IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P.C(OAC) No.2981 of 2018

Ashis Kumar Pattanaik and others …. ***Petitioners***

Mr.K.P.Mishra,
Advocate

-versus-

State of Odisha & another …. ***Opposite Parties***

Mr. H.K.Panigrahi,
Addl. Standing Counsel

CORAM:

JUSTICE SASHIKANTA MISHRA

ORDER
09.03.2022.

Order No.

02. 1. This matter is taken up through hybrid mode.

2. The present Writ Petition has been filed by as many as 45 Petitioners seeking the following relief(s):-

> "(i) To quash the impugned Memo No.SS-1-FE-03/2018/7099/L&ESI dated 12.10.2018 (Annexure-7 and the Letter No.10657/DESI/FE-II-49/2018 dated 29.10.2018 (Annexure-8).

(ii) To hold and declare that the benefits already granted to the applicants under the RACP Scheme are just and reasonable and the same need no interference.

(iii)To pass any order/orders and/or direction/directions as deemed fit and proper in the facts and circumstances of the case; and

(iv) To all this O.A. with costs.

3. The facts of the case are that the Petitioners being sponsored by different Employment Exchanges and consequent upon passing the selection tests, were appointed as Pharmacists by the Director, Employees State Insurance Scheme, Odisha, Bhubaneswar (Opposite Party No.2) and their services were thereafter confirmed on 15th July, 1995. It is stated that the only promotional post available for the Petitioners is the post of Store Superintendent (Tech.) carrying scale of Rs.580-780 which is to be filled up from amongst eligible Pharmacists. In fact, one Hadibandhu Behera, who was working as a Pharmacist, was promoted as Store Superintendent (Tech.) on 5th May, 2010 as per recommendation of the DPC held on 12th April, 2010. The Government in Finance Department vide Resolution No.3560/F dated 7th February, 2013 extended Revised Assured Career Progression Scheme ("RACPS") for the State Government Employees. Subsequently, on 20th February, 2014 the Government in Finance Department issued a clarification. Clause-4 of which provides that where there are less than three

promotional posts in the cadre, the employees of that cadre shall get the pay band and grade pay of the promotional posts of the stage available in that cadre and thereafter the next higher grade pay along with pay band hierarchy available in First Schedule of the Odisha Revised Scales of Pay Rules, 2008 (ORSP Rules, 2008) with introduction of new grade pay, if any, in between shall be given. On such basis, it is contended that the Petitioners are entitled to higher grade pay on completion of service of 10, 20, 30 years. On 1st August, 2015 a Memo was issued by Opposite Party No.2 according sanction for RACPS in favour of 143 employees working under the ESI Scheme including two employees of the Directorate on completion of 10/20/30 years as the case may be. Further, on coming over to RACPS, the employees were allowed upgradation of grade pay as per promotional hierarchy as per amenities available in the case of no such facilities as per First Schedule of ORSP Rules, 2008 besides upgradation of pay extending the benefits of 3% of pay and grade pay was allowed to all the employees except in cases already availed ACPs under ORSP Rules, 2008 and promotion prior to enforcement of the benefits of the RACP. On 28th April, 2016, the Opposite Party No.2 issued an order, annexed as Annexure-5 to the Writ Petition, granting RACP in respect of some other employees. On 30th December, 2017 a letter was addressed to Opposite Party No.2 by the Odisha Pharmacists Service Association, ESI Branch, Bhubaneswar regarding fixation of pay in respect of Pharmacists working in the ESI Scheme under ORSP Rules, 2017 by pointing out that the post of Store

