
(2007) 09 PAT CK 0142
In the Patna High Court
Case No : CWJC No. 1456 of 2007

Madan Mohan Mishra

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 08-09-2007

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 226

Citation : (2008) 1 PLJR 238

Hon'ble Judges : J.N. Bhatt, C.J.; Mihir Kr. Jha, J

Bench : Division Bench

Advocate : Yadu Vansh Giri, Raju Giri and Vikash Ratan Bharti, for the Appellant; Ravi Ranjan and Sanjeev Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Mihir Kumar Jha, J.—This application is directed against the order, dated 15.12.2006 passed by the Central Administrative Tribunal (hereinafter referred to as "the Tribunal") in O.A. No. 127 of 2006 whereby and whereunder the prayer of the writ petitioner, applicant before the Tribunal, for fixation and payment of salary at the minimum of the pay scale with dearness allowance of Chief Medical Officer was rejected. The writ petitioner, on his own showing, was engaged temporarily on daily wage as Medical Officer Incharge in the Post & Telegraph Dispensary at Chapra on 12.9.2002 on a fixed remuneration of Rs. 5,000/- per month and in this context the Office order issued by the Senior Superintendent of Post Offices, Saran Division, Chapra, dated 11.9.2002 (Annexure-2) clearly sets out the terms of his engagement, which reads as follows:---

Ad hoc appointed doctor of P&T Dispensary, Chapra namely Late Dr. J.N. Prasad has died on 7.9.2002. There is no other doctor posted at P&T Dispensary, Chapra, so both post of M.O.I./C at Chapra P&T Dispensary has fallen vacant.

Dr. M.M. Mishra, B.Sc, MBBS, MD, MIMS, FCCP, Physician & specialist in disease of Chest, Clinic & Residence at Sadhanapuri, Chapra has preferred his willingness

vide his application dtd. 10.9.2002. He is hereby temporarily engaged on daily wages, keeping in view the emergent nature of work in anticipation of approval from the competent authority. The arrangement is temporary it can be terminated at any time without any notice. He will has no right for clear absorption in the cadre.

2. It is, thus clear that the petitioner was engaged purely on ad hoc basis against a post of Medical Officer in the Central Health Service which is filled up from amongst the selected candidates recommended by the Union Public Service Commission in terms of Central Health Services Rules. It is further clear that the said temporary engagement of the petitioner on his own request in the daily wages was completely fortuitous in nature and had been occasioned on account of the death of the regular incumbent, namely, Late Dr. J.N. Prasad. Subsequently, the petitioner's remuneration while continuing on daily wages engagement came to be fixed by the order of the Postmaster General at the rate of Rs. 3,000/- per month and again in this order, it was made clear that the petitioner will not be eligible to any other allowances such as non-practicing allowance, Contingent allowance, Post-Graduate allowance or any other allowances as was admissible to a regular incumbent. A copy of this letter, dated 10.12.2002 as contained in Annexure-A, was also forwarded to the petitioner and it is on record that the petitioner did not object to the said terms and conditions rather he continued to work on daily wages. Subsequently, by an order, dated 17.12.2002, the fixed amount of Rs. 3,000/- as per the earlier order dated 10.10.2002 was revised to Rs. 5,000/- while reiterating all other terms and conditions. Again, even when the copy of the corrigendum dated 17.12.2002 altering the amount of fixed remuneration of Rs. 3,000/- to Rs. 5,000/- by the aforementioned letter, dated 17.12.2002 was given to the petitioner why he had accepted the same without any demur or protest.

3. From the averments made in the writ application, it is clear that after more than two years of his continuing on daily wages engagement in the P&T Dispensary, Chapra the writ petitioner had filed a representation before the Post Master General on 5.12.2004 (Annexure-6) wherein he had made a request to pass an order for payment of his salary in the basic scale of the post of Medical Officer with allowances w.e.f. the date of his joining i.e. 12.9.2002, The writ petitioner for the aforementioned relief had staked his claim on the ground that payment of Rs. 5,000/- per month to a qualified MBBS doctor for full time duty was unjustified and that the work being done by him was exactly the same as that of the regular incumbents and as such he was entitled to be paid at the minimum of the pay scale of the post plus dearness allowance etc. The petitioner has stated that after filing of the representation dated 5.12.2004 when no decision in his favour was taken, he had moved before the Tribunal by filing O.A. No. 127 of 2006 for a direction to the respondents for payment of his wages in the minimum of the pay scale of the Chief Medical Officer.

