

\$~12

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ W.P.(C) 1506/2012

%

Date of decision: 21st May, 2013

R.S. RATHORE

..... Petitioner

Through : Mr. Subhashish Mohanty, Adv.

versus

UNION OF INDIA AND ANR.

..... Respondent

Through : Ms. Barkha Babbar, Adv.

CORAM:

HON'BLE MS. JUSTICE GITA MITTAL

HON'BLE MS. JUSTICE DEEPA SHARMA

ORDER

%

21.05.2013

GITA MITTAL, J (Oral)

1. The petitioner seeks in this case restoration of the first financial upgradation as per the Assured Career Progression Scheme (herein after referred to as “ACP”) w.e.f. 20th June, 2000 when he completed 12 years of service with Central Industry Security Force (herein after referred as “CISF”) and became entitled for grant of first financial upgradation in the grade of Head Constable under the ACP Scheme and grant of second financial upgradation as per MACP Scheme w.e.f 1st September, 2008.

2. The undisputed facts in the instant case necessary for adjudication of the writ petition are noticed hereafter. As per the ACP scheme, in order to be eligible the employee of the CISF is required to have completed 12 years from the date of

W.P.(C) No. 1506/2012

appointment to a post without any promotional financial benefit being made available to him and he should have also successfully undertaken the promotional cadre course (herein after referred to as “PCC”).

3. The petitioner has stated that an employee is granted three chances for successful completion of promotional cadre course as per the applicable ACP Scheme which has been placed before us. This is uncontroverted.

4. So far as the present petitioner is concerned, he had completed 12 years of service on 20th June, 2000 and was offered an opportunity to undergo this PCC pursuant to an offer made only in May, 2003. The petitioner was compelled to express his unwillingness to undergo PCC on the ground of his daughter being seriously ill.

5. Learned counsel for the parties have placed reliance on the Unwillingness Certificate dated 5th May, 2003 submitted under the signatures of the petitioner wherein he had stated as follows :-

“UNWILLINGNES CERTIFICATE

No.884481186 Const Name : Ram Sanahi Rathod of
CISF Unit, CSI Airport Mumbai have been detailed to
undergo promotion cadre course of Const of HC which is
scheduled to be held at RTC G.R. Baroda from 05.05.03.

I hereby submitted by unwillingness to undergo the
promotion cadre course and willing to forgo my promotion.

6. While learned counsel for the respondent would contend that the petitioner had unequivocally expressed his unwillingness to undertake the PCC and that he had also clearly given his no objection to his supersession for the ACP due to his unwillingness. Learned counsel for the petitioner has however urged at some length that the unwillingness was restricted and limited only to the specific offer. It is submitted that the petitioner has expressed his unwillingness only to undergo the PCC which commenced w.e.f. 5th May, 2003 and had not repudiated any other offer made by the respondents.

7. It is also an admitted fact before us that the petitioner was granted financial upgradation by the respondents w.e.f. 20th June, 2000. The record placed before us shows that the petitioner successfully qualified the promotional cadre course and the result of the same was informed on 8th September, 2004 by the respondent. The petitioner had undergone the course between 5th July, 2004 to 21st August, 2004.

8. It appears that prior thereto the respondents have issued an order dated 29th May, 2003 whereby the ACP benefit granted to the petitioner vide order dated 20th June, 2000 was cancelled due to the submission of his unwillingness to undergo the promotion cadre course which was held w.e.f. 5th May, 2003. As a result, the respondents proceeded to recover the amount paid to the petitioner towards his financial upgradation from 20th June, 2000 to 30th April, 2003. The respondent however, proceeded to re-grant the ACP upgradation to the petitioner by order passed on 14th June, 2005 which was made effective from 1st January, 2005.

9. Learned counsel for the petitioner has submitted that the respondents have done grave injustice to the petitioner inasmuch as the ACP upgradation could not have been withdrawn. It is further contended that a person becomes eligible for consideration for grant of the ACP upon completing the requisite number of years of service which the petitioner had already completed on 20th June, 2000. The manner in which the respondents worked the ACP Scheme is that the effective date for consideration of the person for entitlement of the grant of financial upgradation is the date on which he acquires the requisite number of years of service in a post without any promotional opportunities being made available to him. It is urged that the completion of the actual PCC would have no effect on the effective date of grant of financial benefits inasmuch as all employees undergo the PCC only after having become eligible for grant of ACP Scheme. It is urged that the same is apparent from the fact that the respondents granted the ACP upgradation to the petitioner w.e.f. 20th June, 2000 when he completed 12 years of continuous service in the rank of Constable without any opportunity for promotion to the next post of Head Constable being made available to him. It is contended that as per the Circular issued by the respondents every employee is given three opportunities to complete PCC.