Superintendent (Tech.) is a promotional Post with the post of Pharmacist being the feeder post. It was, therefore, urged that there being less than three promotional posts, the concerned employees are entitled to the benefits as per Finance Department Memo No.1738 dated 20th January, 2014. The representation was submitted for the reason that there was no proof to deprive the benefits of RACP to the Pharmacists on the ground that no cadre rules exists for them under ESI Scheme and the post of Store Superintendent (Tech.) is an ex-cadre post. On 12th October, 2018, there was a communication from the Government in Labour and ESI Department to Opposite Party No.2 directing that in absence of codified recruitment rule, no employees eligible for the grade pay of the promotional post and, therefore, a Pharmacist is eligible for the grade pay of Rs.2800/- in 10 years, Rs.4200/- in 20 years and Rs.4600/- in 30 years under RACPS instead of Rs.4200/-, Rs.4600/- and Rs.4800/- respectively in absence of promotion. Accordingly, a clarification was issued by Opposite Party No.2 on 12th October, 2018, enclosed as Annexure-8, to various sub-ordinate offices of the organization for effecting the revised rate of RACP to the Pharmacists. Since such revision of the RACP was to the detriment and disadvantage of the Petitioners they have approached this Court seeking the relief as aforesaid.

4. A counter affidavit has been filed by Opposite Party Nos.1 and 2 wherein the averments made in the Writ Petition relating to engagement of the Pharmacists, the Finance Department

Resolution dated 6th February, 2013 along with clarification dated 20th January, 2014, grant of RACP to eligible Pharmacist as per the said Resolution etc. have been admitted. It is, however, stated that the post of Store Superintendent (Tech.) in Central Medical Store of the Directorate of ESI Scheme is a single post and while awarding RACP to Pharmacists, the instruction of Finance Department was scrupulously followed. It is basically stated that in the absence of codified recruitment rule, no employee is eligible for the grade pay of the promotional post although the post held by the employee is the only feeder of his promotional post.

5. Heard Mr. K.P.Mishra, learned counsel for the Petitioner and Mr. H.K.Panigrahi, learned Addl. Standing Counsel for the State.

6. It is argued by Mr. Mishra that the subsequent revision of RACP as per the communication of Government in Labour and ESI Department vide Annexure-7 and the consequential communication made by Opposite Party No.2 vide Annexure-8 being entirely contrary to the Finance Department Resolution dated 6th February, 2013 and in particular, the clarification dated 20th February, 2014, cannot be sustained in the eye of law. Since it is admitted that in so far as the Pharmacists are concerned, there is only one promotional post, the Finance Department clarification dated 20th February, 2014 applies in full force and in fact had also been acted upon by granting the appropriate benefits. Subsequently, the Government cannot take a stand contrary to the

same. It is also contended that the Pharmacists working under the Health and Family Welfare Department of the Government have been held to be entitled to the benefit of RACP as per Finance Department Resolution dated 6th February, 2013 whose RACP benefits accrued prior to coming into force of Orissa Pharmacists Rules, 2015 as per the judgment passed by the learned Odisha Administrative Tribunal in the case of ***Rajendra Kumar Gouda v. State of Odisha*** in O.A. No.914 of 2017 and batch. It is contended that implication of the judgment of the Tribunal is that non-existence of cadre rule cannot be a ground to deprive eligible employees from the benefits of RACP. Mr. Mishra has also relied upon a decision of the division bench of this Court in the case of ***State of Odisha and another v. Biharilal and others,*** i.e. WP(C) No.2831/2016 decided on 27th June, 2016. In the said case, interpreting the RACP Scheme of the Government as per the Finance Department Resolution dated 6th February, 2013, similar benefit was granted to the Village Level Workers (VLW).

7. Per contra, Mr. Mr. H.K.Panigrahi has contended that the case of the Petitioners cannot be equated with the Petitioners in the case of ***Rajendra Kumar Gouda and Batch*** (supra) inasmuch as they were working as Pharmacists under the Health and Family Welfare Department forming a separate cadre whereas, the present Petitioners have not been assigned with any cadre under ESI Scheme under the Administrative control of Labour and ESI Department. It is further contended that in the absence of any

cadre rule, the Petitioners cannot be granted the benefit of RACP as claimed by them.

