

UNION OF INDIA & ORS.

v.

MANJU ARORA & ANR.

(Civil Appeal Nos. 7027-7028 of 2009)

JANUARY 03, 2022

**[R. SUBHASH REDDY AND HRISHIKESH ROY, JJ.]**

*Service Law – Non-acceptance of promotion – Employee if entitled to benefits under Assured Career Progression Scheme (ACP) – Respondents-employees refused the offered promotion due to personal grounds – However, the benefits under the ACP Scheme were given to them but, were later withdrawn – Respondents were reverted back to their earlier pay scale – Challenged withdrawal of ACP benefit – Tribunal held that they were not entitled to the benefits of upgraded pay scale in terms of the ACP Scheme – Division Bench issued direction for restoration of the upgradation under the ACP Scheme – On appeal, held: If a regular promotion is offered but is refused by the employee before becoming entitled to a financial upgradation, she/he shall not be entitled to financial upgradation only because she has suffered stagnation – This is because, it is not a case of lack of promotional opportunities but an employee opting to forfeit offered promotion, for own personal reasons – This vital aspect was not appropriately appreciated by High Court while granting relief to the employees – Employees who have refused the offer of regular promotion are disentitled to the financial upgradation benefits of ACP Scheme under O.M. dtd. 9.8.99 – However, this would not apply to the two respondents in C.A Nos.7150-7151/2009 as they were not offered regular promotion but conditional promotion – Their refusal of the promotion will not disentitle them to the benefits under the ACP Scheme – Doctrine of Approbate and Reprobate.*

**Allowing the C.A.Nos.7027-7028 of 2009 and dismissing the C.A. Nos.7150-7151 of 2009, the Court**

**HELD: 1.1 The OM dated 9.8.1999 offering Assured Career Progression for the Central Government Civilian Employees was intended as a “safety net” to deal with the problem of genuine**

- A stagnation and hardship faced by the employees due to lack of adequate promotional avenues. The ACP Scheme was introduced by the government with appropriate modification on the basis of the recommendation made by the Fifth Central Pay Commission. Under the Scheme, it was decided to grant financial upgradation after 12 years of regular service and the second one after 12 years of regular service from the date of the first financial upgradation, subject to fulfillment of prescribed conditions. The benefit of the financial upgradation under the ACP Scheme shall be available only if regular promotion during the prescribed intervals, 12 years and 24 years, could not be availed by an employee. While Condition no. 5.1 is clear to this effect, the Division Bench unnecessarily referred to condition No. 10 to hold in favor of employees who have refused promotion offered to them. The Court was of the opinion that the employees concerned are entitled to one financial upgradation, even if they turn down the offer of promotion, as non-acceptance of such promotion would impact only their second upgradation. With such finding, the respondents were held entitled to the relief under the ACP Scheme, although it was a case of refusal of promotion offered to the employee. Reading of the ACP Scheme shows that financial upgradation would accrue to an employee only if no regular promotions have been received by her/him at the prescribed intervals of 12 and 24 years respectively. In the entire service career, an employee is entitled to financial upgradation if the concerned employee had to suffer stagnation in the same post without benefit of any regular promotion. The respondents were offered promotion to higher grade on multiple occasions, but they refused the same and chose to continue in the existing pay scale. The purport of the O.M. dated 9.8.1999 was subsequently clarified by the O.M. dated 18.7.2001 where it was specifically provided that an employee who had been offered regular vacancy based promotion before grant of ACP benefit and the regular promotion was refused, she/he become ineligible to the grant of the ACP benefits. Even without the clarificatory notification dated 18.7.2001, a plain reading of clause 5.1 of the O.M. dated 9.8.1999 makes it abundantly clear that an employee who has opted to

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remain in the existing grade, by refusing offer of promotion, forfeits the rights to ACP benefits and such employee, on account of refusal, can be considered for regular promotion only after necessary debarment period is over. Despite the clear wordings in condition 5.1, the purport of the OM dated 9.8.1999 was missed out in the impugned judgment and the Court unnecessarily adverted to the words in condition 10 of the O.M. to hold in favor of the employees who have refused promotion for their own personal reasons. [Paras 10, 11, 13-15][596-F-H; 598-B-H; 599-A-C]

1.2 If a regular promotion is offered but is refused by the employee before becoming entitled to a financial upgradation, she/he shall not be entitled to financial upgradation only because she has suffered stagnation. This is because, it is not a case of lack of promotional opportunities but an employee opting to forfeit offered promotion, for her own personal reasons. However, this vital aspect was not appropriately appreciated by the High Court while granting relief to the employees. It may also be observed that when an employee refuses the offered promotion, difficulties in manning the higher position might arise which give rise to administrative difficulties as the concerned employee very often refuse promotion in order to continue in his/her own place of posting. The employees who have refused the offer of regular promotion are disentitled to the financial upgradation benefits envisaged under the O.M. dated 9.8.1999. The Scottish doctrine of “Approbate and Reprobate” is attracted to the circumstances in this case. The concerned employees cannot therefore be allowed to simultaneously approbate and reprobate. It is declared accordingly for the respondents in the C.A. Nos.7027-28/2009. [Paras 16-18][599-D-G; 600-B-C]

*Lissenden v. CAV Bosch Ltd.* [1940] A.C 412 – referred to.

