

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP(C) No. 144 of 2016

Date of Decision: 13.04.2023

JC-356629 W Nb Sub (Cipher) Vs. Union of India & Ors.
Rajib Kumar Sarkar

Coram:

Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. B. Deb, Adv.
For the Respondent(s) : Mr. R. Debnath, CGC.

- | | | |
|-----|--|--------|
| i) | Whether approved for reporting in Law journals etc.: | Yes/No |
| ii) | Whether approved for publication in press: | Yes/No |

JUDGMENT AND ORDER

1. From what could be gathered from the contents of this petition, it is noticed that the petitioner was enrolled in the Assam Rifles on 12.05.1989 as Rifleman/ORL (Operator Radio & Line). Thereafter, he had undergone basic training course of 6 months at Assam Rifles Training Centre, Dimapur, Nagaland and a further technical training course of six months at the same centre whereupon, he was then posted at 9 Assam Rifles, C/o 99 APO.

2. After four years of service, getting the opportunity for remusteration/conversion of his trade to Havildar/Cipher through

departmental selection process, being eligible, he volunteered for the same. On being selected, he was appointed as Havildar/Cipher on 12.11.1994.

3. When the 5th Central Pay Commission recommendation came out, two financial upgradation for all Central Government Employees known as the Assured Career Progression (ACP) Scheme came into being, which scheme provides for granting or upgradation of financial benefits to an employee who has completed 12 years of service and who is stagnant in the same post and further, on completion of 24 years, if, the same employee is still at the same post, he is entitled to the 2nd upgradation. This Scheme came into force from 09.08.1999.

4. Again, it is the case of the petitioner that he has been recruited as Havildar/Cipher on 12.11.1994 on being remustered and accordingly, he is eligible for the 1st ACP on 11.11.2006 after having completed 12 years in the same post without promotion. However, the department has not granted him this benefit within the stipulated period.

5. The petitioner came to know that the Commandant 38 Assam Rifles Bn. vide letter dated 23.06.2015 had written to Mahanideshalaya Assam Rifles Directorate General Assam Rifles indicating his observations upon checking the audited Initial Pay Statement(IPS) of the petitioner that it was noticed that the petitioner was already granted 2nd ACP w.e.f. 21.05.2008 which is contrary to the relevant rules when in fact he should have been granted the same only w.e.f. 01.07.2009. It is requested that the same be

rectified.

6. Accordingly, the Mahanideshalaya Assam Rifles, Directorate General Assam Rifles in reply to the letter dated 23.06.2015, vide letter dated 28.07.2015 has requested the Commandant 38 Assam Rifles Bn. to make necessary amendment as regard the pay fixation of the petitioner which was done so and the Pay slip issued to the petitioner for the month of July, 2015 reflected the changes made, inasmuch as, he was given one step down increment.

7. Being aggrieved, the petitioner filed representation dated 09.10.2015 seeking the intervention of the Commandant 38 Assam Rifles Bn. to rectify the latest pay fixation, but in reply to this, the Commandant informed the petitioner through letter dated 21.10.2015 that in his case, he has been promoted to the post of Nb/Sub (Cipher) in the year 2008, that is, after completion of 14 years in his service and as such, from the date of remusteration he has been given the First Financial Upgradation and will therefore not be entitled to the 2nd ACP till he complete 24 years of service in the same post.

8. Not being satisfied with the said answer, the petitioner filed another representation dated 21.11.2015 with the same prayer for proper fixation of his payscale, but even after a reminder to this by communication dated 18.12.2015, the respondent authorities have failed to reply to the same and has not taken any positive steps to alleviate the grievance of the petitioner.

Hence this petition.

9. Mr. B. Deb, learned counsel for the petitioner has submitted that the petitioner having been remustered as Hav/Cipher on 12.11.1994, he was never granted any promotion or financial up gradation under the ACP Scheme till 2006. However, he was granted 2nd ACP on 21.05.2008.

10. It is submitted that the reason why the petitioner was not granted the 1st ACP was because the respondent authorities has taken the view that at the time when he was remustered as Hav/Cipher, that was considered as promotion and as such, his case does not come within the scheme of the ACP.

11. In reply to this, the learned counsel has submitted that it has been held by this Court in the case of Ashim Deb Roy v. Union of India & Ors: WP(C) No. (SH) 412 of 2010 that changing of trade in Cipher category, that is, Havildar/Cipher through remusteration is not a promotion and also not a financial up gradation. Extracts of para 4 of the same was referred to in this regard.

