

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 16.10.2017

+ LPA 663/2017 & CM No.36993/2017 (*stay*)

VIJAY LAXMI BAHL Appellant
Through: Mr. Ankur Chhibber, Adv.

versus

UNION OF INDIA & ORS Respondents
Through: Mr. Anurag Ahluwalia, CGSC with
Ms. Surjeet Kaur (Ministry) for R-1.

+ LPA 665/2017 & CM No.37003/2017 (*stay*)

ASHA SETHI Appellant
Through: Mr. Ankur Chhibber, Adv.

versus

UNION OF INDIA & ANR Respondents
Through: Mr. Anurag Ahluwalia, CGSC with
Ms. Surjeet Kaur (Ministry) for R-1.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE SUNIL GAUR

MR. JUSTICE S. RAVINDRA BHAT (ORAL)

%

CM No.36996/2017 (exemption) in LPA No.663/2017
CM No.37006/2017 (exemption) in LPA No.665/2017

Allowed, subject to just exceptions.

CM Nos.36994-36995/2017 (condonation of delay) in LPA No.663/2017
CM Nos.37004-37005/2017 (condonation of delay) in LPA No.665/2017

Allowed.

LPA Nos.663/2017 & 665/2017

1. Issue notice.
2. Mr. Ahluwalia, learned Standing Counsel for the Central Government accepts notice; with the consent of counsel for the parties, the appeals are heard finally.
3. The common question in these appeals is with respect to that part of the judgment of the learned Single Judge which relegated the question of “pay and pension fixation”, to the respondents. The Single Judge, however, had clarified that arrears of alleged excess of pension and allowances paid to the appellants up to the date of judgment ought not be recovered.
4. The controversy pertains to the pension re-determination orders made by the second respondent i.e. the National Institute for the Mentally Retarded (“the Institute”). The undisputed facts are that the appellants were appointed on different dates as Social Workers, who were subsequently upgraded; they were promoted as Senior Social Workers. The replacement scale in respect of that post was ₹6,500-10,500/-. The appellants claimed and sought second financial upgradation in their pay scale w.e.f. 31.01.2000 by an order dated 28.03.2003. The financial upgradation – available to employees working in the post without regular promotions was the second financial upgradation in terms of the ACP scheme. Both appellants were granted that benefit in the grade of ₹7,450-11,500/-. The appellants represented to the Institute, stating that the pay scale to which they were upgraded (₹7,450-11,500/-) was lower than the equivalent pay scales in the

other Central Government departments, therefore establishing that the correct pay scale – in which they ought to have been placed was ₹8,000-13,500/-. This representation made on 25.04.2003 was granted on 14.08.2003. As a result, these appellants were placed in the pay scale of ₹8,000-13,500/-. Both of them continued to work in that pay scale; they enjoyed the benefit of replacement/equivalent scale granted by the Institute, pursuant to the acceptance of the 6th Pay Commission Recommendations w.e.f. 01.01.2006. The Central Government apparently wrote to the Institute some time in 2013-14 relying upon the report of the Comptroller and Auditor General (CAG) of 2010-11. In its report, the CAG had stated that the grant of pay scale of ₹8,000-13,500/- was inaccurate and unwarranted. According to the report, the pay scales to which the appellants ought to have been placed was the pay scales to which the appellants were entitled upon second financial upgradation was ₹7,450-11,500/-. The CAG report also relied upon existence of an intervening pay scale of ₹7,500-12,000/- to say that the appellants could not have been given the scale of ₹8,000-13,500/-.

5. The Institute sought to act upon the CAG report, communicated by the Central Government. The appellants were aggrieved and approached this Court contending that a downward revision in their pay scale should not be resorted to without show-cause notice. The writ proceedings ended with an order dated 10.08.2015. The Institute thereafter issued a show-cause notice and then proceeded to re-determine the pay scales at the lower grade of ₹7450-11,500/-. The appellants were aggrieved and approached this Court.

6. The learned Single Judge relied upon the judgment in *State of Punjab v. Rafiq Masih* AIR 2015 SC 696 and *Sushil Kumar Singhal v. Pramukh*

Sachiv Irrigation Department (2014) 16 SCC 444, both of which were relied upon by the writ petitioners/appellants. In *Sushil Kumar Singhal* (supra), the Supreme Court had noticed and relied upon a GO dated 16.01.2017 which stipulated as follows:

“(1) Pension Fixation Authority shall inquire into emoluments of only last 10 months prior to retirement and for that examine the records of only two years prior thereto i.e. only the records of 34 months would be examined for the purpose of grant of pension, as has been provided in the aforesaid Government order dated 13.12.1977.

