

(2023) 12 CAT CK 0007

In the Central Administrative Tribunal

Case No : Original Application No. 816 Of 2022

Umesh Chandra Mishra

APPELLANT

Vs

Union Of India Through The General Manager, North Central
Railway, Subedarganj, Prayagraj & Ors

RESPONDENT

Date of Decision : 13-12-2023

Acts Referred:

Administrative Tribunals Act, 1985 — Section 19

Citation : (2023) 12 CAT CK 0007

Hon'ble Judges : Dr. Sanjiv Kumar, Member (A)

Bench : Single Bench

Advocate : Bashist Tiwari, Rakesh Kumar Singh

Final Decision : Allowed

Judgement

Dr. Sanjiv Kumar, Member (A)

1. The instant OA has been filed under Section 19 of the Administrative Tribunals Act, 1985 seeking relief to quash the impugned order dated 14.07.2021 issued by respondent No. 3, and to direct the respondents to give Rs. 1,08,081/- deducted from the gratuity of the applicant at the time of his retirement along with 12% interest, and to issue a direction commanding the respondents to settle pensionary benefits with Grade Pay Rs. 5400/- to the applicant w.e.f. 14.04.2021 and all retiral benefit consequent to the said Grade Pay, and any other relief deemed fit and to award cost.

2. The brief fact of the applicant is that he was appointed as Goods Guard on 17.10.1990 and after training he was appointed in the scale of Rs. 1200 – 2040 with Grade Pay Rs. 2800/- w.e.f. 14.04.1991. Due to an accident on 26.01.1993 the applicant became disabled and unfit for Goods Guard job and was declared medically unfit vide order dated 27.12.1993 and was alternatively absorbed on 27.07.1994 in the scale of Rs. 1400 – 2300 with Grade Pay Rs. 4200/- as Head Clerk, which according to Railway Board letter No. 254/99, was equivalent post.

The applicant was promoted as Office Superintendent in scale of Rs. 1600 – 2660 with Grade Pay of Rs. 4600/- w.e.f. 20.07.2006 and further Grade Pay Rs. 4800/- was given to the applicant by means of 2nd MACP w.e.f. 14.04.2011 after completion of 20 years service from 14.04.1991. The applicant retired on 30.06.2021 as Office Superintendent with Grade Pay Rs. 4800/- and his retiral dues were settled with Grade Pay Rs. 4800/-. Before the retirement the applicant gave an application dated 10.06.2021 for grant of 3rd MACP. In response to the said application the Assistant Personnel Officer, North Central Railway, Prayagraj issued a letter on 14.07.2021 after the retirement of the applicant on 30.06.2021 stating therein the benefit of 3rd MACP has already been wrongly given to the applicant on 14.04.2011 whereas it was liable to be given w.e.f. 20.07.2016, therefore, the payment of excess salary amounting Rs. 1,08,081/- has been deducted and recovered from the retiral dues of the applicant and the said recovery was made without any show cause notice or opportunity of hearing. The applicant gave an application on 09.03.2022 to the Divisional Railway Manager, North Central Railway, Prayagraj for payment of deducted amount and for less payment of leave encashment amount.

3. The applicant points out that the Railway Board had issued a letter dated 01.10.1999 for grant of ACP to the Group B, C and D categories employees and as per para 3.1 of the said letter alongwith para 4 of the annexure attached, an employee is entitled for benefit of ACP after completion of 12 years regular service from his initial appointment. Since the applicant was appointed on 14.04.1991 as Goods Guard on regular basis, as such, after completion of 12 years he was entitled for the benefit of 1st ACP and the same was not given to him by the department. The Railway Board issued another letter dated 10.06.2009 for the grant of MACP and para 3 alongwith para 1 of annexure attached with the said letter, a railway employee is entitled for three MACP benefits after completion of 10, 20 and 30 years of service.

