
(2013) 07 AHC CK 0193

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 5251 of 2011

Doctor Prasad Yadav

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 30-07-2013

Acts Referred:

Citation : (2013) 9 ADJ 671 : (2014) 4 ALJ 357 : (2013) 4 UPLBEC 3112

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : B.P. Yadav and R.K. Ojha, for the Appellant; C.S. Sharma, Rajeev Nayan Singh and Yogendra Kumar Srivastava, for the Respondent

Final Decision : Dismissed

Judgement

Sudhir Agarwal, J.—This writ petition under Article 226 of the Constitution has come up at the instance of Doctor Prasad Yadav, Son of Sri Laudhar. The petitioner, aggrieved by order dated 14.1.2011 passed by Director General, Medical Health Services, U.P. Lucknow (hereinafter referred to as "DGMH") holding that those, who do not possess requisite qualification as prescribed in U.P. Pharmacists, Service Rules, 1980 (hereinafter referred to as "Rules, 1980") and are not registered with U.P. Pharmacy Council, cannot be allowed to work as Pharmacist and therefore, petitioner, who was a Nursing Assistant, would be entitled for the post and pay scale applicable to that post only, has come up in this writ petition seeking a writ of certiorari for quashing the same. Another impugned order dated 15.1.2011 is an order passed as a consequence of the order dated 14.1.2011, by Chief Medical Officer, Mirzapur so as to give effect to the aforesaid order and also to make recovery of the amount paid to the petitioner. The facts in brief giving rise to the present writ petition are as under:

2. The Chief Medical Officer, Mirzapur appointed petitioner, temporarily, as Nursing Assistant, and, posted him at Primary Health Centre Dudhi, Mirzapur vide order dated 28.12.1982 in the pay scale of Rs. 330-495. The educational qualification possessed by the petitioner is intermediate in non-science subjects,

as is evident from his Intermediate (Supplementary) Examination, 1975 certificate, placed on record as Annexure CA-1 to the counter-affidavit, filed on behalf of respondents 2 to 5.

3. Pursuant to the aforesaid order of appointment, petitioner joined the post of Nursing Assistant on 29.12.1982, whereafter, he was transferred from one place to another. It appears that post of Pharmacist at newly established Primary Health Centre Nai Bazar, Sonbhadra was vacant. On the request of petitioner and on the recommendation of In-charge Medical Officer, the Chief Medical Officer, Sonbhadra by order dated 23.10.1989, Annexure C.A.2 to the counter-affidavit, transferred petitioner, who was working as Nursing Assistant at Primary Health Center, Kakrahi, to Nai Bazar, Sonbhadra, for discharging duties of vacant post of Pharmacist with the further condition that as soon as Pharmacist shall be posted at Primary Health Centre, Nai Bazar, Sonbhadra, the petitioner shall revert back to his parent post.

4. On 25.7.1990, one Indrajeet Prasad, Pharmacist was posted at New Primary Health Centre, Nai Bazar, Sonbhadra. The petitioner was directed to hand over charge of the post of Pharmacist to Sri Indrajeet Prasad. The copy of the service book of the petitioner is on record as Annexure C.A.7. From page 26 thereof, it appears that petitioner thereafter functioned at Primary Health Centre Duddhi and his service was verified by Medical Officer Incharge, Duddhi for the period from 1.7.1990 to 31.10.1990 whereafter he was transferred to Primary Health Centre, Bhadohi, Varanasi by order dated 23.10.1990, pursuant whereeto, he was relieved from Primary Health Centre, Duddhi on 2.11.1990 and joined at Primary Health Centre, Bhadohi Varanasi, whereat, in the service book, his designation is shown as "Nursing Assistant" and thereat he was confirmed on the aforesaid post in the scale of Rs. 330-495 w.e.f. 1.4.1991 vide order dated 19.8.1991.

5. With the implementation of revised pay scale w.e.f. 1.1.1986, he was placed in the pay scale of Rs. 775-1025. The petitioner was further transferred vide order dated 14.7.1993 to P.A.C. Hospital, Chunar, Mirzapur and in furtherance thereof, he was relieved from Bhadohi on 9.8.1993.

6. In the meantime, it appears that in the service book, at page 5 and 6, his designation was shown as "Pharmacist" hence a clarification was issued by Chief Medical Officer, Sonbhadra vide letter dated 26.2.1993 addressed to Medical Superintendent, M.B.S. Hospital, Bhadohi, Varanasi that the entry made in the service book as "Pharmacist" was a clerical error, inasmuch as, petitioner was a Nursing Assistant and paid salary in the scale admissible to a Nursing Assistant, therefore, entry otherwise in the service book should be read correctly and a warning in this regard was already administered to Incharge, Medical Officer for not repeating the same in future.

7. The petitioner claimed that he was placed in the pay scale applicable to Pharmacist (Untrained), which was revised to Rs. 950-1500 and therefore, he should be given the said pay scale. To enforce the aforesaid claim, he came in

Writ Petition No. 9932 of 1993, wherein, this Court passed the following order on 23.3.1993:

Let an ad interim mandamus be issued to the opposite parties Nos. 2, 3 and 4 to pay salary to the petitioner in pay scale of Rs. 950-1500 within a period of one month from the date of filing of a certified copy of this order before the opposite party No. 3 or to show-cause by 30.4.1993.

List this writ petition for admission on 4.5.1993.

8. Subsequently, on 8.11.1993, the Court passed the following order in the above writ petition:

Counter and rejoinder-affidavits have been exchanged. List this writ petition for final disposal on 24th January, 1994.

Meanwhile, the respondents are directed to pay salary to the petitioner as required by the Rules before the next date of hearing.

