IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 20.11.2020

CORAM:

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

Writ Petition No.12713 of 2014
and M.P.No.2 of 2014

S.Rogini ... Petitioner

vs.

1. The Principal Accountant-General (A&E),
No.361, Anna Salai,
Teynampet,
Chennai - 600 018.

2. The Secretary to Government,
Finance (Pay Cell) Department,
Secretariat, Fort St. George,
Chennai - 600 009.

3. The Secretary to Government,
P&AR(S) Department,
Secretariat, Fort St. George,
Chennai - 600 009. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorari, calling for the records pertaining to the impugned order of the first respondent dated 11.04.2014 in Lr.No.Pr.AG(A&E)/ Legal Cell / WP 5268/2014/75/4359 and quash the same.

For Petitioner : Mr.A.Mohamed Ismail
For R1 : Ms.T.S.Selvarani
For R2 & R3 : Mr.S.Thangavel, Special Government Pleader

ORDER

Petitioner has come up with this Writ Petition seeking to quash the impugned order dated 11.04.2014 passed by the first Respondent vide Lr.No.Pr.AG(A&E)/Legal Cell/WP 5268/2014/75/4359.

2. According to the Petitioner, she entered into Tamil Nadu Medical Subordinate Service as a Staff Nurse on 01.10.1979 and was promoted as Nursing Superintendent-Grade III, now re-designated as Nursing Superintendent Grade II, on

01.05.2008. She had been awarded Selection Grade with effect from 04.10.2009, taking into account the service rendered in the lower post, i.e. Special Grade Nurse, with effect from 04.10.1999. She has further stated that, as on 01.05.2008, Special Grade scale of pay of Nursing Superintendent Grade II was Rs.6500-200-15500 and that, as per G.O.Ms.No.395, Finance (Salaries) Department, dated 14.10.2010, Special Grade scale of pay of Nursing Superintendent Grade II was fixed as Rs.15600-39100 with Grade Pay Rs.5400/-. Hence, she made a representation to rectify the pay anomaly, which was considered and she received pay in the scale of Rs.16230-5400 with effect from 01.01.2006 by the proceedings of the Director and Superintendent of the Regional Institute of Ophthalmology and Government Opthalmic Hospital, Chennai in K.Dis.497/E-1 (G)/12 dated 01.03.2013. Thereafter, she retired from service on 31.05.2013.

3. Pursuant thereto, the office of the Government Ophthalmic Hospital, Chennai sent a letter bearing No.5221/E-1/2013, dated 30.10.2013, to the Accountant-General, seeking clarification with respect to the Government letter dated 14.05.2012 relating to fixation of Selection Grade in the post of Nursing Superintendent Grade-II. Based on the letter of the Government Ophthalmic Hospital, the first respondent issued proceedings dated 31.12.2013 stating that, the Petitioner was not eligible for Selection Grade in the promotional post. Challenging the said proceedings, the Petitioner filed a Writ Petition in WP.No.5268 of 2014, which was disposed of, directing the first respondent to consider the reply dated 12.02.2014 submitted by the Petitioner and to pass appropriate orders, within a period of four weeks. Thereafter, the first respondent passed an order, dated 11.04.2014 stating that, the claim of the Petitioner for pensionary benefits on the basis of wrong fixation of pay i.e., Rs.22,850/- + Rs.5,400/- cannot be acceded to and regulation of pension to the entitled pay of Rs.22,020/- + Rs.5,400/- as ordered vide letter dated 31.12.2013 stands valid and necessary action would follow. Aggrieved over the same, the Petitioner has come up with the present Writ Petition.

