

**COURT No.1, ARMED FORCES TRIBUNAL
PRINCIPAL BENCH, NEW DELHI**

OA 1277/2016

Dated 01 February 2018

No. 3177215W Ex Hav Mohan Singh Tanwar
Aged 53 years S/O Shri Bhagwat Singh Tanwar,
presently Resi at House No. 721(4), Shanti Vihar,
Gali No. 1, Deenpur, Najafgarh, New Delhi Applicant

Versus

1. Union of India, Through it's Secretary
Ministry of Defence
South Block, New Delhi-110 011
2. The Chief of the Army Staff
Through Adjutant General (AG/PS-2(c))
Army Headquarters
Sena Bhawan, New Delhi-110 011
3. Officer-in-Charge Records
Records The JAT Regt
Pin-900 496
C/o 56 APO
4. PCDA (Pension)
Draupati Ghat
Allahabad (UP-211 014) Respondents

For Applicant :Mr. JP Sharma, Advocate
For Respondentss :Ms. Barkha Babbar, Advocate

CORAM:

HON'BLE MR. JUSTICE V.S. RAVI, MEMBER (J)
HON'BLE LT. GEN. GYAN BHUSHAN, MEMBER (A)

JUDGMENT

"Per Hon'ble Lt. Gen Gyan Bhushan, Member (A)"

1. The present Original Application has been preferred under section 14 of the Armed Forces Tribunal Act 2007 claiming the following reliefs:

- (a) Quash and set aside the impugned order dated 30.05.2011 and 08.01.2016 as Annexure A-1 (Colly) impugned Order.**
- (b) To grant 3rd MACPS with minimum increase of 3% of total pay w.e.f. 01.10.2007 after completed 24 years of colour service in the rank of Hav and accordingly pensionary benefit to the applicant by taking consideration benefits of ACP (MACPS) as applicable along with interest @ 10% p.a. interest till payment be made which has not been released willfully.**
- (c) Any other appropriate order or direction which this Hon'ble Tribunal may be deem fit and proper in facts and circumstances of the case.**

2. The factual matrix as agreed by both learned counsel for the parties is that the applicant was enrolled in the Indian Army on 21 September, 1983 and discharged from service in the rank of Hav. w.e.f 30th September, 2007 (Afternoon). The applicant is getting Service Pension. Govt. of India introduced Modified Assured Career Progression Scheme (in short MACPS) in the Sixth Central Pay Commission. Applicant's request for grant of 3rd financial benefit of MACPS was denied by the Respondents vide order dated 8th January, 2016, aggrieved he has filed the Original Application.

3. Submission of learned counsel for the applicant is that the applicant is not being paid 3rd MACP wef 01.10.2007 as he was discharged from service in the rank of Hav after completing 24 years of service. Essence of the submissions of learned counsel for the applicant is that as the Government has considered the recommendations of the 6th Central Pay Commission for introduction of Modified Assured Career Progression Scheme and has accepted the same with modification to grant three financial up-gradation under the MACPS at intervals of 8,16 and 24 years of continuous regular service. A Gazette notification dated 30.08.2008 was also issued by Govt. of India. Thereafter, Special Army Instructions were also issued by Govt. Of India vide notification dated 11.10.2008. As per the notification para 15 of SAI 1/S/2008, the applicant is entitled for 3rd MACP w.e.f. 01.10.2007. Learned counsel for the applicant placed reliance on the judgment of **Radha Krishna Sharma vs Union of India & Others in O.A. No. 42/2013 decided on 21.05.2014** by AFT Regional Bench, Chandigarh, **Ex Ashok Biswas Vs Union of India in OA No. 410/2014 decided on 17.11.2014** by the AFT (PB), New Delhi, **Ex Hav (Hony Nb Sub) Rajeev Kumar Vs Union of India & Others in OA No. 260/2015 decided on 19th January, 2016** by AFT(Principal Bench), New Delhi and **Ex Havildar Abraham. C.U. and others vs. Union of India and**

others in O.A. 103 of 2011 dated 17.07.2013 by the Armed Forces Tribunal, Kochi Bench,

