(2007) 09 AHC CK 0114

In the Allahabad High Court

Case No : Writ Petition (S/S) No. 2266 of 2007 With Writ Petition (S/S)Nos. 1157/07,1156/07, 7815/06 (S/S), 1837/07 (S/S), 1838/07 (S/S) and 7405/06 (S/S)

Pramod Kumar APPELLANT

Vs

State of U.P.and another RESPONDENT

Date of Decision : 13-09-2007

Acts Referred:

Citation : (2007) 09 AHC CK 0114

Hon'ble Judges : Devi Prasad Singh, J

Final Decision : Allowed

Judgement

Devi Prasad Singh, J.—Controversy involved in this bunch of writ petitions relates to common question of facts and law, hence all these writ petitions are being disposed of by this common judgment.

2. All these writ petitions under Article 226 of the Constitution of India have been preferred feeling aggrieved with the ceiling imposed for the payment of dearness allowance by the opposite parties.

3. The petitioners claim to be work charge employees working in the State Bridge Corporation (in short to be hereinafter referred to as ''Corporation''). The State Government as well as the Corporation took a decision that the work charge employees working whether in the State Government or in the Corporation, shall not be entitled for payment of dearness allowance at par with the regular incumbent. Accordingly, the ceiling was imposed providing maximum limit on payment of dearness allowance. Earlier, writ petition No. 1032 (S/S) of 2003, Noor Ahmad and others v. State of U.P. and another, was filed, in which this Court had directed the respondents to decide the controversy by passing a reasoned order keeping in view the judgment and order dated 6.5.2005, passed in writ petition No. 5505 of 1999, Prabhu Narain Sharma v. State of U.P. In pursuance to the order passed by this Court, by the impugned order dated June 8, 2006 (Annexure10), the respondents have rejected the petitioners'' claim on

the ground that in case the dearness allowances are paid to the workcharge employees at par with the regular employees, it shall create an additional burden of Rs. 6 crores per year on the corporation. While rejecting the petitioners'' case, it has also been indicated by the respondents that the corporation is running in loss to the tune of Rs. 32.85 crores.

4. While assailing the impugned order, the petitioners'' Counsel has relied upon a judgment delivered by me on 6.5.2005 in writ petition No. 5505 of 1999, Prabhu Narain Sharma v. State of U.P. (reported in 2006 (24) LCD 1053). While deciding the controversy, a catena of judgments of the Apex Court as well as the constitutional provisions have been considered elaborately and it has been held that no ceiling may be imposed on payment of dearness allowance to the workcharge employees. A finding has been recorded that any ceiling imposed on payment of dearness allowance to the workcharge employees shall be hostile discrimination and hit by Articals 14 and 21 of the Constitution of India. For convenience, paragraphs 19 and 20 of Prabhu Narayan''s case are reproduced as under:

"19. As discussed hereinabove the ceiling on dearness allowance affects the right of livelihood as well as quality of life, of the workcharge employees, it is different thing in case the State Government would have taken a decision not to pay clearness allowance to work charge employees on some sound grounds but once the State Government, took a decision for payment of dearness allowance there should not be disparity in payment of dearness allowance by providing ceiling, payable to work charge employees.

In the case of Hindustan Lever Ltd. v. B.N. Dougre and others (supra), Hon''ble Supreme Court held that the ceiling on the dearness allowance to monthly rated clerical and technical staff working in Sewree factory was illegal. For convenience relevant portion from the judgment of Apex Court in Hindustan Lever Ltd. (supra) is reproduced as under:

"14. It is in the above background that we must consider the question of place of a ceiling on dearness allowance. As is so well known, wages are among the major factors in the economic and social life of the working classes. Workers and their families depend almost entirely on wages to provide themselves with the three basic requirements of food, clothing and shelter. The other necessities of life like children''s education, medical expenses, etc, must also come out to the emoluments earned by the breadwinner. Workers are therefore concerned with the purchasing power of the pay packet he receives for his toil. If the rise in the pay packet does not keep pace with the rise in prices of essential the purchasing power of the pay packet does not keep pace with the rise in prices of essentials, the purchasing power of the pay packet fails reducing the real wages leaving the workers and their families worse off. Therefore, if on account of inflation prices rise while the pay packet remains frozen, real wages will fall sharply. This is what happens in periods of inflation. In order to prevent such a fall in real wage, different methods are adopted to provide for the rise in prices. In the costofliving sliding scale systems the basic wages are automatically adjusted to price changes shown by the cost of living index. In this way the purchasing power of workers'' wages I maintained to the extent possible and necessary. However, lapfrogging must be avoided. This Court in Clerks of Calcutta Tramways v. Calcutta Tramways Company Ltd., AIR 1957 SC 78 [(1956 (2) LLJ 450] held that while awarding dearness allowance cent percent neutralization of the price of cost of living should be avoided to check inflationary tends. That in why in Hindustan Times Ltd. v. Their Workmen, AIR 1963 SC 1332 [(1963)LLJ 108], Das Gupta, J. observed that the whole purpose of granting dearness allowance to workmen being to neutralize the portion of the increase in the cost of living, it shall ordinarily by on a sliding scale and provide for an increase when the cost of living increases and a decrease when it falls."

In one another case reported in AIR 1986 SC 1794. The monthly rated workmen at the Wadala Factory of the Indian Hume Pipe Company Ltd. v. The Indian Hume Pile Company Ltd., Bombay (supra), Hon''ble Supreme Court had repelled the respondents submission to provide any ceiling on the dearness allowance. Relevant portion from the Apex Court judgment in The monthly rated workmen at the Wadala Factory of the Indian Hume Pipe Company Ltd. (supra) is reproduced as under:

"The learned Counsel for the respondents made a strong plea for substitution of the existing system of clearness allowance with ceiling on the quantum of clearness allowance. We have already indicated that in the absence of compelling materials system that gives benefit to the workmen cannot lightly be interfered with to their detriment. The theory of ceiling on the quantum of clearness allowance cannot be accepted since under the prevailing conditions there is no control over the prices of essential commodities and as such a ceiling would no give sufficient cushion when prices of essential commodities continuously rise."

20. In the case of State of West Bengal and others v. Pantha Chatterji (supra) Hon''ble Supreme Court had held that the persons working as part time Border Wing Home Guards recruited for patrolling the border and checking infiltration and working since more than 14 years performing same duties shall be entitled for parity in privileges and monetary benefits with their counter part working as permanent B WHO, not made BSF personal they can not be treated differentially as they also use to assist border security force personal along the borders of the country. For convenience relevant portion from the Apex Court judgment from Pantha Chatterji''s case (supra) is reproduced as under:

"16. In the present case, we have seen that there has not been any dispute about the nature of duties of the two sets of BWHG. Ordinarily, no doubt, they could claim benefits only in accordance with the Scheme under which they were engaged. But as held earlier, the scheme was not implemented in its terms as framed. Hence, the distinction sought to be drawn between the parttime and the permanent BWHG had obliterated and both worked together shoulder to shoulder under similar situations and circumstances and discharged same duties. Once the scheme as famed failed to be implemented as such by those at the helm of the affairs and the parttime BWHG were continues under the authority of those vested with such power to continue them, it is not open to the State Government or the Central Government to deny them the same benefits as admissible to members of the permanent staff of BWHG. The decision reported in Karnataka State Private College Stopgap Lecturers Assn. v. State of Karnataka and Government of India v. Court Liquidators'' employees Assn. may also be beneficially referred to.

18. In the circumstances indicated above, the High Court has rightly come to the conclusion that the socalled parttime Border Wing Home Guards could not be treated differently from the permanent staff of BWHG. They have been rightly accorded parity with them."

5. Relying upon the case of Prabhu Narain Sharma (supra), in a writ petition filed at Allahabad, an interim order was passed. Feeling aggrieved with the interim order, the State has preferred a Special Appeal No. 629 of 2006, State of U.P. and others v. Mohd. Farrukh and others. The special appeal was dismissed by a Division Bench of this Court vide judgment and order dated 20.9.2006 and the interim order was maintained. It has been held by the Division Bench that the paucity of fund cannot be a ground to impose ceiling on payment of dearness allowance. Relevant portion from the judgment of Special Appeal (supra) is reproduced as under:

"It was submitted that even in constitutional matters the Court has to take a pragmatic view; such a pragmatic view is even more necessary at the interim stage; since the burden on the Government will be very large if no stay is ordered, stay should be ordered at this stage and the matter examined further. In regard thereto we make it clear that it is not our intention to compel the State Government to make payment of any arrears prior to today. Our refusal of the stay order on the basis of this melody detailed examination of that the case will hold in this case as well in others from today prospectively. That the Government has not paid the dearness allowance will remain to the credit or debit of the Government as it might be for future and final decision in this appeal but the payment of dearness allowance from today onwards is so extremely justified by the constitution and need for a reasonable policy that it is not possible to pass order any of stay in favour of the State. We explain our reason as follows:

"Suppose a Government has Rs.1 lac as funds; suppose there are one thousand citizens it has to look after. Suppose 5000 rupees is the necessary pay per person necessary for survival. If in this circumstance the State Government distributes 100 rupees to per person among the 1000 people, it will be something for each; it might be good policy for Government popularity or for political purposes but if the Government is to act as a model employer, it has to take on employment a person with the minimum model pay according to its own assessment as the work deserves to be paid; it cannot take on the workers for any less pay; although it will, on this policy employ only 20 out of the 1000 yet it will do so on the correct constitutional principles. It would have to admit that the balance 980 cannot be provided for because of the Government finances are not adequate. This admission is the only honest and proper way of going about it. The State cannot cut down at its own assumption made in one breadth, by the very next breadth or the very next succession of breadth and thus once assess an adequate pay on one say and then let it become inadequate, and increasingly so, as time passes by.

The situation here is not as stark as the 1000 men and Rs. 1,00,000/ further more makes it out to be; but it is well know that to examine the logic of a situation, it is proper to initiate a situation and thereafter examine it, so that the differences appear larger and therefore more easily visible and comprehensible."

6. Learned Counsel for the petitioners has further proceeded to submit that the special leave petition filed by the State against the aforesaid judgment of Special Appeal has been dismissed by the Apex Court on 23.2.2007 in Special Leave to Appeal No. 3661 of2007.

7. My attention has been invited by the petitioners'' Counsel to the recent judgment of the Apex Court, reported in 2007 AIR SCW 4463, Nehru Yuva Kendra Sangathan v. Rajesh Mohan Shukla and others, where difference in payment of dearness allowance to direct recruit and deputationist has been deprecated by the Apex Court. Relevant portion from Nehru Yuva Kendra Sangathan (supra) is reproduced as under:

"2...........A counter affidavit was filed before the High Court and it was pointed out that same pay scale has been granted to the writ petitioners as well as to their counterparts i.e. the deputationists who were absorbed except varying dearness allowance. The Division Bench of the Allahabad High Court relying on a decision of this Court issued mandamus to give the same benefits as prayed by the writ petitioners including same dearness allowance. Hence aggrieved by the order of the High Court, the present appeals were filed."

"3............Oneve these persons are already working for more than two decades discharging the same functions and duties then we see no reason why the same benefit should not be given to the respondents. Looking to the nature and duties of these respondents, we are of opinion that there is no reason to treat them differently..........."

8. Mr. Shishir Jain, learned Counsel for the respondents has vehemently argued raising the plea that payment of same dearness allowance to the workcharge employees at par with the regular employees shall create extra burden on the corporation though he has not disputed that the work and duties of workcharge employees are same as of regular employees.

9. Controverting the submission of the learned Counsel for the respondents, the petitioners'' Counsel Mr. O.K. Tripathi has while relying upon the Apex Court''s judgment, reported in (2006) 6 SCC 310, Mineral Exploration Corporation

Employees Union v. Mineral Exploration Corporation Limited and another, proceeded to submit that under the garb of financial crunch, it is not open to impose ceiling on payment of dearness allowance as it relates to livelihood. The rise of consumer price index affects equally to all whether the incumbent is regular employee or he or she is working on workcharge basis. The submission of the petitioners'' Counsel seems to be well supported by the Division Bench of this Court in Special Appeal (supra), referredhereinabove.

10. Reliance has been placed by the learned Counsel for the respondents Mr. Shishir Jain on the Apex Court''s judgment reported in (2003) 5 SCC 163, A.K. Bindal and another v. Union of India and others and (2003) 6 SCC 490, Officers & Supervisors of I.D.P.L. v. Chairman & M.D.. I.D.P.L and others.

11. The controversy in the case of A.K. Bindal (supra) relates to the revision of the payscale. The nonrevision of the payscale by the employer on the ground of financial crunch was upheld by the Supreme Court on the ground that there was no relevant material before the Apex Court which may create a ground relating to violation of fundamental right enshrined under Article 21 of the Constitution of India. The subject matter of dispute in the case of A.K. Bindal (supra) was totally different than the question involved in the present case. In the Bindal''s case (supra), there was no question of equal treatment, hence it is not applicable in the present controversy.

