

**HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU**

SWP No. 449/2018

IA No. 01/2018

Pronounced on :29.07.2022

Sonam Dolma

....Petitioner(s)/Appellant(s)

Through :- Mr. P. N. Raina, Sr. Advocate with
Mr. J. A. Hamal, Advocate

V/s

Bharat Sanchar Nigam Limited and others

....Respondent(s)

Through :- Mr. Ravinder Gupta, AAG

HON'BLE MR. JUSTICE TASHI RABSTAN, JUDGE
Coram: HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

JUDGMENT

Wasim Sadiq Nargal-J

1. The present petition has been filed against the 'Show Cause Notice No. 862-129/Gen-Corr/Court Cases/2016/34 dated 05.02.2018' by which the promotion granted to the petitioner to the post of Junior Accounts Officer is being withdrawn.

A. Maintainability of the Petition

2. The impugned 'Show Cause Notice' is an offshoot of the statement made by Ld. Counsel appearing for the Respondents in SWP No. 1639/2015, wherein, the petitioner was not a party and according to the petitioner, the said statement has been recorded behind her back and has been acted upon by Respondents. Solely on the basis of a statement made by the Ld. Advocate, who was appearing on behalf of the respondents, in the aforementioned writ petition bearing SWP No. 1639/2015, the impugned 'Show Cause Notice' has been issued to the petitioner. Thus, it is a specific stand of the petitioner that

on mere reading of the impugned 'Show Cause Notice' it has a trapping of finality because the Respondent Department has almost pledged before this court that the case of the petitioner is identically situated as that of Shri Krishan Lal (Writ Petitioner in SWP No. 1639/2015). The petitioner has taken a specific stand that there is no such parity between the petitioner and the Shri Krishan Lal, *supra* neither by facts nor law. Since the impugned show cause notice is an off shoot of a statement made at bar by the Ld. Counsel for Respondents in the case of Krishan Lal, *supra* as such relegating the petitioner to Central Administrative Tribunal (CAT) would not be an efficacious remedy available to the petitioner. Taking into consideration the peculiar facts enunciated herein above, we hold that the present petition is maintainable.

B. RELIEF SOUGHT

3. The petitioner through the medium of the present writ petition has prayed for the following reliefs:-

I. Certiorari quashing impugned 'Show Cause Notice dated 05.02.2018' issued by Respondent No. 3, wherein petitioner has been asked to show cause as to why her promotion to the post of Jr. Accounts Officer made on 16.12.2013 may not be withdrawn, as being arbitrary, illegal and thus unconstitutional.

II. Prohibition, prohibiting Respondents from proceedings against the Petitioner in any manner whatsoever and whenever challenge to her promotion to the post of Jr. Accounts Officer is made.

C. FACTS

4. The petitioner was initially appointed as Telecom Office Assistant on 24.12.1983. Petitioner, on merit, has been appointed to the said post after participating in the process of selection. Petitioner has qualification of PUC

(Pre University Course) to her credit. That re-structuring of different cadres of what was then known as Department of Telecommunication (DOT) took place. In pursuance of the restructuring, the Petitioner got promoted/designated as Sr. Telecom Office Assistant (G). While Petitioner was serving as Sr. Telecom Office Assistant (G), as per the procedure the post of Jr. Accounts Officer was to be filled up on the basis of competition amongst the in-service candidates. The qualification prescribed for competing for the said post of Jr. Accounts Officer was Matric. Petitioner appeared in the competitive qualifying examination in the year 1996-97 under Roll No. JKT-91. A candidate, who scored more than 60% marks in a subject (paper), but could not qualify all the papers were declared to have passed a particular subject wherein he/she had secured 60% or above marks. Petitioner had been given benefit for having scored 60% marks in the subject (III FRSR). It is the further stand of the petitioner that no further competitive exams were held as the Department of Tele Communications became a corporation known as Bharat Sanchar Nigam Limited. As such, because of this change, number of vacancies of Jr. Account officers and other posts became available and department felt requirement of fulfilling these vacancies.

5. The Respondent Department issued an order dated 12.10.2004 for Junior Accounts Officer Part-I screening test and Junior Accounts Officer Part - II (main exams) in BSNL for in-service candidates under modified old syllabus with one time relaxation relating to educational qualification.