4. A detailed counter affidavit has been filed by the first respondent, wherein, it is inter alia stated that, as per G.O.Ms.No.210 P&AR Department, dated 11.03.1987 and Letter No.168 P&AR Department, dated 28.09.1999, service rendered in the Selection/Special Grades of the lower posts shall be counted for awarding Selection/Special Grades in higher post, if the scales of Selection/Special Grades of the lower post and that of the ordinary grade scale of higher post are identical/ higher; however, as per the recommendation of the Pay Commission, revised scale of pay was implemented with effect from 01.01.2006 vide G.O.Ms.No.234 Finance (PC) Department dated 01.06.2009 and G.O.Ms.No.237 Finance (PC) Department dated 22.07.2013, wherein the concept of grant of

increment for Selection Grade scale for 10 years of service and Special Grade for 20 years of service, had been dispensed with, instead of which, 6% Basic Pay + Grade pay had been introduced; and therefore, counting of lower post's identical service in the higher post was restricted upto the date 31.12.2005 and the Government Orders were made inapplicable from 01.01.2006. It is further stated therein that, the Petitioner was awarded Selection Grade on 04.10.2009 i.e. after 31.05.2009; from 01.06.2009 onwards i.e. the date of issuance of Pay Commission Government Order, counting of lower post service in higher post was specifically barred. Hence, according to the first Respondent, her claim for pensionary benefits on the basis of wrong fixation of pay i.e. Rs.22850 + 5400/- cannot be considered and rectification/regulation of her pension to the entitled pay of Rs.22020 + 5400/- as ordered vide Letter dated 31.12.2013, is in order.

5. Denying the averments made in the Affidavit filed in support of the Writ Petition, the third respondent has also filed a separate counter Affidavit, which has been adopted by the second respondent herein. It is stated therein that, the Petitioner is trying to project a false picture as there exists a gross discrimination between employees who retired till 31.05.2009 and employees promoted on or after 01.06.2009 with reference to conferment of benefits of advancement to Selection Grade/Special Grade in the promoted post. It is further stated therein that, the revised Selection Grade/Special Grade scale of pay is not applicable to the employees moving to Selection Grade/Special Grade on or after 01.06.2009, since these employees are awarded Selection Grade/Special Grade in the same pay band and Grade Pay and therefore, they are entitled to 3% of Basic Pay + Grade Pay on the date of award of Selection Grade/Special Grade as ordered in G.O.Ms.No.234 Finance (PC) Department, dated 01.06.2009. Further, employees who were awarded Selection Grade/Special Grade on or after 01.01.2006 are eligible for sanction of additional increment of 3% with notional effect from 01.01.2006 and monetary benefit from 01.04.2013 as per the orders issued in G.O.Ms.No.237 Finance (PC) Department, dated 22.07.2013. Hence, the question of counting of service rendered on identical/higher scale of pay, after 01.06.2009 does not arise at all. Thus, according to Respondents 2 and 3, the action of the first respondent declaring the Petitioner as ineligible for the Selection Grade in the post of Nursing Superintendent, is in consonance with the guidelines issued vide Government Letter No.7296/S/2012-1, Personnel and Administrative Department, dated 14.05.2012 and therefore, the Writ Petition may be dismissed as devoid of merits.

6. Learned counsel for the Petitioner submitted that, though the Petitioner entered the Tamil Nadu Medical Subordinate Service as Staff Nurse on 01.10.1979, she was promoted as Nursing Superintendent Grade III only on 01.05.2008, nearly after 28 years of service. Due to lack of

promotional avenues, the Petitioner was awarded Special Grade with effect from 04.10.1999. Learned counsel pointed out that, the Petitioner's representation to rectify the pay anomaly was considered and the pay anomaly was rectified vide proceedings dated 01.03.2013 of the Director and Superintendent of the Regional Institute of Ophthalmology and Government Opthalmic Hospital, Chennai in the pay scale of Rs.16230-5400 with effect from 01.01.2006. It is her contention that, the proceedings dated 31.12.2013 passed by the first Respondent stating that, the Petitioner is not eligible for Selection Grade in the promotional post and the subsequent impugned order dated 11.04.2014 passed by the first Respondent rejecting the claim of the Petitioner for pensionary benefits in the pay scale of Rs.22,850/- + Rs.5,400/-, after her retirement, is much prejudicial to her interest.

