

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

**LPA No.322 of 2018 (O&M) in
CWP No.9389 of 2013
Date of Decision : 28.02.2018**

Surinder Kumari and others

.... Appellants

VERSUS

State of Haryana and another

.... Respondents

**CORAM : HON'BLE MR. JUSTICE RAJESH BINDAL
HON'BLE MR. JUSTICE B.S.WALIA**

Present: Mr. G.S. Bajwa, Advocate for the appellants.

B.S.WALIA, J.

1. This order will dispose of LPA Nos.322 and 323 of 2018 since common questions of facts and law are involved. However, the facts of the case are being taken from LPA No.322 of 2018 i.e. CWP No.9389 of 2013 titled as “**Surinder Kumari and others versus State of Haryana and another**”.

2. Challenge in this Intra-court appeal is to order dated 05.09.2017 whereby writ petition filed by the appellant-petitioners challenging order dated 26.07.2012 (Annexure P-1) withdrawing the benefit of Assured Career Progressions Scheme (hereinafter referred to as “ACP”) and consequently reducing the pay of the appellant-petitioners, was dismissed.

3. The appellant-petitioners while working in the Department of

Education had foregone promotion as Head Teachers due to compelling domestic circumstances, therefore, were not 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 (hereinafter referred to as "1998 Rules/2008 Rules" respectively).

4. Writ petition was filed by the appellants/petitioners by placing reliance on the decision of this Court in CWP No.9755 of 2009 titled as **Vijay Singh vs. State of Haryana and others** decided on 25.11.2010, CWP No.8047 of 2010 titled as **Bimla Devi and others vs. State of Haryana and others** decided on 29.07.2011 as also the Full Bench judgment of this Court in **Budh Ram and others vs. State of Haryana and others, 2009 (3) SCT 333**. Although plea was taken that the Rules were ultra vires and liable to be struck down, however, no challenge, either to the Rules, 1998 or Rules, 2008 was made to the writ petition. Rule 11 on the basis of which the order was passed under the 1998 Rules, 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. "

5. Likewise, Rule 14 under the 2008 Rules which came into force w.e.f. 01.01.2006 reads as under:

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”.

6. On the basis of the aforementioned Rules, defence of the respondents was that once the appellant-petitioners had foregone promotion for the post of Head Teacher in January, 2008 in the case of petitioner No.12, the Rules would come into play, in view of Division Bench judgments 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**, upholding the validity of the Rules, thereby action of the State was justified. Reliance was also placed upon a 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 issue involved in the said writ petition namely of an employee being disentitled to benefit of higher pay scale on account of having foregone promotion at his own request was decided in favour of the State.

7. On the other hand, reliance was placed by the appellant-petitioners

upon judgment in **Vijay Singh's** case (supra) which was followed in CWP No.6650 of 2010 in case titled as **Kailash Devi and others vs. State of Haryana and others** decided on 23.09.2011, further upheld by the Division Bench in LPA No.160 of 2012 in case titled as **State of Haryana and others vs. Ved Parkash and others** decided on 02.02.2012 and LPA No.449 of 2012 in case titled as **State of Haryana and others vs. Kamlesh Kumari**. SLPs filed by the State i.e SLP Nos.25759-25767 against said decision were dismissed on 19.01.2016. Reliance was also placed upon Division Bench judgment of this Court in CWP No.5786 of 2007 in case titled as **Anita Sharma vs. State of Haryana and others** decided on 11.08.2008 and judgment in CWP No.15839 of 2007 in case titled as **Nirmal Kanta and another vs. State of Haryana and others** decided on 11.08.2008, wherein a similar view was taken and the SLP filed i.e SLP No.1536 of 2009 was dismissed on 16.02.2009. Thereafter, Review Petition No.342 of 2010 was dismissed on 23.02.2010 and a Curative Petition No.380 of 2013 was dismissed on 06.02.2014.