6. Further, those candidates who had not passed Junior Accounts Officer Part-I examination earlier but got exemption in certain subjects had to appear in screening test but were to be given grace marks of 10 for each

subject for which he/she had already qualified in screening test (previously i.e. before Department of Telecommunications became BSNL) and such candidates were exempted from appearing in the papers they had already passed, previously. Petitioner had earned the exemption. That different circles throughout country made request to the BSNL, seeking relaxation and further clarification, as a consequence thereof, Respondent No. 1 issued orders dated 22.11.2004, 23.12.2004 & 19.05.2005 wherein the clarification with regard to equivalence of PUC with 10+2 was decided. It was clarified that PUC is equivalent to 10+2. The Respondents while on one hand issued clarification determining equivalence of Pre-University Course with that on 10+2, yet they issued further order dated 25.08.2005 wherein the 'circles' were directed to take decision on the admissibility of the candidature of the candidates in the context of their educational qualification in consultation with the concerned Board of School Education in the respective State/Union Territories. As such, in light of the aforesaid order dated 25.08.2005, Director Academics of the J&K State Board of School Education communicated vide letter dated 21.09.2005 in the following manner with regard to the equivalence of following examination conducted by the J&K State Board of School Education:-

Examination	Equivalence
1. Matriculation (old)	Equivalent to 10 th class (if passes) eligible for admission in Class XI
2. Secondary School Examination	Equivalent to 10 th class (if passes) eligible for admission in Class XI
3. P.U.C. (old) Pre-University Examination	Equivalent to 11 th class (if passes) eligible for admission in Class XII
4. HSE-Part I Higher Secondary Part Ist	Equivalent to 11 th class (if passes) eligible for admission in Class XII
5. T. D. C. (Three years Decree course)	Equivalent to 12 th class (if passes) eligible for admission in Degree course
6. HSE Part-II Higher Secondary Part-II	Equivalent to 12 th class (if passes) eligible for admission in Degree courses

7. After issuance of the aforesaid clearance certificate by the appropriate authority, the Respondents conducted the test of Junior Accounts Officer Part-I (Screening Test). Accordingly, Admit Card was issued to the petitioner on 07.05.2007 vide No. 863-4/2004/SRT/II/13. At this stage, it is pertinent to mention herein that the petitioner had specifically pleaded in the writ petition that she was initially appointed as Telecom Office Assistant on 24.12.1983 and her appointment was pursuant to the proper selection and her educational qualification at the time of entry into service was Pre-University Course and not Higher Secondary Part-I which, according to the petitioner, has not been denied by the Respondents/Department.

8. As per the stand of the petitioner, she had competed in an examination held for the post of Junior Accounts Officer held previously i.e. before Department of Telecommunications became BSNL wherein she had gained exemption in one paper i.e., subject 'III FRSR'. She had appeared in the said competitive examination in view of her eligibility which was Matric, back then. This aspect of the matter has been pleaded by the petitioner in Para-iii of the writ petition which has not been denied by the Department while filing the reply. It is the further the stand of the petitioner in the writ petition that vide letter dated 12.10.2004, subjects were identified for Junior Accounts Officer Part-I (Screening Test) and Junior Accounts Officer Part-II (Main Examination) for internal candidates under modified old syllabus and also one time relaxation relating to educational qualification was granted. Accordingly, Applications were invited for the said examination. Those candidates, who had not passed Junior Accounts Officer Part-I examination but had got exemption in certain subjects, they were to be dealt differently and since the

petitioner was a candidate who had already earned exemption in an earlier examination which has been admitted by the respondents. Besides that, it was specific stand of the petitioner that the department has always accepted that intermediate and PUC was equivalent to examination of 10+2 as reflected in communications dated 22.11.2004, 23.12.2004 & 19.05.2005.

9. As per the stand of the Petitioner, the Respondents issued yet another communication dated 27.12.2005, much after the equivalence certification decided by the Board of School Education wherein it has been observed as under:-

“....However all the candidates who were allowed to appear in JAO-I Screening Test held on 29/05/05, will be allowed to appear in the above mentioned test as one time dispensation and hence, no fresh applications need to be called for from such candidates. Fresh candidates who would be eligible as per the SEA branch clarification dated 25/08/2005 can apply for the above examination and accordingly applications may be called for from such candidates.”

