

*

Judgment reserved on: 21.02.2012
Judgment pronounced on: 29.02.2012

+

..... Petitioners

versus

..... Respondent

Advocates who appeared in this case:

For the Petitioner	:	Ms Ruchi Sindhwani and Ms Bandana Shukla
For Respondent	:	Mr K.C. Mittal

CORAM:

HON'BLE MR. JUSTICE BADAR DURREZ AHMED

HON'BLE MR. JUSTICE V.K.JAIN

V.K. JAIN, J.

1. This writ petition is directed against the order dated 20.09.2010 passed by the Central Administrative Tribunal, Principal Bench, New Delhi, whereby OA No. 867/2010 was allowed by directing the petitioner to grant second Assured Career Progression (ACP) to respondents 2 to 11 in the pay scale of Rs 10,000 to 15,200. The facts giving rise to the filing of the OA can be summarized as under:-

There were 129 posts of Supervisor (Woman) in erstwhile Department of Social Welfare, now known as Department of Female & Child Development of Delhi Government. The Department also has posts of Welfare Officer (Grade-II)/Probation Officer (Grade II) and Prison Welfare Officers. Pursuant to the recommendations made by the 5th Pay Commission, 52 out of 129 Posts of Supervisor (Woman) as well as the posts of Welfare Officer (Grade-II)/Probation Officer (Grade II) and Prison Welfare Officers were upgraded from the unrevised pay scale of Rs 1400-2300 (revised pay scale 4500-7000) to the unrevised pay scale of Rs 1640-2900 (revised pay scale of Rs 5500-9000) and these upgraded posts were designated as Supervisor Grade I and the remaining posts of Supervisor (Woman) were re-designated as Supervisor Grade-II. Since the next post in the hierarchy, i.e., post of Deputy Superintendent/ACDPO/Welfare Officer also carried the revised pay scale of Rs.5500-9000, those posts were merged with the post of Supervisor Grade-I.

No financial upgradation under the Assured Career Progression Scheme (ACP) on completion of 12 years of service was granted to those 52 women Supervisors, who were posted against upgraded posts, redesignated as Supervisor Grade-I. They were, however, granted financial upgradation in the pay scale of Rs 6500-10500, on completing 24 years of service.

2. The respondents filed OA No. 867/2010, claiming benefit of second Assured Career Progression Scheme (ACP) in the pay scale of Rs 10,000-15200 which was allowed by the Tribunal. The Tribunal allowed the OA, relying upon clarification 52, issued by DOP&T with respect to grant of ACP and rejected the contention of the petitioner to apply clarification 35 issued by the Government.

3. A modified Assured Progression Scheme (ACP) was notified by Government of India vide OM dated 09.08.1999. Vide this Scheme, the Government decided to grant two financial upgradation to its employees, one on completion of 12 years and the other on 24 years of regular service.

Para 5.1 of the conditions for grant of benefit under the ACP Scheme reads as under:-

“Two financial up-gradation under the ACP Scheme in the entire Government service career of an employee shall be counted against regular promotions (including in-situ promotion and fast-track promotion through limited departmental competitive examination) availed from the grade in which an employee was appointed as a direct recruit. This shall mean that two financial up-gradation under the ACP Scheme shall be available only if no regular promotions during the prescribed periods (12 and 24 years) have been availed by an employee. If an employee has already got one regular promotion, he shall qualify for the second financial up-gradation only on completion of 24 years of regular service under the ACP Scheme. In case two prior promotions on regular basis have already been received by an

employee, no benefit under the ACP Scheme shall accrue to him”

It would thus be seen that if an employee gets one promotion within 12 years of regular service, he is not entitled to the first financial upgradation. He, however, is entitled for second financial upgradation on completion of 24 years of regular service. If he receives two promotions before completing 24 years of service, he is not entitled to any benefit under the Assured Career Progression Scheme.

Clarification 35 issued by the Government of India with respect to the ACP Scheme reads as under:-

Point of doubt	Clarification
Whether placement/ appointment in higher scales of pay based on the recommendations of the Pay Commissions or Committees set up to rationalize the cadres is to be reckoned as promotion/financial upgradation and offset against the two financial upgradation applicable under the ACP Scheme?	<u>Where all the posts are placed in a higher scale of pay, with or without a change in the designation; without requirement of any new qualification for holding the post in the higher grade, not specified in the Recruitment Rules for the existing post, and without involving any change in responsibilities and duties, then placement of all the incumbents against such upgraded posts is not be treated as promotion/upgradation. Where, however, rationalization/ restructuring involves creation of a number of new hierarchical grades in the rationalised set up and some of the incumbents in the pre-rationalised set up are placed in the hierarchy of the restructured set up in a grade</u>

