

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 10095 OF 2014

Union of India and ors.	...Petitioners
Versus	
Shri. Ganesh B. Shrote	...Respondent

Mrs. Neeta V. Masurkar a/w. Mr. V.S. Masurkar for the
Petitioners-UOI.
Mrs. Kranti J. Kamble for the Respondent.

**CORAM : SMT. V. K. TAHILRAMANI, Acting C.J. &
M. S. SONAK, J.**

DATE : 16th APRIL 2018.

ORAL JUDGMENT:

- 1] Heard learned counsel for the parties.
- 2] Rule. With the consent of and at the request of learned counsel for the parties, Rule is made returnable forthwith.
- 3] The challenge in this petition is to the judgement and order dated 5th August 2013 made by the Central Administrative Tribunal (CAT), Mumbai in O.A. No. 91 of 2011 instituted by the respondent seeking benefit of financial upgradation under Assured Career Progression

Scheme (ACP Scheme) introduced vide Notification dated 9th August 1999.

4] Ms Masurkar, learned counsel for the petitioners-UOI, submits that the entire objective behind introduction of the ACP Scheme was to compensate employees for stagnation in service. In the present case, the respondent had in fact been offered promotion on 30th July 1998, but the respondent declined this offer of promotion by stating that there were some serious family problems. Ms Masurkar submits that in such a situation, the respondent was not entitled to benefit of financial upgradation under ACP Scheme. She submits that this position was clarified vide DoPT OM dated 18th July 2001 and therefore, the CAT has exceeded jurisdiction in awarding such benefit to the respondent. On this ground, Ms Masurkar submits that the impugned judgment and order made by the CAT is liable to be set aside.

5] Ms Kranti Kamble, learned counsel for the respondent, submits that the view now taken by the CAT, was the view earlier taken not only by the Bombay Bench

of the CAT in O.A. No.129 of 2003, but also by the Ernakulam Bench of the CAT in O.A. No. 768 of 2005. She submits that similar view taken by the Bombay Bench of the CAT in its order dated 28th June 2003 was challenged by the Union of India in Writ Petition No.2949 of 2004. This petition was dismissed by the judgment and order dated 18th August 2006. For all these reasons, Ms Kamble submits that the issue involved in the present petition is covered by the decision of this court in Writ Petition No. 2949 of 2004 and therefore, the present petition is liable to be dismissed with costs.

6] The rival contentions now fall for our determination.

7] The relevant facts in the present matter are not really in dispute. The respondent was appointed as a Radio Mechanic on 8th March 1980. On 30th July 1998, the respondent was offered promotion on transfer to Guwahati. The respondent declined to accept this offer by citing some serious family problems. Accordingly, the respondent continued in the post of the Radio Mechanic at Mumbai.

8] The ACP Scheme was introduced vide Notification dated 9th August 1999. From this, it is quite clear that the respondent's refusal to accept promotion was prior to the very introduction of ACP Scheme. Much thereafter, vide O.M. dated 18th July 2001, DoPT issued a clarification that since the ACP Scheme had been introduced to provide relief in cases of acute stagnation where the employees, despite being eligible for promotion in all respects are deprived of regular promotion for long periods due to non-availability of vacancies in the higher grade where a promotion has been offered before the employee could be considered for grant of benefit under ACP Scheme, but such promotion has been refused by the employee concerned, such employee, cannot claim benefit of ACP Scheme.

9] In identical cases, where offer of promotion was declined by the employee concerned, even before the ACP Scheme came into force, the Bombay Bench and Ernakulam Bench of the CAT have held that such employee is entitled to benefit under the ACP Scheme. It does not appear that the view taken by the Bombay Bench in O.A.

No. 129 of 2003 and the Ernakulam Bench in O.A. No. 768 of 2005 was challenged by the UOI. However, the identical view taken by the CAT (Bombay Bench) in its judgment and order dated 28th June 2003 came to be challenged by the UOI before the Division Bench of this court by instituting Writ Petition No. 2949 of 2004 (***Union of India and ors. vs. V.R. Patil and ors.***).

10] The Division Bench of this court, in *V.R. Patil (supra)*, in virtually identical circumstances, has dismissed the plea of UOI and upheld the view taken by the CAT (Bombay Bench). The contentions, virtually identical to those now raised by Ms Masurkar in the present petition, were considered and rejected by the Division Bench in *V.R. Patil (supra)*. This is evident from the discussion in paragraphs 2 to 6 in Writ Petition NO. 2949 of 2004, which read as follows:

“2. The challenge by the petitioner, Union of India and others is to the order of the Central Administrative Tribunal dated 28th June,2003 whereby the Original Application filed by Respondent Nos.1 to 5 has been allowed. Respondent Nos. 1 to 5 pursuant to the Scheme of ACPS were granted the same in the year 1999. In the year 2001 the Department of Personnel and Training issued a clarification which reads as under:-

"As per clarification at Sl. No.38 of DOPT O.M. No.35034/1/97-Estt(d) (Vol.IV) dt. 18-7-2001 the employee could be considered for grant of benefit under ACPS but he refuses to accept such promotion, then he cannot be said to be stagnating as she had opted to remain in the existing grade on his own volition as such, there is no case of grant of ACP."

