

(2018) 11 UK CK 0228
In the Uttarakhand High Court
Case No : Special Appeal No. 228 Of 2018

General Manager And Another	Vs	APPELLANT
Ved Prakash Sharma And Another		RESPONDENT

Date of Decision : 27-11-2018

Acts Referred:

Constitution of India, 1950 — Article 16

Citation : (2018) 11 UK CK 0228

Hon'ble Judges : Ramesh Ranganathan, CJ;Alok Singh, J

Bench : Division Bench

Advocate : T.A. Khan, Vinay Bhatt, Rahul Consul, C.S. Rawat

Final Decision : Allowed

Judgement

Ramesh Ranganathan, C.J.

1. The application to condone the delay of 14 days' in preferring the appeal is not opposed and is, therefore, ordered and the delay is condoned.
2. This appeal is preferred against the order passed by the learned Single Judge in WPSS No. 1200 of 2011 dated 19.02.2018.
3. The first respondent herein filed the said writ petition seeking a writ of Certiorari to quash the order dated 13/14-10-2010 whereby the first respondent - writ petitioner's claim for being extended the benefit of the post of Lab In-charge (Distillery) in which post he was working since 2002, including the difference of pay scale of the post of Lab In-charge (Distillery), was rejected.
4. The first respondent - writ petitioner was hitherto working as a Lab Chemist in the Distillery belonging to the Appellant Cooperative Society. As the post of Lab In-charge (Distillery) was vacant and remained unfilled, he submitted a representation dated 31.03.2002 requesting that he be permitted to work in the said post in the same pay scale as he was receiving in the post of Lab Chemist. Acceding to his request the appellant appointed the first respondent - writ

petitioner as the Lab In-charge (Distillery), but was continued to be paid the pay scale applicable to Lab Chemist, in the light of his letter dated 31.03.2002. The post of Lab In-charge (Distillery) remained unfilled, and the first respondent - writ petitioner continued to work in the post of Lab In-charge (Distillery) till he retired from service in the year 2012.

5. The petitioner invoked the jurisdiction of this Court, filing WPSS No. 841 of 2010 wherein he sought a Writ of Mandamus to direct the respondents to give him all the benefits of the post of Lab In-charge (Distillery) in which post he was working since 2002, including the difference in pay scale of the post of Lab In-charge (Distillery) forthwith, along with arrears of the difference in the pay scale of the higher post since 2002 with interest. The said writ petition was disposed of by order dated 16.09.2010, and the General Manager of the Appellant Sugar Factory was directed to take a decision on the petitioner's representation, in view of the Notification dated 31.01.1991 and the recommendations made to the Nodal Officer by the General Manager, preferably within a period of four weeks.

6. The General Manager, thereafter, rejected the first respondent - writ petitioner's representation by order dated 13/14-10-2010, questioning which the first respondent - writ petitioner filed WPSS No. 1200 of 2011. In the order under appeal dated 19.02.2018, the learned Single Judge observed that the first respondent - writ petitioner was working as a Lab Chemist; he had submitted an application dated 31.03.2002 requesting that he be permitted to discharge the duties of Lab In-charge (Distillery); the request made by the first respondent - writ petitioner was acceded to; he was permitted to discharge the duties of the Lab In-charge (Distillery) with effect from 31.05.2002; it was the case of the first respondent - writ petitioner that, though he had discharged the higher duties in the post of Lab In-charge (Distillery), he had not been paid salary thereof; while it was true that the first respondent - writ petitioner had made a representation, the fact of the matter was that he had worked uninterruptedly in the higher post with effect from 31.05.2002, till his retirement on 04.01.2012; the petitioner had the right to get the salary of the higher post from 31.05.2002 to 04.01.2012; it was not the case of the employer that the petitioner did not discharge his duties in the post of Lab In-charge (Distillery); it was incumbent upon the employer to engage a fresh hand, however, the employer had got an employee who was already working as a Lab Chemist, and who had discharged the duties of a Lab In-charge (Distillery); and the undertaking given by the first respondent - writ petitioner, that he would not claim the higher salary for discharging the duties of a higher post, would not come in his way, as fundamental rights cannot be waived nor can there be any estoppel against the exercise of fundamental rights. Relying on the Supreme Court judgment, in *Nar Singh Pal Vs. Union of India* and others reported in 2000 (3) SCC 588, the learned Single Judge allowed the writ petition directing the respondents to pay the salary of the Lab In-charge (Distillery) to the first respondent - writ petitioner from 31.05.2002 to 04.01.2012.

