

(1986) 02 DEL CK 0050

In the Delhi High Court

Case No : Civil Writ Appeal No. 1376 of 1984

Kamalanand

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 03-02-1986

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (1986) ILR Delhi 63 : (1986) LabIC 1858

Hon'ble Judges : Sunanda Bhandare, J; H.L. Anand, J

Bench : Division Bench

Advocate : Mukul Rohatagi and S.K. Mishra, for the Appellant;

Judgement

H.L. Anand, J.

(1) By this petition under Article 226 of the Constitution of India, the petitioner, a Restorer in this Court, seeks a writ of mandamus to compel the Central Government, the Delhi Administration and this Court to grant to the petitioner the higher pay-scale of Rs. 400 600, the scale presently applicable to the Restorers, working in the High Courts of Punjab and Haryana and Himachal Pradesh, inter alia, by the enforcement of the principle of equal pay for equal work embodied in Article 39(d) of the Constitution as a Directive Principle of State Policy, in so far as it is enforceable as part of the fundamental rights guaranteed by Articles 14 and 16 of the Constitution.

(2) The petition has been filed in the following circumstances. The petitioner joined the service of the then Punjab High Court in 1960 as Daftari. In 1964, he was promoted as a Restorer. The petitioner continued to serve in that capacity in the Punjab High Court until his services were transferred to this Court on its constitution. The petitioner also served as a Restorer in the Circuit Bench of this Court at Simla before the establishment of the Himachal Pradesh High Court. Until 1970, the post of a Restorer in this Court carried a scale of Rs. 80-110. In May 1970, the post of the Restorer was made equivalent to that of a Lower

Division Clerk in this Court and the post of Restorer was put at the scale of pay applicable to the Lower Division Clerk, which at that time was Rs. 110-180. The scale of pay has since been revised to Rs. 260-400 by the Third Pay Commission the recommendations of which were made applicable to the staff of this Court. For reasons, which are not clear, it appears that the post of Restorer in the Punjab and Haryana High Court and the High Court of Himachal Pradesh, the duties of which are, by and large, identical, carries the scale of pay of Rs. 100-600. The petitioner seeks the higher scale of pay of Rs. 400-600 to get parity with the Restorers in the other two High Courts, in the matter of scales of pay, on the principle of equal pay for equal work" as also for the reason that his court is the successor of one, and the predecessor of the other, of the two High Courts. The petition was, however, filed without seeking Justice from Hon"ble the Chief Justice of this Court in the matter of grant of higher scale of pay and the portion was accordingly adjourned for sometime to enable the petitioner to make a representation. The petitioner made the representation but the representation is said to have been fumed down.

(3) The petitioner seeks to justify the higher scale of pay, applicable to the identical posts in the two other High Courts. not only on the basis that the said two High Courts were either the parent or the successor High Courts of this Court but also on the principle of equal pay for equal work, which is made a constitutional goal by Article 39(d) of the Constitution and has been held by the Supreme Court in the case of Randhir Singh(I). to have been incorporated in the fundamental guarantees of equality before the law and the equal protection of the laws and of equality of opportunity in the matter of employment embodied in Articles 14 and 16 of the Constitution of India.

(4) The petition is opposed on behalf of the Central Government but there is no appearance for the Delhi Administration or of Hon"ble the Chief Justice of this Court, the other two respondents. According to the Central Government, under the Delhi High Court Staff Seniority Rules, 1971, the posts of Lower Division Clerks and Restorers are "equal status posts" on the establishment of this Court, it is, however, not disputed on behalf of the Union that the petitioner has been working as a Restorer for the last about 20 years. It is, however, pointed out that there is nothing on the record of the present proceeding to indicate as to the scale of pay applicable to the post of a Restorer in the Punjab & Haryana High Court and the Himachal Pradesh High Court. It was not disputed on behalf of the Union that the said two High Courts are the successor and predecessor of this Court. It was, however, urged that there was no constitutional right of "equal pay for equal work" and in any event, the principle of "equal pay for equal work" would not be attracted in the present case because the Restorer working in the two High Courts could not be said to be working under "the same employer" and there was, Therefore, no question of hostile discrimination nor could the petitioner and the Restorers working in the other two High Courts be said to be "similarly situated". The decision of the Supreme Court in the case of Randhir Singh (supra) was sought to be distinguished on the ground that in that case,

the principle of "equal pay for equal work" was considered and enforced in relation to a common administration.

