

RESERVED
Court No. 2

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

ORIGINAL APPLICATION No. 394 of 2023

Friday, this the 5th day of January, 2024

Hon'ble Mr. Justice Anil Kumar, Member (J)

Hon'ble Vice Admiral Atul Kumar Jain, Member (A)

No. 13698170P, Hav Rajiv Kumar
S/o Parma Nand Singh
Permanent R/o Shri Rampur Thuthi, Post Office – Temtha, Tehsil –
Khagaria, District – Khagaria, State – Bihar, PIN-851216
Presently residing at C/o Manoj Kumar Pandey, Dev Vihar Colony,
Malak Road, Neelmatha, Lucknow Uttar Pradesh – 226002

..... Applicant

Learned counsel for the : **Shri Bhanu Pratap Singh Chauhan,**
Applicant Advocate

Versus

1. Union of India through Secretary, Ministry of Defence, (Army)
South Block, New Delhi-110010.
2. Chief of the Army Staff, IHQ of MoD (Army), South Block, New
Delhi.
3. Officer-in-Charge, Records Brigade of The Guards, PIN –
900746, C/o 56 APO.
4. PCDA (Pension), Draupadi Ghat, Allahabad.

.....Respondents

Learned counsel for the : **Mrs. Deepti Prasad Bajpai,** Advocate
Respondents Central Govt. Counsel

Departmental Representative : **Maj Naman Gupta**

ORDER

1. The instant Original Application has been filed under Section
14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

- A. To issue/pass a direction or an order to the respondents to grant the benefit of third MACPS for the rank of Naib Subedar with all the consequential benefits alongwith @ 12% interest on arrear in light of Hon'ble Tribunal judgments.
- B. To issue/pass a direction or an order to the respondents to decide the representation dated 01.03.2022 of the applicant for grant of benefit of third MACPS for the rank of Naib Subedar.
- C. To issue/pass any other order or direction as this Hon'ble Tribunal may deem just, fit and proper under the circumstances of the case in favour of the applicant.
- D. To allow this original application with costs."

2. The factual matrix on record is that the applicant was enrolled in the Army on 24.06.1997 and was discharged from service on 30.06.2021 after rendering more than 24 years of service in terms of Rule 13 (3) III (i) of Army Rules, 1954 on fulfilling the terms of engagement. The applicant was granted benefit of 1st MACP of Naik grade w.e.f. 01.01.2006. The applicant was promoted to substantive rank of Havildar on 04.10.2012. The applicant was provided two opportunities to attend the promotion cadre which were refused by the applicant and thus, applicant was not granted benefit of 3rd financial upgradation for the rank of Naib Subedar. The applicant submitted a representation dated 01.03.2022 but the same has not been decided by the respondents. Being aggrieved, the applicant has filed the present Original Application for grant of benefit of 3rd MACP on completion of 8 years of service as on 04.10.2020.

3. Learned counsel for the applicant submitted that applicant was enrolled in the Army on 24.06.1997 and was discharged from service on 30.06.2021 after rendering more than 24 years of service. The Government had introduced Assured Career Progression (ACP) Scheme on recommendation of Vth Central Pay Commission. The said scheme was revised with MACP granting three financial up-gradations i.e. after 8 years, 16 years and 24 years of service in May 2011. The scheme was made to take effect from 01.09.2008 which was later on made effective w.e.f. 01.01.2006. 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 though no such unwillingness certificate was given by the applicant. 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 was unwilling to undergo promotion cadre. 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. The applicant was granted benefit of 1st MACP of Naik grade w.e.f. 01.01.2006. The applicant was promoted to substantive rank of Havildar on 04.10.2012. The applicant was due to be granted third

Modified Assured Career Progression (MACP) on completion of 08 years of service from the date of promotion to the rank of Havildar but the same has not been granted to the applicant. He further submitted 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 given by the applicant.

4. Learned counsel for the applicant further submitted that the applicant was downgraded to medical category P3 (T-24) w.e.f. 17.07.2020 to 31.12.2020 and was not eligible for cadre and therefore, he refused to attend promotion cadre due to disability 'Bilateral Inguinal Hernia Right (Optd)', however, applicant was further upgraded to SHAPE-1 on 05.03.2021. Since the applicant was in low medical category, he was not in position to attend the promotion cadre, hence, benefit of MACP cannot be denied to him merely on the basis of unwillingness which was with regard to promotion and not for benefit of MACP.

