
(2007) 04 CAL CK 0036
In the Calcutta High Court
Case No : F.M.A. No. 1935 of 2006

Paresh Dey and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 18-04-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : 111 CWN 665 : (2007) 115 FLR 657

Hon'ble Judges : Pranab Kumar Chattopadhyay, J;Arunabha Basu, J

Bench : Division Bench

Advocate : Asok De and Sougata Bhattacharya, Ranjit Chatterjee and Prasenjit De, for the Appellant;T.P. Halder, for the Respondent

Final Decision : Allowed

Judgement

Pranab Kumar Chattopadhyay, J.—This appeal is directed against the judgment and order dated 2nd March, 2001 passed by the learned Single Judge while deciding the writ petition filed on behalf of the appellants herein.

The writ petitioners, who are the appellants herein were initially appointed as Lower Division Clerks in West Bengal Council of Higher Secondary Education against on substantive vacancies ad hoc basis. Pursuant to the office order bearing No. S/372 dated 31st December, 1981 issued by the President, West Bengal Council of Higher Secondary Education, total 54 members of the ad hoc staff including the appellants herein were appointed in the substantive posts of Lower Division Clerks w.e.f. 10.10.1981. By the said office order bearing Nos. /372 dated 31.12.1981, another group of employees, namely, the respondent Nos. 5 to 14 were also appointed in the posts of Lower Division Clerks from the posts of Regular Peons. Thus, by the aforesaid office order, 54 ad hoc employees including the appellants and the respondent Nos. 5 to 14, who were regular Peons in the establishment of the West Bengal Council of Higher Secondary Education were brought in a common cadre and placed in the identical scale of pay (Rs. 400 - Rs. 900/-) w.e.f. 10th October, 1981.

2. Subsequently, in partial modification of the aforesaid office order No. S/372 dated 31st December, 1981, another office order was issued bearing No. S/Est/70 dated 15th June, 1982 whereby and whereunder the pay of the respondent Nos. 5 to 14 was refixed at Rs. 450/- per month w.e.f. 10.10.1981. Apart from the aforesaid employees, the respondent Council also refixed the higher initial pay at Rs. 450/- per month in respect of another category of employees consisting of 38 Lower Division Clerks.

3. Although the appellants were similarly placed and have been discharging same nature of duties and functions as Lower Division Clerks, their pay remained at Rs. 400 - Rs. 900/-. At this stage, the Council issued a circular, being Office order dated 14.1.1982 which provides as hereunder:

Provided that the pay in respect of, L.D.C. Typist already in service of the Council prior to 10.10.1981 shall be fixed in such a manner that their basic pay after fixation of pay in the revised scale shall not be less than Rs. 450/-per month as on 1.4.1981.

4. Refixation of the pay of respondent Nos. 5 to 14 and also a group of Lower Division Clerks consisting of 38 Lower Division Clerks was initially not acceptable to the Government and the Assistant Secretary to the Government of West Bengal, Education Department, asked the Secretary, West Bengal Council of Higher Secondary Education by Memo dated 27th December, 1990 to furnish the reasons for fixing pay at Rs. 450/- per month in respect of the said 38 Lower Division Clerks. The relevant portion from the aforesaid Memo dated 27th November, 1990 issued by the Assistant Secretary, Government of West Bengal is set out hereunder:

Three advance increments reported to have been given in favour of atleast 38 L.D.Cs./Typists in the revised scale of pay of Rs. 400 - Rs. 900/- and thereby fixing their pay at Rs. 450/- with effect from 1.4.1981 who were in service prior to 10.10.1981 on consideration of their seniority in service. It is not understood as to why such an extra-ordinary benefit was granted in favour of a particular category of employees.

I am, therefore, to request you kindly to justify, with sufficient reasons the actions of the Council in this regard.

5. The Council in its meeting dated 27th May, 1992 decided as follows:

The matter has now become very complicated both for the Council and for the employees concerned. However, keeping in the view the consequences of such wrong fixation the members present opined that necessary calculation for refixation of their pay in the manner prescribed by the Government in the aforesaid letter and amount overdrawn by such employees be made immediately by a Committee to be conducted for the purpose.