	<u>higher than the normal corresponding level taking into consideration their length of service in existing pre-structured/pre-rationalised grade, then this will be taken as promotion/upgradation</u> (emphasis supplied) If the rationalised/restructured grades require possession of a specific nature of qualification and experience, not specified for the existing posts in pre-rationalised set up, and existing incumbents in pre-rationalised scales/pre-structured grades, who are in possession of the required qualification/ experience are placed directly in the rationalised upgraded post, such placement will also not be viewed as promotion/upgradation. However, if existing incumbents in the pre-rationalised grades who do not possess the said qualification/ experience are considered for placement in the corresponding rationalised grade only after completion of specified length of service in the existing grade, then such a placement will be taken as promotion/upgradation. Where placement in a higher grade involves assumption of higher responsibilities and duties, then such upgradation will be viewed as promotion/upgradation. <u>Where only a part of the posts are</u>
--	---

	<u>placed in a higher scale and rest are retained in the existing grade, thereby involving redistribution of posts, then it involves creation of another grade in the hierarchy requiring framing of separate recruitment rules for the upgraded posts. Placement of existing incumbents to the extent of upgradations involved, in the upgraded post will also be treated as promotion/upgradation and offset against entitlements under the ACPS.</u> For any doubts in this regard, matter should be referred to the Department of Personnel and Training (Establishment 'D' Section) giving all relevant details.
--	---

4. It is not in dispute that out of 129 posts of Supervisor, only 52 posts were upgraded from the pre-revised pay scale of Rs 1400-2300 to pre-revised pay scale of Rs 1640-2900 and were re-designated as Supervisor Grade-I. The remaining posts of Supervisor (Woman), which were not upgraded, were re-designated as Supervisor Grade-II. Thus, only a part of the posts were placed in a higher scale and the remaining posts were retained in the existing grade. This restructuring thus resulted in creation of another grade in the hierarchy. The highlighted parts of clarification 35, issued by the Government of India, therefore, becomes directly applicable to the case of the respondents and placement of 52 Supervisor (Woman)

in the pre-revised pay scale of Rs 1640-2900 on re-designating those 52 posts as Supervisor Grade-I is deemed to be promotion/upgradation of these 52 persons in terms of clarification 35, which has to be offset against their entitlement under the ACP.

5. It was contended by the learned counsel for the respondent that no separate Recruitment Rules for the post of Supervisor Grade I have been framed and, therefore, clarification 35 issued by the Government of India would not apply. We, however, cannot agree with the learned counsel for the respondents. Framing of separate Recruitment Rules was not a condition precedent for upgradation of the posts and failure to frame separate Recruitment Rules for the post of Supervisor Grade-I, which had to take place post-upgradation does not take the case of the respondents out of the purview of clarification 35 issued by the Government of India. Once it is shown that only some of the persons in the cadre of Supervisor (Woman) were placed in a higher pay scale, the clarification 35 issued by the Government comes into play and such upgradation has to be treated as promotion/upgradation and is required to offset against entitlement under the ACP.

6. The Tribunal, while allowing the OA, has taken a view that a clarification issued by DOP&T at Serial No. 52 applies to the case of the applicants and as per that clarification, if the pay scales of feeder and promotional posts are merged in the same pay scale, the ACP entitlement has to be decided in such a manner that

the next financial upgradation is in the next hierarchical grade than the merged level. However, the case before this Court is not a case of merger of feeder and promotional cadre. Here, only 25% of the posts in the cadre of Supervisor (Woman) were upgraded and re-designated as Supervisor Grade-I, and in such a case, Clarification issued at Serial No. 35 clearly applies.

7. The learned counsel for the respondents has relied upon **Bharat Sanchar Nigam Ltd. v. R. Santhakumari Velusamy & Ors.** 2011 STPL (Web) 781 SC. In support of his contention that upgradation of 25% posts of Supervisor (Woman) and re-designating them as Supervisor (Grade-I) does not amount to promotion. In the case of **Bharat Sanchar Nigam Ltd.** (*supra*), there were four grades of employees of Telecom Departments and promotions from one grade to higher grade were made on the basis of the seniority/departmental examination. 'One Time-Bound Promotion' scheme (OTBP) was introduced in the year 1983-84 under which the employees who had completed 16 years of service in the grade were placed in the next higher grade. After some time, the Government decided to have a Biennial Cadre Review (BCR) under which a specified percentage of posts could be upgraded on the basis of functional justification. Under the said scheme, employees, who were in service on 01.01.1990 and who had completed 26 years of service in the basic cadre, were to be screened to assess their performance and determine their suitability for advancement and if found suitable, they were to be

