

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CIVIL APPLICATION NO. 13480 of 2021****With****R/SPECIAL CIVIL APPLICATION NO. 15931 of 2022**

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BHARAT SHIVLAL JESALPURA

Versus

STATE OF GUJARAT & ORS.

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Appearance:

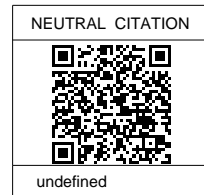
SWAPNESHWAR GOUTAM(9051) for the Petitioner(s) No. 1

MR ADITYA PATHAK, AGP for the Respondent(s) No. 1,2,3,4

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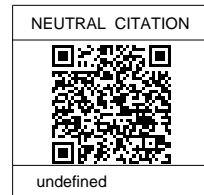
CORAM:HONOURABLE MR. JUSTICE NIKHIL S. KARIEL**Date : 08/05/2024****ORAL ORDER**

1. Heard learned Advocate Mr.Swapneshwar Goutam for the petitioner and learned AGP Mr.Aditya Pathak for the respondent State.
2. By way of Special Civil Application No.13480 of 2021, the petitioner has *inter alia* challenged decision of the respondents of fixing the pay scale of the petitioner in the Pay Scale of Rs.12000-375-16500 from Rs.14300-400-18300. The recovery sought to be initiated on the basis of such fixation vide an order dated 19.7.2021 is also sought to be questioned.
 - 2.1. By way of Special Civil Application No.15931 of 2022, the petitioner has *inter alia* challenged decision of the respondents in not releasing the pension and all other retiral benefits, though PPO has already been issued on 4.6.2019 and also not paying interest on the delayed payment, as also the benefit of Tikku Pay Commission.



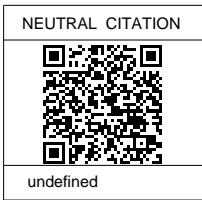
3. It would appear that vide an order dated 21.9.2021, this Court while issuing notice had *inter alia* observed that in case of recovery, the petitioner was required to be granted an opportunity of hearing and whereas under such circumstances, the proposed recovery had been stayed.

4. Insofar as the issue with regard to entitlement of the petitioner is concerned, it is submitted by learned Advocate Mr.Goutam that while the petitioner came to be appointed on 8.4.2003 as a Chief District Health Officer in the Pay Scale of Rs.14300-400-18300, from 12.3.2008 the petitioner had been suspended from service and whereas the petitioner had been reinstated on 5.12.2008. It would appear that in the interregnum, the State Government had passed a Resolution dated 11.7.2008, whereby it was *inter alia* observed that pay scale given to employees selected through GPSC were to be revised and whereas in case of 17 employees, it would be the duty of the Department to take appropriate option from the employees concerned that they may opt to remain in the post in question till retirement, and whereas if such option was given, the pay scale would not be disturbed. Such an option was to be availed within a period of two months from the date of resolution. It is the submission on part of the learned Advocate Mr.Goutam that while the petitioner was in suspension, it was always open for the Department to have sought for option from the present petitioner and whereas in case the option had not been sought for during the period of suspension, then immediately upon suspension being revoked, the respondent authorities were required to, as a special case, take option from the present petitioner. It is submitted that the option having not been given to the present petitioner at the relevant point of time and the said aspect being accepted by all concerned, more particularly as per the documents annexed with the petition, this Court may intervene and direct the



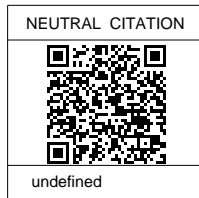
respondents not to disturb the pensionary benefits as available to the petitioner and not to fix the pay of the petitioner in the lower scale. Learned Advocate Mr.Goutam would also rely upon the communication dated 25.11.2019 by the Chief Health Personnel Officer, Health and Family Welfare Department to the Director, Family Welfare Department, more particularly whereby it was recommended that since the petitioner had not been given option at the relevant point of time, the petitioner may be given option in the year 2019 even after retirement of the petitioner. Learned Advocate would emphasize on observations made in the said communication, which would show that the option at the relevant point of time when G.R. dated 11.7.2008 had been passed had not been sought for from the present petitioner. Learned Advocate would, therefore, request this Court that since the option had not been sought for from the petitioner, no adverse consequence on account of the same should be imposed upon the petitioner, and in any case, insofar as the recovery is concerned, it is submitted by learned Advocate Mr.Goutam that the issue would stand covered by the decision of the Hon'ble Apex Court in case of **State of Punjab Vs. Rafiq Masih (White Washer), reported in (2015) 4 SCC 334.**