6. Ultimately, the Government of West Bengal by the subsequent Memo dated 28th November, 1996. accorded approval to the aforesaid fixation of pay of the

said 38 Lower Division Clerks alongwith respondent Nos. 5 to 14 at Rs. 450/- per month subject to certain conditions. The said Government Order dated 28th November, 1996 is set out hereunder:

No. 253-SE(HS) 3S-60/90 Dated: Calcutta, the 28th Nov. 1996

From : Dr. B.M. Thakur. O.S.D. & Ex-officio Dy. Secretary to the Government of West Bengal.

To: The Secretary, West Bengal Council of Higher Secondary Education. Bikash Bhawan. (2nd floor), Salt Lake, Calcutta-91.

Sub: West Bengal Council of Higher Secondary Education - Prayer for fixation of pay of 49 L.D.C. Employees of the-

Ref: Your letter No. EST/537/90 dated 21.11.1990 and subsequent memo No. EST/349/95, date 22.6.1995.

Sir,

In reference to the above, I am directed to say that the State Government in their order No. 25-Edn (HS) dt. 22.6.1981 had sanctioned a revised pay scale of Rs. 450-1000/- for newly created posts of Junior Assistants, to the West Bengal Council and the Council, in turn, fixed the pay of the erstwhile 49 L.D.C. at Rs. 450/- by fitting to that scale. Later on, then the Govt. in their final order No. 137 Edn dt. 18.12.1981, withdrew this pay scale substituting by the scale of Rs. 400-900/-, a confusion cropped up regarding pay fixation of these 49 erstwhile L.D.C.

Now, the Governor has, after careful consideration, been pleased to approve the fixation of pay of these 49 L.D.Cs of the Council at Rs. 450/- as a case of "fait accompli" subject to the following conditions:

(i) that the fresh recruits who joined after pay revision, were not allowed this benefit, and

(ii) that this benefit shall not in any way be regarded as higher initial start for the post.

Sd/- Illegible O.S.D. & Ex-officio Dy. Secretary.

7. Although the appellants herein being lower Division Clerks were already in service of the Council prior to 10.10.1981, their basic pay in the revised scale was unfortunately not fixed at Rs. 450/- per month like other similarly placed Lower Division Clerks/Typists appointed by the respondent Council. The West Bengal Council of Higher Secondary Education surprisingly requested the School Education Department, Government of West Bengal for fixation of pay of 49 Lower Division Clerks at Rs. 450/- per month ignoring the rightful and legitimate claims of the appellants herein. The Government of West Bengal considering the aforesaid request of the West Bengal Council of Higher Secondary Education was pleased to approve the fixation of pay of 49 Lower Division Clerks at Rs. 450/-

per month by the office memorandum dated 28th November, 1996. It has not been explained why the Council did not approach the Government of West Bengal for extending the similar benefit of fixation of pay in respect of the appellants herein at Rs. 450/- per month like other 49 similarly placed Lower Division Clerks.

8. The prayer made by the Council for fixation of pay only in respect of the aforesaid 49 Lower Division Clerks including the respondent Nos. 5 to 14 herein ignoring the similar demands of the appellants have been specifically mentioned in the aforesaid Memo dated 28th November, 1996 issued by the School Education Department, Government of West Bengal under the heading "Sub" which is reproduced hereunder:

Sub: West Bengal Council of Higher Secondary Education - Prayer for fixation of pay of 49 L.D.C. Employees of the

9. The appellants herein, therefore, finding no other alternative filed the writ petition challenging the aforesaid decision of the Government of West Bengal as mentioned in the Memo dated 28th November, 1990 whereby and whereunder the benefit of higher pay at Rs. 450/- per month was granted to 49 Lower Division Clerks of the said Council including the respondent Nos. 5 to 14 herein although the similar benefit was denied to the appellants herein without assigning any reason. The said writ petition was finally decided by the learned Single Judge on 2nd March, 2001 and challenging the said decision of the said learned Single Judge, the instant appeal has been preferred.