7. Before us Sri T.A. Khan, learned Senior Counsel for the appellants, would submit that, while the post of Lab Chemist is governed by the by-laws applicable to the appellant-Cooperative Society, and the Appointing Authority is the General Manager, the post of Lab In-charge (Distillery) is governed by Rules and Regulations, and appointment to the said post is to be made by the Cooperative Sugar Federation and not by the Cooperative Sugar Factory; the mode of appointment to the post of Lab In-charge (Distillery) is by direct recruitment; a fair and transparent mode of appointment to the post of Lab In-charge (Distillery) is by inviting applications from all eligible candidates; it was only because the post remained vacant for a long time, and the first respondent - writ petitioner had expressed his desire to work in the said post on the very same pay scale as he was receiving while working in the post of Lab Chemist, was he permitted to discharge the functions of a Lab In-charge (Distillery); and that did not justify the first respondent - writ petitioner claiming the pay scales of the post of Lab In-charge (Distillery), that too 8 years after he joined in the said post in 2002, and just two years prior to his retirement in the year 2012.

8. On the other hand Sri Rahul Consul, learned counsel for the first respondent - writ petitioner, would submit that the fact that the first respondent - writ petitioner had discharged the duties and functions of a Lab In-charge (Distillery) is not in dispute; the mere fact that he had submitted letter dated 31. 03.2002, waiving his right for payment of the emoluments of a Lab In-charge (Distillery), would not justify the appellant not extending him the benefit of the pay scales of that post; as has been rightly held by the learned Single Judge, fundamental rights cannot be waived; and a similar view was taken by the Supreme Court in *Nar Singh Pal Vs. Union of India* 2000 (3) SCC 588 as was taken by the Supreme Court earlier in *Secretary cum Chief Engineer, Chandigarh Vs. Hari Om Sharma* (1998) 5 SCC 87.

9. While the Supreme Court has, in several judgments including the aforesaid two judgments and in *Olga Tellis Vs. Bombay Municipal Corporation* AIR 1986 SC 180, held that fundamental rights cannot be waived, the question that the learned Single Judge failed to consider was whether any fundamental right of the first respondent - writ petitioner has been violated, as a result of his not being given the pay scale of a Lab In-charge (Distillery), as he was allowed to hold the office of a Lab In-charge (Distillery) only at his request, and not through a regular process of selection. Article 16 of the Constitution of India only requires the State, or its instrumentalities, to consider the case of the person concerned for being appointed to a post in accordance with law, that too only if he is eligible to be appointed to the said post. It is not in dispute that the post of Lab In-charge (Distillery) is required to be filled up by direct recruitment, and the appellants herein did not take any steps to fill up the post by direct recruitment. It appears from the record that for several years, before the petitioner had submitted his letter dated 31. 03.2002, the post of Lab In-charge (Distillery) remained vacant. The question whether a post should be filled up or should be kept vacant is for the employer to decide. As the first respondent - writ petitioner

was permitted to work in the post of Lab In-charge (Distillery) only because he had requested the General Manager to permit him to do so, and undertook not to claim the salary and emoluments of a Lab In-charge (Distillery), he was permitted to occupy the post of a Lab In-charge (Distillery) while being continued to be paid the salary of a Lab Chemist. The petitioner cannot claim violation of his fundamental right as he has no fundamental right to be appointed to the post of Lab In-charge (Distillery) without having to undergo a regular process of selection pursuant to an advertisement being issued inviting applications from all eligible candidates. Accepting his contention would require this Court to recognize back door appointments.

10. The first respondent - writ petitioner held the office of a Lab In-charge (Distillery) drawing the pay scale of a Lab Chemist ever since April, 2002 till 04.01.2012 when he retired from service. He filed Writ Petition No. 841 (SS) of 2010 only two years prior to his retirement. The inordinate delay on the part of the first respondent - writ petitioner in seeking the relief of being extended the pay scales applicable to the post of Lab In-charge (Distillery), has not been explained. Granting the relief sought for, despite the inordinate delay and laches in invoking the jurisdiction of this Court, would not be justified.

11. Viewed from any angle, the learned Single Judge was not justified in granting the relief sought for in the writ petition. The appeal is allowed, and the order under appeal is set aside. However, in the circumstances, without costs.