4. Before the Tribunal, the respondents had filed their written statements in

which it was clearly stated that the appointment of the writ petitioner was purely temporary and on the basis of a contract under which he was to be paid his salary on consolidated fixed amount per month and as such he was not entitled for payment of salary in a pay scale of Medical Officer and for any other allowances. It was further stated by the respondents in their written statement filed before the Tribunal that the claim of the petitioner for payment of his emoluments in the minimum scale of pay of Chief Medical Officer was totally unjustified because the applicant was never assigned the post of Chief Medical Officer and was in fact engaged and continuing as a Medical Officer.

5. The Tribunal after considering the case of the parties had recorded the findings that the writ petitioner had himself volunteered to accept the job on daily wages and it was in the line of his own request that an offer of engagement on daily wages was made to him by letter dated 11.9.2002, the complete text whereof has been quoted above. The Tribunal has further held that upon communication of the terms and conditions, the writ petitioner had accepted the same and, therefore, he could not have made any claim for increase in the amount or payment of his emoluments in the minimum of the pay scale of Chief Medical Officer beyond the terms and conditions communicated to him and also accepted by him. The Tribunal while rejecting the case of the petitioner had also recorded the finding that it was purely temporary arrangement made by the Post and Telegraph Department in which the writ petitioner had been given a chance to serve on a consolidated pay and that such engagement was also at best a part time engagement inasmuch as the writ petitioner was engaged to work only for six hours a day. After recording all these findings and considering the case law relied by the writ petitioner, the Tribunal had dismissed the O.A. No 127 of 2006 by an order dated 15.12.2006 as contained in Annexure-7.

6. Mr. Y.V. Giri, Senior Counsel appearing on behalf of the petitioner while assailing the aforementioned findings of the Tribunal in the impugned order has basically raised the issue that the terms and conditions imposed in the order of engagement, dated 11.9.2002 or that the fixation of consolidated salary by the order dated 10.12.2002 and its revision by the corrigendum dated 17.12.2006 were the unilateral act of the authorities of the Post and Telegraph Department and as such they cannot have bound the writ petitioner. Counsel for the petitioner in this regard has to placed reliance on the judgment of the Supreme Court in the case of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, .

7. On the other hand, Counsel appearing for the respondents while supporting the impugned order had basically relied on the terms and conditions of the engagement of the writ petitioner and it was submitted that the Tribunal had correctly held that the writ petitioner was not entitled for the minimum of pay scale of a regularly appointed Chief Medical Officer. Learned Counsel had also placed his reliance on the judgments of Supreme Court in the case of State of Haryana and Another Vs. Tilak Raj and Others, , State of Madhya Pradesh and

Others Vs. Yogesh Chandra Dubey and Others, and Indian Drugs and Pharmaceuticals Ltd. Vs. Workman, Indian Drugs and Pharmaceuticals Ltd., .

8. On hearing Counsel for the parties I am of the view that the order of the Tribunal does not suffer from any factual or legal infirmity and as such cannot be interfered by this Court in exercise of the power under Article 226 of the Constitution of India. In this regard as has been noted above, the writ petitioner had himself solicited his appointment on purely ad hoc basis vide his application dated 10.9.2002 as contained in Annexure-1 in which while seeking an opportunity to serve in the Post and Telegraph Dispensary at Chapra, he had not even claimed that his such engagement should be in a pay scale much less in the prescribed pay scale of the Chief Medical Officer. Again when the petitioner was communicated the acceptance of his aforementioned offer by an order dated 11.9.2002 issued by the Senior Superintendent of Post Offices, Chapra it was clearly conveyed to him that his temporary engagement on daily wages was in anticipation of the approval of the competent authority and that his such engagement on daily wages will confer him no right for his absorption of the cadre. The writ petitioner had accepted the aforementioned offer unconditionally and had submitted, his joining on 12.9.2002 and subsequently when the approval of the competent authority for his engagement on ad hoc basis was accorded by the Post Master General, Muzaffarpur by his letter dated 10.12.2002, it was made clear that his monthly remuneration would be fixed at Rs. 3,000/- without there being any scope of payment of any other allowances. The writ petition again on being conveyed the decision of the competent authority, the Post Master General, Muzaffarpur vide his letter dated 10.12.2002 and Its corrigendum dated 17.12.2002 did not choose to make any protest even in the matter of fixation of his monthly remuneration and in fact continued to work for a period of next two years by receiving the fixed annual of his consolidated wages @ Rs. 5,000/- per month. In such a situation, the petitioner, could not have raised a plea of "bargaining power of the employer" a concept evolved in the Supreme Court Judgment in the case of Central Inland Water Transport Corporation Ltd. (supra). The ratio of the Central Inland Water Transport Corporation Ltd. in fact will not apply to the case of the petitioner, who is not a workman and was never forced by the department to accept the ad hoc appointment against his Will. On the contrary, there is evidence to show that the petitioner earlier also had worked for sometime on such fortuitous vacancy on the post of Medical Officer in Post and Telegraph Dispensary at Chapra in the year 1980 and later on even after 20 years when he came to know that the regular incumbent in the post of Medical Officer in the P&T Dispensary at Chapra had died, and there was a stopgap vacancy i.e. till the appointment of a regular incumbent, he had himself volunteered to work on a purely temporary basis by way of ad hoc arrangement without putting a condition of payment of his salary and allowances at par with the Chief Medical Officer/Medical Officer.

