

(1988) 08 MP CK 0074

In the Madhya Pradesh High Court

Case No : Miscellaneous M.P. No. 44 of 1985

Ashok Kumar

APPELLANT

Vs

Industrial Court, Indore and others

RESPONDENT

Date of Decision : 18-08-1988

Acts Referred:

Madhya Pradesh Industrial Relations Act, 1960 — Section 2(13), 31(3)

Citation : (1988) MPLJ 729

Hon'ble Judges : S.K. Dubey, J;P.D. Mulye, J

Bench : Division Bench

Advocate : K.N. Puntambekar, for the Appellant; G.M. Chafekar, for the Respondent

Final Decision : Allowed

Judgement

S.K. Dubey, J.

This is a petition under Articles 226/227 of the Constitution of India for issuance of a Writ of Mandamus and/or Certiorari, against the respondent No. 2, which is a Corporate Body and is an authority under Article 12 of the Constitution of India, for a direction to fix and to pay to the petitioner the pay scale of Rs. 650-1200 from 20-9-1978 to 23-6-1981 for the post of the Labour Officer, and from 24-6-1981, and thereafter in the grade of Rs. 700-1300 and for payment of officiating allowance of the post of the Chief Welfare Officer-cum-Labour Officer, in the alternative to quash the order of the Industrial Court (Annexure-P) dated 19th November, 1984 and to remit the case to the Labour Court for deciding the claim of the petitioner in accordance with law.

2-3. The short facts material to this petition, which are not in much of dispute, may be stated, thus: The petitioner after due advertisement, was appointed vide order (Annexure-A) dated 28th September, 1978 on the post of the Labour Officer on a consolidated salary of Rs. 600/- per month. Thereafter, he was confirmed on the said post vide order (Annexure-A1) dated 14th April, 1979.

The respondent No. 2, revised the pay scale of the petitioner and he was fixed in the pay-scale of Rs. 330-10-380 EB 12-500 EB 15-560 with a basic pay of Rs. 452 plus house rent allowance and other usual allowances applicable to the Corporation employees, vide Annexure-B dated 15-11- 1979. In this order the petitioner was styled as Labour Assistant. The petitioner objected to it vide Annexure-C and accepted the same under protest with a condition that his designation should be maintained as Labour Officer and he be placed in the grade of Labour Officer. He filed in Annexure-R-1 on 26-11-1979 with a letter of protest (Annexure-R-2), annexed by the respondents with their return. Respondent No. 2 issued another order Annexure-D dated 23-4-1980, whereby the petitioner instead of Labour Officer was shown in the list of Junior Labour Welfare Officers/Labour Assistants and was placed in the pay scale of Rs. 425-15-500 EB 15- 560-20-700 plus usual allowances admissible to the Corporation employees whereas from 1-5-1980. The petitioner's pay was fixed at Rs. 455/- per month. By this order, the petitioner and others were designated as Assistant Labour Welfare Officers. Vide order Annexure-E dated 27-8-1980, the petitioner was ordered to act as an officiating Labour Officer in Hira Mills and was ordered to be paid officiating allowance as per rules. The petitioner to these unilateral orders Annexure-B, D and E continuously objected and represented about his designation and to fix him in the pay and the grade of the Labour Officers. On this the General Manager of the respondent No. 2 vide Annexure-F dated 20-12-1980, recommended the case of the petitioner and wrote to the Production Manager about the appointment and confirmation of the petitioner on the post of Labour Officer, and the protest of the petitioner in respect of designating him as Labour Assistant. The General Manager in his letter stated that the petitioner is working as a full fledged Labour Officer whereas from 4th September, 1980 and during this period his services were found satisfactory, the petitioner was able to handle the charge of the Labour Officer independently. The General Manager strongly recommended that in view of the earlier assurance to the petitioner, the petitioner should be placed in the grade of Labour Officer as stipulated in his appointment letter Annexure-A and A-1.

