(2016) 11 DEL CK 0073

In the Delhi High Court

Case No : Writ Petition (Civil) No. 8515 of 2014

Union of India APPELLANT

Vs

All India CGHS Employees Association RESPONDENT

Date of Decision : 09-11-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 3 ADDelhi 73 : (2016) 235 DLT 365

Hon'ble Judges : Mr. Sanjiv Khanna and Mr. Chander Shekhar, JJ.

Bench : Division Bench

Advocate : Mr. Ruchir Mishra and Mr. Sanjiv K. Saxena, Advocates, for the Petitioners; Mr. A.K. Behera and Mr. Nitin Kumar Jain, Advocates, for the Respondents

Final Decision : Allowed

Judgement

Mr. Sanjiv Khanna, J.(Oral) - The Union of India and six others have filed the present writ petition impugning the order dated 31st January, 2014 passed by the Principal Bench of the Central Administration Tribunal (Tribunal, for short) in OA No. 3441/2012, which was filed by All India CGHS Employees Association and three others, the respondents herein.

2. The Tribunal has allowed the said OA and held that the officers working as Pharmacists in the Central Government Health Service (CGHS, for short) would be entitled to three financial upgradations in the grade pay of Rs.4600, 4800 and 5400 without taking into consideration the nonfunctional up gradation to the grade pay of Rs.4200, which is granted after two years of service in the grade pay of Rs.2800.

3. In order to appreciate the controversy, we would like to note the relevant rule position before we refer to the provisions of the Modified Assured Career Progression Scheme (MACP Scheme, for short). The respondent is an association of Pharmacists in the CGHS. Before the implementation of the Sixth Pay

Commission, the hierarchy of posts in the cadre of Pharmacists and their pay scales was as under:-

"Pharmacist

Rs.4500-7000.

Pharmacist Grade-II

Rs.5000-8000.

Pharmacist Grade-I

Rs.5500-9000.

Assistant Depot Manager

Rs.6500-10500"

4. Pursuant to the report of the Sixth Pay Commission, the demands regarding the pay scale of the Pharmacist Cadre were referred to a Fast Track Committee. Thereupon, the Government of India, Ministry of Finance, issued a memorandum dated 18th November, 2009 which reads:-

"While approving the Report of the Sixth Central Pay Commission, the Government referred the matter related to the demands made in regard to pay scales of certain common category posts to a Fast Track Committee. The pay scales of the common category posts of Pharmacists was one of the items referred to the Committee. The recommendation of the Fast Track Committee regarding the pay scales of the common category posts of Pharmacists has since been received. The Committee has recommended that the entry grade of Pharmacists in Central Government should remain at grade pay of Rs.2800 in the pay band PB-1. However, on completion of two years service in the entry grade, all the incumbents should be granted nonfunctional up gradation to the next higher grade having grade pay of Rs.4200 in the pay band PB-2.

2. The recommendation of the Fast Track Committee regarding the pay scale of Pharmacists has been considered by the Government and it has been decided to accept the same. Accordingly, the following pay structure is approved for the common category posts of Pharmacists cadre w.e.f. 1.1.2006:-

Designation

Pre-revised pay scale

Pay structure approved on the recommendation of Fast Track Committee

Remarks

Pharmacist (Entry Grade)

4500-7000

Grade pay of 2800 in PB-1

Entry grade for Pharmacist Cadre:

Essential minimum educational qualifications of 10+2 plus 2 years Diploma in Pharmacy and Registration with State Pharmacy Council.

Pharmacist II

5000-8000

Pharmacist Gr. II and I will be merged and designated as Pharmacist (Non-Functional Grade). This grade to be granted to Pharmacist (Entry Grade) on nonfunctional basis after 2 years of service in the grade pay of Rs.2800

Pharmacist I

5500-9000

Grade pay of 4200 in PB-2

3. Consequent upon the implementation of the above pay structure, promotion from Pharmacist (Entry Grade) to the next higher grade of Pharmacist (Non-Functional Grade) having grade pay of Rs.4200 will be de-linked from vacancies and will become nonfunctional and time-bound. In the case of Organisations like the Ordnance Factory Board, where all the Pharmacists posts are presently in the grade pay of Rs.2800 in the pay band PB-1, the implementation of the above pay structure will result in the introduction of the new Non-Functional Grade having grade pay of Rs.4200 in the pay band PB-2.

