
(2019) 09 UK CK 0060

In the Uttarakhand High Court

Case No : Writ Petition No. 558 Of 2015 (S/B)

Hukum Singh Negi

APPELLANT

Vs

State Of Uttarakhand And Others

RESPONDENT

Date of Decision : 12-09-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 16, 39(d)

Citation : (2019) 09 UK CK 0060

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

Bench : Division Bench

Advocate : Sanjay Raturi, Anil Kumar Bisht, Bina Pandey

Final Decision : Dismissed

Judgement

Alok Kumar Verma, J

1. Whether the petitioner, Operation Theater Attendant, can claim parity of pay scale with the pay scale of Medical Attendant? Whether the petitioner is right in contending that grant of different scale of pay to Operation Theater Attendant is discriminatory and in violation of Articles 14 and 16 of the Constitution of India? These are the questions of law which arise for consideration in this writ petition.

2. This writ petition is filed seeking a writ of certiorari to set aside the Judgment and Order dated 13.10.2009 passed by the Public Services Tribunal, Uttarakhand at Dehradun in Claim Petition No.42 of 2009 'Hukum Singh Negi vs. State of Uttarakhand and two others'; a writ of certiorari to quash the order dated 05.10.2015 passed by respondents; a writ of mandamus commanding respondent Nos.1 to 4 to fix the grade pay of petitioner of Rs.2800/-, revised from time to time, as has been given to Medical Attendants in the State of Uttarakhand under the pay scale of Rs.5200-20200/-; further direct respondent Nos. 1 to 4 to pay arrears of salary by fixing the pay-scale of Rs.5200-20200 of Grade Pay of Rs.2800/- or of Rs.4200/- as has been given by the State of Uttar Pradesh to Sri Nag Dev Upadhyaya, Operation Theater Attendant, from the year

2000 with appropriate rate of interest to the petitioner; and a writ of mandamus commanding respondent Nos.5 to 7 to pay arrears of salary by fixing the Grade Pay of Rs.1200/- to Rs.1800/- from 01.01.1986 to 01.01.1996 and Grade Pay of Rs.2400/- from 01.01.1996 to 2000 with appropriate rate of interest to the petitioner.

3. In order to appreciate the issues involved in this writ petition, the relevant facts need mention infra.

4. The facts, to the limited extent necessary, are that the Chief Medical Officer, Dehradun informed on 02.01.1987 to the Employment Office, Dehradun that certain posts of Class III in the pay scale of Rs.330-495 and Class IV category in the pay scale of Rs.305-390 were lying vacant, which were required to be filled through a selection committee. The essential qualification for Class III posts was 10th pass with Science stream and a minimum six months experience from any private Nursing Home/Hospital and 5th Class pass for Class IV posts. On his selection by the Committee, the petitioner was appointed to the post of Operation Theater Attendant (in short "O.T.A."), in the pay scale of Rs.330-495, by the Chief Medical Officer, on 19.01.1987 and was posted at the P.P.C., Vikasnagar, Dehradun. By order of the same date, four other candidates were also appointed as Ward Boys, etc. in the pay scale of Rs.305-390.

5. In pursuance of above order, the petitioner continued to work as O.T.A. with full dedication and sincerity. At the time of filing the claim petition, the petitioner was posted at the S.P.S. Government Hospital, Rishikesh, Dehradun. The post of O.T.A. used to be treated as promotional post for Class IV category employees. When the petitioner was appointed, there was an other post, which was designated as Medical Attendant in the same pay scale of Rs.330-495, which had a prescribed educational qualification of 8th pass without any experience at the time of initial appointment. Following the Central Fourth Pay Commission's recommendations, the Government of Uttar Pradesh also decided to revise the pay scale of employees working in the Government, and an equivalence committee (Samata Samiti) was duly constituted. On the recommendation of the Samata Samiti, the pay scales of different categories of employees were revised in the medical and health services; but the pay scale of the petitioner, who held the technical post of O.T.A. was not revised, and this post was treated as a Class IV post, like that of a Peon, Farash, Jamadar etc., in the pay scale of Rs.825-1200, while the post of Ward Boy, which was not technical by any definition, was granted the higher pay scale of Rs.1200-1800/-.