But, the petitioner was neither designated as Labour Officer nor was paid the grade of the Labour Officer though he was performing and discharging the duties and functions of the Labour Officer since the inception of his employment, the petitioner made representations Annexure-F-1 dated 19-5-1981 and Annexure-F-2 dated 29-12- 1981. Upon this again the General Manager of the respondent No. 2 vide Annexure F- 3 dated 23-5-1981, recommended the name of the petitioner for Labour Officer and also stated therein that the performance of the petitioner as Officiating Labour Officer is quite satisfactory, he has acquired thorough knowledge of the Mills labour affairs, his representation be considered favourably and the orders in this respect be issued at the earliest. General Manager again vide Annexure-F-4 dated 24-7-1981 strongly recommended the case of the petitioner on the ground that in response to an open advertisement the petitioner was interviewed for the post of the Labour Officer at the Head

Office, the result is awaited. The post of the Chief Welfare Officer is vacant in the Mills. petitioner has been posted as a Labour Officer from 5th Sept., 1980, his work on the post has been quite satisfactory. Both the Ex General Managers have recommended the case of the petitioner for confirmation as Labour Officer and now as a Chief Labour Welfare Officer, as the petitioner is carrying on the responsibility of the post of the Labour Officer/Chief Welfare Officer for about one year satisfactorily. But even after these three recommendations, the petitioner was neither appointed nor was paid the grade of Labour Officer. Besides, recommendations, the petitioner in response to open advertisement, was interviewed on 17-3-1981, by the Selection Committee, the petitioner was selected vide Annexure-G as a departmental candidate, on the basis of qualifications, experience, and knowledge of the subject. But the petitioner was not appointed nor was paid the pay scale of Labour Officer. The Manager Personnel of respondent No. 2, for the first time, vide letter dated June 5, 1982 (Annexure-L) wrote contrary to Annexure-G and informed that Selection Committee is of the view that the petitioner has to prove his ability and working knowledge of functions and duties including labour laws study. As number of persons were working in the Labour Office, hence vide order dated 13-4-1982, Annexure-J), Annexure-J-1, dated 7-6-1983 and Annexure-J-2 dated 21-6-1984, the Factory Manager, looking to the exigencies and requirement of work, distributed the duties of the petitioner and others working in Labour Office, petitioner continued to perform the duties efficiently, as assigned to him from time to time.

The petitioner having failed to get his pay scale of the post, served an approach notice u/s 31(3) of the M.P. Industrial Relations Act (for short "the Act"), for appointing him on the post of the Labour Officer in the grade of Rs. 650-1200 from 20th March, 1979 and from 5-9-1980 on the post of Chief Labour Welfare Officer in the pay scale of Rs. 800-1300 with increments. The respondent No. 2 did not pay any heed, hence the petitioner filed an application u/s 31(3) read with Sections 61 and 62 of the Act on 29-10-1982 before the Labour Court at Ujjain for claiming the relief and also applied for grant of temporary injunction for not filling up of the post in lieu of fresh advertisement issued by the respondent No. 2.

The respondent No. 2 and others in response to the notice, appeared before the Labour Court and opposed the application inter alia mainly on the ground that the petitioner does not fall within the definition of "employee" as defined under Section 2(13) of the Act, hence the application is not maintainable and the said Court has no jurisdiction. The Labour Court, after considering the respective submissions of the parties, held that the application is maintainable, and that there is a prima facie case, irreparable loss to the petitioner, and balance of convenience is in favour of the petitioner, passed an order of temporary injunction against the respondent No. 2 for not filling up of the post. Against this order, the respondent No. 2 invoked the supervisory jurisdiction of the Industrial Court u/s 67 of the Act, which is akin to the jurisdiction under Article 227 of the

Constitution of India, and prayed for setting aside of the order of the Labour Court. The Industrial Court, set aside the order of the Labour Court by this order dated 19th Nov., 1984 (Annexure-P). In this order, the Industrial Court not only set aside the order of the Labour Court but also dismissed the main application of the petitioner, holding that the petitioner does not fall within the definition of the "employee" and Labour Court has no jurisdiction. A bare reading of the order in para 12 shows that this order was passed in anger, considering the order to be ante dated by the Labour Court, no other efficacious and alternative remedy is available to him.

