

ARMED FORCES TRIBUNAL, REGIONAL BENCH, LUCKNOW

Original Application No 347 of 2022

Tuesday, this the 20th day of September, 2022

Hon'ble Mr. Justice Umesh Chandra Srivastava, Member (J)
Hon'ble Vice Admiral Abhay Raghunath Karve, Member (A)

1. Ex ACP Nk Dharmendra Kumar Upadhyay (15618299K)
R/o Vill : Bagaha Chini Mill PO : Naraipur
Distt : West Champaran – 845101 (Bihar)
2. Ex ACP Nk Amit Kumar Singh (15618138F)
VPO : Dariyapur, Teh & Distt : Munger – 811201.
3. Ex ACP Nk Ram Pukar Choudhary (15618159X)
Vill : Boukhara, PO : Prasando, Distt : Munger-811213.
4. Ex ACP Nk Vikram Advadiya (15618198K)
Vill : Mansa Ramnagar, PO : Mansa, Distt : Neemuch-458110.
5. Ex ACP Nk Shivanand Singh Rathore (15618183N)
VPO : Ratlam, Teh & Distt : Ratlam – 457001 (MP).
6. Ex ACP Nk Ravishankar Pandey (15619534K)
VPO : Ekawuna, Teh & Distt : Buxar – 802131 (Bihar).
7. Ex ACP Nk Md. Javed Hasan (15618152N)
R/o : Mohall Sharif Colony, PO & Distt : Nawada – 805110.
8. Ex ACP Nk Ram Niwas Kumar (15618135N)
VPO : Mahadeopur, Teh & Distt : Banka – 813102 (Bihar).
9. Ex ACP Nk Debashish Padhi (15618061K)
Saipratik Apt. A-104, Gothapatna, PS : Shandaka,
Distt : Khordha – 752055 (Odisha).
10. Ex ACP Nk Jaspal Singh (15618113P)
Arjun Nagar, Street No. 212, Near Duggal Palace,
Bathinda – 151001 (Punjab).
11. Ex ACP Nk Sanjit Kumar (15618240K)
Vill : Larothe, PO : Bhalla, Distt : Doda – 182222 (J&K).

..... Applicants

Ld. Counsel for the Applicants: **Shri Om Prakash**, Advocate

Versus

1. Union of India, through Secretary, Ministry of Defence, South Block, New Delhi-110106.
2. Chief of the Army Staff, Sena Bhawan, Rafi Marg, New Delhi – 110106.
3. Officer-in-Charge Records, Brigade of the Guards, PIN : 900746, C/o 56 APO.
4. PCDA (Pension), Draupadi Ghat, Prayagraj – 211104.

..... Respondents

Ld. Counsel for the Respondents : **Ms. Amrita Chakraborty**,
Central Govt Counsel

ORDER (Oral)

1. The instant Original Application has been filed on behalf of 11 applicants under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

- A. To direct the respondents to grant the benefit of Second Modified Assured Career Progression Scheme to all the applicant(s) on completion of 16 years of service.
- B. To issue suitable directions to respondents to pay the accrued arrears from the date of grant of benefit of Second MACP and to issue Corrigendum PPO accordingly.
- C. Any other relief(s) to which the applicant(s) be found eligible and entitled, may also be very kindly granted to the applicant(s).”

2. The factual matrix on record is that the applicant(s) was enrolled in the Army on 15.10.2003 and was discharged from service on 31.10.2020 after rendering more than 17 years of service. The remaining co-applicants who have been denied 2nd MACP were also posted to respondent No. 3 and enrolled between Aug. 2003, Sep.

2003 and Oct. 2003 and were discharged from service in respective months of their enrolment and granted service pension of ACP Naik. The applicant and other co-applicants were granted 1st financial upgradation for the rank of Naik on completion of 8 years of service in terms of Army HQ letter dated 13.06.2011 even though the applicants had submitted their unwillingness for Promotion Cadre of Naik due to non availability of vacancies. Part II Order of MACP Naik after completion of 8 years of service, w.e.f. 15.10.2011 in respect of applicant No. 1 was published by the unit and similarly for other applicant's also. The applicants were already ACP Naik which was granted to them after completion of 8 years of service but they have been denied 2nd MACP of Havildar rank on completion of 16 years of service. The present Original Application has been filed by the applicants for grant of benefit of 2nd MACP on completion of 16 years of service.