4. Further, the applicant points out that in para 1307 of IREM Vol. I it is provided that an amount equal to such percentage of pay in lieu of running allowance as may be in force may be added to the minimum and maximum of the scale of pay of the running staff. If the scale of pay so arrived at is not identical with the scale of pay already existing, the same may be replaced by the equivalent existing scale of pay. Hence, according to para 1308, it is also provided that running staff, the fixation will be based on the basic pay plus a percentage of their basic pay, representing the pay element of running allowance as may be enforced. If the basic pay so arrived at does not correspond to any stage in the absorbing grade the pay may be fixed at the stage just below and the difference allowed as Personal Pay to be absorbed in future increase in pay. Similarly, if the Pay so arrived at exceeds the maximum of the absorbing grade, the Pay maybe fixed at the maximum and the may be allowed as personal Pay to be absorbed in future increments/ increases in pay. According to Para-1310, benefit of past service and seniority is also liable to be protected. And, this was main reason why the railway administration had given alternative job in scale of Rs. 1400- 2300/- Grade Pay

Rs. 4200/- while applicant was working in scale of Rs. 1200- 2040/- at the time of declaring him medically unfit and absorbing him in a new cadre. The applicant as per Railway Board letter dated 10.06.2009, after completion of 30 years service on 14.04.2021, the applicant was entitled to the benefit of 3rd MACP with Grade Pay Rs. 5400/-, although the same has not been given to him. He further pleads that according to the para-5 of Railway Board's letter dated 10.06.2009, promotion given in scale of Rs. 1600-2660/- should have been ignored when benefit of MACP with Grade Pay Rs. 4800/- was given on 14.04.2011 to the applicant. Since, scales of Rs. 1400-2300/- and 1600-2660/- were merged in scale of Rs. 5000-8000/-, as such, this Grade Pay amounting Rs. 5000- 8000/- was liable to be ignored and benefit of 5500-9000/- should have been given to the applicant and this is serious mistake committed by the railway administration for not providing benefit of Grade Pay of Rs. 5400/- in scale of Rs. 5500-9000/-. He further states that the Railway Board had also issued a letter dated 22.06.2016 in which it is provided that if any amount has been wrongly paid to the employee, the same cannot be recovered. This circular has been issued in pursuance of judgment given Hon'ble Supreme Court in the case of State of Punjab and others v. Rafiq Masih decided by the Hon'ble Supreme Court. Hence, railway administration has committed grave misconduct by deducting Rs. 1,08,081/- from DCRG without showing any reason or giving opportunity to the applicant, which was clearly violative of principle of Natural Justice and Railway Board's letter dated 22.06.2016 issued on this subject.

5. The applicant says that the railway administration had taken ground that when the applicant was medically absorbed on alternative post on 27.07.1994 in scale of Rs. 1400 – 2300 with Grade pay of Rs. 4200/-, the same was a promotion in the eye of law. The stand taken by the railway administration is fallacious and wrong as for any promotion departmental promotion committee sits and considered for grant of promotion and 5 years ACR and on examining the record only the committee decides to give the promotion or otherwise no such action is taken for decategorised staff for giving them new scale and cadre, hence this cannot be considered as promotion. And they quote Para – 1307 to 1310 of the Indian Railway Establishment Manual, Volume-I. Hence, the applicant prays to allow his OA and to grant all reliefs claimed.

6. The respondents have filed counter reply wherein they point out that after training the applicant was appointed to the post of Goods Guard w.e.f. 14.04.1991 in the pay scale of Rs. 1200 – 2040. After meeting with an accident and being medically de-categorized as Goods Guard, he was absorbed in clerical cadre by the order of competent authority w.e.f. 27.07.1994 in the pay scale of Rs. 1400 – 2300. After restructuring vide letter No. 940/E/9/EO-4/Restructuring dated 30.06.2006 the applicant was given the pay scale of Rs. 6500 – 10500 from 20.07.2006. In accordance with the existing rules of the department in clerical cadre VIIth level – 7 there was no promotion is existing as such after availing the benefit in accordance with recommendation of VIIth CPC level 7 the applicant is not entitled to be give more promotion. As per DOP&T guidelines on