(2) Pension Allowing Authority shall not be entitled to correct the mistake in determining the pay during service tenure beyond the period prescribed in para (1) above. Mistakes in pay determination of an employee can be effectively removed through the process of general inquiry/audit only when the employee is still in service.”

7. By the impugned judgment, the Single Judge concluded as follows:

“14. Having heard the learned counsel for the parties, the issue, which arises for consideration is whether the petitioners have rightly got the second financial upgradation in the scale of Rs.8000-13500. There is no dispute that the petitioners, who were working as Senior Social Worker and Senior Occupational Therapist had feeder post of Social Worker and Occupational Therapist. It is also a conceded position that there was no promotional channel from these two posts. In the absence of promotional channels, the question would be in which pay scale they were entitled to the second financial upgradation under the ACP Scheme. I may state here, the posts in question are not isolated in view of the clarification of the DoP&T dated February 10, 2000 vide Clause 31. I would also like to state here, the stand of the respondents that, the pay scale of Rs.8,000 – 13,500/- was given on a misrepresentation by the petitioners by referring to some analogous cadre / posts in other organization, is not appealing. Nothing precluded, the

respondents, themselves, to satisfy the position before agreeing to grant the scale of Rs.8,000 – 13,500/-. Having not done that, the blame cannot be put on the petitioners. Having seen the clarification issued by the DOP&T to the ACP Scheme, it is clear, in the absence of any promotional channels, the second financial upgradation under the ACP need to be granted in terms of Clause 32 of the said clarification dated February 10, 2000, which I reproduce as under:-

“Clause 32 Such a cadre/hierarchy shall not fall in the isolated category as defined at S.No. 31 above. Hence, the standard/common pay-scales mentioned in Annexure-II of the Office Memorandum dated 9.8.1999 shall not be applicable in such cases. Action in such cases may, therefore, be taken as per following clarifications:-

(i) If such cadre/hierarchy exists in the Ministry/Department concerned, the second upgradation may be allowed in keeping with the pay-scale of an analogous grade of a cadre/post in the same Ministry/Department. However, if no such grade exists in the Ministry/Department concerned, comparison may be made with an analogous grade available in other Ministries/Departments.

(ii) In the case of attached/subordinate offices, the second upgradation under ACPs may be given in keeping with the pay-scale of an analogous grade of a cadre/post of the concerned office. However, if no such cadre/post exists in the concerned office, comparison may be made with an analogous grade available in other attached/subordinate offices of the Ministry/Department concerned.”

15. The respondent No.2 being a subordinate office under the Ministry of Social Justice & Empowerment, it is Clause (ii) above, which would regulate 2nd financial upgradation. But it is noted, the petitioners have, in their representations dated

April 25, 2003 sought parity with the Senior Social Worker in the Child Guidance Centre of the Delhi School of Social Work and the Junior Therapist working in various Central Government Hospitals and Institutions, which are not part of the Respondent No.2 nor attached subordinate offices of the Ministry/Department concerned, that is Ministry of Social Justice and Empowerment in this case. They had referred to the Child Guidance Centre of the Department of Social Work, University of Delhi and a vague reference to various Central Hospitals and Institutions. The Delhi University is an autonomous body constituted under a Central Act and cannot be said to be a part of respondent No.2 or an attached/subordinate office under the Ministry of Social Justice and Empowerment. Further the names of Hospitals and Institutions, that too under the Ministry of Social Welfare and Justice have not been given. No effort has been made by the petitioners even in their rejoinder to name cadre / post in respondent No.2 or attached/subordinate offices under the Ministry of Social Justice and Empowerment to justify grant of scale of Rs.8000-13500 under second financial upgradation.

16. Mr. Chhibber may be right by referring to para 7 (page 282 of the paper-book in W.P.(C) No. 4333/2015) to contend that it is only in the case of isolated posts, in the absence of defined hierarchical grades, financial upgradation shall be given in the immediately next higher pay scale, as per Annexure-II (page 284-285), i.e., pay scale of Rs.7450-11500, as according to him, the posts on which the petitioners were working were not isolated posts in view of Clause 31 of Clarification dated February 10, 2000 as they had a feeder cadre, is appealing.

xxxx

xxxx

xxxx

xxxx

xxxx

19. On consideration of the aforesaid judgments, it is clear that (i) if a case falls within the situations culled out by the Supreme Court in Rafiq Masih case (supra), recovery of excess amount cannot be effected; (ii) if a Policy exists in the

department as was existing in Sushil Kumar Singhal case (supra), vide GO dated January 16, 2007, the same should be given effect to.”