9. Complaining that he was not being paid salary admissible to Pharmacist (Untrained) despite the interim orders of this Court in above mentioned writ petition, he filed a Contempt Petition No. 828 of 1994 and in furtherance of the aforesaid proceedings, DGMH passed order on 10.3.1997 (Annexure 5 to the writ petition) for payment of salary to the petitioner in the scale of Rs. 950-1500, which has further been revised to Rs. 1200-1800. It also says that to honour Court's order, work of Un-trained Pharmacist be taken from the petitioner.

10. Having succeeded to this extent, petitioner then claimed that he should be sent for training meant for untrained Pharmacist in the light of the Government Order dated 18.11.1981 (Annexure 7 to the writ petition) and this request was acceded to by DGMH as communicated vide letter dated 8.10.1998 (Annexure 8 to the writ petition). The petitioner underwent aforesaid training from 14.1.1999 to 4.6.1999. Thereafter, salary was fixed in the pay scale of Rs. 4500-7000 admissible to a "trained Pharmacist" by Chief Medical Officer, Mirzapur vide order dated 17.6.1999 (Annexure 10 to the writ petition) and the said Officer proceeded further by order dated 1.7.1999, confirming petitioner on the post of Pharmacist w.e.f. 1.3.1999 in view of Government Order dated 7.2.1991. The petitioner continued thereafter to enjoy the post and pay scale of "Pharmacist" and probably this matter would not have been investigated further if another incumbent one Ram Naresh Sharma had not claimed similar advantage as made admissible to the petitioner.

11. Ram Naresh Sharma was a Ward boy but under the Orders of Chief Medical Officer concerned, he was permitted to discharge duties of Pharmacist. In view thereof he claimed salary on the said post of Pharmacist. Having failed to get any relief with the Department, Ram Naresh Sharma came to this Court in Writ Petition No. 48153 of 2006 with a prayer that he should be paid salary admissible to the post of Pharmacist. When contested by the Department on the ground that he was not qualified and was never appointed on the post of Pharmacist, he filed

an affidavit before this Court bringing on record the case of petitioner and alleged that like the petitioner, who was unqualified, yet has been confirmed as Pharmacist, and given salary in the scale admissible to the post of Pharmacist, he (Ram Naresh Sharma) was also entitled for similar treatment.

12. In that view of the matter, this Court connected writ petition No. 48153 of 2006 of Ram Naresh Sharma with earlier writ petition of present petitioner i.e. Writ Petition No. 9932 of 1993 and heard both the matters together. Both the writ petitions were dismissed on 25.1.2010. The operative part of the order passed in Writ Petition No. 48153 of 2006 of Ram Naresh Sharma reads as under:

Learned counsel for the petitioner fairly conceded this fact before this Court that admittedly the petitioner is not qualified to be appointed on the post of Pharmacist but he is claiming a parity in view of the fact that one similarly situated person D.P. Yadav petitioner in the writ petition 9932 of 1993 is also having the same qualification which the petitioner is having and officiating on the post of Pharmacist and the salary for the said post is being paid.

After hearing learned counsel for the petitioner I am of the opinion that if a person is not qualified to be appointed on the post of Pharmacist this Court cannot pass the order directing the authority to pay the salary. In such a situation, no relief can be granted to the petitioner.

The writ petition is hereby dismissed.

It is, however, brought to the notice of the Court that various persons who are not qualified to be appointed or promoted on the post of Pharmacist or any other higher post are being permitted by the official concerned under whom they were working officiate on higher post like the petitioner in the Civil Misc. Writ Petition No. 9932 of 1993. In such a situation, the Director General, Medical and Health U.P. Sashan, U.P. is directed to make an enquiry to this effect that if certain persons are officiating on the post of Pharmacist is being permitted by the immediate officer to work, on the post of Pharmacist though, they are not having qualification, then under what circumstances, they are being permitted to work and are being paid salary. The Director General will enquire into the matter specifically from Chief Medical Officer, Mirzapur that under what circumstances, D.P. Yadav petitioner in the writ petition No. 9932 of 1993 has been permitted to work on the post of Pharmacist and salary is being paid. If any person is working in the State of U.P. like such they should immediately be reverted to their original post and salary to that effect which has already been paid though they were not legally entitled should be recovered from those persons.

The Director General will also take into consideration the fact and to make an enquiry and fix the responsibility of those officers and the recovery of amount of salary which has been paid to such employees should be recovered from those officers from their personal account.

The compliance of this order be done within the period of two months from the

date of placement of the certified copy of this order before respondent No. 2 The Director General Medical Health, Lucknow. The Registrar General is directed to send the copy to the Director General, Medical Health within the period of two weeks for compliance.

The writ petition is dismissed.

No order as to costs.

(emphasis added)

13. The petitioner (Doctor Prasad Yadav)'s writ petition No. 9932 of 1993 was also dismissed in view of the aforesaid order passed in Writ Petition No. 48153 of 2006 and the order dated 25.1.2010 passed on the present petitioner's writ petition No. 9932 of 1993 reads as under:

In view of the order passed in writ petition No. 48153 of 2006 (Ram Naresh Sharma v. State of U.P. and others), the writ petition is dismissed.

No other as to costs.

14. As a consequence of the aforesaid order, DGMH issued a circular dated 19.7.2010 addressed to all the Additional Directors, Chief Medical Officers, etc. communicating them this Court's order dated 25.1.2010 and directing that all untrained Pharmacist, who are working in their jurisdiction, their list should be prepared and made available to DGMH within fifteen days.

15. The then Chief Medical Officer, Mirzapur apprehending some adverse action against him, firstly required all the Pharmacists working in his jurisdiction to produce their diploma certificate vide letter dated 24.7.2010. Since the petitioner, admittedly, could not have produced any such certificate, he (Chief Medical Officer, Mirzapur) passed another order on 24.7.2010 for reverting the petitioner as Nursing Assistant and for recovery of excess payment made to him, allegedly in purported compliance of this Court's order dated 25.1.2010 and DGMH's circular dated 19.7.2010.

