

(2006) 09 GAU CK 0011
In the Gauhati High Court

Case No : Writ Petition (C) No"s. 380 of 2001 (Imp) and 5421 of 2005 (G)

Assm Tombi Singh

APPELLANT

Vs

State of Manipur and Others

RESPONDENT

Date of Decision : 28-09-2006

Acts Referred:

Constitution of India, 1950 — Article 14

Contract Act, 1872 — Section 23

Manipur Land Revenue and Land Reforms Act, 1960 — Section 166

Citation : (2006) 4 GLT 608

Hon'ble Judges : Ranjan Gogoi, J;P.G. Agarwal, J;H.N. Sharma, J

Bench : Full Bench

Advocate : S.K. Goswami, for the Appellant; S. Sarma, for the Respondent

Final Decision : Dismissed

Judgement

H.N. Sarma, J.—The dispute raised in these Civil Rules having been referred to the Division Bench it was noticed that there are two sets of conflicting decisions on the points involved in W.A. No. 115/2001, W.A. No. 185/2002 and W.A. No. 3/99 on the one hand and another decision of the Golap Chandra Chetia Vs. Assam Adminstrative Tribunal and Others, (Golap Ch. Chetia v. Assam Administrative Tribunal and Ors.) The Division Bench formulated the following points for resolution of the conflict:

- a) Whether or not the employee simply holding the higher post without any appointment to the higher post will be entitled to get the pay scale attached to the higher post?
- b) Whether or not the incumbent holding the higher post on incharge basis under an order containing specific conditions that it would be without extra remuneration will be entitled to get pay scale attached to the higher post?
- c) Whether or not the incumbent who had been delegated the power of higher post without any order for appointment to the higher post will be entitled to get

any scale attached to the higher post?

Accordingly, to resolve two conflict the matter has been referred to this Full Bench.

2. In order to appreciate the points that has emerged for adjudication, the brief fact of the case may be stated as follows:

The Petitioner is a Revenue Officer under the Government of Manipur working in the capacity of Supervisor Kanungo (SK) having the responsibility to carryout the task of survey in various Revenue Departments of the State. The State Government issued an order being No. 1/23/98 (Com) Revenue, dated 22.6.1998 in exercise of the power u/s 166 of the Manipur Land Revenue and Land Reforms (MLR and LR) Act, 1960 delegating the power and function of Assistant Survey and Settlement Officer (AS and SO) to the Petitioner in addition to his normal duties of Supervisor Kanungo (SK) without any extra remuneration on public interest. For effective appreciation of the relevant terms, the said order is quoted herein below:

No. 1/23/98-Comm (Rev): u/s 166 of the Manipur Land Reforms and Land Revenue Act, 1960, the Governor of Manipur pleased to delegate the powers and functions of AS and SO to Shri A. Tornbi Singh, S.K. of the Directorate of Settlement and Land Records, Manipur in addition to his normal duties of S Ks without any extra remuneration in public interest with immediate effect until further orders.

2. Further, the Governor of Manipur is pleased to order that such delegation of the power and function of AS and SO to Shri Singh will not confer him any right to claim for regularization to the post, pay scale of AS and SO.

3. In pursuance of the said order, the Petitioner is working as Assistant Survey and Settlement Officer (AS and SO, for short) since 22.6.1998 without any break but he has not been provided with the pay and allowances available for the post of AS and SO. Alleging discriminatory treatment and violation of the fundamental right under Article 14 of the Constitution of India, the Petitioner has filed this writ petition for a direction to State Respondents to provide him with the pay and allowance applicable for the post of AS and SO. The State Respondents in their counter have pleaded inter alia that the sanction post for AS and SO in the Directorate of Settlement and Land Records under the Government of Manipur are 7 (seven) and 9 (nine) persons out of which 2 (two) are holding such post under delegated charge, there are excess number of such officers than the sanctioned strength. It is also pleaded that order delegating the power of function of AS and SO to the Petitioner specifically states that such arrangement would not confer any right upon the Petitioner to claim for regularization to the post and to get scale of AS and SO, that the Petitioner having substantively holding the post under lower cadre, is merely discharging the duties of higher post and such arrangement cannot be treated as a promotion, as such, the Petitioner is not entitled to get the higher salary as claimed for.

4. Thus the precise points that falls for considerations as to whether the view of the Division Bench taken in W.A. No. 115/2001 (Chongtham Ibocha Singh) and W.A. No. 3/99, reported in Md. Islahuddin Shah Vs. State of Manipur and Others, and that taken in Gopal Ch. Chetia's case are mutually conflicting.

5. At this stage we deem it appropriate to examine a little about the concept of pay or higher pay and its availability to an employee, in the event of allowing him to hold the charge of a higher post.