(5) Where do we stand vis-a-vis the abstract doctrine of "equal pay for equal work" in the present state of the law ? Does this principle, embodied in Article 39(d) of the Constitution merely represent a laudible constitutional goal to be achieved in some distant or near future and is incapable of enforcement until further State action pursuant to it or by its incorporation in the Fundamental Rights Chapter of the Constitution by an appropriate Constitutional Amendment ? Has the principle been galvanised by recent constitutional developments in the realm of interpretation into a right, fundamental of otherwise, capable of being enforced either as part of Article 14 and Article 16 of the Constitution or as an emanation of the doctrine that State action must be "just, fair and reasonable" ? These are some of the questions that call for answers.

(6) It is an irony of fate that while the right to property and right to carry on business and certain other rights, which may or may not be instruments of social change, were made part of the guaranteed fundamental rights and incorporated in Part III of the Constitution of India, some of the rights which were equally fundamental from the point of view of the commonman, such as the "right to work" and "the right to equal pay for equal work both for men and women" found no place in the Fundamental Rights Chapter and were relegated to the Directive Principles of State Policy. It is common knowledge, that even after more than three decades of constitution making no Directive Principle of State Policy has graduated into a position where they could be raised to the status of Fundamental Rights. The Directive Principle embodied in Article 39(d) of the Constitution provides that the State shall direct its policy towards securing that there is "equal pay for equal work for both men and women". It is well settled that the Directive Principles of State Policy merely indicate the future direction of State Policy and embody constitutional goals to be achieved by the State by legislative and other measures but are not enforceable as rights, much less as fundamental rights. Article 31-C which was inserted by the Constitution (25th Amendment) Act, 1971, gave an ascendancy to the Directive Principle of State Policy over Fundamental Rights by providing that notwithstanding the provisions of Article 13 of the Constitution, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV of the Constitution shall be deemed to be void on the ground that it was inconsistent with or took away or abridged any of the rights conferred by Article 14 or Article 19 and that no law containing a declaration that it was for giving effect to such policy shall be called in question in any Court of law on the ground that it did not give effect to such policy. Even so, these principles continued to be the constitutional goals and pointed to the future direction of State Policy and remained attractive principles which could not be enforced in a court of law, nor could perhaps the State be compelled to bring legislative measures to give effect to the policy embodied in the said Chapter.

(7) The wide gap between the promise held out in the Directive Principles of State Policy in the matter of "equal pay for equal work and its realisation as an instrument of economic change and the void created by insufficient legislative action pursuant to the directive principle posed a serious challenge for the judicial wing of the State and the judicial activists found in them an opportunity to bring about a near transformation in the parameters of Article 14 of the Constitution by the known device of interpretation with the result that, in course of time, the doctrine got embelished as an integral part of Article 14 itself and an abstract and near inert doctrine became an enforceable fundamental right. A review of the decisions of the highest court from the early cases such as *Anwar Ali Sarkar*(2) to *Express Newspapers*" to the more recent decisions in the case of *Royappa*(4) and *Maneka Gandhi*(5), and the latest judgment in the case of *Randhir Singh* (supra), brings out that Article 14, which was at one time thought in terms of embodying a charter of equality for equals and frowned at hostile discrimination but permitted reasonable classification, having a nexus with the object sought to be achieved by a statute, became a bulwark against any arbitrary executive action with a view to ensure that State action at all levels was just fair and reasonable. In the case of *Randhir Singh* (supra) the highest Court was concerned with the question, if "the doctrine of "equal pay for equal work" was a mere promise or was an enforceable right as part of the fundamental right of freedom from arbitrary action as embodied in Article 14 of the Constitution. The Court while bemoaning that the rights that affected the common man lagged behind under the constitutional scheme, however, asserted in unambiguous terms that the doctrine had a positive role as an instrument of economic change, as embodied in Article 14 of the Constitution "by the process of its interpretation", on the ground that the denial of the principle was arbitrary and neither fair nor just or reasonable and that the resulting inequality and arbitrariness could be cured by the enforcement of the fundamental right of equality before the law and the equal protection of the laws.