10. It is the specific stand of the petitioner that letter dated 25.08.2005 was applicable and restricted in its application only to the fresh candidates and supersession of earlier communications mentioned *supra* related to equivalence of educational qualification being made dependent on certification by respective Boards, would by all means apply to fresh candidates and the decision of accepting PUC as equivalent qualification to 10+2, as was done by the Respondent Department through the aforesaid communications was allowed to remain for old candidates.

D. SUBMISSION OF PARTIES

11. Mr. P. N. Raina, Ld. Senior Counsel appearing on behalf of the petitioner, has made the following submissions:

- i. The old candidates having competed in the initial examination when the eligibility, by reference to education qualification, was only Matric and her eligibility was disputed with regard to the education qualification only by one Krishan Lal-petitioner in SWP 1639/2015, wherein she was not a party. It is also the specific stand of the petitioner that her case is completely different to that of Krishan Lal, thus, the issuance of show cause notice is without jurisdiction, illegal and unconstitutional.
- ii. The petitioner was declared qualified in the test vide letter No. 800-218/Con/2005/24 dated 04.08.2007 and subsequently, the petitioner appeared in JAO-II internal competitive examination held on 17th to 19th December, 2012 and was declared having qualified the said examination on 24.10.2013. Thereafter, she was promoted and appointed as JAO vide Order No. 807-2/2011/SRT/96 dated 16.12.2013 which has been admitted by the Respondents in their reply. All along the petitioner has pleaded that her case is distinguishable to that of Krishan Lal's case and there is no ground whatsoever or justification to issue the said show cause notice having trappings of finality.
- iii. With a view to distinguish petitioner's case from that of Krishan Lal, It was pointed out that in para-10 of the impugned show cause notice, it has been stated that the petitioner having qualification of Higher Secondary Education Part-I (Pre-University Course) was allowed to appear in JAO-II internal competitive examination against 40% quota held on 17th-19th

December, 2012 and she was subsequently promoted as JAO, whereas the candidature of Krishan Lal to appear in the said JAO examination was cancelled, as he was possessing educational qualification of Higher Secondary Education Part-I. As such, show cause notice is totally devoid of any factual basis, consequence wherein, the respondents did not have any jurisdiction to issue show cause notice and the same has been issued without application of mind and is liable to be quashed.

- iv. The petitioner has been further promoted to the grade of Accounts Officer by virtue of order dated 29.06.2018 and her name figured at serial No. 09 in the said order, which has not been disputed by the respondents and subsequently, she has taken voluntarily retirement under BSNL Voluntary Retirement Scheme, 2019. Further, as per the Pension Payment Order produced by the Respondents, it is emphatically clear that the petitioner has since retired under BSNL Voluntary Retirement Scheme, 2019 (for short, 'VRS 2019') and is drawing pension since 01.02.2020 and her pension has been fixed from last pay drawn at the time of retirement i.e. Pay scale/Pay Band & Grade pay at the time of retirement = Rs. 20600 – 46500 and Pay last Drawn = Rs. 34, 240/-.
- v. The petitioner's pension has been fixed on the basis of last pay drawn as that of Accounts Officer in terms of the Pension Payment Order, the impugned Show Cause Notice by no stretch

of imagination can sustain in the eyes of law and liable to be quashed.

- vi. Pension Payment Order and also communication dated 05.07.2022 have been placed on record, wherein, it has been certified that the petitioner has retired on 31.01.2020 under BSNL Voluntary Retirement Scheme, 2019 as Accounts Officer from the office of GM, BSNL Leh (Ladakh), and the same have been taken on record alongwith the present petition.
- vii. The petitioner was an old candidate governed by old syllabus and rules, yet she had to qualify the examination within two years, if she had earned exemption.
- viii. The petitioner has qualified her JAO-I examination, result whereof was declared on 04.08.2007 (screening test was held on 27.05.2007). The JAO-II internal competitive examination was held on 17th – 19th December, 2012 for already qualified JAO-I candidates and the result of Part-II examination was declared on 24.10.2013.
- ix. Mr. Raina, learned senior counsel, has vehemently argued that once the Department itself did not conduct the examination within the assumed period of two years then the respondents are estopped under law to raise the said argument as the said plea was not available to the respondents. Learned senior counsel has justified the maintainability of the present petition against show cause notice. According to him, it is the only remedy available as the Show Cause Notice allegedly based on the query raised by

this Court in different writ petition where she was not the party and the basis for issuance of Show Cause Notice was the parity drawn between the petitioner and the said Krishan Lal, which is without any basis. This aspect of the matter has specifically pleaded in the writ petition, which has not been denied by the respondents while filing reply and thus, by all means, the present writ petition, according to him, is maintainable against the said Show Cause Notice.

