
(2020) 12 JH CK 0003
In the Jharkhand High Court
Case No : Writ Petition (S) No. 6207 of 2018

Lakhan Prasad Yadav

APPELLANT

Vs

State of Jharkhand And Ors

RESPONDENT

Date of Decision : 01-12-2020

Acts Referred:

Contract Act, 1872 — Section 23

Citation : (2020) 12 JH CK 0003

Hon'ble Judges : Sanjay Kumar Dwivedi, J

Bench : Single Bench

Advocate : Manoj Tandon, Rakesh Kumar Roy

Final Decision : Disposed Of

Judgement

1. Heard Mr. Manoj Tandon assisted by Mr. Rakesh Kumar Roy, learned counsel for the petitioner and Ms. Shrestha Mehta, learned counsel for the respondent-State.

2. This writ petition has been heard through Video Conferencing in view of the guidelines of the High Court taking into account the situation arising due to COVID-19 pandemic. None of the parties have complained about any technical snag of audio-video and with their consent this matter has been heard on merit.

3. The petitioner has preferred this writ petition for direction to the respondents to consider the case of the petitioner for promotion to the Class-III post from the post of Class-IV. The further prayer is made for direction to the respondents to pay the arrears of salary for the period the petitioner has worked in Class-III post.

4. The petitioner was appointed on Class-IV post as Peon on 01.01.1993 on

compassionate ground. The petitioner was posted at different places and worked to the utmost satisfaction of the respondents. In view of the qualification of the petitioner, he was allotted the work of Clerk in 2000 and office order dated 05.12.2001 was issued regarding his deputation, contained in Annexure-1 of the writ petition. The petitioner made a representation for promotion to the Class-III post i.e. Clerk on 26.08.2002. On 28.08.2002, the Executive Engineer recommended the name of the petitioner for appointment as Clerk against the vacant post on the basis of his experience of the said post, contained in Annexure-3 of the writ petition. The petitioner was deputed to the charge of correspondence Clerk vide office order dated 04.03.2009, contained in Annexure-9 of the writ petition. The petitioner was made In-charge of Clerk Lower Division vide office order dated 29.09.2014, contained in Annexure-11 of the writ petition. Vide office order dated 05.11.2014, allotment of work has been done for the Assistant and the petitioner has also been allotted his respective work in Class-III post, contained in Annexure-12 of the writ petition.

5. Mr. Manoj Tandon, learned counsel for the petitioner submits that the petitioner is entitled for consideration for promotion to Class-III post. He

further submits that by way of various office orders, it is admitted fact that the petitioner was allotted the work on Class-III post. He also submits that

the petitioner is entitled for salary of that post. He further submits that law in this regard is well settled that if a person is put to officiate on a higher

post with greater responsibilities, he is entitled to salary of that post. To buttress his argument, he relied upon the judgments rendered by the Hon'ble

Supreme Court in the case of State of Punjab v. B.K. Dhir, reported in (2017) 9 SCC 337 and in the case of State of Punjab and another v. Dharam

Pal, reported in (2017) 9 SCC 395.

6. Paragraphs 5 and 6 of the judgment reported in (2017) 9 SCC 337 are quoted herein below:

5. This Court today in State of Punjab v. Dharam Pal after referring to the authorities in P. Grover v. State of Haryana and Secy.-cum-Chief

Engineer v. Hari Om Sharma and appreciating the similar factual matrix has held thus:

22. In the instant case, the Rules do not prohibit grant of pay scale. The decision of the High Court granting the benefit gets support from the

principles laid down in P. Grover and Hari Om Sharma. As far as the authority in A. Francis is concerned, we would like to observe that the said case has to rest on its own facts. We may clearly state that by an incorporation in the order or merely by giving an undertaking in all circumstances would not debar an employee to claim the benefits of the officiating position. We are disposed to think that the controversy is covered by the ratio laid down in Hari Om Sharma and resultantly we hold that the view expressed by the High Court is absolutely impeccable.

6. The learned counsel for the State of Punjab referring to the Punjab Civil Services Rules (for short "the Rules"), urged that the respondent was not eligible to hold the post. Be it noted, the said stand was not taken before the High Court and, in any case, we are disposed to think that when the respondent had worked in the officiating post and had been granted the benefits by the High Court, he should be extended the said benefits. Had there been a contest on the score of eligibility of the respondent, possibly the matter would have been different. That not being the fact situation, we are not inclined to interfere with the order passed by the High Court.