9. The concept of equal pay for equal work or the payment of salary in minimum of the pay scale as a derivative of Articles 14 & 16 of the Constitution of India

came to be recognized by the Apex Court in the case of *Randhir Singh Vs. Union of India (UOI) and Others*, and in *Dhirendra Chamoli and Another Vs. State of U.P.*, but then both the cases related to Class-IV employees. The Apex Court in fact did not invoke the said doctrine in the case of *Doctors of Zila Parishad* as would be manifest from the ratio of *Dr. C. Girijambol vs. Government of Andhra Pradesh* reported in AIR 1981 SC 1537 where it was held that the principle of equal pay for equal work can not be invoked or applied invariably in every kind of service and certainly it cannot be invoked in the area of professional service. The ratio of said earlier judgment of the Apex Court in *Dr. Girijambol (supra)* which remained unnoticed in the subsequent cases of *Randhir Singh* and *Dhirendra Chamoli*, however, has been reiterated in its subsequent judgment where while dealing this very question of equal pay for equal work and the grant of minimum pay in the prescribed pay scale where it has been laid down that unless the appointment has been made as per the prescribed procedure against a sanctioned vacant post after following the prescribed rules for such appointment, the ad hoc appointee engaged on temporary basis or daily wages will not be entitled for payment of salary in the same pay scale or even in the minimum of the pay scale. Reference in this connection can be made to the judgment of the Supreme Court in the case of *State of Haryana and Others Vs. Jasmer Singh and Others*, wherein it was observed that the principle of equal pay for equal work is not always easy to apply and there were inherent difficulties in comparing and evaluating work done by different persons in different organisations, or even in the same organisation. Similarly, the Supreme Court again in the case of *Union of India and Others Vs. Pradip Kumar Dey*, after referring to various decisions dealing with the same question had held that before granting the relief of equal pay for equal work, the Courts must examine the materials relating to other comparable employees as with regard to the qualifications, method of recruitment, degree of skill, experience involved in the performance of job, training required, responsibilities undertaken and other facilities in addition to pay scales. Yet again in another decision of the Supreme Court in the case of *State Bank of India and Another Vs. M.R. Ganesh Babu and Others*, while dealing with the same principle has laid down law in paragraph 16 in the following words:---

16. The principle of equal pay for equal work has been considered and applied in many reported decisions of this Court. The principle has been adequately explained and crystallised and sufficiently reiterated in a catena of decisions of this Court. It is well settled that equal pay must depend upon the nature of work done, It cannot be judged by the mere volume of work; there may be qualitative difference as regards reliability and responsibility. Functions may be the same but the responsibilities make a difference. One cannot deny that often the difference is a matter of degree and that there is an element of value judgment by those who are charged with the administration in fixing the scales of pay and other conditions of service. So long as such value judgment is made bona fide, reasonably on an intelligible criterion which has a rational nexus with the object

of differentiation, such differentiation will not amount to discrimination. The principle is not always easy to apply as there are inherent difficulties in comparing and evaluating the work done by different persons in different organizations, or even in the same organization. Differentiation in pay scales of persons holding same posts and performing similar work" on the basis of difference in the degree of responsibility, reliability and confidentiality would be a valid differentiation. The judgment of administrative authorities concerning the responsibilities which attach to the post, and the degree of reliability expected of an incumbent, would be a value judgment of the authorities concerned which, if arrived at bona fide, reasonably and rationally, was not open to interference by the Court.

10. Even recently, the Supreme Court in the case of Yogesh Chandra Dubey (supra) following the ratio of the earlier cases like State of Karnataka and Others Vs. KGSD Canteen Employees Welfare Association and Others, , BHEL and B.H.E.L. and Another Vs. B.K. Vijay and Others, and M.P. Housing Board and Another Vs. Manoj Shrivastava, had held that an appointment in violation of the mandatory provisions of the Statutes or constitutional obligation would be void and if the appointment itself has not been made in terms of the Statute, such appointment will be deemed to be void conferring him with no right including claiming equal salary and emoluments alike a regular employee. It is in this context that the following passage of the judgment in the case of Yogesh Chandra Dubey (supra) needs to be noticed:--

9. It is neither in doubt nor in dispute that the respondents were not appointed in terms of the statutory rules, their services were taken by the officers only to meet the exigencies of situation. No post was sanctioned. Vacancies were not notified. It is now trite that a State within the meaning of Article 12 of the Constitution of India, while offering public employment, must comply with the constitutional as also statutory requirements. Appointments to the posts must be made in terms of the existing rules Regularisation is not a mode of appointment. If any. recruitment is made by way of regularisation, the same would mean a back door appointment, which does not have any legal sanction.

