

(2015) 01 BOM CK 0092

In the Bombay High Court

Case No : Writ Petition Nos. 3722 and 5296 of 2013

Union of India

APPELLANT

Vs

P.M. Wagh

RESPONDENT

Date of Decision : 09-01-2015

Acts Referred:

Citation : (2015) 6 BomCR 627

Hon'ble Judges : C.V. Bhadang, J.;A.P. Bhangale, J.

Bench : Division Bench

Advocate : Gauri Venkatraman, for the Appellant; A.B. Bambal, Advocates for the Respondent

Judgement

C.V. Bhadang, J.—Rule. Rule made returnable forthwith. Heard finally by consent of the learned Counsel for the parties.

2. Both these petitions involve a common question as to interpretation to be placed on para 11 of the Office Memorandum (OM) dated 19.5.2009, by which the Modified Assured Career Progression Scheme (MACP) was made applicable to the Central Government employees. As both these petitions involve common question, they are being disposed of by this common judgment.

3. The petitioners in both these petitions are in the employment of the Central Government. By Office Memorandum dated 9.8.1999, Assured Career Progression scheme (ACP/Old Scheme) was made applicable to the Central Government employees. The scheme envisaged an assured up-gradation to the next pay scale after a period of 12 years and 24 years of service i.e. twice in the service career to the employees subject to certain conditions. The said scheme was modified by the Office Memorandum dated 19.5.2009 and a Modified Assured Career Progression Scheme (MACP) was made applicable retrospectively with effect from 1.9.2008. The said modified scheme envisages three such career progressions (instead of two under the ACP on completion of 10 years, 20 years and 30 years of service, subject to other conditions. Para 11 of the Office

Memorandum which is relevant for the purpose reads as under :

"It is clarified that no past cases would be re-opened. Further, while implementing the MACP Scheme, the differences in pay scales on account of grant of financial upgradation under the old ACP Scheme (of August 1999) and under the MACP Scheme within the same cadre shall not be construed as an anomaly."

4. The petitioner Shri P.M. Wagh in Writ Petition No.3722/2013 was granted the benefit of ACP under the old scheme with effect from 9.8.1999, on which day, he was granted the first ACP on completion of 12 years service. Under the said scheme, he was granted the second ACP with effect from 12.11.2008 i.e. after the MACP came into force with effect from 1.9.2008. It appears that respondents, by an order dated 15.10.2009 and 12.8.2011 had recalled the benefits awarded by second ACP and a recovery from the pay and allowance was sought to be made. That was challenged by the petitioner Shri P.M. Wagh in Original Application No.2061/2012 before the Central Administrative Tribunal (CAT), Mumbai, Circuit Bench at Nagpur. The learned Member of the Central Administrative Tribunal, by a judgment and order dated 4.12.2012 was pleased to allow the application and the impugned orders dated 15.10.2009 and 12.8.2011 were quashed and set aside. It was declared that the petitioner is entitled to retain the benefits already obtained by second ACP granted to him with effect from 12.11.2008 and the amount already recovered was directed to be refunded.

5. The petitioner Mrs. Dhanashree Vairagare in Writ Petition No. 5296/2013 was granted first ACP on completion of 12 years of service on 9.8.1999 and second ACP on 27.9.2008. The recovery was sought to be made from the petitioner on similar lines and for similar reasons on enforcement of MACP Scheme retrospectively. That was challenged by petitioner Mrs. Dhanashree Vairagare in Original Application No.2184/2009 before the Central Administrative Tribunal, Bombay Bench, Mumbai, Camp at Nagpur. The said original application has been allowed by the learned Member of the Central Administrative Tribunal by a judgment and order dated 5.12.2012. It may be mentioned that placing reliance on para 126.5 of the V Central Pay Commission Report, similar benefits of the interpretation of para 11 of the MACP Scheme was extended to other similarly situated employees, although they may not have challenged the orders of recovery.