12. The learned counsel has also pointed out that the respondents have filed an additional affidavit dated 05.12.2019 before this Court bringing on record an order issued by the Directorate General Assam Rifles, dated 15.02.2019, wherein the Assam Rifles in course of implementation of this Court's order dated 23.03.2017, has sanctioned the grant of 1st and 2nd Financial up-gradation under ACP Scheme.

13. However, the petitioner's name appeared at Sl. No. 366 of the

annexed list showing the names of those personnel who have either received the 1st or due to get the 2nd ACP indicating that the petitioner was deemed to have been granted the 1st Financial Upgradation on being promoted to the rank of Warrant Officer (Cipher) on 03.06.2000.

14. To this, the response of the petitioner is that in terms of the common judgment and order dated 23.03.2017 passed in WP(C) No. 403 of 2014 and WP(C) No. 311 of 2016 in the case of Digamber Datt & Ors v. Union of India & Ors has directed the respondents therein to give appropriate rank and pay scales to the petitioners therein as per the Fifth Central Pay Commission and Office Memorandum dated 22.01.1998. Nowhere in the said Office Memorandum was it mentioned about any promotion to the post of the petitioner herein, submits the learned counsel. Therefore, the assertion of the respondents that the fact that the petitioner was promoted as Warrant Office (Cipher) w.e.f. 03.06.2000 vide order dated 15.02.2019, the same is taken as the 1st financial upgradation, cannot be accepted.

15. Mr. R. Debnath, learned CGC arguing on behalf of the respondents has submitted that it is an admitted fact that the petitioner was enrolled as a Rifleman/ORL (Operator Radio & Line) on 12.05.1989 and was remustered as Havildar (Cipher) on 12.11.1994. At the time of preference of this petition, the petitioner has already been promoted as Nb/Sub (Cipher) from 01.01.2008.

16. It is submitted that the petitioner has already earned two financial

upgradation, first when he was remustered as Havildar(Cipher) which post carries a higher payscale than Rifleman, and secondly, on being promoted as Nb/Sub (Cipher) on 01.01.2008 after completion of 19 years of service. Therefore, he will now be eligible for the next financial upgradation only on promotion to the next higher post, or after completion of 30 years of service from the initial date of enrollment, or if he is stagnant at the same post for 10 years. This is in accordance with the terms of the Modified Assured Career Progression (MACP) Scheme.

17. As to the claim of the petitioner that he was never granted financial upgradation or promotion at the time when he was remustered as Havildar (Cipher), the learned CGC has submitted that remusteration is a method of appointment which is counted as financial upgradation as per the relevant recruitment rules. To this effect, the import of the letter No. A/Pers/II-01/ACP/MACP/2011/1202 dated 28.11.2011 was referred to, wherein it was indicated that “Remusteration is a method of appointment in Recruitment Rules and it would be counted as financial upgradation for the purpose of ACPs/MACPs”.

18. Another aspect of the matter that was raised by the learned CGC is the alleged reduction of pay of the petitioner by one increment and the direction for recovery of the same.

19. In this regard, the learned CGC has submitted that as per policy in vogue, an incumbent who is promoted between 2nd January to 30th June of a

particular year is due to get the next increment in the month of July of the next year. This is as per Rule 10 of the CCS (RP) Rules 2008.

20. With reference to the Ministry of finance letter No. 10/02/2011-E.III/A, dated 19.03.2012 (however copy of the same is not annexed herewith or found in these records), it is seen that there is authorization for grant of increment on 01.01.2006 to all employees whose increment is due in the pre-revised scale from 02.01.2006 to 30.06.2006. This petitioner was promoted on 21.05.2008, he had opted to continue in the pre-revised payscale till 20.05.2008 vide option dated 04.10.2008. One increment was wrongly granted to the petitioner on 01.07.2008 when he is to get the same only on 01.07.2009. Therefore, the revised payscale and necessary deduction as recovery is an exercise in due course and no prejudice is caused to the petitioner submits the learned CGC.

21. Finally, the learned CGC has submitted that the respondents would rely on the following decisions in support of the contention set forth herein, being;

- i) ***Union of India & Ors v. M.V. Mohanan Nair: (2020) 5 SCC 421, para 30, 31, 34, 37 & 26;***
- ii) ***Union of India & Ors v. Ex. HC/GD Virender Singh: 2022 SCC Online SC 1058, para 10, 12, 13 & 14.***

22. From the submission and contention of the rival parties noted above, what can be understood is that the main or core issue to be decided is

whether the remusteration of the petitioner from Rifleman (ORL) to Havildar (Cipher) can be taken to be a promotion and admittedly, the difference in the payscale, the rank of Havildar (Cipher) carrying a higher payscale than that of a Rifleman (ORL), whether this can be taken to be a financial upgradation as far as the petitioner is concerned.

