$~23

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

\+ **W.P.(C) 7447/2019 & CM Nos. 31029/2019& 3117/2020**

INDIAN EX BORDERMEN MOVEMENT & ORS. ..... Petitioners
Through: Ms. Richa Ojha, Advocate.

versus

UNION OF INDIA & ORS. .... Respondents
Through: Mrs. Suparna Srivastava, Ms. Nehul Sharma, and Mr. Tushar Mathur, Advocates.

**CORAM:**
**JUSTICE S.MURALIDHAR**
**JUSTICE TALWANT SINGH**

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

% **03.02.2020**

**<u>Dr. S. Muralidhar, J.</u>**:

1. The Petitioner No. 1 association, Indian Ex-Bordermen Movement states that it works "to provide a platform" to retired personnel of the Border Security Force ('BSF') "for redressal of their grievances related to all matters pertaining to and arising out of their service/pension after retirement". Along with 14 of its members, all retired ex-servicemen, it has filed the present writ petition seeking the grant of benefits under the Assured Career Progression ('ACP') Scheme applicable from 1st January 1996, which have heretofore been denied to them.

2. The background facts are that the recommendations of the 5th Central Pay Commission ('CPC'), which included, *inter alia*, making effective the

aforesaid ACP Scheme, were accepted by Ministry of Finance, Government of India ('GoI'), with some modifications, by way of a resolution dated 30th September, 1997. Paragraph 4 of the said resolution provided that the recommendations of the 5th CPC "with regard to revised scales of pay and dearness allowance" shall become operational from 1st January, 1996.

3. Thereafter, the Department of Personnel and Training ('DoPT') issued an Office Memorandum ('OM') dated 9th August, 1999 for the implementation of the ACP Scheme. The said OM, under paragraph 8 thereof, stipulated that "the ACP Scheme shall become operational from the date of issue of this Office Memorandum", i.e. 9th August, 1999.

4. The grievance of the Petitioners arises from the fact that since the aforesaid OM essentially postponed the implementation of the ACP Scheme to 9th August, 1999 from 1st January, 1996, personnel who retired between the two dates could not receive the benefit under the said Scheme. As a result, they were also deprived of the corresponding retiral benefits.

5. The Petitioners submit that the DoPT's OM dated 9th August, 1999 essentially had the effect of revising or modifying a decision of the GoI in violation of the Government of India (Transaction of Business) Rules, 1961 (hereinafter, 'Rules'). The Petitioners contend that Rules 4 and 7 of the Rules read with Entry (m) of Schedule II thereto, the relevant portions of which are reproduced hereunder, necessitated that such modification be carried out by the authorities which took the original decision:

"4. Inter-Departmental Consultations:

(1) When the subject of a case concerns more than one

department, no decision be taken or order issued until all such departments have concurred, or, failing such concurrence, a decision thereon has been taken by or under the authority of the Cabinet.

Explanation: Every case in which a decision, if taken in one Department, is likely to affect the transaction of business allotted to another department, shall be deemed to be a case the subject of which concerns more than one department.

(2) Unless the case is fully covered by powers to sanction expenditure or to appropriate or re-appropriate funds, conferred by any general or special orders made by the Ministry of Finance, no department shall, without the previous concurrence of the Ministry of Finance, issue any orders which may:

(a) involve any abandonment of revenue or involve any expenditure for which no provision has been made in the appropriation act;

(b) involve any grant of land or assignment of revenue or concession, grant, lease or licence of mineral or forest rights or a right to water power or any easement or privilege in respect of such concession;

(c) relate to the number or grade of posts, or to the strength of a service, or to the pay or allowances of Government servants or to any other conditions of their service having financial implications; or

(d) otherwise have a financial bearing whether involving expenditure or not;

Provided that no orders of the nature specified in clause (c) shall be issued in respect of the Ministry of Finance without the previous concurrence of the Department of Personnel and Training.

...

7. Submission of Cases to the Cabinet:

(i) all cases specified in the Second Schedule to these Rules except cases covered by sub-rule (5) of rule 6, shall be brought before the Cabinet:

...

THE SECOND SCHEDULE
(Rule 7)
CASES WHICH SHALL BE BROUGHT BEFORE THE CABINET

(j) Cases involving financial implications on which the Minister of Finance desires a decision of the Cabinet.

(m) Proposals to vary or reverse a decision previously taken by the Cabinet."

6. A significant limb of the Petitioners' case is that the ACP scheme being a "precursor" to the Modified Assured Career Progression ('MACP') scheme, the reasoning adopted by the Supreme Court in ***Union of India v. Balbir Singh Turn (2018) 11 SCC 99*** to decide that the MACP scheme would be applicable from 1st January, 2006 and not from 1st September, 2008, would also extend to their plea that the ACP scheme must be held to be effective from 1st January, 1996 as opposed to 9th August, 1999. The Petitioners state they are not differently situated from Personnel Below Officer Rank ('PBOR'), who were the affected Respondents in ***Balbir Singh Turn*** *(supra)*. The Petitioners further submit that they are similarly placed as the BSF personnel in W.P.(C) 5341/2018 ***(Constable Vijender Pal v. Union of India)*** where this Court following ***Balbir Singh Turn*** *(supra)*, directed the Respondents to grant the benefits under the MACP scheme from 1st January, 2006.