7. As regards recovery of excess payment, learned counsel for the Petitioner relied on an Apex Court decision in the case of State of Punjab v. Rafiq Masih reported in (2015) 4 SCC 334, relevant portion of which, reads thus:

> "15. Examining a similar proposition, this Court in B.J. Akkara v. Govt. of India [B.J. Akkara v. Govt. of India, (2006) 11 SCC 709 : (2007) 1 SCC (L&S) 529] observed as under: (SCC pp. 728-29, para 28)
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> > "28. Such relief, restraining back recovery of excess payment, is granted by courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused if recovery is implemented. A government servant, particularly one in the lower rungs of service would spend whatever emoluments he receives for the upkeep of his family. If he receives an excess payment for a long period, he would spend it, genuinely believing that he is entitled to it. As any subsequent action to recover the excess payment will cause undue hardship to him, relief is granted in that behalf. But where the employee had knowledge that the payment received was in excess of what was due or wrongly paid, or where the error is detected or corrected within a short time of wrong payment, courts will not grant relief against recovery. The matter being in the realm of judicial discretion, courts may on the facts and circumstances of

any particular case refuse to grant such relief against recovery."

(emphasis supplied)

A perusal of the aforesaid observations made by this Court in B.J. Akkara case [B.J. Akkara v. Govt. of India, (2006) 11 SCC 709 : (2007) 1 SCC (L&S) 529] reveals a reiteration of the legal position recorded in the earlier judgments rendered by this Court, inasmuch as, it was again affirmed, that the right to recover would be sustainable so long as the same was not iniquitous or arbitrary. In the observation extracted above, this Court also recorded, that recovery from the employees in lower rung of service, would result in extreme hardship to them. The apparent explanation for the aforesaid conclusion is, that the employees in lower rung of service would spend their entire earnings in the upkeep and welfare of their family, and if such excess payment is allowed to be recovered from them, it would cause them far more hardship, than the reciprocal gains to the employer. We are therefore satisfied in concluding, that such recovery from employees belonging to the lower rungs (i.e. Class III and Class IV—sometimes denoted as Group C and Group D) of service, should not be subjected to the ordeal of any recovery, even though they were beneficiaries of receiving higher emoluments, than were due to them. Such recovery would be iniquitous and arbitrary and therefore would also breach the mandate contained in Article 14 of the Constitution of India."

8. Learned Standing Counsel appearing for the 1st Respondent with reference to the counter Affidavit filed by the 1st Respondent submitted that, revised Selection Grade/Special Grade scale of pay is not applicable to employees moving to Selection Grade/Special Grade on or after 01.06.2009, since those employees are awarded Selection Grade/Special Grade in the same pay band and Grade Pay and therefore, the Petitioner is entitled only to 3% of Basic Pay + Grade Pay on the date of award of Selection Grade/Special Grade as ordered in G.O.Ms.No.234 Finance (PC) Department, dated 01.06.2009.

9. Learned Special Government Pleader appearing for Respondents 2 and 3 submitted that, the action of the first respondent in declaring the Petitioner as ineligible for the Selection Grade in the post of Nursing Superintendent, is in

consonance with the guidelines issued vide Government Letter No.7296/S/2012-1, Personnel and Administrative Department, dated 14.05.2012 and hence, he prayed for dismissal of the Writ Petition.

10. Heard the learned counsel on either side and perused the material documents available on record.

11. It is seen that, the Petitioner joined as Staff Nurse on 01.10.1979 and promoted as Nursing Superintendent Grade III on 01.05.2008. The said post was later re-designated as Nursing Superintendent Grade-II. However, only after her promotion to the said post, she was awarded Special Grade on account of completion of 20 years of service, vide proceedings dated 04.10.2009, with retrospective effect from 04.10.1999. On 31.05.2013, the Petitioner retired from service.

