ORISSA HIGH COURT: CUTTACK

WPC (OA) No.2089 of 2017

(An application under Article 226 and 227 of the Constitution of India)

AFR **Surya Narayana Sahu ..... Petitioner**

-Versus-

State of Odisha & others ..... Opp. Parties

Advocate(s) appeared in this case:-

For Petitioner	:	M/s. S.N. Patnaik, U. Patnaik, C. Panda, K.C. Panigrahy & S. Mohapatra, Advocates
For Opp. Parties	:	Mr. H.K. Panigrahi, Addl. Standing Counsel

CORAM
JUSTICE SASHIKANTA MISHRA

JUDGMENT
20th May, 2022

SASHIKANTA MISHRA, J. The short point that arises for consideration in the present writ petition is whether the benefit of Time Bound Scale (TBA) granted to a government servant makes him ineligible for the benefit of financial upgradation under the Revised Assured Career Progression (RACP) scheme.

2. The facts of the case are that the petitioner joined government service on 20.08.1983 as a Junior Clerk. He was granted the benefit of Time Bound Advancement Scale (TBA) as per Odisha Revised Scale of Pay (ORSP) Rules, 1998 w.e.f. 20.08.1998, since he had served in the entry grade for a period of more than 15 years. Subsequently, he was promoted as Senior Clerk and joined on 13.11.2013. He was further promoted to the post of Head clerk on 17.06.2006 in the office of opposite party no.4. Pursuant to Finance Department Resolution No. 3560 dated 06.02.2013, the petitioner was allowed 3rd upgradation benefit (RACP) w.e.f. 19.08.2013 and accordingly his pay was fixed vide order dated 31.12.2015 passed by opposite party no.3. To his surprise however, the petitioner was served with a copy of the order issued by the opposite party no.4 on 30.11.2017 intimating that a decision had been taken to recover an amount of Rs.55,690/- from him on the ground of excess payment

due to wrong fixation of pay during grant of 3rd RACP. The said order was passed in reference to order dated 31.10.2017 of opposite party no.3, whereby the order granting the 3rd RACP benefit to the petitioner had been superseded on the ground of AG audit objection. According to the petitioner, the provisions of the RACP Scheme, which disentitle a Government Servant from its benefit do not at all apply to the petitioner. It is further stated that financial upgradation received in the shape of TBA/Assured Career Progression (ACP) prior to introduction of the RACP scheme does not stand in the way of granting the benefit under the RACP. Since the portioner had completed 30 years of service w.e.f. 08.08.2013, he was rightly granted the benefit of RACP on the basis of recommendation of a duly constituted screening committee. It is the further case of the petitioner that even otherwise the recovery of the so-called excess payment is entirely illegal since it amounts to a penalty and the petitioner cannot be blamed in any manner for such payment. On the above facts the petitioner originally approached the erstwhile Odisha Administrative Tribunal in O.A. No. 2089 of 2017 with prayer to quash the orders dated 30.11.2017, 31.10.2017 and 27.10.2017 and to fix his pay appropriately in terms of order dated 31.12.2015. The said O.A. has since been transferred to this Court and registered as the present writ application.

3. A counter has been filed on behalf of the opposite parties basically taking the stand that as per audit observation, the petitioner had already availed three financial upgradations in the following manner : (i) first financial upgradation availed as TBA on 20.08.1998 (ii) second upgradation availed as promotion as Senior Clerk on 13.11.2003 and (iii) third upgradation availed as promotion as Head Clerk on 17.06.2006. Therefore, he could not have been granted the benefit of 3rd financial upgradation w.e.f 19.08.2013. It is further stated that the petitioner is only entitled to the next grade pay i.e., Rs.4,600/- w.e.f. 20.08.2013 but not increment of 3% of pay + grade pay on the existing pay and higher rate of grade pay Rs.4,600/-. On such ground, the impugned

orders dated 31.10.2017 in superseding the earlier order granting the benefit of RACP and order dated 30.11.2017 directing recovery of the excess payment made to him were sought to be justified accordingly.

4. Heard Mr. S.N. Patnaik, learned counsel for the petitioner and Mr. H.K. Panigrahi, learned Addl. Standing Counsel for the State.

