

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

CWP No. 9389 of 2013 (O & M)

Date of decision: 05.09.2017

Surinder Kumari and others

....Petitioner(s)

Versus

State of Haryana and another

...Respondent(s)

CORAM: HON'BLE MR. JUSTICE G.S.SANDHAWALIA

Present: Mr. Vikas Chatrath, Advocate,
Mr. Anurag Goyal, Advocate,
Mr. B.K. Bagri, Advocate,
for the petitioners.

Ms. Shruti Jain Goyal, AAG, Haryana.

G.S.SANDHAWALIA, J. (Oral)

The present judgment shall dispose of 13 writ petitions i.e. CWP Nos. 7784 of 2004, 20315 of 2005, 13364, 18102, 21929, 23490 of 2010, 2365, 8907, 7465, 12365 of 2012, 9389 and 9404 of 2013 and CWP No. 10849 of 2014 since common questions of facts and law are involved in all the writ petitions. Facts are being taken from ***CWP No. 9389 of 2013, Surinder Kumari and others vs. State of Haryana and another.***

The challenge, primarily is to the order dated 26.07.2012 (Annexure P-1) whereby, the benefit of the Assured Career Progression Scheme (in short 'ACP Scheme') was withdrawn and reduction of the pay was ordered by the respondents. Resultantly, a writ in the nature of certiorari has been sought under Article 226 of the Constitution of India for quashing the said order and a writ of mandamus has been sought directing the respondents to continue to grant benefit of the ACP scale alongwith consequential benefits.

The said claim is based on the judgments in ***CWP No. 9755 of 2009, Vijay Singh vs. State of Haryana and others*** decided on 25.11.2010 (Annexure P-3) and in ***CWP No. 8047 of 2010, Bimla Devi and others vs. State of Haryana and others*** decided on 29.07.2011 (Annexure P-4) and resultantly, prayer has been made that the pay of the petitioners be refixed and the arrears be released alongwith interest and to refund the recovered amount and not to further recover any other amount since there was no misrepresentation or fraud.

It has been pleaded that the petitioners were appointed in the Department of Education and on foregoing promotion as Head Teachers due to compelling domestic circumstances and, therefore, have not been granted the benefit of ACP after 01.01.1996/01.01.2006 in terms of the notification dated 07.01.1998/30.12.2008 under the Haryana Civil Services (Assured Career Progression) Rules, 1998/Haryana Civil Services (Assured Career Progression) Rules, 2008 (in short 1998 Rules/2008 Rules respectively) fulfilling all the conditions of ACP. Reliance was also placed upon the judgment of Full Bench of this Court in ***Budh Ram and others vs. State of Haryana and others, 2009 (3) SCT 333*** wherein, the principle of recovery in favour of the employees had been upheld by this Court to the extent where there was no fraud or misrepresentation on their part. An averment was also made that the Rules were contrary and were liable to be struck down though no strict challenge, both to the Rules of 1998 and 2008, in principle has been made in the present bunch of cases. Rule 11, on the basis of which the order has been passed under the 1998 Rules, read thus:-

“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 substantively working from the date of such forego of promotion.”

Similarly, Rule 14 under the 2008 Rules which came into force w.e.f. 01.01.2006 reads thus:-

“14. Ceasing of entitlement of ACP Pay structure:-

In case the Government servant chooses to forego any functional promotion on any ground whatsoever, while drawing his pay in any ACP pay structure with reference to him, he shall cease to be entitled to draw his pay in the ACP pay structure last granted to him and shall draw his pay in the pay band and grade pay he was drawing before the grant of the last ACP grade pay from the date of such foregoing of promotion.”

The State, in its defence, has taken the plea that once the petitioners had forgone promotion for the post of Head Teacher in January, 2008 in the case of petitioner no. 12, the Rules would come into play. Reliance is placed upon the Division Bench judgment of this Court in ***Shakuntla Devi vs. State of Haryana, 2003 (2) SCT 697*** and ***Rakesh Kumar vs. State of Haryana and others, 2010 (1) SCT 443*** to submit that the subsequent judgment had upheld the validity of the Rule and, therefore, the action of the State was justified. Reliance was also placed upon another Division Bench judgment in ***Swaran Lata vs. State of Haryana, 1997 (1) SCT 516*** wherein, instructions of higher standard pay scales were subject

matter of consideration and the same issue had been upheld in favour of the State that an employee who foregoes promotion at his own request would render himself ineligible for the benefit of higher pay scale.