23. It is the consistent stand of the respondents that remusteration is to be counted as financial upgradation for the purpose of ACP/MACP and as such, the petitioner on his remusteration as Havildar(Cipher), is counted as the 1st ACP given to him.

24. This logic is flawed as the same is hit by the proposition expounded in the case of *Hav/Ciph Abdul Bari v. Union of India & Ors: 2013 SCC Online Megh 8*, wherein at para 12 of the same this Court has observed as follows:

“12. This Court for the reasons in above paras had already been made a clear findings that the changing of trade in Cipher category i.e. Havildar/Cipher through remusteration is not a promotion and also not a financial up-gradation and, therefore counting of continuous service for the financial up-gradation under the ACP Scheme should be from the date of remusteration to the lowest rank of the Cipher category i.e. Havildar/Cipher on 20.11.1991, for the petitioner.”

25. As to the ACP Scheme, what is generally understood is that this scheme is an incentive to those Central Government employees who are stagnated at a particular post for 12 years and even for 24 years without any promotion granted to them, or when the post they occupies have no

promotional avenue. Then, financial upgradation is bestowed upon such employees, the 1st being if they remained in the same post for 12 continuous years and if they are still in the same post after 12 years thereafter, then at the end of the next 12 years or 24 years in all, they are given the 2nd ACP in the form of financial upgradation.

26. If this logic is applied to the case of the petitioner, then even if the period of his service is counted from the point of initial appointment on 12.05.1989, then he would have received the ACP benefit of financial upgradation on 13.05.2001. But in the case of the petitioner, he was remustered as Havildar (Cipher) on 12.11.1994, therefore if the argument of the respondents is accepted that he was granted financial upgradation or rather that the 1st ACP was given to him in the year 1994, the same cannot be accepted on the ground that from 1989 to 1994, the period is only about 5 years or so, hence, not having completed 12 years in the same post, 1st ACP could not have been granted to him. Remusteration not being considered a promotion, he certainly would be entitled to the 1st ACP in the year 2006. He was then promoted to the rank of Nb/Sub (Cipher) in the year 2008, therefore if ACP is to be counted, then the year 2008 has to be taken as the year of reckoning counting 12 years therefrom.

27. In this backdrop, the petitioner was also aggrieved by the issuance of the letter dated 23.06.2015(supra), wherein, inter alia, it was observed that the petitioner was granted the 2nd ACP w.e.f. 21.05.2008 which he actually

should not have been granted since on being promoted as Nb/Sub (Cipher) on 21.05.2008, his service was only 19 years at that time and not 24 years and as such, granting of 2nd ACP was a mistake and necessary order was issued for recovery of excess pay drawn. This reasoning is also flawed, as the petitioner as have been observed above have not even been granted the 1st ACP and as such, there could not have been any grant of 2nd ACP on 21.05.2008. The grievance of the petitioner is therefore justified. The observations made vide letter dated 23.06.2015 being Fin/Bill-05/2015/980 was not warranted.

28. Coming to the Order No. Digamber Datt/Court Case/2019/Adm-I(Sig)/327 dated 15.02.2019 wherein the respondent authorities have, in compliance with the common judgment and order dated 23.03.2017 passed by this Court in the case of Digamber Datt & Ors(supra), conveyed the sanction of the Ministry of Home Affairs for grant of 1st and 2nd financial upgradation under ACP Scheme, along with the same, the list of those personnel who have been granted the financial upgradation, the petitioner appeared at Sl. No. 366 in the said list, have also been annexed therein.

29. The petitioner has however pointed out that in the said list, under column 6, the heading reads as “Granted 1st Financial Upgradation” and against the name of the petitioner, it was noted that he was promoted as Warrant Officer (Cipher) on 03.06.00(2000) and is therefore, not entitled for 2nd ACP, which is contrary to the import of the said order dated 23.03.2017

in which the respondents were directed to give appropriate rank and pay scales to the petitioners(therein) as per the Fifth Central Pay Commission and Office Memorandum dated 22nd January 1998 including financial upgradation under Modified Assured Career Progression Scheme of the Government of India, if any, within a period of three months.

30. What is now noticed is that the respondent authorities have contradicted themselves, inasmuch as, vide the impugned order dated 23.06.2015(supra), it is said that the petitioner was already granted the 2nd ACP w.e.f. 21.05.2008, whereas in the order dated 15.02.2019(supra), the annexed list, firstly, shows that the petitioner was granted the 1st ACP at the time when he was promoted as Warrant Officer (Cipher) on 03.06.2000 and therefore is not yet due to be granted 2nd ACP, which is again, as pointed out above, contrary to the legal proposition that remusteration is not a promotion and even re-designation is also not considered as promotion.