6. Feeling aggrieved thereby, the petitioner represented his case before the departmental authorities; but his representations were not considered. The petitioner filed Writ Petition No.38446 of 1997 before the Hon'ble High Court, Allahabad with a prayer to grant Pay Scale of Rs.1200-1800/-, as has been allowed to equivalent posts like Medical Attendant. This writ petition was disposed of by order dated 19.11.1997 with a direction to the Chief Medical Officer, Dehradun to pass appropriate orders regarding fixation of pay of the

petitioner. The petitioner's representation was rejected by the Principal Secretary, Medical & Health Department, Government of Uttar Pradesh vide his order dated 11.12.1998. Feeling aggrieved by this order, the petitioner challenged it before this Court by filing writ petition No.3109 of 2001, which was allowed by Order dated 21.09.2004, and the State of Uttarakhand was directed to decide the representation afresh within three months, which was again rejected. The petitioner again approached this Court by filing writ petition No.223 of 2005, which was disposed of on the ground of alternative remedy, and the petitioner was relegated to approach the Public Services Tribunal, Uttarakhand. The Public Services Tribunal, Uttarakhand decided the said claim petition by impugned order dated 13.10.2009, holding that there was no just ground for issuance of any direction for grant of parity with Medical Attendants, and, therefore, there was no occasion to interfere with the impugned order dated 28.01.2005. The claim petition was, therefore, dismissed.

7. We heard Mr. Sanjay Raturi, learned counsel for the petitioner and Mr. Anil Kumar Bisht, learned Standing Counsel for the State-respondent Nos.1 to 4 and Ms. Bina Pandey, learned Standing Counsel for the State of U.P.-respondent Nos.5 to 7.

8. Mr. Sanjay Raturi, Advocate appearing for the petitioner has submitted that the learned Tribunal has, against the record, held that the post of Operation Theater Attendant was a Group 'D' post, and the post of Medical Attendant was a Group 'C' post; however, the respondent department in its letter dated 07.04.2008, and this High Court in its Judgment/Order dated 21.09.2004 have held that the post of Operation Theater Attendant was a Group 'C' post; the learned Tribunal had failed to consider para 11 of the letter dated 28.01.2005, wherein the respondents had stated that the essential qualifications of Operation Theater Attendant was a Class Vth pass, however, the advertisement itself, clearly mentioned that the essential qualification of Operation Theater Attendant was Class Xth pass with six months medical experience in hospitals; the State of Uttar Pradesh had provided enhanced pay-scale to one Shri Nag Dev Upadhyay, Operation Theater Attendant, at Rs.4200/- after completion of 26 years of service, but the petitioner, having opted for the State of Uttarakhand, was still getting the pay-scale of Rs.2800/- even though he had served more than 26 years; and, therefore, the petitioner deserved the enhanced pay-scale as was being given to Medical Attendants.

9. Mr. Anil Kumar Bisht, Standing Counsel and Ms. Bina Pandey, Standing Counsel appearing for the respondents, submitted that the petitioner was appointed in the post of Operation Theater Attendant at P.P.C., Vikasnagar, Dehradun in the pay-scale of Rs.330-495 per month; in the Government Order of the Uttar Pradesh Government dated 27.02.1982 services had been classified; according to the said Government Order, non-gazetted posts whose minimum pay-scale was Rs.354/- or more, was in Group-C, and all the other posts in Group-'D' were non-gazetted posts; it was wrong to state that the petitioner was

