

(2018) 01 OHC CK 0040
In the Orissa High Court
Case No : 8205 of 2017

Daulen Baxla & others

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 10-01-2018

Acts Referred:

Constitution of India, Article 14, Article 16 - Appointment of Commission to inquire into and report on the administration of autonomous districts and autonomous regions - Dissolution of a Distr

Citation : (2018) 01 OHC CK 0040

Hon'ble Judges : D.P. Choudhury

Bench : Single Bench

Advocate : G.A.R. Dora, G. Rani Dora, Priyadarsini Tripathy, A.K. Bose

Final Decision : Disposed off

Judgement

1. Challenge has been made to the inaction of the opposite parties for not releasing the differential arrear salary with regard to the 6th Central Pay

Commission right from 1.1.2006 to 12.1.2017.

FACTS

2. The labyrinth of the factual matrix leading to the writ petition is that the petitioners are working as Assistant Matron, Nursing Sisters and Staff

Nurse in the Swami Vivekanand National Institute of Rehabilitation Training and Research (in short "SVNIRTAR") At-Olatpur, District-Cuttack.

The said institution is under the Ministry of Social Justice & Empowerment, Government of India.

3. It is alleged inter alia that the 6th Central Pay Commission (in short "CPC") of 2008 recommended Grade Pay for Nursing staff which has been

accepted by the Government of India and said recommendation was effective from 1.1.2006. The Grade Pay for Assistant Matron is Rs.5,400/-, for Nursing Sister is Rs.4,800/- and for Staff Nurse is Rs.4,600/- which are found in Section 11 Part-B of the 6th C.P.C. But inadvertently applying Part-A of 6th CPC relating to Ministerial staff, the Staff Nurses and Nursing Sisters are paid Grade Pay of Rs.4,200/- instead of Rs.4,600/- and Rs.4,800/- respectively and Assistant Matron is paid Rs.4,600/- instead of Rs.5,400/-. Representations were made since 2009 by the petitioners to the Executive Council of the SVNIRTAR. The Executive Council approved the proposal and sent the proposal to the Ministry under letter dated 10.10.2013 and the Ministry asked about the financial implication. Thereafter NIRTAR sent necessary information vide Annexure-2. Since no action was taken on the letter of the Director of the SVNIRTAR, even if all Central Government Nursing staff having equal qualification of the petitioners were receiving same benefit, the petitioners had to file W.P.(C) No.17207 of 2015 for implementation of the 6th CPC recommendation as enumerated in Section 11 Part-B relating to Grade Pay of Nursing Staff with effect from 1.1.2006. On 5.10.2015 this Court considering the limited nature of grievance disposed of the writ petition directing the opposite party No.1 to take decision on the recommendation made by the Director, opposite party No.3 within a period of three months. Since no action was taken in spite of the order of this Court, the petitioners filed contempt petition bearing CONTC No.1648 of 2016. Thereafter notice was issued to the opposite parties. After receiving notice on Contempt petition, the opposite party No.1 issued order on 13.1.2017 to upgrade the Grade Pay in accordance with Section 11 Part-B with effect from 1.1.2006 notionally and to award the actual financial benefit from 13.1.2017.

4. Such recommendation of the Ministry for the petitioners being a discriminatory and denial of equal opportunity because of the actual benefit being received by the similarly situated Nursing staff in other institutions, the petitioners were compelled to file the present writ petition. On the other hand, the petitioners alleged about violation of Articles 14 and 16 of the Constitution requiring interference of the Court to grant actual benefit of Grade Pay from 1.1.2006 to 12.1.2017.

SUBMISSIONS

5. Mr. GAR Dora, learned Senior Advocate for the petitioners submitted that the Institute has already informed the Ministry of Social Justice and

Empowerment, Government of India with the comparative statement of pay scales with qualification of the petitioners qua the qualification of the

Staff Nurse, Nursing Sister and Assistant Matron of Safdarjang Hospital, New Delhi and All India Institute of Medical Sciences, Bhubaneswar

along with pay structure available to them and to the petitioners. According to him, since the qualifications are same and the mode of work are the

same, any discrimination without any reasonable basis or class amounts to violation of natural justice and equality before law is not maintained by

the opposite parties.

