, the applicant had requested for supply of certain documents to enable him to submit his representation against the show cause notice. However, no documents as required by the applicant were supplied to him and the respondents vide the impugned order dated 19.02.2018 decided to withdraw the benefits of 1st ACP, which were given to him w.e.f. 29.01.2008 and decided to grant 1st financial upgradation under MACP Scheme w.e.f. 19.03.2010.

11. The learned counsel of the respondents drew the attention of the Bench to the counter reply indicating clearly that there has been an "inadvertent mistake" on the part of DSC, which awarded the benefit of 1st ACP to the applicant vide order dated 21.01.2013 as the penalty of "Censure" had been imposed on the applicant and in terms of the extant rules and "Censure" being a minor penalty,

his case should not have been considered for grant of ACP by the DSC. They have also submitted that on receipt of a complaint about the same, the matter was referred to the Services Department of GNCTD seeking their advice. Based on their advice that the applicant is eligible for grant of ACP/MACP benefits only from 19.03.2010 i.e. the next date of imposition of penalty of "Censure", the review DSC considered the case and decided to withdraw the benefits granted to him by the 1st ACP in view of this inadvertent mistake.

12. The learned counsel of the respondents also relied upon the judgment of Apex Court in the case of Union of India and Ors. Vs. A.N. Mohanan, JT 2007(5)SC 565 and indicated that the applicant has been allowed to exercise his option under FR 22 within one month of the issuance of the order, which has not been done by the applicant and that if he is aggrieved by the impugned order, the applicant should have taken recourse making representation to the higher/ competent authorities for redressal of his grievances. However, as the law stands, the relief sought by the applicant cannot be granted at this stage.

13. Heard the arguments of the learned counsels and perused the records.

14. The applicant was granted benefit of 1st ACP vide order dated 21.01.2013 w.e.f. 29.01.2008. This order was based on the recommendations of the DSC held on 05.05.2011. The DSC had noted that the applicant is charge sheeted. It is not indicated in the recommendations annexed with the O.A. that the DSC was aware if the applicant has been "Censured". Later, the respondents through show cause notice dated 20.12.2017 advised the applicant that in view of a complaint received regarding grant of 1st ACP to the applicant wrongly in view of the penalty of "Censure", it was decided by the review DSC that the financial upgradation under ACP Scheme granted to him w.e.f. 29.01.2008 may be withdrawn and he may be granted 1st financial upgradation under MACP w.e.f. 19.03.2010. As is evident from the minutes of the minutes of the DSC meeting held on 11.10.2017, it is advised that various extant rules and procedure were examined including the opinion sought from the Services Department of GNCTD and the DoP&T O.M. dated 21.11.2016. An opportunity was also given to the applicant to submit a representation within 15 days from the date of issuance of the show cause notice.

15. The applicant vide his letter dated 26.12.2017 sought a number of documents from the respondents in order to submit his representation. However, the respondents vide impugned order dated 19.02.2018 ordered that benefits of 1st ACP granted to him w.e.f. 29.01.2008 vide order dated 21.01.2013 on the recommendations of the earlier DSC are withdrawn and now he is granted 1st financial upgradation under MACP Scheme. It was also mentioned that if any recovery due to wrong fixation under MACP took at any stage, the same will be recovered from the pay of the applicant and that he is allowed to exercise his option, if any, under FR-22. This order also mentions the show cause notice issued and clearly states that in reply to the show cause notice the applicant vide his letter dated 26.12.2017 had sought certain documents to submit his detailed

representation. It is no where mentioned that the documents sought by the applicant were supplied to him for obtaining his representation. During the course of arguments, the learned counsel of the applicant has also submitted that no documents, as required by the applicant, were provided to him to make a representation against the show cause notice. It is thus obvious that the impugned order dated 19.02.2018 has been passed without considering the representation of the applicant.

15.1 The issue of "Censure" being a penalty is well settled in law and continues to remain one of the penalties. This aspect has been over looked or ignored by the earlier DSC, is a fact and has been accepted by the respondents, as being "an inadvertent mistake". The issue of recovery is also well settled in such cases where an undertaking is obtained from the concerned employees that any recovery due to wrong fixation will be detected at any stage and recovered from the pay of the officer concerned. This has been clearly mentioned in the 1st ACP order 21.01.2013 passed in favour of the applicant. The Apex Court in its judgment in Civil Appeal No. 3500/2006 (High Court of Punjab & Haryana & Ors. Vs. Jagdev Singh) dated 29.07.2016 has settled this as follows:-

"11. The principle enunciated in proposition (ii) above cannot apply to a situation such as in the present case. In the present case, the officer to whom the payment was made in the first instance was clearly placed on notice that any payment found to have been made in excess would be required to be refunded. The officer furnished an undertaking while opting for the revised pay scale. He is bound by the undertaking."

Whereas the respondents are free to decide the applicability of ACP or MACP, the very fact that the required documents have not been supplied or denied to the applicant resulted in denial of an opportunity to the applicant to submit a representation and is sufficient reason for quashing and setting aside the impugned order dated 19.02.2018.

16. In view of the above mentioned, the impugned order dated 19.02.2018 is quashed and set aside. The respondents are directed to make available the required documents to the applicant as are permissible for filing his representation to the show cause notice dated 20.12.2017 within 15 days of the receipt of this order. The applicant may prefer a representation against the show cause notice within 15 days thereafter. The competent authority shall consider and decide the representation of the applicant in terms of the extant rules. The O.A. is allowed with the above directions. No order as to costs.