4. Learned counsel for the respondents in rebuttal submitted that the benefit for grant of first ACP of Nk on completion of 10 years of service on 21st September, 1993 could not be extended to the Applicant as the policy of ACP came into effect w.e.f. 07th August, 2003. He was promoted to the rank of Havildar on 01st August, 2003 prior to completion of 20 years of service on 21st September, 2003. As such, the Applicant could not be granted the benefit of second ACP of Hav on completion of 20 years of service. In supersession of ACP scheme, Government of India, Ministry of Defence introduced MACP w.e.f. 01st September, 2008 which envisages merely placement in the immediate next higher grade pay in the hierarchy of the recommended revised pay bands and grade pay at intervals of 8, 16, 24 years of continuous regular service vide Special Army Instructions I/S/2008 dated 11 October, 2008. Had this MACP Scheme been made effective with effect from 01st January, 2006, the Applicant would have been given benefit of third financial up gradation of MACPS i.e. 21st September, 2007. Since the MACP Scheme came into effect with effect from 01st September, 2008, therefore the Applicant was not considered eligible for third financial up gradation of MACP with effect from 21ST September, 2007. He submitted that the

Applicant was discharged from service w.e.f. 01st October, 2007 (FN) i.e. prior to the introduction of Modified Assured Career Progression Scheme for the JCOs/OR in the Army. Learned counsel for the respondents further submitted that the personnel who had retired during the period from 01st January, 2006 to 31st August, 2008 are not entitled for this benefit. Though learned counsel for the respondents initially defended the policy but subsequently agreed that in similar cases various Benches of AFT have granted relief and that the case is squarely covered by these judgments.

5. We have heard learned counsel for the parties and have perused the record.

6. We recall the judgment and order dated 17.07.2013 of the Armed Forces Tribunal, Regional Bench, Kochi passed in O.A. 103 of 2011: ***Ex Havildar Abraham. C.U. and others vs. Union of India and others*** whereby the Tribunal has directed the scheme to be implemented from 01.01.2006. The relevant portion of observations made by the Armed Forces Tribunal, Kochi Bench, needs reproduction, and is reproduced as under:

"9. So far as the claim of the applicants for the benefit of the Assured Career Progression Scheme introduced by the respondents by the letter dated 3.8.2003 (Annexure A2) is concerned, it has no substance. The Government, keeping in view the recommendations of the 5th Central Pay Commission decided to grant the benefit to only those persons who held the rank of Sepoy. The benefit was not extended to any other rank of the Army including direct entry Havildars. There could not be any claim for parity or equality with Sepoy, as

the Havildar being superior in rank could not be said to be at par with Sepoy, as such, both the Sepoy and Havildar were two different and distinct classes, therefore, there was no violation of the provisions of Articles 14 and 16 of the Constitution of India, in restricting the benefit of Assured Career Progression Scheme to the cadre of Sepoy only. So far as the benefit of the MACPS as introduced by the respondents No.1 vide letter dated 30th May, 2011 (Annexure A5) is concerned, it was made available not only to Sepoy but also other ranks falling with the category of PBORs, including direct entry Havildars. The introduction of MACPS was made according to the recommendations made by the 6th Central Pay Commission in para 2.3.34, which may be reproduced as follows:

"2.3.34 Presently PBORs in Defence Forces are eligible for two time bound upgradations on completion of 10 and 20 years of service. The Defence Forces have demanded reduction of period for time bound upgradations to 8 and 12 years. Other suggestions have also been made regarding residency periods for promotion of PBORs. The Commission notes that under the Scheme of Assured Career Progression (ACPS) for civilians, the upgradations are given on completion of 12 and 24 years of service. Demands for reduction of the residency period in case of civilians were also received. However, the Commission has been unable to accept this demand keeping in view the revised scheme of running pay bands and annual increments as a percentage of pay. In such a scenario, any reduction in the prescribed residency period under ACPS for Defence Forces personnel would not be justified especially when the residency period requirements in their case are already lower than in the case of civilian employees. Accordingly, the residency periods for time bound upgradations for PBORs shall remain unchanged. Under the Modified Assured Career Progression now being proposed for the civilians, financial upgradations will entail one increment without any change in the grade pay. In consonance with the scheme of the Report to ensure

parity between civilians and Defence Forces, a similar dispensation needs to be extended in case of the latter. The Commission, therefore, recommends that the time bound promotion scheme in case of PBORs shall allow two financial upgradations on completion of 10 and 20 years of service as at present. The financial upgradations under the scheme shall allow benefit of pay fixation equal to one increment along with the higher grade pay. As regards the other suggestions relating to residency period for promotion of PBORs, Ministry of Defence may set up an Inter Services Committee to consider the matter after the revised scheme of running pay bands is implemented.”

