

Central Administrative Tribunal

Principal Bench, New Delhi.

OA-2651/2012

MA-2194/2012

MA-2561/2012

Reserved on : 15.04.2013.

Pronounced on :26.04.2013.

Honble Mr. G. George Paracken, Member (J)

Honble Mr. Shekhar Agarwal, Member (A)

1. Sh. T.R. Sharma s/o late Sh. Het Ram Sharma,  
Working as Assistant Engineer (P) in the  
Office of Chief Engineer ), Department of Posts,  
Dak Bhawan, New Delhi-16.  
R/o H-Block, House No.124,  
Sector-23, Sanjay Nagar,  
Ghaziabad(UP)-201002.
2. Sh. Samar Kumar Bose s/o late Sh. Mihinrendu  
Prakash Bose, working as Assistant Engineer (P)  
In the Office of Superintending Engineer (C),  
Department of Posts, Postal Civil Circle,  
Yogayog Bhawan (4th Floor),  
36, CR Avenue, Kolkata-7000012.
3. Sh. A.K. Srivastava s/o late Sh. K.N. Srivastava,  
Working as Assistant Engineer (P),  
O/O Superintending Engineer (C),  
Department of Posts, Mumbai-22  
R/o 204, 3/A, Saki Vihar Complex,

Behind ANSA, Saki Naka, Mumbai-72.

4. Sh. Nilratan Das,  
S/o late Sh. Sanatan Das  
Working as Assistant Engineer (C),  
Postal Civil Sub. Division, Jorhat-785014,  
Assam.  
Res: C/O Pappu Dey, Parijat Nagar,  
Jorhat-785014.

. Applicants

(through Sh. Yogesh Sharma, Advocate)

Versus

1. Union of India through its Secretary,  
Ministry of Communications & IT,  
Department of Telecommunications,  
Govt. of India, Sanchar Bhawan,  
New Delhi.
2. The Under Secretary to the Govt. of India,  
O/O Sr. D.D.G.(BW)  
Ministry of Communications & IT,  
Department of Telecommunications,  
Govt. of India,  
Sanchar Bhawan, New Delhi.
3. The Chief Engineer (C),  
Department of Posts,  
Dak Bhawan, New Delhi.

. Respondents

(through Sh. Satish Kumar, Advocate for Respondents No.1 & 2 and  
Sh. B.K. Berera, Advocate for R-3.

## O R D E R

Mr. Shekhar Agarwal, Member (A)

The applicants have sought the following relief:-

(i) That the Honble Tribunal may graciously be pleased to pass an order of quashing the impugned orders dated order dt. 20.7.2012 and dt. 25.7.2012 (A/1 & A/2), declaring to the effect that the same are illegal, unjust and arbitrary and consequently the applicants are entitled for all the consequential benefits of 2nd ACP including the refund of recovered amount if any in compliance of impugned orders.

(ii) Any other relief which the Honble Tribunal deem fit and proper may also be granted to the applicant.

2. Brief facts of the case are that the applicants are working as Assistant Engineers (C) in the Department of Posts. Applicants No. 3 & 4 are also having additional charge of Executive Engineer (C). Applicants were initially appointed as Junior Engineer and were granted one promotion to the level of Assistant Engineer. Under the ACP Scheme of the Government which provided for upgradation after completion of 12 and 24 years of service in case no regular promotion was granted, the applicants were given second ACP w.e.f. the dates shows against their names in the table below:-

Name	Date of appointment as JE(C)	Date of appointment as AE(C)	Date of 2nd ACP
T.R. Sharma	01.01.1979	10.07.2000	01.01.2003
S.K. Bose	03.04.1978	07.09.1994	03.04.2002
A.K. Srivastava	05.12.1978	20.07.2000	05.12.2002
Nilratan Das	08.12.1978	14.01.1997	08.12.2002

However, by the impugned order dated 20.07.2012 the respondents withdrew the benefit of second ACP from the applicants on the grounds that they did not possess necessary

qualifications for promotion to the level of Executive Engineer and hence were also not entitled to second upgradation in terms of DoP&T O.M. No. 35034/1/97-Estt.(D)/Vol.IV dated 18.07.2001.

