

GAHC020000282023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WA/3/2023

THE STATE OF NAGALAND AND 3 ORS
REPRESENTED BY THE CHIEF SECRETARY TO THE GOVERNMENT
OF NAGALAND, KOHIMA

2: THE COMMISSIONER AND SECRETARY TO THE GOVERNMENT
OF NAGALAND

3: THE FINANCE COMMISSIONER,
NAGALAND, KOHIMA

4: THE DIRECTOR, SCHOOL EDUCATION,
NAGALAND, KOHIMA

VERSUS

1: SHRI. KAILASH NATH JHA @ K.N.JHA AND ANR
G/T, GOVERNMENT HIGHER SECONDARY SCHOOL, CHIECHAMA,
KOHIMA, NAGALAND

2: THE ACCOUNTANT GENERAL
NAGALAND, KOHIMA

Advocate for the Petitioner : N. ANGAMI

Advocate for the Respondent : TONGPOK PONGENER

BEFORE
HON'BLE MR. JUSTICE NANI TAGIA
HON'BLE MR. JUSTICE MANISH CHOUDHURY

JUDGMENT & ORDER

Date : 03-05-2023

[Manish Choudhury, J.]

This intra-court appeal, preferred by the State of Nagaland, is directed against a Judgment and Order dated 04.11.2020 passed in the writ petition, W.P.[C] no. 195/2018 wherein the learned Single Judge has observed that the petitioner is entitled for grant of 2nd Financial Up-Gradation on 01.04.2012 under the Modified Assured Career Progression Scheme [MACPS] by counting his ad-hoc service and has directed the respondent no. 5 therein i.e. the respondent no. 2 herein to grant the benefits of 2nd Financial Up-Gradation to the petitioner w.e.f. 01.04.2012 with all the benefits after deduction of the excess drawal during the period from 2010 to 2012.

2. We have heard Ms. V. Suokhrie, learned Additional Advocate General, Nagaland for the appellants and Mr. Tongpok Pongener, learned counsel for the respondent no. 1 – writ petitioner.

3. The respondent no. 1 as the writ petitioner [hereinafter referred to as 'the writ petitioner' for convenience] had instituted the writ petition, W.P.[C] no. 195/2018 under Article 226 of the Constitution of India seeking inter alia a direction for setting aside of a part of an Office Memorandum no. FIN/ROP-19/2001 dated 26.08.2011 issued by the Finance Department, Government of Nagaland and an Order bearing no. ED/MACP/1/2010 dated 20.05.2016.

4. The Office Memorandum dated 26.08.2011 was issued by the Finance Department, Government of Nagaland, giving clarifications on a number of points on the MACPS framed by the Government of Nagaland for the benefit of State Government employees. The writ petitioner was aggrieved by the clarification contained therein in respect of Point no. 1, given in the Office Memorandum. In the Order dated 20.05.2016 issued by the Director of

School Education, Government of Nagaland, it was stated that there would be no recovery of the excess drawal of pay and allowances made owing to the wrong grant of Financial Up-Gradation under the MACPS to the employees. It had further mentioned that the pay of those affected employees would be re-casted and fixed to the lower stage of pay that he/she should have drawn prior to erroneous grant of Financial Up-Gradation under the MACPS. The DDOs were, thereby, directed to scrutinize all such cases and to do the corrections before 30.06.2016. The writ petitioner was aggrieved by that part of the Order dated 20.05.2016 whereby fixation of the pay to the earlier stage was ordered.

5. At this stage, it is apposite to state few relevant facts as regards the service career of the writ petitioner :-

5.1. By an Order dated 16.04.1990, the writ petitioner, B.Sc.[Maths], came to be appointed as an Assistant Teacher in Government High School, Tobu on ad-hoc basis in the Scale of Pay : Rs. 775/- - 1590/- per month plus other allowances, mentioned therein. The order further mentioned that the appointment would have no continuity with previous service, if any. By an Order dated 31.10.2002 of the Director of School Education, Government of Nagaland, the services of a number of ad-hoc/contract teachers, as per Annexure 'A' & 'B' therein, came to be regularized after grant of approval by the State Government on 03.09.2002 and pursuant to a Cabinet Decision on 14.05.2021. The Order further mentioned that the regularization would take effect from 14.05.2001 and would be subject to verification of certificates of the incumbents from the concerned institute/universities. The name of the writ petitioner figured at Serial no. 39 in Annexure 'A', attached to the Order dated 31.10.2002. By a Circular dated 28.07.2004 of the Director of School Education, Government of Nagaland, it was notified that in respect of teachers whose services stood regularized w.e.f. 14.05.2001 vide the Order dated 31.10.2002, the intervening period between the date of joining and the date of regularization would be treated as on duty for the purpose of fixation of pay and also for pensionary benefit.