admitted to Group-C post, and was now being given pay-scale of Group-C; after implementation of Samta Samiti, by the Government Order dated 12.09.1995, the pay-scale of the post of Operation Theater Attendant was modified in the pay-scale of Rs.750-940; in the Sixth Pay-Commission-Scale, Operation Theater Attendant is paid Rs.4200-20200, with Grade Pay of Rs.1800/-; Rs.5200-20200 is the present pay-scale of a IVth Class employee; Operation Theater Attendant and Medical Attendant are separate cadre; it is not necessary that pay-scale of both the cadres should be equal; the post of Medical Attendant is a Group-C post; the post of Operation Theater Attendant is a Class IV post created under cent-percent funded post-natal-programme of the Government of India; the post of Medical Attendant had been created in the light of the shortage of Pharmacists/Nurses to strengthen medical services in the State; the Government of Uttarakhand had declared the post of Operation Theater Attendant as a Class IV post; the post held by the petitioner cannot be equated with the post of Medical Attendant; the petitioner was appointed as an Operation Theater Attendant in the year, 1987, pursuant to an advertisement issued by the Medical Department, in Vikasnagar, under the Chief Medical Officer, Dehradun, in the pay-scale of Rs.330-495; thereafter, from time to time, the pay-scale of the petitioner was revised on the basis of the recommendation of the 4th, 5th and 6th Pay Commission in the scale of Rs.5200-20200 with a Grade Pay of Rs.1800/-, and, accordingly, the pay fixation of the petitioner was done.

10. In the year 1987, the numbers of vacancies were determined by the Chief Medical Officer, Derhadun for recruitment to the post of Class III and Class IV including the post of O.T.A. The learned counsel appearing for the petitioner submitted that the post of O.T.A. was in Class III category in the pay scale of Rs.330-495, and the requisite educational qualification was High School (Science) with six months practical experience in any Private Hospital or Nursing Home. The petitioner possessed the requisite qualification, and he was appointed to the post of O.T.A. after being interviewed by the Selection Committee. According to the learned counsel for the petitioner, the posts of Medical Attendant were in the pay scale of Rs.330-495 and the requisite educational qualification for the Medical Attendant was Class VIIIth without any requirement of training or experience.

11. On the other hand, learned counsel appearing for the respondents submitted that the post of the O.T.A. was in Class IV category. The learned counsel for the respondents submitted that, vide Government Order dated 27.02.1982, categorization of services were made by which such non-gazetted posts of which, the basic minimum of pay was Rs.354/- or above, was placed in category III and all the other posts were placed in Class IV category.

12. The petitioner was appointed as O.T.A in the year 1987. At that time, the pay-scale of both O.T.A and that of Medical Attendant was Rs.330-495. The learned counsel for the petitioner submitted that the post of O.T.A was in Class III category. The submission of the learned counsel appearing for the respondents is

that the petitioner was appointed as O.T.A in the pay-scale of Rs.330-495, and this pay-scale was in Class IV category.

13. The learned counsel for the respondents referred to the Office Memorandum dated 27.02.1982, of the Karmik Department of the State of Uttar Pradesh, to contend that the posts carrying a basic minimum pay of Rs.354/- were in Class III category, and all the other posts, below the basic minimum of pay of Rs.354/-, were in Class IV category. The Office Memorandum is a communication issued by the appropriate authority stating the policy decision of the Government. According to this Office Memorandum, dated 27.02.1982, services were categorized in terms of which such gazetted posts with the basic minimum pay-scale of more than Rs.1720/-, were placed in category 'Ka'; gazetted posts of which, the basic minimum of pay was not more than Rs.1720/-, were placed in category 'Kha', such non-gazetted posts of which, the basic minimum of pay was Rs.354/- or above, were placed in category 'Ga', i.e. Class III category, and all the other posts were placed in Class 'Gha', i.e. Class IV category. The petitioner was appointed as O.T.A in the year 1987 in the pay-scale of Rs.330-495. Therefore, the petitioner was recruited and appointed in Class 'Gha', i.e. Class IV category.