The petitioner, aggrieved of this order, having filed this petition under Articles 226 and 227 of the Constitution of India prayed for issuance of a Writ of Mandamus, directing the respondent No. 2 to fix the petitioner in the pay scale of Rs. 650-30-740-35-810 EB 880-40-1000 EB 40-1200 from 20-3-1979, which is the prescribed pay scale for the post of the Labour Officer and further prayed for the pay scale of Rs. 800-50-1300 prescribed for the post of the Chief Labour Welfare Officer from 1-7-as he was discharging the duties of the Chief Labour Welfare Officer-cum-Labour Officer from 1-7-1980. The petitioner in his petition contended that the grade and designation of Labour Welfare Officer and the Chief Labour Welfare Officer are fixed by the statutory rules, the other employees are discharging the same duties like that of the petitioner and are being paid the same grade and pay scale but the petitioner is being deprived of the same for no reason or rhyme, the petitioner complained the violation of Articles 14 and 16 of the Constitution of India and the principle equal pay for equal work.

Shri K.N. Puntambekar, learned counsel for the petitioner submitted on the above facts that the petitioner was discharging the duties of Labour Officer and Chief Labour Welfare Officer from time to time, this fact has not been controverted by the respondent in the return, as such the submissions made in the return must be accepted. The documents in particular Annexures-A, A-1, B, C, D, E, F, F-1, F-2, F-3, F-4 and K and the fact that other persons, who are discharging the same duties as that of the petitioner, and are getting the higher pay scales and grades of the Labour Officer and Chief Officer, have not been controverted, as such the petitioner should not be deprived of the pay scale fixed under the M.P. Factories Rules, 1962, of the Labour Officer, if not that of Chief Labour Welfare Officer on the principle "equal pay for equal work". Learned counsel submitted that as the petitioner is being deprived of his due since 1979 and that this petition was filed as long as back in the year 1985, the respondents filed their return on 15-6-1985, wherein they still contend that the Labour Court has no jurisdiction to entertain the application and contend in paras 18 and 19 that the petitioner ought to have filed the petition under Article 226 of "the Constitution of India instead of approaching the Labour Court and that the petition against the order of Industrial Court is not maintainable in such circumstances, the petitioner now be not forced to have another innings, and to go before the Labour Court to fight with the employer for his legal rights. This Court, in the circumstances, should exercise the powers under Articles 226 and 227 of the

Constitution of India even though the alternative prayer has been made by the petitioner for quashing of the order of the Industrial Court, and the petitioner be granted the relief. In support of his contentions Shri Puntambekar, learned counsel, relied upon the Apex Court (pronouncements in *Dhirendra Chamoli and Another Vs. State of U.P.*, *Arun Kumar Chatterjee Vs. South Eastern Railway and Others*, *Rohtas Industries Ltd. and Another Vs. Rohtas Industries Staff Union and Others*, *Dwarka Nath Vs. Income Tax Officer, Special Circle D-ward, Kanpur and Another*, *P. Savita and others vs. Union of India and others*, 1986 5 Lab.I.C. 1221, *P. Savita and Others Vs. Union of India (UOI), Ministry of Defence (Department of Defence Production), New Delhi and Others*, and a report of this Court in *Erstwhile National Fitness Corps Employees' Association, M.P. and others vs. Union of India and others*. 1983 MPL.J. 588. Before the conclusion of the arguments, the petitioner also filed an application dated 10-8-1988, limiting his claim for fixation and pay of Labour Officer and for payment of officiating allowances for the post of the Chief Labour Welfare Officer, held by him from 9-7-1980.

Shri G.M. Chaphekar, Senior Advocate appearing for the respondents Nos. 2,3,4 and 5 feebly conceded that the order of the Industrial Court so far it relates to the dismissal of the main application is illegal. According to the learned counsel, it seems the order was passed by the Industrial Court in some anger. But Shri Chaphekar supports the order on the ground that the petitioner was not appointed on the post of Labour Officer-and was working as a Labour Assistant, his position was not that of Labour Officer except the designation, and the petitioner accepted the job without any protest. Looking to the nature of duties, the petitioner was accordingly informed his grade vide letter dated 15-11-1979, who opted for the revised pay scales and continued to accept his salary in the grade of Rs. 330-10-380EB-12-500-EB-15-560 without any protest. The petitioner was redesignated as Assistant Labour Welfare Officer. Thus, the petitioner is not entitled to the grade of Rs. 650-1200. Learned counsel for the respondents, in alternative prayed that as an equally efficacious remedy is available to the petitioner before the Labour Court, the matter be remitted back for trial and/or enquiry. Learned counsel relied upon a decision of the Apex Court in *Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others*, and contended that when the machinery is provided in an enactment, normally this Court should not interfere under Article 226 of the Constitution of India and the matter be left to the decision of such statutory machinery.