Counsels for the petitioners have vehemently argued that the judgment in *Vijay Singh's case (supra)* was thereafter followed in ***CWP No. 6650 of 2010, Kailash Devi and others vs. State of Haryana and others*** decided on 23.09.2011. The said judgment was further upheld by two Division Benches in ***LPA No. 160 of 2012, State of Haryana and others vs. Ved Parkash and others*** decided on 02.02.2012 and in ***LPA No. 449 of 2012, State of Haryana and others vs. Kamlesh Kumari*** and the SLPs filed by the State being SLP Nos. 25759-25767 were also dismissed on 19.01.2016. Reliance is also placed upon Division Bench judgment of this Court in ***CWP No. 5786 of 2007, Anita Sharma vs. State of Harana and others*** decided on 11.08.2008 and judgment in ***CWP No. 15839 of 2007, Nirmal Kanta and another vs. State of Haryana and others*** of even date wherein, a similar view has been taken. It is submitted that the SLP filed by Nirmal Kanta i.e. SLP No. 1536 of 2009 was dismissed on 16.02.2009 and thereafter the review petition i.e. R.A. No. 342 of 2010 was dismissed on 23.02.2010 and a Curative Petition No. 380 of 2013 was dismissed on 06.02.2014. Resultantly, the stamp of approval of the Apex Court is sought to be incorporated and the judgments relied upon by the State are sought to be distinguished.

State, on the other hand, has rightly argued that the validity of Rule 11 was discussed threadbare in *Rakesh Kumar's case (supra)* wherein, apart from the challenge to Rule 11, the order whereby the ACP scale was being withdrawn was under consideration. However, the only benefit which

was granted to the employees was to that extent that the recovery of the excess pay was not to be recovered but refixation as such was upheld. The Division Bench came to the conclusion that on account of lack of promotional avenues or availability of promotional avenues and to reduce stagnation, the State Authorities had framed the schemes under Article 309 of the Constitution of India. It was accordingly held that where a government servant does not accept the promotion for whatever reasons, it can safely be presumed that the Govt. Servant considers there is no stagnation in his Govt service, which needs not to be compensated by ACP/promotional scale and, therefore, it could rightly withdraw the placement of such an employee in the ACP scale. The relevant portion of *Rakesh Kumars* case reads thus:-

*“13. It is a matter of record that keeping in view the prevailing circumstances in some state services like lack of promotional avenues or non-availability of such promotional avenues for long periods of time, Hon'ble the Supreme Court in **Council of Scientific and Industrial Research v. KGS Bhatt, (1989) 4 SCC 635** had pointed out that provision for promotion increases efficiency of the public service while stagnation reduces efficiency and makes the service ineffective and therefore suggested/ directed the State authorities to take steps for framing appropriate schemes for such category of officers. This view has been consistently reiterated by Hon'ble the Supreme Court in **State of Tripura v. K.K. Roy (2004) 9 SCC 65** and **Food Corporation of India v. Parashotam Das Bansal, (2008) 5 SCC 100**. In order to provide advancement of the employees who have been suffering stagnation in service, the State of Haryana under proviso to Articles 309 of the Constitution of India*

framed the ACP Rules, 1998. It is not in dispute that Rule 5 provides for conditions of eligibility for placement/grant of ACP scales after 10 years and 20 years of regular satisfactory service. However, Rule 11 provide that in the event of foregoing of promotion by a Government servant, he shall cease to be entitled to be placed in the ACP scale from the date of foregoing his promotion. In the present case the dispute relates to Rule 11 and it would be appropriate to reproduce the same which reads as under:-

“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 substantively working from the date of such forego of promotion.”

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 Govt 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.

It is not disputed that the matter was taken to the Apex Court in Civil Appeal No. 467 of 2016 by Rakesh Kumar and the Apex Court, keeping in view the fact that that it was an isolated case and the Rules of 2008 had come into force and the employee had retired from service in the year 2015, directed that the difference in the pay which was drawn be granted to the employee without going into the correctness or otherwise of the conclusions drawn by the High Court as regarding the validity of Rule 11 on 19.01.2016. The relevant portion reads thus:-

“5. In such circumstances, we are of the view that it may not be necessary for us to examine the correctness or otherwise of the validity of Rule 11 and instead since it is an isolated case relating to the

appellant and since the appellant also retired from the service in the year 2015, the respondent can be directed to restore the scales which the appellant was drawing prior to the withdrawal of the ACP benefit granted to him by order dated 29th February, 2008. 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.

