

HIGH COURT OF MADHYA PRADESH : JABALPUR**WRIT PETITION No.15022/2007**

Dr. S.K. Saxena & another

Vs.

State of Madhya Pradesh & another

Smt. Shobha Menon, learned senior counsel assisted by Ms. Ankita Khare, learned Counsel for the petitioners.

Smt. Nirmala Nayak, learned Govt. Advocate for the respondents-State.

Present : Hon'ble Shri Justice K.K. Trivedi

O R D E R**(14/01/2015)**

This writ petition under Article 226 of the Constitution of India is filed by the petitioners, two in number, working on the post of Surgical Specialist challenging the validity of the order dated 18.07.2007 (Annexure P-19) as also bringing the anomaly in the matter of grant of appropriate pay scale to the post of Surgical Specialist on account of passing an order of granting and conferring on them the senior scale and selection grade pay scale. By amending the relief, the petitioners have also called in question the order dated 30.07.1998/06.08.1998 (Annexure P-20). Mainly the following reliefs were claimed by the petitioners :

- I. to issue a Writ of mandamus or such other appropriate writ, directing respondents to implement the recommendations of Singh Deo Committee, by amending the Recruitment Rule "Madhya Pradesh Public Health and Family Welfare (Gazetted) Service Recruitment Rules, 1988, by inserting higher pay scale as per direction of respondent No.1.
- II. to direct respondents to award the higher pay scale of Rs.4100 - 5300/- to petitioners on

promotion and direct respondent Government to release the difference of pay along with interest thereof and compensation.

(II-A). Order dated 30-7-/6-8-1998/P-20 is ultra vires, contrary to statutes and therefore liable to be set aside.

III. to grant any other relief which this Hon'ble Court deems fit and proper under the facts and circumstances of the case, in the interest of justice.

IV. to award the cost of the petition to the petitioner.”

2. The contentions raised by the petitioners are that at present they are working as Surgical Specialist in different hospitals at Bhopal. However, they were initially appointed as Assistant Surgeon on selection through Madhya Pradesh Public Service Commission, in the year 1974 and were confirmed on the said post in the year 1978 and 1976 respectively. While the petitioners were continuing on the post, the Pay Commission recommendations were accepted by the State Government and Madhya Pradesh Revision of Pay Rules, 1990 were made. For the first time, three tier system of pay scale was made applicable on the recommendations of the Pay Commission by the State Government by making the said rules, in exercise of powers conferred under the proviso to Article 309 of the Constitution of India. In terms of the aforesaid rules, a person serving in the junior pay scale on completing requisite years of service was to be given the benefit of senior pay scale. Similarly, the provisions were made for grant of selection grade pay scale. Though it was necessary to consider the cases of grant of selection grade pay scale to the petitioners as they were already granted the senior grade pay scale, action was not taken and, therefore, original application was filed before the Madhya Pradesh State Administrative Tribunal being O.A. No.141/1992, which came to be decided on 21.11.1994. The benefit of the order

passed by the Madhya Pradesh State Administrative Tribunal was extended to the petitioners by amending the earlier order of conferring on them the senior grade and selection grade pay scale, on 10.11.1995.

3. Though the service recruitment rules were made in the year 1988, entitled as Madhya Pradesh Public Health and Family Welfare (Gazetted) Service Recruitment Rules, 1988 and as specific provision for promotion was made in the said rules but till the year 1993, no amendment whatsoever was made in the said rules. By way of amendment in the year 1993, three tier system of pay scale was included, in the shape of promotion. The fact remains that the post of Surgical Specialist was required to be filled in 100% by promotion after the amendment made in the year 1993. Only those, who were in the selection grade pay scale in feeder cadre post, were required to be considered for promotion.

4. Prior to the amendment, the post of Specialist was required to be filled in by two sources, 60% by direct recruitment and 40% by promotion of Assistant Surgeon. The recruitment on the initial post was to be made in the pay scale of Rs.3000-4000/- and on completion of six years of service, such a direct recruitee was required to be conferred senior scale of pay at Rs.3700-5000/- and on further completion of four years of service in the said pay scale, a higher pay scale known as selection grade in the scale of Rs.4100-5300/-. The petitioners were promoted on 13.12.1994 after the coming into force of the amendment made in the rules referred to herein above but there were certain direct recruitments after the appointment of the petitioner as Assistant Surgeon, on the post of Specialist.