12. *Per Contra*, Mr. Ravinder Gupta Ld. AAG, appearing on behalf of Respondents, has submitted:-

- i. The petitioner was inadvertently allowed to appear in the examination as she was not eligible in view of her educational qualification which was PUC and not equivalent to 10+2 which was the basic requirement. He further pleaded that Recruitment Rules for Junior Accounts Officer was revised on 31.08.2001 and the earlier Rules were declared as null and void. As per him, the examination notification dated 12.10.2004 under exemptions and other relevant heading Para (iii) envisages that the candidates, who have not passed JAO Part-I Examination but got exemption in certain subject will have to appear in screening test but they will be given grace marks of 10 marks for each subject for which the candidate got exemption in screening test. According to him, the exemption claimed by the Petitioner does not change the status of her educational qualification which as per examination notification was fixed as 10+2. As per the stand of the petitioner,

since the petitioner has not qualified JAO Part-I examination prior to screening test within the stipulated period and accordingly, exemption claimed by the petitioner was not valid.

- ii. Mr. Gupta, Ld. AAG has relied upon the equivalence certificate issued by the Jammu & Kashmir State Board of School Education. Besides that, Mr. Gupta, learned AAG has also placed on record one communication dated 08.02.2017 which was not part of the record of the writ petition but supplied subsequently (after the case was finally heard and reserved for judgment) alongwith synopsis. From the perusal of the aforesaid communication, which is alleged to have been issued by the Jammu & Kashmir State Board of School Education to Assistant General Manager BSNL in SWP No. 1639/2015 wherein, a stand has been taken that Pre-University Course of 1982 is not treated as equivalent to Higher Secondary Part-II (Class 12th pass). It is the stand of the respondents that the petitioner was inadvertently allowed to appear in the examination which by no means justify her promotion to Junior Accounts Officer as she did not possess the requisite eligibility criteria as prescribed in the examination notification dated 12.10.2004.
- iii. Mr. Gupta, learned AAG submits that since the petitioner remains absent for all papers, thus, she has forfeited her claim of exemption for screening test held in 2007.

E. ANALYSIS

13. We have heard in detail the counsel for the parties and perused the record. From the record, it transpires that the show cause notice which is impugned in the present writ petition has been issued on 05.02.2018 wherein the petitioner was required to show cause within 15 days as to why the benefit of promotion as Junior Accounts Officer given vide order dated 16.12.2013, inadvertently, be not withdrawn alongwith the consequential benefits with a further direction to the petitioner that in case, if the statement of facts/explanation not received within the time so allowed, the matter will be decided under rules with the presumption that the petitioner has nothing to say in her defence.

14. From the record, it is emphatically clear that although show cause notice has been issued on 05.02.2018 with a view to withdraw her promotion as Junior Accounts Officer given on 16.12.2013, then subsequently, how and under what circumstances, the petitioner was further promoted in the grade of Accounts Officer on 29.06.2018 by the respondents has not been explained nor respondents could justify their stand. We fail to understand that, once the show cause notice has been issued with regard to her promotion as Junior Accounts Officer, then subsequently how and under what circumstances, she was promoted in the grade of Accounts Officer, that too, pursuant to the approval of the competent authority. The respondents have miserably failed to justify her subsequent promotion as Accounts Officer. Even the petitioner has subsequently retired on 31.01.2020 under BSNL Voluntary Retirement Scheme, 2019 as Accounts Officer and as per Pension Payment Order, her pension has been fixed on the basis of last pay drawn as Accounts Officer and

the petitioner is continuously drawing her pension even as on today and no grouse was ever raised by the respondents with regard to fixation of her pension as Accounts Officer or her promotion.

