(2014) 10 DEL CK 0186

In the Delhi High Court

Case No : W.P. (C) 1738/2014 and C.M. No. 3639/2014

Union of India and Others APPELLANT

Vs

Gaje Singh and Others RESPONDENT

Date of Decision : 28-10-2014

Acts Referred:
Constitution of India, 1950 — Article 226, 39 (d)

Citation : (2014) 10 DEL CK 0186

Hon'ble Judges : Vipin Sanghi, J;S. Ravindra Bhat, J

Bench : Division Bench

Advocate : J.K. Singh, Advocates for the Appellant; Sameer Sharma and Tinu Bajwa, Advocates for the Respondent

Judgement

Vipin Sanghi, J.—The Petitioner/UOI has preferred the present Writ Petition under Article 226 of the Constitution of India to assail the order dated 15.02.2013 passed in OA No. 2815/2011 and order dated 26.08.2013 in RA No. 122/2013 by Central Administrative Tribunal, Principal Bench, Delhi (CAT/ Tribunal), whereby the Tribunal allowed the said application and quashed the order of the Railway Board dated 12.07.2011. It further directed the petitioners to consider grant of MACP benefit to the respondents as per Clause-5 of the Scheme.

2. The respondents initially joined services as Assistant Station Master (ASM) in the initial pay scale of Rs. 330-560. After about 30 years of service in Railways, respondents no. 1 to 4 were promoted and are now serving as Chief Controller, while respondent no. 5 got promoted, and is serving as Deputy Chief Controller. All the respondents have rendered more than 30 years of service on 01.09.2008.

3. The hierarchy of posts in the cadre of ASM, after the recommendations of 4th, 5th and 6th Pay Commission is as below:

After the recommendations of 6th CPC, the Grade of Rs. 5000-8000/- and Rs. 5500-9000 have been merged in Pay Band II+ Grade Pay 4200/- w.e.f. 01.01.2006. Consequently, promotion from ASM to Section Controller (SCNL) carries the same Grade Pay.

4. The Railway Board while accepting recommendations of 6th Central Pay Commission and revising the pay scales, also introduced Modified Assured Career Progressive Scheme (MACP) Scheme for Railway Board employees vide Railway Board circular No. R.B.E. No. 101/2009 dated 10.06.2009. Under the aforesaid scheme three financial upgradations were made admissible to the railway employees on completion of 10, 20 and 30 years of service, in case they had not been able to secure regular promotion in their cadre. Clause-5 of the aforesaid scheme reads as follows:

"5. Promotions earned/ upgradations granted under the ACP scheme in the past to those grades which now carry the same Grade Pay due to the merger of pay scales/ upgradations of posts recommended by the Sixth Pay Commission shall be ignored for the purpose of granting upgradations under Modified ACPS."

The illustration given in the scheme is as follows:

"Illustration

The pre-revised hierarchy (in ascending order) in a particular organization was as follows:

Rs.5000-8000, Rs.5500-9000 & Rs.6500-10500.

(a) A Railway servant who was recruited in the hierarchy in the pre-revised pay scale Rs.5000-8000 and who did not get a promotion even after 25 years of service prior to 01.01.2006, in his case as on 01.01.2006, he would have got two financial upgradations under ACP to the next grades in the hierarchy of his organization, i.e. to the pre-revised scales of Rs.5500-9000 and Rs.6500-10500.

(b) Another Railway servant recruited in the same hierarchy in the pre-revised scale of Rs.5000-8000 has also completed about 25 years of service, but he got two promotions to the next higher grades of Rs.5500-9000 & Rs.6500-10500 during this period.

In the case of both (a) and (b) above, the promotions/financial upgradations granted under ACP to the pre-revised scales of Rs.5500-9000 and Rs.6500-10500 prior to 01.01.2006 will be ignored on account of merger of the pre-revised scales of Rs.5000-8000, Rs.5500-9000 and Rs.6500-10500 recommended by the Sixth CPC. As per the RS(RP) Rules, both of them will be granted Grade Pay of Rs.4200 in the Pay Band PB-2. After the implementation of MACPS, two financial upgradations will be granted both in the case of (a) and (b) above to the next higher Grade Pays of Rs.4600 and Rs.4800 in the Pay Band PB-2".

Clause-8 of the aforesaid scheme reads as follows:

"8. 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.

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."

5. The respondents claimed that since they had rendered more than 30 years of service as on 01.09.2008 and as per Para-5 of the MACP Scheme - after ignoring the earlier promotion/upgradation, they were granted only two promotion i.e. from PB-I + Grade Pay 2800/- to PB-II + Grade Pay 4200/- & from PB-II + Grade Pay 4200/- to PB-II + Grade Pay 4600/-, they were entitled for the 3rd MACPs upgradation in the next grade pay of Rs.4800/- w.e.f. 01.09.2008.