16. The present petitioner assailed the Chief Medical Officer, Mirzapur's order dated 24.7.2010 in Writ Petition No. 46916 of 2010 alleging that DGMH by order dated 19.7.2010 had not directed for any reversion or recovery but has only required information about untrained Pharmacist working in the area/authority of various Medical Officers and therefore Chief Medical Officer was not competent to pass the order dated 24.7.2010 since it was only DGMH, who could have passed appropriate order.

17. This contention prevailed and writ petition was partly allowed vide judgment dated 12.8.2010 with the following direction:

It is, therefore, not possible to sustain the order dated 24.7.2010 passed by the Chief Medical Officer, Mirzapur. It is, accordingly, set-aside. It shall, however, be open to the Director General, Medical and Health, U.P. to pass an appropriate

order in the light of the directions issued by the Court in Writ Petition No. 48153 of 2006.

18. It is in furtherance thereto, DGMH has passed impugned order dated 14.1.2011 and Chief Medical Officer, Mirzapur's order dated 15.1.2011 is consequential thereto.

19. Sri R.K. Ojha, Advocate assisted by Sri Akhilesh Kumar Singh, Advocate, appearing for the petitioner contended that petitioner has worked as Pharmacist for the last more than two decades, having been confirmed thereon after completion of departmental training meant for Pharmacist, his appointment cannot be held illegal on the aforesaid post at this late stage and rigour of the rule relating to qualification should be deemed to stand relaxed in view of Rule 27 of Rules, 1980. He also contended that there is no fraud or misrepresentation on his part and therefore, no recovery of the salary paid to him on the post of Pharmacist is permissible from him.

20. I have considered the aforesaid submission and perused the record.

21. Before proceeding further, I may refer to one own document of the petitioner, which has been placed on record as Annexure 17 to the writ petition. It is an application dated 17.6.1999 submitted by the petitioner to the Secretary/Registrar, Pharmacy Council, Aarif Building, U.P. Lucknow seeking his registration under U.P. Pharmacy Council and therein, he has mentioned his date of birth as 18.8.1957, date of first appointment in the department as 29.12.1982, the post of appointment as Pharmacist and educational qualification as Intermediate. At item No. 9 of Annexure 17, he has mentioned that pursuant to the DGMH's order dated 22.12.1998, he was given a practical training of 750 hours.

22. It is not disputed that this application has been rejected by U.P. Pharmacy Council by order dated 31.12.1999 on the ground that petitioner having not passed diploma course in Pharmacy from any recognized institution, which is the minimum qualification for registration under Pharmacy Act, 1948 (hereinafter referred to as "Act, 1948") vide Section 32(2)(2), his registration with U.P. Pharmacy Council is not permissible.

23. Sri R.K. Ojha, learned counsel for the petitioner has not disputed before this Court that for the purpose of registration with U.P. Pharmacy Council, one has to possess requisite qualification prescribed in Section 32 thereof i.e. diploma in Pharmacy from any recognized institution, which the petitioner does not possess. Therefore, he is not eligible for registration with U.P. Pharmacy Council governed by Act, 1948.

24. This is one part of the matter. Now the next limb is the one governed by Rules, 1980.

25. It is not disputed before this Court by learned counsel, appearing for either side, that appointment to the post of Pharmacist is governed by statutory rules framed in exercise of power under proviso to Article 309 of the Constitution i.e.

Rules, 1980. The appointing authority to the post of "Pharmacist" is mentioned in Rule 3(a) of Rules, 1980, which says that in respect of Pharmacists, working in or attached to the officers/hospitals, the appointing authority would mean, (i) Joint Director (Employees State Insurance), (ii) Chief Medical Officer, (iii) Senior Superintendent of Medical Colleges, (iv) Senior Superintendent of Hospitals, (v) Superintendent, Women's Hospitals.

26. Part III of Rules, 1980 deals with recruitment and Rule 5 thereof provides that recruitment to the post of Pharmacist shall be made from only one source i.e. by direct recruitment. Part IV talks of qualifications and Rule 8, thereof provides for academic qualification, and reads as under:

Academic qualification.--A candidate for direct recruitment to the posts in the service must possess diploma in Pharmacy from a recognised institution and must also be registered with the State Pharmacy Council Uttar Pradesh.

(emphasis added)

27. Rule 10 provides for age. For direct recruitment, minimum age is 18 years and maximum is 28 years, subject to further relaxation in respect of reserved categories, i.e. Scheduled Castes, Scheduled Tribes and others, as notified by the Government from time to time. The procedure for recruitment is provided in Part V, which empowers the Director to determine number of vacancies to be filled during the course of the year and to notify the same with the Employment Exchange and also advertisement thereof in leading newspapers. A Selection Committee is also to be constituted for recruitment vide Rule 15(i), which consists of the following:

I. Additional Director, to be nominated by the Director;

II. Joint Director, dealing with establishment of Pharmacists.

III. Secretary, State Pharmacy Council.

28. The Selection Committee, after making selection, is required to submit list of selected candidates in order of merit vide Rule 15(2) to the Director, who shall forward" the requisite number of names, in order of merit, from the list, to the concerned appointing authority/appointing authorities, for appointment.

29. Since the petitioner has placed reliance on Rule 27 also, which empowers the State Government to relax the Rules regulating conditions of service, therefore, I may reproduce the same also, which shall be discussed at length, a bit later. Rule 27 reads as under:

Relaxation from the conditions of service.--Where the State Government is satisfied that the operation of any rule regulating the conditions of service of persons appointed to the service causes undue hardship in any particular case, it may notwithstanding anything contained in the rules applicable to the case, by order, dispense with or relax the requirements of that rule to such extent and subject to such conditions as it may consider necessary for dealing with the case

in a just and equitable manner.