Accordingly, the Commission recommended that time bound promotion scheme in the case of PBORs shall allow two financial upgradation on completion of 10 and 20 years of service, and the upgradation shall be provided by way of pay fixation equal to one increment along with higher grade pay in the concerned pay band. It appears that the Government accepted the recommendation of the 6th Central Pay Commission with further liberalisation to the effect that upgradation was made applicable three times. The first upgradation on completion of 8 years of service, second upgradation on completion of 16 years of service and third upgradation on completion of 24 years of service. Most of the recommendations of the 6th Central Pay Commission regarding pay and allowances were made effective from 1.1.2006. Therefore, the intention behind the introduction of Modified Assured Career Progression Scheme was to provide the benefit of the said scheme with effect from the said date. But, it appears that the Government was to constitute a Committee, therefore, the delay occurred in bringing out the scheme into operation. Accordingly, the Government ultimately issued the letter, Annexure A5, but we fail to understand as to what prompted respondents No.1 to implement MACPS only with effect from 1st September, 2008. We do not find any reason as to

why the scheme was not introduced with effect from 1.1.2006, especially when the recommendations of the 6th Central Pay Commission with regard to pay etc. were implemented by the respondents No.1 with effect from 1.1.2006. The policy to introduce MACPS with effect from 1.9.2008 instead of 1.1.2006 has resulted in depriving the benefits to direct entry Havildars and other PBORs, who were in service on 1.1.2006 and retired before 1st September, 2008, and had the eligibility to get the benefit of the Scheme. Sepoys had been granted the benefit of the old scheme of ACP in the year 2003 and were even allowed to avail the benefit of the same scheme from 1.1.2006 to 31.8.2008. So, they were not, in any way, in a disadvantageous position due to the delayed implementation of the MACPS, but it affected all those who had no benefit of ACP, as introduced by the 5th Central Pay Commission and became entitled to MACPS as per the recommendations of the 6th Central Pay Commission and retired prior to 1.9.2008. Article 14 of the Constitution of India ensure to all equality before the law and equal protection of the laws. The equality clause so provided in the Constitution can be made subject to a valid classification, based on a just objective. The result to be achieved by the just objective pre-supposes, the choice of some differential treatment over others. To put it otherwise, the test for a valid classification may be summarised as a distinction based on a classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved. Whenever a cut off date is fixed to categorise one set of persons for favourable consideration over others, twin test for classification, namely the distinguishing rationale based on a just objective and the choice of differentiating one set of person from another having a reasonable nexus to the objective sought to be achieved, must necessarily be satisfied. Learned counsel for the applicant submitted that there was no justification to enforce MACPS from 1.9.2008 instead of 1.1.2006 by depriving those who retired after 1.1.2006 but before 1.9.2008. According to the

learned counsel, there was no rationale behind the classification nor it had any nexus to the object sought to be achieved by making the classification. He next tried to contend that there could be a financial reason for keeping the MACPS scheme in abeyance from 1.1.2006 to 31.8.2008. But, it was not a valid reason to deny the benefits with effect from 1.1.2006 especially when most of the benefits extended by the 6th Central Pay Commission have been extended with effect from that date. Prescription of pay scales, OA No.103 of 2010 - 11 - schemes for promotion including time bound scale such as ACP, MACPS, is a very complex exercise to be done by expert bodies like the Pay Commission, employer etc. and cannot be taken by any Courts or Tribunals on their own, due to the simple reason that they lack necessary expertise to undertake the issue. In this view of the matter, we have no option except to remit the matter to respondents No.1 to give due consideration to the view points of the applicants and take appropriate decision thereon keeping in view the recommendations and the objects behind the recommendations of the 6th Central Pay Commission and the imports of Articles 14 and 16 of the Constitution of India. In our view, it will also be just and expedient to provide an opportunity to the applicants to give a detailed representation/representations to the respondents No.1, justifying the claim for implementation of the Modified Assured Career Progression Scheme with effect from 1.1.2006, which shall be given preferably within one month from today."

