

Before Harsimran Singh Sethi, J.

BALBIR SINGH—Petitioner

versus

STATE OF HARYANA AND OTHERS—Respondent

CWP No.20032 of 2015

November 22, 2019

Constitution of India, 1950—Art.226—Service matter— 3rd ACP withdrawn—Pay re-fixed—Recovery effected two months before retirement — Challenge to—Besides, step-up of pay equivalent to that of junior also sought—Held, following Ram Sarup Ganda case and the consequent government instructions, that senior employee will be entitled to step-up of pay equivalent to that of his/her junior in case there is an anomaly — Denial on the plea that the junior was a direct recruit and would be entitled to up-gradation which was not admissible to a promotee, was not sustainable— Also, any subsequent reduction of the junior's pay on account of punishment of stoppage of increment, is no ground to deny up-gradation as it would only prejudice the senior employee for no fault of his—Further held, recovery on re-fixation of salary was impermissible from the petitioner, who was due to retire within one year.

Held that a bare perusal of the above would show that the Hon'ble Supreme Court of India in *Ram Sarup Ganda's case (supra)*, has already held that senior employee cannot get the lesser pay than his junior due to the anomaly created by the Rules granting ACP to the employees. Keeping in view the said judgment, the respondents-State issued instructions on the said issue more than once, which makes it clear that the senior employee will be entitled for the step of his/her pay equivalent to the junior in case there is any anomaly.

(Para 14)

Further held that, in the present case, the respondents have admitted the anomaly that the petitioner was getting lesser salary than his junior Sh. Wazir Singh in April and May, 2014. The said anomaly occurred only due to the fact that Sh. Wazir Singh was given upgradations treating him to be direct recruit, which benefit was denied to the petitioner on the ground that he was a promotee and is not entitled to third upgradation for the grant of ACP. But once, it is an admitted fact that Sh. Wazir Singh was getting a higher pay than the

petitioner, the petitioner was entitled for the step up of his pay equivalent to that of Sh. Wazir Singh keeping in view the order passed by the Hon'ble Supreme Court of India in *Ram Sarup Ganda's case (supra)* as well as instructions which have been issued by the Government of Haryana dated 13.04.2007 (Annexure P-5) and 27.01.2015 (Annexure P-14).

(Para 15)

Further held that, once, an employee who though is senior but getting lesser pay than his junior, his pay is to be stepped up equivalent to his junior and the stepped up pay of such senior employee cannot depend upon the pay of the junior thereafter especially when the junior has been imposed punishment. The stepping up of the pay of the petitioner once granted, cannot be brought down upon the punishment imposed upon a junior employee. In case, the same is allowed, senior employee will be prejudiced without there being any fault upon him/her part and therefore, once the step up of the pay is granted, the senior employee will continue to get the stepped up pay irrespective of the fact that the pay of the junior has been reduced by award of punishment hence, the step up of the pay, which is to be granted to the petitioner, will continue till his retirement, irrespective of the fact that the pay of Sh. Wazir Singh was reduced in June, 2014 keeping in view the punishment imposed upon him, withholding his increment.

(Para 18)

Ram Niwas Sharma, Advocate
for the petitioner.

Safia Gupta, A.A.G., Haryana.

HARSIMRAN SINGH SETHI, J.(oral)

(1) In the present writ petition, the grievance which is being raised by the petitioner is against order dated 11.12.2014 (Annexure P-9) by which, the benefit of 3rd ACP granted to the petitioner, has been withdrawn. Further challenge is also to the order dated 12.01.2015 (Annexure P-10) vide which the pay of the petitioner has been refixed and recovery amounting to Rs.32,229/- has been made, being contrary to the law.

(2) Further prayer of the petitioner is to step up the pay of the petitioner equivalent to his junior Sh. Wazir Singh, who was getting higher pay than the petitioner, which is impermissible keeping in view the order passed by the Hon'ble Supreme Court of India in *Civil*

Appeal No.3250 of 2006 titled as Commissioner and Secretary to the Government of Haryana and others versus Ram Sarup Ganda and others, decided on 02.08.2006, read with the instructions dated 27.01.2015 issued by the Government of Haryana.