(emphasis added)

30. it is evident from the aforesaid that minimum qualification for appointment to the post of Pharmacist is diploma in Pharmacy and he must also be registered with U.P. Pharmacy Council, since that is a statutory requirement to enable any person to function as Pharmacist in the State of Uttar Pradesh in view of Act, 1948. Further, the post of Pharmacist cannot be filled in by taking a person working in any other post treating it a promotion. There is only one source of recruitment i.e. direct. Lastly, the power to make selection is not vested with appointing authorities but selection is at the directorate level i.e. the Director, who shall constitute a Selection Committee in terms of Rule 15(1) and the person selected by such committee shall only be appointed by the appointing authorities.

31. Learned counsel for the petitioner could not dispute that none of these conditions under the Rules, 1980 are satisfied in the case in hand. The appointment of petitioner to the post of Pharmacist cannot be said to have fulfilled any of the aforesaid conditions and procedure. Irrespective of whatever has transpired, the fact remains that the orders passed by respondents, having the effect of appointing or confirming petitioner as "Pharmacist", are, ex facie, illegal and a nullity in the eyes of law.

32. This Court is surprised to see how DGMH as also the authorities subordinate to him could have functioned in this case in flagrant violation of statutory rules as also the statute, i.e. Act, 1948, by permitting a person to function as "Pharmacist" though neither he was qualified nor could have been appointed as "Pharmacist". The more shocking aspect of the matter is that respondent authorities have attempted to give a cover to their misdeed in the garb of alleged compliance of judicial orders, though, as a matter of fact, it was not and could not have been. At no point of time this Court permitted or required the respondents to proceed in breach of statutory provisions so as to confer status of Pharmacist upon the petitioner and also to pay him salary in the scale admissible to such post of "Pharmacist", without any application of mind or may be, a deliberate misreading or mis-construction. Certain orders have been passed, may be for reasons other than bona fide, so as to make the petitioner "Pharmacist", through back door, though neither he was qualified nor otherwise eligible nor could have been so allowed even to function as "Pharmacist" in view of Act, 1948.

33. It is well-settled that a person, who does not possess requisite qualification, prescribed in law for a particular post cannot be appointed to such a post and if an appointment in breach of such statute has been made, it would be a nullity and non-est.

34. In Mohd. Sartaj and Another Vs. State of U.P. and Others, , the Apex Court held that a person lacking requisite qualification on the date of appointment, cannot derive any benefit out of such appointment since it is a nullity and void ab

initio and, thus, does not confer any right upon the incumbent concerned to hold the post. Relevant observations contained in paras 19 and 21 are as under:

In view of the basic lack of qualifications, they could not have been appointed nor their appointment could have been continued. Hence the appellants did not hold any right over the post.

It is settled law that the qualification should have been seen which the candidate possessed on the date of recruitment and not at a later stage unless rules to that regard permit it.

35. In *Pramod Kumar Vs. U.P. Secondary Education Services Commission and Others*, , has observed as under:

If the essential educational qualification for requirement to a post is not satisfied, ordinarily the same cannot be condoned. Such an act cannot be ratified. An appointment which is contrary to the statute/statutory rules would be void in law.

36. Similarly, a Division Bench of this Court (in which I was also a member), in Special Appeal No. 1 (def.) of 1998 (*Vijai Kumar Singh v. State of U.P. and others*) decided on 23.2.2006, following the Apex Court's decision in *Mohammad Sartaj* (supra), has clearly held that any appointment made in violation of Rules is void ab initio.

37. Act, 1948 makes it impermissible for a person to function as "Pharmacist" unless he possess a requisite qualification and registered with U.P. Pharmacy Council. The respondents, in the case in hand, by appointing petitioner as "Pharmacist" and permitting him to work as such, have clearly not only breached the aforesaid provision but are also guilty of passing illegal orders.

38. Sri R.K. Ojha, learned counsel for the petitioner attempted to submit though meekly, that the petitioner was given appointment as "Pharmacist" as also the pay scale applicable thereto and training pursuant to the interim orders passed by this Court in petitioner's earlier writ petition No. 9932 of 1993.

39. I find no force in the submission. The first interim order passed on 23.3.1993 is only a kind of interim mandamus directing respondents No. 2, 3 and 4, either to pay salary to the petitioner in the scale of Rs. 950-1500 or to show-cause. The respondent Nos. 2, 3 and 4 impleaded in the aforesaid writ petition were, Director, Chief Medical Officer, Varanasi and Medical Superintendent, M.B.S. Government Hospital Bhadohi. It appears that respondents filed counter-affidavit and when pleadings were exchanged, this Court passed order on 8.11.1993 directing listing of the case for final disposal on 24.1.1994 but in the meantime, respondents were directed to pay salary to the petitioner as required by the Rules. Therefore, respondents were supposed to act strictly in accordance with the rules. This Court never permitted them to proceed in flagrant violation and breach of mandatory statutory provisions with respect to the appointment on the post of Pharmacist. It appears that respondents, in fact did not pass any order whatsoever, pursuant to the order dated 8.11.1993, giving an occasion to the

petitioner to come in a contempt petition and under the pressure of contempt proceedings, the then Director (Medical Care) Sri S. Saran issued order dated 10.3.1997, which is the first order to create a basic ground for petitioner for conferment of the status and designation of "Pharmacist" and the pay scale admissible thereto.

40. A perusal of letter dated 10.3.1997, (Annexure 5 to the writ petition), shows that Sri S. Saran, the then Director, (Medical Care) virtually misconstrued the entire chronology commencing from the date of appointment of petitioner. The petitioner, admittedly was appointed as Nursing Assistant by Chief Medical Officer, Mirzapur by order dated 28.12.1982 but the pay scale admissible on the post of Nursing Assistant mentioned in the appointment letter was Rs. 330-495. It is not in dispute that petitioner, lacking qualification for the post of Pharmacist, though could not have been appointed as Pharmacist but could have been appointed as Nursing Assistant at the relevant time i.e. in December, 1982. The pay scale admissible to a Nursing Assistant was Rs. 315-440. Sri Brij Narain, the then Chief Medical Officer, Mirzapur committed a blatant mistake/error in mentioning the pay scale admissible to the post of Nursing Assistant. Instead of Rs. 315-440, he mentioned it as Rs. 330-495.

