

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice V. M. Velumani

WPCT 36 of 2017

Asoke Sengupta
-Versus-
Union of India & Ors.

For the Petitioner : *Mr. Soumya Majumder,*
Mr. Barun Chatterjee.

For the Respondent
Nos. 4, 5 & 6 : *Mr. Debapriya Gupta.*

Hearing is concluded on : *28th November, 2023.*

Judgment On : **20th December, 2023.**

Tapabrata Chakraborty, J.

1. The issue which arises for consideration is as to whether a post filled up on the basis of a Limited Departmental Competitive Examination (in short, LDCE) would be treated as promotion for the purpose of benefit under the Modified Assured Career Progression Scheme (in short, MACPS) upon

counting the past regular service of the incumbent from the date of initial appointment.

2. Records would reveal that the petitioner was confirmed in the post of PWI, Grade-III on 2nd March, 1984. He got his first promotion on 14th October, 1988. The Railway Board *vide* memo dated 14th October, 1990 decided to fill up 10% of the 20% Direct Recruitment vacancies subject to successful completion of LDCE. Pursuant thereto, a notification dated 29th September, 1997 was issued for preparation of a panel of 12 candidates of Section Engineer through the process of LDCE. The petitioner participated and qualified. He was, accordingly, appointed to the post of Section Engineer through the process of LDCE on 19th July, 2000. On the basis of the Sixth Central Pay Commission recommendation, the MACPS was introduced with effect from 1st September, 2008 as per instructions contained in RBE 101/2009 towards grant of three financial upgradations at intervals of 10, 20 and 30 years of continuous regular service. The petitioner, having availed two promotions and having completed 30 years of service, applied for the 3rd financial upgradation and *vide* memo dated 2nd May, 2014 such benefit was granted but not implemented and the matter was referred to the Railway Board by the Zonal Administration *vide* memo dated 28th July, 2015. The petitioner's claim was reviewed and turned down by a communication dated 1st September, 2015 observing that his promotion from PWI to Section Engineer was covered under Para – I of the RBE- No. 100/2012 and his past service shall not be counted for the purpose of grant of financial upgradation under MACPS. Thereafter *vide*

memo dated 24th September, 2015 the petitioner's eligibility to get 1st MACP was deferred to 24th September, 2009 from 1st September, 2008 with a direction towards recovery of over payment. Aggrieved thereby and challenging RBE- No. 100/2012, the memo dated 24th September, 2015 and claiming 3rd financial upgradation, the petitioner preferred the original application and in the midst thereof, the petitioner retired on 31st October, 2015.

3. Mr. Majumder, learned advocate appearing for the petitioner submits that the learned Tribunal erred in law in rejecting the petitioner's claim on the rudiments of a tentative finding that the post of Section Engineer was a direct recruitment post as the same was filled up in view of administrative exigencies and not through normal promotion mechanism.

4. Drawing our attention to clause 9 of MACPS, Mr. Majumder submits that the trigger point towards sanction of such benefit is the initial date of joining of a post on regular basis and that prior to superannuation, the petitioner rendered service for 32 years, as would be explicit from the pension payment order. The petitioner got his first promotion in the pre-revised scale on 14th October, 1988. The second financial upgradation was granted on 1st September, 2008 and he became entitled to 3rd MACP in the year 2014, having been appointed and confirmed in the post of PWI, Grade-III on 2nd March, 1984.

5. Drawing our attention to the notification dated 29th September, 1997, he submits that LDCE was held for filling up of 10% direct recruitment quota vacancies for serving employees upon relaxation of age

criterion. The object of LDCE was to ensure that those who would otherwise have to wait for years to get promotion were given an opportunity to fast track such chance of promotion. LDCE was thus an instance of accelerated promotion and appointment upon successful completion of LCDE cannot be treated as direct recruitment. The RBE No.100/2012 is in conflict with clause 9 of the mother circular of DoPT and Railway Board's Circular No.101/2009 and the former cannot be viewed as an amendment or an improvement of RBE 101/2009. The said issues, as urged, were glossed over by the learned Tribunal and no finding was returned on the same. Such infirmity in the order impugned warrants interference of this Court.

6. Drawing our attention to a memo dated 2nd May, 2014, Mr. Majumder argues that the respondents themselves were of the opinion that the petitioner's service for the purpose of MACP will be counted from the date of actual joining of the post of PWI but such decision was subsequently modified by the memo dated 1st September, 2015 without granting any opportunity of hearing to the petitioner and the learned Tribunal erroneously proceeded on the basis that the petitioner had not challenged the said circular being RBE 100 of 2002.

7. Mr. Majumder contends that persons similarly situated with the petitioner, upon appointment in higher posts through LDCE have been granted the benefit of past service rendered in lower pay scale and their appointment in such posts was considered as promotion. In support of such contention reliance has been placed upon the averments made in the supplementary affidavit.