(8) In the case of *Randhir Singh* (supra), the drivers working in the Delhi Police Force under the Delhi Administration sought parity in the scale of pay of drivers working in the Delhi Administration. The Court, however, compared the functions and duties of drivers working in the Delhi Police Force and other drivers in the service of the Delhi Administration and the Central Government and eventually gave to the drivers of the Delhi Police Force parity of scale with the drivers working in the Railway Protection Force, which was a Central Force and, Therefore, part of the Central Administration. In the course of the Judgment, the Supreme Court explained the earlier decision of that Court in the case of *Kishori Mohanlal Bakshi*(6) which had hitherto been generally believed as having given a "short shrift" to the principle of "equal pay for equal work" and while reiterating that the principle of "equal pay for equal work" was not an "abstract doctrine" as was generally believed, but one of "substance". It was pointed out that *Kishori Mohanlal Bakshi* (supra) merely decided that there could be different scales of pay for different grades of a service with varying qualification for entry into a

particular grade, the higher grade often being a promotional avenue for officers of the lower grade. The higher qualification for the higher grade, it was pointed out, which may be either academic qualification or experience based on length of service reasonably sustained the classification of the officers into two grades, and the different scales of pay. It was, Therefore, pointed out that the principle of "equal pay for equal work" would be an abstract doctrine not attracting Article 14 "if sought to be applied to them." In the case of Randhir Singh, the Supreme Court put its conclusion thus :

"Construing Articles 14 and 16 in the light of the Preamble and Article 39(d), we are of the view that the principle "Equal Pay for Equal Work" is deductible from those Articles and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though those drawing the different scales of pay do identical work under the same employer."

However, support of the conclusion, the Court made observations as to the scope and foundation of the principle which are, however, much wider in amplitude than as suggested in the conclusion. Thus, it observed that questions concerning wages and the like mundane as they may be, are yet matters of "vital concern" to them and it is there if at all that the "equality clauses of the Constitution have any significance to them." It further pointed out that the word "socialist" in the Preamble to the Constitution must mean "something" and at least mean "equal pay for equal work". It then pointed out that the principle was "expressly recognised by all socialist systems of law", and enumerated quite a few, apart from the Preamble of the Constitution of the International Labour Organisation, which recognised the "principle of equal remuneration for equal work" as Constituting one of the means of "achieving the improvement of conditions involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that peace and harmony of the world are imperilled." The ultimate order made by the Court also did not strictly confine to a common administration because in a sense Delhi Administration and a Central Force are not identical, even though the Union Territory is administered by the President through an Administrator but in strict constitutional terms, they are not identical.

(9) A question that, however, arises is, if the principle could be extended in relation to equal work being performed by incumbents who work in different States or one of whom works under the Union or a territory administered by the Union or the other work in a similar position and in a similar institution in one or more State. The question, in other words, is if unequal pay for equal work would be contrary to Article 14 in relation to persons working in two different departments of the same administration on the ground that such treatment would be arbitrary and lacking in reasonableness or fairness, could the position be different and be able to pass the muster of Article 14 and the test of arbitrariness if they are working under two different administrations, whether the Union and a State or different States.

(10) India, according to the Constitution, is "a Union of States" and its territory

comprises the territories of the States, the Union Territories and such other territories as may be acquired. The expression "States"* according to Article 12 of the Constitution, inter-alia, includes "the Government and Parliament of India and the Government and Legislature of each of the States". The expression "State" in the Constitution of India is used both in its generic sense and as denoting units of the Union. The Constitution does not embody either a purely unitary form of government or a purely federal system of government. It embodies a hybrid variety. There are thus features which point to a unitary form of government but there are strong features which liken it to a federal system of government. While there is clear demarcation of executive, legislative and financial powers between the Union and the States, the residuary powers do not vest in the States but in the Union, and there is an elaborate Concurrent List which simultaneously empowers the Union and the States executive and legislature. The Constitution makes ample provision for the takeover of the administration in a State by the Union in certain situations when the Union Legislature may even legislate in relation to the territories of States in respect of matters enumerated in the Staff List. The States have their own sources of funds but there are constitutional provisions for subsidy and grants to the States out of the Union Revenues. While on one reckoning the Constitution has dominant federal features, it has been authoritatively held by the Supreme Court in the case of State of Rajasthan (7) that the federal character of the government has been considerably "watered down" by a number of constitutional provisions. Service under the "State" would ordinarily constitute a separate class by itself, whether it is under the Centre or a State, but conditions of service for Central services may be laid down by the Central Legislature while those under the State could be regulated by the State Legislatures. The services under the Union and the States are, however, dealt with by Part XIV of the Constitution and Article 311 deals with persons employed in civil capacities under the Union or a State". It is probably for this reason that while considering the question as to the validity of Rules 148(3) and 149(3) of the Railway Establishment Code vis-a-vis the fundamental guarantees of Article 14 of the Constitution of India, the Supreme Court in the case of Moti Ram Deka.(8) examined the matter as if public service, whether under the Union or the States, is one broad category and held that while the nature of service rendered by employees in different sectors of "public service" may differ, and the terms and conditions governing the employment in all public sectors may not necessarily be the same or uniform but in regard to the question of terminating the services of a civil servant, there was no reason to treat the Railways as constituting a separate and distinct class by reference to which the impugned rules could be justified. It was further held that if there was any rational connection between the making of such a rule and the object intended to be achieved by it, that connection would clearly be in existence in several other sectors of the public service. Even so, having regard to the constitutional provisions, it would be difficult to hold that the Central and the State administrations are a "common administration" or that the persons working in a service of the Union and that of the different States work under a "common