12. The case of Officers & Supervisors of I.D.P.L. (supra) also relates to the revision of the payscale. In the said case, the Supreme Court has declined to interfere with the matter regarding revision of the payscale on the ground that the employees have already opted for Voluntary Retirement Scheme (VRS) and under the said Scheme, they have retired from service. Since the employees have already opted VRS, they are having no right to claim revision of the payscale. The facts and circumstances and the law propounded by the Supreme Court in these two cases do not seem to be applicable in the present case.

13. My attention has been invited by the learned Counsel for the respondents towards the judgment of Hon''ble Single Judge of this Court dated 27.10.2006, passed in writ petition No. 3182 (S/S) of 2006, Nanda Ballabh Pandey and others v. The State of U.P. and others, where Hon''ble Single Judge held that the case of Prabhu Narain shall not be applicable to the corporation. While recording a finding regarding nonapplicability of Prabhu Narain''s case (supra), Hon''ble Single Judge has not considered the Apex Court''s judgment, relied upon in the case of Prabhu Narain [(Hindustan Lever Ltd.. The Indian Hume Pipe Company Ltd., Bombay. Pantha Chatterji (supra) etc.] where the controversy relating to payment of dearness allowance has been dealt with. The consumer price index affects the employees of the State Government as well as the employees of the corporation equally and once question relates to the right of livelihood and fundamental right, guaranteed by PartIll of the Constitution, there cannot be discrimination only on the ground that the employer is a corporation or a local body or an authority. The judgment in the case of Nanda Ballabh Pandey (supra)

seems to be per incuriam to the law settled by the Apex Court in the cases referred to hereinabove. Right to livelihood and right to equal treatment are the pulse beat of our Constitutional scheme and the State or its instrumentality has got no right to treat the employees discriminatory.

14. The concept of "per incurium" in all those decisions given is ignorance or forgetfulness of some inconsistent statutory provisions or of some authority binding on the Court concerned, i.e., previous decisions of the Court i.e. its own Court or by a Court of coordinate or higher jurisdiction or in ignorance of a term of a statute or by a rule having the force of law. "Incuria", literally means "carelessness". In practice, per incuriam is taken to mean perignoratium. (Vide Mamleshwar Prasad and another v. Kanhaiya lal, (1975) 2 SCC 232; A.R. Antule v. R.S. Nayak. (1988) 2 SCC 602; State of U.P. and others v. Synthetics and Chemicals Ltd., (1991) 4 SCC 139;B. Shama Rao v. Union Territory of Pondichery. AIR 1967 SC 1480; Municipal Corporation of Delhi v. Gurnam Kaur,(1989) 1 SCC 101; Ram Gopal Baheti v. Girdharilal Soni and others, (1999) 3 SCC 112; Sarnam Singh v. Dy. Director of Consolidation and others, (1999) 5 SCC 638; Government of Andhra Pradesh v. B. Satyanarayana Rao. (Dead) by L.Rs. andotehrs, AIR 2000 SC 1729; Ml s. Fuerst Day Lawson Ltd. v. Jindal Exports Ltd., AIR 2001 SC 2293; Suganthi Suresh Kumar v. Jagdeeshan. AIR 2002 SC 681; State of Bihar v. Kalika Kuer, AIR 2003 SC 2443; Director of Settlements, A. P. and others v. M.R. Apparao and another, (2002) 4 SCC 638; Manda Jaganath v. K.S. Rathnam and others, (2004) 7 SCC 492; Sunita Devi v. State of Bihar and others, 2004 AIR SCW 7116: Central Board of Dawoodi Bohra Community and another v. State of Maharashtra and another, (2005) 2 SCC 673=2005 All. CJ 639); K.H. Siraj v. High Court of Kerala and others, AIR 2006 SC 2339; and Union of India and another v. Manik lal Banerjee, AIR 2006 SC2844.