8. The DB held that the background where a Government servant does not accept promotion for any reason whatsoever, it can safely be presumed that the Government servant considers that there was no stagnation in his service which needed to be compensated by the grant of ACP/promotional scale, therefore, it could rightly withdraw the placement of such an employee in the ACP scale. Stand of the State on the other hand was that the validity of Rule 11 was discussed threadbare in **Rakesh Kumar's** case (supra) where while upholding the validity of Rule 11 of the 1998 Rules, the only benefit granted was that excess payment made on withdrawal of ACP scale was ordered not to be recovered while

upholding the re-fixation. Relevant extract of the decision is reproduced as under:-

*“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.”

However, Civil Appeal No.467 of 2016 filed by Rakesh Kumar was decided in background of the case being an isolated case and the 2008 Rules having come into force as also Rakesh Kumar having retired in the year 2015. In the circumstances, Hon'ble the Supreme Court directed that the difference in the pay which was drawn, be granted to Rakesh Kumar without going into the correctness or otherwise of the conclusions drawn by the High Court regarding the validity of Rule 11 on 19.01.2016. Relevant extract of the decision of Hon'ble the Supreme Court in Civil Appeal No.467 of 2016 titled as **Rakesh Kumar vs. State of Haryana** decided on 19.01.2016 is 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 ACP 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.”*

9. On the same date, Hon'ble the Supreme Court also disposed of bunch of cases filed by the State of Haryana in case titled as **State of Haryana vs. Pushpa Devi** preferred against LPA Nos.449 of 2012 and LPA Nos.160 and 161 of 2012 arising from the judgment in **Kailash Devi's** case (Supra) which in turn had placed reliance upon **Vijay Singh's** case (supra). While disposing of the aforementioned case, the Hon'ble Supreme Court relied upon its earlier judgment in **Nirmal Kanta's** case (supra) and dismissed the appeals filed by the State. However, the decision of the Division Bench of this Court in **Nirmal Kanta's** case (supra) was based upon an earlier Division Bench judgment of this Court in **Shashi Kiran and others vs. State of Punjab and others, 2003(5) SLR 603** in which the issue of proficiency step up was the subject matter of consideration in which another Division Bench while taking note of the decision of an earlier Division Bench in CWP No.6049 of 1997 in case titled as “**Tipan Chand Sharma vs. State of Punjab**” decided on 06.05.1998 granted benefit on the ground that in said decision i.e Tipan Chand Sharma's case, there was no mention in the circular that the person who does not avail promotion, shall not be entitled to the benefit of proficiency step up. On the same date, the judgment in **Anita Sharma's** case (supra) was passed by the same Division Bench. In **Kailash Devi's** case (supra), the learned Writ Court had relied upon another Single bench judgment in **Vijay**

Singh's case (supra) which in turn had relied on the Division Bench in **Nirmal Kanta's** case (supra) keeping in mind that the same was upheld by Hon'ble the Supreme Court. Similarly, reliance was placed upon **Shashi Kiran's** case (supra) as also **Anita Sharma's** case (supra) where the writ petitions were allowed. However, it was not brought to the notice of the learned Writ Court 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 therefore, the writ petitioners could not rely upon the said judgment as such. Accordingly, once the Division Bench had specifically held that the Rule was valid, it was not open to the petitioners to contend that the re-fixation was without any basis. The learned Writ Court held that the case as set up by the petitioners was based exclusively on the sets of judgments which were not applicable in the facts and circumstances of the case.