31. The issue of whether re-designation is considered as promotion or not have been dealt with by this Court in the case of Ashim Deb Roy & Ors v. Union of India & Anr: 2023 SCC Online Megh 18, wherein, inter alia, while dealing and touching the import of the order dated 15.02.2019(supra), this Court has answered the question at para 20, 21 and 22 of the same which, in the respectful opinion of this Court is the correct proposition laid down and which also has a direct bearing on the issue pertaining to the petitioner herein. The paragraphs are reproduced herein below as:

“20. The respondents implemented the order passed by this Court on 23.08.2012, in WP(C) No. 277(H) of 2010, in the case of other similarly situated personnel, by introducing the rank of ASI (Warrant Officer), at the entry grade, and the same was never treated as promotion. However, what emerges in the case of the petitioners herein, is that, the respondents while implementing the judgment and order dated 23.03.2017, passed in WP(C) No. 403 of 2014 and WP(C) No. 311 of 2016, while introducing the rank of Warrant Officer, which is a re-designation, declared the same to be a promotion by way of upgradation. This in the considered view of this Court, is not in consonance with the directions contained in the order dated 23.03.2017, which had specifically directed for grant of appropriate rank and pay scale to the petitioners, and the same tantamount to unequal treatment being meted out to the petitioners from other similarly situated personnel, which is also not in line with the Office Memorandum dated 22.01.1998.

21. It is also noticed that, in the order dated 23.03.2017, as submitted by the petitioners, two distinct directions have been issued that is, firstly, to give appropriate rank and pay scales to the petitioners as per the 5th Central Pay Commission, and Office Memorandum dated 22.01.1998, and secondly, for financial upgradation under the Modified Assured Career Progression Scheme of the Government of India, if any, within a period of three months. The directions clearly imply that, the respondents were to **give** appropriate rank and pay and it does not imply that, the same be **upgradation** of rank and pay. Similarly, the judgment dated 23.03.2017, had only limited the direction to financial upgradation under the MACP scheme, and not with regard to ACP. What follows therefore, is that, the respondents were to give appropriate rank and pay scale, which would necessarily be to grant the benefits of being re-designated as ASI (Warrant Officer). As observed in the preceding paragraph, there is no direction for grant of promotion to the petitioners to the rank of Warrant Officer, rather it is but, re-designation of the post, as such, the terming of the same as a promotion is contrary to the directions of this Court, contained in order dated 23.03.2017, and also the Office Memorandum dated 22.01.1998.

22. In this view of the matter, the impugned orders dated 08.02.2019 (Annexure-8), 15.02.2019 (Annexure-9) and

08.03.2019 (Annexure-15) are liable to be interfered with, inasmuch as, in order dated 08.02.2019, and consequential order dated 15.02.2019, the order for financial upgradation under ACPs issued were superseded and in the case of the writ petitioner No. 1, it was shown that he was promoted to the post of Warrant Officer (Cipher), w.e.f. 23.01.1999, and therefore not entitled to 2nd ACP. Consequential effects of the incorrect implementation of the order dated 23.03.2017, also resulted in reduction of the basic pay of the writ petitioners, which also needs correction. In the totality of the circumstances therefore, the impugned orders are hereby set aside and quashed, and the respondents are directed to re-visit the matter of implementation of the judgment and order dated 23.03.2017, for grant of appropriate rank and pay structure to the writ petitioners, and to issue fresh orders thereon, taking into account, the observations made in this order.”

32. In the backdrop of what has been discussed above, the authorities cited by the learned CGC are found to be not relevant to the subject matter of this lis. Accordingly, such authorities are not required to be discussed herein.

33. In the light of the above findings and observations, this Court is of the view that the approach of the respondent authorities as far as the case of the petitioner is concerned is not correct and the same has caused prejudice to his case of entitlement for grant of ACP/MACP at the relevant period as well as an arbitrary reduction of his pay also at the relevant period of time. The same is hereby corrected herein by a direction to the respondent authorities to embark on a course correction and to ensure that the petitioner is not deprived of his legally entitled dues and benefits whether in respect of the grant of ACP/MACP or a proper payscale. This exercise is to be carried out within a period of 4(four) months from the date of receipt of this order.

34. Consequently, the impugned orders dated 23.06.2015, 28.07.2015, 21.10.2015 and the order dated 15.02.2019 to the extent it affects the petitioner are hereby set aside and quashed.

35. Petition disposed of. There shall be no order as to costs.

Judge

Meghalaya
13.04.2023
"D. Nary, PS"