10. Learned counsel for the petitioner has also drawn our attention to the Circular dated 7th November, 2003 wherein, it is pointed out that the respondents have themselves drawn a distinction between '*stoppage*' of the financial upgradation and '*withdrawal*' of the amount given as the benefit thereunder. As against withdrawal of

financial upgradation benefits, learned counsel for the respondents has placed reliance on para 4 of the Circular dated 7th November, 2003 which is to the effect that a considered decision was taken to effect the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACP Scheme to the date of stoppage of such financial up-gradation.

11. In support of his contention, learned counsel for the petitioner has placed reliance on the pronouncement of this court dated 15th February, 2011 reported in ***W.P.(C)6937/2010 Hargovind Singh v. Central Industrial Security Force***. In this case, the petitioner in this case was seeking restoration of his second financial upgradation under the ACP Scheme with effect from 3rd November, 1999 and further grant of 3rd financial upgradation with effect from 1st September, 2008. It is noteworthy that the petitioner was granted the second upgradation under the ACP scheme on 3rd November, 1999 but the same was withdrawn without notice to the petitioner resulting in the claim in the writ petition. The stand of the respondents has been noted in para Nos 5 and 6 of the judgment which was to the following effect.

“5. The undisputed position is that the petitioner was granted the benefit of the 2nd upgradation under the ACP Scheme with effect from 3.11.1999 but the same was withdrawn without notice to the petitioner; and thus the claim in the writ petition.

6. As per the counter affidavit filed, the 2nd ACP upgradation benefit was granted to the petitioner on 3.11.1999 in ignorance of the fact that the Mandatory Promotion Course was not successfully undertaken by the petitioner and when this was realized, petitioner was required to attend the Promotion Course commencing on 15.11.2009 for which he expressed his unwillingness to

attend the course on 29.10.2004.”

12. This very contention is urged before us. Just as the present case in hand, the petitioner Hargovind Singh also did not get the opportunity to undergo the PCC course on the date he became eligible for grant of further financial upgradation which was withdrawn. On this aspect, in Hargovind Singh’s case (supra) the court has ruled on the respondents contention urged before us as well, commented on the responsibility of the department to detail the person for undertaking the promotional course. In this regard, observations made in para 8 to 14 of the judgment are being relied upon which reads thus :-

“8 Learned counsel for the respondent would urge that the issue at hand is squarely covered against the petitioner as per the judgment and order dated 30.9.2010 disposing of W.P.(C) No.8631/2009 Bhagwan Singh Vs. UOI & Ors.

9 A perusal of the decision in Bhagwan Singh’s case (supra) would reveal that the petitioner therein was working as a Head Constable and was denied the second upgradation under the ACP Scheme on account of the fact he had consciously refused to undergo the mandatory promotional courses which would have made him eligible to be promoted as an Assistant Sub-Inspector and, in writing, had given that he foregoes the right to be promoted.

10 The Division Bench noted paragraph 10 of the ACP Scheme which reads as under :-

“10. Grant of higher pay-scale under the ACP Scheme shall be conditional to the fact that an employee, while accepting the said benefit, shall be deemed to have given his unqualified acceptance for

regular promotion on occurrence of vacancy subsequently. IN regular promotion subsequently, he shall be subject to normal debarment for regular promotion as prescribe din the general instructions in this regard. However, as and when he accepts regular promotion thereafter, he shall become eligible for the second upgradation under the ACP Scheme only after he completes the required eligibility service/period under the ACP Scheme in that higher grade subject to the condition that the period for which he was debarred for regular promotion shall not count for the purpose. For example, if a person has got one financial upgradation after rendering 12 years of regular service and after 2 years therefrom if he refused regular promotion and is consequently debarred for one year and subsequently he is promoted to the higher grade on regular basis after completion of 15 years (12+12+1) of regular service, he shall be eligible for consideration for the second upgradation under the ACP Scheme only after rendering ten more years in addition to two years of service already rendered by him after the first financial upgradation (2+10) in that higher grade i.e. after 25 years (12+2+1+10) of regular service because the debarment period of one year cannot be taken into account towards the required 12 years of regular service in that higher grade.