6. After regularization of service of the writ petitioner w.e.f. 14.05.2001, the State Government in the Finance Department by an Office Memorandum dated 28.02.2002 introduced the Assured Career Progression Scheme [ACPS] for employees of the State

Government to avoid genuine stagnation and hardship faced by the State Government employees due to lack of adequate promotional avenues. At that point of time, the ACPS was made not applicable to Graduate Teachers under the Director of School Education, Government of Nagaland.

7. In the year 2008, the State Government decided to extend the benefit of ACPS to the Graduate Teachers in the Department of School Education. Earlier, the Graduate Teachers were not given the benefit of ACPS on the premise that they were provided a higher scale of pay and designated as Senior Graduate Teacher on completion of 10 years of continuous service, as per the previous successive Revision of Pay. Finding that similarly placed teachers under the Central Government were being covered under the ACPS, the State Government in the Education Department by an Office Memorandum dated 08.04.2008, extended the benefits under the ACPS to the Graduate Teachers under the Director of School Education, Government of Nagaland.

8. In the Office Memorandum dated 08.04.2008, the effective date of adoption was stated as 21.02.2008. The Office Memorandum dated 08.04.2008 was followed by an Order dated 14.10.2008 under the hand of the Director of School Education, Government of Nagaland, whereby, a list of incumbents under different subordinate establishments under it was published, as per the recommendations of the ACP Screening Committee. The persons included in the list were granted either 1st Financial Up-Gradation or 2nd Financial Up-Gradation under the ACPS. In the said list, the name of the writ petitioner as Graduate Teacher as on 28.02.2002 figured at Serial no. 380. The writ petitioner was extended the benefit of 1st Financial Up-Gradation w.e.f. 21.02.2008 by considering his date of entry into service as 23.04.1990 and the date of completion of 12 years as 23.04.2002.

9. In the year 2010, the Finance Department, Government of Nagaland, introduced a new scheme, that is, the MACPS in replacement of the earlier ACPS to grant 3 [three] Financial Up-Gradations under the MACPS at intervals of 10, 20 and 30 years of continuous regular service.

10. On coming into force of the MACPS in place of the earlier ACPS, the Screening

Committee of the MACPS under the Director of School Education, Government of Nagaland held its Meetings during the months of February and April, 2011 and recommended the names of persons to be granted Financial Up-Gradation under the MACPS, notified vide the Office Memorandum dated 12.10.2010. The Director of School Education, Government of Nagaland issued an Order dated 24.05.2011 on the basis of the recommendations of the Screening Committee of the MACPS declaring that the incumbents under different subordinate establishments, as given in the annexure attached there, were extended the benefit of Financial Up-Gradation under the MACPS. In the list of incumbents, the name of the writ petitioner figured at Serial no. 496. The writ petitioner was thereby, given 2nd Financial Up-Gradation w.e.f. 23.04.2010 by taking into account the date of his entry into service as 23.04.1990 and the date of completion of 20 years of service as 23.04.2010.

11. Subsequently, the State Government in the Finance Department issued the Office Memorandum dated 26.08.2011 providing the clarifications on a number of points in connection with the MACPS. It was inter alia clarified therein that the period of service rendered on ad-hoc/contract or work-charged basis prior to regularization would not be taken into account for computation of length of service for grant of benefit under the MACPS. Pursuant to the Office Memorandum dated 26.08.2011, a Circular dated 11.03.2013 came to be issued whereby the direction was made to scrutinize all cases of 2nd Financial Up-Gradation granted under various establishments under the MACPS and to recover the excess pay and allowances drawn by the incumbents who were granted 2nd Financial Up-Gradation under the MACPS without completing 10 years of service from the date of grant of 1st Financial Up-Gradation under the earlier ACPS.

