

Court-3
Reserved
Ser No. 18

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
 LUCKNOW**

Original Application No 883 of 2022

Wednesday, this the 19th day of July, 2022

Hon'ble Mr. Justice Anil Kumar, Member (J)
Hon'ble Maj Gen Sanjay Singh, Member (A)

Rank- EX Nk, Name- Ritesh Kumar, Service No. 4281831-Y, Son of Ashok Kumar, Village- Madiyaon Gaon, PO-Jankipuram Extn, Sita Vihar Colony Phase-1, District – Lucknow (Uttar Pradesh-226021).

..... Applicant

Ld. Counsel for the Applicant: **Shri VK Chahar**, Advocate

Versus

1. Union of India, Represented by- the Secretary, Govt of India, Ministry of Defence through, South Block, New Delhi-110011.
2. The Chief of the Army Staff, Integrated Headquarters of Ministry of Defence (Army), PO- DHQ, New Delhi – 110011.
3. The Officer-in-Charge, Records The Bihar Regiment, PIN-908765, C/o 56 APO.
4. Commanding Officer, 8 Bihar, PIN-910508, C/o 56 APO.
5. The P.C.D.A. (P) Draupadi Ghat, Allahabad, PIN-211014 (Uttar Pradesh).

..... Respondents

Ld. Counsel for the: **Shri Rajiv Narayan Pandey**, Advocate
 Respondents Central Govt Counsel

ORDER

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

- (a) to grant the benefit of Second Modified Assured Career Progression Scheme on completion of 16 years of service with effect from 15.04.2018
- (b) to summon the entire records of the applicant pertaining to computation of the benefit to the applicant Modified Assured Career Progression Scheme.
- (c) and any such further and other orders as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case and thus render justice.

2. The factual matrix on record is that the applicant was enrolled in the Army on 18.04.2002 and on completion of compulsory military training at the Bihar Regimental Centre, he was posted to 8th Battalion The Bihar Regiment. During the course of his service he was placed in low medical category A3 (Permt) with effect from 01.02.2005 to 31.01.2011 and P2 (Permt) from 29.01.2016 till his discharge. He was discharged from service on 30.04.2019 (AN) after rendering more than 17 years service in terms of Rule 13 (3) III (i) of Army Rules, 1954 on fulfilling the conditions of his service. The applicant was granted 1st MACP on 15.04.2010 after completion of 08 years service and was due for second financial upgradation on completion of 16 years service on 18.04.2018. On account of submission of unwillingness certificate, applicant was denied grant of further MACP

and was discharged from service without granting benefits of 2nd MACP. This O.A. has been filed for grant of benefit of 2nd MACP on completion of 16 years of service which the applicant completed on 18.04.2018.

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, 16 years and 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 (PBOR) superseding the previous ACP scheme. The scheme was made to take effect from 01.09.2008 and subsequently, it was made effective w.e.f. 01.01.2006. The grievance of the applicant is that applicant has been denied the benefits of the 2nd MACP on the ground that he had expressed unwillingness to undergo promotion cadre/further promotion. 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 MACP 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. The applicant was granted 1st MACP in the year 2010 on completion of 08 years service and second financial upgradation on completion of 16 years service in the year 2018 was due on 18.04.2018 but he was denied the same. He further submitted that the only condition that was available to the applicant that if the applicant had 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.

4. Learned counsel for the applicant further submitted that applicant had never given his unwillingness to forgo the promotion but he submitted unwillingness certificate to attend the promotion cadre as he was in low medical category and his unwillingness was only due to suffering from illness and treatment of illness at Military Hospital, Hyderabad. Further submission of learned counsel for the applicant is that mere undertaking given by the applicant would not extinguish the right for grant of the benefits of 2nd MACP. He placed reliance on the judgment of AFT, Nainital Circuit Bench in O.A. No. 179 of 2022, ***Ex L/Nk Ravi Bhatt vs Union of India & Others***, AFT, Kochi Bench in O.A. No. 170 of 2016, ***Ex Hav Zubai P Vs Union of India & Others***, and submitted that in view of the aforesaid judgments, applicant be granted 2nd MACP on completion of 16 years service.

5. Per contra, submission of learned counsel for the respondents is that applicant was enrolled in the Army on 18.04.2002. It was further submitted that he was granted 1st MACP on 18.04.2010 after

completion of 08 years service and was due for second financial upgradation on completion of 16 years service on 18.04.2018. It was further submitted that on account of submission of unwillingness certificate for promotion he was denied grant of further MACP and was discharged from service without granting benefits of 2nd MACP. Further submission 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. His other contention is that the applicant was not detailed in promotion cadre as he was placed in low medical category. His contention is that since applicant had denied grant of further promotion, he was not granted 2nd MACP in terms of aforesaid provisions. He pleaded for dismissal of O.A.

6. We have heard learned counsel of both the parties and perused the material placed on record.

7. There is no dispute that applicant was enrolled in the Army on 18.04.2002 and was discharged from service on 34.04.2019 (AN) in low medical category. On completion of 08 years service he was granted 1st MACP w.e.f. 18.04.2010. The applicant was placed in low medical category A3 (Permt) from 01.01.2005 to 31.01.2011 and A2 (Permt) from 01.02.2015 till his discharge from service for the disability Chondromalacia (Rt) knee (Optd). He was also placed in P2

(Permt) medical category from 29.01.2016 till his discharge for SARCODOSIS STAGE II.

8. Respondents' contention is that since the applicant was placed in low medical category there was a requirement of producing certificate as per AO 09/2012/MT to attend promotion cadre, which being not submitted by the applicant, he could not be detailed to undergo promotion cadre.

9. We find that the applicant was granted 1st MACP when he was placed in permanent low medical category. There is no record showing whether he underwent promotion cadre prior to grant of 1st MACP or he refused to undergo promotion cadre or he gave or he rendered unwillingness certificate for further promotion but the fact is that being placed in low medical category he was granted 1st MACP. 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 MACP.

10. The question whether a person who had refused to undergo promotion cadre/course or had given unwillingness for promotion cadre was eligible for MACP 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.”

11. In the case in hand we find that the applicant was granted 1st MACP on 18.04.2010 when he was suffering from same disability with which he was suffering at the time when he became due for 2nd MACP. We observe that the applicant was in low medical category and his unwilling was only due to suffering from illness and treatment of illness at Military Hospital, Hyderabad. As stated above, in our considered view, there is no reason to deny him his second MACP.

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 MACP due to him on 18.04.2018 by ignoring the unwillingness certificate given by him at the time of promotion cadre course/promotion. The appropriate decision shall be intimated to the applicant within a period of four months from the date of receipt of a copy of this order. Default will invite interest @ 8% p.a.

13. No order as to costs.

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

(Maj Gen Sanjay Singh)
Member (A)

(Justice Anil Kumar)
Member (J)

Dated: July, 2023

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