
(2016) 04 SHI CK 0016
In the High Court Of Himachal Pradesh
Case No : CWP Nos. 1971 and 1972 of 2011

Faryad Bhatti and Others

APPELLANT

Vs

High Court of H.P.

RESPONDENT

Date of Decision : 01-04-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 04 SHI CK 0016

Hon'ble Judges : Mansoor Ahmad Mir, C.J. and Tarlok Singh Chauhan, J.

Bench : Division Bench

Advocate : B.C. Negi, Senior Advocate and Pranay Pratap Singh, Advocate, for the Appellant; Vikas Rathore, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Tarlok Singh Chauhan, J.—1. The sole question to be determined in these petitions is as to whether an employee who has simply been deployed to discharge his duties on higher post without actually been appointed either on substantive or officiating capacity can be held entitled to the salary and allowances of the higher post.

2. Both the petitioners in March, 2007 had been working as Superintendents and on account of increase in court work, because of the elevation of new Hon'ble Judges to this Court, they were deputed to discharge the functions of Court Secretaries, which they did so with effect from 2.4.2007 to 7.1.2009. They preferred a representation on 30.4.2009 claiming salary and allowances payable to the Court Secretaries, however, the same was turned down by the respondent on 5.11.2009, leading to the filing of instant petitions.

3. The respondent in its reply has averred that the petitioners were simply deployed to discharge the duties of Court Secretaries and were never appointed as such in accordance with the Rules in any capacity including substantive or officiating and thus no legal right whatsoever is conferred upon the petitioners to

claim salary of higher post. It is further averred that in terms of Rule 49 of the FRSR Part-1 (General Rules), payment of salary of higher post can only be claimed in a situation where a government servant is appointed to officiate as a temporary measure against such higher post and would not be applicable to a case where the government servant is simply deployed on a higher post in view of the administrative exigency. It is further averred that it was on account of pendency of Writ petition No. 1743 of 2002 titled as Tek Ram & Ors. v. Hon"ble High Court of HP & Ors. and later on LPA No. 7 of 2007 in which the vires of the Recruitment and Promotion Rules of the Officers and Staff of the Registry was under challenge, that no promotion could be made against the vacant posts of Court Secretaries, which in turn compelled the respondent to depute the petitioners to work as Court Secretaries on the elevation of new Judges to this Court.

We have heard learned counsel for the parties and have gone through the records of the case.

4. Sh. B.C. Negi, learned Senior counsel for the petitioners has vehemently argued that claim of the petitioners is squarely covered under Fundamental Rule 49 (for short "Rule") and thus there is no reason or logic for the respondent for not paying the petitioners the salary and allowances payable to the Court Secretaries.

5. Before we advert to the interpretation of Rule 49, we may notice that an identical issue on the principles involved in the instant case came up for consideration before the Hon"ble three Judges of the Hon"ble Supreme Court in Ramakant Shripad Sinai Advalpalkar v. Union of India , AIR 1991 SC 1145, wherein it was categorically held that where an officer who substantively holds a lower post and is merely asked to discharge the duties of a higher post cannot be treated as a promotion and in such case he does not get the salary of the higher post, but gets only "charge allowance". It was further held that such situations are contemplated where exigencies of public service necessitate such arrangements and even consideration of seniority do not enter into it. The person continues to hold his substantive lower post and only discharges the duties of the higher post essentially as a stop gap arrangement. It is apt to reproduce relevant portion of the judgment which reads thus:

"4. On the first contention, the very terms of the office order dated 30th August, 1963 (Exhibit A) is clear and conclusive. It says:

"Shri Ramakanta Sripada Sinai Advolpalcar, acting 3rd grade officer of the Caixa Economica de Goa will perform the duties of the Treasurer of Caixa Economica de Goa, vice Shri Antonio Xavier Furtado, who died this morning. Shri Advolpalcar should assume the function of the post from today.

Shri Advolpalcar will draw besides the monthly salary of his own post as acting 3rd grade officer an allowance of Rs. 100/- p.m. which is payable to the post of treasurer under the existing rules...."