12. Apprehending adverse action of recovery in terms of the direction given in the Circular dated 11.03.2013, the writ petitioner along with 27 others preferred a writ petition, W.P.[C] no. 33[K]/2015 challenging the validity of the Circular dated 11.03.2013 on the ground that they were not responsible for extension of the benefit of 2nd Financial Up-Gradation as there was no misrepresentation or fraud on their part. The challenge was made also on the ground that the Circular dated 11.03.2013 was issued without any show cause notice and without giving an opportunity of being heard to the petitioners. The writ petition, W.P.[C] no. 33[K]/2015 was heard along with a number of other similar writ

petitions.

13. The learned Single Judge took notice of an Office Memorandum dated 06.02.2014 issued by the Ministry of Personnel, PG and Pension, Department of Personnel and Training, Government of India wherein in paragraph 3[ii], it was stated as under :-

ii. In a case like this where the authorities decide to rectify an incorrect order, a show cause notice may be issued to the concerned employee informing him of the decision to rectify the order which has resulted in the overpayment, and intention to recover such excess payments. Reasons for the decision should be clearly conveyed to enable the employee to represent against the same. Speaking orders may thereafter be passed after consideration of the representations, if any, made by the employee.

14. The writ petition, W.P.[C] no. 33[K]/2015 and all other analogous writ petitions were disposed of by a common Judgment and Order dated 20.07.2015. The operative part of the common Judgment and Order dated 20.07.2015 reads as under :

This Court is therefore, of the considered opinion that the respondents should have given a show cause notice to the petitioners thereby allowing them to represent to such show cause. Accordingly, the impugned Circular dated 11.03.2013 is set aside and quashed. However, the State respondents are given liberty to issue show cause notice to the petitioners and thereafter, take appropriate steps as per the guidelines contained in the Office Memorandum dated 06.02.2014 issued by the Ministry of Personnel, PG and Pension, Department of Personnel and Training and thereafter pass appropriate orders as deemed fit. Let such steps be taken and completed at the earliest but not later than 3 months from the date of receipt of certified copy of this order by the State respondents.

15. Subsequent to the disposal of the writ petitions in the afore-stated manner by the common Judgment and Order dated 20.07.2015, the writ petitioner herein was served with a show cause notice dated 11.09.2015 whereby the writ petitioner was asked to justify as to why action should not be taken to rectify the error committed and the excess

payment should not be recovered from the writ petitioner. The writ petitioner was granted 15 days time to file his reply to the show cause and the writ petitioner had submitted his reply to the show cause notice on 28.09.2015.

16. It transpires that the State Government in the Director of School Education had taken a conscious decision, following the principles laid down by the Hon'ble Supreme Court of India in State of Punjab and others vs. Rafiq Masih [White Washer], reported in [2015] 4 SCC 334, not to recover excess payment made erroneously under the MACPS from the beneficiaries including the writ petitioners in the writ petition, W.P.[C] no. 33[K]/2015 wherein the writ petitioner herein was one of the petitioners. The said decision was conveyed by a Notification dated 04.02.2016 of the Director of School Education, Government of Nagaland. Consequently, an Order dated 17.02.2015 was passed by the Director of School Education, Government of Nagaland whereby the show cause notices issued inter alia to the petitioners in W.P.[C] no. 33[K]/2015 including the writ petitioner herein, were revoked with effect from the date of issuance of the said Order.

17. It is iterated that on 20.05.2016, the impugned Order was passed by the Director of School Education, Government of Nagaland under the hand of the Additional Director & HOD. By the said Order dated 20.05.2016, it was clarified that there would be no recovery of the excess drawal of pay and allowances made owing to the erroneous grant of Financial Up-Gradations under the MACPS to the employees, in compliance of the principles laid down by the Hon'ble Supreme Court of India in Rafiq Masih [supra] and in pursuance of a Notification dated 29.01.2016, which was already superseded by the Notification dated 04.02.2016. The Order dated 20.05.2016 had further mentioned that the pay of those affected employees would be re-casted and fixed to the earlier stage of pay that he/she should have drawn prior to the grant of Financial Up-Gradation under the MACPS in the erroneous manner. The DDOs were thereby, directed to scrutinize all such cases and to make corrections before 30.06.2016.