6. While allowing the original applications, the learned Member of the Central Administrative Tribunal was of the view that the provisions of para 11 which provide for a protection against reopening of past cases was necessitated on account of the MACP Scheme being made applicable retrospectively. It has thus been held that the term ""past cases"", in para 11 of the Office Memorandum dated 19.5.2009 applies to the cases where the earlier scheme i.e. the ACP was invoked during the period from 1.9.2008 to 18.5.2009. It was found that the cases prior to 31.8.2008 could not have been envisaged by the term ""past

cases"" inasmuch as those cases are not at all governed by the MACP Scheme. In the face of such a finding, it was found that the impugned recovery was unsustainable and was accordingly quashed and set aside.

7. Feeling aggrieved by the orders passed by the Central Administrative Tribunal, the respondents-Union of India have filed these petitions.

8. We have heard Mrs. Gauri Venkatraman, learned counsel for the petitioners in both the petitions. We have also heard Advocate Shri A.B. Bambal for respondent no.1 in Writ Petition No.3722/2013 and Shri M.M. Sudame, learned counsel for respondent no.1 in Writ Petition No.5296/2013.

9. It is submitted by Mrs. Gauri Venkatraman, the learned Counsel for the petitioners that the earlier scheme was replaced by the MACP vide Office Memorandum (O.M.) dated 19.5.2009 with retrospective effect from 1.9.2008. It is submitted that it is on account of the scheme being implemented retrospectively that a need for treatment of the benefits granted under the old scheme, namely, ACP for the period from 1.9.2008 to 19.5.2009 arose and it is provided in paragraph no.11 of the O.M. dated 19.5.2009. It is submitted that the old scheme was operative only till 31.8.2008 and as such the respondents could not claim the benefits of the old scheme after the said date. The learned Counsel would submit that the Department of Personnel and Training (""DoPT"" for short) had clarified that the expression ""past cases"" in paragraph no.11 of the O.M. clearly referred to the cases in which the benefits of the ACP was granted during the period from 1.9.2008 to 18.5.2009. It is, therefore, submitted that the learned Tribunal was in error in holding that the expression ""past cases"" could not refer to such of the employees to whom the benefit was granted for the said period. It is submitted that the reasoning articulated by the Tribunal that in any case as the old scheme ceased to be operative from 1.9.2008, the expression ""past cases"" cannot mean the cases in which the benefit is granted prior to said date, is not correct. The learned Counsel was at pains to point out that in the case of doubt it was for the DoPT to clarify the same and indeed the Department had clarified the said position, which could not have been lightly interfered with. The learned Counsel submitted that the Tribunal erred in not considering the office memorandum as a whole and particularly the effect of conjoint reading of paragraph nos.9 and 11 which would make the position clear. It is submitted that the Tribunal could not have interfered with the policy decision taken by the Government in making the MACP applicable to its employees from a particular date. It is also submitted that if the view taken by the Tribunal would result into overlapping of the benefits of the scheme, in other words, it would result into both the schemes being operative for the period from 1.9.2008 to 18.5.2009, the same would be impermissible. It would also result into rewriting of the terms of the scheme, which is not permissible. The learned Counsel, therefore, submitted that the impugned orders need to be quashed and set aside.

10. On behalf of the petitioner, reliance is placed on the following decisions in support of its various submissions.

- (1) Union of India (UOI) and Others Vs. Asian Food Industries, .
- (2) Ex-Capt. K.C. Arora and Another Vs. State of Haryana and Others, .
- (3) Uday Pratap Singh and Others Vs. State of Bihar and Others, .
- (4) P.U. Joshi and Others Vs. The Accountant General, Ahmedabad and Others, .

11. On the contrary, it is submitted on behalf of the respondents that the whole dispute has arisen on account of MACP being made applicable retrospectively. It is submitted that the view taken by the Tribunal, that the ACP ceased to be operative from 1.9.2008 and as such there was no need for making a provision for protecting the benefits granted under that scheme prior to that date is correct. It is submitted that in that view of the matter, the reasoning articulated by the Tribunal in holding that paragraph no.11 could not have referred to cases of grant of benefit under the ACP prior to 1.9.2008 was correct and proper. The learned Counsel would submit that paragraph no. 11 indeed referred to cases under the old scheme, namely, the ACP, which could have been finalized during the period from 1.9.2008 to 19.5.2009. It is submitted that any other interpretation placed would lead to absurd results, which is not permissible.