6. *The appeal stands disposed of on the above terms.”*

It is pertinent to notice that on the same date, the Apex Court also disposed of the bunch of cases filed by State in ***State of Haryana vs. Pushpa Devi*** which was preferred against LPA Nos. 449 of 2012 and LPA Nos. 160 and 161 of 2012 which were arising from the judgment in *Kailash Devi's* case which further placed reliance upon *Vijay Singh's case (supra)*. The Apex Court relied upon the earlier judgment in *Nirmal Kanta's case (supra)* and had dismissed the appeals filed by the State.

A perusal of a judgment of a Division Bench in *Nirmal Kanta's case (supra)* would go on to show that it was based upon an earlier Division Bench judgment in ***Shashi Kiran and others vs. State of Punjab and others, 2003 (5) SLR 603*** pertaining to the State of Punjab and in which the

issue of proficiency step up was subject matter of consideration. The Division Bench had granted the benefit on the ground that an earlier Division Bench in ***CWP No. 6049 of 1997, Tipan Chand Sharma vs. State of Punjab*** decided on 06.05.1998 had held that there was no mention in the circular that the person who does not avail the promotional avenue shall not be entitled to the benefit of proficiency step up. It is to be noticed that on the same date, the judgment in *Anita Sharma's case (supra)* was also passed by the same Division Bench on 11.08.2008.

In *Kailash Devi's case (supra)*, the Single Judge had relied upon another Single Bench judgment in *Vijay Singh's case (supra)*. A perusal of the same would go on to show that the Single Judge had followed the view of the Division Bench in *Nirmal Kanta's case (supra)* keeping in mind that the same had been upheld by the Apex Court also. Similarly, reliance has also been placed upon *Shashi Kiran's case (supra)* which has already been discussed above and *Anita Sharma's case (supra)* where the writ petitions were allowed. Unfortunately, it was not brought to the notice of the said Single Bench that the Division Bench, at that point of time, had already decided the controversy on 05.08.2009 and upheld the validity of Rule 11 specifically and, therefore, the petitioners cannot rely upon the said judgments as such. Once the Division Bench had specifically noticed that the Rule was valid, it is now not open to the petitioners as such to contend that the refixation is without any basis once the challenge to the said Rule has been negated. The case is totally based on a set of judgments, which are not applicable to the facts and circumstances of the case as noticed above.

The argument raised that there were Division Bench judgments

on both sides and, therefore, this Court should follow the view which is favourable to the employees is also not liable to be accepted keeping in view the judgment of the Full Bench in ***Indo Swiss Time Limited Vs. Umrao and others'* 1981 AIR (Punjab) 213**. The Full Bench in the said case has held that it is not necessary that the subsequent judgment has to be followed but the one which appears to lay down the law more elaborately and accurately. The relevant portion reads thus:-

“22. A perusal of the judgments in the municipal corporation of the city of Ahmedabad and Himalaya Tiles cases would plainly indicate that there is a direct conflict on the point therein. Both the judgments have been rendered by a Bench consisting of two Hon'ble Judges and cannot possibly be reconciled. This situation at once brings to the fore the somewhat intricate question which is now not of infrequent occurrence namely, - 'when there is a direct conflict between two decisions of the Supreme Court rendered by co-equal Benches, which of them should be followed by the High Courts and the Courts below'.

23. Now the contention that the latest judgment of a co-ordinate Bench is to be mechanically followed and must have pre-eminence irrespective of any other consideration does not commend itself to me. When judgments of the Superior Court are of co-equal Benches and therefore of matching authority then their weight inevitably must be considered by the rationale and the logic thereof and not by the mere fortuitous circumstances of the time and date on which they were rendered. It is manifest that when two directly conflicting judgments of the Superior Court and of equal authority are extent then both of them cannot be binding on the Courts below. Inevitably a choice,

though a difficult one, has to be made in such a situation. On principle it appears to me that the High Court must follow the judgment which appears to it to lay down the law more elaborately and accurately. The mere incidence of time whether the judgments of co-equal Benches of the Superior Court are earlier or later is a consideration which appears to me as hardly relevant.”