7. Paragraphs 9 to 22 of the judgment reported in (2017) 9 SCC 395 are quoted herein below:

9. The said orders have to be tested on the anvil of the Rules. It needs no special emphasis to state that if the orders are in consonance with the Rules indubitably the respondent cannot put forth a claim unless the Rules are declared unconstitutional. Our attention has been invited to Rule 4.13 which occurs under the heading "Pay of Officiating Government Employees". The relevant part of the said Rule reads as follows:

4.13. (1) Subject to the provisions of Rules 4.22 to 4.24, a government employee who is appointed to officiate in a post shall not draw pay higher than his substantive pay in respect of a permanent post, other than a tenure post, unless the post in which he is appointed to officiate is one enumerated in the Schedule to this Rule or unless the officiating appointment involves the assumption of duties and responsibilities of greater importance than those attaching to the post, other than a tenure post on which he holds a lien: Provided that the competent authority may exempt from the operation of this Rule, any service which is not organised on a time-scale basis and in which a system of acting promotions from grade to grade is in force at the time

of the coming into force of these Rules: Provided further that the competent authority may specify posts outside the ordinary line of a service the holders of which may, notwithstanding the provisions of this Rule and subject to such conditions as the competent authority may prescribe, be given any officiating promotion in the cadre of the service which the authority competent to order promotion may decide and may thereupon be granted the same pay (whether with or without any special pay, if any, attached to such posts) as they would have received if still in the ordinary line.

(2) For the purpose of this Rule, the officiating appointment shall not be deemed to involve the assumption of duties or responsibilities of greater importance if the post to which it is made is on the same scale of pay as the permanent post, other than a tenure post, on which he holds a lien, or on a scale of pay identical therewith.

10. Certain Notes have been appended to the said Rule but they are not relevant for adjudication of the present controversy. On a close scrutiny, it is noticeable that the said Rule postulates that the government employee appointed to an officiating post shall not draw pay higher than his substantive pay in respect of a permanent post unless the post in which he is appointed to officiate is one enumerated in the Schedule to the Rules and further the officiating appointment involves assumption of duties and responsibilities of greater importance than those attached to the post. It is not in dispute that the posts of Superintendent Grade II and Grade I are covered under the Schedule. Be it mentioned, the extension of benefit is subject to the provisions of Rules 4.22 and 4.24.

11. In view of the aforesaid Rule position, it is necessary to reproduce Rule 4.22 and Rule 4.24. They read as follows:

4.22. The competent authority may appoint one government employee to hold substantively, as a temporary measure or to officiate in, two or more independent posts at one time. In such cases, the government employee shall draw the highest pay to which he would be entitled if his appointment to one of the posts stood alone:

Provided that the employee must fulfil the requisite qualifications and conditions for services for both the posts.

* * * 4.24. When a government employee holds current duty charge of another post, in addition to that of his own substantive post, he does not

officiate in the former post and as such is not entitled to any additional remuneration.

12. As we understand the said Rules, they categorically convey that the employee who holds the higher post must fulfil the requisite qualifications and conditions for service for both the posts. It is not controverted at the Bar that the respondent was eligible to hold the posts of Superintendent Grade II and Grade I. In this context, the learned counsel for the appellants has commended us to Rule 4.16. The said Rule reads as follows:

4.16. A competent authority may fix the pay of an officiating government employee at an amount less than that admissible under these Rules.

Note 1.--One class of cases falling under this Rule is that in which a government employee merely holds charge of the current duties and does not perform the full duties of the post.

Note 2.--When a government employee is appointed to officiate in a post on a time-scale of pay but has his pay fixed below the minimum of the time-

scale under this Rule he must not be treated as having effectually officiated in that post within the meaning of Rule 4.4 or having rendered duty in it

within the meaning of Rule 4.9. Such a government employee, on confirmation, should have his initial pay fixed under Rule 4.4(b) and draw the next

increment after he has put in duty for the usual period required, calculated from the date of his confirmation. Note 3.--The power conferred by this

Rule is not exercisable save by a special order passed in an individual case and on a consideration of the facts of that case. A general order purporting

to oust universally the operation of Rule 4.14 would be ultra vires of this Rule. Although, the practice of passing ostensibly special order on every

individual case would not be ultra vires of this Rule it would constitute the grossest possible fraud thereon.

13. On a careful scrutiny of the aforesaid prescription, it is perceptible that the said Rule envisages a different situation altogether. The present factual

matrix is quite different. We are inclined to so hold as the respondent herein was holding higher posts and further he was performing the duties of

higher responsibility attached to the posts. Thus analysed, we arrive at the conclusion that the Rules do not bolster the proposition advanced by the

learned counsel for the State.