11. The Apex Court recently had again reviewed the whole case law on the issue of equal pay for equal work or grant of minimum pay scale to an employee engaged on daily/temporary basis in the case of Indian Drugs & Pharmaceuticals Limited (supra) and held therein that a daily-rated or casual worker is only a temporary employee and such a temporary employee has no right to the post. The Apex Court had also explained the term "temporary employee" as a general category which has under it several subcategories e.g. casual employee, daily-rated employee, ad hoc employee, etc. In the same judgment, the Supreme Court after placing reliance on an earlier decision in the case of Tilak Raj had held that the Courts cannot issue a direction for payment of salary of a regular employee to one who was engaged on daily wages. In the aforementioned judgment, the Supreme Court also had considered and followed the ratio of its

judgment of the Constitution Bench in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others, and ultimately laid down law in the following words:--

31. No doubt, there can be occasions when the State or its instrumentalities employ persons on temporary or daily-wage basis in a contingency as additional hands without following the required procedure, but this does not confer any right on such persons to continue in service or get regular pay. Unless the appointments are made by following the rules, such appointees do not have any right to claim permanent absorption in the establishment.

38. The respondents have not been able to point out any statutory rule on the basis of which their claim of continuation in service or payment of regular salary can be granted. It is well settled that unless there exists some rule no direction can be issued by the court for continuation in service or payment of regular salary to a casual, ad hoc, or daily-rated employee. Such directions are executive functions, and it is not appropriate for the court to encroach into the functions of another organ of the State. The courts must exercise judicial restraint in this connection. The tendency in some courts/ tribunals to legislate or perform executive functions cannot be appreciated. Judicial activism in some extreme and exceptional situations can be justified, but resorting to it readily and frequently, as has lately been happening, is not only unconstitutional, it is also fraught with grave peril for the judiciary.....

12. Thus, from the long line of binding precedents on the subject as noticed above, it is clear that in the matter of "equal pay for equal work" and/or payment of salary to a temporary/ad/ hoc/daily wages employees in the minimum of the pay scale, the same is not to be readily given for asking only because a claim is made that such temporary/daily wages/ casual/ad hoc employee is performing the same work as that of the regular incumbent. As noticed above, manner of recruitment, availability of post, exact nature of qualification of work have to be decided before it can be even held that such temporary employee can be given equal pay for equal work or the minimum of the pay scale.

13. In this context, it is undisputed that so far the post on which the petitioner has been engaged on purely temporary basis by way of daily-wages engagement is a cadre post of Central Health Services. The recruitment to the post of Central Health Services is made under the Central Health Services Rules by the Government of India through the selection procedure and recommendation of the Union Public Service Commission. It is only by way of a purely temporary arrangement that when the regular incumbent working on the post of Medical Officer had died that the petitioner on his request came to be engaged by way of purely stoppage arrangement on specified terms and conditions. It has to be noted here that the petitioner had been allowed to continue with his private practice whereas a regularly appointed doctor under C.H.S. Rules cannot take up private practice. Yet again when the petitioner was given the option to continue with his private practice, he was even divested of the requirement of the job to

be performed by a regular Medical Officer of undertaking domiciliary visit. Thus the work also being given to the petitioner during his purely temporary engagement is not comparable much less equal to a doctor appointed on regular basis. The finding of the Tribunal that the writ petitioner was not performing the duty for the same number of hours as that of a regularly appointed doctor and his engagement was only for six hours a day virtually has reduced him to a part-time engagement and as such the petitioner cannot be heard to say that he was performing the same work and same duty as of a regular Medical Officer much less a Chief Medical Officer, whose salary and pay-scale, the petitioner had claimed in O.A. filed by him before the Tribunal. Thus, having given my anxious consideration on the whole issue, I am of the view that both on fact and in law the petitioner was/is not entitled for the relief prayed by him in the application filed by him in the Tribunal and that there is no infirmity in the impugned judgment of the Tribunal. In the result, this writ application being devoid of any merit is accordingly hereby dismissed, However, there will be no order as to costs.

Dr. J.N. Bhatt, C.J.

I agree.