10. The argument that in view of two contradictory Division Bench judgments, this Court should follow the view which was favourable to the employees was negated by the learned Writ Court in view of the decision of Full Bench of this Court in **Indo Swiss Time Limited vs. Umrao and others, AIR 1981 P&H 213** wherein it was held that it was not necessary that the subsequent judgment had to be followed but the one which appeared to lay down the law more elaborately and accurately was to be followed. The ineligibility of the Government employee who had foregone promotion to get higher standard pay scale and the withdrawal of the benefit was also considered by the Division Bench judgment in **Swaran Lata's** case (supra) wherein instructions issued by the State of Haryana to remove stagnation of its employee 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 was under consideration. Clause in the aforementioned instructions applicable w.e.f. 1.1.1994 providing relief by way of higher standard pay scale for those employees who had not got even one promotion in their career contained Clause-4 i.e. an employee who had foregone promotion or sought reversion to a lower post at his own request would render himself ineligible for the benefit of higher standard pay scale and other instructions could not be held to be the victim of stagnation and entitled to the benefit of the instructions or for that matter employees who had foregone their promotion or sought reversion to a lower post after coming into force of the instructions were held ineligible for the benefit of higher standard pay scale. Accordingly, the validity/instructions which were applicable w.e.f. 1.1.1994 were upheld. Likewise in **Shakuntala Devi's** case (supra) while considering Rule 11 of 1998 Rules, the Division Bench held that a Government employee who chooses to forego functional promotion on any ground whatsoever while drawing his pay in any ACP scale would cease to be entitled to draw his pay in that scale and would be entitled to draw his pay in the functional pay scale prescribed for the post on which he was substantatively working.

11. In the aforementioned background, a co-ordinate bench on 26.09.2016 in CWP No.6594 of 2007 in case titled as **Prem Lata vs. State of Haryana and others** while noticing the judgment in **Nirmal Kanta and Shashi Kiran's** cases (supra) as also disposal of the SLP filed in **Rakesh Kumar's** case (supra) besides dismissal of SLP in case titled as **State of Haryana vs. Pushpa Devi**, dismissed the writ petition filed by Prem Lata protecting the employee to

the extent of recovery in view of the subsequent judgment of Hon'ble the Supreme Court in **State of Punjab ad others vs. Rafiq Masih (White Washer) and others, 2015(1) RSJ 177** while noticing that the order in **Rakesh Kumar's** case (supra) was passed by Hon'ble the Supreme Court in exercise of its jurisdiction under Article 142 of the Constitution of India.

12. In the aforementioned background, the learned Writ Court dismissed the writ petitions filed by the appellant-petitioners while holding them to be entitled to the benefits of the judgment of Hon'ble the Supreme Court in **Rafiq Masih's case** (supra) to the extent that the State would not be entitled to make any recovery on the basis of re-fixation ordered.

13. We have considered the submissions of learned counsel for the appellant-petitioners. The appellants while working in the Department of Education declined promotion to the post of Head Teachers, therefore, were not granted the benefit of ACP w.e.f. 1.1.1996/1.1.2006 in terms of notification dated 07.01.1998/30.12.2008 under the 1998 Rules/2008 Rules. The validity of Rule 11 of 1998 Rules was upheld in **Rakesh Kumar's case** (supra) by a Division Bench of this Court. However, SLP against the said decision was disposed of by Hon'ble the Supreme Court by ordering that being an isolated case, it was not necessary to examine the correctness or otherwise of the validity of Rule 11 and since the appellant had also retired from the service in the year 2015, the State was directed to restore the scale which the appellant was drawing prior to the withdrawal of the ACP benefit granted to him vide order dated 29.02.2008. No doubt on the same date, Hon'ble the Supreme Court also dismissed the appeals filed by the State of Haryana against Pushpa Devi against the decision of the Division Bench in LPA