As stated in narration of facts, the appointment of the petitioner was on the post of a Labour Officer in compliance of the provisions of Section 49 of the Factories Act and the Rules framed thereunder, known as the M.P. Factories Rules, 1962 (for short "the Rules"). Relevant rules for the purposes of this petition are 88,89,90 and 91. Rule 88 provides for number of Labour Welfare Officers in a particular factory in proportion to number of employees; Rule 89 lays down the duties of the Welfare Officers; Rule 90 lays down qualifications of the Welfare

Officer; and Rule 91 lays down the conditions of service of the Welfare Officers, including the pay scales. It is not the case of the respondents that the petitioner was not appointed in accordance with the provisions of the Rules, after due advertisement for the post of Welfare Officer, nor was performing the duties according to Rule 89. It is also not the case of the respondents that the petitioner was not holding the qualifications, as required, under Rule 90 of the rules. But only contention of the respondents is that the petitioner was working on a junior position in the Labour Office as Labour Assistant, though he was designated as a Labour Officer but accepted the consolidated salary of Rs. 600/- per month. The respondents have not traversed categorically in return, the documents annexed with the petition, particularly in relation to the satisfactory performance of the petitioner and recommendations Annexures F, F-3 & F-4 of three different General Managers, under whom the petitioner worked in the circumstances it must be accepted that the petitioner was working as Labour Officer. There is no complaint against the work of the petitioner, but on the other hand strong recommendations that the petitioner was discharging the duties satisfactorily not only of Labour Officer but of the Chief Welfare Officer also. The petitioner was neither given the appointment nor the pay scale of the Labour Officer, even after selection of the petitioner by the Selection Committee though the fresh interview or selection was not necessary, as the petitioner was appointed on the post of Labour Officer vide Annexure-A and thereafter was confirmed by Annexure-A-1. For the first time by Annexure-R-8, when the selection of the candidates for direct recruitment and the departmental candidates was being made for the post of Chief Welfare Officer-cum-Labour Officer, the Departmental Committee, gave a remark about the Departmental candidates about the performance being found very poor and far from satisfaction. This was a general observation, nothing particular was mentioned against the petitioner. Surprisingly enough, though the petitioner was discharging his duties as Labour Officer since 1978 but no order or warning ever was issued to the petitioner about, his work or performance on the other hand, as stated above, the three General Managers found his work satisfactory. Except for the remark of the Selection Committee about all the candidates, there is nothing on record to show that the petitioner was not discharging the functions and duties of the Labour Welfare Officer and was not officiating as Chief Labour Officer and his work was not satisfactory. The contention of the learned counsel for the respondents can also be not accepted that the appointment order (Annexure-A) was given by mistake wherein the designation was mentioned as Labour Officer and thereafter confirmation A-1 was issued. This has not been made a ground in the return, hence cannot be considered, nor there is any material to hold so. The petitioner was never communicated by any letter or order that in the appointment order he was wrongly designated as Labour Officer and the mistake is being corrected. It is true that in one order Annexure-B the petitioner has been styled as Labour Assistant, to which the petitioner objected, protested and represented and claimed the salary throughout the the pay scale of Labour Officer. The option exercised by Annexure-R-1 has also no effect on the rights of

the petitioner for the simple reason that the petitioner accepted it under protest vide Annexure-R-2 and, thereafter, continuously made representations. Moreover, acceptance of employment with full knowledge to petitioner's disadvantage has no effect, as it is violative of Article 14 of the Constitution of India. See the case of Dhirendrasingh Chamoli of the Apex Court (supra).