5. Though the petitioners were given the promotion but those who were subsequently recruited, have taken a march over and above them inasmuch as they were conferred the

senior scale and selection grade pay scale. Though the petitioners were granted the benefit of senior scale and selection grade pay scale with effect from 01.04.1985 and 01.04.1989 respectively but they were given this benefit in the pay scale, which was made applicable to the post of Assistant Surgeon and not on the post of Specialist. As a result, even when the petitioners were regularly promoted, their pay was fixed in the lower stage than those who were junior to them and subsequently appointed on the post of Specialist.

6. This anomaly has remained in operation even when the State Government made the Pay Revision Rules again after accepting the recommendations of the Pay Commission in the year 1998. When these facts were pointed out by the petitioners that there was some anomaly, an order was issued on 30.07.1998/06.08.1998 directing that the Specialist if promoted from the post of Medical Officer (including the Assistant Surgeon) and even if they were treated to be given the pay scale of Rs.3700-5000/-, which was the selection grade pay scale for the post of Assistant Surgeon, they have to be treated as promoted on the very same pay scale and only one increment of pay would be given to them. Again the matter was represented by the petitioners but to their utter surprise, instead of removing the anomaly, order was issued on 18.07.2007 bifurcating certain posts from the post of Assistant Surgeon and upgrading them on the post of Specialist and further bifurcating the post of the Medical Officer into different category of senior scale and selection grade saying that seven posts of the Regional Director would be within the selection grade pay scale of the specialist. It is contended that such an anomaly has not been removed, as a result the pay of the petitioners is so fixed that they are getting lesser salary than what is being paid to their juniors. On the basis of these submissions, it is contended that the impugned

orders are liable to be quashed and reliefs as claimed in the writ petition are required to be granted.

7. The respondents have filed their return denying such allegations made by the petitioners. However, unfortunately nothing is placed on record by the respondents to explain as to how even on promotion the petitioners are not entitled to higher pay scale, if they were working on the pay scale applicable to the post of Specialist in junior scale, when their claims were considered for grant of promotion on the post, as a feeder post of the petitioners was to be treated as Assistant Surgeon Selection Grade. Again it has not been explained as to how the provisions of Fundamental Rule 22-D would not be attracted in the case of promotion of the petitioners, though the post of Specialist is naturally a post carrying higher responsibility than the post of Assistant Surgeon. When the matter was heard on certain occasions, this Court thought it better to refer the matter to the respondents for taking a decision. For the first time on 26.07.2012 though detailed directions were not issued but after hearing learned Counsel for the State, on the prayer of the said counsel, time was granted to file an affidavit explaining the impugned order dated 18.07.2007 (Annexure P-19). This order was not complied with and, therefore, again on 26.02.2013 this Court passed a detailed order. The relevant portion of the said order is reproduced below :

“The controversy involved in this case appears to be only this much that when an officer getting the Senior Selection Grade Pay Scale is granted the next promotion on higher post, his salary is fixed in the lower pay scale and in this manner, he suffers the monetary loss. It is rightly pointed out that vide order dated 18.7.2007, such a class within the class was created by the respondent/State and to seek clarification in the same, this Court has specifically directed to produce the relevant record on the basis of which the order dated

18.7.2007 was issued. This was the specific order on 12.12.2008 passed by this Court which has been reiterated on 26.7.2012. However, when again the record was not produced, this Court has granted an opportunity to the respondent to produce the record or else an action was to be taken against the concerned authority. Today, also learned Deputy Government Advocate appearing for the respondents prayed for some more time to comply with the aforesaid order.”

No affidavit to this effect was filed nor the query raised by the Court was satisfied. Time and again opportunities were granted but only this much was intimated that the original record is received and an affidavit to that effect would be filed.