5. Learned counsel for the applicant placed reliance on the judgment of the AFT, Kochi Bench in O.A. No. 170 of 2016, **Ex Hav Zubair P vs Union of India & Others**, decided on 21.02.2017, AFT (PB) New Delhi judgment in OA No. 680 of 2016, **Ex Hav Chandran Mohan vs. Union of India & Others**, decided on 09.04.2021, AFT (RB) Lucknow judgment in OA No. 153 of 2016, **Ex Havildar Vrajesh Kumar Shankhdhar vs. Union of India & Ors**, decided on 24.01.2018 and OA No. 37 of 2023, **Ex Hav Amod Kumar Rai vs.**

Union of India & Others, decided on 09.10.2023 and submitted that in view of the aforesaid judgments, applicant is entitled for grant of 3rd MACP on completion of 8 years from the date of promotion to the rank of Havildar, i.e. w.e.f. 04.10.2020 and pensionary benefits w.e.f. 01.07.2021 in the rank of MACP Naib Subedar.

6. Per contra, learned counsel for the respondents submitted that applicant was enrolled in the Army on 24.06.1997 and was discharged from service on 30.06.2021 after rendering more than 24 years of service in terms of Rule 13 (3) III (i) of Army Rules, 1954 on fulfilling the terms of engagement. The applicant was granted benefit of 1st MACP of Naik grade w.e.f. 01.01.2006. The applicant was promoted to substantive rank of Havildar on 04.10.2012. The applicant was provided two opportunities to attend the promotion cadre which were refused by the applicant and thus, applicant was not granted benefit of 3rd financial upgradation for the rank of Naib Subedar. The applicant submitted a petition/representation dated 01.03.2022 as stated by the applicant in O.A. but the same has not yet been received by Records, Brigade of The Guards. He further submitted that as per Para 15 of SAI/1/2008, Govt. of India, Ministry of Defence enhanced the benefit of Assured Career Progression (ACP) Scheme vide its letter dated 03.08.2009 which was further redesignated as Modified Assured Career Progression Scheme (MACPS) vide IHQ of MoD (Army) letter dated 13.06.2011 with financial upgradation on completion of 8,16 & 24 years of service, i.e. 1st, 2nd and 3rd MACP respectively.

7. Learned counsel for the respondents further submitted that as per Para 25 of Annexure No 1 of Govt. of India, Ministry of Defence letter dated 19.05.2019, *“if a regular promotion has been offered but was refused by the employee before becoming entitled to a financial upgradation, no financial upgradation shall be allowed as such an employee has not stagnated due to lack of opportunities. If however, financial upgradation has been allowed due to stagnation and the employee subsequently, refuse the promotion, it shall not be ground to withdraw the financial upgradation. He shall however, not be eligible to be considered for further financial upgradation till he agree to be considered for promotion again and the second, the next financial upgradation shall also be deferred to the extent of period of debarment due to the refusal”*. Since the applicant has opted unwilling for further promotion/promotion cadre when he came in seniority, therefore, applicant is not entitled for financial upgradation to 3rd MACP (Naib Subedar grade), due on 04.10.2020 as per policy in vogue. He pleaded for dismissal of O.A.

8. We have heard Shri Bhanu Pratap Singh Chauhan, learned counsel for the applicant and Maj Naman Gupta, Departmental Representative for the respondents and perused the material placed on record.

9. The applicant was enrolled in the Indian Army on 24.06.1997 and was discharged from service on 30.06.2021 (AN) after serving more than 24 years of service. The applicant was granted benefit of 1st MACP of Naik grade w.e.f. 01.01.2006. The applicant was

promoted to substantive rank of Havildar on 04.10.2012. The applicant was entitled for 3rd financial upgradation of Naib Subedar grade on completion of 8 years from the date of promotion to the rank of Havildar, i.e. w.e.f. 04.10.2020 which has not been granted to the applicant prior to his discharge from service.

10. The contention of the respondents is that applicant was denied 3rd MACP on the ground that he had submitted unwillingness certificate for undergoing promotion cadre course, as such he was ineligible for grant of 3rd MACP. In this regard, we find that as per 4 GUARDS (1 RAJPUT) letter dated 05.05.2023, filed alongwith counter affidavit shows that during 1st chance of promotion cadre, applicant was willing to attend but during cadre, applicant was admitted to military hospital. For 2nd chance of promotion cadre, applicant was in low medical category, hence, he was unable to attend promotion cadre. 3rd chance was not granted as applicant was SOS from service w.e.f. 01.07.2021. Para 3 of the letter dated 05.05.2023 is reproduced as under :-

“3. The indl was due for MACP-III on 04 Oct 2020 as the indl completed 8 yrs service in the rk of Hav. However the indl was gtd opportunities for promotion cadre before MACP was due. Detls of two cadre opportunities provided to NCO are as under :-