4. All administrative ministries may initiate action to implement the above revised pay structure in respect of the common category post of Pharmacist Cadre."

As per the memorandum, the grades of Pharmacist Grade-II and Pharmacist Grade-I, which were earlier in the pay scale of Rs.5000-8000 and Rs.5500-9000 respectively, were merged in the grade pay of Rs.4200 in Pay Band-2, Rs.9300-34800. The Pharmacist, which is the entry level post, were given grade pay of Rs.2800 in Pay Band-1, Rs.5200-20200. Pharmacists (Entry Grade) were entitled to higher grade of Pharmacist (Non-Functional Grade) grade pay of Rs.4200 after two years of service. The entitlement to the higher grade of Rs.4200 was de-linked from vacancies and was made on a time-bound basis.

5. The aforesaid office memorandum which had ameliorated the grievance of the Pharmacists has led to the present controversy; whether the grant of non-functional grade pay of Rs.4200 is to be counted and treated as the first financial up gradation under the MACP Scheme?

6. By letter dated 16th July, 2010, the Director Administration (CGHS), had communicated the decision taken by the Director General in consultation with the Ministry of Health and Family Welfare to the following effect:-

"It has now been decided in consultation with M/o Health & F.W. to implement the said orders in CGHS wef 1.1.2006. Accordingly the following grades of Pharmacist in CGHS will come into existence:-

Designation

Pre-revised pay scale

Pay structure implemented as per 6th CPC

Remarks

Pharmacist (Entry Grade)

Rs.4500-7000

Grade Pay of 2800 in PB-1

Entry Grade

Pharmacist-II (Non-Functional Grade)

Rs.5000-8000

Grade Pay of Rs.4200 in PB-2

This grade to be granted to Pharmacist (Entry Grade) on non-functional basis after completion of 2 years of service in the grade pay of Rs.2800.

They are to be re-designated as Pharmacist-II (Non-Functional Grade)

Assistant Depot Manager (ADM)

Rs.6500-10500

Grade Pay of Rs.4600

The post of ADM is to be filled up on promotion from the feeder post of Pharmacist-II (Non-Functional Grade) on completion of prescribed years of service as per Rectt. Rules.

Accordingly the grant of financial up gradation under MACP Scheme in CGHS to the Pharmacist cadre are to be granted in the following Grades Pay:-

DESIGNATION

GRADE PAY UNDER 1st MACP

GRADE PAY UNDER 2nd MACP

GRADE PAY UNDER 3rd MACP

REMARKS

Pharmacist

-

-

-

On completion of 2 years of regular service a Grade Pay of Rs.4200 to be granted on Nonfunctional basis and to be redesigned as Pharmacist (Non-Functional Grade). This is not to be treated as promotion for MACP purpose as per relevant rule.

Pharmacist (Non-Functional Grade)

Rs.4600

Rs.4800

Rs.5400

Since up gradation to this grade from entry level (Pharmacist) not to be treated as promotion, 1st financial up gradation in the Grade Pay of Rs.4600 are being granted.

Assistant Depot Manager(ADM)

-

Rs.4800

Rs.5400

As above. Therefore, promotion to ADM to be treated as 1st financial up gradation under MACP Scheme. Hence is eligible for 2nd and 3rd MACP.

The aforesaid communication had mentioned the financial upgradations under the MACP Scheme applicable to the Pharmacists Cadre of the CGHS in a tabular form. We shall refer to the remarks column, which is being highlighted by the counsel for the respondent subsequently.