1.3 However, the above would not apply to the two respondent employees in C.A Nos.7150-7151/2009 as they were not offered regular promotion but conditional promotion on officiating basis subject to reversion. These two employees cannot be said to have exercised a choice between alternatives and as

- A such the above Principle would not apply and their refusal to accept the officiating promotion cannot be held against them. The refusal of the promotion will not disentitle the two employees to the benefits under the ACP Scheme. It is declared accordingly. Since the respondents have reached the age of superannuation in the meantime, the consequential relief under this order should be made available to the two eligible employees (if not granted), within three months from today. [Paras 19, 20][600-C-E]
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CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 7027-7028 of 2009.

- C From the Judgment and Order dated 21.11.2007 of the High Court of Delhi at New Delhi in W. P. (C) Nos.7227 and 7283 of 2003.

With

Civil Appeal Nos.7150-7151 of 2009.

- D Ms. Meera Patel, Bhuvan Mishra, Ayush Puri, Arvind Kumar Sharma, Advs. for the Appellants.

Dr. I. B. Gaur, Rajeev Manglik, Piyush Sharma, A. P. Dhamija, Ms. Tanya Sharma, Sarad Kumar Singhania, Advs. for the Respondents.

The Judgment of the Court was delivered by

- E **HRISHIKESH ROY, J.**

1. Heard Ms. Meera Patel, learned counsel appearing for the appellants in both the matters. The respondents in Civil Appeal Nos. 7027-7028 of 2009 are represented by Mr. Rajiv Manglik, learned counsel. In Civil Appeal Nos. 7150-7151 of 2009, the respective respondents are represented by learned counsel Mr. Piyush Sharma and Mr. A.P. Dhamija.
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2. The respondents herein are claiming the benefit of *Assured Career Progression Scheme* (for short “ACP Scheme”) for the Central Government civilian employees under the O.M. dated 9.8.1999 issued by the Ministry of Personnel, Public Grievances and Pensions, Government of India. The ACP Scheme provided for financial upgradation to the next higher grade of pay for those employees who could not get promotion after 12 years of service. Second upgradation is similarly admissible after 24 years of service.
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3. Suman Lata Bhatia and Manju Arora who were appointed as Senior Translator (Hindi), were offered promotion to the higher post of Translation Officer (Hindi) on regular basis. But due to personal grounds, they refused the offered promotions. However, the benefits under the ACP Scheme were given to the respondents on 15.11.1999 but when it was found that those were wrongly granted, the same were withdrawn by orders dated 4.9.2002 and 10.10.2002 for Suman Lata Bhatia and Manju Arora respectively. The withdrawal order adverted to the clarificatory O.M. dated 18.7.2001 which disentitled financial upgradation under the ACP Scheme to those who had refused vacancies based promotion. It is specifically reflected in the said order that the employee (respondent herein) having refused promotion on multiple occasions, cannot be said to be stagnating as she, of her own volition has opted to remain in the grade of Senior Translator (Hindi). Accordingly, taking note of the response to the show cause notice and rejecting the same, the ACP benefit was withdrawn and the respondent was reverted back to her earlier pay scale. Similar steps were taken for the other employee as well.

4. The withdrawal of ACP benefit for the two respondents and one other was challenged before the Central Administrative Tribunal, Principal Bench (for short “the Tribunal”) in OA No. 2673/2002 (Suman Lata Bhatia), OA No. 2674/2002 (Veena Arora) and OA No. 3021/2002 (Manju Arora) respectively.

5. In the analogous order (28.8.2003), the Tribunal adverted to both OMs (9.8.1999 and 18.7.2001) and noted that the ACP Scheme is to provide relief to employees who are suffering stagnation in the same post for long period of time. However, having regard to the clarificatory communication as also the purport of the Scheme and the fact that the original applicants had refused regular promotion, they were held disentitled to the upgraded pay scale in terms of the ACP Scheme. The Tribunal opined that on refusal to accept regular promotion, the employee cannot be considered to be stagnating as she has opted to remain in the existing grade of her own volition. Consequently, the decision of the employer to withdraw the ACP benefits to the three applicants were found to be in order by declaring that they are not entitled to the benefits of upgraded pay scale, in terms of the ACP Scheme. However, the proposed recovery of the differential pay on account of cancellation of the pay upgradation was interdicted with the observation that the upgraded pay scale was allowed without any misrepresentation from their side.