15. The Respondents have failed to justify their stand with regard to her subsequent promotion as Accounts Officer and also her drawing of pension as Accounts Officer, uninterruptedly and no grievance was ever raised by the respondents with regard to her promotion as Accounts Officer nor the fixation of her pension on the basis of her being retired as Accounts Officer under VRS 2019. Thus, the issuance of show cause notice is without any basis and cannot sustain in the eyes of law and liable to be set aside. The petitioner was allowed to appear in the test as one time dispensation and hence in her case, no fresh applications had to be invited from such candidates and like and reliance placed by the respondents on Annexure-G i.e., Communication dated 25.08.2005 superseding previous communications dated 22.11.2004, 23.12.2004 & 19.05.2005 would apply only to the candidates with respect to whom, fresh applications were invited after 27.12.2005. Since the BSNL is wholly a State Corporation, it has not only to act as a model employer but has also to conduct itself in such a way, which is in consonance with equity, just and fair play.

16. We have gone through the impugned show cause notice and there is no whisper with regard to the fact that the petitioner was not entitled to exemption nor there is any reference to such exemption. It is nobody's case that the promotion has been accorded to her by any suppression or misrepresentation of fact which has resulted in her promotion to the post of Junior Accounts Officer and subsequently, as Accounts Officer even after the

issuance of said Show Cause Notice. The petitioner's credentials were with the respondents with regard to her educational qualification as PUC which was never questioned or objected at any stage by the respondents. Under these circumstances, the petitioner has rightly competed the examination initially when the eligibility was only matriculation and subsequently, had earned exemption twice; (i) by way of reference to her by having exemption in one of the papers (i.e., Part-II FRSR) of the examination held in 1996-1997 and thereafter the petitioner had again earned an exemption as per the order issued by the respondents with respect to filing of the application. Merely that some statement was issued by learned counsel for the respondents in some different writ petition, where the petitioner was not a party and the action of the respondents in issuing impugned Show Cause Notice in haste manner on the basis of said statement made at her back is unjustified and that too without conducting any enquiry associating the petitioner by giving her an opportunity of being heard. It appears that the impugned show cause notice has been issued in a hush-hush manner, with a view to justify their stand before this court in the said writ petition i.e. SWP No. 1639/2015, where the petitioner has been condemned unheard and no opportunity was ever given to the petitioner to rebut the said statement/allegation. It appears that the impugned show cause notice was issued in a haste manner and without application of mind which cannot sustain the test of law. Had the promotion of the petitioner as a Junior Accounts Officer been illegal, then how and under what circumstances, the petitioner has been further promoted as Junior Accounts Officer by the said respondents has not been explained. Mr. Gupta, learned

AAG has miserably failed to justify her further promotion and release of pension as Accounts Officer, even as on today.

17. The question of eligibility as raised by the Respondents in the impugned show cause notice by no stretch of imagination is comparable to that of Krishan Lal as both the cases are distinguishable and there is no similarity as the petitioner in the present case is an old candidate who has first appeared for the post of Junior Accounts Officer way back in the year 1999 when at that relevant point of time, eligibility was Matric, which fact has not been denied by the Respondents. Thus, the petitioner being an old candidate has no similarity to that of the facts pleaded in Krishan Lal's case and therefore, basis for the issuance of show cause notice cannot sustain the test of law. Even the essence of show cause notice to withdraw her promotion as Junior Accounts Officer loses its significance in light of her further promotion by the same respondents as Accounts Officer. The very purpose of issuance of show cause notice loses its significance by subsequent conduct on the part of the respondents wherein she stood promoted by the competent authority. It seems that the respondents, without corroborating material facts on record or conducting detailed enquiry whatsoever, just got swayed away by the statement made by the counsel for the respondents in SWP No. 1649/2015, where the petitioner was not the party and proceeded to justify their stand in hush-hush manner by issuing show cause notice which is contrary to the record.

18. It is settled proposition of law that the benefit of promotion and consequential monetary benefits cannot be taken away in an arbitrary and whimsical manner without providing an opportunity of being heard to the

effected person. No enquiry, whatsoever has been conducted by the respondents in this regard. The respondents have failed to take any stand to justify her subsequent promotion as Accounts Officer and release of pension as Accounts Officer. In absence of any specific stand by the respondents with regard to her subsequent promotion as Accounts Officer and fixation of pension as such, the impugned show caused notice cannot sustain in the eyes of law. Since the petitioner has already retired under BSNL Voluntary Retirement Scheme, 2019, and is drawing the pension as Accounts Officer, against higher post than that the Junior Accounts Officer, it would not be equitable at this belated stage to give effect to the impugned show cause notice.

