IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 668 OF 2014

1. Shri Ashok Kashinath Naik,
major of age,
UDC (ACP-II), W.D. VII, P.W.D.,
Panaji, Goa.

2. Shri Santosh A. Sinai Lotlicar,
major of age,
UDC (ACP-II), Circle Office V,
P.W.D., Altinho, Panaji, Goa.

3. Smt. Bharati D. Prabhushastri,
major of age,
UDC (ACP-II), W.D. XXIII, P.W.D.,
Bicholim, Goa.

4. Smt. Felicidade Dias e Vaz,
major of age,
UDC (ACP-II), Circle Office VII,
P.W.D., Altinho, Panaji, Goa.

5. Smt. Gokul V. Kamat Satoskar,
major of age,
UDC (ACP-II), Circle Office V,
P.W.D., Altinho, Panaji, Goa.

6. Smt. Medha Tamba,
major of age,
UDC (ACP-II), Circle Office V,
P.W.D., Altinho, Panaji, Goa.

7. Smt. Maria A. Pires,
major of age,
UDC (ACP-II), Office of the Principal
Chief Engineer, P.W.D., Altinho,
Panaji, Goa.

8. Shri Dattaram Parab,
major of age,
UDC (ACP-II), Office of the Principal
Chief Engineer, P.W.D., Altinho,

Panaji, Goa.

9. Smt. Suchita S. Naique,
major of age,
UDC (ACP-II), W.D. XVII, P.W.D., Porvorim, Bardez, Goa.

10. Shri Bhiku B. Pednekar,
major of age,
UDC (ACP-II), W.D. III, P.W.D., St. Inez, Panaji, Goa.

11. Smt. Rekha S. Rao,
major of age,
UDC (ACP-II), W.D. XIII, P.W.D., Mapusa, Bardez, Goa.

12. Smt. Sunita R. Korgaonkar,
major of age,
UDC (ACP-II), W.D. XIII, P.W.D., Mapusa, Bardez, Goa.

13. Shri Uday S. Kudtarkar,
major of age,
UDC (ACP-II), W.D. XVII, P.W.D., Porvorim, Bardez, Goa.

14. Shri Dharmanand Lotlikar,
major of age,
UDC (ACP-II), Circle Office III, P.W.D., Altinho, Panaji, Goa.

15. Shri Ravindra S. Padloskar,
major of age,
UDC (ACP-II), Office of the Principal Chief Engineer, P.W.D., Altinho, Panaji, Goa.

16. Smt. Shaila G. Kenny,
major of age,
UDC (ACP-II), Office of the Principal Chief Engineer, P.W.D., Altinho, Panaji, Goa.

17. Smt. Kalpana P. Chopdekar,

major of age,
UDC (ACP-II), Office of the Principal Chief Engineer, P.W.D., Altinho, Panaji, Goa.

18. Smt. Arati A. Sancolkar,
major of age,
UDC (ACP-II), Office of the Principal Chief Engineer, P.W.D., Altinho, Panaji, Goa.

19. Smt. Pragati Pramod Naik,
major of age,
UDC (ACP-II), W.D. II, P.W.D., Panaji, Goa.

20. Smt. Fatima B. D'Souza,
major of age,
UDC (ACP-II), Office of Monitoring & Evaluation Unit, P.W.D., Altinho, Panaji, Goa.

21. Shri Shaikh Mohd. Ayaz,
major of age,
Office of Superintending Surveyor of Works, P.W.D., Altinho, Panaji, Goa.

22. Smt. Yolanda Roncon,
major of age,
UDC (ACP-II), Office of Superintending Surveyor of Works, P.W.D., Altinho, Panaji, Goa.

23. Smt. Catherine George,
major of age,
UDC (ACP-II), W.D. IV, P.W.D., Tonca, Panaji, Goa.

24. Smt. Vijayalaxmi D. Phadte,
major of age,
UDC (ACP-II), Circle Office VI, P.W.D., Altinho, Panaji, Goa.

25. Smt. Beatrice D'Souza,
major of age,

UDC (ACP-II), Circle Office VI, P.W.D., Altinho, Panaji, Goa.