MACP, the benefit of 3rd MACP was given to the applicant on the date of assuming the charge on the post, on 14.04.1991 after completion of 30 years on 14.04.2021 or second promotion from 20.07.2006 after completion of 10 years of service on 20.07.2016. The applicant availed two regular promotions and thereafter he was given the benefit of 3rd MACP on 20.07.2016. As per para 8 of RBE No. 101/2009 dated 10.06.2009, since the applicant has already earned two regular promotions and one MACP, hence, he is not entitled for the further up-gradation under MACP in the Grade Pay Rs. 5400/-. It is further submitted that the applicant was granted 3rd MACP on 14.04.2011 inadvertently, actually due date of MACP was 20.07.2016. As such when the mistake came into the knowledge of the respondents, the same has been corrected immediately and the department recovered the excess payment amounting to Rs. 1,08,081/- which was recovered from the DCRG as per rules. Hence, there is no illegality in the order of the respondents, so there is no relief which can be granted to the applicant and, hence, the OA should be dismissed.

7. The applicant has filed rejoinder affidavit where he reiterates his stand taken in the OA. He files Master Circular No. 25 in support of his case "Absorption of Medically De-categorised Non-gazetted Staff in Alternative Jobs".

8. The case came up for final hearing on 05.12.2023. Shri Bashisth Tiwari, learned counsel for the applicant and Shri Rakesh Kumar Singh, learned counsel for the respondents were present and heard. I have gone through the records carefully and considered the rival contentions.

9. From the rival contention it is evident that following points emerge for my consideration:-

i. Whether the scale given of Rs. 1400 – 2300 with Grade Pay Rs. 4200/- dated 27.07.1994 being higher grade than what the applicant was drawing as Goods Guard was a promotion or not?

ii. On what day the 2nd and 3rd MACP eligibility of the applicant falls and to be given?

10. For the first question as it is the main bone of contention where the respondents have considered the absorption of the applicant in the grade of 1400 – 2300 with Grade pay of 4200/- in the clerical grade as a substantive promotion on 27.07.1994. Whereas as per applicant it was not a promotion. If I examine the rules which are there in the rejoinder, in Master Circular No. 25 with a heading, "Absorption of Medically De-categorised Non-gazetted Staff in Alternative Jobs" dated 18.06.1996. At para 6.6 and 6.7 it reads following:-

"6.6. Medically incapacitated staff should not be absorbed in higher scales.

6.7. In the case of running staff the former emoluments for the purpose of comparison and identifying equivalent posts will be basic pay plus a percentage of such pay in lieu of running allowance, as may be in force."

11. As from this rule it is clear that Medically incapacitated staff should not be absorbed in higher scale as well in the running staff the former emoluments for the purpose of comparison and identifying equivalent posts will be basic pay plus a percentage of such pay in lieu of running allowance as may be in force is to be considered. It is a fact that that the basic scale and grade pay of the running staff will be slightly lower than that of the stationary staff like clerks as the running staff gets a running allowance which is not available to the stationary staff. And in this case also clearly the applicant was a Goods Guard (a running staff) and he met with an accident and declared medically unfit in 1993 and vide order dated 27.07.1994 he was absorbed in a new cadre of clerk (a stationary staff), which was a stationary post. So from the Goods Drivers grade of 1200 – 2040 with Grade Pay of Rs. 2800/- the applicant's new grade changed to Rs. 1400 – 2300 with Grade Pay of Rs. 4200/- and this change as per the rules in the Master Circular No. 25 (supra) cannot be considered as a promotion at all, from any angle, as it was absorption in a new scale after de-categorization due to medical reason. Hence, I have no doubt in my mind that respondent authorities have erred in considering that this event was applicant's substantive promotion.