19. In **Union of India & ors. Vs. N. Murugesan & ors.** reported as **(2022) 2 Supreme Court Cases 25**, Hon'ble the Supreme Court has held as under:-

“...Therefore, a State is not expected to act adversely to the interest of the employee, and any discrimination should be a valid one. Ultimately, one has to see the overwhelming public interest as every action of the instrumentality of the State is presumed to be so. While applying the said principle, one has to be conscious of the fact that there may not be a legitimate expectation on the part of an employee as against the statute.”

20. The law has been settled by Hon'ble the Supreme Court in catena of judgments that in absence of any misrepresentation on the part of the petitioner with regard to factum of seeking her promotion, no recovery, whatsoever, can be made from her retirement benefit or for that matter her promotion can be withdrawn. In the present case, there is no such allegation about misrepresentation on the part of the petitioner, thus by no stretch of imagination, consequential benefits can be taken at this belated stage, when

she is drawing the pension after retirement. More so, there is no challenge as on date by anybody with regard to her subsequent promotion as Accounts Officer or drawing her pension as Accounts Officer and in the absence of any specific challenge with regard to her subsequent promotion as Accounts Officer and drawing of pension on basis of having been retired as Accounts Officer. We are not inclined to allow the Respondents to proceed further with the impugned show cause notice, as much water has flown under the bridge, since then. The benefit of higher pay scale once given to an employee by virtue of her legitimate promotion which is without any misrepresentation/ fraud on the part of the petitioner cannot be recovered subsequently from her pension or her gratuity.

21. The Hon'ble Supreme Court in catena of decisions has consistently held that if an excess amount was not paid on account of any misrepresentation or fraud of the employee or by applying a wrong principle or interpretation of rule/order which is subsequently found to be erroneous, such excess payment of emoluments or allowances are not recoverable subsequently after retirement. In **Thomas Daniel v. State of Kerala & ors.** reported as **2022 AIR (SC) 2153**, Hon'ble Supreme Court has held as under:-

(10) *In Sahib Ram v. State of Haryana and Others, 1995 Supp (1) SCC 18, this Court restrained recovery of payment which was given under the upgraded pay scale on account of wrong construction of relevant order by the authority concerned, without any misrepresentation on part of the employees. It was held thus :*

“5. Admittedly the appellant does not possess the required educational qualifications. Under the circumstances the appellant would not be entitled to the relaxation. The Principal erred in granting him the relaxation. Since the

date of relaxation, the appellant had been paid his salary on the revised scale. However, it is not on account of any misrepresentation made by the appellant that the benefit of the higher pay scale was given to him but by wrong construction made by the Principal for which the appellant cannot be held to be at fault. Under the circumstances the amount paid till date may not be recovered from the appellant. The principle of equal pay for equal work would not apply to the scales prescribed by the University Grants Commission. The appeal is allowed partly without any order as to costs."

(11) In *Col. B.J. Akkara (Retd.) v. Government of India and Others* (2006) 11 SCC 709, this Court considered an identical question as under:

"27. The last question to be considered is whether relief should be granted against the recovery of the excess payments made on account of the wrong interpretation/understanding of the circular dated 76 1999. This Court has consistently granted relief against recovery of excess wrong payment of emoluments/allowances from an employee, if the following conditions are fulfilled (vide Sahib Ram v. State of Haryana [1995 Supp (1) SCC 18 : 1995 SCC (L&S) 248], Shyam Babu Verma v. Union of India [(1994) 2 SCC 521 : 1994 SCC (L&S) 683 : (1994) 27 ATC 121] , Union of India v. M. Bhaskar [(1996) 4 SCC 416 : 1996 SCC (L&S) 967] and V. Gangaram v. Regional Jt. Director [(1997) 6 SCC 139 : 1997 SCC (L&S) 1652]):

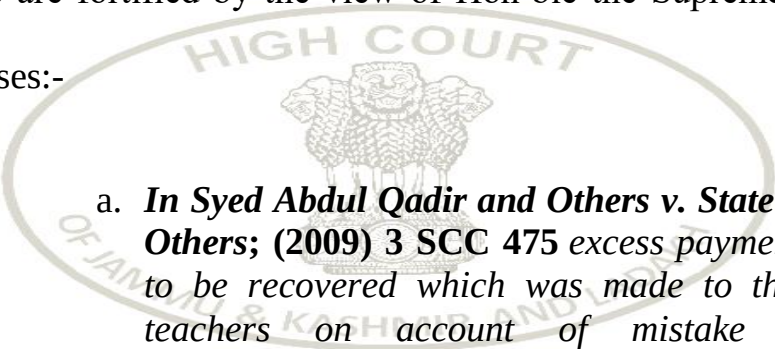
(a) The excess payment was not made on account of any misrepresentation or fraud on the part of the employee.