14. The posts of Medical Attendants were sanctioned by the State of Uttar Pradesh, vide Government Order dated 23.07.1979, and persons appointed in the vacant posts of Pharmacists/Nurses and Medical Attendants were given 750 hours practical training. In the year, 1987 the pay-scale of the posts of Medical Attendant was also Rs.330-495 and the post of O.T.A got 100% financially support from the Government of India under the 'post-natal scheme'.

15. The un-revised pay-scale of Rs.330-495, of the posts of the Medical Attendant, was revised to Rs.825-1200 w.e.f. 01.01.1986. At that time the pay-scale of the post of O.T.A was not revised. It is pertinent to note that, after the considering the recommendations of Samta Samiti, the State of Uttar Pradesh, vide Government Order No.3129/5-5-11-95-9(18)/94 dated 12.09.1995 (Chikitsa Vibhag), had revised the pay-scale of 16 posts of O.T.A working in the pay-scale of Rs.305-390 in the time-scale of Rs.330-425 and 111 posts of O.T.A working in the pay-scale of Rs.330-395, to the time-scale of Rs.405-540 which was revised later to the pay-scale of Rs.750-940. The revised pay-scale of the post of O.T.A in the Sixth Pay Commission, was Rs.4200-20200, with Grade Pay of Rs.1800/-, and was again revised to the pay-scale to Rs.5200-20200. The post of Medical Attendant is a dying cadre.

16. The respondents do not deny that, in the year 1987, the requisite qualification for the post of O.T.A was High School (Science Stream) with six months practical experience in any private Hospital or Nursing Home, and the requisite qualification for the posts of Medical Attendant was Class VIII. The respondents do not also deny that the petitioner, who possessed the requisite qualifications, was legally appointed to the post of O.T.A. In the year 1987, the pay-scales of both O.T.A. and that of Medical Attendant was Rs.330-495. The pay-

scale of the posts of Medical Attendant of Rs.330-495 was revised to Rs.825-1200 w.e.f. 01.01.1986 but the pay-scale of the posts of O.T.A was not revised. In these circumstances the learned counsel for the petitioner submitted that the post of O.T.A. and the post of Medical Attendant were of equal status, and, therefore, the petitioner is seeking similar pay-scale at par with the post of Medical Attendant.

17. The learned counsel appearing for the respondents submitted that the nature of the work in the post of Medical Attendant, was different as compared to the post of O.T.A. Medical Attendants were required to undergo 750 hours departmental training, while there was no such requirement for the O.T.A; and the Medical Attendants were required to do the duties of the Pharmacists and Staff Nurse and to distribute medicines etc. whereas the O.T.A was required to maintain the instruments in the Operation Theater Room only; and therefore, the pay-scale of Medical Attendants had been revised w.e.f. 01.01.1986.

18. For considering the equation of posts, the following factors are relevant:-

- (i) The nature and duties of the said posts;
- (ii) The minimum qualifications.
- (iii) The responsibilities and powers; and
- (iv) The salaries of these posts.

19. In *Steel Authority of India Ltd. and others vs. Dibyendu Bhattacharya*, (2011) 11 SCC 122, the Hon'ble Apex Court has held "In *State of Maharashtra and another vs. Chandrakant Anant Kulkarni and others*, (1981) 4 SCC 130 and *Vice-Chancellor, L.N. Mithila University vs. Dayanand Jha*, (1986) 3 SCC 7, a similar view has been reiterated observing that equal status and nature and responsibilities of the duties attached to the two posts have to be taken into consideration for equivalence of the post. Similar view has been reiterated in *E.P. Royappa vs. State of T.N. and another*, (1974) 4 SCC 3 and *Sub-Inspector Rooplal and another vs. Lt. Governor Through Chief Secretary, Delhi and others*, (2000) 1 SCC 644, wherein this Court following the earlier judgment in *P.K. Roy, AIR 1968 SC 850* held that the salary of the post alone may not be a determining factor, the other three criterion should also be fulfilled."

