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**(2004) 03 GAU CK 0024**  
**In the Gauhati High Court**  
**Case No : C.R. No. 446 of 1997**

Bijoy Choudhury and Others

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

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**Date of Decision :** 10-03-2004

**Acts Referred:**

Constitution of India, 1950 — Article 14, 16, 39D

**Citation :** (2006) 1 GLR 664 : (2005) GLT 467 Supp

**Hon'ble Judges :** Tinlianhang Vaiphei, J

**Bench :** Single Bench

**Advocate :** A.K. Bhowmik and B. Bhattacharjee, for the Appellant; S. Chakraborty, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

T. Vaiphei, J.—By this writ petition, the petitioners are claiming payment of higher pay scale benefit of Rs. 1300-3220 which has been allowed to some Junior Physical Instructors, who acquired Bachelor Degree in Physical Education (for short "B.P.Ed.") or Post Graduate Diploma in Physical Education (for short "D.P.Ed") on or after or prior to 24.4.1982 but upto 31.12.1991 by the Office Memorandum dated 11.6.1993 (Annexure-5 to the writ petition) on the ground that they also have acquired D.P.Ed, on 1.12.1992.

2. The material facts are not in dispute and the same may be briefly highlighted. The petitioners, who are 9th(nine) in numbers are Junior Physical Instructors, who were appointed on 7.8.1989 in the scale of pay of Rs. 900-2400 with the usual admissible allowances. After sometime they were sent for training in D.P.Ed. Course at Regional College of Physical Education, Panisagar, North Tripura and their training was completed on 4.7.1992 in the said institute. Thereupon, they were recognised as diploma holder in Physical Education or Post Graduate Diploma in Physical Education. By the Office Memorandum dated 11.6.1993, the respondent No. 2 circulated the guideline for granting of benefit of higher pay scale to the Physical Instructors, who acquired B.P.Ed, or D.P.Ed, from a

recognised College. It was stipulated therein that Physical Instructors holding such degree or diploma and who were enjoying the pay scale of Rs. 900-2400 and Rs. 1250-2890 under graded scale No. 19 under part-C of R.O.P. Rules, 1988 should be granted the revised scale of pay. In view of the said Memorandum, such benefits were given to different grade as under:

3. However, by the same Memorandum it was stated therein that such benefit of higher revised scale would be allowed only to those Physical Instructors who acquired B.P.Ed, or D.P.Ed, on or after or prior to 24.4.1982 but upto 31.12.1991 (date of publication of result). It was further stipulated therein that Junior Physical Instructors and Physical Instructors, who acquired B.P.Ed, and D.P.Ed, or M.P.Ed, on or after 1.1.1992 would be granted the benefit of one additional increment in the existing scale in the manner as indicated at (G) of Finance Department's O.M. No. 4(62)-FIN(PC)/92 dated 7.12.1992. It was stated by the petitioners that by making 31.12.1991 as the cut-off date for granting the benefit of the said higher pay scale, they have been denied of the same since they acquired the said qualification on 1.12.1992. It is the further case of the petitioners that the proforma respondent No. 1, who is also similarly situated has been given the higher pay scale benefit. According to the petitioners, they have made a number of representations to the State-respondents for redressing their grievance but to no effect. According to the petitioners, the denial of the said benefit of higher revised pay scale to them under the circumstances of the case is arbitrary, illegal and discriminatory. It is the further case of the petitioners that they were also keen to obtain diploma i.e. higher qualification from the training centre but due to the method of pick and choose policy adopted by the respondent No. 3, they were not able to acquire the said higher qualification within the cut-off date referred to earlier. It is submitted by the petitioners that there is no rationality in adopting 31.12.1991 as the cut-off date for granting the benefit of higher pay scale to the Physical Instructors, who acquired the post graduate diploma and that there is no earthly reason for treating the petitioners differently and as such the State-respondent should be directed to grant the benefit of said higher revised pay scale of Rs. 1,300-3,220 to them.