(b) Such excess payment was made by the employer by applying a wrong principle for calculating the pay/allowance or on the basis of a particular interpretation of rule/order, which is subsequently found to be erroneous."

22. On the same principle, the pensioners are on a better footing than the in-service employees and such pensioners can seek a direction that wrong

payment should not be recovered, as pensioners are in a more disadvantageous position when compared to in service employees, any attempt to recover an excess wrong payment would cause undue hardship to them. Admittedly, in the present case, the petitioner is not guilty of any misrepresentation or fraud in regard to excess payment on account of her promotion, thus, the respondents by no stretch of imagination can withdraw such promotion at this belated stage or can make recovery.

23. We are fortified by the view of Hon'ble the Supreme Court in the following cases:-

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- a. ***In Syed Abdul Qadir and Others v. State of Bihar and Others; (2009) 3 SCC 475*** excess payment was sought to be recovered which was made to the appellants-teachers on account of mistake and wrong interpretation of prevailing Bihar Nationalised Secondary School (Service Conditions) Rules, 1983. The appellants therein contended that even if it were to be held that the appellants were not entitled to the benefit of additional increment on promotion, the excess amount should not be recovered from them, it having been paid without any misrepresentation or fraud on their part. The Court held that the appellants cannot be held responsible in such a situation and recovery of the excess payment should not be ordered, especially when the employee has subsequently retired. The court observed that in general parlance, recovery is prohibited by courts where there exists no misrepresentation or fraud on the part of the employee and when the excess payment has been made by applying a wrong interpretation/ understanding of a Rule or Order. It was held thus:

“59. Undoubtedly, the excess amount that has been paid to the appellant teachers was not because of any misrepresentation or fraud on their part and the appellants also had no knowledge that the amount that was being paid to them was more than what they were entitled to. It would not be out of place to mention here that the Finance Department had, in its counter affidavit, admitted that it

was a bona fide mistake on their part. The excess payment made was the result of wrong interpretation of the Rule that was applicable to them, for which the appellants cannot be held responsible. Rather, the whole confusion was because of inaction, negligence and carelessness of the officials concerned of the Government of Bihar. Learned counsel appearing on behalf of the appellant teachers submitted that majority of the beneficiaries have either retired or are on the verge of it. Keeping in view the peculiar facts and circumstances of the case at hand and to avoid any hardship to the appellant teachers, we are of the view that no recovery of the amount that has been paid in excess to the appellant teachers should be made”.

- b. ***In State of Punjab and Others v. Rafiq Masih (White Washer) and Others, (2015) 4 SCC 334***, wherein this court examined the validity of an order passed by the State to recover the monetary gains wrongly extended to the beneficiary employees in excess of their entitlements without any fault or misrepresentation at the behest of the recipient. This Court considered situations of hardship caused to an employee, if recovery is directed to reimburse the employer and disallowed the same, exempting the beneficiary employees from such recovery. It was held thus:

“8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the Preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the employee concerned. If the effect of the recovery from the employee concerned would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.”

24. The law of estoppel by conduct, acquiescence also holds good against the respondents as the respondents have acquiesced their right by their own conduct and now at this belated stage, the respondents after the retirement of the petitioner cannot withdraw the said promotion which is perfectly justified, legal or for that matter, recover the excess amount. The respondents, as such, are estopped under law to question her promotion at this belated stage more particularly when she has since retired and gained another promotion by competent authority. In reference to the **Chairman, State Bank of India & ors. Vs. M. J. James** reported as (2022) 2 SCC 301, it has been stated as under:-

“39. Before proceeding further, it is important to clarify distinction between ‘acquiescence’ and ‘delay and laches’. Doctrine of acquiescence is an equitable doctrine which applies when a party having a right stands by and sees another dealing in a manner inconsistent with that right, while the act is in progress and after violation is completed, which conduct reflects his assent or accord. He cannot afterwards complain.¹⁷ In literal sense, the term acquiescence means silent assent, tacit consent, concurrence, or acceptance,¹⁸ which denotes conduct that is evidence of an intention of a party to abandon an equitable right and also to denote conduct from which another party will be justified in inferring such an intention.¹⁹ Acquiescence can be either direct with full knowledge and express approbation, or indirect where a person having the right to set aside the action stands by and sees another dealing in a manner inconsistent with that right and in spite of the infringement takes no action mirroring acceptance.²⁰ However, acquiescence will not apply if lapse of time is of no importance or consequence.