8. On 30.07.2013 again after hearing learned Counsel for considerable time, this Court found that in fact there was no deliberation in respect of the controversy raised by the petitioners and that order dated 18.07.2007 was not even explained in appropriate manner in the return filed by the respondents. Again since the anomaly was to be looked into by the respondents-State, a direction was issued to constitute a Committee and to consider the matter relating to the issuance of order dated 18.07.2007. The relevant portion of the order dated 30.07.2013 is quoted below :

“It is seen from the record and controversy involved in the petition that unless the matter is looked into by the higher officials of the State and a decision is taken, it will be difficult to sort out the anomaly created in the grant of pay scale to the post of Specialist. These facts have been recorded by this Court on two occasions. While looking to the order dated 18/07/2007 placed on record as Annexure P-19, this Court has issued direction to produce the record for the purposes of examining whether the order dated 18/07/2007 was passed after due deliberation. It appears that such a controversy was neither foreseen nor was examined or anticipated by the respondents and therefore still it has to be examined whether the order dated 18/07/2007 was

proper and correct order in view of the facts mentioned herein above.

For the aforesaid purposes, it would be better if a meeting is convened by the departmental authorities, a consultation is done and the outcome of the said meeting is furnished to this Court by filing an affidavit of the Principal Secretary of the department. This is being ordered in view of the fact that nothing material has been pointed out with respect to the issuance of the order dated 18/07/2007 by the respondents in their return. The submissions made in the return are not sufficient to satisfy the queries or the objections raised by the petitioners in the present petition.”

After passing of this order since again nothing was done, therefore, some stern action was taken by the Court on 12.08.2014 and then only an affidavit was filed by the respondents. The affidavit in short is that in fact the order dated 18.07.2007 contains four different orders/decisions taken by the State Government and in the meeting convened by the department in terms of the order of this Court, decision was taken to implement the order dated 18.07.2007. Justification of issuance of the said order was not again explained by the respondents. The objection was filed by the petitioners with respect to such an affidavit stating that there was no such direction to implement the order dated 18.07.2007 issued by the Court, rather a query was raised as to what was the basis of issuing the order and why a post of Specialist was created in the pay scale of Rs.16400-20000/- without even suggesting any via-media to resolve the anomaly created by the department in the matter of revision of pay. Even after receipt of this objection, nothing has been done by the respondents.

9. The record and contentions reveal that even when on earlier occasion the representations were made by the petitioner and the Service Association, a High Power Committee was constituted in terms of the orders issued by

the Cabinet of Ministers. The Chief Secretary of the State appointed a committee, which after due consideration made the recommendations that a higher pay scale of Rs.4100 - 5300/- should have been given to the Specialist in selection grade pay scale. This recommendation made by the Committee was never acted upon. On the other hand, the order impugned was issued. It is contended by learned senior Counsel for the petitioners that there should be a deliberation in respect of suggestion made by the Committee in terms of the decision taken by it and if the said recommendation was not acceptable, atleast the reasons should have been assigned as to why such recommendations were not acceptable. The contentions raised by learned Govt. Advocate for the State is that on due consideration the order was issued on earlier occasion giving the benefit of senior pay scale to the petitioners with retrospective effect. Since the Revision of Pay Rules were made in exercise of powers conferred by the proviso to Article 309 of the Constitution of India, it was not deemed necessary to make any amendment in the said rules. On the other hand, by subsequent order a classification was done in respect of the post of Specialist. This contention raised by learned Govt. Advocate further fortifies the fact that there was no justified reason assigned for making the class within the class. Why only in such circumstances the impugned order was issued when there was no amendment made in the rules as is categorically contended by the respondents and why a much higher pay scale was made applicable to those 2% posts, which were treated to be in the selection grade pay scale in the cadre of Specialist and what would be the manner of filling those posts was not indicated. Only this much was said that a senior selection grade pay scale would be made available after completion of six years of service on the selection grade pay scale. This apparently cannot be accepted as yet another class was created within the cadre post of Specialist. Even

otherwise if the order dated 18.07.2007 was to be implemented, it was necessary for the respondents to amend the statutory rules to insert such provisions in the rules as in absence of the rules it would be difficult for the respondents themselves to implement such an order.