5. As against the submissions made by learned Advocate Mr.Goutam, the present petition is opposed by learned AGP Mr.Aditya Pathak. Learned AGP Mr.Pathak would submit that vide G.R. dated 11.7.2018, 17 employees working in Class-I posts were required to give option as to whether they would be governed by the Gujarat Civil Service (Revision of Pay) Rules, 1998, which grants a pay scale of Rs.12000-16500 or the candidates may choose to continue in the existing pay scale of Rs.14300-18300 and whereas in doing so, the candidates would have to accept that they would remain in the said posts till their retirement and they will forego option for further promotion. Learned AGP would



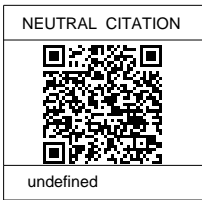
submit that the petitioner not having given any option at the relevant point of time, the respondents were absolutely justified in passing the order dated 19.7.2021. Insofar as the issue with regard to non-grant of option is concerned, it is submitted that while the G. R. dated 11.7.2008 *inter alia* envisaged that option had to be taken from the employee within two months, since the petitioner was suspended in the interregnum, therefore, option could not be availed. Learned AGP would, therefore, request that this Court may not interfere in the present petition.

6. Heard learned Advocates for the respective parties and perused the documents on record.
7. Considering the submissions, the question which arises for consideration of this Court is whether the petitioner was entitled to be granted an option as per Government Resolution dated 11.7.2008 and whereas having not given the option, whether the respondent authority is justified in passing the impugned order dated 19.7.2021, whereby the pay scale of the petitioner had been refixed and recovery had also been contemplated. In this regard, it would be pertinent to note that while Government Resolution dated 11.7.2008 *inter alia* envisaged that option was to be taken from 17 employees, including the present petitioner as to whether they would be inclined to continue on the pay scale, which was published by the GPSC, at that time, in the advertisement, subject to the employee waiving his right for future promotion and whereas the same would entail a salary of the employee concerned being fixed in the appropriate pay scale as per Gujarat Civil Services (Pay Revision) Rules, 1987 and 1998. While the option was to be taken within a period of two months from the date of Resolution undisputedly no option had been sought for from the present petitioner. As noted herein above, it



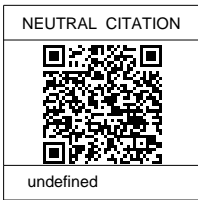
would clearly appear that at the relevant point of time, while the G. R. had been passed, the petitioner was under suspension and whereas even after the suspension came to be revoked and the petitioner was reinstated on 5.12.2008, no option had been sought for from the present petitioner.

7.1. In this regard, it would also be profitable to note that the Chief Personnel Officer of the Health and Family Welfare Department had written to the Additional Director vide communications dated 25.11.2019 and 11.12.2019, recommending that since at the relevant point of time, the petitioner had not been given any option, he could be given an option even after his retirement. It would also appear as per the file notings, which have been placed on record that the recommendation based upon representation of the petitioner dated 15.11.2019 had been considered by the Department and whereas the Principal Secretary, Health and Family Welfare Department had also taken a view that the case of the petitioner be considered sympathetically more particularly since the petitioner was known to be an upright/sincere officer. It also appears that probably the Finance Department i.e. the Additional Chief Secretary, Finance also did not object to such recommendation. Under such circumstances, the reason for the respondent No.3 taking a decision to refix the pay scale without granting any option, more particularly without stating any reason for not abiding by the recommendation of the Principal Secretary appears to be without appreciating the entire context. As it is, even in the affidavit-in-reply, there is no justification appearing as to the circumstances in which the respondent No.2 had passed the impugned order dated 19.7.2021, in spite of the recommendations to the contrary by senior officers. The affidavit-in-reply, while it seeks to justify the impugned order, is completely silent as to why the respondents were not inclined to give an opportunity to the petitioner



for exercising his option as per Government Resolution dated 11.7.2008, more particularly when it is undisputed that the petitioner had not been issued with any option at the relevant.

