

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

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**CWP-9488-2013 (O&M)
Date of decision: 22.03.2017**

Sulochana Sharma

....Petitioner

Versus

State of Haryana and others

.... Respondents

CORAM: Hon'ble Mr. Justice P.B. Bajanthri

Present: Mr.R.S.Budhwar, Advocate for the petitioner.

Mr.Sushil Gautam, DAG, Haryana.

P.B. Bajanthri, J. (Oral)

In the instant writ petition, petitioner has questioned the validity of the order dated 27.12.2012 vide Annexure P2 by which the claim of the petitioner for grant of Ist and 2nd ACP has been declined on the score that the petitioner foregoes the promotion granted to the petitioner to the post of Head Teacher on 18.01.2007.

2. The petitioner is stated to have been appointed to the post of JBT Teacher on 26.10.1983. According to ACP Rules 1998 the petitioner is entitled for Ist ACP on 01.05.1999 and further she is entitled for 2nd ACP. ACP Rules, 2008 were replaced by Haryana Civil Services Revised Pay Rules, 1998. Admittedly, the petitioner has foregone the promotion to the

post of Head Teacher. Having regard to the same, the petitioner is not entitled for ACP. According to Rule 11 in ACP Rules, 1998 and Rule 14 in ACP Rules, 2008 if an employee has been extended the benefit of ACP and if he foregoes the promotion in that event he/she ceases to be entitled to draw his/her pay in the ACP pay scale and shall draw his/her pay in the functional pay scale prescribed for the post on which he/she is substantively working from the date of such foregone promotion. Learned counsel for the petitioner in support of his claim for grant of ACP relied on decision of this Court passed in **Anita Sharma Versus State of Haryana and others** disposed of on 11.08.2008. The respondents have preferred SLP before the Supreme Court and the Supreme Court dismissed the respondents claim in view of the decision of **Anita Sharma's case supra** that the petitioner is entitled for ACP and the impugned communication of the official respondent dated 27.12.2012 is liable to be set aside.

3. Per contra, learned counsel for the respondents submitted that the petitioner is not entitled for grant of ACP having regard to the Rule 11 of ACP Rules, 1998 read with Rule 14 of ACP Rules 2008. Learned State counsel relied on decision passed in the case titled as **Rakesh Kumar versus State of Haryana and others** disposed of on 05.08.2009 wherein this court rejected the re-fixation of pay and partly allowed insofar as recovery is concerned. Thus, while interpreting Rule 11 of ACP Rules 1998 it is held that an employee who has foregone the promotion is not entitled for ACP. Whereas, learned counsel for the petitioner placed on record that in the case of **Rakesh Kumar versus State of Haryana and others**, who had

preferred an appeal before the Supreme Court and the Supreme Court allowed the claim of Rakesh Kumar which reads as under:-

“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.”

Thus, learned counsel for the petitioner submitted that in view of the Rakesh Kumar's case (supra) the impugned order dated 27.12.2012 is liable to be set aside.

4. Heard learned counsel for the parties.

5. Short question for consideration in the present case is whether the petitioner is entitled for 1st and 2nd ACP even though she has foregone the

promotion to the post of Head Teacher which was granted on 18.01.2007 or not. Rule 11 of ACP Rules, 1998 and Rule 14 of ACP Rules, 2008 are reproduced hereunder:-

Rule 11 of 1998 ACP

11. *Ceasing of Entitlement of ACP scale:-*

In case the Government service 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 forgo or promotion”

Rule 14 of 2008 ACP

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 forgoing of promotion.”

6. In the case of Rakesh Kumar (supra), Rule 11 was considered by Division Bench of this court and held that re-fixation of pay of Rakesh Kumar is upheld only to the extent of recovery is concerned it was allowed with reference to decision rendered in **Sahib Ram's** case of the Supreme

Court. Insofar as reliance on the decision of Supreme Court in the case of ***Rakesh Kumar Versus State of Haryana and others***, Civil Appeal No. 467 of 2016 arising out of SLP(C) No. 32555 of 2009 disposed of on 19.01.2016 in favour of Rakesh Kumar is concerned, it is to be noted that Rule 11 has not been read down or struck down so as to extend the benefit of ACP. Rule 11 and 14 of ACP Rules, 1998 and 2008 respectively specifically prohibits an employee who foregoes promotion to the higher cadre. Even though, ACP is granted her pay would be refixed in the relevant post. Thus, the Supreme Court in an isolated case they have extended the benefit of ACP. The said decision is not applicable to the present case and it is distinguishable for the reasons that as long as Rule 11 of 1998 Rules and Rule 14 of 2008 Rules are intact. In the case titled as ***Nair Service Society Vs. Dr. T.Beermasthan*** reported in (2009)5 SCC 545 in para 47, the Supreme Court has held that for extension of any service benefits one must examine relevant Rules before examination of a judgment. Extract of the judgment is reproduced herein:-

“47. This Court in *Nair Service Society vs. Kerala Public Service Commission* (SCC para 22) had the occasion to examine the Rules, the ranked merit list and the supplementary reserved list prepared by the Commission, and the principles followed by the Commission in making the appointments. This Court observed as follows: (SCC pp.21-22, para 22)

22.Based on the procedure so prescribed, KPSC prescribes the ranked merit list in the order of merit. The candidates are arranged strictly according to the community or caste or group or

according to the cycle of rotation, in reservation. The number of candidates to be included in this rank list is filed with reference to some principles followed by them, which are explained in para 4 of KPSC's writ appeal before the High Court (pp. 102-03). The candidates are advised for appointment as and when vacancies are reported, but following the rules of reservation and rotation prescribed in Rules 14 to 17 of KSSR".

The Commission has advised appointments based on a unit of 20 for the last more than 30 years. The principle of reservation, rotation and sub-rotation are all applied based on this unit of 20."

7. Having regard to the above decision, the Rakesh Kumar's case supra judgment is distinguishable. Therefore, the petitioner is not entitled for ACP benefits. Consequently, order dated 27.12.2012 (Annexure P2) is upheld.

8. Petition stands dismissed.

22.03.2017

pooja saini

**(P.B.BAJANTHRI)
JUDGE**

Whether speaking/reasons

Yes/No

Whether Reportable:

Yes/No