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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 23rd January, 2019

Decided on: 15th February, 2019

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W.P.(C) 3859/2017

PAWAN KUMAR SHARMA

..... Petitioner

Through: Mr. Ankur Chhibber, Advocate.

versus

UNION OF INDIA & ORS

..... Respondents

Through: Ms. Sangita Rai, SCGC with Mr.
Pradeep Singh Tomar, Advocate.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE SANJEEV NARULA

J U D G M E N T

Dr. S. Muralidhar, J.:

1. The Petitioner is aggrieved by the refusal of the Respondents to grant him the benefit of the Assured Career Progression Scheme ('ACP Scheme') with effect from 7th December, 1999 the date on which he completed 12 years of service having been appointed as Naik (CM) in the Indo Tibetan Border Police ('ITBP') on 7th December, 1987. The Petitioner challenges an order dated 25th November, 2016 issued by the Directorate of the ITBP rejecting the above plea.

2. The background facts are that the Petitioner was appointed as Naik (CM) in the ITBP with effect from 7th December, 1987 in the pay scale of Rs.950-

1400/-. On completion of training he was posted to the 13th Battalion at Nahen, Himachal Pradesh. In February, 1989 the Petitioner applied for selection to the post of Head Constable (CM) in the pay scale of Rs.975-1660/- which was being conducted by way of direct recruitment. Having qualified in the said selection the Petitioner was appointed to the said post of Head Constable (CM) in the pay scale of Rs.975-1660/- with effect from 5th July, 1989 after tendering technical resignation from the previous post of Naik (CM). His basic pay was fixed at Rs.1,000/- after granting one notional increment.

3. Between the post of Constable and Head Constable in the ITBP there were two posts of Lance Naik and Naik. These two posts of Lance Naik and Naik were subsequently abolished with effect from 10th October, 1997 and they were merged with that of a Head Constable on rationalisation of rank structure and pay scales of non-gazetted cadre of Central Police Organisation ('CPO') in terms of an order dated 10th October, 1997 issued by the Ministry of Home Affairs ('MHA'). In terms thereof of the said merger the Petitioner would also have been deemed to be appointed to the post of Head Constable from 7th December, 1987.

4. The ACP Scheme was introduced in 1999 to avoid stagnation in service. The scheme envisaged placement of the incumbent in the next higher grade. It was similar to an in-situ promotion.

5. In terms of a clarification issued by way of an Office Memorandum ('OM') dated 10th February, 2000 issued by the Department of Personnel and Training, ('DOPT') Government of India upgradation under the ACP

Scheme was to be allowed in the existing hierarchy. After 1997 the hierarchy prevalent in the ITBP was Constable (CM) followed by HC (CM). Importantly, the DOPT OM clarified that an employee was promoted from a lower pay scale to a higher pay scale as a result of promotion prior to the merger of pay scales was entitled for upgradation under the ACP scheme ignoring the said promotion.

6. On 7th December, 1999 the Petitioner completed 12 years of service. He was entitled to the benefit of the 1st financial upgradation under the ACP Scheme in the pay scale of Rs.5500-9000/- as he had completed 12 years of service on that date having been appointed as Naik (CM) since 7th December, 1987. By an order dated 21st August, 2001 the Petitioner was accordingly granted the 1st financial upgradation under the ACP Scheme with effect from 7th December, 1999.

7. The Petitioner was promoted to the rank of Sub-Inspector (SI) (CM) on 20th February, 2002. According to the Petitioner the Respondents issued an order dated 17th May, 2005 arbitrarily showing the date of appointment of the Petitioner as 5th July, 1989 i.e. the date he was directly recruited as HC. The date of sanctioning of the ACP benefit was altered as 5th July, 2001.

8. The Petitioner was promoted as Inspector (CM) on 7th September, 2007. As of the date of the filing of the present petition he was posted on deputation to the National Security Guards ('NSG') Mehramnagar near the domestic airport in New Delhi.

9. The order dated 17th May, 2005 was revised by the Respondents by an

order dated 1st October, 2012 for consequent pay fixation upon introduction of the rank of ASI with effect from 2007. However, even in the said order dated 1st October, 2012 the date of appointment of the Petitioner was shown as 5th July, 1989 which was the date of his being directly recruited as HC.

10. The Petitioner made two representations dated 12th January, 2016 and 19th September, 2016 to grant him the 1st financial upgradation under the ACP with effect from 7th December, 1999. By the impugned order dated 25th September, 2016 both representations were rejected.

11. The Petitioner refers to the case of one Trilok Singh who was also appointed as Naik (CM) in the year 1987 and who got promoted as Head Constable in normal course on 6th November, 1990. Trilok Singh has been granted the benefit of the ACP Scheme from 1999 whereas the Petitioner was granted the said benefit only from 2001, as a result the Petitioner is drawing a salary less than a similarly situated batch mate. It is in these circumstances that the present petition was filed.