upgraded in the higher scale. The upgradation was restricted to 10% of the posts in Grade III. Vide Circular dated 11.03.1991, the Government issued some clarification regarding designations by another Circular dated 13.12.1995. The Government formulated a procedure for promotion to Grade IV. Under the said procedure, promotions to Grade IV were to be based on seniority in the basic grade, from amongst the officers in Grade III, subject to fitness determined in the usual manner of OTBP. By a clarificatory Circular dated 01.03.1996, the Government issued a clarification that promotion to Grade IV would be given from amongst officials in Grade III on the basis of their seniority in the basic grade, subject to fulfillment of other conditions and that normal rules of reservation would apply to promotions in Grade IV. The Circular dated 01.03.1996 was challenged by All India Non SC/ST Telecom Employees Association on the ground that principles of reservation would not apply for upgradation of existing posts which did not carry any change in duties and responsibilities. Ahmedabad Bench of the Tribunal held that the Department could not apply reservation rules while upgrading the post in the BCR Scheme. The writ petition filed by the Government was dismissed by Gujarat high Court. The Government then issued an order directing that review DPC be held and all ineligible officers, wrongly promoted to Grade IV by application of reservation roster, be reverted back and all eligible officers should be placed in Grade IV. As a consequence, the contesting

respondents were reverted from Grade IV to Grade III. Being aggrieved, they filed applications before Madras Bench of the Tribunal, challenging the validity of the order, whereby they were reverted. The Full Bench of the Madras High Court differed from the decision of its Ahmedabad Bench and held that the appointment was a non-promotional appointment and distinction between upgradation and promotion based on the nomenclature only does not appear to be tenable. The Government was directed to restore the contesting respondents to their promoted posts. The writ petition filed by the Telecommunication Department was dismissed by Madras High Court. The order of the High Court was challenged before Supreme Court and it was contended that there was a clear distinction between upgradation and promotion. It was submitted that upgradation does not involve promotion to a higher position as the pedestal of the employees remains the same and he is only conferred some benefit by granting a higher pay scale to overcome stagnation. The appellants before the Supreme Court contended that since there was only upgradation of existing post with creation of additional post, principles of reservation would not apply. Supreme Court, after reviewing the case of law on the subject, was of the view that even in cases where no additional posts were created, but, a process of selection was involved in the upgradation, the process has to be considered as a process of promotion and not as an upgradation simplicitor and, therefore, the principle of reservation would be attracted. The

following principles were laid down by the Court, indicating the distinction between the promotion of upgradation:-

(i) Promotion is an advancement in rank or grade or both and is a step towards advancement to higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both that is advancement to a higher position and advancement to a higher pay scale - are described by the common term 'promotion', does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay-scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay-scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a

process of selection, as contrasted from an upgradation simplicitor can be said to be a promotion in its wider sense that is advancement to a higher pay scale.

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation, can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simplicitor. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation.

(v) Where the process is an upgradation simplicitor, there is no need to apply rules of reservation. But where the upgradation involves selection process and is therefore a promotion, rules of reservation will apply.

(vi) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of

additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation.

As regards the case before it, Supreme Court noted that the BCR scheme did not involve creation of additional posts but merely restructured the existing posts, as a result of which 10% of the posts in Grade III were placed in a higher grade (Grade IV) to give relief against stagnation and the purpose of screening was only to find out whether the service record of the employees contained any adverse entries or whether the employee had suffered punishment. It did not involve consideration of comparative merit or selection. The Court, therefore, held that BCR Scheme was an upgradation scheme to give relief against stagnation.

8. There can be no doubt that if we have to examine the issue as a proposition of law, without applying clarification 35 issued by the DOP&T, upgradation of 52 posts of Supervisor (Woman) to the pre-revised pay scale of 1640-2900 would not be a promotion since neither any additional posts were created as a part of the restructuring nor was any element of selection or comparative merit involved in placing 52 Supervisor (Woman) in the upgraded post which was re-designated as Supervisor (Grade-I). As a legal proposition, promotion is clearly distinguishable from upgradation. The promotion ordinarily involves advancement in rank or grade or both of the employee concerned on the basis of selection. On promotion, the

employee is placed in a higher position/grade consequent to the promotion and such higher position/grade may also involve discharge of higher duties. However, even if there is no change in the duties but, a process of selection is involved while placing an employee in a higher grade, such as Selection Grade, it would amount to promotion, even if the nature of the duties continues to remain the same. On the other hand, financial upgradation is normally granted in order to remove stagnation and sometimes also for administrative reasons. If financial upgradation available to the employees to complete a specified years of service or on the basis of seniority alone, no element of selection is involved in the process and consequently it cannot be termed as promotion, irrespective of whether additional posts are created while granting financial upgradation or not. The purpose of financial upgradation in such a case being only to provide relief against stagnation, the process does not involve advancement to a higher post. Even if screening of the employee is required to assess his suitability for advancement before giving the financial upgradation, that also would not amount to promotion for the reason that no process of selection is involved in such a case. If, however, financial upgradation is given after selection it would be a case of promotion to a higher pay scale since grant of the higher pay scale in such a case would depend upon the comparative merits of those who are considered for grant of higher pay scale.