7. Earlier, by the office memorandum dated 2nd June, 2010, the Ministry of Finance had referred to paragraph 2 of the earlier OM dated 18th November, 2009 referring to the grade pay and the merger of the posts of Pharmacist Grade-II and Pharmacist Grade-I which had been re-designated as Pharmacist (Non-Functional Grade) in Pay Band-2 with grade pay of Rs.4200. The said grade pay was to be granted in a time bound manner to Pharmacist (Entry Grade) on a non-functional basis after two years of service in grade pay of Rs.2800. In view of the said position, promotion in the second sentence of paragraph 3 of the OM was to be read as placement. It was also clarified that placement in the grade pay of Rs.4200 would be subject to vigilance clearance.

8. The Director-General of Health Services (CGHS) thereafter wrote letter dated 11th November, 2011 to all CGHS units revising the decision taken and incorporated in the communication dated 16th July, 2010. The relevant portion of the letter dated 11th November, 2011 reads as under:-

"The Directorate in its letter of even No. dated 16.7.2010 had communicated the grant of 1st, 2nd and 3rd MACP in the Grade Pay of Rs.4600, Rs.4800 and Rs.5400 respectively to the cadres of Pharmacists in CGHS while implementing the recommendations of Fast Track Committee as per D/o Expenditure''s OM. No. F.No. 1/1/2008-IC, dated 18.11.2009 by ignoring the up gradation of Grade Pay of Rs.4200 on completion of 2 years of regular service to the entry level pharmacists in the Grade Pay of Rs.2800 for MACP purpose.

However, on consultation with DoPT it has now been clarified that ''as per the provision of MACPS contained in DoPT''s OM dated 19.5.2009, every financial up gradation under the Scheme has been treated as one up gradation and would be offset against one financial up gradation. Accordingly, the grade pay of Rs.4200 allowed to Pharmacist after completion of 2 years under NFG would have to be counted as one up gradation under the MACPS. Thereafter, the benefits of 2nd and 3rd financial up gradation would be allowed to the eligible pharmacists in the grade pays of Rs.4600 and Rs.4800 on completion of their 20 and 30 years of continuous regular service or 10 years stagnation in a single grade pay whichever is earlier.

Accordingly it is proposed to revise the grant of 1st, 2nd and 3rd financial up gradation under MACP Scheme to the Pharmacists cadre in CGHS to Rs.4200, Rs.4600 and Rs.4800 respectively from Rs.4600, Rs.4800 and Rs.5400 respectively as mentioned in the Directorate''s letter dated 16.7.2010. The financial up gradation already granted to the Pharmacists cadres-both at the Directorate''s level and at your level therefore has to be revised accordingly and excess payment recovered.

You are, therefore, requested to bring this to the notice of all concerned to enable them to submit a representation, if any, before initiating action to re-fix the pay."

The communication dated 11th November, 2011 states that nonfunctional up gradation from grade pay of Rs.2800 in Pay Band-1 to grade pay of Rs. 4200 in Pay Band 2 granted to Pharmacist (entry grade) on completion of two years of service in the lower grade should be taken as the first financial up gradation under the MACP Scheme. This was in contrast with and contrary to the earlier communication/letter dated 16th July, 2010 that the non-functional up gradation in the grade pay of Rs. 4200 would not be treated as "promotion for the purpose of MACP Scheme" and would be ignored.

9. The aforesaid change and the letter/communication dated 11th November, 2011 was challenged by the respondent association and its members/office bearers in the OA No. 3441/2012, which as noticed, stands allowed. The communication dated 11th November, 2011 has been set aside holding that the grant of financial up gradation under the MACP Scheme in the Pharmacist Cadre would be in terms of the letter dated 16th July, 2010.

10. In order to appreciate the controversy, we would first interpret the MACP

Scheme, which was notified vide office memorandum dated 19th May, 2009. Paragraphs 1 and 2 of the said letter read as under:-

"The Sixth Central Pay Commission in Para 6.1.15 of its report, has recommended Modified Assured Career Progression Scheme (MACPS). As per the recommendations, financial up gradation will be available in the next higher grade pay whenever an employee has completed 12 years continuous service in the same grade. However, not more than two financial upgradations shall be given in the entire career, as was provided in the previous Scheme. The Scheme will also be available to all posts belonging to Group "A" whether isolated or not. However, organised Group "A" services will not be covered under the Scheme.