5. Referring to the Finance Department resolution dated 06.02.2013, Mr. Patnaik submits that firstly, the TBA provision of ORSP Rules, 1998 has been held to be akin to the Assured Career Progression(ACP) Scheme of the Government on completion of 15, 25 and 35 years of service; and secondly, the RACP scheme clearly provides that an employee completing 30 years of service, who has got two upgradations, either by RACP or promotion or both, will be considered for 3rd upgradation. Further referring to the Paragraph-18 of the Resolution, Mr. Patnaik contends that it is clearly provided that ACP availed under ORSP Rules, 2008 shall not be taken into account while considering the RACP but only grade pay as

applicable shall be allowed while granting RACP. Therefore, according to Sri Patnaik, the petitioner must be held to have availed only two financial upgradations, i.e., consequent upon his promotion as Senior Clerk and subsequent promotion as Head Clerk, since the TBA cannot be treated as a financial upgradation in the context of the RACP Scheme.

Mr. Patnaik has referred to a judgment of a Division Bench of this Court in the case of ***State of Odisha and Others vs. Bikash Ranjan Dash and another and batch*** (W.P.(c) No. 18749 of 2018 and batch). It is further argued by Mr. Patnaik that even assuming for the sake of argument that 3rd RACP was granted to the petitioner wrongly, the petitioner cannot be blamed for the same since such benefit was granted on the basis of recommendation of the screening committee and not due to any personal endeavor of the petitioner. In support of such argument, Sri Patnaik has relied upon the decisions of the Supreme Court in the case of ***State of Punjab vs. Rafiq Masih (White Washer),*** reported in

2015 (4) SCC 334 and ***Thomas Daniel vs. State of Kerala and others*** reported in 2022 SCC OnLine SC 536. Sri Patnaik has also referred to a decision of a Division Bench of this Court in the case of ***State of Odisha vs. Ashokarani Mishra*** and others (W.P.(C) No.2172 of 2019, decided on 24.06.2021)

6. Mr. H.K. Panigrahi on the other hand, has referred to Paragraph-9 of the FD Resolution dated 06.02.2013 to argue that if an employee has already availed three financial upgradations by way of RACPs/promotion, there shall be no further financial upgradation. He further refers to Paragraph-10 of the Resolution to submit that the benefit of pay fixation available at the time of regular promotion is also being allowed at the time of financial upgradation under RACP i.e., by raising the pay by 3% of the total pay and the grade pay drawn before such upgradation. Referring to the facts of the present case, it is argued that the petitioner has admittedly availed the benefit of TBA w.e.f. 20.08.1998, i.e., after completion of 15 years of service in

the entry grade without promotion. Thereafter, he was promoted to the post of Senior Clerk and further as Head Clerk. Thus, the petitioner has availed three financial upgradations which makes him ineligible for any further financial upgradation in the RACP scheme and that he shall only be entitled to get higher grade pay of the next promotional post, i.e., Head Assistant of Rs.4600/-. Mr. Panigrahi has also referred to a writ petition being W.P.(C) No. 12834 of 2021 filed by the petitioner before this Court with prayer to direct the authorities concerned to grant him promotion to the rank of Head Assistant. In course of argument, Mr. Panigrahi has also brought to notice of this Court the notification dated 19.09.2015 of the Government in Finance Department regarding revision of grade pay in certain posts with grade pay Rs.4200/- and Rs.4600/-, wherein in the ministerial cadre of the Works Department, Head Clerk with grade pay Rs.4200/- is the feeder post and the next promotional post with grade pay Rs.4600/- is that of Head Assistant.

7. From the rival contentions and undisputed

facts, it is for this Court to decide whether the grant of TBA benefit under the ORSP Rules, 1998 to the petitioner will stand as a bar for granting him the benefit of 3rd financial upgradation under the RACPS. A reference to the FD Resolution dated 06.02.2013 reveals that the grant of benefit of Assured Career Progression (ACP) on completion of 15, 25 and 30 years of service is akin to TBA provisions of ORSP Rules, 1998. Further, Paragraph-18 of the said Resolution reads as under;

> *"18. Assured Career Progression (ACP) availed under ORSP Rules, 2008 shall not be taken into account while considering the RACPs in favour of an employee. But, no pay fixation shall be allowed by extending the benefit of 3% of basic pay and Grade Pay to the existing Pay but only the Grade Pay as applicable shall be allowed while giving RACPs."*

Thus, per se, the fact that the petitioner had availed the benefit of TBA upon completion of 15 years of service shall not stand in the way of granting him the 3rd financial upgradation under the RACPs.

8. A Division Bench of this Court in the case of ***Bikash Ranjan Dash and batch*** (supra) has, inter alia, held that TBA or ACP granted to an employee prior to

2013 cannot be taken as a ground to deny the benefit of RACP to him. It would be profitable to extract the relevant observations of this Court as under;

> *"xxxxxxxxx. For the same reason, the TBA granted earlier in 2005 cannot be considered to be as an upgradation which would deny the Opposite Parties the benefit of RACPS. In other words, merely because the employee had availed a TBA or ACP prior to 2013, he cannot be denied to the benefit of the RACPs. Unless a person has already got a promotion within time period of 10, 20 and 30 years in the manner indicated, he cannot be denied the RACPs benefit."*

Thus, there can be no doubt that notwithstanding the grant of the benefit of TBA to the petitioner on 20.08.1998, he would be still entitled to the benefit under 3rd financial upgradation under RACPS.