12. A reply was filed by the Respondents not disputing any of the basic facts viz. that the Petitioner was initially appointed as Naik (CM) on 7th December, 1987 and then was directly recruited as HC on 5th July, 1989 after technical resignation from the post of Naik (CM). It was also not disputed that in terms of the recommendations of the 5th Central Pay Commission ('CPC'), the posts of Lance Naik and Naik were abolished and the rank of Naik was merged with the rank of HC. It is also not disputed that under the ACP scheme, financial upgradation was granted to government employees upon completion of 12 to 24 years of regular service, subject to

the condition of fulfilment of promotional norms prescribed for the higher post. A reference is also made to the same OM issued by the DOPT dated 10th February, 2000. What is however highlighted is that portion of the clarification which states as under:

"If the appointment is made to higher pay scale either as on direct recruitment or on absorption (Transfer) basis or first on deputation basis and later on absorbed (on transfer basis); such appointment shall be treated as direct recruitment and past service shall not count for benefits under ACP".

13. The Respondents contend that it is on account of the above clarification that in the Petitioner's case, the initial grant of notional upgradation from 7th December, 1999 was cancelled and the first ACP was granted with effect from the date of his appointment on direct recruitment basis as HC (CM) "which was deemed to be direct/fresh appointment."

14. In the rejoinder, the Petitioner reiterates that an employee who got promoted from lower pay scale to higher pay scale as a result of promotion before merger of pay scale shall be entitled for upgradation of the ACP scheme ignoring the said promotion as otherwise he would be placed in a disadvantageous position *vis-a-vis* the fresh entrant. The Petitioner points out that he merely gave a technical resignation from the post of Naik which is a post that no longer exists. It is pointed out that the service rendered by the Petitioner before tendering the technical resignation ought to be considered in addition to the service rendered by the Petitioner after his appointment as HC. With the cancellation of the rank of Naik (CM), the technical resignation became infructuous. It is therefore submitted that the benefit of the 1st financial upgradation would be from 7th December, 1999

and not 5th July, 2001.

15. The question that arises is what is the effect of the abolishing of the posts of Lance Naik and Naik and merging them with that of the Head Constable in terms of the order dated 10th October, 1997 of the MHA? This question arises because of the main defence of the Respondents, by referring to the OM dated 10th February, 2000 of the DOPT that if an appointment is made to the higher scale on direct recruitment or absorption then such appointment shall be treated as a direct recruitment, and past service shall not count under the benefits of ACP.

16. It will be recalled that in the present case although the Petitioner was initially appointed as Naik (CM) on 7th December, 1987 he got subsequently appointed as HC (CM) in the ITBP on 5th July, 1989 and this was by way of direct recruitment. The Petitioner gave a technical resignation from his post as Naik (CM) but this was only because the period served by him as Naik (CM) was not meant to be wiped out. It is not even the case of the Respondents that the service rendered by the Petitioner before giving such technical resignation should not be counted as service rendered by him in the ITBP.

17. The second aspect of the matter is that an anomaly would arise *vis-a-vis* the Petitioner's junior if for benefits of the ACP, the Petitioner's start of service is taken to be on 5th July, 1989 and not 7th December, 1987. The Petitioner highlighted this in the petition itself by referring to the case of one Trilok Singh who got appointed as Naik (CM) in 1987 and was promoted as Head Constable in due course on 6th July, 1990. The said Trilok Singh got

the benefit of the ACP Scheme from 1999 by counting the 12 years of service from 1987. The Petitioner is however being granted that only from 2001. Thus compared to a similarly placed batchmate, the Petitioner would draw a lesser pay despite the fact that he has shown greater enterprise in clearing the exam and got appointed as HC on 5th July, 1989. There is no convincing answer from the Respondents *vis-a-vis* this anomaly.

18. In ***Om Prakash v. Union of India*** [W.P.(C) 388 of 2015 decided on 5th March, 2015], the Petitioners were appointed as Constable (GD) in the CRPF and thereafter re-mustered as Naik (RO). In the year 1997 the post of Naik (RO) was merged with the rank of HC (RO). A reference was made to Clarification-I of the DOPT's OM dated 10th February, 2000 that "an employee who got promoted from lower pay scale to higher pay scale as a result of promotion before merger of pay scale shall be entitled for upgradation under the ACP Scheme ignoring the said promotion as otherwise he would be placed in a disadvantageous position vis-a vis the fresh entrant in the merged grade."

19. This Court in ***Om Prakash v. Union of India*** (*supra*) noted that in terms of the said clarification, upgradation under the ACP Scheme is to be allowed in the 'existing hierarchy'. A review petition was filed by the Union of India seeking review of the above judgment dated 5th March, 2015 of this Court in ***Om Prakash v. Union of India*** (*supra*). In a judgment dated 29th January, 2016 in Review Petition No. 31/2016 (hereafter '***Om Prakash review judgment***') the Court dismissed the review petitions. The argument of Union of India relying on clarifications 4, 5 & 6 was negated by this Court by

referring again to a clarification No.1 and emphasizing that the upgradation under the ACP scheme is to be allowed in the existing hierarchy. It was noted that after 1997 the hierarchy in the CRPF is that of Constable ('RO') and then Head Constable ('RO'). The Court also noted that an employee who got promoted from a lower pay scale to a higher pay scale before the merger of pay scales would still be entitled for upgradation "ignoring the said promotion". On that logic the Court concluded that "as per the clarification the re-mustering to the rank of Naik (RO) is required to be ignored for the grant of ACP".

