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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: August 02, 2017

\+ W.P.(C) 10690/2015 & CM 426/2016

VIJAY LAXMI BAHL ..... Petitioner

Through: Mr.Ankur Chhibber Adv.

versus

UNION OF INDIA & ORS ..... Respondents

Through: Mr.Anurag Ahluwalia CGSC with Mr.Pradeep Singh Tomar, Adv. for R-1/UOI
Ms.Saroj Bidawat, Adv. for R-2

CORAM:
HON'BLE MR JUSTICE V. KAMESWAR RAO

JUDGMENT

V.KAMESWAR RAO, J.

For orders, see W.P.(C) No.4333/2015.

V. KAMESWAR RAO, J

AUGUST 02, 2017/ak

-Fresh cm 32373/2017 on b/o Petitioner for release the amount.
-W/P D/off - 02/08/2017.

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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: April 24, 2017
Judgment delivered on: August 02,2017

\+ W.P.(C) 4333/2015, CM Nos. 7850/2015 & 8330/2015

ASHA SETHI

..... Petitioner

Through: Mr.Ankur Chhibber Adv.

versus

UNION OF INDIA & ANR.

..... Respondents

Through: Mr.Anurag Ahluwalia CGSC with Mr.Pradeep Singh Tomar, Adv. for R-1/UOI
Ms.Saroj Bidawat, Adv. for R-2

AND

\+ W.P.(C) 10690/2015 & CM 426/2016

VIJAY LAXMI BAHL

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Ms.Saroj Bidawat, Adv. for R-2

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CORAM:
HON'BLE MR JUSTICE V. KAMESWAR RAO

JUDGMENT

V. KAMESWAR RAO, J

1. As identical issues arise for consideration in both these Writ Petitions, the same are being disposed of vide this common order. The facts of both the writ petitions shall be narrated separately.

W.P.(C) No. 4333/2015

2. The petitioner was appointed as Social Worker on temporary basis on January 31, 1976 at the National Institute for the Mentally Retarded in the pay scale of Rs.425-640. She was substantially appointed on the said post on December 09, 1982 with effect from December 22, 1981. While she was working on the said post, the scale of the post of Social Worker was upgraded from Rs.425-640 to Rs.440-750 with effect from July 23, 1983. Pursuant to the recommendations of the 4th Central Pay Commission, the pay scale of the petitioner was revised to Rs.1400-2600.

3. On December 13, 1997, she was appointed as Senior Social Worker in the pay scale of Rs.6500-10500, which is the replacement scale of Rs.1640 -2900 granted on completion of 12 years of regular service. In terms of the ACP Scheme, the petitioner was granted second financial upgradation in the pay scale of Rs.7450-11500 with effect from January 31, 2000 vide order dated March 28, 2003. It is averred that on April 25, 2003, the petitioner made a representation to the respondent no.2 drawing their attention towards recommendation of the 5th Central Pay Commission according to which, Senior Social Worker is entitled to pre-revised pay scale of Rs. 2200-4000. She had also

drawn the attention to the fact that the scale under 2nd Financial upgradation applicable to the Social Worker in Child Guidance Centre is Rs.8000-13500. She accordingly requested the respondent no.2 to review her second ACP by granting her the scale of Rs.8000-13500.

4. On such representation, the respondent no.2, on August 14, 2003 issued an order whereby they upgraded the scale of pay of petitioner to Rs.8000-13500 with effect from January 31, 2000. On September 30, 2011, the petitioner superannuated. It is her case that she has been receiving pensionary benefits in terms of pay scale of Rs.8000-13500. On June 16, 2014 after three years from the date of her retirement, the respondent no.2 issued an order dated June 16, 2014 wherein it was inter-alia stated that her pay has been revised in the scale of Rs.7450-11500 with effect from January 31, 2000. It was further stated that the recoveries on account of aforesaid pay fixation be made. The petitioner made a representation dated July 14, 2014 requesting the respondent no.2 to reverse the order dated June 16, 2014 and grant her pensionary benefits in terms of order dated August 14, 2003. The said request of the petitioner was rejected vide order dated March 17, 2015.

<u>W.P.(C) No. 10690/2015</u>

5. The petitioner herein was appointed as Occupational Therapist Teacher on May 2 1978 with the respondent No.2 in the scale of Rs.440-750. Pursuant to the recommendations of the fourth Central Pay Commission, the pay of the petitioner was revised to Rs.1400-2600. On February 5, 1991, she was promoted to the post of Senior Occupational Therapist in the pay scale of Rs.2000-3500. On March 28, 2003, the

petitioner was granted the second financial upgradation in the pay scale of Rs.7450-11500 with effect from April 10, 2002.