8. Mr. Gupta, learned advocate appearing for the respondents submits that the appointment of the petitioner as Senior Engineer consequent to passing of LDCE is to be considered as direct recruitment and not promotion. The petitioner was aware of such fact at the time of participation in LDCE. The notification dated 29th September, 1997 categorically specified that such examination was for filling up of 10% Direct Recruitment quota vacancies. On introduction of MACPS, the petitioner could not have been granted financial upgradation since appointment to the post of Senior Engineer was not in promotional quota. Such posts were filled up to meet administrative exigencies and the learned Tribunal rightly observed that notwithstanding the use of the term promotion, the spirit of the RBE No. 100/2012 suggests that if an employee gets a grade prescribed for direct recruitment through LDCE/GGCE, the same has to be treated as direct recruitment.

9. He strenuously argues that the petitioner's claim comes under the purview of clause (i) of the memo dated 12th September, 2012 (RBE No. 100/2012) since the petitioner's appointment through LDCE was in respect of a vacancy in a grade by Direct Recruitment and in view thereof, his past service rendered in lower pay scale cannot be counted for the purpose of MACPS. Having full knowledge of the fact that the vacancies were direct recruitment quota vacancies and being conscious of the fact that if appointed there will be a substantial enhancement of pay which his colleagues cannot achieve through normal promotion within a short period,

the petitioner participated in LDCE and upon such participation and selection he cannot claim such induction as normal promotion.

10. Heard the learned advocates appearing for the respective parties and considered the materials on record.

11. The notification dated 29th September, 1997 contained a decision towards formation of a panel through LDCE for filling up of 10% Direct Recruitment quota vacancies of Section Engineer from amongst the serving employees and for implementing such decision the age criterion required for Direct Recruitment quota vacancies was relaxed. Such selection was from a lower category post to a higher category post, carrying a higher grade, in the same service. Promotion as understood under service jurisprudence means advancement in rank, grade or both. It is always a step towards advancement. In the said conspectus, appointment to the post of Senior Engineer from the post of PWI has to be considered as promotion and not direct recruitment.

12. As per Rules, 80% posts of Section/Senior Engineer are filled by promotion from the eligible employees working in lower post and 20% of posts by direct recruitment. Due to administrative exigency, the respondents decided to fill up 10% of direct recruitment posts in the said category from among existing employees working in the lower post. The respondents adopted LDCE to fill up 10% of Section/Senior Engineer. Only employees working in the lower post having Civil Engineering degree were eligible to participate in the said examination. While age limit for direct recruitment is 20-30 years, the respondents fixed 40 years for the existing

employees. The respondents excluding the eligible general candidates, restricting only to existing employees and relaxing age limit, had changed the 10% of direct recruitment method to that of promotion of existing employees. It is pertinent to note that respondents have also reduced the training period for selected Senior Engineers from 1 year to 2 months.

13. In view of the above procedure adopted by the respondents, the petitioner, on being successful in LDCE, was only promoted and not directly recruited. Hence, petitioner is entitled to the entire service rendered by him from the initial appointment for all the benefits including MACP. The petitioner's entire service of 32 years is taken into account on his retirement for calculating pension. For the above reason, only clause (ii) of RBE 100 of 2012 is applicable to the petitioner's case and not clause (i) of the said RBE.

14. The order impugned reveals that the learned Tribunal could not arrive at any specific finding that the post against which the petitioner was recruited was a direct recruitment post. The characteristics attributable to direct recruitment were also found lacking, as would be explicit from the observation that *'it is not through open examination and only eligible departmental candidates can appear in the written test'*.

15. The learned Tribunal, in our opinion, ought not to have granted weightage to the fact that the petitioner's colleagues would have taken years to reach the post of Senior Engineer under normal promotion since there was no bar towards participation of the petitioner's colleagues in the LDCE. The order impugned also does not disclose any reason as to why the learned Tribunal agreed with the respondents' argument that the petitioner cannot

‘after having availed the benefit of promotion through an unusual mode of recruitment claim in addition, every other benefit which goes with the normal promotion’.

16. The learned Tribunal, in the order impugned, erroneously observed that the petitioner did not challenge the circular dated 12th September, 2012 (RBE No. 100/ 2012). The averments and the prayers made in the original application though clearly reveal that RBE No. 100/ 2012 was under challenge.

17. For the reasons discussed above, the impugned order dated 31st August, 2016 passed by the learned Tribunal in OA 350/01600/2015 as well as the orders dated 1st September, 2015 and 24th September, 2015 impugned in the original application are set aside and the respondents are directed to grant the 1st MACP benefit with effect from 1st September, 2008 as well as the 3rd MACP benefit to the petitioner counting his entire service prior to his promotion to the post of Section Engineer.

18. The respondents are directed to calculate the petitioner’s retiral dues, arrear pension and the pensionary relief on the basis of fixation of pay, as directed, together with the amount recovered from the pensionary benefits of the petitioner within a period of four weeks from the date of communication of the order and to continue payment of the revised pensionary benefits.

19. With the above observations and directions the writ petition and the connected application, if any, are disposed of.

20. There shall, however, be no order as to costs.

21. Urgent Photostat certified copy of this judgment, if applied for, shall be granted to the parties as expeditiously as possible, upon compliance of all formalities.

(V. M. Velumani, J.)

(Tapabrata Chakraborty, J.)