2. The Government has considered the recommendations of the Sixth Central Pay Commission for introduction of a MACPS and has 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."

11. The Department of Personnel, Public Grievance and Pension was conscious of the fact that there were differences between MACP Scheme and the earlier ACP Scheme, which was floated on the basis of the recommendations of the Fifth Pay Commission. This aspect has been noticed in paragraph 1 of the letter dated 19th May, 2009 quoted above. As is apparent, the aforesaid aspect is significant and of seminal importance.

12. The relevant paragraphs of the MACP Scheme read:-

"1. There shall be three financial upgradations under the MACPS, counted from the direct entry grade on completion of 10, 20 and 30 years service respectively. Financial up gradation under the Scheme will be admissible whenever a person has spent 10 years continuously in the same grade-pay.

2. The MACPS envisages merely 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 CCS (Revised Pay) Rules, 2008. Thus, the grade pay at the time of financial up gradation 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. 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.

3. XXXXX

4. XXXXX

5. Promotions earned/up gradation~ granted under the ACP Scheme in the past to those grades which now carry the same grade pay due to 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.

6. XXXXX

7. XXXXX

8. XXXXX

9. XXXXX

10. XXXXX

11. XXXXX

12. XXXXX

13. Existing time-bound promotion scheme, including in-situ promotion scheme, Staff'' Car Driver Scheme or any other kind of promotion scheme existing for a particular category of employees in a Ministry/Department or its offices, may continue to be operational for the concerned category of employees if it is decided by the concerned administrative authorities to retain such Schemes, after necessary consultations or they may switch-over to the MACPS. However, these Schemes shall not run concurrently with the MACPS.

14. XXXXX

15. XXXXX

16. On grant of financial up gradation under the Scheme, there shall be no change in the designation, classification or higher status. However, financial and certain other benefits which are linked to the pay drawn by an employee such as HBA, allotment of Government accommodation shall be permitted.

17. The financial up gradation would be on nonfunctional basis subject to fitness, in the hierarchy of grade pay within the PB-1.Thereafter for up gradation under the MACPS the benchmark of ''good'' would be applicable till the grade pay of Rs. 6600/- in PB-3. The benchmark will be ''Very Good'' for financial up gradation to the grade pay of Rs. 7600 and above.

18. XXXXX

19. The 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. Therefore, no reservation orders/roster shall apply to the MACPS, which shall extend its benefits uniformly to all eligible SC/ST employees also. However, the rules of reservation in promotion shall be ensured at the time of regular promotion. For this reason, it shall not be mandatory to associate members of SC/ST in the Screening Committee meant to consider cases for grant of financial up gradation under the Scheme.

20. Financial up gradation under the MACPS shall be purely personal to the employee and shall have no relevance to his seniority position. As such, there

shall be no additional financial up gradation for the senior employees on the ground that the junior employee in the grade has got higher pay/grade pay under the MACPS.

21. XXXXX

22. If Group "A" Government employee, who was not covered under the ACP Scheme has now become entitled to say third financial up gradation directly, having completed 30 year''s regular service, his pay shall be fixed successively in next three immediate higher grade pays in the hierarchy of revised pay-bands and grade pays allowing the benefit of 3% pay fixation at every stage. Pay of persons becoming eligible for second financial up gradation may also be fixed accordingly."

Paragraph 1 of the MACP Scheme has been rightly highlighted by the counsel for the petitioners and the respondents. Paragraph 1 stipulates that the employees would be entitled to three financial upgradations counted from the direct entry grade. In the present case, it is an undisputed position that the direct entry grade for Pharmacists was Pay Band-1 with grade pay of Rs.2800. Each employee, i.e., Pharmacist (Entry Grade) as per paragraph 1, were/are entitled to three financial upgradations. These upgradations were/are to be granted on completion of 10, 20 and 30 years of service after the said employee has spent 10 years continuous service in the same grade pay.