7. The Petitioners further rely on the Supreme Court's judgment in ***Balbir Singh Turn*** *(supra)* to contend that since the aforesaid judgment held, in the context of the MACP Scheme, which is the successor of the ACP Scheme, that the benefit under the MACP Scheme constituted a "part of the pay structure" and not "allowances", paragraph 4 of the GoI resolution dated 30th September, 1997 would squarely apply to their case.

8. The Petitioners preferred a representation dated 9th May, 2019 to the appropriate authorities seeking the reliefs as prayed for. It is stated that the representation has not elicited any reply.

9. Notice was issued in the present petition on 12th July, 2019. Pursuant thereto, a counter affidavit has been filed on behalf of the Respondents in which the reasons for rejecting the claim of various personnel to the benefits under the ACP scheme have been set out at some length in para 4 of the section titled "preliminary submissions". In the very next para, it is stated as under:

> "That in view of the above, it is respectfully submitted that pursuant to the recommendations of 5th CPC, the Government of India introduced the ACP Scheme for Group 'B', 'C and 'D' services and isolated posts in Group 'A', 'B', 'C and 'D' Categories. The said scheme was notified by the Respondent No.1 vide Office Memorandum (OM) dated 9.8.1999 with certain modifications. As per Para 8 of the said OM, the ACP scheme was to become operational from the date of issue of the OM i.e. w.e.f 9.8.1999. As such, the personnel who retired prior to the implementation of scheme, were not entitled for the benefits under the ACP scheme. It is submitted that the ACP is a condition of service, hence, can never be given with retrospective effect."

10. Further, the Respondents seek to distinguish the decision in ***Balbir***

***Singh Turn*** by submitting that the personnel before the Supreme Court were PBOR, "employed by Ministry of Defence" who were seeking benefits under the MACP scheme whereas the Petitioners here are CAPF personnel praying for benefits under the ACP scheme. It is submitted that the ACP scheme "is a condition of service and hence, cannot be given to any employee with retrospective effect". As regards the GoI resolution dated 30$^{th}$ September 1997, the Respondents submit that the said resolution only pertained to allowances. As the ACP scheme "is not part of the pay but is condition of service" it was made applicable from the date of the issuance of the DoPT's OM i.e. 9$^{th}$ August, 1999, by which date the Petitioners had already superannuated.

11. In their rejoinder, the Petitioners have reiterated the submissions in their petition.

12. The Court has heard Ms. Richa Ojha, learned counsel for the Petitioner and Ms. Suparna Srivastava, learned Standing counsel for the Respondents. The Court has also perused the GoI resolution dated 30$^{th}$ September, 1997 as well as the DoPT's OM dated 9$^{th}$ August, 1999.

13. The first question that is required to be considered is whether the decision of the Supreme Court ***Balbir Singh Turn*** *(supra)* would apply to the case at hand? The incidental question is whether the Petitioners' contention that the benefits under the ACP scheme form part of the pay structure tenable?

14. The Court is of the view that both questions must be answered in the

affirmative. It is not the case of the Respondents in their counter affidavit that the MACP scheme did not succeed the ACP scheme. Neither have the Respondents been able to demonstrate that the mere fact that the MACP scheme is an upgradation on the ACP scheme sets the former apart from the latter as far as the essential nature of the schemes is concerned, which as per the 6th CPC itself is to "provide an assured progression for in-situ promotion on personal basis to all the employees who have rendered a specified period of service". If anything, the fact that the Respondents in their counter affidavit have cited the rationale that had been put forth earlier to deny the benefits under the MACP scheme from an earlier date, which stand has been rejected in ***Balbir Singh Turn****,* as being relevant to determining the date from which the ACP scheme should be held to be applicable, serves to bolster the Petitioner's case. There can, therefore, be no manner of doubt that the observation of the Supreme Court in ***Balbir Singh Turn*** *(supra)* that the benefits under the MACP scheme are part of an employee's pay structure must be viewed as covering the ACP scheme as well.

15. The fact that the Petitioners here belong to the BSF, which is a CAPF, cannot stand in the way of the aforesaid conclusion in ***Balbir Singh Turn***, set out in para 7 thereof, being relevant to their entitlement to the benefits under the ACP scheme. This is the view that this Court has taken *inter alia* in its order dated 1st May, 2019 in W.P.(C) 3549/2018 ***(Sunil Kumar Tyagi v. Union of India)*** as well as the order dated 6th September, 2018 in W.P.(C) 5341/2018 ***(Constable Vijender Pal v. Union of India)***.