6. Mr. Dora, learned Senior Advocate for the petitioners further drew attention of the Court to the pay structure for Nursing and Para Medical

staff where under 6th CPC the Staff Nurses have got Grade Pay of Rs.4,600/-, Nursing Sisters have got Grade Pay of Rs.4,800/- and Assistant

Matrons have got Grade Pay of Rs.5,400/- with effect from 1.1.2006. It is also submitted on behalf of the petitioners that the Director of the

Institute SVNIRTAR has sent a comparative statement showing the justification for settlement of anomalies arising out of the 6th CPC. Learned

Counsel for the petitioners also drew attention to the order of this Court passed in W.P.(C) No.17207 of 2015 that the Court had directed the

opposite party No.1 to take a decision on the recommendation of the Director and thereafter the impugned orders vide Annexures-7 and 8 were

passed which show that the Government of India had upgraded the pay scale/ Pay Band of the petitioners with effect from 1.1.2006, but

unfortunately ordered the notional upgradation with effect from 1.1.2006 and the actual benefit from the date of issue of orders, i.e., 13.01.2017.

According to him, there is no any reasonable basis to grant such benefit notionally as the letter is silent as to why the actual benefit was not

extended to the petitioners although the opposite party No.1 admitted about the upgradation of the scale of pay. He submitted that since similarly

placed Nursing staff in other institutions are getting the same actual benefit with effect from 1.1.2006, the letter vide Annexures-7 and 8 showing

discrimination to the petitioners has not only affected the fundamental right of

the petitioners but also giving utter inequality to a lot out of the same class of employees. So, he submitted for awarding the actual financial benefit with effect from 1.1.2006 by modifying Annexures-7 and 8.

7. Learned Assistant Solicitor General relying upon the counter filed by t0he State submitted that the writ petition is not maintainable as the

Government of India has made a policy vide Annexure-7 for upgradation of the scale of pay/pay band of the petitioners with effect from 1.1.2006

notionally and since it is a policy of the Government, the Court normally does not interfere with the policy framed by the Government. According to

him, time was taken by the Government to examine the proposal of the SVNIRTAR and accordingly the upgradation was allowed with effect from

1.1.2006 notionally but actual benefit was given from 13.1.2017 when the order was passed. It is for the Government to decide cutoff date when

such benefit is to be extended and in no cases the benefit can be extended retrospectively. If the upgradation of pay is implemented actually from

retrospective date, the opposite party No.3 will be saddled with serious financial burden of arrear of recurring in nature for which such arrear

should not be allowed to the petitioners. There being no discrimination, the question of violation of natural justice does not arise. So, he submitted

to reject the writ petition.

8. The main point for consideration:-

(i) Whether the petitioners are entitled to the upgradation of Grade Pay with financial benefit with effect from 1.1.2006 to 12.1.2017 or notionally

from 1.1.2006 to 12.1.2017 ?

9. It is not in dispute that the petitioners are employees of the institution under Ministry of Social Justice & Empowerment, Department of Disability

Affairs, Government of India. It is admitted fact that the petitioners were not granted similarly Grade Pay as available to other Central Government

institutions for which the SVNIRTAR has to send a proposal with comparative statement to the opposite party No.2 for upgrading the Grade Pay

as available to other Nursing staff of AIIMS, Bhubaneswar and Safdarjag Hospital, New Delhi. It is not in dispute that due to delay in

consideration of such proposal the petitioners had filed W.P.(C) No.17207 of 2015 where direction was issued to take a decision on the

recommendation of the opposite party No.3.

10. It is available from the counter read with Annexure-7 that opposite parties have accepted the proposal of the SVNIRTAR by extending the

6th Pay Commission Pay band by upgrading the Grade Pay to Rs.4,600/-, Rs.4,800/- and Rs.5,400/- respectively for the post of Staff Nurse,

Nursing Sister and Assistant Matron respectively. On the other hand, the opposite parties have made equal Pay Band and the Grade Pay as per

6th Pay Commission as available to the Nursing staff of other institutions.