13. Paragraph 2 of the MACP Scheme is equally important for it stipulates that the MACP Scheme envisages mere placement in the 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 Central Civil Services (Revised Pay) Rules, 2008 (2008 Rules, for short). Paragraph 2 incorporates a distinct departure from the earlier ACP Scheme, which referred to financial up gradation equal to or as per the next promotional post in the hierarchy. On the other hand, MACP Scheme mandates and refers to the first schedule of the 2008 Rules, which in Part-A, Section 1 sets out the revised pay band and grade pay for the posts with the present pay scale and the revised pay structure. In the present context, we would take on record the table in Part A, Section 1 from serial No. 9 (S- 8) to serial No. 16 (S-15). The said table reads as under:-

"Present Scale

Revised Pay Structure

Sl. No.

Post/Grade

Present Scale

Name of Pay Band/Scale

Corresponding Pay Bands/Scales

Corresponding Grade Pay

(1)

(2)

(3)

(4)

(5)

(6)

9

S-8

4500-125-7000

PB-1

5200-20200

2800

10

S-9

5000-150-8000

PB-2

9300-34800

4200

11

S-10

5500-175-9000

PB-2

9300-34800

4200

12

S-11

6500-200-6900

PB-2

9300-34800

4200

13

S-12

6500-200-10500

PB-2

9300-34800

4200

14

S-13

7450-225-11500

PB-2

9300-34800

4600

15

S-14

7500-250-12000

PB-2

9300-34800

4800

16

S-15

8000-275-13500

PB-2

9300-34800

5400"

As per the aforesaid table, the employees in the pre-revised pay scale of Rs.4500-7000, which was applicable to Pharmacists (entry grade), were entitled to revised pay structure in Pay Band-1, Rs.5200-20200 plus grade pay of Rs.2800. The next higher grades in the hierarchy were S-9 and S- 10, which had been clubbed and as per the revised pay structure, were merged in Pay Band-2, Rs.9300-34800 with grade pay of Rs.4200. As stated in paragraph 2 of the MACP Scheme, this would constitute the first financial up gradation for the Pharmacist

(Entry Grade) appointed in Pay Band I Rs. 5200-20200 with grade pay of Rs. 2800. The next higher grade pay as per the aforesaid table would be S-13 in Pay Band-2, Rs.9300-34800 plus grade pay of Rs.4600. This would be the second financial up gradation for the Pharmacist (Entry Grade). The third financial up gradation would be in S-14, Pay Band-2, Rs.9300-34800 plus grade pay of Rs.4800. This, according to us, is the correct way to interpret and implement paragraph 2 of the MACP Scheme. The said interpretation is in consonance and harmony with our interpretation of paragraph 1 of the MACP Scheme.

14. Paragraph 5 of the MACP Scheme states that the promotions and upgradations granted under the ACP Scheme, which had been withdrawn and which now carry the same grade pay due to merger of pay scales/upgradations of pay scales recommended by the 6th Pay Commission, can be ignored for granting up gradation under the MACP Scheme. The aforesaid paragraph may have some application for employees working at the post of Pharmacist Grade-I when the MACP Scheme was introduced, for there was a merger of pay scales of Pharmacist Grade-I with Pharmacist Grade-II. We, however, do not propound and pronounce any judgment on the said aspect as this would depend on the factual matrix of each case. If any particular employee wants to and seeks reliance on paragraph 5 of the MACP Scheme, he will be at liberty to initiate action and raise his grievance. The association may also raise the grievance in accordance with law with reference to the particular factual matrix. It will not be possible or appropriate for this Court to decide the matter without reference to the factual matrix and only on the basis of hypothetical considerations. Counsel for the petitioners has given illustrations to submit that the letter/communication dated 11th November, 2011 takes notice and is in consonance with paragraph 5 of the MACP Scheme. Prima facie, the petitioners may be correct but, for reasons stated above, we would hesitate to expound a firm, universal conclusion.