20. In the present case there is no post of Naik or Lance Naik and these have been merged in the post of HC. As already noticed the Petitioner who was already a Naik (CM) with effect from 7th December, 1987 qualified in exam for direct recruitment of HC and got appointed as such on 5th July, 1989.

21. The relevant query in the OM dated 10th February, 2000 in this regard reads as under:

"Whether a Government servant, who is direct recruit in one grade and subsequently joins another post again as direct recruit, is eligible for first financial upgradation under ACPS after completion of 12 years Of service counted from the first appointment or from the subsequent second appointment as direct recruit?

22. Clarification at para 5 of the above OM answered the query thus:

"The benefits under ACPS are limited to higher pay scale and do not confer designation, duties and responsibilities of the higher post. Hence, the basic criterion to allow the higher pay scale under ACPS should be whether a person is working in the same pay scale for the prescribed period of 12/24 years.

Consequently, so long as a person is in the same pay scale during the period in question, it is immaterial whether he has been holding different posts in the same pay scale. As such, if a Government servant has been appointed to another post in the same pay scale either as a direct recruit or on absorption (transfer) basis or first on deputation basis and later on absorbed (on transfer basis), it should not make any difference for the purpose of ACPS so long as he is in the same pay scale. In other words, past promotion as well as past regular service in the same pay scale, even if it was on different posts for which appointment was made by different methods like direct recruitment, absorption (transfer)/deputation, or at different places should be taken into account for computing the prescribed period of service for the purpose of ACPS. Also, in case of absorption (transfer)/deputation in the aforesaid situations, promotions earned in the previous/present organisations, together with the past regular service shall also count for the purpose of ACPS. However, if the appointment is made to higher pay- scale either as on direct recruitment or on absorption (transfer) basis or first on deputation basis and later on absorbed (on transfer basis), such appointment shall be treated as direct recruitment and past service/promotion shall not count for benefits under ACPS.”

23. It is on account of the above clarification that the Respondents in the present case have contended that the benefit of the judgment in ***Om Prakash v. Union of India*** (*supra*) as further clarified in the ***Om Prakash review judgment*** will not be available to the Petitioner.

24. Having examined the clarification issued, the Court is of the view that while the case of promotion to the post of HC may not be treated at par with case of direct recruitment as HC, the fact remains that by accepting the Petitioner’s ‘technical resignation’ as Naik (CM) the Respondents have acknowledged that for all instances and purposes that period of service as

Naik (CM) was not meant to be wiped out. It obviously had to count for the purposes of seniority, fixation of pay etc. Although the clarification No.5 in the OM dated 10th February, 2000 states that direct recruitment to a post would be treated differently from promotion to the same post, in the case of a person already in service being appointed by way of direct recruitment to a higher post cannot result in the service rendered in the lower post redundant. It is also pertinent to note that in the clarification at para 5 of the OM, the query is not dealing with a situation that arises in the present case. The Petitioner, who comes as a direct recruit on the post of HC has already served as Naik (CM). The post of Naik (CM) as noted above was abolished and as a result whereof employees working as Naik (CM) were re-designated as HC. Thus the difference of pay scale stood erased and thus the response to query No.5 loses its significance. Not counting such past service for benefits under the ACP, would be a disincentive for persons like the Petitioner who have shown enterprise and are able to progress faster in the hierarchy purely on their individual merit. There is no effective answer from the Respondents to the anomaly pointed out in para 17 above where someone appointed alongside the Petitioner as Naik (CM) would end up getting a higher pay on account of the benefit under the ACP scheme being given earlier, even though the Petitioner has shown greater enterprise and progressed to the next higher post sooner.

25. The result of the above discussion is that the Petitioner's 1st Financial Upgradation under the ACP has to be granted on his completion of 12 years of service, counted from 7th December, 1987 that is, with effect from 7th December, 1999.

26. The impugned order dated 25th November, 2016 of the Respondents is accordingly set aside and a direction is issued to the Respondents to grant the Petitioner the benefit of the ACP scheme with effect from 7th December, 1999 as was earlier granted by the order dated 21st August, 2001 with consequential fixation of pay and arrears. The consequential orders be issued and arrears be paid to the Petitioner within 12 weeks from today failing which the Respondents would be liable to pay simple interest @ 6% p.a. on the said sum till the date of payment.

27. The writ petition is allowed in the above terms with no order as to costs.

S. MURALIDHAR, J.

SANJEEV NARULA J.

FEBRUARY 15, 2019

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