11. The only question remains that the said financial benefit although extended from 1.1.2006 but same was extended notionally and actually from

the date of issue of the order, i.e., 13.1.2017. Annexure-8 is only issued by opposite party No.3 in pursuance of Annexure-7.

12. It is the contention of the learned Assistant Solicitor General that due to policy of the Government, the financial benefit was extended

prospectively but not retrospectively. His argument is mainly based on fact that the policy of the Government is to extend the actual benefit to the

petitioners prospectively because they form a different class although they are performing similar job as available in the case of the Nursing staff of

All India Institute of Medical Sciences and Safdarjang Hospital who have admittedly availed the same benefit with effect from 1.1.2006 and

therefore, he submitted that there is no violation of natural justice under Articles 14 of the Constitution. He cited the decision reported in AIR 2008

SC 647; State of Tamil Nadu v. Seshachalam (Civil Appeal No.1938 of 2007, disposed of on 18.9.2007) where Their Lordships have observed

at paragraphs-17, 18 and 19 in the following manner:

17. Reliance has been placed by Mr. Venkataramani on the following passage of The State of West Bengal v. Anwar Ali Sarkar [(1952) 3 SCR

284] :

The learned Attorney-General, appearing in support of these appeals, however, contends that while a reasonable classification of the kind

mentioned above may be a test of the validity of a particular piece of legislation, it may not be the only test which will cover all cases and that there

may be other tests also. In answer to the query of the Court he formulates an alternative test in the following words : If there is in fact inequality of

treatment and such inequality is not made with a special intention of prejudicing any particular person or persons but is made in the general interest

of administration, there is no infringement of article 14. It is at once obvious that, according to the test thus formulated, the validity of State action, legislative or executive, is made entirely dependent on the state of mind of the authority. This test will permit even flagrantly discriminatory State action on the specious plea of good faith and of the subjective view of the executive authority as to the existence of a supposed general interest of administration. This test, if accepted, will amount to adding at the end of article 14 the words ""except in good faith and in the general interest of administration."" This is clearly not permissible for the Court to do. Further, it is obvious that the addition of these words will, in the language of Brewer, J., in *Gulf, Colorado and Santa Fe Railway Co. v. W. H. Ellis* (165 U.S. 150), make the protecting clause a mere rope of sand, in no manner restraining State action. I am not, therefore, prepared to accept the proposition propounded by the learned Attorney-General, unsupported as it is by any judicial decision, as a sound test for determining the validity of State action.

This Court therein was dealing with the provisions of the West Bengal Special Courts Act. The said decision, in our opinion, has no application with the facts and circumstances of this case, particularly, when in the said decision itself, it has been pointed out that Article 14 does not insist that every piece of legislation must have universal application and it does not take away from the State the power to classify person for the purpose of legislation.

18. As to what, therefore, is necessary for this purpose is that classification must be rational and in order to pass the test : (1) the classification must be founded on an intelligible differentia and (2) the differentia must have a rational relation to the object sought to be achieved by the Act.

19. Equally misplaced is the decision of this Court in *The State of Jammu & Kashmir v. Shri Triloki Nath Khosa & Ors.* [(1974) 1 SCC 19], wherein this Court, inter alia, held that educational qualification can be held to be a criteria for valid classification for different scales of pay. Justice

V.R. Krishna Iyer, held :

The social meaning of Articles 14 to 16 is neither dull uniformity nor specious "talentism". It is a process of producing quality out of larger areas of equality extending better facilities to the latent capabilities of the lowly. It is not

a methodology of substitution of pervasive and slovenly mediocrity for activist and intelligent-but not snobbish and uncommitted-cadres. However, if the State uses classification casuistically for salvaging status and elitism, the point of no return is reached for Articles 14 to 16 and the Courts jurisdiction awakens to dadden such manoeuvres. The soul of Article 16 is the promotion of the common man's capabilities, over-powering environmental adversities and opening up full opportunities to develop in official life without succumbing to the sophistic argument of the elite that talent is the privilege of the few and they must rule, wriggling out of the democratic imperative of Articles 14 and 16 by the theory of classified equality which at its worst degenerates into class domination.