14. Having analysed the Rule position, we may allude to the authorities that have

been commended to us. First, we shall dwell upon the decision in Pritam Singh Dhaliwal that has been relied upon by the High Court in the impugned order. In the said case, the Division Bench of the High Court had placed reliance upon P. Grover v. State of Haryana and Selvaraj v. Lt. Governor of Island, Port Blair and earlier decisions of the High Court and analysing the Rule position opined that the officer therein had been asked to officiate as Deputy Director with effect from 14-3-1996 and he had been continuously posted to equivalent posts such as Additional Deputy Commissioner (D) and till his superannuation the officiating charge was never withdrawn and hence, his entitlement to claim higher pay scale for the post for which he was asked to officiate and perform his duties till his superannuation would not be negated.

15. As the reasoning of the High Court is fundamentally based on enunciation of law propounded by the Court in P. Grover, we think it apt to appreciate the ratio laid down in the said case. A two-Judge Bench of this Court was dealing with the fact situation wherein keeping in view the policy decision, the appellant therein was promoted as an acting District Education Officer. The order of promotion contained a superadded condition that she would draw her own pay scale which apparently meant she would continue to draw her salary on her pay scale prior to promotion. The claim was put forth by the appellant that she was entitled to the pay of District Education Officer and there was no justification for denying the same to her. A writ petition was filed before the High Court and the State filed the counter-affidavit contending, inter alia, that she was promoted to the post of acting District Education Officer as there was no Class I post and hence, she was not entitled to be paid the salary of District Education Officer.

Appreciating the fact situation, the Court held:

3. ... We are unable to understand the reason given in the counter-affidavit. She was promoted to the post of District Education Officer, a Class I post, on an acting basis. Our attention was not invited to any rule which provides that promotion on an acting basis would not entitle the officer promoted to the pay of the post. In the absence of any rule justifying such refusal to pay to an officer promoted to a higher post the salary of such higher post (the validity of such a rule would be doubtful if it existed), we must hold that Smt Grover is entitled to be paid the salary of a District

Education Officer from the date she was promoted to the post, that is, 19-7-1976, until she retired from service on 31-8-1980.

16. In *Tilak Raj*, the issue arose regarding justification of grant of minimum pay in the scale of pay applicable to the regular employees to the daily

wagers. A two-Judge Bench referred to various decisions and came to hold thus:

11. A scale of pay is attached to a definite post and in case of a daily-wager, he holds no posts. The respondent workers cannot be held to hold any

posts to claim even any comparison with the regular and permanent staff for any or all purposes including a claim for equal pay and allowances. To

claim a relief on the basis of equality, it is for the claimants to substantiate a clear-cut basis of equivalence and a resultant hostile discrimination before

becoming eligible to claim rights on a par with the other group vis-à-vis an alleged discrimination. No material was placed before the High Court as to

the nature of the duties of either categories and it is not possible to hold that the principle of "equal pay for equal work" is an abstract one.

12. "Equal pay for equal work" is a concept which requires for its applicability complete and wholesale identity between a group of employees claiming

identical pay scales and the other group of employees who have already earned such pay scales. The problem about equal pay cannot always be

translated into a mathematical formula.

On a careful perusal of the said decision in its entirety, we are of the considered opinion that it is not an authority for the proposition canvassed by the

learned counsel for the appellants. It remotely does not support the principle that is assiduously sought to be built by the State.

17. In *S.C. Chandra*, the appellants therein had filed a writ petition in the High Court of Jharkhand seeking a writ of mandamus against Respondents 3

to 6 to release the pay, DA with arrears along with interest and further a direction not to close the school or in the alternative, to issue a direction to

Respondents 1 to 2 to take over the management and control of the school in question. The writ petitioners before the High Court were teachers and

non-teaching staff of the school and claimed themselves to be the employees of Hindustan Copper Ltd. (HCL). The Court, after going through the

judgment of the High Court, came to hold that solely because the management of HCL was giving financial aid that by itself cannot be construed that

the school was run by the management of HCL and accordingly, the Court

dismissed the appeal. We have no hesitation in opining that the principle that has been laid down in the said judgment has no applicability to the facts at hand.

18. In *A. Francis*, the Court was dealing with the entitlement of the appellant to the salary in higher pay of Assistant Manager wherein he had worked from 28-2-2001 till 31-5-2005. The employer had denied certain benefits and the employee preferred a writ petition before the High Court which was allowed by the learned Single Judge. The Corporation filed letters patent appeal which reversed the judgment of the learned Single Judge. The appellant before this Court placed reliance on *Secy.-cum-Chief Engineer v. Hari Om Sharma*. On behalf of the Corporation terms of the order were pressed into service contending that there were specific conditions stipulated in the order with regard to salary and emoluments and, therefore, the claim with regard to higher post was not tenable in law.