6. The origin of public service arises out of a contract, although once an employee enters into service, certain status is conferred upon him by specific service law holding the field and the Constitution. This contractual aspects involve fulfillment of certain reciprocal instances giving rise to an enforceable contract. Consideration is one of the essential ingredient of an enforceable contract; remuneration payable to him for rendering such services constitute the consideration moving from the employer to the employee and the services rendered is the consideration moving to the employee to the employer. Such pay allowable to an employee may be of different kind as recognized by the service Rules, which includes substantive pay, special pay, additional pay, personal pay, presumptive pay. FR 49 provides that when a public servant is holding two posts, he is entitled to draw the salary of the higher post. Such occasion to pay higher pay arises in the event of an employee being allowed to "officiate" temporarily to a higher post at a time when the employee is substantially holding the post in a lower cadre, which may arise on different contingencies.

7. In the case of Chongtham Ibocha Singh, the writ Petitioner claimed higher scale of pay and for allowing him to perform the duty of Assistant Engineer (Elec). The learned Single Judge having allowed the prayer of the Petitioner, State preferred a Writ Appeal No. 115/01 and the learned appellate Court dismissed the said appeal, holding that as admittedly the Petitioner was allowed to perform the duties of the higher post, the condition that was imposed that he would not get any extra remuneration is violative of Article 14 of the Constitution on the principle of equal treatment and equal protection of law to all citizens. It was also held that when a person is holding higher post, he may draw higher pay and any contrary condition would amount to exploitation.

In rendering the aforesaid decisions, the learned Court relied on the decisions of the Apex Court, reported in Judhistir Mohanty Vs. State of Orissa and Others, and Selvaraj Vs. Lt. Governor of Island, Port Blair and Others, distinguishing the decisions of the Apex Court, reported in H.P. State Cement Corporation Ltd. and Others Vs. B.K. Tiwari, and AIR 2001 SC 560 (Pabitra Mohan Dass etc. v. State of Orissa).

8. In W.A. No. 185/02 the writ Petitioners were allowed to work as Principal-in-charge, Government College, Manipur. While they were working as Lecturers and the Government not having accepted their claim for getting the scale of Principal for the period they worked as Principal-in-charge, they filed the writ petition and

the learned Single Judge allowed the writ petition, wherefrom State preferred the said Writ Appeal. The Division Bench of this Court vide judgment and order dated 20.9.04 dismissed the appeal of the State holding, inter alia, that if the Government, for want of suitable candidate, directs an officer of the Lower Cadre to perform duties of the post of higher cadre during that period, necessarily, the incumbent would be entitled to payment of salary attached to the higher post, if the incumbent had performed the duties of that posts.

9. In W.A. No. 3/99, the writ Petitioner, who was ordered to work as Accounts Officer-in-charge in the department of Horticulture in addition to his normal duties, claimed for his entitlement to salary for the said higher post and the learned Single Judge having rejected the claim, the aforesaid appeal was filed.

The Division Bench in the appeal, relying on the decisions of the Apex Court, reported in *Judhistir Mohanty Vs. State of Orissa and Others*, and *Selvaraj Vs. Lt. Governor of Island, Port Blair and Others*, and *Mohd. Swaleh Vs. Union of India (UOI) and Others*, allowed the prayer of the Petitioner.

10. As against the aforesaid decisions, there is another Division Bench judgment, reported in *Golap Chandra Chetia Vs. Assam Administrative Tribunal and Others*, . In the case of *Golap Ch. Chetia (Supra)* the Appellant-Petitioner was allowed to hold full charge of the post of Financial Adviser in the Health and Family Welfare Department in addition of his own duty of the Finance and Accounts Officer in the Directorate of Geology and Mining, Government of Assam. The Appellant/Petitioner held the additional charge from 23.4.83 to 11.4.86. Thereafter he was again directed to hold the additional charge as Financial Adviser in the Flood Control Department with effect from 17.5.86 to 30.5.88. The Accountant General, Assam issued pay slip of the Petitioner on 7.12.88 fixing his pay as Officiating Financial Adviser at Rs. 1860/- per month, but the Petitioner claimed that it ought to have been fixed at Rs. 1980/-. It was not done by the authority. Being aggrieved for such non fixing of his salary, he approached the Administrative Tribunal, but the learned Tribunal rejected his claim. The writ petition filed by the Petitioner having been rejected by the learned Single Judge, he filed appeal before the Division Bench. The Division Bench dismissed the appeal. The Division Bench held inter alia that it is amply clear from FR 49(a) that a Government servant can be asked by the Government to hold higher post as a temporary measure or to officiate in two or more independent posts at one time and in that case the pay shall be regulated as provided under Clause (a) of FR 49 on fulfilling other conditions mentioned therein. The learned Court found from record that the Appellant-Petitioner was directed to hold the charge of Financial Adviser in the Health and Family Welfare Department, from which it is clear that he was not appointed to the post of Financial adviser, but was directed to hold the charge of the post and in the absence of any appointment to the post, FR 49 has no application, as it stood then.

11. In the case of *Selva Raj (Supra)*, referred to in *Chongtham Ibocha Singh (Supra)*, by the Division Bench, the Petitioner was transferred to the Directorate

of Education to look after the duties of Secretary (Scouts) which was performed by him and accordingly the learned Court allowed his prayer to get the pay scale of the Secretary, but the nature of order passed by the authority, on the basis of which such claim for higher pay so made was allowed is not known.