employer".

(11) But that is not the end of the matter because executive action in the matter of employment, as indeed, in other matters, must also satisfy the test of being "just, fair and reasonable". A claim to parity in the matter of scale of pay by those working under a State with a person carrying out similar work in an institution under the Central Government in a city like Delhi would perhaps fail because even though both are doing equal work but having regard to the higher cost of living index applicable to Delhi and the financial constraints of the State revenues, the disparity could not be unfair or unreasonable. But could the reverse be true ? A claim of parity by someone working in the Central Administration in Delhi with those employed in similar institution in States in places like Chandigarh or Simla must succeed because such a disparity is bound to be looked upon as being .neither fair nor reasonable. In industrial law, the principle of "equal pay for equal work" is recognised subject to the doctrine of "region-cum-industry", the reason being that the different regions of the country have different indexes of living and different industries have the different capacity to pay, even though it is recognised that in the matter of payment of minimum wages to a worker, the capacity to pay is irrelevant. But how does one justify in the context of an allegation of arbitrariness and discrimination denial of a scale of pay to someone working in a city like Delhi, under the Central Government or the Delhi Administration on the basis on which a similarly situated person is being paid in a similar institution in cities like Chandigarh or Simla, where the cost of living indexes are admittedly lower than that obtaining in Delhi. While in the case of a reverse claim, one would be justified in saying, that they are not similarly situated, such a distinguishing feature .would not be available where a claim to parity is sought with those working in similar situations in less costly areas as in the present case. It appears to us that the principle of "equal pay for equal work" would be squarely available to the petitioner, particularly, having regard to the admitted fact that of the two High Courts, in relation to which parity is claimed, one was a predecessor of this Court and the other its successor, In the circumstances, to pay to the Restores of this-Court on a scale which is lower than the scale applicable to their counterparts in the two High Courts referred to above, could not but be termed arbitrary and discriminatory. If the matter was before an expert body like the Pay Commission, it would perhaps be inclined to consider that if the scale of pay applicable to the other two High Courts is a fair basis, those working in similar posts in a city like Delhi would be entitled to a still higher scale of pay but that is not the claim of the petitioner nor are we in a position in which we may embark on the work of fixation of pay scales which involves a variety of technical factors, as indeed, would require considerable supporting material and such an exercise is neither necessary nor possible in the present case.

(12) We are happy that we have been able to arrive at a conclusion which would do justice to the petitioner, who inspire of long service, now of about 20 years, still continues to be a restorer and has been stagnating in that position for years

and inspire of somewhat unusual nature of his work would perhaps not be able to get promotion to the next higher post of an Upper Division Clerk, because of his educational qualification.

(13) Having regard, Therefore, to all the circumstances, we accent the petition and c the Rule absolute. A mandamus would issue to the respondents to take appropriate steps by way of recommendation and executive orders, as the case may be, to raise the scale of pay of the petitioner to Rs. 400 -600 w.e.l the date the present petition was filed. The petitioner never sought higher scale either from this Court or from the Delhi Administration at any stage, until during the pendency of the petition. The question, Therefore, of giving any further retrospectively to the benefit would not arise. The petitioner would also have his costs. Counsel's fee is assessed at Rs. 750.