10. The question now is to be decided whether the appellants/writ petitioners are entitled to refixation of their basic pay at Rs. 450/- per month like the aforesaid 49 Lower Division Clerks w.e.f. 10.10.1981.

11. Upon hearing the submissions of the learned Counsel of the respective parties and on examination of the relevant records available before this Court we find that the appellants, respondent Nos. 5 to 14 and the other category of 38 Lower Division Clerks were in the same cadre of Lower Division Clerks of the Council and discharging identical duties. The respondent Council admittedly, granted the benefit of higher initial pay of Rs. 450/- per month to the respondent Nos. 5 to 14 and other separate category of 38 Lower Division Clerks of the Council but denied the same benefit to the appellants herein even though the said appellants were appointed to the substantive posts of Lower Division Clerks of the respondent Council w.e.f. 10.10.1981. The respondent Council brought the appellants, the respondent Nos. 5 to 14 and the aforesaid 38 Lower Division Clerks into a common platform and in the same cadre of Lower Division Clerks but without assigning any reason granted the benefit of higher pay fixation at Rs. 450/- per month only to the respondent Nos. 5 to 14 and the separate group of 38 Lower Division Clerks. The respondent Council thus, denied equal treatment to the appellants, who are admittedly the members of the same cadre.

12. After formation of one unified cadre of Lower Division Clerks, the respondent authorities are not entitled to create any artificial division amongst the same

group of employees of the same cadre as sought to have been done in the present case. The respondent-Council although granted the benefit of higher initial pay at Rs. 450/- per month to the 49 Lower Division Clerks including the respondent Nos. 5 to 14 herein and approached the School Education Department, Government of West Bengal for approving the said fixation of pay to the 49 employees of the Council but the claims of the appellants for awarding the same benefit of fixation of pay at Rs. 450/- per month was neither sanctioned by the Council nor the competent authority of the Council forwarded the said claims of the appellants to the School Education Department, Government of West Bengal for obtaining necessary approval as was done in respect of the aforesaid 49, Lower Division Clerks, who were identically placed with the appellants herein. The appellants herein unfortunately received discriminatory treatment from the Council in the matter of fixation of pay.

13. Mr. Ranajit Chatterjee, learned Counsel of the respondent-Council submits before this. Court that the appellants herein did not submit any representation and accepted salary on the basis of pay fixation allowed to them without any protest since 1981. Mr. Chatterjee further submits that the appellants have not disclosed any legal right based on any statute or circular for invoking the writ jurisdiction of this Court. The learned Counsel of the respondent-Council also submits that the private respondents and other similarly placed Lower Division Clerks whose pay was fixed at Rs. 450/- per month formed a category or class different from the appellants herein on the ground that all of them were in regular service of the Council long before 10.10.1981.

14. It is not in dispute that after 10.10.1981 the appellants, respondent Nos. 5 to 14 and the other 38 Lower Division Clerks merged into same cadre of Lower Division Clerks and therefore, the respondent-Council after bringing all the aforesaid employees into the same platform cannot create any artificial classification. The learned Single Judge, however, dismissed the writ petition on the grounds that there was delay of 18 years in filing the writ petition by the appellants herein and the claims of the appellants are stale. The learned Single Judge also held that re-fixation of basic pay at Rs. 450/- in favour of the respondent Nos. 5 to 14 may be an act of mistake or aberration on the part of the statutory authorities but such mistake cannot be perpetuated by the order of the Court.