Now this is settled that when an employee having similar qualifications performs similar nature of work, the doctrine of "equal pay for equal work" applies, which is a constitutional obligation of Article 39(d). This principle applies on the premises of similar work, which does not mean that there should be complete identity in all respects. If two classes of persons under the same employer working with similar responsibility under similar working conditions, discharging similar duties, the doctrine of "equal pay" cannot be ignored as it violates Article 39(d) of the Constitution of India. The purpose of Article 39(d) to fix certain social and economic goals for avoiding any discrimination amongst the people doing similar work in matters relating to pay. This doctrine cannot be disregarded on the ground of the nature of employment being temporary or permanent in nature, or because of different mode of selection. See the latest pronouncement of the Apex Court in *Munawar Harun Shah and Others Vs. State of Maharashtra*, and also in *Delhi Municipal Karmacjari Sangh vs. P.L. Singh*, (1988 supp SCC 95 , *P. Savita and Others Vs. Union of India (UOI), Ministry of Defence (Department of Defence Production), New Delhi and Others*, , *Randhir Singh Vs. Union of India (UOI) and Others*, and *Dhirendra Chamoli and Another Vs. State of U.P.*, . Having regard to the facts stated above, and in the circumstances of the case, we are of the opinion that there is no difference in the nature of duties of the Labour Officer and that of the petitioner and other persons, who are discharging the duties of the Labour Officers under the respondent No. 2. Besides, the appointment of the petitioner on the post of Labour Officer, the petitioner performed the duties of Chief Labour Welfare Officer, he would not have been asked to officiate as Chief Labour Officer and his General Managers would not have recommended his case thrice. In view of these facts it is too late to deny the petitioner the pay scale of Labour Officer only on the ground that he was later designated as Labour Assistant of Assistant Labour Welfare Officer and opted for revised pay scale without any protest which is also not correct. Hence, in our opinion the petitioner was and is discharging the functions and duties of a Labour Officer and he cannot be denied by the respondent No. 2 the pay scale of Labour Officer as laid down under the Rules, so framed by the State Government, or paid by the respondent No. 2 to the other Labour Officers.

The second ground for our consideration is whether the petitioner falls within the definition of employee or not. u/s 2(13) of the Act, suffice it to say that this point was directly covered in a case of the Division Bench of this Court in case of *Shital Kumar Hemrajani vs. J.B. Mangharam and Company*, 1973 MPLJ 324, wherein the Division Bench held that a Labour Welfare Officer cannot be said to be an employee mainly in managerial capacity within the paragraph (iii) of Sub-clause (b) of Clause (13) of Section 2 of the Act, and as such is not excluded under the

definition he is in a sense is a technical worker and if his wages do not exceed Rs. 500/- per month he is an employee as defined in Section 2(13) of the Act. The work of a Labour Welfare Officer is also of a highly technical nature inasmuch as in maintaining proper relationship between the management and the labour. When the present petitioner filed the application before the Labour Court on 29-10-1982 at that time the definition u/s 2(13) of the Act was amended and was substituted by M.P. Act No. 41 of in that such employees, who are employed in a supervisory capacity and their wages exceed from Rs. 1600/- per month only are excluded. The technical employees irrespective of their salary are not excluded except those who are employed in managerial capacity. Moreover, the respondents themselves do not treat the petitioner as Labour Officer but they designated him as Labour Assistant or Assistant Labour Welfare Officer, in such a situation the respondents cannot be allowed to blow hot and cold on one hand Labour Assistant and on the other hand as Labour Welfare Officer for merely taking a technical plea. It is trite proposition of law that for determining the question whether a person is an employee or not one must look into the main work and that must be found from the main duties or substantial work. See case of Continental Construction Co. Ltd. Vs. State of Madhya Pradesh, , wherein all earlier cases on the point whether a workman falls within the definition of Section 2(s) of the Industrial Disputes Act have been considered. As the petitioner was drawing wages less than Rs. 1600/- per month, in view of Shitalkumar's case (supra), the petitioner was and is an employee u/s 2(13) of the Act, hence the order of the Industrial Court on this point deserves to be quashed and is hereby quashed.

The third and last important question arises for our consideration is that whether in the facts and circumstances of this particular case, the parties, after quashing of the order of the Industrial Court, be directed to approach the Labour Court for deciding the dispute on merits afresh and also for the determination of the question whether the petitioner falls within the definition of the employee or not under the Act. The respondent No. 2 is harping upon the technical pleas. Though, in return there is no plea that the matter be sent back to Labour Court for a decision on the other hand in para 19, the respondents contend that the petitioner ought to have approached this Court at the initial stage in writ jurisdiction, as he does not fall within the definition of employee u/s 2(13) of the Act. Refer paras 18 and 19 of the return, but learned counsel for the respondents Shri Chaphekar, realising that the petitioner is an employee u/s 2(13) of the Act, meekly admitted that the petitioner falls within the definition of the employee in view of the direct decision of this Court in Shital Kumar's case (supra), even then he submits that this matter can also be decided by the Labour Court, meaning thereby the petitioner be again compelled to have another innings, i.e. decision by the Labour Court, thereafter appeal and then a petition before this Court and appeal before the Supreme Court. In such state of affairs, in the facts and circumstances of the case, and in our opinion on the admitted position that the petitioner was appointed as Labour Officer and was discharging the functions

