

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

239 (02 cases)

**CM-5400-C-2017 in/and
RSA-2217-2017 (O&M)
Date of Decision :16.05.2023**

**Haryana Power Generation Corporation
Limited and others**

...Appellants

Versus

Neerja Bhatia

...Respondent

**CM-3209-2019
RSA-1293-2019 (O&M)**

Haryana Power Generation Corporation

...Appellant

Versus

Promila Mehta and others

...Respondents

CORAM: HON'BLE MR. JUSTICE HARSIMRAN SINGH SETHI

Present: Mr. R.S. Longia, Advocate for the appellant
in RSA-2217-2017.

Mr. Harsh Aggarwal, Advocate for the appellant
in RSA-1293-2019.

Mr. Rajesh Arora, Advocate for the respondent(s).

* * *

Harsimran Singh Sethi, J. (Oral)

1. By this common order, above mentioned two regular second appeals are being disposed of as both the appeals involve same question of law on similar facts.

2. For the purpose of this order, firstly the facts are being taken from RSA-2217-2017 titled as **Haryana Power Generation Corporation Limited and others vs. Neerja Bhatia.**

3. Respondent-plaintiff was appointed as Junior Scale Stenographer after she was selected through the Service Selection Board on 12.05.1977. Prior to the said selection on the post of Junior Scale Stenographer, she was already working as steno-typist on regular basis since 14.11.1975. An employee working on a cadre post on completion of 10 years of service is entitled for the benefit of 1st ACP and on completion of 20 years of service benefit of 2nd ACP is to be extended in case employee does not get promotion to the higher rank despite eligibility.

4. Respondent-plaintiff was granted the benefit of 1st and 2nd ACP in the cadre of Junior Scale Stenographer keeping in view the fact that respondent-plaintiff was eligible for promotion but due to the non-availability of the promotional avenue, she remained working in the feeder cadre hence, she was extended the said benefit of ACP after rendering 10-20 years of service.

5. In the year 1998, after getting benefit of 1st and 2nd ACP, respondent-plaintiff was promoted from the post of Junior Scale Stenographer to that of Senior Scale Stenographer. It is a conceded position that said promotion was forgone by the respondent-plaintiff in the year 1998.

6. It may be stated here that as per the rules governing the grant of benefit of ACP, in case an employee gets promotion but forgoes the same, the benefit of the ACP already granted is liable to be withdrawn. Though, the plaintiff, Neerja Bhatia declined the promotion in the year 1998 but

inadvertently the benefit under the Assured Career Progression Scheme already granted to her were not withdrawn by the appellant-Corporation.

7. At the time when the respondent-plaintiff attained the age of superannuation, while going through her service record, the said fact of non-withdrawal of the benefit of ACP extended upon completion of 10-20 years of service on account of forgoing her promotion in the year 1998 was noticed and the said benefit of 1st and 2nd ACP was withdrawn by the appellant-Corporation and her pay was refixed in the year 2011. Upon refixation of pay, it came to the notice of the appellant-Corporation that a sum of Rs.85,873/- was paid in excess to the plaintiff-Neerja Bhatia, which was ordered to be recovered from her retiral benefits. Recovery of the excess amount upon refixation of the salary from the retiral benefit was challenged by plaintiff Neerja Bhatia by filing a civil suit in the year 2012 and keeping in view the evidence and facts which came on record, the said suit was decreed by the trial Court on 03.07.2014 and the recovery of the excess amount paid was held to be bad and the same was ordered to be refunded. The said judgment and decree has been complied with and excess payment recovered from the respondent-plaintiff has already been refunded.

8. Again a second Civil Suit was filed by the plaintiff on 04.04.2015 challenging the withdrawal of ACP benefit which was granted to her upon the completion of 10-20 years of service and the consequential refixation of salary by the department, as the reasons given for the said withdrawal of the benefit that she had forgone her promotion in 1998 and as per the Rules governing ACP, if an employee forgoes promotion then the

benefit of ACP already granted to him/her is liable to be withdrawn, is bad.

9. Keeping in view the facts and evidence which came on record, the trial Court vide order dated 28.03.2016 held that the plaintiff is entitled for the restoration of benefits of 1st and 2nd ACP and also issued a direction for the grant of 3rd ACP from the date of completion of 30 years of service i.e. 12.05.2007 along with interest @6% per annum.