4. The State-respondents resisted the writ petition and filed the counter affidavit in which they, inter alia, assert that the petitioner were not eligible to get higher scale benefit in terms of the said Office Memorandum since they acquired D.P.Ed, only after 31.12.1991. According to the State-respondents, the petitioners are entitled to get one additional increment in the existing scale in terms of the said Office Memorandum and were accordingly paid the additional increment. It is further pointed out by the State-respondents that some school authority extended the benefit of said higher pay scale erroneously and without referring it to the higher authorities and that the Finance Department vide Memo dated. 28.4.1997 has now clarified that such benefit would be admissible to those who are directly recruited in the scale of Rs. 560-1300 or their corresponding pay scale in the pay revision of 1961 and 1975. It was also clarified therein, according to the State-respondents, that past cases where such benefits were

erroneously granted to any promoted Physical Instructors on wrong interpretation should not be re-opened while all future cases including cases not yet settled would be governed by the new clarification. The State-respondents denied that the cut-off date in respect of entitlement to higher scale benefit fixed by the Government is arbitrary or illegal and that since the petitioners are entitled to get the same benefit as per above Office Memorandum, the question giving discriminatory treatment to the petitioners does not arise. In so far as the payment of such benefit to the proforma respondent No. 1 is concerned, it is asserted by the State-respondent that such benefit was erroneously granted without referring to the departmental authorities and as such the benefit so extended is protected by the said clarification of the Finance Department. The State-respondents also strongly denied that there was any policy of pick and choose in selecting untrained graduate Physical Instructors for training in D.P.Ed. It is stated by the State-respondents that before selection of the trainees for the D.P.Ed. Course all concerned Head of Office or D.D.O's were asked to obtain willingness from the un-trained employees of the Physical Instructors and it was on the basis thereof selection was made strictly according to the seniority among those who offered their willingness.

5. The petitioners filed their affidavit-in-reply to the counter affidavit of the State-respondents. In the reply affidavit, the petitioners denied that the selection of trainees for untrained graduate Physical Instructors was made strictly according to seniority. On the other hand, it is pointed out by the petitioners that as per the final seniority list of Junior Physical Instructors published on 10.6.1997, the names of the petitioner Nos. 1 to 9 are at Serial Nos. 424, 336, 425, 401, 475, 346, 366, 493 and 472 respectively in which the petitioner No.8 i.e., Shri Asish Choudhury is the junior most at serial No. 493, but the name of Smti. Swapna Dey, Shri Kalipada Sutradhar and Shri Bijoy Kumar Das appear at Sl. Nos. 498, 518 and 523 who were sent for the said training earlier than the petitioners are admittedly junior to them. Similarly, it is pointed out by the petitioners that Shri Tapash Kumar Baidya and Smti. Priti Paul, whose names appeared at Sl. Nos. 349 and 340 respectively were also given out of turn selection even though the petitioner No. 6 at Sl. No. 346 is admittedly senior to them. Again it is highlighted by the petitioners that Sri Salil Kumar Bhowmik, Smt. Milan Dey, Sri Rajat Bhattacharjee, Shri Ashok Kumar Paul, Sri Sukesh Lodh, Sri Monojit Bagehi and Md. Abdul Kalam Azad, whose names appear at Sl. Nos. 357, 358, 379, 404, 410 and 460 are also admittedly junior to some of the petitioners but they were given training in the earlier batch. It is contended by the petitioners that the non-selection for such training was not due to their fault and as such their failure to acquire the higher qualification under the aforesaid circumstances cannot justify the denial of the benefit of higher revised pay scale. In that view of the matter, according to the petitioners, the cut-off date fixed by the State-respondents for granting of the benefit of revised pay scale is absolutely arbitrary, unfair, unreasonable and discriminatory and is violative of Article 14 and 16 of the Constitution of India. Having failed to establish the rationality of the said cut-off

date by the State-respondents, it is submitted by the petitioners, the impugned cut off date cannot be sustained in law.

6. The principle of "equal pay for equal work" under Articles 39(d), 14 and 16 of the Constitution of India is now too well settled to be reiterated by reference to cases. It is conceded that equation of posts and equation of pay are matters primarily for the Executive Government and expert bodies like the Pay Commission to decide and not for courts but where all things are equal that is, where all relevant considerations are the same, persons holding identical posts may not be treated differently. Of course, if officers of the same rank perform dissimilar functions and the powers, duties and responsibilities of the posts held by them vary, such officers may not be heard to complain of dissimilar pay merely posts are of the same rank and nomenclature is the same. Therefore, the principle of "equal pay for equal work" is to be applied where unequal scales of pay among persons holding identical posts are based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same.