26. Smt. Pramila S. Prabhu Lawande,
major of age,
UDC (ACP-II), W.D. X, P.W.D., Margao, Goa.

27. Shri Joseph Rato,
major of age,
UDC (ACP-II), Circle Office I, P.W.D., Altinho, Panaji, Goa.

28. Smt. Shital A. Sambhari,
major of age,
UDC (ACP-II), W.D. XV, P.W.D., Ponda, Goa.

29. Shri Shashikant D. Kodarkar,
major of age,
UDC (ACP-II), W.D. XV, P.W.D., Ponda, Goa.

30. Smt. Shanta G. Kuvelkar,
major of age,
UDC (ACP-II), W.D. XV, P.W.D., Ponda, Goa.

31. Smt. Shubhada S. Panandikar,
major of age,
UDC (ACP-II), W.D. XXI, P.W.D., Margao, Goa.

32. Shri Somnath Chari,
major of age,
UDC (ACP-II), Circle Office I, P.W.D., Altinho, Panaji, Goa.

33. Smt. Sulbha Pai,
major of age,
UDC (ACP-II), W.D. XI, P.W.D., Panaji, Goa.

34. Smt. Anuprita Chopdekar,
major of age,

UDC (ACP-II), W.D. XI, P.W.D., Panaji, Goa.

35. Shri Antonio I. L. Fernandes,
major of age,
UDC (ACP-II), W.D. XI, P.W.D., Panaji, Goa.

36. Smt. Luiza Monica Fernandes,
major of age,
UDC (ACP-II), Circle Office IX, P.W.D., Altinho, Panaji, Goa.

37. Shri Deelip B. Shetkar,
major of age,
UDC (ACP-II), W.D. XVII, P.W.D., Porvorim, Bardez, Goa.

38. Shri Kashinath V. Naik,
major of age,
UDC (ACP-II), Office of Superintending Surveyor of Works, P.W.D., Altinho, Panaji, Goa.

39. Shri Namdev Malwannkar,
major of age,
UDC (ACP-II), W.D. XXIV, P.W.D., Margao, Goa.

40. Smt. Pratiksha Pednekar,
major of age,
UDC (ACP-II), Office of the Principal Chief Engineer, P.W.D., Altinho, Panaji, Goa.

41. Smt. Maria C. Rocha,
major of age,
UDC (ACP-II), Circle Office VII, P.W.D., Altinho, Panaji, Goa.

42. Smt. Milagrina S. Vaz Barreto,
major of age,
UDC (ACP-II), Circle Office I, P.W.D., Altinho, Panaji, Goa.

43. Smt. Kunda D. Salgaonkar,
major of age,
UDC (ACP-II), W.D. II, P.W.D.,
Panaji, Goa.

44. Smt. Razia Shaik,
major of age,
LDC (ACP-I), Office of Superintending Surveyor of Works,
P.W.D., Altinho, Panaji, Goa.

45. Shri Umesh T. Bhandari,
major of age,
LDC (ACP-II), Circle Office V,
P.W.D., Altinho, Panaji, Goa.

46. Smt. Pushpa S. Vaigankar,
major of age,
LDC (ACP-II), W.D. VII, P.W.D.,
Panaji, Goa. …... Petitioners

Versus

1. State of Goa
through its Chief Secretary, having office at Secretariat, Porvorim, Bardez, Goa.

2. The Principal Chief Engineer, Public Works Department, Altinho, Panaji, Goa.

3. The Director of Accounts, Directorate of Accounts, Panaji, Goa. ….. Respondents.

Mr. V. Rodrigues, Advocate for the petitioners.

Mr. D. Lawande, Advocate General with Mr. A. Gomes Pereira, Additional Govt. Advocate, Mr. P. Dangui, Government Advocate and Mr. A. Jamadar, Additional Govt. Advocates for the respondents.

CORAM :- F.M. REIS &
NUTAN D. SARDESSAI, JJ.
Date : - 26/04/2017.