of the said post, it is not proper for us to refuse the relief to the petitioner on the plea of existence of alternative remedy.

The petitioner in fact exhausted the alternative remedy, where objection was taken by the respondents that it is not available, got the main petition dismissed from the Industrial Court at a stage when the Industrial Court was hearing the application u/s 107 of the Act, i.e. the temporary injunction be granted or not. The Presiding Officer of the Industrial Court in his supervisory jurisdiction u/s 67 of the Act, illegally and in a prejudicial manner passed the order, as it seems to us was annoyed from the Presiding Officer of the Labour Court but this could not have deprived justice to a litigant, even in the mind of the Industrial Court the order was ante dated, which is also not correct, even if it is correct, this should not have resulted in injustice to the petitioner because, while hearing the application for temporary injunction or its appeal or revision or exercising the powers of superintendence, it is settled position of law that a main petition cannot be dismissed on the ground of maintainability or jurisdiction without first the written statement is filed and the preliminary issue is raised and tried. We cannot restrain ourselves for saying so, that the President, Industrial Court, while showing an anger to the conduct of the then Presiding Officer of Labour Court, acted against the principle that an act of Court, shall prejudice no man which is found upon justice and good sense and affords a safe, certain guide for administration of justice. See *A.R. Antulay vs. R.S. Nayak*. (1988) II SCC 602. Hence, the order of the Industrial Court, dismissing the main, application was palpably wrong, which resulted in great injustice to the petitioner.

Ordinarily, when an order of Tribunal is quashed, the matter is to be sent back to the Tribunal for deciding it afresh in accordance with law. It is also settled that when a statute provides a machinery for seeking the relief, the High Court will not exercise the extraordinary power under Article 226 of the Constitution of India, to short circuit or circumvent the statutory proceedings. But in the instant case as the petitioner is being deprived of his legal due only on technical pleas, that too by a Corporate Body, which is State under Article 12 of the Constitution of India, it would not be proper for us to direct a poor employee to drag him again in litigation by sending the case to the Labour Court, on a technical plea of alternative remedy, such a plea now is not available to respondents, because the same was availed, but on the objection of the respondents the petitioner was non-suited and the petitioner could not get his due even after ten years. The wisdom and the justice, therefore, require that the matter is decided now once for all under Article 226, which is intended to do justice between the parties and save wastage of time and that the circumstances of the case require that the matter be decided once for all without remitting the case to the Labour Court.

The upshot of the above is that the petitioner is declared as Labour Officer, who is entitled to the salary of a Labour Officer and deserved to be fixed in the same pay scale as that of Labour Officer from the date of his initial appointment in the grade of Rs. 650-1200 from 20-9-1978 to 23-6-1981 and in grade of Rs.

700-1300 thereafter. But, as the dispute was raised by the petitioner before the Labour Court, i.e. by an application under Sections 31(3) and 61 of the Act on 29-10-1982, hence the petitioner would be entitled to the pay scale and grade of Labour Officer from 29-10-1982 only, as we are not inclined to grant the relief from the date of his confirmation on the post because the petitioner failed to approach the said Court at the earliest. Hence, the respondent No. 2 is directed to pay, within two months from today, the difference in pay from 29-10-1982 till today with all increments and benefits of the post of Labour Officer. The respondent No. 2 is further directed to pay, within two months from today, the officiating allowance of Chief Welfare Officer to the petitioner for the period the petitioner officiated as Chief Officer after 29-10-1982 till date. The petitioner shall also be entitled to his seniority to the post of Labour Welfare Officer from 20-9-1978.

In the result this petition is allowed with costs. Counsel's fees Rs. 500/- if already certified. The security amount, if deposited by the petitioner, on verification be refunded to the petitioner.