(Emphasis supplied)

The arrangements contemplated by this order plainly does not amount to a promotion of the appellant to the post of Treasurer. The distinction between a situation where a Government servant is promoted to a higher post and one where he is merely asked to discharge the duties of the higher post is too clear to require any reiteration. Asking an officer who substantively holds a lower post merely to discharge the duties of a higher post cannot be treated as a promotion. In such a case he does not get the salary of the higher post; but gets only that in service parlance is called a "charge allowance". Such situations are contemplated where exigencies of public service necessitate such arrangements and even consideration of seniority do not enter into it. The person continues to hold his substantive lower post and only discharges the duties of the higher post essentially as a stop-gap arrangement."

6. Similar issue thereafter came up for consideration before the Hon"ble Supreme Court in *State of Haryana v. S.M. Sharma & Ors.* , 1993 Supp (3) SCC 252, where too the incumbent though an SDO was entrusted with the charge of the post of Executive Engineer and it was held as under:

"11. Sharma was given the current duty charge of the post of Executive Engineer under the orders of the Chief Administrator and the said charge was also withdrawn by the same authority. We have already reproduced above Rule 4(2) of the General Rules and Rule 13 of the Service Rules. We are of the view that the Chief Administrator, in the facts and circumstances of this case, was within his powers to issue the two orders dated June 13, 1991 and January 6, 1992.

12. We are constrained to say that the High Court extended its extraordinary jurisdiction under Article 226 of the Constitution of India to a frivolity. No one has a right to ask for or stick to a current duty charge. The impugned order did not cause any financial loss or prejudice of any kind to Sharma. He had no cause of action whatsoever to invoke the writ jurisdiction of the High Court. It was a patent misuse of the process of the Court."

7. At this stage, we may now advert to the provisions of FR-49 which reads thus:

"F.R. 49. The State Government may appoint a Government servant already holding a post in a substantive or officiating capacity to officiate, as a temporary measure, in one or more of other independent posts at one time under that Government. In such cases, his pay is regulated as follows:--

(i) Where a Government servant is formally appointed to hold full charge of the duties of a higher post in the same office as his own and in the same cadre/line of promotion, in addition to his ordinary duties, he shall be allowed the pay admissible to him, if he is appointed to officiate in the higher post, unless the competent authority reduces his officiating pay under Rule 35; but no additional pay shall, however, be allowed for performing the duties of a lower post;

(ii) Where a Government servant is formally appointment to hold dual charges of

two posts in the same cadre in the same office carrying identical scales of pay, no additional pay shall be admissible irrespective of the period of dual charge:

Provided that if the Government servant is appointed to an additional post which carries a special pay, he shall be allowed such special pay;

(iii) Where a Government servant is formally appointed to hold charge of another post or posts which is or are not in the same office, or which, though in the same office, is or are not in the same cadre/line of promotion, he shall be allowed the pay of the higher post or of the highest post if he holds charge of more than two posts in addition to ten percent of the presumptive pay of the additional post or posts, if the additional charge is held for a period exceeding 45 days but not exceeding 3 months:

Provided that if in any particular case it is considered necessary that the Government servant should hold charge of another post or posts for a period exceeding 3 months, the concurrence of the Finance Department shall be obtained for the payment of the additional pay beyond the period of 3 months;

(iv) where an officer is formally appointed to hold full additional charge of another post, the aggregate of pay and additional pay shall in no case exceed Rs. 80,000/-

(v) No additional pay shall be admissible to a Government servant who is appointed to hold current charge of the routine duties of another post or posts irrespective of the duration of the additional charge;

(vi) If compensatory or sumptuary allowances are attached to one or more of the posts, the Government servant shall draw such compensatory or sumptuary allowances as the State Government may fix:

Provided that such allowances shall not exceed the total of the compensatory and sumptuary allowances attached to all the posts."