Ser No	Types of Chance	Cadre Duration	Remarks
(a)	1 st Chance	<u>09 Dec 2019</u> 20 Feb 2020	Initially indl was willing for cadre. However during cadre the indl was admitted in MH Jalandhar on 27 Jan 2020 for Diag ; Bilateral inguinal hernia Right (Optd) and disch from MH Jalandhar on 17 Feb 2020 post test of cadre gets over and further proceeded to 42 days SL wef 18 Feb 2020 to 30 Mar 2020 and refused

			to attend cadre.
(b)	2 nd Chance	<u>19 Oct 2020</u> 13 Mar 2021	Indl was downgraded to med cat P3 (T-24) wef 17 Jul 2020 to 31 Dec 2020 and was illegible for cadre and refused to attend promotion cadre for Diag ; Bilateral Inguinal Hernia Right (Optd) and further upgraded to SHAPE-I on 05 Mar 2021.
(c)	3 rd Chance	Not Availed	Indl SLS from service on 01 Jul 2021.

11. Clarification with regard to unwillingness to attend promotion cadre and unwillingness for promotion has been given vide letter dated 20.07.2017 issued by Adjutant General's Branch, IHQ of MoD (Army) as under:-

"1. "x x x x x

2. *The proposal has been analysed by this Dte in light of existing rules/policies. It is clarified that MACP is granted in lieu of promotion whereby financial upgradation is granted whenever a person has spent eight years continuously in the same grade pay at 8, 16 and 24 years of service, whichever is earlier provided the indl meets the required criteria. The scheme was implemented to provide financial benefit to the stagnating personnel wherein indl was willing for promotion but could not be promoted due to limited vacancies. The overall Govt policy on the subject has been adapted to the conditions of Def Forces. The indl, denying the offer of promotion is fully aware of the implications incl MACP and hence is not entitled for any relaxation at a later stage.*

3. *It is also clarified that unwillingness to attend promotion cadre cannot be equated to unwillingness for promotion. The same has already been clarified by our letter No B/33513/ACP/AG/PS-2 (c) dt 13 Jun 2011 (copy encl). Hence, an indl unwillingness for promotion cadre would still be eligible to MACP upgradation **unless he is explicitly unwilling for promotion.**"*

The aforesaid ruling makes it clear that unwillingness to attend the promotion cadre course and unwillingness to accept further promotion cannot be automatically equated.

12. We observe that merely because the applicant was in the seniority list for promotion cadre course he was offered the promotion cadre course, first time in Dec 2019 and second time in Oct. 2020 but this does not automatically imply that he would have been promoted to the next higher rank also, because that would

depend on the vacancy position at the time of actual promotion. Attending a promotion cadre course allows a person to become eligible for promotion. It is one among several eligibility criteria necessary for promotion. Others inter alia being medical category, ACR, courses attended, vacancy, length of service/seniority etc. More so, applicant was given only two opportunities to attend promotion cadre in which he availed 1st chance to attend promotion cadre but he became ill during the cadre and admitted to military hospital, thus, he being willing to cadre, attended the same but due to illness, he could not complete the cadre and admitted in hospital. During detailment of 2nd chance, applicant was in low medical category and thus, he was unable to undergo promotion cadre on medical ground and third chance was not provided to him because at that time he has been discharged from service. Thus, we do not find any lapse on the part of the applicant to undergo promotion cadre and therefore, he is very much entitled to the benefit of 3rd MACP of Naib Subedar grade as due to him, i.e. w.e.f. 04.10.2020 on completion of 8 years from the date of last promotion to the rank of Havildar, i.e. w.e.f. 04.10.2012.

13. As a result of foregoing discussion, the Original Application is **allowed**. Since, the respondents have already granted benefit of 1st MACP, i.e. Naik to the applicant in due course and applicant was promoted to the rank of Havildar on 04.10.2012, the respondents are directed to grant benefit of 3rd MACP of Naib Subedar grade due to him on 04.10.2020. The respondents are further directed to issue

fresh PPO granting benefit of 3rd MACP of Naib Subedar grade w.e.f. 04.10.2020 and grant pension of 3rd MACP (Naib Subedar grade) from the next date of discharge from service, i.e. w.e.f. 01.07.2021 and pay arrears accordingly. The respondents are directed to comply with the order within a period of four months from the date of receipt of certified copy of the order. Default will invite interest @ 8% per annum till actual payment.

14. No order as to costs.

15. Pending Miscellaneous Application(s), if any, shall stand disposed off.

(Vice Admiral Atul Kumar Jain)
Member (A)

Dated: January, 2024
SB

(Justice Anil Kumar)
Member (J)