12. The learned Counsel also submitted that the benefits granted to employee cannot be altered to his detriment retrospectively. In other words, it is submitted that the benefits which had accrued to the respondents under the ACP could not have been interfered with or taken away by making the MACP retrospective. The learned Counsel would submit that the MACP although appears to give better benefits to the employees, namely, of three chances of assured career progression in the place of two, was in effect less beneficial than the old scheme, inasmuch as under the ACP, up-gradation was to the next higher scale, while under the MACP, up-gradation is only to the next grade within the same pay scale. It is, therefore, submitted that on the basic principles of administrative law, the interpretation, which would lead to interfering with the benefits which have already accrued/vested in the employees, has to be discarded. Reliance is placed on the following decisions in support of the various submissions.

- (1) Union of India (UOI) and Others Vs. Asian Food Industries, .
- (2) Ex-Capt. K.C. Arora and Another Vs. State of Haryana and Others, .

13. Upon hearing the learned Counsel for the parties, the following points were framed and were referred to the learned Counsel for appropriate submissions.

"1) Whether normal rule against retrospectivity would apply even where subsequent Scheme/Policy, is more beneficial than the one it seeks to replace ?

2) If the benefits under ACP (Old Scheme) are to be protected (as being covered by the expression "past cases"), whether it would result in overlapping of the two Schemes, for the period from 1.9.2008 to 18.5.2009 ?

3) What is the effect of conjoint reading of paragraph nos.9 and 11 of the Office Memorandum ?

4) On facts, if MACP is more beneficial, how come it is, resulting into over payment, necessitating recovery ?"

On behalf of the parties, time was sought to make appropriate submissions and on the subsequent date, the parties have addressed the court as also placed on record brief notes of arguments.

14. It is not in dispute that under the ACP there were two up-gradations during the service tenure after putting in 12 years and 24 years of service while under the MACP there are three such up-gradations allowed on completion of 10 years, 20 years and 30 years of service. It is further not in dispute that under the ACP up-gradation allowed was to the next higher pay scale while under the MACP it is to the next grade within the same pay scale.

On this basis, it was submitted that the MACP cannot be said to be wholly beneficial although it allows three such up-gradations in the place of two available under the old scheme. The parties have also produced the computation of the benefits in order to demonstrate as to under what circumstances the enforcement of the MACP is leading to a certain over payment which was required to be recovered. Be that as it may, the fact remains that although in the short run the MACP resulted into a certain recovery, it allows three such up-gradations during the service tenure. We also find that there was no challenge as such raised before the Tribunal to the MACP being enforced retrospectively, based on the ground that the accrued/vested benefits could not have been interfered with. In other words, the respondents had not challenged the retrospective operation of the MACP on any such ground. We also do not propose to go into the aspect as to which of the two schemes is more beneficial inasmuch as it is the policy decision of the petitioners and the same has not been specifically challenged on any such ground before the Tribunal.

15. The dispute essentially turns upon the interpretation to be placed on paragraph no.11 of the office memorandum. It is trite that the office memorandum dated 19.5.2009, making the MACP applicable, has to be read as a whole. Paragraph nos.9 and 11 of the office memorandum, which are relevant for the purpose, read as under :

"9. Any interpretation/clarification of doubt as to the scope and meaning of the provisions of the MACP Scheme shall be given by the Department of Personnel and Training (Establishment-D). The scheme would be operational w.e.f. 01.09.2008. In other words, financial upgradations as per the provisions of the earlier ACP Scheme (of August, 1999) would be granted till 31.08.2008.