18. The learned Single Judge after taking note of the writ petitioner's initial appointment as Assistant Teacher on ad-hoc basis by the Order dated 16.04.1990, proceeded on the premise that in the year 1992, the writ petitioner appeared in a

selection test conducted by the Education Department and pursuant to recommendation by the District Selection Board, he was appointed to the post of Assistant Teacher in the Scale of Pay of Rs. 775/- - 1500/- per month plus other admissible allowances w.e.f. 01.06.1992 on contract basis by an Order dated 25.05.1992. The writ petitioner was granted Senior Grade Scale of Pay by an Order dated 29.07.2000 and thereafter, by the Order dated 31.10.2002 [supra], the writ petitioner's service was regularized w.e.f. 14.05.2001. On 28.07.2004, the Directorate of School Education, Government of Nagaland issued a Circular dated 28.07.2004 whereby it was declared that the intervening period between the date of joining and the date of regularization of all the teachers whose services had been regularized w.e.f. 14.05.2001 by the Order dated 31.10.2002, would be treated as on duty for the purpose of fixation of pay and also for pensionary benefit. Reliance was placed on another Office Memorandum dated 19.11.1975 of the Personnel and Administrative Reforms [P&AR] Department, Government of Nagaland which provided that the period of contract service rendered would count for increment, leave, pension and other service benefits. Reliance was placed on another Office Memorandum dated 26.11.2009 of the P&AR Department, Government of Nagaland which provided that services rendered on contract/ad-hoc/work-charged would be counted for increment, leave, pension and other service benefits except seniority. Based on the Circular dated 28.07.2004, Office Memorandum dated 19.11.1975 and the Office Memorandum dated 26.11.2009, the learned Single Judge reached a reasoning that the writ petitioner's pensionary benefit and other connected benefits out of the service would be counted from 16.04.1990, which was his initial appointment on ad-hoc basis.

18.1. Proceeding further, the learned Single Judge took note of the fact that by the Office Memorandum dated 08.04.2008, the benefits of ACPS was extended to Graduate Teachers and based on the said Office Memorandum dated 08.04.2008, the Department of School Education by Order dated 14.10.2008, extended the benefit to those employees who were not in Group 'B' & 'C' categories and had been serving without promotion or lift in the pay grade and they would be given a lift in a block of 12 years. Which such reasoning, the learned Single Judge had gone on to hold that the writ petitioner, by application of the scheme, on completion of 12 years of service without promotion was granted Financial Up-Gradation under the ACPS w.e.f. 01.04.2002, which fact does not emerge from the

records. When the State Government introduced the MACPS by the Office Memorandum dated 12.10.2010, the writ petitioner had, by then, completed 20 years of service without promotion and therefore, the Department of School Education, by the Order dated 24.05.2011 granted the writ petitioner the 2nd Financial Up-Gradation w.e.f. 23.04.2010. To arrive at such a finding, the learned Single Judge had referred to the decision in Nabam Protima & another vs. State of Arunachal & others, reported in 2016 [3] GLT 582, wherein it was held that as per the MACPS, the Financial Up-Gradation in the form of 1st Financial Up-Gradation would be admissible to an employee who had completed 10 years of continuous service in the same grade pay. The decision had observed that nowhere in the MACPS it was stipulated that such tenure of 10 years must be against a regular sanctioned vacancy and, thus, as and when the employee would complete 10 years of continuous service, the employee would acquire the eligibility for being considered for the benefit under the MACPS. The learned Single Judge had also referred to the decision in Union of India & others vs. Utpal Saikia and others, reported in 2017 [2] GLT 719, wherein Clause 9 of the MACPS came up for consideration.