6. It is the case of the petitioner, on April 25, 2003, the petitioner made a representation stating that in all other Central Government Hospitals and Institutions, the junior therapist who are working in the scale of Rs.1400-2600 had been given pay scale of Rs.8000-13500 as the replacement scale and were entitled to second financial upgradation in the pay scale of Rs.10000-15200 and requested she be granted the pay scale of Rs.8000-13500. Pursuant to the representation, the respondent no.2 issued an order dated August 14, 2003 whereby they had granted to the petitioner the scale of Rs.8000-13500 with effect from April 10, 2002. It is her case that on June 16, 2014, the respondent no.2 suddenly, without giving a show cause notice, passed an order stating that the petitioner's pay scale has been revised to Rs.7450-11500 with effect from April 10, 2002 instead of Rs.8000-13500 and excess payment made to the petitioner on account of higher pay fixation need to be recovered. The petitioner challenged the aforesaid order dated June 16, 2014 in this Court vide W.P.(C) No. 4605/2014. On July 25, 2014, this Court stayed the operation of order dated June 16, 2014. The said writ petition was disposed of by this Court on August 10, 2015 by setting aside the order dated June 16, 2014, and giving liberty to the respondents to issue a show cause notice and thereafter pass a speaking order. Pursuant thereto, an order dated October 19, 2015 was passed whereby the respondent no.2 has fixed the pay of the petitioner at Rs.7450-11500 with effect from April 10, 2002 and ordered recovery of the excess amount.

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7. The aforesaid facts are not disputed. The case of the respondents 1 and 2 is that, the higher pay scale of Rs.8,000 – 13,500/- was given to the petitioners on their representations and the decision was reviewed by respondent No.2. as the scale of Rs.8000-13500 was granted by skipping the pay scales of Rs.7450-11500 and Rs.7500-12000/-. It is their case that the petitioners have mislead the respondent Authorities by quoting the hierarchy prevailing in other Organizations for considering the financial upgradation, which is not as per the ACP Scheme. According to them, as per the ACP Scheme, in the absence of defined hierarchal grades, financial upgradation has to be given by the Ministries/Department concerned in the immediately next higher pay scale.

8. It is their case, the Rules/hierarchy prevailing in other Organizations is not applicable to the respondent No.2. It is further submitted that the CAG has pointed out in its inspection report that fixation of pay of the petitioners in the pay scale of Rs.8000-13500 by skipping the pay scales of Rs.7450-11500 and 7500-12000 is irregular and is not in accordance with the ACP Scheme and it is pursuant thereto, the impugned action has been taken.

9. Mr. Ankur Chhibber, learned counsel for the petitioners would submit, the premise on which the respondents have re-fixed the pay under second financial upgradation at Rs.7450-11500 is contrary to the very ACP Scheme itself, and is untenable. He would draw my attention to the clarifications issued by the DoP&T on February 10, 2000 to contend that the posts in question are not stand alone posts as there is a defined feeder cadre. In other words, the posts having no promotional grade but having a feeder grade vice versa shall not be treated as an isolated post for the purpose

of ACP Scheme. He states that if such cadre/post exist in the Ministry/Department concerned, the second upgradation needs to be allowed keeping in view the pay scale of an analogous grade of a cadre / post of the Ministry/Department concerned, i.e., respondent no. 1 in this case. However, if no such cadre / post exists in the Ministry / Department concerned, comparison may be made with an analogous grade available in other Ministries / Department.

10. According to him, the petitioners in their representations have pointed out, the analogous grade of a post/cadre of Senior Social Worker in Child Guidance Centre in Delhi School of Social Work (petitioner in W.P.(C) No. 4333/2015) and Senior Occupational Therapist in Central Government Hospitals / Institutions respectively who have been granted the scale of Rs.8000-13500/ Rs.10,000 – 15,200/-.

11. He also states, the financial upgradation given in the year 2003 was from a back date with effect from January 31, 2000 and April 10, 2002 respectively and sought to be withdrawn from those respective dates in the year 2014 / 2015 after the petitioner had retired / more than five years after fixation, and benefits received by them cannot be recovered in view of the judgment of the Supreme Court in the case of ***State of Punjab vs. Rafiq Masih AIR 2015 SC 696.*** It is also his contention, assuming the petitioners are not entitled to the higher scale of Rs.8000-13500, he states that in view of the judgement of the Supreme Court in the case reported as ***(2014) 16 SCC 444 Sushil Kumar Singhal v. Pramukh Sachiv Irrigation Department and ors,*** the pension cannot be reduced.

12. On the other hand, Mr. Anurag Ahluwalia and Ms. Saroj Bidawat would argue, it

is the petitioners who were responsible for the grant of pay scale of Rs.8000-13500 as it was on the petitioners' representation that the scale of Rs.8,000 – 13,500/- was given. According to him, as there was no promotional post to the post of Senior Social Worker/ Senior Occupational Therapist in the respondent No.2, in terms of the ACP Scheme the petitioners were entitled to the pay scale of Rs.7450-11500, which is the next higher pay scale to Rs.6500-10500. They also state, there is a further scale of Rs.7500-12000 before the scale of Rs.8000-13500. They oppose the plea of Mr. Chibber, who had relied upon the clarification issued by the DoP&T on February 10, 2000 to contend that the petitioners have not pointed out any analogous grade in cadre/post in the Ministry/Department concerned or in other Ministries/Departments and also in the same office or another office in the same Ministry / Department.