41. Sri S. Saran, the then Director (Medical Care) took advantage of this wrong mention of pay scale and ignoring completely that under the statutory rules, petitioner could not have been appointed as Pharmacist, proceeded to hold that since the petitioner was appointed in the scale of Rs. 330-495, which was the pay scale admissible to Pharmacist (untrained), therefore, he should be treated to be a "Untrained Pharmacist" from the date of his first appointment and should be given respective revised scale accordingly. Thereafter, the respondents took advantage of a Government Order dated 18.11.1981, which referred to an earlier Government Order dated 30.9.1981, relating to departmental training to "untrained Pharmacist" and by referring to the same, Sri A.G. Rizvi, the then Director (Medical Care) vide letter dated 8.10.1998, communicated the authorities concerned to provide one year Pharmacist training to petitioner alleging it to have been approved by DGMH.

42. Here, the petitioner completed a little lessor than six months training (750 hours practical training) and on the basis thereof, the then Chief Medical Officer, Mirzapur, got encouraged not only to confirm petitioner as "Pharmacist" but also allowed him trained pay scale vide orders dated 17.6.1999 and 1.7.1999 respectively.

43. The patent illegality in this exercise, on the part of respondents vis-?-vis petitioner, would have remained under carpet, had the similar benefit would not have been claimed by another unsuccessful person i.e. Ram Naresh Sharma and when he came to this Court, all this mischief played by respondents, in which the petitioner was an active participant and beneficiary, came to be revealed, whereafter a tough view was taken by this Court, and, while dismissing writ petition, an order was passed for making appropriate enquiry as to how all these

illegalities could take place and also for recovery of illegally paid salary to undeserving, unqualified and illegally appointed persons.

44. I do not find that so far as this Court is concerned, at any point of time it has allowed or directed respondents to do something, which is not permissible in law.

45. Even considering the question of untrained Pharmacist, it is not in dispute that statutory rules under proviso to Article 309 of Constitution were framed, for the first time, in 1980 i.e. Rules, 1980 published by notification dated 18.12.1980. Therefore, on and after 18.12.1980, no appointment could have been made on the post of Pharmacist, if one did not possess qualification prescribed in Rule 8 thereof. The earlier executive orders, if any, existed, permitting appointment/engagement of untrained Pharmacist, could not have continued after promulgation of Rules, 1980. The executive orders issued in 1981 in respect of untrained Pharmacist obviously would have included within its ambit only those untrained Pharmacist, if any, appointed before enforcement of Rules, 1980 for the reason that after enforcement of Rules, 1980, no untrained Pharmacist i.e. one lacking qualification under Rule 8 of Rules, 1980 could have been appointed at all.

46. Now coming to the question, whether there can be relaxation deemed or otherwise under Rule 27 of Rules, 1980, in my view, it can be looked into from two angles. Firstly, what can be relaxed under Rule 27 and whether it will include minimum essential qualifications prescribed under Rule 8 or not and secondly, even otherwise in general, whether relaxation in the manner, as pleaded and argued by learned counsel for the petitioner in the matter of possession of minimum qualification could be conceded.

47. A bare perusal of Rule 27 shows that operation of any rule including conditions of service of persons appointed to the service may be dispensed with or relaxed to such extent and subject to such conditions as may be considered necessary by State Government. Therefore, this Rule applies in respect of relaxation of rules which regulates conditions of service. The prescription of eligibility and qualifications, to my mind, is not a rule regulating conditions of service of a person appointed in a service but it relates to the Stage at which such person enters into service.

48. The distinction between rules pertaining to "recruitment" and those regulating "conditions of service" has been considered time and again. In Keshav Chandra Joshi and others etc. Vs. Union of India and others, , referring to distinction between the two sets of rules, it was held that rule, which permits relaxation pertaining to conditions of service cannot be applied for seeking relaxation of rules pertaining to recruitment.

49. Reiterating the same in Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India (UOI) and Others, , the Court said:

Conditions of recruitment and conditions of service are distinct and the later is

precedent by an appointment according to Rules. Former cannot be relaxed.

50. In para 31 of the judgment in Syed Khalid Rizvi (supra), the Court said that eligibility for recruitment is a condition of recruitment and not a condition of service, hence not relaxable.

51. Taking a similar view in Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others, , the Court said:

The decisions of this Court have recently been requiring the strict conformity with the recruitment rules for both direct recruits and promotees. The view is that there can be no relaxation of the basic or fundamental rules or recruitment.

52. In service jurisprudence three terms are of wide application, have a definite concept and well known to those who deal in the subject. This is called "common parlance". These three terms are "recruitment", "appointment" and "conditions of service". The distinction between "recruitment" and "conditions of service" is well established.

53. The meaning of term "recruitment" and its distinction vis-?-vis "appointment" came to be considered in Prafulla Kumar Swain Vs. Prakash Chandra Misra and Others, and the Court said that the term "recruitment" connotes and signifies enlistment, acceptance, selection or approval for appointment. Certainly, this is not actual appointment or posting in service. In contradiction thereto the word "appointment" means the actual act of posting a person to a particular office. Similarly, in K. Narayanan and others Vs. State of Karnataka and others, , the Court said that "recruitment" according to dictionary meaning is "enlistment". It is a comprehensive term and includes any method provided for inducting a person in public service. However, in the context of that case the Court proceeded to observe that appointment, selection, promotion, deputation are well known methods of recruitment and even appointment can be made by transfer.

54. The term "conditions of service" is also no more res integra, having been considered and defined by Courts, time and again.