8. As is evident from the rival contentions noted above, the basic facts involved in the case are not in dispute inasmuch as the Petitioners were granted RACP benefits by Memo dated 1st August, 2015 by Opposite Party No.2. It is also not disputed that subsequently it was held that in the absence of codified Recruitment Rule no employee is eligible for such benefits. The point for determination in this case therefore would be, whether RACP benefits are admissible to employees in respect of whom no cadre/recruitment rule exists.

9. The Petitioners are all working as Pharmacists in different ESI Hospitals and their cadre structure is as mentioned in the letter dated 17th December, 2013, enclosed as Annexure-2 to the Writ Petition. It is clearly mentioned that base level post is of Pharmacist carrying scale of pay Rs.5200-20,000/- plus grade pay Rs.2400/-. The next promotional post, which is a single post, is that of the Store Superintendent Technical with scale of pay of Rs.9300-34800 plus grade pay of Rs.4200/-. The Government in Finance Department extended the RACP Scheme to State Government Employees vide resolution dated 6th March, 2013. As per the clarification issued by the Finance Department Memo No.1738/F dated 20th January, 2014 (Annexure-3), in case of an employee where there are three promotional stages in the cadre the grade pay under RACP Scheme would be the pay band and

grade pay of the promotional post up to the stages available in that cadre. For immediate reference, relevant portion of the clarification as at Sl. No.4 is reproduced herein below:-

> "Where there are less than 3 promotional posts in the cadre, the employee of that cadre shall get the pay Bank and Grade Pay of the promotional post(s) upto the stages available in that cadre and thereafter, the next higher Grade Pay along with Pay Band hierarchically available in First Schedule of ORSP Rules, 2008 with introduction of new Grade Pay, if any, in between shall be given".

10. Evidently, the clarification as above, does not refer to any such condition that the same would be applicable only if there is a cadre rule. Learned State counsel has also not submitted any order, circular or rule to substantiate his contention that without a cadre rule the benefits under the RACP Scheme cannot be granted. Viewed from another angle also, the above contention cannot be accepted for the reason that it is for the authority concerned to frame cadre rules and, therefore, for the inaction of the authorities in framing a cadre rule, the employees cannot be made to suffer. Nothing is forthcoming from the side of the State as to the reasons for not framing a cadre rule for the Pharmacists of ESI organization. In the case of ***Rajendra Kumar Gouda*** (supra), the learned OAT took note of the fact that a cadre rule namely, Orissa Pharmacist Services (Method of Recruitment and Condition of Services) Rules, 2015 has been framed for Pharmacists working under Health and Family Welfare

Department and thus, held that till the date of coming into force of the said Rules i.e. 30th June, 2015, the RACP benefit as per F.D. Resolution dated 6th February, 2013 in favour of Pharmacists whose RACP benefits accrued prior to coming into force of such Rules shall be computed treating the Technical Store Keeper as the next promotional post for granting first RACP benefit and on that basis they shall be granted next available grade pay of First Schedule of ORSP Rules, 2008 towards second and third RACP benefits. However, for those Pharmacists whose RACP benefits accrued on or after 30th June, 2015, the same shall be strictly computed as per the grade pay available of the next promotional post defined in the 2015 Rules. This Court finds itself in agreement with the reasoning adopted by the learned Tribunal in the aforesaid cases. Even otherwise, there is no dispute that the nature of work of the Pharmacists working under the Health and Family Welfare Department and that of the Pharmacists working under ESI organization is identical. Such being the case, there is no reason as to why they should be deprived of the benefits available to their counterparts in the Health and Family Welfare Department. Depriving the Petitioners from the benefits of RACP as have already been granted to their counterparts would amount to discrimination and militate against the principles of equality enshrined under Article 14 of the Constitution of India.

11. In such view of the matter, the Writ Petition is allowed. The impugned orders under Annexures-7 and 8 are hereby quashed. It is held that the RACP benefits already granted to the Petitioners

being in consonance with the Finance Department Resolution No.3560/F dated 7th February, 2013 read with Clarification dated 20th February, 2014 are just and proper and, therefore, need not be interfered with.

(Sashikanta Mishra)
Judge

AKB