19. The Court appreciating the factual score held thus: (*A. Francis* case, SCC p. 285, para 6) "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 *Secy.-cum-Chief Engineer* 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.

20. In *Hari Om Sharma*, the respondent was promoted as a Junior Engineer I in 1990 and had been continuing on that post without being paid salary for the said post and without being promoted on regular basis. It was in this situation, he approached the Central Administrative Tribunal which allowed the claim petition with the direction that the respondent shall be paid salary for the post of Junior Engineer I. That apart certain other

directions were also issued. The Court took note of the fact that the respondent was promoted on a stop-gap arrangement as Junior Engineer I and

opined that this by itself would not deny his claim of salary for the said post. In that context, the Court held:

6. ... If a person is put to officiate on a higher post with greater responsibilities, he is normally entitled to salary of that post. The Tribunal has noticed that the respondent has been working on the post of Junior Engineer I since 1990 and promotion for such a long period of time cannot be treated to be a stop-gap arrangement.

21. After so stating, the Court proceeded to opine thus:

8. The learned counsel for the appellant attempted to contend that when the respondent was promoted in stop- gap arrangement as Junior Engineer I,

he had given an undertaking to the appellant that on the basis of stop-gap arrangement, he would not claim promotion as of right nor would he claim

any benefit pertaining to that post. The argument, to say the least, is preposterous. Apart from the fact that the Government in its capacity as a model employer cannot be permitted to raise such an argument, the undertaking which is said to constitute an agreement between the parties cannot be

enforced at law. The respondent being an employee of the appellant had to break his period of stagnation although, as we have found earlier, he was

the only person amongst the non-diploma holders available for promotion to the post of Junior Engineer I and was, therefore, likely to be considered for

promotion in his own right. An agreement that if a person is promoted to the higher post or put to officiate on that post or, as in the instant case, a

stop-gap arrangement is made to place him on the higher post, he would not claim higher salary or other attendant benefits would be contrary to law

and also against public policy. It would, therefore, be unenforceable in view of Section 23 of the Contract Act, 1872.

(emphasis supplied) The principle postulated in the said case is of immense significance, for it refers to concept of public policy and the conception of unconscionability of contract.

22. In the instant case, the Rules do not prohibit grant of pay scale. The decision of the High Court granting the benefit gets support from the

principles laid down in P. Grover and Hari Om Sharma. As far as the authority in A. Francis is concerned, we would like to observe that the said case

has to rest on its own facts. We may clearly state that by an incorporation in the order or merely by giving an undertaking in all circumstances would

not debar an employee to claim the benefits of the officiating position. We are disposed to think that the controversy is covered by the ratio laid down

in Hari Om Sharma and resultantly we hold that the view expressed by the High Court is absolutely impeccable.

8. Ms. Shrestha Mehta, learned counsel for the respondent-State submits that the petitioner has appeared in the limited examination and he has not

passed the said examination and, accordingly, he is not entitled for consideration for promotion to Class-III post. She further submits that the petitioner

has worked on Class-III post on his own and that is why he is not entitled to salary for the period he has worked on Class-III post.

9. In view of the above facts and considering the admitted position that the petitioner has not passed the limited examination for promotion to Class-III

post, no direction can be issued by the Court for consideration of promotion. It is open for the petitioner to take a chance in another limited

examination. So far as salary part is concerned, it is admitted position in view of the office orders contained in Annexures-1, 9, 11 and 12 of the writ

petition that the petitioner has worked in Class-III post on direction of his superiors for such a long period. The work on Class-III post has been taken

from the petitioner, which itself suggests that the petitioner was competent and that is why the work on Class-III post is being taken from the

petitioner. On query from the Court, learned counsel for the petitioner submitted at bar that the petitioner is still working on Class-III post.

10. In view of the admitted position that the petitioner was allotted the work of Class-III post by the respondents and considering the judgments

rendered by the Hon'ble Supreme Court in the case of State of Punjab v. B.K.

Dhir and State of Punjab and another v. Dharam Pal (supra), the petitioner is entitled to salary for the period he has worked on officiating capacity,

which has happened pursuant to the order of the competent authority.

Thus, the petitioner shall be entitled to salary of Class-III post for the period he has worked. Accordingly, the respondents are directed to pay salary to

the petitioner for the period he has worked on Class-III post.

11. With the above observations and directions, this writ petition stands disposed of.