

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19 /12/2019

C O R A M

THE HONOURABLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.9162 of 2013

S. Kamini

...

Petitioner

Vs

1. The State of Tamil Nadu
rep. By its Principal Secretary to Government
Health & Family Welfare Department
Fort St. George
Chennai 9.

2. The Director
Medical and Rural Health Services
Chennai 6.

...

Respondents

Prayer : Petition filed under Article 226 of the Constitution of India praying for the issuance of a writ of mandamus to direct the respondents to revise and re-fix scale of pay of the petitioner in the promotion post of Nursing Superintendent Grade - II, as per orders issued in G.O.Ms.No.234 Finance (Pay Cell) Department, dated 1/6/2009, with effect from 1/10/2010 and correspondingly to revise pension and other terminal benefits.

For petitioner ... Mr.A.Mohamed Ismail

For respondents ... Mr.A.Zakir Hussain
Government Advocate

O R D E R

Instant writ petition has been filed, to direct the respondents, to revise and re-fix scale of pay of the petitioner, in the promotion post of Nursing Superintendent Grade - II, as per orders issued in G.O.Ms.No.234 Finance (Pay Cell) Department, dated 1/6/2009, with effect from 1/10/2010 and correspondingly, to revise pension and other terminal benefits.

2. Facts in brief are as follows:-

Petitioner states that she was appointed as Staff Nurse in the Health and Family Welfare Department. She was promoted as Nursing Superintendent Grade - III, on 30/3/2007. Government by its order, in G.O.Ms.No.395, Finance (Pay Cell Department), dated 14/10/2010, upgraded the post of Nursing Superintendent Grade - III to Nursing Superintendent Grade - II. The petitioner reached the age of superannuation, on 31/1/2012. The petitioner states that she would have been promoted as Nursing Superintendent Grade - II, in the year 2011, had the post of Nursing Superintendent Grade III not been upgraded to Nursing Superintendent Grade - II. The petitioner states that the respondents had called for a list of eligible Nursing Superintendent Grade III, for promotion to the post of Nursing Superintendent Grade - II, for the year 2010 - 11 and her name was placed in S.No.134. Though the list of 135 candidates were prepared, candidate strength was restricted to 111 and therefore, the petitioner lost the chance of promotion.

3. It is stated by the petitioner that Nursing Superintendent Grade - III has been redesignated as a promotion post of Nursing Superintendent Grade - II, retrospectively, with effect from 1/10/2010 and in view of the same, 43 Nursing Superintendent who had been promoted as Grade II were benefited in both the category of Grade II and Grade I. Another category of beneficiaries are the Staff Nurses who have got their promotion chances straight away as Nursing Superintendent Grade - II, without being appointed as Grade - III. The petitioner states that because of merger, she was not given the benefit arising out of promotion to the post of Nursing Superintendent Grade II by way of merger or the benefit as Nursing Superintendent Grade I.

4. Petitioner states that as per G.O.Ms.No.234, Finance Pay Cell Department, 1/6/2009, the Government of Tamil Nadu, framed Tamil Nadu Revised Scale of Pay Rules, 2009. The petitioner relies on paragraph 10 of the said Rules, which reads as under:-

"10. Fixation of Pay on Promotion on or after 1/1/2006 - In the case of promotion from one grade pay to another in the revised pay structure, the fixation shall be done in the manner given below:-

One increment equal to three per cent of the sum of the pay in the pay band and the existing grade pay shall be computed and rounded off to the next multiple of 10. This will be added to the existing pay in the

pay band. The difference in grade pay corresponding to the promotion post and the feeder post will thereafter be granted in addition to this pay in the pay band. In cases where promotion involves change in the pay band also, the same methodology shall be followed. However, if the pay in the pay band after addition of the increment is less than the minimum of the higher pay band to which promotion is taking place, pay in the pay band will be stepped to such minimum."

5. Petitioner states that in view of the above mentioned paragraph, it is clear that in the case of promotion from one grade pay to another in the revised pay structure, one increment equal to three percent of the sum of the pay in the pay band and the existing grade pay shall be computed and rounded off to the next multiple of 10 and paid to the employee.

6. Petitioner further states that at the time of retirement, the scale of pay was fixed at Rs.24,260/-, whereas as per Tamil Nadu Revised Scale of Pay Rules, 2009, which were made pursuant to G.O.Ms.No.234, Finance Pay Cell Department, and deals with the fixation of pay on promotion on or after 1/1/2006 and the pursuant increase of 3% the pay amount should be Rs.25,827/-.

7. The petitioner further states that Tamil Nadu Revised Scale of Pay Rules, 2009 were introduced from 1/1/2006 and therefore, she was entitled to pay scale in accordance with the said Rules. The petitioner states that despite giving representations, the respondents have not taken any step to revise the pay. She states that had the benefit been given to her there will be a corresponding increase in the pension also.