7. As noted earlier, the petitioners, who are Junior Physical Instructors, acquired D.P.Ed, on 1.12.1992. By the impugned notification dated 11.6.1993, the State-respondents have made a classification between the petitioners and other Junior Physical Instructors, who obtained such qualification on or after or prior to 24.4.1982 but upto 31.12.1991 (the date of publication of result) for enjoying the benefit of the higher revised pay scale i.e. Rs. 1300-3220. Since the petitioners did not obtain the said qualification within 31.12.1991, they are considered not entitled to the said higher pay scale. This is not a case in which the petitioners and the other group of Junior Physical Instructors are performing dissimilar functions or the powers, duties and responsibilities of the posts held by them are different. Thus, the petitioners and the other Junior Physical Instructors belong to the same class. However, classification is sought to be made by fixing 31.12.1991 as the cut-off date for conferring the benefit of higher pay scales. No doubt, it is settled law that the choice of date as a basis for classification cannot always be dubbed as arbitrary even if no particular reason is forthcoming for the choice unless it is shown to be capricious or whimsical in the circumstances.

8. In the instant case, since the petitioners and the other Junior Physical Instructors undoubtedly belong to the same class holding the same posts, denial of the higher pay scale to the petitioners by fixing a particular cut-off date is prima facie arbitrary. It is true that whenever a revision of pay takes place, a cut-off date becomes imperative because the benefit has to be allowed within the financial resources available with the Government. I am also not unmindful of the legal position that a cut-off date for granting service benefits may not necessarily tantamount to a violation of Article 14 of the Constitution and will be upheld by the courts if there is rational explanation in support of that date. Therefore, in the view that I have taken that the fixation of 31.12.1991 as the cut-off date for conferring the revised pay scale is prima facie arbitrary, it is to be seen whether

there is any rational explanation by the State-respondents for fixing the impugned cut-off date.

9. In para 7 of the counter-affidavit, the State-respondents seek to explain the reason for denying the higher pay scale to the petitioners, which may be reproduced below :

7. That with regard to Para-13 of the instant writ petition it is stated by the answering respondents that it is fact that there were representations and accordingly Finance Department was moved on number of occasions for clarification/decision but no such benefit of higher scale was agreed to by the Finance Department who have finally clarified after taking all aspects in the consideration vide Memo. No. F.4(62)-FIN/(PC)/92, dated 28.4.1997 stating that benefit of higher scale as contemplated in item No. (D) of Finance Department, O.M. of dated 7.12.1992, shall be admissible only for those P.I.'s who were directly recruited in the scale of Rs. 560-1,300 on their corresponding pay scale after revisions.

It is also decided by the Finance Department through the said Memo. That all future cases including the past cases which are yet to be settled, would be regulated accordingly. Past settled cases giving such benefit even of erroneously or for wrong interpretation should not be reopened. A copy of the said Circular is annexed herewith and marked as ANNEXURE-R.I.

10. Since the said Memorandum dated 28.4.1997 is not annexed to their counter-affidavit, the learned Counsel for the State-respondent was directed to place the same before the Court in the course of hearing. Accordingly, the said Memorandum is now made available to the Court. The said Memorandum reads thus :

#### MEMORANDUM

Sub : Grant of Higher Pay Scale to the post of Senior Physical Instructors over and above the highest Graded pay scale under Graded Scale No. 19 in Part-C of Schedule - III of the TSCS(RP) Rules, 1988 - Clarification thereof.

Attention is invited to Item No. (D) on page-3 of Finance Department's Office Memorandum of even number dated 07.12.1992. In the said item "Senior P.I." in the pre-revised scale of Rs. 560-1300 (1982 revision) who have been allowed granted pay scale of Rs. 1450-3710 in the TSCS(RP) Rules, 198 under the Grade Scale No. 19 in Part-C of the aforesaid Rules and who have very limited scope of promotion, were allowed further higher scale of Rs. 1,700-3,980 on completion of 10(ten) years continuous service in the post/grade under the provisions of Notes of Part-B of the TSCS(RP) Rules, 1988.

2. A question has now been raised whether the above benefit is admissible only for the "Sr.P.I."s who entered into service initially in the scale of Rs. 560-1,300 (1982 revision), or in the corresponding pay scales in the previous revisions (i.e. 1961 revision/1975 revision), or both for the direct recruits as well as the

Physical Instructors who entered into service initially in a lower pay scale and thereafter by virtue of promotion had become eligible for the higher scale of Rs. 560-1300 (1982 revision) as prescribed for the promotion most.

3. The matter has been examined carefully in Finance Department taking all aspects into consideration.

4. It is hereby clarified that the benefit of higher scale as contemplated in Item No.(D) of Finance Department's D.O. of even number dated 07.12.1992, shall be admissible only for those P.I.'s who were directly recruited in the scale of Rs. 560-1300 (1982 revision) or their corresponding pay scales in the revisions of 1961 and 1975.