10. Feeling aggrieved against the judgment of the trial Court dated 28.03.2016, an appeal was preferred, which appeal also came to be dismissed on 06.01.2017. Hence the present regular second appeal.

11. With regard to the issue raised in RSA-1239-2019, it may be noticed that the case of plaintiff-Promila Mehta is similar to that of plaintiff-Neerja Bhatia as the benefit of ACP granted was also withdrawn from plaintiff-Promila Mehta as she also had forgone her promotion after availing the benefits of ACP after 10-20 years of service. The only difference in fact relating to plaintiff-Neerja Bhatia and Promila Mehta is that action against Neerja Bhatia was taken by the appellant-Corporation after her retirement whereas, in case of Promila Mehta action was taken while she was in service when the fact of non-withdrawal of ACP upon forgoing promotion came to the notice of the appellant-Corporation and the said benefit of ACP was withdrawn after due show cause notice by passing appropriate speaking order.

12. The question of law raised in the present appeal is whether an employee will continue to get the benefit of ACP even after forgoing the promotion or the department was well within its right to withdraw the said benefit keeping in view 1998 Rules which regulate the grant of benefit of

ACP.

13. Learned counsel for the appellant-Corporation while challenging judgments and decrees in the case of plaintiff-Neerja Bhatia submits that plaintiff-Neerja Bhatia had forgone her promotion in the year 1998. Keeping in view the Rule 11 of 1998 Rules regarding the grant of ACP, once an employee forgoes his/her promotion, the benefit granted under the ACP Rules is liable to be withdrawn as the said employee is no longer to be treated as stagnating in feeder cadre on the ground of non-availability of promotional avenue. Further argument raised by the learned counsel for the appellant in the case of plaintiff-Neerja Bhatia is that she had filed a first civil suit in the year 2011 upon her retirement wherein, only recovery of the excess amount was challenged which was decreed and the said amount has already been refunded to her whereas, withdrawal of the benefit of ACP was not challenged while filing civil suit in the year 2012 hence, Order 2 Rule 2 of the CPC will be applicable qua the challenge raised in the second suit filed in the year 2015 as the challenge to the withdrawal of benefit of ACP was available with her when the first civil suit was filed in the year 2012. Further objection raised is that the benefit of ACP was withdrawn in the year 2011 and her pay was refixed in the same year, whereas civil suit was filed for restoration of the said benefit in the year 2015 which is after the expiry of limitation period, which aspect has also been ignored by the Courts below while allowing the claim of the plaintiff-Neerja Bhatia.

14. In the case of plaintiff-Promila Mehta, it has been argued that the recovery of the excess amount was done from Promila Mehta while she

was in service after withdrawing the benefit of the ACP granted as she had forgone her promotion hence, in the present case not only recovery of the excess amount paid was permissible but benefit of ACP was also rightly withdrawn keeping in view the 1998 rules governing the service, which aspect has been ignored by the Courts below while allowing the claim raised by the plaintiff-Promila Mehta.

15. I have heard learned counsel for the parties and have gone through the record with their able assistance.

16. It is a conceded position that after the retirement, plaintiff-Neerja Bhatia had filed a civil suit in the year 2012 only challenging the recovery of the excess amount but the withdrawal of the benefit of ACP and refixation of her salary was not challenged. That being so, once the recovery of the excess amount was on the account of withdrawal of the benefit of ACP and the plaintiff only chose to challenge the recovery of the excess amount and not the withdrawal of the benefit, subsequent suit for the withdrawal of the benefit of ACP and refixation of her salary will be barred by Order 2 Rule 2 of the CPC hence, once she had waived of her right to challenge the withdrawal of the benefit of ACP and refixation of her salary, the second suit for the said action was not available especially, when consequence of the withdrawal i.e. recovery of the excess amount has been challenged by her in the year 2012.

17. Learned counsel for the respondent-plaintiff has not been able to rebut the said aspect, which has already come on record. The Courts below have not at all considered the said aspect while allowing the claim qua the challenge to the withdrawal of the benefit of ACP and refixation of her

salary hence, the claim being raised by the appellants qua the applicability of Order 2 Rule 2 of the CPC has not been considered by the Court below therefore, the judgments and decrees of the Courts below qua said aspect are perverse to the facts and evidence on record.

