

Court No 3
ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 395 of 2022

Wednesday, this, the 25th day of January, 2023

Hon'ble Mr. Justice Anil Kumar, Member (J)
Hon'ble Vice Admiral Atul Kumar Jain, Member (A)

No 4482547Y Ex L Nk Kulwinder Singh, S/o Shri Pritam Singh presently r/o Vill-Hathkauli, PO-Baldev, District-Mathura (UP)-281301.

...Applicant

Counsel for the applicant: **Shri Vikas Singh Chauhan**, Advocate
Shri Ashok Singh, Advocate

Versus

1. Union of India, through its Secretary, Govt of India, Ministry of Defence, New Delhi-110011.
2. Chief of the Army Staff, IHQ of MoD (Army), DHQ, PO-New Delhi-110001.
3. OIC Records, Records the Sikh Li, PIN-900927, C/o 56 APO.
4. Commanding Officer, 17 SIKH LI, PIN-912317, C/o 56 APO.
5. Principal Controller of Defence Accounts (Pension), Draupadi Ghat, Prayagraj (UP).

.... Respondents

Counsel for the Respondents : **Mrs Anju Singh**, Advocate
Central Government Counsel

ORDER (Oral)

1. By means of the present O.A., the applicant has approached this Tribunal under Section 14 of the Armed Forces Tribunal Act, 2007 praying for the following reliefs:

- (i) *To quash/set aside the impugned order dated 12 Mar 2022 passed by the Commanding Officer, 17 SIKH LI on behalf of the Chief of the Army Staff which is annexed with compilation No 1 as Annexure No A-1 to this present application and pass the appropriate order to the authority concerned to publish the Part-II order with regard to MACP-II for grant of the pensionary benefits to the applicant w.e.f. Jan 2019 onwards under the provisions of Special Army Instruction 1/S/2008.*
- (ii) *Issue an appropriate order or direction as this Hon'ble Tribunal may deem fit and proper in the demand of justice.*
- (iii) *Issue an order or direction awarding the cost of the application together with all legal expenses incurred by the applicant.*

2. The facts draped in brevity are that the applicant was enrolled in the Indian Army on 20.01.2003 and was discharged from service on 31.01.2020 after completion of more than 17 years of service in terms of Rule 13 (3) III (i) of Army Rules, 1954. Applicant was due to be granted MACP-II w.e.f. January 2019 i.e. on completion of 08 years service from Ist MACP but due to submitting unwillingness certificate dated 08.07.2019 for promotion cadre he was denied MACP-II. He is in receipt of pension vide PPO No. 166201900838-0100. This O.A. has been filed for grant of 2nd MACP on completion of 16 years service.

3. Learned counsel for the applicant submitted that the Government had introduced Assured Career Progression (ACP) Scheme on recommendation of Vth Central Pay Commission. The

said scheme was revised with three financial up-gradations i.e. after 8 years, after 16 years and after 24 years of service. Subsequently, in May 2011, the Government introduced a Modified Assured Career Progression Scheme (in short, MACPS) for personnel below officer rank superseding the previous ACP scheme. The scheme was made to take effect from 01.09.2008. The crux of grievance of applicant is that applicant has been denied the benefits of the said scheme on the ground that he had expressed unwillingness to undergo promotion cadre. It is further submitted by learned counsel for the applicant that despite executing the undertaking of unwillingness, the right of the applicant to receive benefits conferred by MACPS did not extinguish for the reason that the applicant did not get opportunity of promotion. It is also submitted that the applicant after discharge from service approached the respondents for benefits of the scheme but was denied the same merely on the ground that he had given unwillingness certificate. He further submitted that there are no enabling provision in the MACPS which could disentitle the applicant as the applicant had already completed his terms of engagement. He further submitted that the only condition that was available to the applicant that if the applicant has no opportunity for promotion for want of vacancy in the next higher rank, the benefit of MACP could not be denied to him merely on the basis of unwillingness certificate given by the applicant. Learned counsel for the applicant relying upon order dated 30.11.2015 passed by AFT, RB, Kochi Bench in O.A. No. 40 of 2015, **Ex**

Hav/Clk Muraleedharan A.M. vs UOI & Ors, submitted that in view of the aforesaid judgment, applicant is entitled for grant of 2nd MACP.