A         6. The above decision of the Tribunal declaring disentitlement of the Original Applicants to the ACP benefits were challenged respectively in the WP (C) No. 7227/2003 (Manju Arora), W.P. (C) No.7283/2003 (Suman Lata) and both cases were taken up for analogous consideration.

B         7. The Division Bench adverted to the condition No. 5.1 as also Condition No.10 in the O.M. dated 9.8.1999 to conclude that in case a particular employee had turned down the offered promotion, the non-acceptance of promotion would impact their second upgradation only. It was concluded that the employees were rightly given the benefit of first upgradation, which could not have been withdrawn. Accordingly, the judgment of the Tribunal was interfered and consequently, direction was issued for restoration of the upgradation under the ACP Scheme, to the concerned employees.

D         8. The basic facts in the Civil Appeal Nos.7150-7151/2009 are similar where the concerned respondents Kanta Suri and Veena Arora were also appointed as Senior Translator (Hindi) in the Air Headquarters. The key point of distinction for these two employees was that instead of regular promotion, both Kanta Suri and Veena Arora were offered promotion on officiating basis to the post of Translation Officer (Hindi) with the stipulation that the promotes are liable to reversion if their seniors who are on deputation to other office/posts, return to their present cadre in the Air Force or due to any administrative reasons.

F         9. Additionally, it may be mentioned that the decision in favor of the employees to the effect that their refusal for promotion would impact only their second upgradation, was based upon the common judgment dated 21.11.2007 of the Division Bench of the Delhi High Court in the case of Suman Lata Bhatia and Manju Arora, adverted earlier.

G         10. The OM dated 9.8.1999 offering Assured Career Progression for the Central Government Civilian Employees was intended as a “*safety net*” to deal with the problem of genuine stagnation and hardship faced by the employees due to lack of adequate promotional avenues. The ACP Scheme was introduced by the government with appropriate modification on the basis of the recommendation made by the Fifth Central Pay Commission. Under the Scheme, it was decided to grant financial upgradation after 12 years of regular service and the second one after 12 years of regular service from the date of the first financial upgradation, subject to fulfillment of prescribed conditions. Conditions 5.1 and 10 thereof being relevant, are extracted hereinbelow:-

“5.1 Two financial up-gradation under the ACP Scheme in the entire Government Service career of an employee shall be counted against regular promotions (including in-situ promotion and fast track promotion availed through limited departmental competitive examination) availed from the grade in which an employee was appointed as a direct recruit. This shall mean that two financial up-gradation under the ACP Scheme shall be available only if no regular promotion during the prescribed periods (12 and 24 years) have been availed by an employee. If a employee has already got one regular promotion, he shall qualify for the second financial up-gradation only on completion of 24 years of regular service under the ACP Scheme. In case two prior promotions on regular basis have already been received by an employee, no benefit under the ACP Scheme shall accrue to him.

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10. Grant of higher pay scale under the ACP Scheme shall be conditional to the fact that an employee, while accepting the said benefit, shall be deemed to have given his unqualified acceptance for regular promotion on occurrence of vacancy subsequently. In case he refuses to accept the higher post on regular promotion subsequently, he shall be subject to normal debarment for regular promotion as prescribed in the general instructions in this regard. However, as and when he accepts regular promotion thereafter, he shall become eligible for the second up-gradation under the ACP Scheme only after he completes the required eligibility service/period under the ACP Scheme in that higher grade subject to the condition that the period for which he was debarred for regular promotion shall not count for the purpose. For example, if a persons has got one financial up-gradation after rendering 12 years of regular service and after 2 years there from if he refuses regular promotion and is consequently debarred for one year and subsequently he is promoted to the higher grade on regular basis after completion of 15 years (12+12+1) of regular service, he shall be eligible for consideration for the second up-gradation under the ACP Scheme only after rendering ten more years in addition to two years of service already rendered by him after the first financial up-gradation (2+10) in the higher grade i.e. after 25 years

- A (12+12+1) of regular service because the debarment period of one year cannot be taken into account towards the required 12 years of regular service in that higher grade.”

11. As can be seen, the benefit of the financial upgradation under the ACP Scheme shall be available only if regular promotion during the prescribed intervals, 12 years and 24 years, could not be availed by an employee. While Condition no. 5.1 is clear to this effect, the Division Bench unnecessarily referred to condition No. 10 to hold in favor of employees who have refused promotion offered to them. The Court was of the opinion that the employees concerned are entitled to one financial upgradation, even if they turn down the offer of promotion, as non-acceptance of such promotion would impact only their second upgradation. With such finding, the respondents were held entitled to the relief under the ACP Scheme, although it was a case of refusal of promotion offered to the employee.