3. The contention of the applicants is that this benefit has been withdrawn by the respondents without even giving a reasonable opportunity or a show cause notice to them. They have stated that a Memo was issued to them regarding withdrawal of this benefit on 08.11.2006, which was duly replied to by them. On their replies, a decision was taken to grant one time relaxation to officers who had been given the ACP benefit upto 20.02.2004; but now on the basis of same Memo the impugned order has been passed nearly ten years later. This according to the applicants is illegal and against the principles of natural justice. In the impugned order, it has been mentioned that against the Memo dated 08.11.2006, no representations from non-eligible Assistant Engineers of the Department of Posts were received. This is factually incorrect as according to the applicants they had submitted their representations and copies of those representations dated 13.12.2006 were duly forwarded by the competent authority. Further, the applicants have contended that the respondents have made one time exemption only for those Assistant Engineers now working in the Department of Telecom though at the time of grant of ACP the cadre controlling authority of all of them was the same and all were within the same seniority list. Thus, the respondents have clearly discriminated between persons posted in Telecom Department and persons posted in Postal Department only for the reasons that the cadre controlling authority for the former is now Telecom Department.

4. The next ground taken by the applicants is that those diploma holders, who were promoted as Assistant Engineer (C) prior to 06.08.1994 are still entitled for promotion to the post of Executive Engineer even though having a degree in Engineering. The applicants have relied on the ruling of Honble High Court of Punjab & Haryana at Chandigarh in CWP No. 5203/2010 (Narendra Singh Yadav Vs. State of Haryana) decided on 23.01.2012 in which it was held that a diploma in engineering in appropriate discipline + total ten years of technical experience in the appropriate field will be treated and recognized as equivalent to a degree in Engineering. Further, they have relied on the instructions of Ministry of Education & Social Welfare (Deptt. Of Education Technical) New Delhi issued on 26.05.1977, which reads as under:-

Sub : Recognition of Technical & Professional Qualifications.

On the recommendation of the Board of Assessment for Educational Qualifications and recommendation of Defence Director (Tech.), the Government of India have decided to recognize a Diploma in Engineering in appropriate discipline plus total ten years of technical experience in the appropriate fields is recognized as equivalent to Degree in Engineering. It is considered valid for the purpose of selection to Gazetted posts and services under the Central Government or State Government.

According to these instructions, a diploma in Engineering with ten years of technical experience in the appropriate field is recognized as equivalent to degree in Engineering.

5. The applicants have also quoted the ruling of Honble Supreme Court in the case of State of Orissa Vs. Advail Charan Mohandty, 1995 Supp.(1)SCC 470, according to which once the benefits of relaxation has been granted rightly or wrongly, the same cannot be withdrawn subsequently. The applicants have further stated that in a number of cases it has been laid down that the recovery of excess payment already paid cannot be made if the additional payment had been made to the employees for no fault of theirs. In the case of Babu Lal Jain Vs. State of M.P. & Ors., (2007) 6 SCC 180, the Honble Supreme Court has laid down as under:-

15. We, however, are of the opinion that in a case of this nature, no recovery should be directed to be made. The appellant has discharged higher responsibilities. It is not a case where he obtained higher salary on committing any fraud or misrepresentation. The mistake, if any, took place on a misconception of law.

Further, on the same issue of recovery, the applicants have relied upon the following cases:-

Union of India Vs. Sita Ram Dheer, 1994 SCC(L&S) 1445.

Nand Kishore Sharma Vs. State of Bihar, 1995 Supp.(3)SCC 722.

State of Karnataka Vs. Mangalore University Non-Teaching Employees Assn., 2002(3) SCC 302.