12. Pursuant thereto, the office of the Government Ophthalmic Hospital, Chennai sent a letter dated 30.10.2013 to the Accountant-General, seeking clarification with respect to the Government letter dated 14.05.2012, relating to fixation of Selection Grade in the post of Nursing Superintendent Grade-II. Based on the said letter, the first respondent issued proceedings dated 31.12.2013 stating that, the Petitioner was not eligible for Selection Grade in the promotional post. The said order was challenged in W.P.No.5268 of 2014. Pursuant to the order passed therein, the first Respondent passed the impugned order dated 11.04.2014 stating that, the claim of the Petitioner for pensionary benefits on the basis of wrong fixation of pay i.e., Rs.22,850/- + Rs.5,400/- cannot be acceded to and regulation of pension to the entitled pay of Rs.22,020/- + Rs.5,400/- as ordered vide letter dated 31.12.2013 stands valid.

13. The stand taken by the first Respondent is that, from 01.06.2009 onwards i.e. the date of issuance of Government Order pertaining to Pay Commission, counting of lower post's identical service in the higher post was restricted upto 31.12.2005 and the Government Orders were made inapplicable from 01.01.2006 onwards. Thus, according to the Respondents, the action of the first respondent in declaring the Petitioner as ineligible for Selection Grade in the post of Nursing Superintendent, is in consonance with the guidelines issued vide Government Letter dated 14.05.2012.

14. The Supreme Court has time and again held that, fixation of pay and determination of parity in duties are the functions of the Executive and the scope of judicial review of administrative decision is very limited. In the case of State of West Bengal v. Subhas Kumar Chatterjee, (2010) 11 SCC 694,

the Supreme Court once again reaffirmed its earlier decisions and also condemned the Tribunal's action in interfering with the administrative authorities' power. In paragraph Nos.14 and 21 of the said decision, it was observed as follows:

> "14. This Court time and again cautioned that the court should avoid giving a declaration granting a particular scale of pay and compel the Government to implement the same. Equation of posts and equation of salaries is a matter which is best left to an expert body. Fixation of pay and determination of parity in duties and responsibilities is a complex matter which is for the executive to discharge. Even the recommendations of the Pay Commissions are subject to acceptance or rejection, the courts cannot compel the State to accept the recommendations of the Pay Commissions though it is an expert body. The State in its wisdom and in furtherance of its valid policy may or may not accept the recommendations of the Pay Commission. (See Union of India v. Arun Jyoti Kundu and State of Haryana v. Haryana Civil Secretariat Personal Staff Assn.) It is no doubt true, the constitutional courts clothed with power of judicial review have jurisdiction and the aggrieved employees have remedy only if they are unjustly treated by arbitrary State action or inaction while fixing the pay scale for a given post.
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> 21. This Court on more than one occasion decried such practices adopted by the tribunals directing applications filed before them to be treated as representations before the executive authorities for their decision on merits. It is for the tribunals that are empowered to examine service disputes on merits. Such delegation of power apart from being illegal and unconstitutional amounts to avoidance of constitutional duties and functions to decide such disputes which are exclusively entrusted to them by law."

15. In view of the foregoing discussion and the settled legal position, this Court finds no reason to interfere with the order impugned in this Writ Petition. However, in view of the ratio laid down in the case of Rafiq Masih (cited supra), this Court holds that, any excess payment made to the

Petitioner after her retirement, shall not be recovered from her, as such recovery would be iniquitous and arbitrary. It is made clear that, the relief of restraining back recovery of excess payment, is granted by Courts not because of any right in the employees, but in equity, in exercise of judicial discretion to relieve the employees from the hardship that will be caused, if recovery is implemented.

16. This Writ Petition is disposed of accordingly. No costs. Consequently, connected Miscellaneous Petition is closed.

-sd-
Assistant Registrar(CS)

//True copy//

Sub Assistant Registrar

av/aeb

To:

1. The Principal Accountant-General (A&E),
No.361, Anna Salai, Teynampet, Chennai - 600 018.

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Finance (Pay Cell) Department,
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+1 C.C. to The Government Pleader SR.NO. 37553

Writ Petition No.12713 of 2014
& MP.No.2 of 2014

PVS (CO)

VS 19.12.2020