13. That apart, Mr. Ahluwalia, had submitted that the judgment of the Supreme Court in the case of ***Rafiq Masih (supra)***, has no applicability. Moreover, the Supreme Court in the case reported as ***(2012) 8 SCC 417 Chandi Prasad Uniyal and ors v. State of Uttarakhand and Ors.*** held that recovery of excess salary due to irregular / wrong pay fixation can be effected. He would also state in the facts of this case, the judgment of ***Sushil Kumar Singhal (supra)*** has no applicability.

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. Now the issue needs to be answered is which scale the petitioners are entitled to the second financial upgradation. Before I answer this issue, I would like to deal with the Judgments referred to by the learned counsel for the parties. Mr. Chibber had relied upon the Judgments of the Supreme Court in ***State of Punjab v. Rafiq Masih (supra)*** and ***Sushil Kumar Singhal (Supra)***. In ***Rafiq Masih (supra)***, the Supreme Court has in para 18 of the judgment has culled out few situations wherein recovery by the employers would be impermissible in law. I reproduce para 18 of the said judgment as under:-

> *"18. It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:*
>
> *(i) Recovery from employees belonging to Class-III and Class-IV service (or Group 'C' and Group 'D' service).*
>
> *(ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.*
>
> *(iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.*
>
> *(iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even*

though he should have rightfully been required to work against an inferior post.

(v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover."

The case of the petitioners falls under Clause (iii).

17. In the case of ***Sushil Kumar Singhal (supra),*** the Supreme Court was concerned with a case wherein the facts were, the appellant retired on December 31, 2003 as an Assistant Engineer and on the basis of his last salary drawn i.e Rs.11,625/-, his pension was fixed. After few years of his retirement, it was found by the respondent- employer that the salary of the appellant had been wrongly fixed in 1986 and therefore, re-fixed his salary vide order dated March 23, 2005. On the basis of the re-fixed salary, a sum of Rs.99,522/- was sought to be recovered and for that purpose a notice was issued to the appellant on April 23, 2005 and his pension was reduced from Rs.11625/- to Rs.10,975/-. The aforesaid action of the respondent-employer was challenged by the appellant before the High Court. The High Court rejected the petition and came to the conclusion that the pay of the appellant was wrongly fixed and therefore, the employer was justified in recovering the excess salary paid and reducing the pension. It was the case of the appellant before the Supreme Court that the High Court did not consider the GO dated January 16, 2007. I may state that GO dated January 16, 2007 stipulated as under:-

"(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."

Suffice to state, the Supreme Court in view of the GO dated January 16, 2007 has held that the High Court was not correct permitting the employer to reduce the pension and recover the excess amount of salary paid. In para 10, the Supreme Court has held as under:-

> *"10. For the aforestated reasons, we quash the impugned judgment delivered by the High Court and direct the respondents not to recover any amount of salary which had been paid to the appellant in pursuance of some mistake committed in pay fixation in 1986. The amount of pension shall also not be reduced and the appellant shall be paid pension as fixed earlier at the time of his retirement. It is pertinent to note that the Government had framed such a policy under its G.O. dated 16.01.2007 and therefore, the respondent authorities could not have taken a different view in the matter of refixing pension of the appellant."*

18. Insofar as the judgment of the Supreme Court in ***Chandi Prasad Uniyal (supra)*** on which reliance was placed by Mr. Ahluwalia is concerned, the Supreme Court, no doubt held, excess salary paid due to irregular wrong pay fixation can always be recovered, it had made, exception in cases of hardship. In other words, even in ***Chandi Prasad Uniyal (supra),*** the Supreme Court has in cases of hardship made an exception

where recovery cannot be effected. The situations of hardships have been culled out by the Supreme Court in its later judgment of ***Rafiq Masih (supra),*** a reference of which has already been made above.

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.

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.

21. Now coming back to the question, which pay scale, the petitioners are entitled to on second financial upgradation. The answer must be, an exercise needs to be carried out by the respondent No.2 keeping in view the clarification of the DoP&T dated February 10, 2000, a reference of which is already made above. On such exercise, the petitioners shall be given the relevant pay scale with effect from January 31, 2000 and April 10, 2002 respectively. Their pay and pension shall also be fixed accordingly but in view of the judgment of the Supreme Court in the case of ***Rafiq Masih (supra),*** as the case of the petitioners falls in paras 18(ii) and 18(iii), the recovery of excess amount by the respondents shall be impermissible. The impugned orders dated June 16, 2014 [W.P.(C) No.4333/2015] and October 19, 2015 [W.P.(C) No. 10690/2015] are set aside. The exercise required to be carried out by the respondents in terms of clarification dated

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February 10, 2000 shall be completed within a period of three months. Till such time, the pension shall be paid to the petitioners at the same rate, which is being paid as of date. But on carrying out the exercise, if it is found that the pay scale/pay/pension has to be, at a lower amount then the excess pension paid, post this order during the period of exercise shall be recovered by the respondents. The petitions stand disposed of. No order as to costs.

CM Nos. 7850/2015 (for stay) & 8330/2015 (for stay) in W.P.(C) 4333/2015
CM 426/2016 (for direction) in W.P.(C) 10690/2015

Dismissed as infructuous.

V. KAMESWAR RAO, J

AUGUST 02, 2017/ak