11. It is clarified that no past cases would be re-opened. Further, while implementing the MACP Scheme, the differences in pay scales on account of grant of financial upgradation under the old ACP Scheme (of August 1999) and

under the MACP Scheme within the same cadre shall not be construed as an anomaly."

16. It is, thus, clear that the ACP Scheme was to be operational only till 31.8.2008 and not thereafter. Paragraph no.9 in terms makes it abundantly clear that the provisions of the ACP Scheme would not be permissible after 31.8.2008, that is on the MACP Scheme being made operational.

17. The Tribunal has found that the prohibition against reopening of "past cases" was safeguard for those who had been granted financial up-gradation on the basis of earlier ACP Scheme. The Tribunal found that the "past cases" prior to 31.8.2008 have nothing to do with the MACP Scheme as they were in any event to be covered by the ACP Scheme only. It was, therefore, found that the term "past cases" in paragraph no.11 applies to the cases where earlier scheme was invoked during the period from 1.9.2008 to 18.5.2009 and such cases cannot be reopened.

18. In our considered opinion, we are unable to subscribe to the view as taken and the reasons articulated. On behalf of the petitioners, it is submitted that the old ACP Scheme was implemented as proposed by the 5th Pay Commission ("5th CPC" for short) while the MACP was introduced as a consequence of the recommendations of the 6th Pay Commission ("6th CPC" for short). It is submitted that although the revised pay structure as per 6th CPC was implemented w.e.f. 1.1.2006, the MACP was made applicable w.e.f. 1.9.2008. Thus, the past cases would refer to such of the employees in respect of whom benefits under the ACP were granted between 1.1.2006 to 31.8.2008. The protection against reopening was for the benefits granted during this period. We find that this interpretation as has been clarified by the Department of Personnel and Training is in consonance with the overall reading of the office memorandum dated 19.5.2009. The reasoning that the "past cases" prior to 31.8.2008 have nothing to do with the MACP (as they were even otherwise to be covered by the ACP Scheme only) in our considered opinion, cannot be accepted. In our view, paragraph no.11 read with paragraph no.9 of the office memorandum would clearly show that the term "past cases" would not mean, cases in which the benefits of ACP are granted for the period from 1.1.2006 to 31.8.2008. We also find that if the interpretation as placed in the impugned judgment is accepted, that would either result into there being overlapping of the provisions of the ACP/MACP during the said period or it would amount to rewriting of the MACP Scheme (inasmuch as it would result into MACP being applicable only from 19.5.2009 and not retrospective). None of the same would be permissible.

19. In the face of the view as is being taken, we would like to make a brief reference to the cases cited on behalf of the parties. In the case of Ex Capt. K.C. Arora and another (supra) the dispute was between direct recruits and promotees. In paragraph no.15 of the judgment, the Hon'ble Apex Court held that the Parliament as also the State Legislature have plenary powers to legislate within the field committed to them and subject to certain constitutional

restrictions, they can legislate prospectively as well as retrospectively. It has been further held that every statute prima facie would be prospective unless it is expressly or by necessary implication made to have retrospective effect. It has also been held that the rule in general is applicable where the object of the statute is to affect the vested rights or to impose new burden or to impair existing obligations.

In the case of Asian Food Industries (supra) again it has been held that by reason of a policy a vested or accrued right cannot be taken away. Such a right therefore, cannot a fortiori be taken away by an amendment thereof.

20. Turning to the present case, we find that it has not been conclusively shown that the MACP Scheme is less beneficial than the earlier ACP and at any rate, there was no challenge to the office memorandum on any such ground before the tribunal. The dispute was only as regards interpretation to be placed on paragraph no.11 of the office memorandum. In that view of the matter, we do not find that the interpretation as placed on paragraph no.11 of the office memorandum can be sustained. Consequently, the writ petitions are allowed. The impugned judgments and orders of the Central Administrative Tribunal are hereby quashed and set aside. The original applications are hereby dismissed.

Rule is made absolute in the aforesaid terms. In the circumstances, however, the parties are left to bear their own costs.