15. Paragraph 13 of the MACP Scheme states that existing time-bound promotions, including in-situ promotion scheme or other kinds of promotion schemes existing for a particular category of employees in the Ministry or Department or its offices could continue to be operational if it was decided by the administrative authority to retain such schemes after consultation. However, the said scheme cannot run concurrently with the MACP Scheme. This stipulation is significant for it postulates that the employees cannot get dual benefit under the MACP Scheme or under the scheme relating to time-bound promotion or in-situ promotion. The reason is also obvious. Paragraphs 1 and 2 of the Scheme postulate grant of three financial upgradations after ten years of service, as per the pay band and grade pay as given in Section 1, Part A to the First Schedule. Once an employee has got the benefit of time-bound promotion or in-situ promotion and has got the higher pay scale, the same has to be counted for the purpose of financial up gradation under the MACP Scheme. Similarly, paragraph 16 of the MACP Scheme affirms our interpretation for it stipulates that there would be no change in designation, classification or higher status on the grant of financial up gradation. However, certain benefits like HBA, allotment of

Government accommodation shall be permitted. Paragraph 17 re-affirms what has been stated in paragraph 2 for it states that up gradation would be on non-functional basis subject to fitness in the hierarchy of grade pay within Pay Band-1. The up gradation under the MACP Scheme would be on the benchmark of ''Good'' till the grade pay of Rs. 6600/- in Pay Band-3. The benchmark of ''Very Good'' will be applicable for financial up gradation to the grade pay of Rs. 7600 and above. Paragraph 19 contemplates that the placement in the higher grade pay or financial up gradation shall be personal and will be restricted to the next higher grade pay and grant of financial up gradation only. It would not amount to actual or functional promotion of the employees. Accordingly, no reservation or roster would apply. This would support the contention of the petitioner that the grant of non-functional grade pay is treated as financial up gradation for the purpose of the MACP Scheme. For grant of non-functional up gradation, there is no reservation and there is also no requirement of vacancy. It postulates time-bound up gradation of pay scales. Similar is the effect of paragraphs 20 and 22.

16. Having examined the aforesaid aspects, we have to hold that the letter/ communication dated 11th November, 2011 reflects the correct interpretation of the MACP Scheme and the earlier order/communication dated 16th July, 2010 had wrongly interpreted the MACP Scheme.

17. Learned counsel for the respondents, during the course of hearing, had submitted that paragraph 1 of the MACP Scheme requires that the employees would be entitled to three financial upgradations after the employee had stagnated at a particular pay scale/grade pay of ten years continuously. This is correct, but this would not help and assist the respondents. The Scheme envisages three financial upgradations at the end of 10, 20 and 30 years of service. The Pharmacist (Entry Grade) were/are entitled to financial up gradation after two years. Paragraph 1 does not state or stipulate that the said financial up gradation has to be ignored and not taken into account for the purpose of MACP Scheme. If a Pharmacist (Entry Grade) has remained at the said post for ten years in the grade pay of Rs.4200, he would be entitled to benefit of financial up gradation to the grade pay of Rs.4600 and then after ten years to another financial up gradation in the grade pay of Rs.4800. The argument would not lead us to the conclusion that the financial up gradation of Pharmacist (Entry Grade) at the first stage after two years of service in grade pay of Rs. 2800 to Rs. 4200 would be clubbed and accordingly, the first financial up gradation would be to grade pay of Rs.4600 and then to grade pay of Rs.4800 and thereafter to grade pay of Rs.5400. The argument of the respondent, in fact, ignores the first financial up gradation from Rs. 2800 to the grade pay of Rs.4200 and is, therefore, not acceptable.

18. Another issue, which may arise for consideration, is with regard to recovery of arrears. We would not like to comment and deal with the question of arrears as the decision on the said aspect has to be specific to the facts and the case.

Different issues and considerations would apply to individuals, as has been held in the case of State of Punjab v. Rafiq Masih, (2015) 4 SCC 334. It may be advisable for the petitioners to first issue show cause notice before they take steps for recovery as there may be extennuating circumstances, which may warrant non-recovery. We clarify that we do not express any opinion on the said aspect.

19. With the aforesaid observations and directions, the writ petition is allowed to the extent indicated above. There will be no order as to costs.