20. Burden of establishing parity in pay-scale is on the petitioner. In *Steel Authority of India Ltd. (Supra)*, the Hon'ble Apex Court further observed, ".....the law on the issue can be summarized to the effect that parity of pay can be claimed by invoking the provisions of Article 14 and 39(d) of the Constitution of India by establishing that the eligibility, mode of selection/recruitment, nature and quality of work and duties and effort, reliability, confidentiality, dexterity, functional need and responsibilities and status of both the posts are identical. The functions may be the same but the skills and responsibilities may be really and substantially different. The other post may not require any higher qualification, seniority or other like factors. Granting parity in pay-scales depends

upon the comparative evaluation of job and equation of posts. The person claiming parity, must plead with necessary averments and prove that all things are equal between the posts concerned. Such a complex issue cannot be adjudicated on the averments in the affidavits filed by the parties."

21. In the year 1987, though both of the posts of O.T.A. and Medical Attendant had been included in Class IV category, the duties, responsibilities, nature of work, functional needs and the manner of recruitment were different. The duties and nature of work of O.T.A. and Medical Attendant were entirely different. No material has been produced by the petitioner to prove that the duties, responsibilities, nature of work, functional need and manner of recruitment of the post of O.T.A. was similar to the post of Medical Attendant.

22. The learned counsel for the petitioner has submitted that the State of Uttar Pradesh has given the enhanced pay-scale with Grade Pay of Rs.4200/- to Shri Nag Dev Upadhyay, Operation Theater Attendant, after completion of 26 years of service, and, therefore, the petitioner should be given the parity with Shri Nag Dev Upadhyay.

23. According to the petitioner, the pay-scale of one Shri Nag Dev Upadhyay, O.T.A has been enhanced with Grade Pay of Rs.4200/- by the State of Uttar Pradesh. Granting of pay-scale is a purely executive function. The petitioner cannot claim parity with employees of the other States. In Steel Authority of India Ltd. (Supra), the Hon'ble Apex Court observed, "In Union of India and others Vs. S.L. Dutta and another, (1991)1 SCC 505; Union of India and others Vs.N.Y. Apte and others, (1998) 6 SCC 741; State of U.P. and others vs. J.P. Chaurasia and others, (1989)1 SCC 121 and Kshetriya Kisan Gramin Bank Vs. D.B. Sharma and others, (2001)1 SCC 353, this Court held that the determination that two posts are equal or not, is a job of the Expert Committee and the Court should not interfere with it unless the decision of the Committee is found to be unreasonable or arbitrary or made on extraneous considerations. More so, it is an executive function to fix the service conditions, etc. and lies within the exclusive domain of the rule-making authority."

24. In S.C. Chandra and others Vs. State of Jharkhand and others, (2007)8 SCC 279, the Hon'ble Apex Court has observed that it may be mentioned that granting pay scales is a purely executive function and hence the court should not interfere with the same. It may have a cascading effect creating all kinds of problems for the Government and authorities. Hence, the court should exercise judicial restraint and not interfere in such executive function.

25. The burden lies upon the petitioner who claims parity of the pay-scale to prove similarities in duties, responsibilities, etc. as mentioned above. The petitioner has failed to prove that, as a matter of right, he should be given parity with the pay-scale of the post of Medical Attendant. The nature of work performed by the O.T.A is proved entirely different from the nature of work discharged by persons holding the post of Medical Attendant. Therefore,

petitioner cannot claim that he should be given a similar pay-scale as are given to the Medical Attendants. It is well settled that Article 14 of the Constitution of India would be applicable only when a discrimination is made out between the persons who are similarly situated and not otherwise. The petitioner has failed to prove that the O.T.A. and Medical Attendant were similarly situated. Therefore, the petitioner cannot claim to have been discriminated against.

26. In view of the above detailed discussion, we are of the considered view that the learned Public Services Tribunal has not erred in law. We do not find any perversity or infirmity in the impugned order warranting interference. Therefore, the writ petition is liable to be dismissed.

27. In the result, the writ petition is dismissed. No costs.