- D 12. The learned counsel for the appellant has taken us through the relevant conditions in the ACP Scheme notified on 9.8.1999 and more particularly clause 5.1 and Clause 10 thereof. She has also brought to the notice of the Court, the promotions offered to the employees and their refusal to accept the promotion for their own personal reasons, such as family needs or movement to another station etc.

- E 13. Reading of the ACP Scheme shows that financial upgradation would accrue to an employee only if no regular promotions have been received by her/him at the prescribed intervals of 12 and 24 years respectively. In the entire service career, an employee is entitled to financial upgradation if the concerned employee had to suffer stagnation in the same post without benefit of any regular promotion and, as earlier stated, the O.M. dated 9.8.1999 was introduced as a “*safety net*” to deal with the problems of genuine stagnation and hardship faced by the employees due to lack of adequate promotional avenues. But can the benefit of the Scheme be claimed by an employee when she, despite offer of regular promotion, refuses to accept the same and chooses to remain in the existing grade of her own volition?

- H 14. As can be seen from the records, Manju Arora and Suman Lata Bhatia were offered promotion to higher grade on multiple occasions, but they refused the same and chose to continue in the existing pay scale. The purport of the O.M. dated 9.8.1999 was subsequently clarified by the O.M. dated 18.7.2001 where it was specifically provided that an



employee who had been offered regular vacancybased promotion before grant of ACP benefit and the regular promotion was refused, she/he become ineligible to the grant of the ACP benefits. Even without the clarificatory notification dated 18.7.2001, a plain reading of clause 5.1 of the O.M. dated 9.8.1999 makes it abundantly clear that an employee who has opted to remain in the existing grade, by refusing offer of promotion, forfeits the rights to ACP benefits and such employee, on account of refusal, can be considered for regular promotion only after necessary debarment period is over.

15. However, despite the clear wordings in condition 5.1, the purport of the OM dated 9.8.1999 was missed out in the impugned judgment and the learned Court unnecessarily adverted to the words in condition 10 of the O.M. to hold in favor of the employees who have refused promotion for their own personal reasons.

16. We are quite certain that if a regular promotion is offered but is refused by the employee before becoming entitled to a financial upgradation, she/he shall not be entitled to financial upgradation only because she has suffered stagnation. This is because, it is not a case of lack of promotional opportunities but an employee opting to forfeit offered promotion, for her own personal reasons. However, this vital aspect was not appropriately appreciated by the High Court while granting relief to the employees.

17. It may also be observed that when an employee refuses the offered promotion, difficulties in manning the higher position might arise which give rise to administrative difficulties as the concerned employee very often refuse promotion in order to continue in his/her own place of posting.

18. In the above circumstances, we find merit in the submissions made on behalf of the appellants. Consequently, it is declared that the employees who have refused the offer of regular promotion are disentitled to the financial upgradation benefits envisaged under the O.M. dated 9.8.1999. In this situation, the Scottish doctrine of “Approbate and Reprobate” springs to mind. The English equivalent of the doctrine was explained in *Lissenden v. CAV Bosch Ltd.*<sup>1</sup> wherein Lord Atkin observed at page 429,

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<sup>1</sup> [1940] A.C 412

- A “.....In cases where the doctrine does apply the person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one he cannot afterwards assert the other.....”
- B The above doctrine is attracted to the circumstances in this case. The concerned employees cannot therefore be allowed to simultaneously approbate and reprobate, or to put it colloquially, “eat their cake and have it too”.It is declared accordingly for the respondents in the C.A. Nos.7027-28/2009.
- C 19. However, the above would not apply to the two respondent employees Kanta Suri and Veena Arora in C.A Nos.7150-7151/2009 as they were not offered regular promotion but conditional promotion on officiating basis subject to reversion, by the order dated 29.12.1988. These two employees cannot be said to have exercised a choice between alternatives and as such the above Principle would not apply and their refusal to accept the officiating promotion cannot be held against them.The refusal of the promotion offered by the communication dated 29.12.1988 will not disentitle the two employees, Kanta Suri and Veena Arora to the benefits under the ACP Scheme. It is declared accordingly.
- E 20. Since the respondents have reached the age of superannuation in the meantime, the consequential relief under this order should be made available to the two eligible employees (if not granted), within three months from today.
- F 21. For the foregoing, the first set of Appeals i.e. Civil Appeal Nos.7027-7028 of 2009 are allowed. However, the second set of Appeals i.e. Civil Appeal Nos.7150-7151 of 2009 stand dismissed. There shall be no order as to costs.