8. However, in the subsequent portion of the impugned judgment, the Single Judge was of the opinion that the judgment in *Sushil Kumar Singhal* (supra) was not applicable. He relied upon *Rafiq Masih* (supra) to say that arrears of pension upto the date of judgment could not be recovered. He concluded the impugned judgment with the following directions:

“20. Mr. Chhibber has not drawn my attention to any Policy where pension once fixed cannot be reduced. The judgment in the case of Sushil Kumar Singhal (supra), shall not be applicable to the petitioners. The same is distinguishable on facts.”

9. It is contended by the learned counsel for the appellants Mr. Ankur Chhibber that the learned Single Judge fell into error in not giving effect to GO dated 16.01.2017. He urged that the Supreme Court judgment in *Sushil Kumar Singhal* (supra) was categorical in that the GO of 16.01.2017 placed an embargo upon the authorities to refix the pension, once the employee retired and no exception could be taken, as was sought to be done by the impugned judgment. It was also submitted that the Institute is an autonomous body and given the qualifications that the appellants possessed and the admitted length of their service i.e. about 33 years, the conclusions of the CAG which were sought to be blindly enforced, were unjustified. In this regard, it is stated that the CAG took note of the existence of intervening pay scales, higher than was ₹7450-11,500/-, *vis-a-vis* Section Officers in the Central Secretariat Services and other departments of the Central Government.

10. Learned counsel for the respondents – including the Institute urged that no exception can be taken to the impugned judgment which has fairly restrained the respondents from recovering any part of the arrears of pension paid. It is, however, stated that the re-determination of pension is necessary and reasonable given the CAG's pointed reference to the factors that apparently were not taken into account when the appellants were granted the higher pay scale of ₹8,000-13,500/- w.e.f. 14.08.2003. It is submitted that the conclusions of the learned Single Judge with respect to the application of *Sushil Kumar Singhal* (supra) are also justified.

11. As is evident, there is no dispute about the facts. Both the petitioners retired; their pensions were fixed on the basis of the average monthly emoluments for the last 10 months. Concededly, they were drawing salary in the grade of ₹8,000-13,500/-. The replacement scale to that grade was also given to them upon the implementation of the 6th Pay Commission, w.e.f. 01.01.2006. *Rafiq Masih* (supra) strived to balance the two public interests – one in ensuring that injustice is not done by recovering of pension amounts after a long period of time and the second i.e. the larger public interest that excess amounts should not be paid. In our opinion, the Single Judge's conclusions with respect to *Rafiq Masih* (supra) are justified. In any case, the directions pertaining to recovery of past pension/alleged excess amounts are not in dispute in the present appeals.

12. What is in dispute is the direction of the Single Judge relegating the pension fixation task to the respondents. This Court has quoted the GO dated 16.01.2007 which categorically states that the pension allowing authority would not be “entitled to correct the mistake in determining the pay during service tenure beyond the period prescribed in Part I above”.

13. Part I refers to the 10 months' period prior to retirement of the first two "last 10 months prior to the retirement". The thrust of Clause (ii) of the GO dated 16.01.2007 is borne out further by the injunction that mistakes in pay determination of an employee can be effectively removed through the process of general inquiry/audit "only when the employee is still in service".

14. The Single Judge in this Court's opinion correctly noticed *Sushil Kumar Singhal* (supra) and the GO dated 16.01.2007. However, he proceeded to hold it inapplicable in a single sentence without spelling out why. Secondly, this Court is of the opinion that the factors which appear to have weighed with the respondents in revising pension downwards after 11 orders, are also not beyond reproach. The CAG merely noticed the existence of an intervening pay scale (₹7,500-12,000/-). However, the peculiar nature of the responsibilities which the appellants discharged almost continuously for over a decade and a half, having regard to their placement in-house, as experts, was completely overlooked. What the CAG – and later the Central Government appear to highlight was the disparity in the scales and the multifarious scales available in the case of Section Officers in various departments. That in this Court's opinion is not sufficient justification to say that the pay fixation and consequently the pension determination on the basis of the last salaries drawn in the pay scale of ₹8,000-13,500/- was erroneous or not justified.

15. For the above reasons, this Court is of the opinion that the directions contained in the impugned order, to the extent as spelt out in Paras 20 and 21 cannot be sustained. They are accordingly set aside.

16. In view of the above position, the respondents shall not be entitled to recover, or in any manner alter the pension fixation initially made in respect

of the appellants/petitioners. The impugned order dated 02.01.2017 therefore stands quashed without any condition.

The appeals are allowed in the above terms.

S. RAVINDRA BHAT, J

SUNIL GAUR, J

OCTOBER 16, 2017

kks