4. The contentions advanced by learned counsel for the respondents, per contra, are that subsequent to issue of MACPS, detailed Administrative Instructions for grant of MACPS were issued by the Army Headquarters in June 2011 vide letter dated 13.06.2011. Para 21 of the aforesaid instructions clarified that if an individual refuses promotion, MACPS will also be denied. Para 15 of the Appendix to the instructions clarified that unwillingness to attend promotion cadre amounts to unwillingness or refusal for promotion. It is also contended that the applicant was granted chances to undergo promotion cadre but every time he refused to undergo said promotion cadre by submitting unwillingness certificate. Further contention made by learned counsel for the respondents is that as per Govt of India, Ministry of Defence (Army) letter dated 11.07.2018 when a regular promotion offered to an employee was refused by him before becoming entitled to a financial upgradation, no financial upgradation shall be allowed. As such applicant was not granted stagnation due to lack of opportunities. His contention is that since applicant had denied to undergo promotion cadre, he was not granted 2nd MACP in terms of aforesaid provisions. He pleaded for dismissal of O.A.

5. Heard learned counsel for the parties and perused the material placed on record.

6. The only contention of the respondents is that applicant was denied 2nd MACP on the ground that he had submitted an unwillingness certificate, as such he was ineligible for promotion and consequently for benefits accruing from MACPS. Attention of the Tribunal was invited to Para 15 of Appendix 'X' to Army Headquarters Administrative Instructions which postulates that unwillingness to attend promotion cadre course also amounts to unwillingness/refusal for promotion. The learned counsel also contended that the applicant did not submit his willingness which made him ineligible for the benefits of the MACPS.

7. It is worthy of notice that ACP scheme of 2003 as well as MACP scheme of 2011 merely envisaged grant of financial benefits to Personnel Below Officer Rank (PBOR) through placement in a higher pay scale and was not to be considered as functional or regular promotion. It cannot be said that unwillingness certificates rendered for promotion cadre in accordance with Record Office Instructions were irrevocable.

8. It may be noted that it is not the first case. Earlier also, the Kochi Bench of Armed Forces Tribunal examined and dealt on this aspect in O.A. No. 170 of 2016, ***Ex Hav Zubair P vs Union of India & Others***, and converged to the conclusion leaning in favour of the applicant in the O.A. Hence the question whether a person

who had refused to undergo promotion cadre/course or had given unwillingness for promotion cadre was eligible for MACPS is no more *res integra*. The Armed Forces Tribunal, Regional Bench, Kochi had an occasion to consider this aspect of the matter and observed as under:-

*"As observed, the applicant had given unwillingness certificate on 20th Jun 2003, in accordance with the provisions of AEC Record Office Instructions specifying mandatory criteria courses for promotion and impact of unwillingness to undergo such courses. The ROI specified that an individual who is unwilling to attend criteria course/promotion cadre, relinquishes his claim for next higher rank as he has not qualified the necessary promotion course. At the stage of signing such a certificate, there was no MACP Scheme which was introduced only in May 2011 to be effective from 01 Sept 2008. Even the earlier ACP was Scheme introduced in August 2003, which, as such was not applicable to direct entry Havildars like the applicant. The ACP Scheme of 2003 as well as the MACP Scheme of 2011 merely envisaged grant of financial benefits to Personnel Below Officer Rank (PBOR) of the three services through placement in a higher pay scale and was not to be considered as functional or regular promotion. It is also observed that the unwillingness certificate rendered in accordance with ROI is not really irrevocable as there were provisions to apply for withdrawal of unwillingness certificate and for subsequent detailment of the course provided the individual made such an application to obtain the sanction of Additional DG AE. The Additional DG AE could then consider the submission made by the individual and grant necessary waiver. The aspect of whether a person who had refused to undergo promotion course or had given permanent unwillingness for promotion was eligible for MACP is no more *res integra* as this Bench had examined the issue in O.A.No.73/14 and connected cases and more recently in O.A.Nos.26 and 40 of 2015 and O.A.No.25/2016 and connected cases. In our view, the question to be considered is whether the applicants had any opportunity for promotion based on vacancies available from the date of coming into effect of MACP till their retirement. If the applicants had no opportunity for promotion for want of vacancy in the next higher rank, then their claim for MACP could not be denied only on the basis of the undertaking executed by them. While the respondents have also contended that unwillingness to undergo mandatory/criteria course for promotion amounts to unwillingness/refusal for promotion, it is observed that there*