12. If I ignore this to be his promotion than it emerges that from his initial substantive appointment after joining regular duty on 14.04.1991, earlier under ACP the applicant was eligible for one upgrade in 12 years, as per the Railway Board's letter dated 01.10.1999. Simple perusal of the impugned order dated 14.07.2021 it is evident as well as in the pleadings of the respondents also it is not understandable why they were silent on applicant's eligibility for first ACP on completion of 12 years, which had fallen due in the year 2003. This fact has to be examined by the respondents and as per the then existing circular the applicant is entitled for his first ACP in 2003. Whereas, it is evident from record that the applicant got a substantive promotion on 30.06.2006, which is not disputed in the Grade of Rs. 6500 – 10500. If I consider one ACP in 2003 and his regular promotion in 2006 then only one more up-gradation the applicant would have been eligible further, under MACP (3rd MACP); when the new MACP rules came into being vide Railway Board letter dated 10.06.2009.

13. As the applicant was eligible for his first ACP in the year 2003, and he got his substantive promotion on 30.06.2006 which is not disputed by either of the parties, hence, he could have got his third upgrade under the new MACP scheme after 30 years of his service or 10 years after his second promotion whichever was earlier, so the third MACP he could have been given rightfully on 30.06.2016. Whereas, from the record it is evident that he was given second MACP only on 14.04.2011 with Grade Pay Rs. 4800/- which was later taken back as it was considered by the authorities as defective, and instead another MACP was given to him effective on 20.07.2016. Hence, from the records available before me, I have no doubt to say that the authorities erred in granting the benefit of ACP and MACP to the applicant as per rule, and the impugned order dated 14.07.2021 needs interference.

14. In the case of State of Punjab and others Vs. Rafiq Masih and others reported in (2015) 2 Supreme Court Cases (L&S) 33, Hon'ble Supreme Court has been pleased to observe as under:-

"It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).

(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.

(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.

(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

15. Simple reading of the above judgment clearly shows that recovery from retired employees, or employees who are due to retire within one year, of the order of recovery; where payments have mistakenly been made by the employer not due to any fraud or fault on the part of the employee is not permissible. The respondents are unable to show anything contrary to this in facts or rule.

16. Not only this, the Hon'ble Supreme Court in the case of Chandi Prasad Uniyal and others Vs. State of Uttarakhand and others reported in (2012) 8 Supreme Court Cases 417, has been pleased to observe as under:-

"8. We are of the considered view, after going through the "various judgments cited at the Bar, that this Court has not laid down any principle of law that only if there is misrepresentation or fraud on the part of the recipients of the money in getting the excess pay, the amount paid due to irregular/wrong fixation of pay be recovered."

17. In the case of Davinder Singh and others Vs. State of Punjab and others reported in (2010) 13 Supreme Court Cases, 88, the Hon'ble Apex Court has also been pleased to observe that "opportunity of hearing is to be given to the delinquent before passing an order."

18 . From the record and pleadings, rules and the judgment of Hon'ble Supreme Court cited above it is evident that there is anomaly in the impugned order of recovery as well as in the grant of MACP to the applicant. Hence, I pass following orders:-

"The OA is allowed. The impugned order dated 17.07.2021 is set aside. The respondents are directed to reconsider the case of the applicant afresh for grant of ACP and MACP ignoring the re-absorption of medically de-categorised applicant on 27.07.1994 from the cadre of running staff of Goods Guard to a stationary staff of clerk from the grade of Rs. 1200 – 2040 with Grade Pay Rs. 2800/- and from 1400 – 2300 with Grade Pay Rs. 4200/- as a promotion, as it was not a promotion and was only absorption in an equivalent grade as per the departmental rules.

The respondent has to also examine the eligibility of the applicant in the ACP scheme under which he was eligible for upgrade in the year 2003 and then regular promotion he was having on 30.06.2006 and after that another 3rd MACP upgrade on 30.06.2016 for which the applicant was eligible.

Furthermore, as cited case of State of Punjab and others vs. Rafiq Masih and others (supra) is relevant to this case, in which the wrong calculation made at the time of retirement from Group "B", cannot be recovered if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover. The respondents are directed to return the recovered amount of Rs. 1,08,081/- to the applicant with 6% interest within a period of three months from the date of receipt of a certified copy of this order. The respondents shall complete all the aforesaid exercise within a period of three months.

All pending MAs, if any, shall stand disposed of. No costs."