55. One of the earliest known case considering the term "conditions of service" is AIR 1949 112 (Privy Council) . Therein Privy Council considered the term "conditions of service" as mentioned in Section 243 of Government of India Act, 1935. It says that the term "conditions of service" must mean all the conditions on which a man serves and they must include inter alia the tenure of his service, the method by which he may be dismissed or reduced in rank etc.

56. In State of Madhya Pradesh and Others Vs. Shardul Singh, , the Court explain the expression "conditions of service" as under:

The expression "conditions of service" is an expression of wide import. It means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it in matters like

pension etc.

57. In I.N. Subba Reddy Vs. Andhra University and Others, , the Court explain the term as under:

The expression "conditions of service" means all those conditions which regulate the holding of a post by a person right from the time of his appointment till his retirement and even beyond it, in matters like pension etc.

58. Same view was taken in para 6 of the judgment in Mysore State Road Transport Corporation Vs. Mirja Khasim Ali Beg and Another, .

59. In Lily Kurian Vs. Sr. Lewina and Others, , in para 13 of the judgment, the Court referred to above decisions and observed that the expression "conditions of service" includes everything from the stage of appointment to the stage of termination of service and even beyond, including the matter pertaining to disciplinary action.

60. This Court has also discussed and reiterated the same view in Civil Misc. Writ Petition No. 6325 of 2004 (Smt. Rajni Dubey v. State of U.P. and others) decided on 29.3.2007, Committee of Management, Lala Babu Baijal Memorial Inter College, Lodipur, Ghaziabad and Another Vs. State of U.P. and Others, , Civil Misc. Writ Petition No. 34797 of 2011 (Sunil Kumar Pandey and others v. State of (U.P. and others) decided on 24.6.2011 and Civil Misc. Writ Petition No. 52243 of 2007 (Dr. Rajeev Ranjan Misra and others v. State of U.P. and others) decided on 30.10.2007.

61. Recently the Apex Court has also discussed all the relevant aspect of the matter in State of Orissa and Another Vs. Mamata Mohanty, and has held that if a person does not possess requisite eligibility qualification, his appointment is illegal and has to be quashed. It has also held that in absence of enabling provision for grant of relaxation, no relaxation can be made. Even if such a power is provided under the statute it cannot be exercised arbitrarily and therefore, the Court relied on its earlier decision in Union of India (UOI) Vs. Dharam Pal Etc., . The Court also held that power of relaxation cannot be implied or taken to be incidental or necessary power for execution of necessary provision.

62. It is then contended that salary paid to the petitioner on the post of Pharmacist, even if not legal or valid, for that petitioner was not at fault, inasmuch as, neither there was any fraud nor misrepresentation on his part and therefore, recovery of amount of salary, paid to him on the post of Pharmacist, cannot be recovered from him.

63. First I proceed to consider whether the amount, if has been wrongly or illegally paid, can be recovered or not. This aspect has been considered in a catena of authorities time and again.

64. The first is State of Haryana and another Vs. O.P. Sharma and others, . There an ad hoc interim relief was granted in 1972 by the Government on slab basis

pending fixation of additional dearness allowance. No formula with reference to cost of living was adopted while granting ad hoc relief. When the formula for grant of additional dearness allowance of the cycle of increase by 8 points in the Consumer Price Index was adopted by the State Government, it realised that the ad hoc interim relief was in excess by Rs. 9.40 to Rs. 45 per month depending on the pay-slab of a Government servant. It then decided to adjust excess amount paid in subsequent emoluments in instalments, rather than lump sum recovery of entire excess amount. Such order was passed in March 1974. The Court did not find order bad, illegal, arbitrary, unreasonable or unfair. It held that the Government has rightly chosen to recover excess amount in a phased manner.

65. In *Union of India and Others Vs. Smt. Sujatha Vedachalam and Another*, , an employee was working as Senior Clerk (Accounts) in the pay scale of Rs. 1400-2600. On his personal request, he was transferred from Nagpur to Bangalore. One of the conditions of transfer was that the employee shall technically resign from the post held at Nagpur and join as Direct Recruit on the post of Clerk at Bangalore. At the time of transfer, basic pay drawn by the employee at Nagpur in the cadre of Senior Accountant, was Rs. 1260/-. When the employee joined on the lower post of clerk, by mistake, her salary was fixed at basic pay of Rs. 1250/- per month instead of Rs. 1070/-. On detection of mistake, pay was refixed at the stage of Rs. 1070/- by order dated 1.12.1995. The order(s) of recovery and refutation were challenged before Central Administrative Tribunal. Employee's claim was allowed by the Tribunal and Government's Writ Petition was dismissed by High Court. The Apex Court relying on its earlier decision in *Comptroller and Auditor General of India and Others Vs. Farid Sattar*, , set aside both the judgments and upheld G.O. of refixation and recovery, with the only indulgence that excess pay may be recovered in easy instalments. The Court herein upheld recovery and permitted instalments.

66. *Col. B.J. Akkara (supra)* is the case wherein the law relating to recovery of excess payment from employees was considered. The Court held that cases wherein excess payment has not been allowed to be recovered from employees" are not founded because of any right in the employees but in equity and in exercise of judicial discretion to relieve employees from the hardship that may be caused, if recovery is implemented. Such a discretion is exercised by the Court and one of the reasons therefore, has been, that the employee was receiving excess payment for a long period and utilising the same, genuinely believing that he is entitled to it, but where the employee had knowledge that the payment so received was in excess of what was due and the error was detected within a short period of wrong payment, Court would not give relief against such recovery. It is said that these matters lie in the realm of judicial discretion of the Court.