8. It would be evident from the perusal of FR-49 (5) that no additional pay is admissible to government servant who is appointed to hold current charge of urgent duties of another post, irrespective of the duration of this charge. Even in the instant case, it was on account of elevation of new Hon''ble Judges to this Court that the petitioners were deputed to discharge the functions of Court Secretaries.

9. Similar issue came up before a Coordinate Bench in the case of Mohinder Pal Puri v. State of H.P. & Anr. 2013 (2)SLC 1017, wherein this Court held as under:

"5. F.R. 49(5), unambiguously clarifies that no additional pay is admissible to a government servant, who is appointed to hold current charge of urgent duties of another post, irrespective of the duration of the additional charge. Also our specific attention is invited to sub-rule (3) of F.R. 49, in support of the petitioner's claim. Said Rule, also, in the given facts, is inapplicable. Petitioner was not formally appointed to hold charge of another post. Also it cannot be said

that the post of Commandant is not in the same cadre/line of promotion. As such, in our considered view, petitioner's claim for grant of additional pay and fixation of higher pay for the purpose of pension stands rightly rejected by the Tribunal.

6. The Apex Court in *Selvaraj v. Lt. Governor of Island, Port Blair and others*, , (1998) 4 SCC 291, had the occasion to deal with a case where for justifiable reasons, even though the petitioner could not be promoted, but was also made to discharge the duties of a higher post, his claim for salary for higher post was disallowed.

7. The Apex Court in , (1997) 6 SCC 200, *Mohd. Swaleh v. Union of India and others*, repelled the contention of an employee basing his claim for higher salary under the Rule in question, on the principle of quantum merit.

8. The Apex Court in *D.D. Suri v. Union of India and Another*, , (1979) 3 SCC 553, while dealing with Rule in question has also disallowed the claim of an employee for additional salary of the post for which he was to discharge additional duties. In the said decision, the Court considered the applicability of the fundamental rules in extenso.

9. Thus we see no reason to interfere in the impugned order.

10. The Apex Court in *Secretary-cum-Chief Engineer, Chandigarh v. Hari Om Sharma and others*, , (1998) 5 SCC 87, referred to by learned counsel for the petitioner, in the given facts is not applicable. Petitioner therein was promoted as Junior Engineer, however, such promotion was neither on regular basis nor was he paid salary for the said post. It is in these circumstances, the Apex Court granted relief to the petitioner holding that order of promotion cannot be considered as a stop-gap-arrangement.

11. Reliance by the petitioner on the decision of the Apex Court in *Selvaraj v. Lt. Governor of Island, Port Blair and others*, , (1998) 4 SCC 291, is misconceived as in the said case also, the Apex Court was dealing with the case where the employee was posted and asked to discharge duties only of a higher post."

10. On similar lines is the decision rendered by the Hon"ble Supreme Court in *A. Francis v. Management of Metropolitan Transport Corporation Ltd., Tamil Nadu* , (2014)13 SCC 283, wherein it was observed as under:

"6. The order dated 28.2.2001, by which the appellant was ALLOWED TO DISCHARGE DUTIES IN THE POST OF Assistant Manager had made it clear that the appellant would not be entitled to claim any benefit therefrom including higher salary and further that he would continue to draw his salary in the post of Assistant Labour Welfare Officer. If the above was an express term of the order allowing him to discharge duties in the higher post, it is difficult to see as to how the said condition can be overlooked or ignored. The decision of this Court in , (1998) 5 SCC 87 was rendered in a situation where the incumbent was promoted on ad hoc basis to the higher post. The aforesaid decision is also distinguishable

inasmuch as there was no specific condition in the promotion order which debarred the incumbent from the salary of the higher post. Such a condition was incorporated in an undertaking taken from the employee which was held by this Court to be contrary to public policy."

11. In view of the aforesaid exposition of law, prayer of the petitioners for grant of salary and allowances of the post of Court Secretary cannot be countenanced and being devoid of any merit cannot be acceded to. These petitions are sans merit and are accordingly dismissed, leaving the parties to bear the costs.