40. Laches unlike limitation is flexible. However, both limitation and laches destroy the remedy but not the right. Laches like acquiescence is based upon equitable considerations, but laches unlike acquiescence imports even simple passivity. On the other hand, acquiescence implies active assent and is based upon the rule of estoppel in pais. As a form of estoppel, it bars a party afterwards from complaining of the violation of the right. Even indirect acquiescence implies almost active consent, which

is not to be inferred by mere silence or inaction which is involved in laches. Acquiescence in this manner is quite distinct from delay. Acquiescence virtually destroys the right of the person.²¹ Given the aforesaid legal position, inactive acquiescence on the part of the respondent can be inferred till the filing of the appeal, and not for the period post filing of the appeal. Nevertheless, this acquiescence being in the nature of estoppel bars the respondent from claiming violation of the right of fair representation.”

25. The waiver or acquiescence presupposes that the persons/respondents in the present case were fully cognizant of their rights and that being so, they neglected to enforce them. Since the respondents failed to raise any grouse for a petty long period and a long period of silence and inaction on the part of the respondent amounts to acquiescence and estoppel and it was only when some statement was made by same counsel in different proceedings, the impugned Show Cause Notice was issued.

26. Ordinarily, the writ Court may not exercise its discretionary jurisdiction in entertaining the writ petition questioning a notice to show cause unless the same appears to be without jurisdiction issued in haste manner without application of mind contrary to the record and has the trappings of finality. In the instant case, it appears that the impugned show cause notice has been issued without application of mind in a haste manner to justify their stand in another petition where the petitioner was not a party that too contrary to their own record. Since, by virtue of impugned show cause notice an attempt has been made by the respondents to withdraw her promotion as Junior Accounts Officer by drawing comparison to the facts and circumstances of the another writ petition which was distinguishable coupled with the fact that she was not a party in the said writ petition.

27. We, have already held, *supra* that the present writ in peculiar facts and circumstances is maintainable against the show cause notice. Also, Learned AAG has relied upon a judgment passed by this Court in *Balwan Singh vs Union of India reported as 2003 (1) JKJ [HC] 104*. We have gone through the aforesaid judgment which is not applicable to the facts and circumstances of the present case as the challenge was thrown to the Show Cause Notice and the said challenge was held not maintainable particularly when the final order of the dismissal has been passed by the respondents which was not the subject-matter of challenge in the said petition and accordingly, the petition was dismissed whereas the facts in the present case are distinguishable as no final order of dismissal has been passed as yet, thus, the judgment relied upon by Mr. Gupta, learned AAG, is not applicable in the case in hand.

28. Mr. Gupta, learned AAG has also relied upon a judgment rendered by the Hon'ble Apex Court in **The Special Director and anr. Vs. Mohd. Ghulam Ghouse & anr.** reported as **2004 (3) SCC 440**, which is also not applicable to the case in hand as the writ petition was filed against the Show Cause Notice in initiating the departmental proceedings and the prayer was made for interim stay against the proceedings on Show Cause Notice which was declined by the Court on the ground that unless the Court is satisfied that the same was totally non-est in the eyes of law for absolute want of jurisdiction of authority to investigate the facts by holding that the writ should not interfere and deprive the authority of its statutory power by grant of such an interim relief to which the petitioner may not be entitled to even on merits.

F. CONCLUSION

29. For all what has been said above, the present writ petition is allowed and impugned Show Cause Notice No. 862-129/Gen Corr/Court cases/2016/34 dated 05.02.2018 is set aside/quashed.

30. **Disposed of** in the above terms.

(Wasim Sadiq Nargal)
Judge

(Tashi Rabstan)
Judge

Jammu
29 .07.2022
Ram Murti