19. What is noticeable from the ACPS, notified by the Office Memorandum dated 28.02.2002, the same was issued by the Finance Department, Government of Nagaland to avoid genuine stagnation and hardship that might be faced by the State Government employees due to lack of adequate promotional avenues. Under the ACPS, provision for two Financial Up-Gradations were made to Group 'B' & 'C' employees on completion of 12 years and 24 years of regular service, provided no regular promotion had been given to an employee during the above periods. It was made specific in the ACPS that the employees appointed on ex-cadre, casual, contract, ad-hoc and work-charged basis shall not qualify for the benefits under the ACPS. Under the ACPS, the 1st Financial Up-Gradation was to be allowed after 12 years of regular service and the 2nd Financial Up-Gradation after another 12 years of regular service counted from the date of the 1st Financial Up-Gradation, provided no regular promotion was availed during each of the two blocks of 12 years. The 1st effective date for grant of Financial Up-Gradation under the ACPS was the date of completion of the prescribed eligibility period or the date of issue of the ACPS i.e. 28.02.2002, whichever was earlier.

19.1. By the Office Memorandum dated 08.04.2008, the State Government took note of the fact that the benefits of the ACPS were not extended to the Graduate Teachers under the Department of School Education as they were provided a higher scale of pay and designated as Senior Graduate Teacher, on completion of 10 [ten] years of continuous service, which benefit the writ petitioner received on 29.07.2000. After taking note of the fact that similarly placed teachers under the Central Government were being covered under their respective ACPS, the State Government took a conscious decision to extend the provisions of the ACPS also to the Graduate Teachers under the Department of School Education, with certain terms and conditions. As per the Office Memorandum dated 08.04.2008, the Graduate Teachers were made eligible for the 1st Financial Up-Gradation under the ACPS on completion of 12 years of continuous regular service in that grade and the 2nd Financial Up-Gradation would be admissible on completion of 24 years of regular service as per the terms and conditions laid down under the ACPS. Thus, it is clear that apart from the terms and conditions of the original ACPS, notified by the Office Memorandum dated 28.02.2002, the terms and conditions set forth in the Office Memorandum dated 08.04.2008 whereby the benefits of the ACPS were extended to the Graduate Teachers, would also be applicable. The Office Memorandum dated 08.04.2008 had made it specific that the effective date would be 21.02.2008. From a combined reading of the Office Memorandum dated 28.02.2002 and the Office Memorandum dated 08.04.2008, it is clear that the employees appointed on ex-cadre, casual, contract, ad-hoc and work-charged basis were not qualified for the benefits under the ACPS. It needs reiteration to mention that the writ petitioner was appointed as an Assistant Teacher on 16.04.1990 on ad-hoc basis whereafter he was appointed on contract basis as an Assistant Teacher by the Order dated 25.05.1992. The writ petitioner's service as ad-hoc/contract teacher was regularized by Order dated 31.10.2002 w.e.f. 14.05.2001.

19.2. During the interregnum, the writ petitioner was granted Senior Grade Scale of Pay in the year 2000 by an Order dated 29.07.2000 on completion of 10 years of continuous service in the same grade. Notably in the year 2000, the service of the writ petitioner was on contract basis and though he had rendered 10 years of continuous service, he did not render 10 years of continuous regular service.

19.3. The Circular dated 28.07.2004 had made a distinction between the service rendered during the pre-regularization period and the service rendered in the post-regularization period. By the Circular, the services rendered by the teachers whose services had been regularized w.e.f. 14.05.2001, during the intervening period between the date of joining which can be either on ad-hoc basis or on contract basis, and the date of regularization was to be treated as on duty for the purpose of fixation of pay and also for pensionary benefit. The writ petitioner had, at no point of time, laid any challenge in respect of his date of regularization w.e.f. 14.05.2001. The service rendered during the pre-regularization period, as notified by the Circular dated 28.07.2004, was relevant for the purpose of fixation of pay on the date of regularization and such pay fixation could become the basis of calculating the benefit of 1st Financial Up-Gradation on completion of 12 years of continuous regular service under the ACPS for a Graduate Teacher like the writ petitioner, counting from the date of regularization and on and from 21.02.2008, that is, the effective date from which the benefits under the ACPS were extended to the Graduate Teachers under the Department of School Education, Government of Nagaland. Thus, if one counts 12 years of continuous regular service of the writ petitioner from 14.05.2001, the writ petitioner was not found entitled for the 1st Financial Up-Gradation under the ACPS with effect from 21.02.2008. Both the Office Memorandum dated 19.11.1975 and the Office Memorandum dated 26.11.2009 was about the manner in which the period of service rendered on contract/ad-hoc/work-charged was to be counted for increment, leave, pension and other service benefits but neither of them was on the aspect of Financial Up-Gradation under the ACPS. Thus, we have found ourselves in disagreement of the learned Single Judge who reached a view that the writ petitioner was entitled for the 1st Financial Up-Gradation under the ACPS w.e.f. 01.04.2002 which was based on an erroneous finding that on 01.04.2002, the writ petitioner had completed 12 years of continuous service without promotion conspicuously ignoring the fact that such continuous service was not continuous regular service. It needs to be reiterated that to be eligible for 1st Financial Up-Gradation under the ACPS, one requires 12 years of continuous regular service, not 12 years of continuous service without regularization.