9. Now the question is, what would be the extent of such benefit of 3rd financial upgradation. Reference to Paragraph-18 as quoted hereinbefore would reveal that in case an employee has availed TBA no pay fixation shall be allowed by extending the benefit of 3% of basic pay and grade pay to the existing pay but only the grade pay as applicable shall be allowed while giving RACPS. A

reference to the office order dated 31.12.2015 shows that 3rd financial upgradation under RACPs was granted by fixing his pay at Rs.12,930/- + grade pay Rs.4600/- from Rs.12430/- + grade pay Rs.4200/-. Thus, not only was the grade pay enhanced from Rs.4200/- to Rs.4600/- but also the basic pay was raised from Rs.12,430/- to Rs.12,930/-. Evidently and as conceded by Mr. Patnaik also in course of argument, the provisions under Paragraph-18 being applicable, the petitioner would only be entitled to raising of his grade pay of the next promotional post but not raising of his pay by 3%. It also implies that raising of his basic pay has been treated as an excess payment and therefore, vide office order dated 31.10.2017 (Annexure-4) his pay was refixed at the earlier pay, i.e., Rs.12430/- but with the higher grade pay, i.e., Rs.4600/- corresponding to Pay Band-2, i.e., Rs.9300-34800/- with grade pay Rs.4600/- w.e.f. 20.08.2013. After examining the provisions of the scheme and the admitted facts of the case this Court finds nothing wrong in the impugned order passed by opposite party no.4 in refixing the pay of the petitioner in the earlier scale. This Court therefore holds that the petitioner, despite being granted TBA, is entitled to the benefits of 3rd financial upgradation under RACPS but the same shall be confined only to raising of his grade pay from Rs.4200/- to 4600/- with effect from 20.08.2013.

10. The above being the legal and factual position, the only question that remains to be determined by this Court is whether the order passed by opposite party no.4 on 30.11.2017 in directing recovery of Rs.55,690/- from the salary of the petitioner @ Rs.11,138/- in monthly installments is justified.

In this regard, both the parties have relied upon decisions of the Supreme Court to buttress their respective contentions. Mr. Patnaik has mainly relied upon the decision of the Supreme Court in the case of ***Rafiq Masih*** (supra) while Mr. Panigrahi has referred to the decision in the case of ***High Court of Punjab and***

Haryana and Others vs. Jagdev Singh reported in (2016) 14 SCC 267.

11. In ***Rafiq Masih*** (supra), the issue was was whether the Government is entitled to recover from an employee any payment made in excess of what the employee is otherwise entitled to, in the absence of any fraud or misrepresentation on the part of the employee. The Court held as under:

> *"18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:*
>
> *(i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).*
>
> *(ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.*
>
> *(iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.*
>
> *(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.*
>
> *(v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or*

> *arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."*

12. In the case of ***Jagdev Singh*** (supra) the matter relates to the principle enunciated in the proposition (ii) in ***Rafiq Masih*** to the effect that it would be impermissible in law to effect recovery from a retired employee, or employees who are due to retire within one year of the order of recovery. Referring to the case at hand, the Supreme Court held that since the officer had furnished an undertaking that any payment made in excess would be required to be refunded, he is bound by the undertaking and therefore, the order of recovery was justified.

13. The present case however, would be covered under proposition (i) since admittedly, the petitioner is a group-'C' employee and therefore, no recovery is permissible as per the ratio of ***Rafiq Masih***.

9. In the final analysis, this Court holds that the action of the opposite parties in refixing the pay of the petitioner at Rs.12430/- + grade pay Rs.4600/- in Pay

Band-2 w.e.f. 20.08.2013 vide order dated 31.10.2017 (Annexure-4) does not warrant any interference whatsoever. However, as regards the order for recovery of Rs.55,690/- from the salary of the petitioner, this Court holds that in view of the fact that the petitioner is a group-'C' employee the same would not be justified or tenable in the eye of law. Accordingly, the order dated 30.11.2017 under Annexure-3 is hereby quashed.

10. The writ petition is disposed of accordingly.

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Sashikanta Mishra,
Judge

Orissa High Court, Cuttack
The 20th May, 2022/ A.K. Rana