ORAL JUDGMENT : (PER F.M. REIS, J.)

Heard Mr. V. Rodrigues, learned Counsel appearing for the petitioners and Mr. Dattaprasad Lawande, learned Advocate General appearing for the respondents.

2. The above petition, *inter alia,* prays for an appropriate writ or direction, quashing and setting aside the impugned Circular dated 02/12/2010 issued by the respondent No.3 and further to quash and aside the Corrigendum Circular dated 15/04/2011 and also seeking direction to the respondents to restore to the petitioners the amounts recovered from the petitioners in view of the impugned Circular dated 02/12/2010 and the impugned Corrigendum dated 15/4/2011.

3. Briefly, the facts of the case are that pursuant to the recommendations of the Fifth Central Pay Commission, Government of India, introduced Assured Career Progression

Scheme (ACP) for Group “B”, “C” and “D” employees and isolated posts in Group “A”, “B”, “C” and “D” vide Office Memorandum dated 9th August, 1999. The ACP Scheme was adopted by the respondent No.1 in toto and made it applicable to its employees w.e.f. 22/2/2001. It is further contended that under the ACP Scheme, the employees were to be given two financial upgradations after completing 12 years and 24 years of regular service, respectively and if any promotion in between is given to such an employee, the same should be counted against the upgradation under the ACP Scheme. It is further contended that as per the ACP Scheme, the financial upgradation has to be in the next promotional scale in the hierarchy of the cadre, without creating a new post for the purpose, as the upgradation granted is personal to such employee and shall not amount to functional or regular promotion. It is the further contention of the petitioners that the respondent No.1 issued clarification on 28th June, 2001 to the ACP Scheme. Upon recommendation of the Screening Committee, on various dates, the petitioners were granted second financial upgradation under the ACP Scheme in the Pay Scale of Rs.4500-7000 (pre-revised) of the post of Head Clerk , which was the pay scale of the next promotional post according to the hierarchy of the cadre. Accordingly, somewhere on 10/10/2008, the respondent No.1 allowed its employees the benefit of the pay scale as per the recommendations of the Sixth Central Pay Commission. Thereafter, according to the petitioner, on 6/8/2009, the respondent No.1 adopted the Modified Assured Career Promotion Scheme (MACPS), introduced by the Central Government to its employees with effect from 01/09/2008. As per the MACPS, three financial upgradations were permitted after completion of 10, 20 and 30 years of regular service. The said recommendations were accepted by the respondent No.1, in-principle and by the Government Order dated 6th March, 2009 directed to examine various cases of the revised upgradations of the pay scales. It is further contended that by an Order dated 11th November, 2009, there was upgradation of the pay scale of the Head Clerks, equivalent to Senior Assistant in the Secretariat i.e. Rs.9300-34800+4200 (Grade Pay) in PB-II pay scale equivalent to Rs.5500-900 (pre-revised) to be fixed notionally w.e.f. 1st January, 2006 and actual monetary benefits to be granted w.e.f. 1st October, 2009. Under the same order dated 11/11/2009, pay scales of certain other posts were also similarly upgraded. By the order dated 11/11/2009, the petitioners were granted upgraded pay scale of the post of Head Clerk i.e. Rs.9300-34800+Rs.4200 (Grade Pay) in PB II Pay Band equivalent to Rs. 5500-9000 (pre-revised) and their pay was accordingly fixed in the upgraded pay scale. It is further contended that the pay fixation statements of the petitioners fixing their pay, in the upgraded pay scale, were duly checked and approved by the respondent No.3 and the petitioners were drawing their pay regularly based on the upgraded pay scale. It is further contended that somewhere on 11th June, 2010, the respondent No.3, after reexamination, by his letter dated 11th June, 2010, clarified to the Joint Director of Accounts, Margao that in respect of LDCs/UDCs who are holding TBPs/ACP scale of Rs.4500-7000 as on 1.1.2006 are to be given the revised grade pay of Rs.4200 in terms of Fiance Department's Order dated 11.11.2009, since these employees have been granted TBPs/ACPS of the post of Head Clerk i.e. promotional scale of the post. The respondent No.2 granted three financial upgradations under the MACPS to the petitioners who had completed 30 years of regular service. It is further contended that the respondent No.3 arbitrarily issued the Circular dated 2/12/2010 stating that the benefit under para 6.1 of the Order dated 11/11/2009 is to be extended only to the Head Clerks strictly on functional basis only and not to those who draw pay scales by virtue of non-functional upgradation. Consequently, it is contended that the LDCs/UDCs in ACP-I or ACP-II shall not be entitled to the pay band of Rs.9300-34800+ 4200 (Grade Pay) in PB-II. It is further contended that the Circular dated 2/12/2010 issued clarification to modify the ACP Scheme issued by the Central Government and consequently, the respondent No.2 issued the corrigendum dated 15/4/2011 downgrading the pay scale of the petitioners who have been already granted three financial upgradations under the MACPS for having completed more than 30 years regular service. Being aggrieved by the arbitrary action of the respondent No.1 in issuing the Circular dated 2/12/2010 by the respondent No.3 which, according to the petitioners, runs contrary to the ACP Scheme and having caused financial loss, the petitioners have approached this Court praying for the aforesaid reliefs.