20. At the cost of repetition, it is to be mentioned that the writ petitioner was given 2nd Financial Up-Gradation w.e.f. 23.04.2010 by taking into account the date of his entry into

service as 23.04.1990 and the date of completion of 20 years of service as 23.04.2010. The MACPS which replaced the ACPS, had provided for 3 [three] Financial Up-Gradations at intervals of 10, 20 & 30 years of continuous regular service. Clause 7 of the Office Memorandum dated 12.10.2010 had provided that any interpretation/clarification of doubt as to the scope and meaning of the provision of the MACPS shall be given by the Finance Department. The MACPS was made operational w.e.f. 01.04.2010 with the further clarification that Financial Up-Gradations as per the provisions of the earlier ACPS would be granted till 31.03.2010. The MACPS envisaged placement in the immediate next higher grade pay in the hierarchy of recommended revised pay bands and grade pay as per the Nagaland Services [RoP] Rules, 2010. Clause 9 of the MACPS had stipulated that 'regular service' for the purposes of the MACPS shall commence from the date of joining of a post in direct entry grade on a regular basis either on direct recruitment basis or on absorption/re-employment basis. It further clarified that service rendered on ad-hoc/contract basis before regular appointment on pre-appointment training shall not be taken into a reckoning.

20.1. In Union of India vs. Utpal Saikia [supra], the afore-mentioned Clause 7 of the MACPS came under consideration. Taking note of the facts and circumstances and Clause 9 of the MACPS, the Court had inter alia observed as under :-

7. A close reading of Clause 9 shows that the period of service commencing from the date of joining of a post in direct entry grade on regular basis is to be deemed as "regular service". Such entry can either be on direct recruitment basis or on absorption/re-employment basis. It envisages that services rendered on ad-hoc/contract basis before regular appointment on pre-regularization shall not be taken into reckoning for the purpose of the scheme. Clause 9 does not take stock of a situation where a person whose entry into a grade is declared to be on regular basis, promoted to a higher grade, initially on ad-hoc basis and thereafter regularized, granted a particular grade-pay from day one and then to be denied further benefits. There is no mention in the Scheme or any clarification made by the concerned ministry that even in respect of promotion, benefits under the Scheme will accrue on and from the date of regularization of the promotion and not otherwise.....

20.2. The factual matrix involved in Union of India vs. Utpal Saikia [supra], is found not similar to the factual matrix of the case in hand. The MACPS under consideration there was a scheme framed by the Government of Arunachal Pradesh. The respondents' entitlement to 1st Financial Up-Gradation was not an issue therein. It is trite to mention that the decision is an authority for what it decides and not what can be logically deduced therefrom and even a slight distinction in fact or an additional or different fact may make a lot of difference in the decision-making process. The reliance on the said decision by the learned Single Judge appears to be, in our considered opinion, misplaced.

21. Following the conscious decision of the State Government not to recover the excess payment made erroneously under the MACPS from the beneficiaries including the petitioners in the writ petition, W.P.[C] no. 33[K]/2015 wherein the writ petitioner herein was also one of the petitioners, following the principle laid down in Rafiq Masih [White Washer] [supra], the decision was conveyed by the Notification dated 04.02.2016, the Order dated 17.02.2016 and the Order dated 20.05.2020. It was also a decision of the State Government that the pay of those affected employees would be recasted and fixed to the earlier stage of pay that he or she should have drawn prior to the grant of Financial Up-Gradation under the MACPS in the erroneous manner.