3. Learned counsel for the applicants submitted that MACP scheme was introduced by the Govt. in May 2011 with three financial up-gradations i.e. after 8 years, 16 years and 24 years of service. The scheme was made to take effect from 01.09.2008 which was later on made effective from 01.01.2006. The crux of grievance of applicants is that they have been denied the benefits of the said scheme on the ground that they had expressed unwillingness to undergo promotion cadre. It is further submitted by learned counsel for the applicants 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 applicants did not get opportunity of promotion. It is also submitted that the applicants after discharge from service approached the respondents for benefits of the scheme but they were denied merely on the ground that they had given unwillingness certificate to undergo promotion cadre course. He further submitted that there are no enabling provision in the MACPS which could disentitle the applicants as the applicants had already completed their terms of engagement. The applicants were granted first MACP to the rank of Naik in the year 2011 on completion of 08 years of service and were due for second financial upgradation on completion of 16 years of service in the year 2019. He further submitted that the only condition that was available to the applicants that if the applicants have no opportunity for promotion for want of vacancy in the next higher rank, the benefit of MACP could not be denied to them merely on the basis of unwillingness certificate given by the applicants. The respondent No. 3 has refused promulgation of Part II Order for applicants under the garb of unwillingness for Promotion Cadre Exam of Naik though granted 1st MACP of Naik after 8 years of service to all the applicants. Since the applicants were already ACP Naik which was granted to them after completion of 8 years of service but they have been denied 2nd MACP of Havildar rank on completion of 16 years of service as on 15.10.2019 (for Applicant No. 1).

4. Learned counsel for the applicants further submitted that applicants never given their unwillingness to forgo the promotion

further mere undertaking given by the applicants would not extinguish the right for grant of the benefits of Second MACP. He placed reliance upon the judgments of AFT (RB) Lucknow judgments in O.A. No. 181/2021, **Ex L/Nk Subodh Kandwal vs. Union of India and Others**, decided on 17.11.2021 and O.A. No. 153 of 2016, **Ex Havildar Vrajesh Kumar Sankhdhar vs. Union of India and Others**, decided on 24.01.2018 and AFT, Kochi Bench in O.A. No. 170 of 2016, **Ex Hav Zubair P vs Union of India & Others**, decided on 21.02.2017 and submitted that in view of the aforesaid judgments, applicants are entitled for 2nd MACP on completion of 16 years of service.

5. 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. The applicant No. 1 was granted 1st MACPS w.e.f. 15.10.2011 on completion of eight years of service and was due for grant of 2nd MACP w.e.f. 15.10.2019 and similarly other applicants were also granted 1st MACP on their due dates after completion of 8 years of service. Thereafter, applicants came up in seniority for promotion cadre on a number of occasions, however, the applicants have

rendered unwillingness certificate on each occasion to appear in promotion cadre. 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 applicants were not granted stagnation due to lack of opportunities. Her contention is that since applicants had denied to undergo promotion cadre, they were not granted 2nd MACP in terms of aforesaid provisions. She pleaded for dismissal of O.A.

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

7. The only contention of the respondents is that applicants were denied 2nd MACP on the ground that they had submitted an unwillingness certificate, as such they were ineligible for promotion and consequently for benefits accruing from MACPS. Attention of the Tribunal was invited to 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 applicants did not submit their willingness which made them ineligible for the benefits of the MACPS.

8. It is worthy of notice that ACP scheme of 2003 as well as MACP scheme of 2011 (effective from 01.01.2006) 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.

9. It may be noted that it is not the first case. Earlier also, this Tribunal in **Ex L/Nk Subodh Kandwal** (supra) and **Ex Havildar Vrajesh Kumar Sankhdhar** (supra) and 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."

10. Coming to the present case, the moot question which arises for adjudication is whether the applicants had any opportunity for promotion based on vacancies available from the date of coming into effect of MACPS till their discharge? We observe that merely because the applicants were in the seniority list for promotion cadre course they were offered the promotion cadre course on many occasions. This does not automatically imply that they 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 only 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, age etc. In the reply statement the respondents have not alluded to the vacancy position for the next higher rank, and therefore, it cannot be presumed that a post in the next higher rank was readily available for the applicants had they undergone the promotion cadre course. Therefore, the respondents have not been able to show that assured vacancies in next higher rank were available for the applicants, and thus their unwillingness to attend promotion cadre course is not tantamount to refusal for promotion. If the applicants had no opportunity for promotion for want of vacancy in the next higher rank, then their claim for MACPS could not be denied only on the basis of the undertaking containing their unwillingness.

11. 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 Administrative Instructions issued by Army Headquarters, 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 applicants on account of unwillingness certificate given by them to undergo promotion cadre course.

12. The applicant No. 1 was enrolled on 15.10.2003 and was discharged from service on 31.10.2020, meaning thereby he was entitled to be granted first MACPS on completion of 08 years of service and was granted on 15.10.2011 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.

13. As stated above, in our considered view, there was no enabling provision in the MACPS which could disentitle the applicants merely because they submitted their unwillingness certificate. The only condition that was available was that if the applicants had no opportunity for promotion till their retirement, the benefit of MACPS could not be denied to them merely on the basis of unwillingness certificate rendered by them at the time of their promotion cadre course.

14. As a result of foregoing discussion, the Original Application is **allowed**. The respondents are directed to give due consideration to the claim of all 11 applicants for the benefit of 2nd MACPS due to them

on 15.10.2019 (for Applicant No. 1)/on their dues dates by ignoring the unwillingness certificate given by them at the time of promotion cadre course. The appropriate decision shall be intimated to the applicants within a period of four months from the date of receipt of a copy of this order. Default will invite interest @ 8% p.a.

15. No order as to costs.

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

(Vice Admiral Abhay Raghunath Karve) (Justice Umesh Chandra Srivastava)
Member (A) Member (J)

Dated: September, 2022

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