4. Mr. Vivek Rodrigues, learned Counsel appearing for

the petitioners has pointed out that the petitioners have been given the benefit of ACP Scheme much before the coming into operation the MACPS and, as such, invoking the provisions of MACPS to the petitioners much before the coming into operation such Circular, is totally unjustified. The learned Counsel has, thereafter, taken us through the Order dated 11th November, 2009 wherein it is clearly recorded that in the case of Senior Assistants/Legal Assistants in Secretariat, the pay scale of Rs.5500-9000 (pre-revised) is maintained. It is further pointed out that based on the recommendations of the Committee, the Head Clerks who function in the Departments outside the Secretariat, shall be granted the pay scale equivalent to the Senior Assistant in the Secretariat i.e. Rs.9300-34800+Rs.4200 (G.P.) in PB-2 pay scale, equivalent to Rs.5500-9000 (pre-revised), to be fixed notionally w.e.f. 01/01/2006. The learned Counsel further points out that when the petitioners were entitled to the ACP Scheme, after completion of 24 years' regular service much before giving effect to the MACPS, the petitioners were entitled to the promotional scale of the Head Clerk. The learned Counsel further submits that as such, the petitioners were entitled to the said pay scale fixed for the Head Clerk in the said Order dated 11/11/2009, as the petitioners were working outside the Secretariat. The learned Counsel further submits that accordingly, the pay scales of the petitioners were fixed as that of the Head Clerks, as reflected in the letter dated 11th June, 2010, issued by the Directorate of Accounts. The learned Counsel further submits that all of a sudden, arbitrarily and without even informing the petitioners, the Circular dated 2/12/2010 was issued by the Director of Accounts, *inter alia,* stating that such pay scales of Head Clerks were to be granted only to the serving Head Clerks and not to persons who were availing of the ACP Scheme. The learned Counsel further submits that a plain reading of the ACP Scheme would reveal that there is nothing to suggest that the petitioners would be given the pay scales based on whether they were serving or not. The learned Counsel further submits that the main objective of the ACP Scheme is to ensure that there is no stagnation at a particular post and being deprived of a promotional avenue in the cadre. It is further pointed out that as per the ACP Scheme, the petitioners are entitled to the next higher pay scale in the hierarchy and, as such, according to him, the petitioners are entitled to the pay scale of the

Head Clerks who were working outside the Secretariat. The learned Counsel has, thereafter, taken us through the MACPS to point out that such upgradations are given on the basis of the grade pay, which is not the case as far as ACP Scheme is concerned. It is further pointed out that when the petitioners have completed 30 years of regular service, such petitioners were in fact given upgradations based on the MACPS. The learned Counsel further submits that in fact, till the time of retirement, the petitioners were given pay scales as payable to the Head Clerks working outside the Secretariat and only thereafter when they were on the verge of retirement, the pay scales were sought to be revised and directions issued to recover the amounts from the year 2010. The learned Counsel further points out that as such, the action on the part of the respondents is arbitrary and without any justification and, as such, points out that the said Circular dated 2/12/2010 be quashed and set aside and directions be issued that the amounts which have been recovered be restored and the respondents be directed to refund the amounts which have been deducted from the pensionery benefits of the concerned petitioners.

