

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Date of decision: 26.09.2016

CWP No.6594 of 2007

Prem Lata

...Petitioner

Vs.

The State of Haryana & others

...Respondents

CORAM: HON'BLE MR. JUSTICE RAJIV NARAIN RAINA

Present: Mr. Ram Nivas Sharma, Advocate, for the petitioner.

Ms. Shruti Jain Goel, AAG, Haryana, for the respondents.

RAJIV NARAIN RAINA, J. (ORAL)

Admittedly, the first prayer has been rendered infructuous and requires no determination. The correct amount of DCRG has been released, which is ₹71,000/- and not ₹91,000/- mentioned in the prayer clause.

As far as the second prayer is concerned, the same deserves to be rejected for the reason that when the petitioner's right to promotion matured to the post of Head Mistress, she declined the offer for personal reasons. She sought permission from the Department that she would not avail promotion and would rather forego consideration. The prayer was accepted vide letter dated 22.12.1999 and she continued on the lower post. Thereafter, it appears that the Department mistakenly granted the ACP benefits on completion of 10 years of service. On discovery of mistake, the benefit was withdrawn, which led to reduction in pay. It transpired that in 2003, the petitioner's turn came again for consideration for promotion from

the post of JBT to Head Mistress. She accepted the offer of promotion this time.

The only argument raised by Mr. Sharma is on the construction of Rule 11 of the Assured Career Progression Rules, 1998 (for short 'the Rules'). Rule 11 reads as follows:

“11. Ceasing of entitlement of ACP Scales: In case, the Government servant chooses to forego any functional promotion on any ground whatsoever, while drawing his pay in any ACP scale with reference to him, he shall cease to be entitled to draw his pay in the ACP pay scales and shall draw his pay in the functional pay scales prescribed for the post on which he is substantially working from the date of such forgo of promotion.”

Mr. Sharma argues that words 'ceasing' of entitlement of ACP scales are significant and this does not mean that promotion will neither be offered nor accepted at a later point in time when the petitioner was willing. 'Ceasing' means stopping i.e. for the time being, but it does not mean that right to promotion stands extinguished. That may be true, but the question is; by own act and conduct, the petitioner surrendered her right for promotion by seeking permission in 1999, which when granted entitled her to ACP scales. On promotion being granted in 2003, the right to ACP scales cannot be claimed as a matter of right and, therefore, there was nothing wrong in the action of the Department in withdrawing the ACP benefits, which are in lieu of promotion.

At this stage, Mr. Sharma relies upon a Single Bench judgment rendered in CWP No.8143 of 2009 titled 'Kamlesh Kumari Vs. State of Haryana & others', wherein the learned Single Judge has relied upon earlier

On the other hand, Ms. Shruti Jain Goel, AAG, Haryana, per contra has placed reliance on a decision of the Division Bench of this Court in Rakesh Kumar Vs. State of Haryana & others, 2010 (1) SCT 443, where Rule 11 fell for consideration. The Bench relied upon earlier case law of the Supreme Court and this Court noticed in the judgment and held as follows:

A plain and bare reading of Rule 11 of ACP Rules, 1998 reveals that a Government servant who has been placed in the ACP scale, if chooses to forego his promotion on any ground whatsoever while drawing the ACP scale shall cease to be entitled to draw his pay in the ACP pay scale from the date of his refusal of promotion. It is thus clear that continuance of the grant of pay in the ACP scale is based on the condition that the Government employee shall not forego his promotion for whatever reason. The rationale is based on logic besides being just and fair as placing in the ACP scale is itself made on account of stagnation/non-availability of promotional avenues and in the event, though subsequently, the Government servant willingly refuses to accept the offer of promotion for whatever reason then it can safely be presumed that the Govt. Servant considers there is no stagnation in his Government service, which needs/deserves to be compensated by ACP/promotional scale. Therefore, in our opinion, the State Government would be well within its right to withdraw placement of such an employee in ACP scale as the same was subject to certain condition which is germane to the grant of the same. Consequently, the provision of Rule 11 cannot be by any stretch of reasoning be held to be arbitrary. A reading of the clarification Annexure P/2 further reveals that for implementing the provision of Rule 11 of the ACP Rules, the method and manner of refixing the pay scale of the Government servant covered under Rule 11 has been provided. No serious challenge has been laid to the clarification Annexure P/2. Therefore, no infirmity can also

be found with Annexure P/2. We further find that the refixation of the pay of the petitioner vide Annexure P/6 in terms of Rule 11 cannot also be faulted. Therefore, challenge to Annexure P/6 also fails.”