13. With due regard to the aforesaid decision, it is made very clear that the classification must be rational and in order to pass the test the classification must be founded on an intelligible differentia and the differentia must have a rational relation to the object sought to be achieved by the Act. No doubt the aforesaid decision speaks about the social meaning of Articles 14 to 16. In the instant case, when the opposite parties have accepted the petitioners as Nursing personnel under the Government of India at par with the Nursing staff of other medical institutions as per the comparative statement of the NIRTAR, the inequality between them cannot be allowed to stand. On the other hand, according to the above decision, there is no difference between the Nursing staff of this institution and the Nursing staff of other Central Government medical institutions. Thus, according to such decision, any discrimination with regard to pay or salary is manifestly violation of natural justice under Article 14 of the Constitution.

14. Learned counsel for the petitioners on the other hand cited the decision in the case of State of Madhya Pradesh and others v. Mala Banerjee; (2015) 7 SCC 698, where Their Lordships have observed at para-6 in the following manner:

6. We also find ourselves unable to agree with the appellants' submission that this is a policy matter and, therefore, should not be interfered with by the courts. In Federation of Railway Officers Assn. v. Union of India 2003 4 SCC 289, this Court has already considered the scope of judicial review and has enumerated that where a policy is contrary to law or is in

violation of the provisions of the Constitution or is arbitrary or irrational, the courts must perform their constitutional duties by striking it down. The appellants have not been able to explain why it chose to deny teachers the benefit of the second Kramonnati while granting this benefit to all the other employees, thus discriminating against them and violating their fundamental rights enshrined in articles 14 and 16 of the constitution. It is indeed paradoxical that teachers who prepare persons for employment and leadership are dealt with in a parodical attitude by the State. Further, we reiterate that no explanation is forthcoming for granting the second Kramonnati with effect from 1-8- 2003. This is neither the date in the original Scheme nor justifiable on the basis of any other material available on the record. Many employees had completed twentyfour years of service by 1999; therefore, in postponing their second Kramonnati by four years, the appellants have departed from the basic object of the Scheme. The 3-9-2005 Order failed to explain the basis of this decision, and is thus arbitrary in nature and discriminatory towards the respondents and others in their position.

15. With due regard to the aforesaid decision, it appears that the policy of the Government if contrary to law or in violation of the provisions of the Constitution or is arbitrary or irrational, the Court must perform their constitutional duty by striking it down. It is also reported in 2017 (8) Supreme 500; State of Punjab & others v. Senior Vocational Staff Masters Association & others, where Their Lordships have observed at paras-16, 17 and 18 in the following manner:

16) Further, since the very inception, the educational qualification for appointment as Vocational Masters had been a degree or a diploma with three years" experience as both the qualifications were placed at par. All persons were appointed by a common process of selection and they teach the same classes, performing the same work. No distinction can be brought about between the persons so appointed. It is only subsequently that the appellants designated some of the Vocational Masters as Vocational Lecturers and brought about an artificial distinction between the two. Even on account of redesignation of the degree holders and post graduates as vocational lecturers, there was no change in the responsibilities and the financial matters as between the degree holders and diploma holders before

the alleged Notification which fact is duly admitted by the State.

There is no distinction between the vocational lecturers and vocational masters and they form one unified cadre and class. There cannot be any

discrimination between similarly situated persons, whether by way of a government notification or any amendment in the Rules. As far as nature of

work is concerned, it is stated that the vocational masters are discharging their duty in the Senior Secondary Schools in the Engineering/non-

Engineering trades and have the technical qualifications while the vocational lecturers are also discharging the same duties in the same schools. Both

vocational masters and lecturers are teaching the same classes, i.e., 10+1 and 10+2 and hence the nature of work, responsibilities and duties being

identical and the pay scales were also kept identical since 1978 onwards.