5. On the other hand, Mr. Dattaprasad Lawande, learned Advocate General appearing for the respondents submits that the Office Memorandum dated 19/05/2009 was made effective with retrospective effect from 1/9/2008 and, as such, according to him, the petitioners were entitled to the upgradations on the pay grade in terms of the MACPS. The learned Advocate General further submits that in any event, according to him, as the pay scale fixed by the respondent No.1 was by mistake or an error, it is always open to the State Government to rectify the error and recover the access amount from the concerned employee. It is further pointed out that in the present case, the serving Head Clerks who were working outside the Secretariat, were entitled to the pay scale claimed by the petitioners and not the employees who were not serving who were only getting such pay scale based on ACP Scheme. The learned Counsel further points out that in such circumstances, the respondent No.3 was justified to issue the Circular, *inter alia,* stating that such pay scale of the Head Clerk was available only to the serving employees. It is further submitted that in the present case, though the next higher post in

the hierarchy is that of the Head Clerk, nevertheless, the pay scale cannot be of a Head Clerk working outside the Secretariat as the petitioners were not serving Head Clerks and, as such, it is pointed out that the respondents were justified to pass the impugned order and, as such, the petition deserves to be rejected.

As far as the contention of the petitioners that no recovery can be made for the excess amount, the learned Advocate General has pointed out that once it is shown that the amounts have been paid in excess erroneously, and contrary to the Office Memorandum, it is open to the State Government to recover the excess amount from such employees. The learned Advocate General further submits that in the present case, as the pay scales of the petitioners were erroneously fixed, the respondents are justified to recover the excess amounts paid to the petitioners. The learned Advocate General, without prejudice, submits that in the event this Court comes to the conclusion that the excess amount cannot be recovered, the retirement benefits of the petitioners would have to be fixed on the basis of the impugned Circular.

The learned Advocate General, in support of his submissions, has relied upon the Judgments of the Apex Court reported in (2006) 9 SCC 321 in the case of ***State of Haryana and others vs. Charanjit Singh and ors.,*** and (2016) 14 SCC 267 in the case of ***High Court of Punjab and Haryana and ors.. vs. Jagdev Singh.***

6. We have considered the submissions of the learned Counsel and we have also gone through the records. A short point for consideration is, whether the action of the respondents in refixing the pay scale based on the impugned Circular dated 02/12/2010 stands justified. As already pointed out herein above, the respondents seek to justify such action on the basis that the petitioners are not serving Head Clerks, but were only given such notional promotion on account of ACP Scheme. Clause (1) of the Office Memorandum reads thus :

> " 1. The ACP Scheme envisages merely placement in higher pay-scale/grant of financial benefits (through financial upgradation) only to the Government servant concerned on personal basis and shall, therefore, neither amount to functional /regular promotion nor would require creation of new posts for the purpose;"

7. On going through the said clause, it is seen that mere granting of such benefit under the ACP Scheme to an employee does not create any functional promotional post nor create any new post for such purpose. In such circumstances, the action of the respondents to differentiate the pay scale on the basis as to whether the post is functional or not, cannot be read into the said ACP Scheme. In the present case, as such, the stand of the respondents that they are entitled to revise the pay scales in view of the impugned Circular is not at all justified.