(3) The facts as stated in the writ petition are that the petitioner was recruited on the post of Dak Runner on 17.12.1976. He was further promoted as a Daftri w.e.f. 23.01.1980 and thereafter, as a Clerk on 24.11.1982. On the basis of seniority-cum-merit, petitioner was further promoted as Sub Divisional Clerk on 24.03.2011 and ultimately, while working on the said post, petitioner retired on attaining the age of superannuation on 31.03.2015. While the petitioner was in service, respondents passed an order on 11.12.2014 by which, the benefits of 3rd ACP granted to the petitioner on 11.01.2013, w.e.f. 01.12.2012 was withdrawn and consequent upon the withdrawal of the grant of the benefit of 3rd ACP, the pay of the petitioner was refixed by the respondents on 12.01.2015 and after the refixing the salary, the respondents found that the petitioner was paid an excess amount of Rs.32,229/-, which was recovered from the petitioner in installments.

(4) The grievance which is being raised by the petitioner is that the benefit of 3rd ACP was wrongly withdrawn from the petitioner and his pay was wrongly fixed and the consequent recovery of the amount of Rs.32,229/-, recovered from the pensionary benefits of the petitioner, is liable to be refunded.

(5) The alternative prayer of the petitioner is that even if the petitioner was not found entitled for the benefit of 3rd ACP, petitioner was entitled for the step up of his pay equivalent to his junior Sh. Wazir Singh as the senior employee cannot be paid lesser salary than his junior employee.

(6) Upon notice of motion, the respondents have filed the reply and have controverted the claim as being raised by the petitioner in the present writ petition. In the reply, the respondents have stated that an employee can only get two upgradations during his service career, which had already been extended to the petitioner prior to extending the benefit of 3rd ACP and therefore, the grant of 3rd ACP to the petitioner w.e.f. 01.12.2012 was contrary to the rules governing the service and therefore, the same was rightly withdrawn and the recovery of the excess amount was made from the salary of the petitioner from the month of January, 2015 and February, 2015 and not from the retiral benefits as being alleged by the petitioner. With regard to the claim of the petitioner for stepping up of his pay with that of his junior Sh.

Wazir Singh, the respondents have stated that Sh. Wazir Singh was getting higher pay being a direct recruitee on the post of Clerk whereas the petitioner who was a promotee, cannot equate him with that of Sh. Wazir Singh in order to claim the step up of pay. Learned counsel for the respondents further submits that at the time of retirement, petitioner was getting a higher salary than Sh. Wazir Singh as due to imposition of a punishment, increment of Sh. Wazir Singh were withheld.

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

(8) Though, in the writ petition, petitioner is challenging the order Annexure P-9 and P-10 by which, the benefit of the 3rd ACP was withdrawn and the pay of the petitioner was refixed but the petitioner has not pressed the said claim at the time of hearing except the recovery, which has been done from the petitioner on account of refixation of the salary.

(9) With regard to the claim of the petitioner that Sh. Wazir Singh, who was junior to the petitioner, was getting higher salary, has not been denied by the respondents. The only differentiation which have been given by the respondents to justify their act is that the petitioner was a promotee to the post of Clerk whereas Sh. Wazir Singh was appointed by way of direct recruitment and therefore, after getting two upgradations in the cadre of Clerk, Sh. Wazir Singh was getting a higher pay, which is permissible.

(10) The said argument, which has been raised by the respondents, is not at all justifiable keeping in view the order passed by the Hon'ble Supreme Court of India in *Civil Appeal No.3250 of 2006* titled as *Commissioner and Secretary to the Government of Haryana and others* versus *Ram Sarup Ganda and others*, decided on 02.08.2006. In the said proceedings before the Supreme Court, question of law was raised whether an employee can be granted the 3rd upgradation or not. This Court had allowed the claim of the employees that 3rd ACP is also available to the promotees and no differentiation can be made with regard to the appointment to the post of Clerk by way of promotion or direct recruitment but the Hon'ble Supreme Court of India held that once the ACP rules only envisage two upgradations, the grant of 3rd upgradation was not in consonance with the rules but further held that in case, by the grant of two upgradations, a senior employee though promotee, is getting lesser salary than his junior, he will be entitled for the stepping up of his/her pay to remove the said anomaly. The relevant portion of the said judgment is as

under:-

“By the impugned judgment, the High Court has held that the respondents are entitled to get the ACP scales that are applicable to group “C” post, but the Rules, as such, do not provide for that. The Rules says that if there are already two upgradations, then the concerned employees are not entitled to the benefit of ACP scales. Nevertheless, if ACP scales are higher, they are certainly entitled to the ACP scales at the starting point. The date of giving such ACP scales is the date of entry into the service and though these respondents are entitled to get ACP scales and get fixation of the ACP scales as applicable to Group “D” employees and in case there are anomalies to the effect that they receive lesser pay than their juniors working in the same cadre/post, such senior Government servants are entitled to step up of their salary to get it on par with the salary which is being received by their juniors.