It will be clear from a reading of this clarification, that the employee ought to have been offered promotion before the employee could be considered for grant of benefit under ACPS. This clarification was issued by the petitioners to the conditions for grant of benefits under the ACP Scheme.

Para.5.1 of the conditions reads as under:-

"5.1. The financial upgradations under the ACP Scheme in the entire Government Service Career of an employee shall be counted against regular promotions (including in situ promotion and fact track promotion availed through limited departmental competitive examination) availed from the grade in which an employee was appointed as a direct recruit. This shall mean that two financial upgradations under the ACP Scheme shall be available only if no regular promotions during the prescribed periods (12 and 24 years) have been availed by an employee. If an employee has already got one regular promotion, he shall qualify for the second financial upgradation only on completion of 24 years of regular service under the ACP Scheme. In case two prior promotions on regular basis have already been received by an employee, no benefit under the ACP Scheme shall accrue to him." (emphasis supplied).

A perusal of this clause would indicate that the employee had to avail of a regular promotion. In other words even if an employee had been considered and selected by way of promotion, but did not avail of regular promotion, in which event the ACP would still

be allowable to such employee.

The learned Tribunal in the impugned order has noted that the various orders by which the Applicants before it, were granted ACP. The Tribunal has also noted that the Applicants were offered promotion, but due to their family circumstances refused such regular promotions. The cause for the Respondents to move the Tribunal was the orders dated 16th December, 2002, 28th August, 2002 and 8th January, 2003 whereby the benefit of ACP was withdrawn and recovery was sought to be made from the Respondents. The learned Tribunal noted para.5.1 of the A.C.P.Scheme which we have adverted to earlier and held that it would cover a case even where an employee was scheduled for promotion, but was not actually promoted. The Tribunal found that the Respondents herein, had not availed of the promotion and as such the order withdrawing the benefit was without authority of law and consequently allowed the Original Application. It is this order which is the subject matter of the present petition.

2. On behalf of the Petitioners learned Counsel submits that the A.C.P. was introduced with a view that the employee should not be stagnated and this has been noted by the subsequent clarification issued on 18th July, 2001. In these circumstances it is pointed out, that the fact that the Respondents were offered promotion would indicate that there was no stagnation and as such the order of the Tribunal be interfered with.

3. We may firstly note, that the respondent No.,1 was offered promotion firstly on 4th October, 1998. The ACP scheme was notified from 9th August, 1999. As such the promotion with effect from 4-2-1998 could be of no consequence. The second promotion which was offered was from 7th June, 2002. Before this the Respondents had already been granted ACP and as such the clarification would not be applicable to him.

In so far as Respondent No.2 is concerned, both the promotions were offered before the ACP Scheme

was introduced and as such the clarification would not apply.

. In so far as the Respondent No.3 is concerned, two promotions were offered before ACP scheme came into effect and the third promotion was from 19th February, 2002 after the respondent was granted ACP. The clarification, therefore, would not be attracted.

. In so far as Respondent No.4 is concerned, the first promotion was before the ACP scheme came into force and the second promotion was after ACP had already been granted. Hence the clarification also was not applicable. In so far as respondent No.5 both promotions were before the ACP had been brought into force and consequently the clarification would not be applicable.

. Factually, therefore, the petitioners acted without authority of law in withdrawing the benefit of the A.C.P. Scheme.

4. Even otherwise the clarifications are in the nature of administrative instructions. On the date when the respondents were granted the benefit, the administrative instructions which were in force clearly contemplated that the employee must have availed of the promotion. It is only by the clarification of 2001 was it clarified, that an employee who was offered promotion, but did not consider it before ACP was granted would be ineligible. This, therefore, would contemplate that it has to be from the date when the clarification was issued as the position earlier was that all employees who did not avail of promotion were to be given the benefit. In other words this could only be prospective and not retrospective. Had the respondents, as an example, been informed that they will be denied ACPS if they refuse promotion, then their stand perhaps in refusing promotion would be different.

. On facts, all the Respondents were offered promotion before the ACP came into force or had already been granted ACP before the clarification was issued. In these circumstances the subsequent

clarification issued pursuant to which the respondents are sought to be denied the ACP, and recoveries are sought to be made in our opinion was clearly without authority of law.

6. For the aforesaid reasons we find no merit in this petition. Rule discharged. There shall be no order as to costs."

11] Applying the very same reason, therefore, this petition is liable to be dismissed and is hereby dismissed. Rule is discharged. There shall be no order as to costs.

(M.S. SONAK, J.)

(ACTING CHIEF JUSTICE)