9. In the case before us, since no element of selection was involved in placing 52 Supervisor (Woman) in the higher pay scale of Rs 1640-2900, such upgradation would in common parlance, not amount to promotion to a higher post or to a higher pay scale. But, if we have to apply Clarification 35 issued by DOP&T, there is no escape from holding that such financial upgradation would be deemed to be promotion for the purpose of ACP Scheme, as far as the persons who are posted against upgraded posts are concerned and it would be offset against their entitlement under the ACP. We have no hesitation in saying that in terms of service jurisprudence, this kind of financial upgradation does not constitute promotion to a higher post or to a higher pay scale such as selection grade since it does not have an element of selection, which requires evaluation of comparative merit and the financial upgradation is not given only on the basis of seniority alone. But, in order to get benefit of financial upgradation, the respondents have to bring their case within the four corners of the ACP Scheme, which, on account of Clarification No. 35, provides for treating such upgradation as promotion, for the purpose of Scheme, by virtue of a deeming provision, which by virtue of this clarification, now forms part of the ACP Scheme.

10. We find from a perusal of the prayer made in the OA, that the respondents had challenged Clarification No. 35, issued by DOP&T on the ground that it was against the object of the main scheme. However, no arguments seem to have been

advanced before the Tribunal on this aspect and no arguments challenging the legality of the said Clarification have been advanced before us. In any case, it is for the framer of the Scheme to decide the terms and conditions on which financial upgradation under the ACP Scheme is to be granted and while doing so, the framer of the Scheme is not bound by the meaning to the expression 'promotion' in the ordinary service parlance and it is competent to accord a restrictive meaning of the expression 'promotion', for the purpose of deciding to whom and subject to what conditions the benefit under the Scheme should be granted. It is not as if the Clarification No. 35 has been issued by someone other than the framer of the Scheme. The original Scheme as well as the Clarification, both having been issued by DOP&T, we see no merit in the challenge to the validity of the clarification. The purpose of providing financial upgradation under the ACP scheme is to remove stagnation on account of inability of the system to provide periodical promotion to the Government servants, the underlying idea being to atleast compensate them for the financial loss which they would otherwise suffer on account of periodical promotion not being given to them. Since financial upgradation of 52 Supervisors (Woman) resulted in the next pay scale being made available to them, the objective behind framing the ACP scheme stood served as far as the first financial upgradation was concerned. If this upgradation is not taken into consideration for the purpose of scheme, the result would be that these 52

persons would get 03 financial upgradations, one on upgradation of the post from the pre-revised pay scale of 1400-2300 to the pre revised scale of Rs 1640-2900, second on completion of 12 years of service and third on completion of 24 years of service whereas the objective of the scheme is to grant two financial upgradations to the employees in whole of their career and that is why the scheme provides that if promotion is granted to the employee within 12 years or 24 years of the service he would not be entitled to first or second financial upgradation as the case may be. If Clarification 35 is not applied, the result would be that those who were placed in the upgraded posts would get ACP on completion of 24 years of service, in the pay scale of Senior Superintendent, whereas those who do not work on the upgraded post would be placed in the pay scale of CPPO/Superintendent, on completion of 24 years of service. On the other hand, if Clarification 35 is applied, all the persons who were working as Supervisor (Woman) at the time the restructuring took place would be placed in the pay scale of Rs 6500-10500, which is the pay scale of CPPO/Superintendent on completion of 24 years of regular service. Therefore, it cannot be said that clarification 35 issued by DoPT runs contrary to the objective of ACP scheme of the government.

For the reasons stated hereinabove, we are of the view that the upgradation of 52 Supervisor (Woman) from the pre-revised pay scale of 1400-2300 to the pre revised scale of Rs 1640-2900 amounts to promotion for the purpose of ACP

Scheme and consequently, the respondents were not entitled to the benefit of the first financial upgradation under the ACP Scheme. The impugned order dated 20.09.2010 passed by the Tribunal is, therefore, set aside.

In the facts and circumstances of the case, there shall be no order as to costs.

V.K.JAIN, J

BADAR DURREZ AHMED, J

FEBRUARY 29, 2012
BG