8. Apart from that, it is not in dispute that the next higher post in the hierarchy of the cadre of the petitioners is that of a Head Clerk. The only pay scale available, as notified by the State Government, is the pay scale as reflected in the Order dated 11/11/2009. In such circumstances, the learned Advocate General appearing for the respondents was unable to point out any pay scale available in between the pay scale of the petitioners and the next higher pay scale in the hierarchy of the petitioners. In such circumstances, the contention of the learned Advocate General that

the petitioners are not entitled to the next higher pay scale in terms of the impugned Circular cannot be accepted. In fact, as already pointed out herein above, after fixation of the pay scale on receipt of the ACP Scheme as reflected in the communication of the Directorate of Accounts dated 11th November, 2009, the petitioners and other similarly placed employes were given the pay scale as reflected therein. But, however, the respondents unilaterally chose to issue the subsequent Circular dated 02/12/2010 to fix the revised non-existing pay scale for the petitioners. This action on the part of the respondents is arbitrary and cannot be sustained. The facts also disclose that upto the time of retirement, the petitioners have been duly paid in terms of the revised pay scale as reflected in the said Order. Only at the time of retirement of the petitioners, the respondents chose to revise the pay scales unilaterally, without even giving any notice to the petitioners. This action on the part of the respondents is not at all justified and cannot be sustained.

9. As far as contention of the learned Advocate General that as the MACPS came into force with retrospective effect from

the year 2008, the petitioners would not be entitled to the ACP Scheme, but for MACPS, we find that the said contention cannot be accepted. Admittedly, on the date of the Office Memorandum, right to get the ACP Scheme had already accrued to the petitioners and, in fact, steps were already taken by the respondents to grant such ACP Scheme to the petitioners. In such circumstances, by claiming that the MACPS which came into force in the year 2009 with retrospective effect, the purpose and spirit of the ACP Scheme cannot be defeated to the detriment of the petitioners, as, admittedly, the right to get such benefit had crystallised in favour of the petitioners. In this connection, the Madras High Court in a Judgment passed in Writ Petition Nos. 33946, 34602 and 27798 of 2-014, dated 14th February 2017 has observed at para 10, thus :

> "10. Although it is a matter of record that MACP Scheme was introduced vide Memorandum dated 19.05.2009, but the same was put into effect from 01.09.2008. In the instant case, admittedly, before introduction of the MACP Scheme under the Office Memorandum dated 19.05.2009, the applicants have completed 24 years of service and their right to get second financial upgradation under the erstwhile ACP Scheme got crystalised and such

right cannot sought to be negated by bringing in a new Scheme with retrospective effect. The purpose and spirit of the Career Progression Scheme is only for the benefit of employees, who face stagnation in their career. That purpose and spirit cannot be defeated, if the benefit under the new Scheme is causing detrimental to the interest of the employees. The intention between the Scheme would not be as such. In any event, as a principle of purposive interpretation, it has to be seen that what is more advantageous to the employees is what should be preferred, since the Scheme being a beneficial one, cannot be allowed to result in loss to the employees on its implementation. Therefore, in all fairness and fitness of things, till the introduction of MACP Scheme vide Office Memorandum dated 19.05.2009, the benefit which accrued to the employees under the erstwhile ACP Scheme ought to have been made available."

10. Considering the above, taking note of the said observations and for the reasons as stated herein above, we find that the stand of the respondents that the petitioners are entitled to MACPS, as it came into force with retrospective effect, cannot be accepted as, admittedly, the petitioners became entitled to the ACP

Scheme much earlier.

11. Considering the view taken by us, we need not examine the contention as to whether the respondents are entitled to seek refund of the excess amount, allegedly paid to the petitioners.

12. In view of the above, we find that the impugned Circular cannot be sustained and deserves to be quashed and set aside. The petitioners are thus held to be entitled for all the benefits as reflected in the earlier Communication dated 11th June, 2010, in accordance with law. Consequently, any recovery made by the respondents based on such impugned order cannot be sustained and deserves to be quashed and set aside.

13. In view of the above, we pass the following :

<u>O R D E R</u>

(I) The impugned Circular dated 2nd December, 2010, as far as the petitioners are concerned, is quashed and set aside.

(II) The respondents are, accordingly, directed to fix the retirement benefitS of the petitioners in the light of the observations made herein above.

(III) Rule is made absolute in the above terms.

NUTAN D. SARDESSAI, J. **F.M. REIS, J.**

ssm.