11. In the instant case, facts noted hereinabove, would show that the respondents offered to detail the petitioner for the mandatory PCC course to be held with effect from 15.11.2004. We shall deal with the effect of the petitioner not joining the said course, but relevant would it be to note that the petitioner's entitlement to the ACP benefit accrued with effect from the month of November 1999 and it is not the case of the respondents that till they offered petitioner the chance to clear the PCC course

commencing with effect from 15.11.2004, any earlier opportunity was granted to the petitioner to attend the course.

12. It is an admitted position that the department has to detail persons for undertaking the promotion cadre course and attending said courses is not at the option of the officers concerned.

13. If that be so, the respondents cannot take advantage of not discharging their obligation which precedes the obligation of the incumbent to clear the promotion cadre course. The prior obligation of the department is to detail the person concerned to undertake the promotion cadre course.”

14. As regards petitioner’s unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word ‘*unwilling*’ would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village.”

13. Before us, it is an admitted position that the petitioner became eligible for grant of financial upgradation on 20th June, 2000 which was actually granted to him. So far his being given an opportunity to undergo the PCC is concerned, he was detailed for the first time to undergo the course which commenced on 5th May, 2003.

14. Undoubtedly for the reasons recorded in *Hargobind Singh’s case (supra)*, the petitioner could not be deprived of the financial upgradation for this period. It is apparent from the working of the ACP Scheme by the respondents that a person is entitled to the financial benefit on the date he completes the required twelve years of service without a promotional opportunity. The respondents have so worked the scheme in Hargovind Singh’s case as well as the present case. The completion of the

promotional cadre course is akin to completion of the requisite training upon appointment/promotion. It does not change the date of the appointment or the date of his promotion.

15. We may now come to the second aspect of the matter. The respondents have relied upon the Unwillingness Certificate submitted by the petitioner which is dated 5th May, 2003 to urge that the petitioner had submitted his unwillingness to undergo the PCC and stated that he had no objection if he was superseded due to his unwillingness. We have reproduced hereinafter therefore the exact words of the unwillingness expressed by the petitioner. The unwillingness was restricted to petitioner's inability to undergo the promotional course which commenced on 5th May, 2003 and non other. Obviously, the petitioner could not have made any legally tenable objection in case he was superseded because of such unwillingness. There is nothing before us to show that the petitioner was detailed to undergo any other PCC for which he had expressed his unwillingness.

16. On this aspect, we may usefully extract the observations of the Division Bench judgment in *Hargovind Singh's case (supra)* which are in consonance with the facts of the present case. After May, 2003, the present petitioner was detailed for undertaking PCC only in July, 2004. It is an admitted position that the petitioner accepted this offer and has successfully undertaken the PCC which was conducted between 5th July, 2004 to 21st August, 2004. In this background, the petitioner cannot be denied of his rightful dues till date.

17. So far as the unwillingness of the petitioner to undertake the promotional cadre course for which he was detailed in May, 2003 is concerned, in *Hargovind Singh's case (supra)*, this court has deemed the same to be “ a technical default”. On this aspect it was held as follows :-

“14 As regards petitioner's unwillingness to undergo the promotion cadre course commencing from 15.11.2004, it may be noted that the use of the word ‘*unwilling*’ would be a misnomer. What has happened is that prior to the petitioner being intimated that he would be detailed to undertake the promotion cadre course commencing with effect from 15.11.2004, on account of the extreme ill medical condition of the wife of the petitioner he had sought for and was granted leave to proceed to his native village.

15 Suffice would it be to state that the position therefore would be that the respondent is in greater default by not detailing the petitioner to undertake the promotion cadre course till an offer to this effect was made somewhere a few days prior to 15.11.2004. Surely, petitioner cannot be denied his rights till said date.

16 As regards the technical default committed by the petitioner in not undertaking a promotion cadre course with effect from 15.1.2004, suffice would it be to state that he has a reason for so doing”.