In the result, all the appeals are partly allowed. The appellants shall revise the pay scales of the respondents. In case of any anomaly, if the employees who, on fixation of ACP scales, are in receipt of lesser salary than their juniors in the same cadre/post, then their salary shall be stepped up accordingly. Revised orders shall be passed within a period of two months of the receipt of the copy of this order by the Government. However, if upon revision of the pay-scales, any employee is liable to refund any amount, the Government shall not insist on refund of such amount. If any employee is entitled to get any amount by way of pay revision, the said amount shall be made available to him within a period of six months from the date of receipt of the copy of this order by the Government.

Consequently, the appeals are partly allowed with no order as to costs.”

(11) After the judgment was rendered by the Hon'ble Supreme Court of India, the respondents issued instructions on 13.04.2007 for stepping up of the pay equivalent to the juniors. In the said instructions, it has been clearly mentioned that in case after the grant of ACP scale, a senior employee is getting less salary than his junior, the senior will be entitled for the step up of his/her pay at par with the junior employee. The relevant portion of the instructions are as under:-

“Subject: Regarding grant of benefit of stepping-up to senior employees at par with junior employees in case of ACP matters.

Sir,

I am directed to draw your kind attention towards F.D's letter No.6/84/2006-3PR (F.D) dated 6th Feb. 2007 vide which it was decided to implement the judgment of Hon'ble Apex Court in the case of all officials promoted from Group 'D' to 'C' who are similiary placed. It is now clarified that relief to officials promoted from Group 'D' to 'C' is to be provided by grant of ACP scale from the date it has been allowed to the junior employee in the same cadre/post. If after grant of ACP scale (s) the senior employee gets lesser pay than his junior in the same cadre/post, then his salary shall also be stepped-up at par with the junior employee.

2. Receipt of these instructions may please be acknowledged.”

(12) A bare perusal of the above instructions would show that the respondents have acknowledged that there could be an anomaly, the grant of the ACP scale, where a senior employee is getting lesser salary than his/her junior and that anomaly be removed by the stepping up of the pay of the senior employee equivalent to that of the junior employee.

(13) This issue was again clarified by the Government of Haryana vide instructions dated 27.01.2015, which is prior to the date of retirement of the petitioner. In the said instructions, it has been again stated that in case after fixation of the pay, in case any junior employee is getting a higher pay than his senior, the senior employee will be entitled for the stepping up of the pay. The relevant portion of the instructions is as under:-

“Subject: Regarding review of pay fixation cases of promoted employees.

It has come to notice of Finance Department that, in case of the promoted Section Officers (SAS cadre), the pay is being fixed as per Rule 8 of HCS (RP) Rules, 2008 read with FD letter dated 16.12.2010, whereas, their pay is required to be fixed under Rule 13 of HCS (RP) Rules, 2008. In case of senior promoted employee getting less pay

than junior direct recruit, there is a provision for stepping up their pay at par with junior employee in terms of FD's letter dated 16.12.2010. It has further been observed that there is a possibility of similar mistake in cases of other categories of employee where there is a provision for direct recruitment as well as promotion on a post. Therefore, in order to rectify such mistake and to avoid of recurrence of the mistake. It is clarified that, the pay of promoted employees be fixed under Rule 13 of HCS (RP) Rules, 2008 without any linkage with Rule 8 of HCS (RP) Rules, 2008. Thereafter, cases for stepping up of pay of senior employees at par with their junior in the same cadre could be considered under the provision contained in FD's instruction dated 16.12.2010.”

(14) A bare perusal of the above would show that the Hon'ble Supreme Court of India in *Ram Sarup Ganda's case (supra)*, has already held that senior employee cannot get the lesser pay than his junior due to the anomaly created by the Rules granting ACP to the employees. Keeping in view the said judgment, the respondents-State issued instructions on the said issue more than once, which makes it clear that the senior employee will be entitled for the step of his/her pay equivalent to the junior in case there is any anomaly.