67. Then comes *Registrar, Co-operative Societies Haryana Vs. Israil Khan and Others*, , wherein recovery of excess amount paid to employees of cooperative society was challenged relying on Apex Court's decision in *Sahib Ram Vs. State*

of Haryana and Others, and Shyam Babu Verma (Supra). A two Judges Bench of Apex Court, consisting of Hon''ble R.V. Raveendran and Hon''ble P. Sathasivam said in para 6 of the judgment that there is no principle that any excess payment to an employee should not be recovered back by the employer. The Court observed that in certain cases merely a judicial discretion has been exercised by Apex Court to refuse recovery of excess wrong payments of emoluments/allowances from employees on the ground of hardship where the following conditions were fulfilled:

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

(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.

68. Now very recently, the Apex Court in Chandi Prasad Uniyal and Others Vs. State of Uttarakhand and Others, , has said that there is no such principle of law that wrong payment made to an employee can be recovered only in those cases where he is guilty of fraud and misrepresentation, and not otherwise. The Court has distinguished all its earlier decisions in State of Bihar and Others Vs. Pandey Jagdishwar Prasad, and Yogeshwar Prasad and Others Vs. National Inst., Edu. Planning and Admn. and Others, . In paragraphs 9, 15, 16 and 18 of the judgment the Court has said:

9. We are of the considered view, after going through various judgments cited at the bar, that this Court has not laid down any principle of law that only if there is misrepresentation or fraud on the part of the recipients of the money in getting the excess pay, the amount paid due to irregular/wrong fixation of pay be recovered.

15. We are not convinced that this Court in various judgments referred to hereinbefore has laid down any proposition of law that only if the State or its officials establish that there was misrepresentation or fraud on the part of the recipients of the excess pay, then only the amount paid could be recovered. On the other hand, most of the cases referred to hereinbefore turned on the peculiar facts and circumstances of those cases either because the recipients had retired or on the verge of retirement or were occupying lower posts in the administrative hierarchy.

16. We are concerned with the excess payment of public money which is often described as "tax payers money" which belongs neither to the officers who have effected over-payment nor that of the recipients. We fail to see why the concept of fraud or misrepresentation is being brought in such situation. Question to be asked is whether excess money has been paid or not may be due to a bona fide mistake. Possibly, effecting excess payment of public money by Government officers, may be due to various reasons like negligence, carelessness, collusion, favouritism etc. because money in such situation does not belong to the payer of

the payee. Situations may also arise where both the payer and the payee are at fault, then the mistake is mutual. Payments are being effected in many situations without any authority of law and payments have been received by the recipients also without any authority of law. Any amount paid/received without authority of law can always be recovered barring few exceptions of extreme hardships but not as a matter of right, in such situations law implies an obligation on the payee to repay the money, otherwise it would amount to unjust enrichment.

18. Appellants in the appeal will not fall in any of these exceptional categories, over and above, there was a stipulation in the fixation order that in the condition of irregular/wrong pay fixation, the institution in which the appellants were working would be responsible for recovery of the amount received in excess from the salary/pension. In such circumstances, we find no reason to interfere with the judgment of the High Court. However, we order the excess payment made be recovered from the appellant's salary in twelve equal monthly instalments starting from October 2012. The appeal stands dismissed with no order as to costs. 1A Nos. 2 and 3 are disposed of.

69. The Apex Court further held that decision in Shyam Babu Verma (Supra), Sahib Ram (Supra), Yogeshwar Prasad (Supra), etc. are all decided on their own facts and do not lay down any principle of law, restraining recovery of excess payment of salary from the concerned employee. On the contrary, in para 17 of the judgment the Court said that except few instances pointed out in Syed Abdul Qadir and Others Vs. State of Bihar and Others, and in Col B.J. Akkara (Supra), excess payment due to wrong/irregular pay fixation can always be recovered.

70. There is a Division Bench judgment of this Court also in State of U.P. and others v. Vindeshwari Prasad Singh (Special Appeal No. 503 of 2008), decided on 28th July, 2009. The Court formulated two questions, as under:

(i) Whether any financial benefit given to an employee by mistake without any misrepresentation or fraud on his part can be recovered from him later on after his superannuation from service?

(ii) Whether before directing for recovery of the amount paid in excess, the employee concerned is required to be given notice and opportunity of hearing?

71. Having said so, the Court said:

Having given my most anxious consideration, neither on first principle nor precedent, I am prepared to accept the broad submission that excess amount paid to an employee by mistake cannot be recovered after his superannuation only on the ground that while obtaining monetary benefit, it has not made false representation or played fraud.

72. Further, the Court referred to Section 72 of Indian Contract Act and thereafter said:

From a plain reading of the aforesaid provision it is evident that a person to

whom money has been paid by mistake is obliged to return the same. In my opinion an employee not entitled to receive monetary benefit gets it, it becomes a case of unjust enrichment and restitution in case of unjust enrichment is an accepted principle for ensuring justice in appropriate cases. In my opinion in a case of mistake clear, plain and simple, excess amount paid to and employee can be recovered after retirement despite the fact that he had not made any misrepresentation or played fraud. There is no legal impediment in ordering for recovery from a retired employee such monetary benefits, which he had received on account of mistake and not entitled to such benefits. However, I would hasten to add that a mistake, pure and simple though justifies recovery of excess amount paid but in a case in which two interpretations are possible and one was consciously approved and benefit given to an employee by the competent authority but such decision in the ultimate analysis and long process of reasoning, later on is found incorrect, it may be possible to correct the same at a latter stage but the amount already paid in the light of the earlier decision is not fit to be recovered. In other wards, excess payment is made upon reasonably possible view taken by competent authority without fraud or misrepresentation, the excess payment cannot be recovered. Excess payment is possible to be made by the order of the employer. It is also possible by interim or final order of the Court, which ultimately is found to be erroneous. In case of former, a recovery is permissible under the condition enumerated above. However, in latter case, it depends upon the facts and circum- stances of each case and it is primarily within the discretion of the Court.