No.449 of 2012 and LPA Nos.160 and 161 of 2012 arising from the judgment in Kailash Devi's case which in turn placed reliance on the decision in **Vijay Singh's** case (supra). Besides, Hon'ble the Supreme Court also relied upon the earlier judgment in **Nirmal Kanta's** case (supra), however, the Division Bench judgment in Nirmal Kanta's case was in fact based upon an earlier decision of a Division Bench in Shashi Kiran's case (supra) pertaining to the State of Punjab in which the issue of proficiency step up was subject matter of consideration. In the said case, the Division Bench had granted the benefit on the ground that an earlier Division Bench in CWP No.6049 of 1997 in case titled as **Tipan Chand Sharma vs. State of Punjab** decided on 6.5.1998 had held that there was no mention in the circular that the person who did not avail the promotional avenue would not be entitled to the benefit of proficiency step up. On the other hand, **Kailash Devi's** case (supra) was decided by the learned Single Bench on 23.9.2011 by placing reliance on another Single Bench judgment in **Vijay Singh's** case (supra) i.e. CWP No.9755 of 2009 decided on 25.11.2010 which in turn had followed the view of the Division Bench in **Nirmal Kanta's** case (supra) which in turn was decided on 11.08.2008 and SLP in respect thereto i.e SLP No.1536 of 2009 was dismissed on 16.02.2009. Thereafter, Review Petition No.342 of 2010 was dismissed on 23.02.2010 while Curative Petition No.380 of 2013 was dismissed on 06.02.2014. Likewise **Shashi Kiran's** case (supra) and **Anita Sharma's** case (supra) have been relied upon by the appellant-petitioners. However, as has been noticed above, **Shashi Kiran's** case (supra) was decided by the Division Bench in which the issue of proficiency step up was the subject matter of consideration and the same was allowed in favour of the employees by taking note of Division Bench

judgment in an earlier case in **Tipan Chand Sharma's** case (supra) decided on 06.05.1998 wherein it was held that there was no mention in the circular that the person who did not avail the promotional avenue, would not be entitled to the benefit of proficiency step up. Judgment in Anita Sharma's case (supra) was also passed by the Division Bench on 11.08.2008 i.e on the same date on which decision was given in **Nirmal Kanta's** case (supra). Nirmal Kanta's case (surpa) as has been noted above was based upon an earlier Division Bench judgment in **Shashi Kiran's** case (supra) in which the issue of proficiency step up was allowed in favour of the employee on the ground that as per earlier Division Bench judgment in **Tipan Chand Sharma's** case (supra) there was no mention in the circular that the person who did not avail the promotional avenue would not be entitled to the benefit of proficiency step up. However, the validity of the Rules was not in question in the judgments relied upon by learned counsel for the appellant-petitioners and the same was only decided in **Rakesh Kumar's** case (supra) and relief granted to Rakesh Kumar by Hon'ble the Supreme Court was in exercise of jurisdiction under Article 142 of the Constitution of India by taking note of the fact that he had retired, his was an isolated case, therefore, it was not necessary for Hon'ble the Supreme Court to examine the correctness or otherwise of validity of Rule 11 of the 1998 Rules.

14. In the aforementioned background, the order of the learned Single Judge upholding the rejection of the claim of the appellant-petitioners for grant of benefit of ACP in view of their having foregone promotion, in the light of Rule 11 of 1998 Rules and Rule 14 of 2008 Rules, while protecting them to the extent of recovery sought to be made on refixation of pay in the light of decision of Hon'ble

the Supreme Court in **Rafiq Masih's** case (supra) does not warrant interference. The Division Bench in **Rakesh Kumar's** case (supra) had categorically upheld the validity of Rule 11 whereas the Division Bench judgments in the case of **Nirmal Kanta's** case (supra) and **Anita Sharma's** case (supra) had not gone into the question of validity of Rule 11 of the 1998 Rules but had proceeded on the basis of judgment in the case of **Tipan Chand Sharma's** case (supra) pertaining to the State of Punjab regarding proficiency step up and the circular not providing that a person who did not avail the promotional avenue would not be entitled to the benefit of proficiency step up. Thus, decisions relied upon by the learned counsel for the appellant-petitioners are distinguishable and are not applicable in the facts of the instant case. Instead the matter is squarely covered by the Division Bench judgments of this Court in **Swaran Lata, Shakuntala Devi and Rakesh Kumar's** cases (supra).

15. Accordingly, finding no merit in the instant appeals, the same are dismissed in limine. Consequently, the application for condonation of delay of 117 days in filing the appeals is also dismissed.

(RAJESH BINDAL)
JUDGE

(B.S.WALIA)
JUDGE

February 28, 2018

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Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No