17) The principle of equality, is also fundamental in formulation of any policy by the State and the glimpse of the same can be found in Articles 38,

39, 39A, 43 and 46 embodied in Part IV of the Constitution of India. These Articles of the Constitution of India mandate that the State is under a

constitutional obligation to assure a social order providing justice-social, economic and political, by inter alia, minimizing monetary inequalities, and

by securing the right to adequate means of livelihood and by providing for adequate wages so as to ensure, an appropriate standard of life, and by

promoting economic interests of the weaker sections. Meaning thereby, if the State is giving some economic benefits to one class while denying the

same to other then the onus of justifying the same lies on the State specially in the circumstances when both the classes or group of persons were

treated as same in the past by the State. Since Vocational Masters had been drawing same salary as Vocational Lecturers were drawing before

the application of 4th pay commission, any attempt to curtail their salary and allowances would amount to arbitrariness which cannot be sustained

in the eyes of law if no reasonable justification is offered for the same.

18) We are conscious of the fact that a differential scale on the basis of educational qualifications and the nature of duties is permissible. However,

it is equally clear to us that if two categories of employees are treated as equal initially, they should continue to be so treated unless a different

treatment is justified by some cogent reasons. In a case where the nature of duties is drastically altered, a differential scale of pay may be justified.

Similarly, if a higher qualification is prescribed for a particular post, a higher scale of pay may be granted. However, if the basic qualifications and the job requirements continued to be identical as they were initially laid down, then the Court shall be reluctant to accept the action of the authority in according a differential treatment unless some good reasons are disclosed. Thus, the decisions relied upon by learned senior counsel are clearly distinguishable and are not applicable to the facts of the present case.

16. With due regard to the aforesaid decision, it appears that the principle of equality is also fundamental in formulation of any policy by the State and same is also required in view of the clear provisions in Part IV of the Constitution to assure a social order providing justice-social, economic and political by minimizing monetary inequalities and by securing the right to adequate means of livelihood and standard of life, the State has got obligation to extend same benefit to such employees who are under one class. On the other hand, if the State is giving same economic benefit to one class and denying the same to other, the onus of justifying the same lies on the State specially in the circumstance when both classes or group of persons were treated as same by the State. Now adverting to the present case, it appears that the petitioners have been treated equally with other Nursing staff of the Government of India and those staff have already got the benefit of 6th Pay Commission with upgraded Grade Pay with effect from 1.1.2006, there is no any justifiable reason produced by the State to show that the petitioners were to be given that benefit notionally from 1.1.2006. Annexure-7 also does not explain why the decision was taken to extend the benefit of upgradation of Grade Pay notionally with effect from 1.1.2006.

17. Since the State has failed to prove the onus of justifying the decision to formulate a policy of extending financial benefit with effect from 1.1.2006 notionally, same cannot be stand on the way in view of the decision of the Hon''ble Apex Court as enumerated above. On the other hand, by such notification, the natural justice under Articles 14 and 16 of the Constitution as available to the petitioners have been violated.

18. In terms of the above discussion, the Court is of the view that the petitioners are entitled to the upgradation of the pay scale/Pay Band with Grade Pay from 1.1.2006 actually but not notionally. The point is answered

accordingly.

CONCLUSION

19. The petitioners have prayed to declare the notional benefits as illegal and to direct the opposite parties to release the arrears from 1.1.2006 to 12.1.2017.

20. It has been already observed above that the petitioners are entitled to the actual financial benefit from 1.1.2006 but not notional. Learned

Assistant Solicitor General has vehemently argued that any direction for payment of arrears would saddle the State with heavy financial burden.

The financial burden cannot arrest the right of the employees working under the State. When the rights have not been addressed at right time by the

opposite parties, the employees cannot be held responsible for this. Any constitutional safeguards to the employees should not be defeated by

mere plea of financial burden by the State. Therefore, the Court is of the view that Annexures-7 and 8 declaring the order of upgradation notionally

with effect from 1.1.2006 is liable to be quashed. Hence, Annexures-7 and 8 are hereby quashed to such extent by deleting the word "notionally".

Therefore, the Court direct the opposite parties to pay differential upgraded Grade Pay to the petitioners as per posts they held with effect from

1.1.2006 to 12.1.2017 under 6th CPC within three months from today.

The writ petition is disposed of accordingly.