18. Even otherwise, the benefit of ACP was withdrawn from the plaintiff in the year 2011 and the pay of plaintiff-Neerja Bhatia was refixed in the year 2011 and her pensionary benefits were calculated on the refixed salary. Once the said order of withdrawal of benefit of 1st and 2nd ACP and consequent refixation of salary was passed in the year 2011 and the pensionary benefits were released based upon refixed salary as fixed after withdrawal of the ACP benefit, the cause of action accrued qua the withdrawal of the benefit of ACP in the year 2011 itself. Concededly, a suit was filed in the year 2015. Though, an issue was already framed as to whether the suit was barred by law of limitation but no findings have been returned despite the fact that same has been noticed by both the Courts below while recording the facts and the arguments of the Corporation .

19. Learned counsel for the respondent-plaintiff has not been able to show as to how the said suit is within limitation in the facts and circumstances of the present case when concededly the same has been filed beyond the period of three years of limitation provided keeping in view the date when the cause of action accrued i.e. 2011.

20. Further, the Courts below have allowed the claim for the restoration of the benefit of ACP extended in favour of the respondent-plaintiff on the ground that the employee after completing required period of service, is entitled for the benefit of ACP. The Courts below have failed to

appreciate the fact that the said benefit of ACP is extended in case employee is stagnating in feeder cadre due to the non-availability of promotional avenue. The Courts below further failed to appreciate that as per Rule 11 of 1998 Rules even if, the benefit of ACP has been extended to the employee after rendering 10-20 years of service and thereafter the employee forgoes the promotion, the said benefit of ACP is to be withdrawn and the pay of the said employee is to be fixed in functional pay scale. Learned counsel for the respondent-plaintiff has also not been able to dispute the said fact that as per Rule 11 of the Notification dated 27.02.1998 by which 1998 Rules were brought in force and benefit of ACP has been extended to the employees, in case an employee chooses to forgo promotion, he/she shall cease to be entitled for the benefit of ACP already granted and he/she will draw the functional pay prescribed. The said Rule 11 is as under:

11. Ceasing of entitlement of ACP Scales:- In case the Board employee chooses to forgo 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 Scales and shall draw his pay in the functional pay scales prescribed for the post on which he is substantially working from the date of such forgo of promotion.”

21. The Courts below though, have noticed the said rule in their judgment but have not interpreted the same keeping in view the facts and circumstances of the present case.

22. In the present case, it is a conceded position that after the grant of benefit of 1st and 2nd ACP the employee i.e. plaintiff in both the regular second appeals chose to forgo the promotion. That being so, Rule 11 will come into operation and the benefit of ACP already extended to them was

liable to be withdrawn and the respondents-plaintiffs were only entitled to be granted pay as per functional pay scale. The said action has been taken by the respondent-department against the plaintiff in view of the conceded fact that both the employees have forgone their promotion, when offered. That being so, the findings recorded by the Courts below are perverse to the Rule 11 of the 1998 Rules governing the service for the grant of benefit of ACP and are perverse to Rule 11 of 1998 Rules and hence, cannot be sustained in the eyes of law.

23. The only argument which has been raised by the learned counsel for the respondent is that though, as per Rule 11, the benefit was liable to be withdrawn but as both the plaintiffs continued to get the benefit either up to the date of retirement in case of Neerja Bhatia or up to the period when the plaintiff-Promila Mehta was nearing retirement, keeping in view the judgment of the Hon'ble Supreme Court of India in *SLP-32555-2009* titled as *Rakesh Kumar vs. State of Haryana and others* decided on 19.01.2016 once, an employee has already retired the benefit of ACP though, wrongly been extended should have been allowed to be continued.

24. It may be noticed that order passed by the Hon'ble Supreme Court of India in Rakesh Kumar's case (supra) makes it clear that same was rendered without expressing any opinion on the validity of Rule 11 of the 1998 Rules. The said order was passed as an exception. Further the said order was passed by the Hon'ble Supreme Court of India in the year 2016 whereas, the benefit had also been withdrawn from both the plaintiffs prior to the said date and the same had already been implemented hence, no

benefit of the order passed by the Hon'ble Supreme Court of India can be extended in favour of the plaintiffs.

25. Rather, Hon'ble Supreme Court of India in a recent judgment passed in Civil Appeal No.7027-7028 of 2009, titled as **Union of India Vs. Manju Arora, decided on 03.01.2022** held that once an employee has forgone promotion, the said employee is not entitled for Assured Career Progression Scheme, which is granted for being stagnated in the feeder cadre. The claim of the respondent-plaintiff is covered against them as per the judgment in **Manju Arora's case (supra)**. The relevant paras of the said judgment are reproduced as under:

“17. It may also be observed that when an employee refuses the offered promotion, difficulties in manning the higher position might arise which give rise to administrative difficulties as the concerned employee very often refuse promotion in order to continue in his/her own place of posting.