22. Subsequent to issuance of the Office Memorandum 12.10.2010 notifying the MACPS, the Finance Department, Government of Nagaland issued an office Memorandum dated 10.03.2011 clarifying certain points in respect of the MACPS. One of the points raised and clarification given in the Office Memorandum dated 10.03.2011 were as follows

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Sl. No.	Points raised	Clarification
1	In case of incumbents who already got 1 st financial up-gradation under old ACP Scheme what will be the length of service required for giving him the 2 nd financial up-gradation under the new MACP Scheme will it be 10+10 or 12+10?	Since para 9 of the Finance Department notification No.FIN/ROP-19/2001 dated 12.10.2010 introducing the MCP Scheme has stated that no past cases would be re-opened, it is clarified that in case of incumbents who already got 1 st financial up-gradation under old

		ACP Scheme, the length of service required for giving 2 nd financial up-gradation under the new MACP Scheme will be 12+10, that is, after 10 years of service from the 1 st financial up-gradation under the old ACP Scheme. It may, however, be noted that no financial up-gradation under the new MACPS can be granted prior to 01.04.2010, that is, the date on which the scheme is made operational.
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22.1. Going by the above clarification and taking into consideration that the writ petitioner was given the 1st Financial Up-Gradation, by the Order dated 14.10.2008, w.e.f. 21.02.2008, he would be eligible for 2nd Financial Up-Gradation on completion of 10 years from 21.02.2008, that is, in the year 2018.

23. In deference of Clause 7 of the Office Memorandum dated 12.10.2010 whereby the MACPS was notified, the Finance Department, Government of Nagaland issued the Office Memorandum dated 26.08.2011 providing clarifications on 3 [three] points in respect of the MACPS. As the point no. 1 raised therein and the clarification provided thereof is of relevance and import, the same are quoted hereinbelow :-

Sl. No.	Points raised	Clarification
1	It is found that in many cases the period of contract service is counted towards all service benefits like Pension, Leave, Pay etc. except seniority as per condition given at the time of regularization of their services. In such cases whether such contract service should be counted as qualifying service for financial up-gradation under MACP Scheme?	The MACP Scheme does not cover the employees appointed on contract, ad-hoc or work-charged basis. If any of these category of employees are subsequently regularized and their past continuous service on contract, ad-hoc or wok-charged basis are allowed to be counted for pensionary and other service benefits still their seniority in service is counted from the date of regularization only. In view of this, for allowing the benefits under MACP Scheme the qualifying

		length of service shall be counted w.e.f. the date of regularization only. The period of service rendered on ad-hoc, contract or work-charged basis prior to regularization will not be taken into account of computation of length of service for grant of benefits under MACP Scheme.
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24. The writ petitioner's pay came to be re-fixed from the month of August, 2015. By submitting a representation dated 21.06.2016, the writ petitioner made a request for restoration of his pay by taking into account the 2nd Financial Up-Gradation. The writ petitioner has himself admitted that when his representation was not considered, he and four other similarly situated teachers instituted a writ petition, W.P.[C] no. 201[K]/2016 alleging violation of the principle of natural justice prior to giving effect to reduction of their pay and prayed for a direction to the State respondents to restore the petitioners therein to their upgraded pay. The writ petitioner in the writ petition had admitted that in response, the State respondents filed their counter affidavit bringing on record the Notification dated 04.02.2016 and the Order dated 20.05.2016, impugned in the present writ petition. The writ petitioner has himself admitted that by the Order dated 20.05.2016, it was clarified that there would be no recovery of the excess drawal of pay and allowances made owing to the grant of Financial Up-Gradation under the MACPS and that the pay of those affected employees would be re-cast and fixed to the lower stage of pay that he/she should have drawn prior to the erroneous grant of Financial Up-Gradation under MACPS.