8. Additional Secretary to Government, Health & Family Welfare Department, Secretariat, has filed counter. In the counter, it has been categorically stated that the Nursing Superintendent Grade III was only upgraded to Grade II, and there is no promotion it is only a re-designation. It is stated that since there is only a redesignation and not a promotion, G.O.Ms.No.234, is not applicable. The respondents state that keeping in view the difference in pay scale in Nursing Superintendent Grade II and III and I, the Government passed G.O.Ms.No.395 dated 14/10/2010 and the new scale of pay reads as under:-

NAME OF THE POST	SCALE OF PAY
Nurse	Rs.93,00-34,800+G.P Rs.4,450/-
Nursing Superintendent III Grade merged with Nursing Superintendent II Grade	Rs.9,300- 34,800+G.P.Rs.4,700/-

9. The respondents state that revision of pay from 1/10/2010 and the pay scale nursing has been modified from 9300-34800+GPRs.4400/- into that of the pay of Rs.9,300-34,800+GP of Rs.4,700/-. It is stated in the counter that had the pay not been modified, and the petitioner would not get the higher pay after retirement. It is contended that since the petitioner was not promoted to the post of Assistant Superintendent Grade II, as she had not reached the zone of consideration.

10. Heard Mr.A.Mohamed Ismail, learned counsel for the petitioner and Mr.A.Zakir Hussain, learned Government Advocate for the respondents.

11. The difference between promotion and upgradation/redesignation has been succinctly explained by the Hon'ble Supreme Court in {(2014) 16 SCC - 593} B.Tirumal Vs. Ananda Sivakumar, wherein the Hon'ble Supreme Court, has observed as under:-

This Court upon a comprehensive review of the decisions rendered earlier including those rendered in Union of India v. S.S. Ranade (1995) 4 SCC 462, Union of India v. V.K. Sirothia (2008) 9 SCC 283 and Lalit Mohan Deb and Ors. v. Union of India & Ors. (1973) 3 SCC 862 formulated specific principles relating to promotion and upgradation in the following words:

"21. On a careful analysis of the principles relating to promotion and upgradation in the light of the aforesaid decisions, the following principles emerge:

(i) Promotion is an advancement in rank or grade or both and is a step towards advancement to higher position, grade or honour and dignity. Though in the traditional sense promotion refers to

advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both that is advancement to a higher position and advancement to a higher pay scale - are described by the common term 'promotion', does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay-scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay-scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simpliciter can be said to be a promotion in its wider sense that is advancement to a higher pay scale.

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation, can also be restricted to a percentage of posts in a cadre with reference to seniority (instead

of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simplicitor. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation. A

(v) Where the process is an upgradation simplicitor, there is No. need to apply rules of reservation. But where the upgradation involves selection process and is therefore a promotion, rules of reservation will apply.

(vi) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation."

16. On a careful reading of principles (ii) and (iii) above, it is evident that upgradation which is synonymous to re-designation in the facts of this case simply confers a financial benefit by raising the scale of pay of the posts without there being

movement from a lower position to a higher position. In the case of upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale. Not only that, where the advancement to a higher pay-scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if advancement to a higher pay-scale without change of post is accompanied by some process which has the element of selection, then it will be a promotion to a higher pay-scale. This Court declared that upgradation in that case was not promotion, also because the BCR Scheme did not involve creation of additional posts nor did the scheme involve consideration of inter se merit of the candidates or involve any selection process. The Court on that basis declared such process of upgradation, the Reservation Rules had no application, declared this Court.

17. The rationale behind upgradation not being considered tantamount to promotion would, in our opinion, apply with full force even to a case where the upgradation/redesignation is sought to be termed as a case of recruitment by transfer. If the process of upgradation/redesignation has no correlation to the vacancies available in the State Engineering and if such upgradation/redesignation is granted as a matter of course without any selection process and merely on the incumbent acquiring a degree qualification, we see no reason why such upgradation/redesignation should be treated as a case of appointment to the said service by transfer."

12. Government by G.O.Ms.No.395, Finance (Pay Cell) Department, dated 14/10/2010 has only tried to remove the pay anomaly between the pay scale of Nursing Superintendent Grade III and II which arose due to merger of two scales. Nursing Superintendent Grade III who was in a pay scale of 9300-3400+GP 4450 on merger would pay 9300-34380+4700. The said G.O does not talk of promotion. Petitioner as stated above, placing reliance on paragraph 10 of G.O.Ms.No.234, Finance (Pay Cell) Department, dated 1/6/2009, cited supra, which deals with fixation of pay of promotion on or not after 1/1/2006. Therefore, paragraph 10,

in G.O.Ms.No.234, Finance (Pay Cell) Department, dated 1/6/2009, does not apply to the facts of the present case. The petitioner is therefore, under misconception that upgradation amounts to promotion. The petitioner has not been promoted to the post of Nursing Superintendent Grade II and she could not get the promotion for the year 2010 - 2011, since she did not come under the zone of promotion. Before she was promoted, there was a merger and post was upgraded. Upgraded pay scale was fixed as per G.O.Ms.No.395, Finance (Pay Cell) Department, dated 14/10/2010. Claim of the petitioner is therefore, cannot be sustained and the writ as prayed for cannot be granted.

13. Accordingly, writ petition is dismissed. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

mvs.

To

1. The Principal Secretary to Government
State of Tamil Nadu
Health & Family Welfare Department
Fort St. George
Chennai 9.
2. The Director
Medical and Rural Health Services
Chennai 6.

+1cc to Mr.A.Mohamed Ismail, Advocate sr.106101

+1cc to Government Pleader SR.NO. 106718

Order made in
W.P.No.9162 of 2013

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nr 28/01/2020