7.2. It appears to this Court that while the State had taken a policy decision to give an appropriate option to certain employees vide Government Resolution dated 11.7.2008 and whereas while the petitioner was also one such employee from whom option ought to have been sought for, yet on account of the fact that the petitioner was under suspension, probably option had not been sought for. As it is, it would appear that during the time when the petitioner was under suspension i.e. from 12.3.2008 to 5.12.2008, the Head Quarter of the petitioner was fixed with the office of the Commissioner, Health and Medical Services and Medical Education, as clearly mentioned in the communication dated 25.11.2019. Thus, at the relevant point of time, in spite of the fact that the petitioner was under suspension, there did not appear to be any obstruction against option being sought for from the present petitioner. Even otherwise, upon suspension being revoked and the petitioner being reinstated on 5.12.2008, even at that time, the respondents ought to have ensured that option was taken from the present petitioner as per Government Resolution dated 11.7.2008. In the considered option of this Court, having not given any option to the petitioner as per the above referred G.R., at the relevant point of time, and even after the reinstatement of the petitioner and having permitted the petitioner to continue as such till his retirement, it was completely unjustified on part of the respondents to have refixed the salary of the petitioner from the pay scale of Rs.14,300 – Rs.18,300 to Rs.12,000 – Rs.16,500. Since the respondent State itself was at fault on account of not providing option to the petitioner, it was not open for



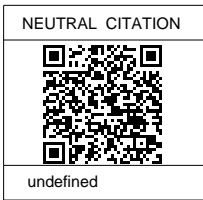
respondent authorities to have penalized the petitioner for their fault.

7.3. Furthermore, since the present petition is preferred by the petitioner praying for fixation in the pay scale of Rs.14300-400-18300 (Prayer B) and whereas since the same would amount, in other words, to the petitioner stating that if given an opportunity, he would have exercised option as per Government Resolution dated 11.7.2008 to remain in the pay scale of Rs.14300 – Rs.18300 at the relevant point of time, therefore, this Court is of the considered opinion that while the pension would succeed and appropriate directions would be passed, but at the same time, no purpose would be served by directing the respondents to seek option of the present petitioner as per Government Resolution dated 11.7.2008, rather this Court deems it appropriate to direct the respondents to treat the case of the petitioner as if he had chosen the option of remaining in pay scale of Rs.14300 – Rs.18300.

8. In view of the above discussion, observations and conclusion, the petition succeeds. The impugned order dated 19.7.2021 is hereby quashed and set aside with the following directions :-

8.1. That the respondents shall refix the pay of the petitioner in the pay scale of Rs.14300 – 400 – 18300 as per Government Resolution dated 11.7.2008 and to take appropriate action pursuant to the same and whereas since the petitioner has already retired upon attaining the age of superannuation on 30.10.2019, the respondents are directed to fix and pay the pension and other retiral benefits of the petitioner accordingly;

8.2. The above exercise shall be completed within a period of ten



weeks from the date of receipt of this order and all arrears, which the petitioner would be entitled to on the above basis shall be paid to the petitioner within a period of four weeks thereafter;

8.3. Insofar as the prayers with regard to interest for delayed payment, benefit of Tikku Pay Commission, etc., the petitioner shall make a separate representation to the concerned respondents within a period of two weeks from today and the respondents shall scrutinize and take a decision in accordance with the law, within a period of eight weeks thereafter.

9. With the above observations and directions, the present petitions stand disposed of as allowed. Direct service is permitted.

V.V.P. PODUVAL

(NIKHIL S. KARIEL,J)