6. The General Manager, Northern Railway while considering grant of benefit under MACP Scheme, sought the following clarification vide his letter dated 09/16.08.2010 from the Railway Board:

"While implementing MACP Scheme, it is noticed that the ASM who had passed selection and promotion as selection controller are getting deprived of MACP benefit whereas the ASM who failed in the selection are on beneficial side getting the benefit of MACP.

7. However, as no clarification was received from the Railway Board, General Manager vide his order dated 05.07.2011 granted the benefit of 3rd upgradation under the MACP Scheme to the respondents in the grade pay of Rs. 4800/- w.e.f. 01.09.2008. The upgradation was granted subject to clarification from the Railway Board.

8. The Railway Board vide their letter dated 12.07.2011 issued a clarification as follows:

"With reference to the above, it is stated that the instructions on MACP Scheme are categorical and unambiguous. The same should be strictly adhered to, in terms of para-8 of annexure to Board''s letter dated 10.06.2009 (RBE No. 101/2009) 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. Northern Railway''s decision to decide MACP cases contrary to these instructions is a clear violation of the prescribed policy instructions. It is thus advised that corrective steps to rectify the error may be taken at the earliest and all such MACP cases in future to be decided strictly in accordance with the extant instructions on the subject."

Consequently, the Railway Board rejected the claim of the respondents for 3rd upgradation under the MACP Scheme.

9. The respondents, aggrieved by the clarification given by the Railway Board filed the original application which the Tribunal allowed, as otherwise, a situation would be created where the juniors of the respondents would get more pay than

the respondents.

10. Aggrieved by the order of the Tribunal, petitioner preferred the present petition.

11. Learned Counsel for the petitioners submits that clause-5 of the scheme is not applicable to the respondents, as it deals only with ACP cases and not cases of substantive promotions. He further contends that the respondents are not similarly placed as those who did not get the benefit of the ACP upgradation before the coming into force of the MACP Scheme and, therefore, there can be no discrimination amongst un-equals. He submits that the observation of the learned Tribunal that in the instant case, clause-5 of the scheme would be applicable is not correct, as it was not the case of the respondents that they should be given the benefit of the aforesaid clause of the scheme. Rather in their application before the Tribunal, they had challenged clause-8 as being ultra vires and illegal. He further submits that decision of the Railway Board is a policy matter, and should be left to the discretion of the executive. The same should not be interfered with by the CAT/Courts.

12. Learned Counsel for the respondents supported the impugned order by submitting that the decision of the Railway Board was unreasonable, as it was leading to an absurd anomaly. He placed reliance on the decision of this Court in Tejbir Singh Dagar vs. Union of India, W.P. (C) No. 840/2012, decided on 03.01.2014, which deals with a similar situation.

13. Before we proceed further, we consider it appropriate to extract the discussion in the order of the Tribunal, wherein it has been held that Clause- 5 is applicable to the respondents. The relevant portion of the order of the Tribunal reads as follows:

"5. While the General Manager granted the applicants benefit of Clause-5 of the Scheme, the Railway Board has clarified that the cases of the applicants have to be dealt with under Clause-8 of the MACP Scheme. Thus, the issue to be decided is whether Clause-5 or Clause-8 would be applicable for deciding the cases of applicants. Counsel for applicants stated that there is contradiction between Clause-5 and Clause- 8 of the Scheme whereas counsel for respondents argued that Clause-5 deals only with ACP cases and not cases of substantive promotions. We are not inclined to accept either of the two view points. In our opinion a mere reading of Clause-5 quoted above would make it clear that it deals with cases in which promotions/upgradations under the ACP Scheme have been earned prior to acceptance of the new pay scales as recommended by the 6th CPC. On the other hand, Clause-8 deals with promotions earned after acceptance of new pay scale. This is clear from the fact that Clause-8 mentions grade pay in the promotional hierarchy, a concept which was introduced only after acceptance of 6th Pay Commission recommendations. Prior to that there was no provision of grade pay. In the instant case, the contention of the applicants is that in the old pay scales they had earned promotion Rs.5000-8000 to Rs.5500-9000. In our opinion since these two grades have been merged in the revised pay scales and have been put in Pay Band-II with Grade Pay of Rs.4200/- these promotions have to be ignored as per Clause-5 of the MACP Scheme while considering their cases for 3rd upgradation in MACP. If this is not done, then those juniors to the applicants who were still working in the pay scale of Rs.5000-8000 would get placed in the new pay scales in Pay Band-II with Grade Pay of Rs.4200/- and would be entitled to two upgradations under the MACP Scheme to reach Grade Pay of Rs.4800/- whereas applicants would remain entitled to one MACP and would only reach grade pay of Rs.4600/-. Thus, an anomalous situation would be created in which juniors would get more pay than their seniors. Thus Railway Board have erred in giving the clarification vide their impugned letter dated 12.07.2011".