16. Also relevant in this regard is the more recent decision of this Court dated 13th September, 2019 in W.P. (C) 8203/2019 ***(Ex-Constable GD***

***Prahalad v. Union of India and batch***), the operative portions of which read as under:

> "4. Even prior to the above decision of the Supreme Court, a set of Petitioners, who were ASI GDs in the Sashastra Seema Bal ("SSB"), approached this Court in W.P.(C) 11725 of 2015 ***(Digambar Singh v. Union of India)*** and a batch connected petitions, with two grievances: one, that they were entitled to grant of the ACP benefit in terms of the OM dated 9 th August, 1999 from the date each of them completed 12 years of regular service and, two, for release of the MACP benefits after they completed 20 years of service. By an order dated 18th December, 2015, this Court held that in view of the express stipulations in the ACP schemes, the question of denial of ACP benefits after completion of 12 years did not arise. The Court held that the Petitioners were entitled to the ACP benefits at an earlier stage i.e. immediately after 10th August 1999. Arrears were directed to be released within 8 weeks from that date. As far as the MACP benefits were concerned, it was held that it operated independently upon the completion of 20 years of service. It was held that on completion of 20 years of service, each of the Petitioners would be entitled for upgradation in a next higher grade available in the existing scales of pay.
>
> 5. Admittedly, the Respondents have accepted the above decision in ***Digambar Singh v. Union of India*** *(supra)* and of the Supreme Court in ***Union of India v. Balbir Singh Turn*** *(supra)*. However, for some reasons the benefit was not extended across the board to all members of the CAPFs.
>
> 6. Constable Vijender Pal filed W.P.(C) 5341 of 2018 seeking the benefit of the MACP scheme with effect from 1st January, 2006. This Court disposed of the said petition on 6th September, 2018 directing the Respondents to comply with the decision in ***Union of India v. Balbir Singh Turn*** *(supra)* and pay the requisite amount towards the MACP benefit to the Petitioner."

17. Subsequently, paragraph 19 of the aforesaid order of this Court came to

be modified by this Court by its order dated 18th September, 2019. A plain reading of the said paragraph, reproduced as under, dispels any doubt with respect to the applicability of the judgment of this Court in ***Balbir Singh Turn*** to CAPF personnel:

> "19. With the SLP against the order in ***Vijender Pal*** also having been dismissed, and with there being no difference factually or otherwise between those cases and the case at hand, the Court sees no reason why the same relief ought not to have been granted to the Petitioners. After the decision of the Supreme Court in ***Balbir Singh Turn*** the distinction sought to be drawn by the Respondents between civilian and defence personnel in the matter of grant of the MACP benefit from 1st January 2006 is untenable. Again, the mere fact that there may be other service conditions that are applied from a prospective date is not an answer to not implementing the benefit of the above decision in the matter of MACP to all CAPFs uniformly."

18. The Court turns now to the question of whether the DoPT's OM could have held the ACP scheme to be applicable from 9th August, 1999 i.e. the date of the issuance of the OM, overruling the GoI resolution dated 30th September, 1997, para 4 of which laid down that the recommendations of the 5th CPC with regard to revised pay scales were to be effective from 1st January, 1996? Here again, the Court is inclined to agree with the Petitioners that a plain reading of Rules 4 and 7 read with Entry (m) of Schedule II disallows the DoPT from unilaterally modifying the date from which the ACP scheme was to come into effect. The apprehension expressed by Ms. Srivastava for the Respondents that this might set a precedent for recommendations of CPCs prior to the 5th CPC is without merit for the simple reason that it is only from the 5th CPC onwards that the ACP scheme became operational.

19. The upshot of the above discussion is that the benefit under the ACP scheme is part of the pay structure; the decision in ***Balbir Singh Turn*** *(supra)* would apply to the case on hand as well; the benefit of the ACP Scheme would be available to the Petitioners who retired between 1st January, 1996 and 9th August, 1999 from the date that the 5th CPC's recommendations "with regard to revised pay scales" became effective. In other words, the Petitioners would be entitled to the benefits of the ACP from 1st January, 1996.

20. The DoPT's OM dated 9th August, 1999 is clarified by holding that for the Petitioners who retired between 1st January, 1996 and 9th August, 1999, it will become effective from 1st January, 1996. Accordingly, the following directions are issued to the Respondents:

(i) The members of the Petitioner No. 1 association who retired between 1st January 1996 and 9th August, 1999, including Petitioner Nos. 2 to 15, will be granted the benefits under the ACP scheme by treating the said scheme as applicable from 1st January, 1996.

(ii) The said Petitioners as at (i) above will be placed in the appropriate pay scale of SI/HC etc. as the case may be (for e.g. In the case of SIs Rs.9300 – 34800 with grade pay of 4200) from the date of completion of 12 or 24 years of service, as the case may be.

(iii) The appropriate revised pension orders will be issued and arrears will be paid to the said Petitioners as at (i) above within a period of 12 weeks, failing which the Respondents would be liable to simple interest at 6% per annum on the arrears of period of delay.

21. The petition and pending applications are disposed of in the above terms.

**S. MURALIDHAR, J.**

**TALWANT SINGH, J.**

**FEBRUARY 3, 2020**
***abc***