(emphasis added)

73. On the second question, however, the Division Bench said that an opportunity before making recovery is must. The Court also relied upon an earlier Division Bench Judgement in Union of India (UOI) and Others Vs. Rakesh Chandra Sharma and Others, , observing that there is no law of universal application, restraining the employer from recovering the extra amount paid to an employee beyond entitlement. The Court also observed that rectification of mistake is not only permissible but desirable otherwise system/requirement of auditing of accounts would be rendered nugatory.

74. These authorities clearly show that there is no right of petitioner in law or otherwise that admitted excess payment wrongly made cannot be recovered. As a matter of right, petitioner cannot contend that though he had been paid certain amount wrongly in excess to what was due to him, yet it cannot be recovered by the administration.

75. In the present case, it is not the contention and neither there is any pleading nor actually argued that before passing impugned order no opportunity was afforded to petitioner. There is no challenge to the impugned order on the ground that it is in violation of principle of natural justice. The only argument advanced is that since petitioner himself is not guilty of any fraud or misrepresentation in fixation of his pay in a higher pay scale, as a result whereof, having been paid

extra amount or excess salary over and above to which he was entitled, therefore, the excess amount paid to him cannot be recovered.

76. It is not the case that petitioner was not aware or would not have been aware as to what should have been the correct pay scale which he was entitled to, but he continued to receive excess salary. If the fixation has been made in a lower pay scale, it has always been seen that employee concerned immediately raises a protest that he is being paid wrong amount or lesser amount, but when an employee receive more than the amount to which he was/is entitled, he does not inform the authorities concerned or bring this fact to their notice. It shows a tacit acquiescence on the part of petitioner in the wrong, committed by administration, by which, he was the beneficiary and became part and parcel to the administration in this regard.

77. There is one more aspect to which this Court would like to advert.

78. The excess money received by petitioner is not anybody's private money but it has come from the coffer of public exchequer. It is a public money contributed by tax payers and hard earned money of public at large. If an excess money is allowed to be retained by a person who is not authorised, that would result in denying user and consumption of that money other than the purpose for which it is meant.

79. Administration, whether in executive or judiciary, holds public funds in trust and with responsibility of spending it strictly in the manner they are required to do so and not to enrich anyone or waste money by its unmindful, unauthorised and illegal acts. If any such thing has happened, even if unknowingly and indeliberately, the administration is legally, morally and by any standard of civilised society, is bound to restore back such wasteful expenditure to the public exchequer, so that, it may thereafter be utilised in the manner and for the purpose, so prescribed. Any attempt on the part of administration to allow an employee to retain certain money, which the Administration has wrongly paid to him, though the employee was not entitled to the same, or, any act on the part of administration, in not realising the said amount from the employee, is liable to be treated as breach of trust. Such decision would amount to not only waste of public money but also an attempt to perpetuate an illegal act. It is not a private property to which one can show any attitude of charity and so called broad heart and magnanimity. This would be against any principle of administrative law. Simultaneously, an employee if retains something which he did not owe, he being also equally responsible to the public and public fund holding an office of trust, is bound to return/refund it.

80. In *P.K. Chinnaswamy v. Government of Tamilnadu and others*, AIR 1978 SC 78, the Apex Court said that every public officer is a trustee, and, in respect of the office he holds and the salary and other benefits which he draws, he is obliged to render appropriate service to the State. Conversely, it would also be true that a Government official would be entitled to payment of only that

amount, which he is entitled towards salary etc. under the relevant provisions, applicable to him, in the context of his status, position, rank, etc. If he has received or paid even by mistake, certain amount to which he was not entitled, it would amount to excess drawl of money unauthorisedly from public exchequer, to which every Government official is a trustee and, therefore, whether mistaken or otherwise, no one is entitled to retain such unauthorised money belonging to public exchequer but, is under a legal and ethical obligation to return/refund the same, so that, it may be utilized for the purpose, it is made and decided by the competent authorities in budgetary allocation.

81. Every single penny constituting consolidated fund of India/State comes from hard earned money of tax payers and others. It has to be utilized strictly in the manner in which the competent authority i.e., the legislature has resolved and decided. No amount of public exchequer can be allowed to be squandered as a matter of charity or otherwise to be retained by a Government servant who is not entitled to obtain such money but by another Government Servant has been allowed to withdraw from public exchequer, may be, by his mistake or may be collusive mistake or otherwise.

82. This Court also tried to find out as to from which budgetary allocation excess money was paid to the employee and to which it can be adjusted. Since the allocated money is already identified and beyond that nothing could have been paid by anybody, no authority can be allowed to retain any amount which he has received unauthorisedly or on account of mistake of administration. It shall also amount to financial indiscipline and misuse of public fund. In the context of above decisions, we are clearly of the view that various authorities cited by the petitioners concerned would not help them to claim that excess amount paid should not be recovered from them.

83. Now coming to the case in question. I find that this Court has already passed an order for recovery of such wrongful payment to the petitioner on the post of Pharmacist from him as well as from those officers who are found responsible for such illegal and invalid payment of salary on the post of Pharmacist to the petitioner. This judgment has attained finality, therefore, it is not even the province of this Court to make any alteration or change at this stage but since the recovery has been allowed from both the sources, I find it appropriate to direct that the amount, which is to be recovered being illegal payment made to the petitioner in the pay scale applicable to the Pharmacist, 50% shall be recovered from him and 50% from such officers/officials, who are found responsible for such error enabling the petitioner to receive such illegal payment.

84. State Government shall determine responsibility of the officials concerned and thereafter proceed to recover the amount as directed above after making enquiry as permissible in law but shall complete the process within six months from the date of communication of this judgment.

85. With the aforesaid direction, the writ petition is dismissed. Registrar General

is directed to furnish a certified copy of this order to the State Government for information and compliance of the directions contained above. Only for the purpose of submitting compliance report to this Court and for its perusal, this matter shall be listed in the week commencing 24th March, 2014. For all other purposes, it stand dismissed.