(15) In the present case, the respondents have admitted the anomaly that the petitioner was getting lesser salary than his junior Sh. Wazir Singh in April and May, 2014. The said anomaly occurred only due to the fact that Sh. Wazir Singh was given upgradations treating him to be direct recruit, which benefit was denied to the petitioner on the ground that he was a promotee and is not entitled to third upgradation for the grant of ACP. But once, it is an admitted fact that Sh. Wazir Singh was getting a higher pay than the petitioner, the petitioner was entitled for the step up of his pay equivalent to that of Sh. Wazir Singh keeping in view the order passed by the Hon'ble Supreme Court of India in *Ram Sarup Ganda's case (supra)* as well as instructions which have been issued by the Government of Haryana dated 13.04.2007 (Annexure P-5) and 27.01.2015 (Annexure P-14).

(16) Learned counsel for the respondents states that Sh. Wazir Singh was getting higher pay than the petitioner only for a period of two months i.e. April and May, 2014 after which, the petitioner started getting more salary than Sh. Wazir Singh.

(17) On being asked as to how this happened, learned counsel for

the respondents, on the instructions from Sh. Dharmander, SDO, O/o Executive Engineer, Division No.28, Jind, states that a punishment of stoppage of increment was imposed upon Sh. Wazir Singh due to which he was not released the increment and therefore, his pay became less than the petitioner herein, hence petitioner should only be granted the benefit of stepping up of his pay equivalent to Sh. Wazir Singh only for the period of month of April, 2014 and May, 2014 and not thereafter.

(18) This argument fallacious and cannot be accepted.

(19) Once, an employee who though is senior but getting lesser pay than his junior, his pay is to be stepped up equivalent to his junior and the stepped up pay of such senior employee cannot depend upon the pay of the junior thereafter especially when the junior has been imposed punishment. The stepping up of the pay of the petitioner once granted, cannot be brought down upon the punishment imposed upon a junior employee. In case, the same is allowed, senior employee will be prejudiced without there being any fault upon him/her part and therefore, once the step up of the pay is granted, the senior employee will continue to get the stepped up pay irrespective of the fact that the pay of the junior has been reduced by award of punishment hence, the step up of the pay, which is to be granted to the petitioner, will continue till his retirement, irrespective of the fact that the pay of Sh. Wazir Singh was reduced in June, 2014 keeping in view the punishment imposed upon him, withholding his increment.

(20) Consequently, the respondents are directed to step up the pay of the petitioner equivalent to that of Sh. Wazir Singh from the date said anomaly occurred till the petitioner was in service i.e. upto his retirement. As the direction is being given for step up of the pay of the petitioner equivalent to that of Sh. Wazir Singh, petitioner will also be entitled for the refixation of his salary and consequent retiral benefits. The second question, which the petitioner has raised for the consideration of this Court is whether the respondents could have effected recovery after refixing the salary of the petitioner on 12.01.2015 when petitioner was about to retire.

(21) The Hon'ble Supreme Court of India while deciding *State of Punjab & Others* versus *Rafiq Masih (White Washer) etc*¹, has laid down guidelines in paragraph 12 of the said judgment, that under what circumstances, recovery cannot be effected. As per clause (i) and (ii) of para 12, the recoveries cannot be effected from a retired employee or an

¹ (2014) 8 SCC 883

employee who is nearing his/her retirement. The relevant portion of the said judgment is as under:-

“It is not possible to postulate all situations of hardship, which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to herein above, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

- (i) Recovery from employees belonging to Class-III and Class- IV service (or Group 'C' and Group 'D' service).
- (ii) Recovery from retired employees, or employees who are due to retire within one year, of the order of recovery.
- (iii) Recovery from employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.
- (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.
- (v) In any other case, where the Court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.”

(22) In the present writ petition, the pay of the petitioner was refixed two months prior to his retirement and the recovery was done from the last two salaries for which the petitioner got while in service. The case is covered by the judgment of *Rafiq Masih's* case (supra) that the recovery could not have been ordered from the petitioner as he was about to retire within a period of two months.

(23) Keeping in view the above settled principle of law, the recovery done from the petitioner is held to be bad and petitioner is held liable for the refund of the amount of Rs.33,229/-.

(24) Keeping in view the above, the writ petition is allowed in above terms. Petitioner is held entitled for the step up of his pay

equivalent to that of his junior Sh. Wazir Singh from the date the said anomaly occurred till petitioner was in service and further the petitioner's pensionary benefits will be revised keeping in view the grant of benefit of step up and also the arrears of the pay and pensionary benefits. Further, the recovery, which has been done from the petitioner, has been set aside therefore, petitioner will be entitled for the refund of the amount of Rs.33,229/-. Let this order be complied with and the benefit for which the petitioner is entitled for, be computed within a period of three months from the receipt of certified copy of this order.

Tribhuvan Dahiya