14. Clause-8 applies to those cases where the grade pay is the same, while the pay bands are different. In those cases, where promotion is from one pay band to the other, but the Grade Pay is the same, such promotions/ financial upgradations will be counted for the purpose of considering the eligibility for grant of MACPs. In the case at hand, therefore, clause-8 would not apply, as it is not the petitioners case that the aforesaid conditions are fulfilled in the case of the respondents.

15. On perusal of Clause-5 of the scheme, this Court is of the view that the promotion earned by the employees under the ACP scheme in the grade- which now have the same Grade Pay due to their merger, will not be considered for granting them MACPS. In the instant case, the respondents had earned promotions in pay scale of Rs. 5000-8000 and Rs. 5500-9000, which have been merged and placed in the PB-II with Grade Pay of Rs.4200. Therefore, the promotion of the respondents in the same Grade Pay will be ignored for the purpose of granting them MACPS.

16. It is clear that clause-5 would apply in cases where the promotions were given to the employees prior to application of the recommendations of the 6th CPC. Prior to such recommendations, the respondents secured their promotions in the pay bands of Rs. 5000-8000 and Rs. 5500-9000. Therefore, after the application of the 6th CPC, the aforesaid promotions will be considered as one promotion/ financial upgradation. Thereafter, the MACP Scheme came into being, whereby the employees would be entitled to financial upgradations after completion of 10, 20 and 30 years of their service, if they were not granted regular promotion. In the instant case, the respondents had completed their 30 years in service and as per the aforesaid discussion, they had obtained only one promotion/ financial upgradation as per Clause-5. In the opinion of this Court, as only one promotion had been granted to the respondents, they are entitled to the benefit of two more financial upgradation. Thus, the respondents should be placed in the Grade Pay of Rs. 4800 after their 3rd financial upgradation.

17. In Tejbir Singh Dagar (supra), under the scheme, the salary of the petitioners was fixed lower than the salary of the juniors. This Court directed the

respondents to upgrade the pay of the petitioner as per the ACP Scheme during the application of the 5th CPC. However, the aforesaid order was not implemented. In the meantime, the 6th CPC came into being and the earlier anomaly of the petitioner - regarding lower pay than that of their juniors continued. The respondents justified their actions before the Court on the ground that as per Condition 20, MACP Scheme, ''no additional financial upgradation for the senior employees on the ground that the junior employee in the grade has got higher pay/ Grade pay under the MACPS.'' The Court, allowing the petition, held:

"It does not appeal to the common sense of a reasonable man that Scheme which has been envisaged/ formulated to benefit those employees who are stagnating in the same rank, either due to lack of promotion or failure to clear the departmental examination, by granting them financial up gradation to such stagnant employees, would prejudice meritorious and hardworking employees, who had qualified the Limited Departmental Competitive Examination and climb the ladder of success. They cannot be penalized for their efficiency in securing a promotion to next rank instead of stagnating in same rank. The scheme is a welfare scheme for those employees who stagnate. It is certainly not intended to prejudice senior personnel by compelling them to draw lesser salary than those junior and less meritorious than them. The scheme certainly did not envisaged the disadvantage it was causing to its bright employees. Such working of the Scheme would result in rewarding those who did not succeed in the competitive examination."

(Emphasis Supplied)

Further, this Court in Tejbir Singh Dagar (supra) also placed reliance on the case of Anya v. University of Oxford, 2001 EWCA Civ 405 (CA) , wherein it was held that Article 39 (d) of the Constitution was the guiding factor in interpreting FR-22 and the Principle of stepping up contained in the Fundamental Rules applies when a junior person in the same post starts receiving more salary than his senior on the same post.

18. In the present case also, the respondents - being more meritorious, are suffering and drawing a lesser Grade Pay due to the reason that they obtained two promotions - but in the same Grade Pay, which was merged by the 6th CPC. No junior in the same post can draw more salary than his seniors.

19. In view of the foregoing discussion, this Court finds no reason to interfere with the decision of the CAT. The writ petition is, accordingly, dismissed, but with no order as to costs.