15. From the records we find that the Higher Education Department, Government of West Bengal by the Memo dated 28th November, 1996 approved the fixation of pay of 49 Lower Division Clerks of the Council including the respondent Nos. 5 to 14. The competent authority of the respondent-Council unfortunately did not forward the claims of the appellants regarding fixation of pay at Rs. 450/- per month to the School Education Department, Government of West Bengal even after issuance of the aforesaid Memo dated 28th November, 1996 whereby and whereunder the School Education Department approved the fixation of pay of 49 Lower Division Clerks of the Council at Rs. 450/- per month as a case of "fait

accompli". The appellants herein reasonably expected that the respondent-Council being a model employer will not allow any discrimination in the matter of fixation of pay in respect of same set of employees. The School Education Department, Government of West Bengal took a reasonable stand by approving the fixation of pay of all 49 Lower Division Clerks of the Council at Rs. 450/- per month as a case of "fait accompli" since the Council, only pursued the claims of the said 49 Lower Division Clerks including the respondent Nos. 5 to 14. The respondent-Council should not have ignored the rightful and legitimate claims of the appellants regarding fixation of pay at Rs. 450/- per month like other 49 similarly placed Lower Division Clerks of the said Council.

16. It is most surprising that the competent authority of the respondent-Council did not even invite the attention of the competent authority of the Government of West Bengal to the aforesaid fact that the appellants herein being the members of the same cadre of Lower Division Clerks of the Council were and are entitled to the benefit of fixation of higher initial pay at Rs. 450/-. The School Education Department, Government of West Bengal had no knowledge in respect of the aforesaid discriminatory treatment of the respondent-Council towards the appellants herein. The respondent-Council by allowing the fixation of pay at Rs. 450/- to 49 Lower Division Clerks including the respondent Nos. 5 to 14 herein and excluding the appellants have acted in a discriminatory manner and in clear violation of the principles of natural justice and fair play. The School Education Department, Government of West Bengal by issuing the Memo dated 28th November, 1996 not only approved the benefit of fixation of pay of 49 Lower Division Clerks at Rs. 450/- but also made it clear that such benefit will not be available only to the fresh recruits who joined after the pay revision. Therefore, in view of the aforesaid Memo dated 28th November, 1996, the appellants herein not being fresh recruits and since joined before the cut-off-date were also entitled to enjoy the benefit of pay fixation at Rs. 450/- per month like the said 49 Division Clerks.

17. The appellants herein submitted demand for justice on 18th November, 1997 claiming -fixation of pay at Rs. 450/- like similarly placed other 49 Lower Division Clerks of the Council who were granted the said benefit of pay fixation by the Government of West Bengal by the aforesaid Memo dated 28th November, 1996. The said demand of the appellants was, however, not taken into consideration either by the appropriate authority of the Council or the Government of West Bengal. Accordingly, the appellants filed the present writ petition in the year 1998.

18. In the aforesaid circumstances, we do not consider that there was any delay on the part of the appellants herein to approach this Hon"ble Court for adjudication of the grievances by tiling the writ petition. However, we are also of the opinion that the rightful and legitimate claims of the appellants should not be defeated only on the ground of delay alone even if there was any delay in filing the writ petition by the appellants herein.

19. In the case of Collector, Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, . Hon''ble Supreme Court has specifically held that the Court should adopt liberal approach while deciding the issue relating to delay. The relevant extract from the aforesaid judgment is quoted hereunder:

3. ...

1. ...

2. ...

3. ...

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact, he runs a serious risk.

6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so....

20. The learned Single Judge also held that the claims of the appellants herein are stale claims but, we have already held that the claims of the appellants herein are based on principles of natural justice as enshrined under Article 14 of the Constitution of India. The respondent authorities by approving the fixation of pay of the 49 Lower Division Clerks including the respondent Nos. 5 to 14 herein at Rs. 450/- per month on the basis of the Government Memo dated 28th November, 1990 have clearly discriminated the appellants herein, without any valid reason. The authorities of the respondent-Council herein have consciously created artificial classifications amongst the same group of employees within the same unified cadre in an illegal and unlawful manner.

21. In the case of All India Federation of Central Excise Vs. The Union of India and others, , Supreme Court has specifically observed that officers once promoted from the feeder categories, identity of the feeder channel from which they are promoted ceases to exist. In the present case also, the appellants, respondent Nos. 5 to 14 and the separate category of 38 other Lower Division Clerks after absorption in the permanent substantive posts of Lower Division Clerks of the Council w.e.f. 10.10.1981 formed an integrated unified cadre of Lower Division Clerks. Therefore, the respondent-Council is not entitled to create artificial classification by awarding the benefit of fixation of higher pay at Rs. 450/- per month to only 49 Lower Division Clerks and excluding the appellants herein.