The view of the Single Judge in Kamlesh Kumari’s case on the subject matter has to be brought in tune with the judgment of the Division Bench, which is binding on me. The Bench held that if employee chooses to forgo his promotion on any ground whatsoever while drawing the ACP scale he shall cease to be entitled to draw his pay in the ACP pay scale from the date of his refusal of promotion.

Ms. Jain also cites in her favour another ruling of the Division Bench in Shakuntla Devi Vs. State of Haryana, 2003 (2) SCT 697. In Rakesh Kumar’s case, the Division Bench had relied on Para.3 of Shakuntla Devi’s case. However, Ms. Jain points out that a mistake of fact and law occurred before the Division Bench while deciding CWP No.15839 of 2007 titled ‘Nirmal Kanta & another Vs. State of Haryana & others’, decided on 11.08.2006 relying upon Shashi Kiran & others Vs. State of Punjab & others, 2003 (1) SCT 340, which was a decision pertaining to the State of Punjab and dealing with the benefit of proficiency step up and not higher standard pay scale or ACP scales. Rule 11 of the Rules was not involved in Shashi Kiran’s case and, therefore any observation which touches upon Rule 11 of the Rules in Haryana will be read obiter and not binding on this Court.

It may be noticed that the Hon’ble Presiding Judge in Nirmal Kanta’s case was the same Presiding Judge in Rakesh Kumar’s case, which is a subsequent judgment. Obviously, while deciding Nirmal Kanta’s case, it could not be pointed out to court that Shashi Kiran’s case did not apply since it was based on a different benefit. It has been pointed out that special leave petition carried by the private party in Rakesh Kumar’s case bearing

Special Leave to Appeal (C) No.32555 of 2009 was disposed of by passing the following order after granting leave:

“By the impugned orders in these special leave petitions, the Division Bench of the High Court relied upon its earlier order in the case of Nirmal Kanta in CWP No.15839 of 2007 that very judgment in CWP No.15839 of 2007 was subject matter of challenge in SLP (C) No.....@ CC No.1536 of 2009 and the same came to be dismissed by this Court by order dated 16th February, 2009. Subsequently, the Review Petition No.342 of 2010 as well as Curative Petition @ No.380 of 2013 were also dismissed by this Court by orders dated 6th February, 2014. In the light of the said orders, these special leave petitions are also dismissed.

SLP (C) No.16962 of 2011

None present for the petitioner.

List on 2nd February, 2016.”

It may be noted that there was another SLP before the Supreme Court arising out of orders passed by this Court in State of Haryana & others Vs. Pushpa Devi & others, which was decided alongwith SLP No.16962 of 2011 titled ‘Budh Ram Vs. State of Haryana & others’. The State’s SLP was dismissed in view of earlier decision, which were rendered in the chain of cases starting from Shashi Kiran’s case.

In Rakesh Kumar’s case, the Supreme Court granted relief to the petitioner only for the reason that since the new Rules had come into force, so the need of examining the correctness or otherwise of the validity of Rule 11 would not arise since it was an isolated case. The Supreme Court concluded as follows:

“5.Therefore, without going into the correctness or otherwise of the conclusion drawn by the High Court as regards the validity of Rule 11, the respondent is directed to pay the difference in the pay which was drawn by the appellant prior to 29th February, 2008, namely, in the second

ACP with consequential increments for which he could have been entitled to but for the withdrawal of SACP and pay the same for the period till the date of his superannuation. The said exercise shall be carried out by the respondent within eight weeks from the date of communication of this order. We make it clear that we have not interpreted the validity of Rule 11 in this order.”

For obvious reasons, those orders were passed in exercise of jurisdiction under Article 142 of the Constitution, which power this Court does not possess.

In view of the above discussion, I find no reason to interfere in the impugned order and would dismiss the petition. However, recovery of money, based on mistaken over payments, shall become irrecoverable in view of law laid down in State of Punjab & others Vs. Rafiq Masih (White Washer) & others, AIR 2015 SC 696 the Supreme Court holding that there can be no recovery against pensioners.

[RAJIV NARAIN RAINA]
JUDGE

26.09.2016
Vimal

Whether speaking/reasoned: *Yes*

Whether Reportable: *Yes*