All future cases including the past cases which are yet to be settled, will be regulated accordingly. However, the past cases where the said benefit has been granted to any promoted Physical Instructors erroneously or for wrong interpretation, shall not be re-opened.

Sd Illegible 28.04.1997 Deputy Secretary, Finance Department.

10A. A perusal of the said Memorandum will show that the higher pay scale of Rs. 1700-3980 in respect of Senior Physical Instructor on completion of 10 years continuous service in the post/grade under the provisions of Notes of Part-B of the TSCS(RP) Rules, 1988 would be admissible only to Physical Instructors who were directly recruited in the scale of Rs. 560-1300 (1982 Revision) or their corresponding pay scale in the revisions of 1961 and 1975. Admittedly, the petitioners are not claiming the higher scale of Rs. 1700-3980 nor are they Senior Physical Instructors nor did they enter into service initially in a lower scale of pay and thereafter by virtue of promotion had become eligible for the higher scale of Rs. 560-1300 (1982 Revision). That apart, Item No. (D) of Finance Department's D.O. dated 7-12-1992 unmistakably refers to and is meant for Senior Physical Instructors and not for Physical Instructors like the petitioners. A comparative reading of Item No. (D) and Item No. (F) and the said D.O. will reveal that whereas the higher scale envisaged in the former is based in completion of continuous service in the grade/post, the higher scale contemplated in Item No.(F) is to be based on acquiring higher qualification. Therefore, I agree with the submission of Mr. A.K. Bhowmik, the learned senior counsel for the petitioners that the Memorandum dated 28-4-1997 is not related to or in any way concerned with the claim of the petitioners in this writ petition. Therefore, there is no error nor can there be any error in extending the benefit of higher pay scale of Rs. 1300-3220 to those Physical Instructors who have acquired the requisite higher qualification including the private respondent.

11. It may also be noticed that in attacking the choice of cut-off date as arbitrary and irrational, the petitioners contend that their failure to acquire the prescribed higher qualification prior to 31-12-1991 was not due to their fault but due to the policy of pick and choose method adopted by the Department in selecting the trainees. It is asserted by the petitioners that they were also keen to undergo

training and applied for the same but by adopting the policy of pick and choose, only their juniors were selected for the training. The names of the persons junior to the petitioners who were so selected and who managed to acquire the said qualifications prior to 31-12-1991 thereby enjoying the benefit of the revised higher pay scales are mentioned in the rejoinder-affidavit, which were referred to in the foregoing paragraph. These details are furnished apparently by the petitioners to substantiate their averments in para 18 of the writ petition in view of the denial by the State-respondents in their counter-affidavit. In the face of this allegation, which is not seriously controverted by the State respondents, the inference is irresistible and the conclusion inevitable that the selection for undergoing training in D.P.Ed, was not based on seniority and that no rational principle appeared to have been followed in selecting the trainees.

12. The Apex Court in a string of judgments has settled the principle of law that different scales of pay can be granted based on experience and merit to the employees in the same grade classification based on experience is valid. An employee having more length of service is certainly better equipped to perform his duties than a relatively new employee. Similarly, possession of higher qualification can be a basis for qualification. In the instant case, the basis for choosing 31-12-1991 as the cut-off date for granting of higher revised pay scale is not forthcoming. The question then is whether different pay scales can be made in respect of persons holding the same post i.e. the post of Junior Physical Instructors under the same Department on the basis purely on the fortuitous circumstance of the date of acquiring the prescribed higher qualification? Upon my finding that the selection for undergoing training in D.P.Ed., was not based on rational principle or seniority, and in the absence of evidence showing any reasonable or intelligible basis for granting higher pay scale to those who acquired the prescribed higher qualification upto 31-12-1991, in my considered view, the choice of cut-off on the basis of such fortuitous circumstances is plainly arbitrary, and in violative of Articles 14 and 16 of the Constitution.

13. In the view that I have taken, I hold that the writ petitioners are entitled to the benefit of the higher pay scale of Rs. 1300-3200 as extended to the private respondent and other Junior Physical Instructors w.e.f. 1.12.1992 when they acquired D.P.Ed. The Office Memorandum dated 7-12-1992 and dated 11-6-1993 shall be read down accordingly. The writ petition stands allowed. The respondents-State shall pay the revised pay scale of Rs. 1300-3200 to the petitioners w.e.f. 1.12.1992 less the additional increment, if already drawn by them in the interregnum, within two months from the receipt of this judgment. No costs.