is no such provision in the Government letters at Annexures A2 and A4 or in the Administrative Instructions issued by Army Headquarters (Annexure R1). The provisions of Para 15 quoted by the respondents is only in Appendix 'A' to the Administrative Instructions which is essentially a compilation of frequently asked questions on MACPS. While the answer to question No.15 states that unwillingness to attend promotion cadre amounts to unwillingness/refusal for promotion, since there are no enabling provisions in the Policy letters governing the issue, a mere question/ answer in the Appendix cannot be claimed as a provision to deny the benefit of MACPS. Therefore, we do not see any merit in such a contention and the benefit of MACP Scheme could not be denied to the applicant merely on the basis of an unwillingness certificate given by him prior to the introduction of the Scheme, if he had no opportunity for promotion for want of vacancy in the next higher rank. 11. When the MACP Scheme was introduced to be effective from 01 September 2008, the applicant, who had been enrolled on 20 Apr 1990, had a little over 18 years of service. Therefore, in accordance with the provisions, he was eligible by requisite service for second MACP with effect from 01 September 2008 as he had more than 16 years of service as on that date provided he did not have any chance for promotion prior to that date. The respondents have submitted that the immediate senior as well as the immediate junior of the applicant were promoted with effect from 01 Feb 2011 ie more than 2 years after the date of introduction of MACP Scheme. Therefore, in our view, the applicant did not have any opportunity for promotion to next higher rank for want of vacancy prior to 01 Sep 2008 even if he had qualified in the criteria course. Hence, he was eligible for the benefit of second MACP with effect from 01 Sep 2008 provided he was found fit after due screening in accordance with law."

9. Coming to the present case, the moot question which arises for adjudication is whether the applicant had any opportunity for promotion based on vacancies available from the date of coming into effect of MACPS till his discharge? If the applicant had no opportunity for promotion for want of vacancy in the next higher rank, then his claim for MACPS could not be denied only on the basis of the undertaking containing his unwillingness. The contention that unwillingness to undergo promotion cadre course for

promotion amounts to unwillingness/refusal for promotion, does not impress inasmuch as there is no such provision in the Administrative Instructions issued by Army Headquarters. The provisions of para 15 quoted by the respondents is only in Appendix 'A' to the Administrative Instructions, as observed in the case of **Ex Hav Zubair P** (supra), is essentially a compilation of frequently asked questions on MACPS. While the answer to question No. 15 states that unwillingness to attend promotion cadre course amounts to unwillingness/refusal for promotion, since there is no enabling provision in the policy letters governing the issue, a mere question/answer in the Appendix cannot be claimed as a provision to deny the benefit of MACPS. There appears to be no substance in the contention of the respondents that benefits of MACP scheme were not available to the applicant on account of unwillingness certificate given by him to undergo promotion cadre course.

10. The applicant was enrolled on 20.01.2003 and was discharged from service on 31.01.2020, meaning thereby he was entitled to be granted first MACPS on completion of 08 years of service and second MACPS on completion of 16 years of service which he rendered prior to his discharge from service after completion of terms of engagement.

11. As stated above, in our considered view, there was no enabling provision in the MACPS which could disentitle the applicant merely because he submitted his unwillingness certificate. The only

condition that was available was that if the applicant had no opportunity for promotion till his retirement, the benefit of MACPS could not be denied to him merely on the basis of unwillingness certificate rendered by him at the time of his promotion cadre course.

12. As a result of foregoing discussion, the O.A. is **allowed**. The respondents are directed to give due consideration to the claim of the applicant for the benefit of 2nd MACPS due to him w.e.f. January, 2019 by ignoring the unwillingness certificate given by him at the time of promotion cadre course. The appropriate decision shall be intimated to the applicant within a period of four months from the date of receipt of a certified copy of this order. Default will invite interest @ 8% p.a. Impugned order dated 12.03.2022 passed by the respondents is quashed.

13. No order as to costs.

14. Pending miscellaneous applications, if any, shall stand disposed off.

(Vide Admiral Atul Kumar Jain)
Member (A)

Dated : 25.01.2023
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(Justice Anil Kumar)
Member (J)