22. Mr. T.P. Halder, learned Counsel of the State of West Bengal fairly submitted

before this Court that the claims of the appellants herein were never forwarded by the respondent-Council to the School Education Department, Government of West Bengal for according necessary approval of fixation of higher pay at Rs. 450/- per month like other 49 Lower Division Clerks.

23. We have already discussed hereinbefore that the respondent-Council wrongfully and illegally ignored the grievances of the appellants regarding fixation of pay at Rs. 450/- per month like other similarly placed 49 Lower Division Clerks in absence of valid reasons and thus the respondent-Council acted in clear violation of the principles of natural justice as enshrined under Articles 14 and 16 of the Constitution of India. In the aforesaid circumstances, it cannot be said that the aforesaid claims of the appellants should be regarded as stale claims and we are, therefore, not in agreement with the learned Single Judge in this respect. Furthermore, in view of the Government Order dated 28th November, 1996 it cannot be said that the fixation of pay of the 49 similarly placed Lower Division Clerks at Rs. 450/- per month should be regarded as a mistake.

24. For the reasons discussed hereinabove, we also do not consider that there is no existence of any legal right in favour of the appellants herein since the said appellants filed the writ petition before this Hon'ble Court, challenging the discriminatory treatment of the respondent-Council to the matter of fixation of pay of the said appellants.

25. Mr. Ranjit Chatterjee, learned Counsel of the respondent-West Bengal Council of Higher Secondary Education referred to and relied on the following decisions of the Supreme Court in support of his arguments.

(1) K.V. Rajalakshmiah Setty and Anr. v. State of Mysore and Anr. AIR 1967 SC 993, (Head-note "B", Para 13)

(2) The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and Others,

(3) Chandigarh Administration and Others Vs. Naurang Singh and Others,

26. The aforesaid decisions, in our opinion, are not at all applicable in the facts of the present case.

27. In view of the aforementioned reasons, we are unable to affirm the decision of the learned Single Judge, as, in our opinion, the said decision of the learned Single Judge cannot be sustained in the eye of law. We also hold that the appellants herein are entitled to enjoy the benefit of fixation of pay at Rs. 450/- per month like other 49 similarly placed Lower Division Clerks of the Council including, the respondent Nos. 5 to 14 herein w.e.f. 10.10.1981.

28. We, therefore, direct the respondent authorities, particularly the respondent Nos. 2, 3 and 4 herein to refix the pay of the appellants at Rs. 450/-per month like other 49 similarly placed Lower Division Clerks including the respondent Nos.

5 to 14 herein w.e.f. 10.10.1981 and grant all other consequential benefits due and payable to the appellants on account of subsequent revision of the pay scales without any further delay but positively within a period of two weeks from the date of communication of this order. The aforesaid respondents are directed to calculate the admissible arrear dues payable to the appellants within a period of three weeks from the date of refixation of the pay of the appellants in terms of his order and disburse the same to the said appellants within three weeks thereafter.

29. The competent authority of the State of West Bengal, particularly, the Secretary, School Education Department is directed to accord necessary approval to the aforesaid fixation of pay of the appellants in terms of this order at an early date but positively within 10 days from the date of receiving the relevant papers and documents from the respondent-Council in respect of the appellants herein. The appropriate authority of the State of West Bengal is also directed to sanction and provide necessary funds to the respondent Nos. 2, 3 and 4 immediately so that the said respondents can disburse necessary payment to the appellants herein in terms of this order within the time mentioned hereinabove.

30. With the aforesaid directions, this appeal stands allowed and the judgment and order under appeal is set aside. There will be, however, no order as to costs.

Let urgent xerox certified copy of this judgment and order, if applied for, be given to the learned Advocates of the parties on undertaking.

Pranab Kumar Chattopadhyay, J.

I agree.