6. The respondents in their reply have stated that it is true that on the recommendations of Departmental Screening Committee held on 25.08.2003, second financial upgradation under the ACP Scheme was granted to the applicants along with other 102 officers. As per Condition-6 of the ACP Scheme fulfillment of normal promotional norms as applicable in

terms of relevant recruitment rules was to be ensured for grant of ACP benefit. As per Clarification No. 53, it has further been clarified that Therefore, various stipulations and conditions specified in the Recruitment Rules for promotion to the next higher grade, including the higher/additional qualification, if prescribed, would need to be met even for consideration under the ACP Scheme. According to the provisions contained in the Post & Telegraph Building Works (Group-A) Service Rules, 1994, one of the norms prescribed for promotion of Assistant Engineer (Civil) to the post of Executive Engineer (Civil) on regular basis is a degree in Engineering. However, as per one time relaxation officers with diploma qualification and holding the post of Assistant Engineer (Civil) on regular basis as on the date of publication of the Rules i.e. 06.08.1994 are also eligible for promotion to the grade of Executive Engineer (Civil). The respondents have stated that since the applicants were promoted as Assistant Engineers after publication of these Recruitment Rules and possess only a diploma in Civil Engineering they were not eligible for the grant of second financial upgradation. This aspect of educational qualification was not verified at the time of grant of second ACP to the applicants. However, when this fact came to notice, show cause notices for cancellation of the same were issued on 08.11.2006. The respondents have further stated that no representations from non-eligible Assistant Engineers working in the Department of Posts were received. Their contention is that the second ACP benefit has been granted to the applicants inadvertently and when the mistake came to notice the same was withdrawn. According to them, the respondents cannot be faulted for this and they are also entitled to make recovery of any excess payment made to the applicants because of this error.

7. We have heard both the parties and perused the material produced on record.

8. The first ground taken by the applicants is that the respondents have discriminated against those who are working in the Department of Posts by withdrawing this benefit from them but have given relaxation to other similarly placed officers who are working with the Department of Telecom. The respondents in their reply have stated that the onetime relaxation was granted only to those employees who have been absorbed in BSNL/MTNL and are now PSU employees. This relaxation has been given to them on the basis of representations submitted by the Executive Association of BSNL. They have denied that this is a violation of Articles 14 and 16 of the Constitution of India because the applicants have been discriminated against.

9. We have perused the O.M. dated 30.03.2007 by which this relaxation has been granted. This O.M. reads as follows:-

Subject : Grant of 2nd ACP to Civil Wing Officers notice reg.

I am directed to refer to this office O.M. dated 8.11.2006, under which a notice has been issued for withdrawal of 2nd ACP granted by DOT vide Orders No.3-1/2000-CWG dated 16.09.2002, 24.04.2003, 01.09.2003 & 20.02.2004 respectively, to Civil Wing officers, not meeting the educational qualifications as prescribed in the relevant Recruitment Rules.

2. The representations received have been carefully examined. Keeping in view of the fact that most of the officers have already availed the benefit, stand absorbed in BSNL/MTNL and are PSU employees at present, it has been decided not to withdraw the 2nd financial upgradation under ACP scheme granted to the officers up to 20.2.2004 i.e. prior to issue of Presidential Order for permanent absorption of Group Officers in BSNL/MTNL. This is being ordered as one time measure to mitigate the hardship to the officers on withdrawal at this stage and not to be construed as general relaxation.

3. Accordingly, in respect of the officers covered under para 1 above, the 2nd financial upgradation under ACP scheme granted by DOT shall be regulated as under:-

If the officer absorbed in BSNL, opts to avail 2nd Financial upgradation under ACP scheme granted by DOT, he/she shall have to forego the 1st IDA pay scale upgradation as on 1.10.2004 or later in terms of para 7 of promotional policy for Group B level officers of BSNL circulated vide O M No. 400-61/2004-Pers.I/308 dated 18.1.2007.

ii) On acceptance of 2nd ACP these officers will be considered for subsequent IDA pay scale upgradation only after completion of 5 year service in the current IDA scale as provided in para 1(I)(b)(3.2) of the Executive Promotional Policy of BSNL for subsequent IDA pay scale upgradation.

4. In respect of officers absorbed in MTNL, the same shall be regulated as per the Executive Promotion Policy of MTNL.

The respondents counsel argued that this relaxation granted to BSNL/MTNL employees was further subject to the conditions mentioned in Para-3(i) & 3(ii) of the above quoted O.M.