The ineligibility of the Government employee who had foregone the promotion to get higher standard pay scale and the withdrawal of the benefits was considered by the Division Bench in *Swaran Lata's case (supra)* as under:-

“8. A reading of Annexure P2 shows that the State of Haryana issued these instructions to remove stagnation of its employees who had not got any promotion in their service career by granting time bound higher standard pay scale of group 'C' and 'D' categories after 10/20 years of regular satisfactory service. These instructions came into force with effect from 1.1.1994. These instructions were issued to provide some relief by way of higher standard pay scale for those employees who had not even earned one promotion in their career. It was specifically provided in Clause 4 of these instructions that an employee who foregoes promotion or seeks reversion to a lower post at his own request will render himself ineligible for the benefit of higher standard pay scale under these instructions. An employee who had got a chance of promotion cannot be held to be victim of stagnation and entitled to the benefits of instructions Annexure P2. From the overall reading of the instructions Annexure P2, particularly Clause 4, it cannot be said that only those employees who forego their promotion or seek reversion to a

lower post in future i.e. after the coming into force of the instructions Annexure P2 would render themselves ineligible for the benefit of higher standard pay scale under these instructions. Employees who had foregone their promotion or had sought reversion to a lower post at their own request even prior to the coming into force of the instructions Annexure P2 would also render themselves ineligible for higher standard pay scale under instructions Annexure P2. The ratio in Ex. Capt. K.C. Arora's case (supra) and Beant Singh Bedi's case (supra) would not be applicable to the facts of the present case. In those cases, it was held that the subsequent instructions issued were not clarificatory in nature. Instructions Annexure P2 had been issued for providing relief to group 'C' and 'D' category of employees with the clear stipulation that an employee who foregoes promotion or seeks reversion to a lower post at his own request would render himself ineligible for the benefit of higher standard pay scale. On a query raised by some of the departments, Government simply clarified its stand which in essence remains the same and under these circumstances the instructions Annexure P3 would be deemed to be clarificatory in nature. The instructions Annexure P3 cannot be taken to be fresh instructions taking away the rights which had accrued to the petitioners by virtue of instructions Annexure P2.”

Similarly, in *Shakuntala Devi's case (supra)*, it was also held while considering Rule 11 of 1998 by the Division Bench that the functional pay scale would be the entitlement. The relevant part reads as under:-

“3. A reading of the aforesaid Rule makes it clear that a Government employee who chooses to forego any functional promotion on any ground whatsoever while

drawing his pay in any ACP scale shall cease to be entitled to draw his pay in that scale and shall draw his pay in the functional pay scale prescribed for the post on which he is substantially working. It is not in dispute that the petitioner was working as a Junior Mistress when she was granted the second higher standard pay scale. When she decided to forgo the promotion she could not continue to draw pay in the higher scale but could draw her pay only in the functional scale of her post. Admittedly, the higher scale in which she was drawing her pay was Rs.5500-9000 whereas the functional scale of the post of Junior Mistress which she was holding was Rs.5000-7850. In view of the provisions of Rule 11 of the ACP Rules, she was not entitled to draw pay in the scale of Rs.5500-9000 and could only draw in the functional scale of Rs.5000-7850. No fault can, thus, be found with the impugned order passed by the Director withdrawing the higher scale and fixing her pay in the functional scale of the post.”

The same issue also came up before a co-ordinate Bench on 26.09.2016 in **CWP No. 6594 of 2007, Prem Lata vs. State of Haryana and others** wherein also, the said Court noticed the judgments of *Nirmal Kanta's* and *Shashi Kiran's* cases (*supra*) and the disposal by the Apex Court of both in *Rakesh Kumar's* case (*supra*) and the SLPs of the State of Haryana in **State of Haryana vs. Pushpa Devi** and dismissed the writ petition by noticing that the orders were passed in exercise of jurisdiction under Article 142 of the Constitution of India whereby benefit had been given to the petitioner in *Rakesh Kumar's* case. However, the employees were protected to the extent of recovery, in view of the subsequent judgment of the Apex Court in **State of Punjab and others vs. Rafiq Masih (White Washer) and others, 2015 (1) RSJ 177.**

Accordingly, keeping in view the above facts, this Court is of the opinion that once the Division Bench in *Rakesh Kumar's case (supra)* has categorically as such decided the issue on Rule 11 whereas the other Division Benches in the cases of *Nirmal Kanta and Anita Sharma (supra)* had taken a view on the basis of the judgment pertaining to the State of Punjab regarding the proficiency step up and the said judgments do not apply on all four squares, this Court is of the opinion that the judgments of the Division Bench in *Swaran Lata; Shakuntala Devi and Rakesh Kumar's case (supra)* will be fully applicable to the facts and circumstances by which this Court is bound.

Resultantly, the present writ petitions are dismissed and the orders refixing the pay are upheld. However, in view of the judgment of the Apex Court in *Rafiq Masih's case (supra)*, the State shall not be entitled to make any recoveries on the basis of the refixation as such. The petitioners are accordingly held entitled for limited relief only.

05.09.2017
shivani/naveen

(G.S. SANDHAWALIA)
JUDGE

Whether reasoned/speaking

Yes/No

Whether reportable

Yes/No