18. The court has thus held that the petitioner had a reason for so doing.

19. It cannot be denied that in the case in hand as well the petitioner has given a genuine and reasonable explanation for his inability to undergo the PCC course which has not been doubted by the respondents. We may also note that this aspect of the matter can be examined from yet another angle. As per the Scheme, every

employee is entitled to three chances to complete the PCC. In case, the petitioner had undertaken the PCC course when he was first offered the same but had failed to clear the course, the respondents would not have then deprived him of the benefits of the financial upgradation but would have offered him a second; and thereafter, even a third chance to successfully complete the same. This being the position, a person who was prevented by just and sufficient cause from undertaking PCC at the first option cannot be deprived of the benefit of the financial upgradation in this matter. The petitioner has in fact cleared the PCC course at the first chance, when he underwent the same.

20. Looked at from any angle, the acts of the respondents in recovering the amount of the first financial upgradation from 20th June, 2000 till 30th April, 2003 cannot be justified on any ground at all. It is further urged that the petitioner is entitled to the second financial upgradation as per the modified MACP Scheme w.e.f. 1st September, 2008. The view we have taken is supported by the judgment rendered in ***Hargovind Singh's case (supra)***. Before we part with the case, it is necessary to deal with the submissions of the learned counsel for the respondents premised on the decision mentioned in the Circular dated 7th November, 2003. The relevant extracts of this Circular reads as follows :-

“02 Instructions had been issued to the field formations that the personnel who have been granted ACPs benefits without qualifying PCC, but later on declared failed in PCC express their inability to undergo PCC on the pretext of one reason or other

reason and submit medical unfitness certificate when detailed for PCC, the ACP benefits earlier granted to them may be stopped from the date of result of failure/submission of medical unfitness certificate or expressing their inability to undergo PCC on medical ground.

04 In view of the observations of Internal Audit party of MHA, the case has been examined and it has been decided that the recovery of pay and allowances pertaining to the period from the date of upgradation of scale under ACPs to the date of stoppage of such benefits may be made”.

21. We may note that the respondents were conscious of the distinction between ‘stoppage’ of the financial benefit and its ‘withdrawal’ which is evident from bare reading of para 2 of the said circular.

22. Para 2 of this circular clearly recognizes that a person would be entitled to financial upgradation from the date he becomes eligible to the same. The ‘stoppage’ of the same is clearly noted to be with effect from the date of result of failure/ submission of medical unfitness certificate or expressing inability to undergo PCC on medical grounds. The recovery which is postulated has to be read in context of the clear stipulation as laid in para 2 and cannot be related to recovery of an amount beyond the period that is noted in para 2. In our view, the para 4 has to be operated in the context of what has been clearly stated in para 2 of the Circular dated 7th February, 2003. Such reading and application of this Circular is in consonance with the above discussion. The respondents would not possibly seek recovery of the higher pay and allowances (advanced as benefits under the ACP Scheme) for the entire

period from the date of upgradation of the scale under the ACP Scheme to the date of stoppage of benefit in case a person fails to clear the PCC in all three chances. The view we have taken is clearly supported by the respondent's directive in the Circular dated 16th April, 2003, which has been placed before us.

23. The respondents have not waited for any employee to take the three available chances for undergoing the PCC course before proceeding with their recovery action. The restoration has also been effected most arbitrarily. The respondents hold a person entitled to the PCC for the several years when the employee is not offered an opportunity to undergo the PCC course even though he may be willing and able to do so. He is given the pay upgradation for this period (between 20th June, 2000 and 31st December, 2004 in the case of the petitioner). This amount is then recovered on the ground that the employee though desirous, but is not able (on account of some unavoidable circumstances) to go for the PCC.

24. For all the foregoing facts and reasons this writ petition has to be allowed.

25. We accordingly hold that the petitioner would be entitled to grant of financial upgradation under the Assured Career Progression Scheme benefit with effect from 20th June, 2000.

26. The petitioner is as a result entitled to the amounts recovered from him which shall be refunded to him within six weeks from today.

27. In case the petitioner was entitled to the benefit of the second financial upgradation as per the modified ACP Scheme as well, the respondent shall consider the claim of the petitioner in accordance with the scheme in the light of the forgoing discussion and pass appropriate orders in regard thereto within a period of three months. The order passed thereon shall be conveyed to the petitioner. The amounts falling due and payable in terms of the above shall be released to the petitioner within a period of six weeks thereafter.

28. This writ petition is allowed in the above terms.

29. *Dasti* to learned counsel for the parties.

GITA MITTAL, J

DEEPA SHARMA, J

MAY 21, 2013

j