7. Subject to above observations, the Tribunal in O.A. No. 103 of 2011 (supra) directed the respondents to consider the claim of the applicants for implementation of the Modified Assured Career Progression Scheme with effect from 01.01.2006 instead of 01.09.2008. The operative portion of the order is reproduced as under:

“10. The Original Application is disposed of with the direction to the respondents No.1 to consider the claim of the applicants for implementation of the Modified Assured Career Progression Scheme with effect from 1.1.2006 instead of 1.9.2008. The respondents No.1 while considering the applicants' matter will have to give due consideration their representations also. The respondents No.1 to take appropriate decision expeditiously, preferably within six months from the date of receipt of a copy of the representation.”

8. Hon'ble Supreme Court in Civil Appeal Diary No. 3744 of 2016 and other connected cases had the opportunity to consider the same issue. Upon consideration of the MACPS as applicable to the Armed Forces with regard to PBORs who retired after 01.01.2006 but prior to 31.08.2008, in paras 6, 7, 10 and 11 held as under:

“6. The question that arises for decision is whether the benefit of MACP is applicable from 01.01.2006 or from 01.09.2008.

7. The answer to this question will lie in the interpretation given to the Government Resolution, relevant portion of which has been quoted hereinabove. A bare perusal of Clause (i) of the Resolution clearly indicates that the Central Government decided to implement the revised pay structure of pay bands and grade pay, as well as pension with effect from 01.01.2006. The second part of the Clause lays down that all allowances except the Dearness Allowance/relief will be effective from 01.09.2008. The AFT held, and in our opinion rightly so, that the benefit of MACP is part of the pay structure and will affect the grade pay of the employees and, therefore, it cannot be said that it is a part of allowances. The benefit of MACP if given to the respondents would affect their pension also.

10. As already held by us above, there can be no dispute that grant of ACP is part of the pay structure. It affects the pay of the employee and he gets a higher grade pay even though it may be in the same pay band. It has been strenuously urged by Col. R. Balasubramanian, learned counsel for the UOI that the Government took the decision to make the Scheme applicable from 01.09.2008 because many employees would have lost out in case the MACP was

made applicable from 01.01.2006 and they would have had to refund the excess 10 amount, if any, paid to them. His argument is that under the old Scheme if somebody got the benefit of the ACP he was put in the higher scale of pay. After merger of pay scales into pay bands an employee is only entitled to higher grade pay which may be lower than the next pay band. Therefore, there may be many employees who may suffer.

11. We are only concerned with the interpretation of the Resolution of the Government which clearly states that the recommendations of 6th CPC as modified and accepted by the Central Government in so far as they relate to pay structure, pay scales, grade pay etc. will apply from 01.01.2006. There may be some gainers and some losers but the intention of the Government was clear that this Scheme which is part of the pay structure would apply from 01.01.2006. We may also point out that the Resolution dated 30.08.2008 whereby the recommendation of the Pay Commission has been accepted with modifications and recommendations with regard to pay structure, pay scales, grade pay etc. have been made applicable from 01.01.2006. This is a decision of the Cabinet. This decision could not have been modified by issuing executive instruction. The letter dated 30.05.2011 flies in the face of the Cabinet decision reflected in the Resolution dated 30.08.2008. Thus, administrative instruction dated 30.05.2011 is totally ultra vires the Resolution of the Government."

9. The case of the applicant is squarely covered by the decision of the Armed Forces Tribunal, Regional Bench Kochi (supra) and the decision rendered by Hon'ble Supreme Court (supra) and we feel that the same directions be issued to the respondents to consider the claim of the applicant for implementation of the MACPS from 01.01.2006 instead of 01.09.2008.

10. The Original Application is allowed and is disposed of with the direction to the respondents to grant 3rd benefit of financial upgradation of MACPS to the Applicant from his date of discharge i.e. 01.10.2007 within a period of four months from the

date of receipt of certified copy of this order. In case they fail to do so they will have to pay interest @ 9% per annum on the amount accrued.

11. No order as to costs.

(Lt Gen Gyan Bhushan)
Member (A)

(Justice VS RAVI)
Member (J)

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