24.1. The writ petition, W.P.[C] no. 201[K]/2016 came up for consideration on 27.06.2017. The learned Single Judge took note of the stand taken by the State respondents in the counter affidavit filed therein wherein it was admitted that while compiling the list of employees for up-gradation for the MACPS, a bona fide mistake was committed by wrongly interpreting the Office Memorandum dated 12.10.2010 and as a result, financial up-gradations were wrongly granted to a number of employees including the petitioners therein. It may be worthwhile to mention that the writ petitioner herein

was one of the petitioners therein W.P.[C] no. 201[K]/2016. The writ petition, W.P.[C] no. 201[K]/2016 came to be disposed of in the following manner :-

After hearing the submissions of the learned counsel for the parties and on consideration of the materials available on record what is discernible is that it is undisputed that when the up-gradation under the MACP Scheme was granted to the petitioners, the same was done due to wrong interpretation of the OM dated 12.10.2010 by the Department of School Education. Further, this Court has also taken into account the statement made in the affidavit-in-opposition that no excess recovery would be made from the petitioners in terms of the ratio laid down in the case of Rafiq Masih [supra]. The statements of the respondents are further fortified by the Notification dated 04.02.2016 which is annexed to the affidavit-in-opposition as Annexure-II.

In that view of the matter, this Court does not find any necessity of keeping the present writ petition pending more particularly when no affidavit-in-reply has been filed by the petitioners against the affidavit-in-opposition filed by the State respondents.

Accordingly, the writ petition is disposed of without interfering with the action of the respondents with regard to re-casting of the salaries of the petitioners.

24.2. The learned Single Judge in the writ petition, W.P.[C] no. 201[K]/2016 disposed of the writ petition without interfering with the action of the State respondents with regard to re-casting of the salaries of the petitioners therein. In the writ petition, W.P.[C] no. 201[K]/2016, the Order dated 20.05.2016, impugned herein, was part of the counter affidavit of the State respondents, a fact the writ petitioner has himself admitted in paragraph 20 of the writ petition, W.P.[C] no. 195/2018. The disposal of the writ petition, W.P.[C] no. 201[K]/2016 by the order dated 27.06.2016 without interfering with the action of the State respondents with regard to re-casting of the salaries of the writ petitioner herein has attained finality as the writ petitioner has not laid any challenge to such non-interference with regard to re-casting of his salary in any appropriate proceeding. Thus, we find sufficient force in the submission of the learned counsel for the appellants that the challenge made to the Order dated

20.05.2016 by the writ petitioner in the writ petition, W.P.[C] no. 195/2018 against which the instant intra-court appeal has been preferred, is hit by the principle of res judicata.

25. In view of the discussion made above and taking into account the provisions contained in the ACPS and the MACPS, we are not persuaded to agree with the view of the learned Single Judge given in the decision in Nabam Protima [supra] to the effect that as long as the employee completes 10 years of continuous service, the said person would acquire the eligibility for being considered for the benefits under the MACPS.

26. In view of the discussion made above, we are also not persuaded to agree with the view of the learned Single Judge to the effect that the date, 16.04.1990 would be treated as the date of the writ petitioner's regular appointment for all purposes of computation of the salary and wages of the writ petitioner in terms of the Circular dated 28.07.2004 which, according to him, remained unassailed. For the reasons already assigned hereinabove in connection with the Circular dated 28.07.2004, the reasoning assigned in the impugned Judgment and Order dated 04.11.2020 with regard to the Circular dated 28.07.2004 cannot be countenanced. With no challenge from the writ petitioner with regard to the date of regularization of his service w.e.f. 14.05.2001 at any point of time during the period from 31.10.2002 till the institution of the writ petition, W.P.[C] no. 195/2018, the finding reached by the learned Single Judge to the effect that the writ petitioner was in regular service since 16.04.1990 is found to be erroneous. Consequently, the findings that the writ petitioner was entitled to 1st Financial Up-Gradation on 01.04.2002; the 2nd Financial Up-Gradation on 01.04.2012 and would be entitled for 3rd Financial Up-Gradation on completion of 30 years from 16.04.1990 are found unsustainable in law and as such, they are liable to be interfered with. It is accordingly ordered.

27. In view of the observations made, for the reasons assigned and findings arrived at and the direction made above, the instant intra-court appeal succeeds.

Consequently, the writ petition is dismissed. There shall, however, be no order as to cost.

Sd/-

JUDGE

Sd/-

JUDGE

Comparing Assistant