15. A similar view has been reiterated in Mayuram Subramanian Srinivasan v. CBI, AIR 2006 SC 2449, wherein the Apex Court has observed as under:

"Incuria" literally means "carelessness". In practice per incuriam is taken to mean per ignorarium. English Courts have developed this principle in relaxation of the rule of stare decisis. The "quotable in law", as held in Young v. Bristol Aeroplane Co. Ltd., (1944) 2 All ER 293, is avoided and ignored if it is rendered, "in ignoratium of a statute or other binding authority". Same has been accepted, approved and adopted by this Court while interpreting Article 141 of the Constitution of India, 1950 (in short ''the Constitution") which embodies the doctrine of precedents as a matter of law. The above position was highlighted in State of U.P. v. Synthetics and Chemicals Ltd., (1991) 4 SCC 139. To perpetuate an error is no heroism. To rectify it is the compulsion of the judicial consigns. The position was highlighted in Nirmal Jeet Kaur v. State of M.P., (2004) 7 SCC 558."

Since in the case of Nanda Ballabh Pandey and others (supra), the law propounded by Supreme Court against the imposition of ceiling on dearness allowance in Hindustan Lever (supra). The Indian Hume Pipe Co. Ltd. Bombay, Pantha Chatterji''s case (supra) and other caseshas not been considered, it lacks binding effect. ''

16. Moreover, in the present case, the impugned order dated 8.6.2006 has been passed in compliance of the judgment and order dated 21.9.2005, passed in writ petition No. 1032 (S/S) of 2003, Noor Ahmad and others v. State of U.P. and another. The case of Noor Ahmad was filed by the petitioners against the respondent corporation itself. Accordingly, the respondent corporation does not have got right to defend their action keeping in view the shelter of Nanda Ballabh Pandey''s case (supra).

17. Needless to say that in the case of Noor Ahmad (supra), Hon''ble Single Judge of this Court has directed the respondents to consider the petitioners'' case keeping in view the judgment and order dated 6.5.200S rendered in Prabhu Narain ''s case where this Court has commanded the State Government to pay dearness allowance and other consequential benefits without imposing ceiling on dearness allowances. While passing the impugned order dated 8.6.2006 which admittedly was passed in view of Noor Ahmad''s case, the competent authority has not considered the representation keeping in view the letter and spirit of the operative portion of the judgment in Prabhu Narain''s case, reported in 2006 (24) LCD 1053, Prabhu Narain Sharma v. State of U.P. For COM venience, operative portion of the judgmeni of Prabhu Narain''s case is reproduced ail under:

"A writ in the nature of certiorari isj issued quashing the impugned order dated 26.8.1999 passed by the State Government as contained in Annexure No. 1 to the writ petition to the extent it provides ceiling at the payment of dearness allowance to the work charge employees of the respective departments with all consequential benefits. A writ in the nature of mandamus is also issued commanding the Government of U.P. to pay same dearness allowance to the work charge employees of the respective departments which is being paid to their regular counter part."

18. The payment of dearness allowance is made to the employees on the basis of consumer price index, which has been elaborately dealt within the case of the Prabhu Narain (supra). Whether it is Government or its local bodies or instrumentality or corporation, they have to comply with the decision taken by the competent authority on the basis of the consumer price index for payment of dearness allowance. There cannot be any exception on any ground whatsoever to treat differently in the matter of payment of dearness allowance. The source of livelihood or payment of salary, perks and allowances affect everyone equally with the rise of price index whether the employee is working on workcharge basis or regularly. The payment of dearness allowance does not corelate with the payscale but correlates with the consumer price index and consequential decision taken thereon by the competent authority. Accordingly, once''s State or its local bodies or corporation takes decision to pay dearness allowance, then no ceiling can be imposed.

19. Needless to say that the payment of dearness allowance to the employees of

the State Government and the Corporation is made in pursuance to the decision taken by the State Government on the basis of the consumer price index. The circulars issued from time to time by the State Government are adopted by the local bodies and the State instrumentalities including Corporation. Since the circular of the State Government imposing ceiling on dearness allowance has already been quashed in Prabhu Narain''s case (supra), there is no justification on the part of the Corporation to impose ceiling on their own by taking a different view.

20. In view of the above, the writ petitions deserve to (sic be) allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 8.6.2006, contained in Annexure No. 10 to the writ petition with consequential benefits. The opposite parties are directed to ensure payment of dearness allowance to the petitioners without any ceiling keeping in view the law laid down in Prabhu Narain''s case forthwith with consequential benefits.

The writ petitions are allowed accordingly. No order as to costs.