10. The applicants were granted the second ACP benefit along with other 102 officers when they were working under the undivided Department of Telecom Services. Subsequently, the department split into two i.e. Department of Posts and Department of Telecom. The applicants went to the Department of Posts whereas the others went to Department of Telecom and were subsequently absorbed in BSNL/MTNL. However, on the dates on which ACP benefits were granted all of them were similarly placed and working under Department of Telecom services. In our considered opinion, the relevant date for deciding whether the applicants and the other 102 officers are similarly placed or not is the date on which ACP benefit was granted to them and not the date on which the impugned orders were passed. Moreover, the fact that these 102 officers got absorbed in BSNL/MTNL is not relevant for the purpose of ACP benefit and consequently the distinction made by the department for treating their cases separately is also not relevant. There is no nexus between grant of ACP and subsequent absorption of some of these officers in BSNL/MTNL. As such this classification cannot be termed as reasonable. Even the fact that there were some conditionalities attached to the relaxation given not material. We, therefore, come to the conclusion that the respondents have erred by treating the case of the applicants differently from those who got absorbed in BSNL/MTNL. In our opinion, this constitutes a case of discrimination.

11. The respondents have also completely ignored the instructions of Government of India issued on 26.05.1977 by which diploma in Engineering with 10 years of technical experience has been recognized as equivalent to degree in Engineering. The respondents reply is silent on this issue. The applicants have also relied upon the ruling in the case of Narendra Singh Yadav, CWP No. 5203 of 2010 decided on 23.01.2012 in which the Honble High Court of Punjab & Haryana has allowed the petition on the grounds that diploma with ten years experience is equivalent to degree in Engineering based on the same instructions of Government of India.

12. The respondents, on the other hand, have cited the judgment of Honble High Court of Delhi in Writ Petition (C) No. 1293/2011 (UOI & Ors. Vs. S.C. Surliya & Ors.) decided on 16.10.2012 in which the argument of UOI has been accepted that the respondent did not have degree in Civil Engineering and therefore cannot be considered for promotion as Executive Engineer (Civil) since he was not holding a regular post of Assistant Engineer on or before 06.08.1994 i.e. the date on which the new Recruitment Rules came into force. However, we do not think that this citation would be helpful in the instant case because the issue of



recognizing diploma with ten years experience as equivalent to degree was not agitated before the Honble High Court at all.

13. The applicant have also argued based on a number of citations that even if ACP benefit is withdrawn from them, recovery of excess amount cannot be made. In this regard, they have annexed with their O.A. the judgment of this Tribunal passed in OA-2904/2011 dated 23.12.2011 in the case of Officers Association of AIIMS & Ors. Vs. AIIMS & Ors. in which after analyzing various judgments such as (i) Shyam Babu Verma & Ors. Vs. UOI & Ors., JT 1994(1) SC 574; (ii) Babulal Jain Vs. State of M.P. & Ors., (2007)6 SCC 180; (iii) SK. Abdul Rashid & Ors. Vs. State of Jammu & Kashmir & Ors., (2008) 1 SCC 722; and (iv) UOI & Anr. Vs. Narendra Singh, (2008) 1 SCC (L&S) 547, it was held that the settled law is that the recovery of the amount already paid to the applicants cannot be made because the excess payment was not made on account of any misrepresentation of facts or fraud committed by the applicants. In the instant case also the mistake, if any, occurred on the part of the respondents and the applicants were in no way responsible for the same.

**14. In the circumstances, we quash the impugned order dated 20.07.2012 by which the benefit of second ACP Scheme has been withdrawn from the applicants. We also quash the order dated 25.07.2012 by which recovery of excess payment from the applicants has been ordered. We direct that the applicants may be considered for grant of this benefit in terms of Government of India Instructions dated 26.05.1977 by which diploma in Engineering with ten years technical experience has been recognized as equivalent to degree in Engineering, keeping in mind that this benefit has not been withdrawn from those similarly placed 102 officers who have got absorbed in BSNL/MTNL. We further direct that, in any case, recovery of any excess payment will not be made from the applicant. The O.A. is accordingly allowed. There shall be no order as to costs.**

(Shekhar Agarwal)

Member (A)

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(G. George Paracken)

Member (J)