12. In the case of Secretary-cum-Chief Engineer, Chandigarh Vs. Hari Om Sharma and Others, referred to in Chongtham Ibocha Singh (Supra), the Apex Court accepting the claim of the workman for higher salary refuted the argument advanced by the State, and, inter alia held that although the stop gap promotion was given to the Petitioner on his giving an undertaking not to claim any promotion as a matter of right nor that he would claim any benefit pertaining to the post, the Apex Court observed that this undertaking, which was stated to have been given by the Petitioner would be contrary to law, against public policy and unenforceable u/s 23 of the Contract Act.

13. In the case of Judhistir Mohanty (Supra) referred to in Chongtham Ibocha Singh (Supra) the claim of the writ Petitioner to get higher scale of pay available to the post of Superintendent, which post was allowed to be held by him, came up for consideration, and the Apex Court held, inter alia, that the Petitioner though was accommodated in the higher post, he was not allowed to draw the higher scale of pay attached to that post, as there was no equivalent post to accommodate the Petitioner.

14. In the case of Jaswant Singh Vs. Punjab Poultry Field Staff Association and Others, the Apex Court rejected the claim of the Petitioner for promotion to that post but directed the Respondent-authorities to pay him the higher scale for the period he rendered his service as Chick Sexer.

15. In the case of Mohd. Swaleh Vs. Union of India (UOI) and Others, the Apex Court interpreting the provisions of fundamental rules did not allow the claim for higher salary attached to the higher post as the appointment of the Petitioner to the higher post was made by an Officer without authority i.e. for want of jurisdictional competence of the appointing authority.

16. In the case of H.P. State Cement Corporation Ltd. and Others Vs. B.K. Tiwari, also the Apex Court did not accept the claim of the Petitioner for higher scale in view of the specific terms of letter of appointment, and further held that the Petitioner cannot be allowed to read more than what is expressly conveyed in the letter of appointment.

17. In the case of Pabitra Mohan Dass reported in AIR 2001 SC 560, the Apex Court concurring with the decision of the Orissa High Court, that as the appointment to the post of Headmaster on incharge basis was illegal, the Petitioner is not entitled to higher scale of pay of the post during his period of holding office as incharge headmaster.

Relying on the ratio of the decision of the Apex Court in Pabitra Mohan Dass and Selva Raj (Supra) a learned Single Judge of this Court in the case of Thiya

Katon Singh and Ors. v. State of Manipur reported in (2003) 1 GLR 22 held that the Apex Court in those cases laid down the law to mean that such benefit can only be allowed if there is no express prohibition against grant of such benefit in the order allowing the incumbent to hold charge of the higher office.

18. From the aforesaid discussion, we find that, it is beyond the civil of any doubt that in order to get the benefit of pay of a higher post, the nature, terms and conditions of the relevant order is the pivotal factors to be considered. The language of FR 49, is undoubtedly clear that the Government is entitled to appoint an employee as a temporary measure or to officiate in two or more independent posts and on such contingencies the Govt. servant is not entitled to claim the pay of the higher post, unless the order speaks otherwise.

19. On proper consideration of the ratio of the two lines of decisions of this Court, we hold that the decisions rendered by the Division Bench in Gopal Ch. Chetia to be laying down the correct principle of law applicable in such cases.

20. In view of the aforesaid discussion, we hold that an employee simply placed in charge of the higher post, without any appointment therein, in terms of FR 49 is not entitled to claim pay and allowances for such higher post. Similarly, an incumbent holding a higher post on Incharge basis under an order which contains specific conditions that it would be without extra remuneration, is not entitled to read in the order more than what it discloses. Likewise, such employee who is simply delegated the power of the higher post, while serving in his substantive post in the lower cadre, is also not entitled to get the higher pay scale, unless directed by the authority, otherwise. The reference is answered accordingly.

21. The learned Counsel having argued the matter also on merit, we purpose to dispose the writ petition itself on merit in-the light of the above findings.

22. In the instant case, referring to the order No. 1/23/98 (Com) Revenue, dated 22.6.1998 (quoted supra) it is clear that the Petitioner was delegated with the power and functions of AS and CO u/s 166 of the Manipur Land Revenue and Land Reforms (MLR and LR) Act, 1960. The said order further provided that the Petitioner would not be entitled to get any extra remuneration nor shall have any right to claim for regularization to the post.

23. A bare perusal of the order does not disclose that the pre-condition laid down in FR 49 has been complied with. There is a gulf of difference between "delegation" and "promotion" having wide legal consequences. On scrutiny of the delegation order which is worded to be an order not of promotion, we do not find that the said order was passed in terms of Section 49 of the Fundamental Rules entitling the Petitioner to claim higher pay scale provided to the post in question.

24. In view of the aforesaid discussions, the writ petition stands dismissed.

25. No costs.