10. It is seen that the controversy is one which ought to have been looked into by the Grievance Redressal Committee or a High Power Specialized Committee established in terms of the provisions of the Revision of Pay Rules and instructions issued in that respect. It is also to be seen that there was specific prescription of the pay scale after coming into force of the Revision of Pay Rules, 1998. The rules give power to the State Government to relax or suspend operation of any of the provisions of the rules only with a rider that such suspension or relaxation of the rules shall not operate to the disadvantage of the Government servant or the category of Government servant, as the case may be. The overriding effect of the rules as prescribed in Rule 13 of Revision of Pay Rules, 1998 is that where the pay is regulated by the Revision of Pay Rules, the provisions of Fundamental Rules and any other rules shall not apply to the extent they are inconsistent with the Revision of Pay Rules. Normally it has to be seen that the selection grade pay scale is prescribed on a higher pedestal. If a person is working on the selection grade pay scale and is promoted on the post carrying the lesser pay scale at the initial stage, the benefit of pay protection is required to be granted otherwise the very purpose of providing the selection grade pay scale would be frustrated. In the rules governing the services, the prerevised scales were mentioned in the schedules of the rules, which automatically stand amended by the Revision of Pay Rules. As such without there being any exercise of powers in terms of the Pay Revision Rules relaxing any condition, the respondent No.1 was not competent to issue the order dated 30.07.1998/06.08.1998

creating an anomaly in the matter of pay fixation of the petitioners, who admittedly were promoted in the higher pay scale from substantive rank of Assistant Surgeon after conferral of the senior and selection grade pay scale. Similarly, by order dated 18.07.2007 it was not open to the State Government to seek any amendment in the schedule of the rules. The well settled law is that amendment in the service rules can be made by the same method and in the same manner, the rules are made. If the administrative instructions are issued, they will not take away the specific provisions made in the rules and, therefore, such administrative instructions are required to be treated as ultra vires or violative of the statutory provisions of the rules, specially the Revision of Pay Rules. The Apex Court in the case of ***Punjab State Warehousing Corpn., Chandigarh vs. Manmohan Singh and another, (2007) 9 SCC 337***, has very categorically held in paragraph 12 that such an administrative instruction would not be sustainable in the eye of law.

11. From the analysis made herein above, it is clear that the orders impugned so issued were not in consonance to the provisions of the Revision of Pay Rules and, therefore, the same cannot be sustained or approved. The impugned orders dated 30.07.1998/06.08.1998 in so far as they prescribe grant of a minimum pay scale to the post of Surgical Specialist, which post is filled in by promotion of the Assistant Surgeons/Medical Officers working in the selection grade pay scale and the order dated 18.07.2007 issued in that respect, are declared as bad in law and are struck down.

12. Now the question is whether the relief, which is claimed by the petitioners can be granted by this Court. Which pay scale would be the appropriate pay scale is a job which is to be performed by the highly specialized

committee. Notably in respect of the grievance of the persons in relation to grant of pay scale, after coming into force of the Revision of Pay Rules, the same is required to be referred to the Grievance Committee, which is highly qualified committee constituted by the State Government. Even if such a Committee is not in existence, it can be constituted again including those, who have the expertise, knowledge and experience in suggesting the appropriate pay scales for the concerning post. That being so, it would be appropriate to direct the respondents to constitute one such committee, refer the matter relating to grant of proper pay scale to the Specialists on promotion from the post of Assistant Surgeon Selection Grade and to take a final decision in the matter and grant such benefit to the petitioners from the date they were promoted on the said post of Specialists. Let this exercise be completed within a period of four months from the date of receipt of the certified copy of the order passed today.

13. Needless to say, looking to the previous conduct of the respondents, non-compliance of this order would be seriously viewed and this Court will not hesitate in initiating *suo motu* contempt proceedings against the respondents in case the order is not complied with. However, the writ petition is kept pending for a period of four months by which time after complying with the order, the respondents would report the compliance to the Registrar General of this Court. In case of non-receipt of this compliance report, the case be listed after four months under caption 'Direction'. If the order is complied with and compliance report is submitted within the aforesaid period, the writ petition be treated as finally disposed of.

(K.K. Trivedi)
Judge