18. In the above circumstances, we find merit in the submissions made on behalf of the appellants. Consequently, it is declared that the employees 6 who have refused the offer of regular promotion are disentitled to the financial upgradation benefits envisaged under the O.M. dated 9.8.1999. In this situation, the Scottish doctrine of “Approbate and Reprobate” springs to mind. The English equivalent of the doctrine was explained in *Lissenden v. CAV Bosch Ltd.* wherein Lord Atkin observed at page 429,

“.....In cases where the doctrine does apply the person concerned has the choice of two rights, either of which he is at liberty to adopt, but not both. Where the doctrine does apply, if the person to whom the choice belongs irrevocably and with knowledge adopts the one he cannot afterwards assert the other.....”

The above doctrine is attracted to the circumstances in this case. The concerned employees cannot therefore be allowed to simultaneously approbate and reprobate, or to put it colloquially, “eat their cake and have it too”. It is declared accordingly for the respondents in the C.A. Nos.7027-

28/2009.”

26. At this stage, learned counsel for the respondents submits that though in the case of plaintiff-Neerja Bhatia payment of excess amount has already been set aside by the competent Court of law but in case of plaintiff-Promila Mehta, excess amount had already been recovered by the appellant-Corporation grant of which benefit by the Courts below is liable to be upheld.

27. Rebutting the said argument, learned counsel for the appellants submits that in the case of plaintiff-Promila Mehta, the order of withdrawal of benefit of ACP was passed when Promila Mehta was in service and that too after giving due show cause notice, hence recovery of the excess amount was permissible.

28. Qua this argument with regard to recovery of excess amount, it may be submitted that at the time when the benefit of ACP was withdrawn from plaintiff-Promila Mehta, she was left with one year of service before retirement. Further nothing has come on record to show that the said plaintiff has misrepresented in any manner so as to take benefit of ACP rather it was the appellant-corporation, who did not withdraw the benefit of ACP from the plaintiff upon forgoing promotion by Promila Mehta. Keeping in view the facts and circumstances of the present and the judgment of the Hon’ble Supreme Court of India in **Civil Appeal No.7115-2010** titled as **Thomas Danial vs. State of Kerala** decided on 02.05.2022, has held that where there is no misrepresentation or fraud on the part of the employee, no recovery of the excess amount paid, can be done.

in *State of Punjab and others Vs. Rafiq Masih (White Washer) etc.,*

2015(1) S.C.T., 195 no recovery can be done from a employee who is nearing his/her retirement and the benefit which is sought to be withdrawn, the employee continued to get the said benefit for more than 05 years, the recovery cannot be done.

30. Learned counsel for the appellant-Corporation has not been able to rebut that keeping in view the settled principle of law noticed hereinbefore, recovery from plaintiff-Promila Mehta qua the excess amount paid, could not have been done. Hence, though orders passed by the Courts below qua the grant of benefit of 1st, 2nd and 3rd ACP to the plaintiffs are set aside but the same are upheld qua the directions that no recovery of the excess amount paid will be done.

31. No other argument has been raised.

32. Keeping in view the settled principle of law cited hereinbefore, the judgments and decrees passed by the Courts below in the case of plaintiff-Neerja Bhatia are perverse to the facts and evidence on record and cannot sustain in the eyes of law and are accordingly set aside and suit filed by the plaintiff Neerja Bhatia is dismissed.

33. With regard to the suit filed by plaintiff-Promila Mehta with regard to the challenge of withdrawal of the ACP benefit, the suit is dismissed as the judgment and decree of the Courts below allowing the said benefit are perverse to the settled principle of law keeping in view the fact and circumstances of the present case as well as provisions of 1998 ACP Rules, which are applicable for the grant of benefit of ACP

Qua the recovery of the excess amount, action of the appellant-

Corporation is held to be bad being contrary to the settled principle of law and the excess amount paid and recovered from Promila Mehta be refunded back to her within a period of 08 weeks from the date of receipt of copy of this order.

35. Civil miscellaneous application pending if any is also disposed of.

May 16, 2023
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(HARSIMRAN SINGH SETHI)
JUDGE

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