
(2013) 05 AHC CK 0392

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 563 of 2012

Prem Chandra Srivastava

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 24-05-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2013) 5 ADJ 594

Hon'ble Judges : Devi Prasad Singh, J; Ashok Pal Singh, J

Bench : Division Bench

Advocate : Jagdish Prasad Maurya, for the Appellant;

Final Decision : Allowed

Judgement

1. Heard learned counsel for the petitioner and learned Standing Counsel. Since affidavits have been exchanged, with the consent of the parties' counsel, the writ petition is being finally disposed of at admission stage. The petitioner has approached this Court under Article 226 of the Constitution of India claiming salary of the higher post of A.R.T.O. on the ground that he has officiated on the said post for about five years. The petitioner has staked his claim in view of the provisions contained in Financial Hand Book.

2. The petitioner has joined on the post of Passenger Tax Superintendent on 27.3.1985. He is a permanent employee duly selected in accordance with rules for the post of Passenger Tax Superintendent. On 13.6.2003, the petitioner was directed to discharge duty of the post of A.R.T.O. by office memorandum of the said date, a copy of which has been filed as Annexure 3 to the writ petition. While permitting the petitioner to discharge duty on the post of A.R.T.O., it was provided that the petitioner shall not claim any financial gain as well as seniority of the said post. The petitioner continued on the post of A.R.T.O. Upto 31.12.2008.

3. According to the petitioner's counsel, since the petitioner has continuously

discharged duty on the post of A.R.T.O. from 13.6.2003 to 31.12.2008, he is entitled for payment of salary of the said post. It is submitted that though the officiating promotion was done on 13.6.2003 for a short period but since, in exigency of service, he had continued for about five years, the respondents should have paid salary of the post of A.R.T.O..

4. Earlier, the petitioner had filed a writ petition No. 1828(S/B) of 2011 which was decided by judgment and order dated 18.10.2011. While deciding the writ petition, this Court directed the Transport Commissioner, U.P. and the Finance Controller, U.P., Lucknow to look into the matter with regard to payment of arrears of salary in the revised pay-scale in accordance with law, by passing a speaking and reasoned order within three months and refer the matter to the State Government, if necessary. In pursuance to the order of this Court, by the impugned order, the petitioner's representation has been rejected on the ground that the petitioner shall not be entitled for payment of salary of the higher post. While passing the impugned order, the Principal Secretary of the Government has relied upon a Division Bench judgment of this Court dated 24.3.2011, passed in writ petition No. 63740 of 2006 Subhash Chandra Kushwaha and others v. State of U.P. and others. Relevant portion from the judgment has been reproduced in the impugned order.

5. A plain reading of the relevant portion of the judgment, reproduced in the impugned order reveals that it does not relate to payment of salary with regard to officiating post.

6. Learned counsel for the petitioner has invited attention of this Court another Division Bench judgment, of which one of us (Hon'ble Devi Prasad Singh, J) was a member, in Subhash Chandra Kushwaha v. The State of U.P. and others, 2009(27) LCD 1013, (Writ Petition No. 1448 (S/B) of 2012 decided on 20.10.2008), which relates to payment of salary during the period when the incumbent officiates on higher post. In the case of Subhash Chandra Kushwaha, relied upon by the petitioner's counsel, the incumbent discharged duty on the post of A.R.T.O. and after considering the provisions contained in para 49 of the Financial Hand Book, it has been held that the incumbent shall be entitled for payment of salary of the higher post. Relevant portion from the judgment of Subhash Chandra Kushwaha (supra) is reproduced as under:

4. From the plain reading of the provisions contained in Para 49 of Chapter VI of Financial Hand Book. Vol. II (Parts II to IV), it is evident that a Government servant who is formally appointed to hold full charge of the duties of a higher post in the same office as his own and in the same cadre/line of promotion, in addition to his ordinary duties, shall be paid the pay admissible to him, if he was appointed to officiate in the higher post, unless his officiating pay is reduced under Rule 35 but no additional pay shall be allowed for performing the duties of a lower post. The provisions contained in Rule 49 of the Financial Hand Book seem to provide that a Government servant who officiates on the higher post shall be entitled for payment of pay-scale admissible to such higher post. For

convenience, Para 49 of Chapter VI of the Financial Hand Book, Vol. II (Parts II to IV) is reproduced as under:

CHAPTER VI-COMBINATION OF APPOINTMENTS.

49. The Government may appoint a Government servant already holding a post in a substantive or officiating capacity to officiate, as a temporary measure, in one or more of other independent posts at one time under the State Government. In such cases, his pay is regulated as follows:

(i) where a Government servant is formally appointed to hold full charge of the duties of a higher post in the same office as his own and in the same cadre/line of promotion, in addition to his ordinary duties, he shall be allowed the pay admissible to him, if he were appointed to officiate in the higher post, unless his officiating pay is reduced under Rule 35 but no additional pay shall be allowed for performing the duties of a lower post.

(ii) where a Government servant is formally appointed to hold dual charge of two posts in the same cadre in the same office carrying identical scales of pay, no additional pay shall be admissible irrespective of the period of dual charge;

Provided that if the Government servant is appointed to an additional post which carries special pay, he shall be allowed such special pay.

(iii) where a Government servant is formally appointed to hold charge of another post or posts which is or are not in the same office, or which, though in the same office, is or are not in the same cadre/line of promotion, he shall be allowed the pay of the higher post, or the highest post if he holds charge of more than two posts, in addition to ten percent of the presumptive pay of the additional post or posts, if the additional charge is held for a period exceeding thirty days but not exceeding ninety days:

Provided that if in any particular case, it is considered necessary that the Government servant should hold charge of another post or posts for a period exceeding ninety days, the concurrence of the State Government in the Finance Department shall be obtained for the payment of the additional pay beyond the period of ninety days.

(iv) No additional pay shall be admissible to a Government servant who is appointed to hold current charge of the routine duties of another post or posts irrespective of the duration of the additional charge.

(v) If compensatory or sumptuary allowances are attached to one or more, of the posts the Government servant shall draw such compensatory or sumptuary allowances as the State Government may fix:

Provided that such allowances shall not exceed the total of the compensatory and sumptuary allowances attached to all the posts.

In the case of Subhash Chandra Kushwaha (*supra*), the provision contained in

para 49 Chapter VI of the Financial Hand Book has been reproduced and relied upon which reveals that where a Government servant is formally appointed to hold full charge of the duties of a higher post in the same office, he shall be allowed to pay salary admissible to him of the higher post.

7. The provision contained in Financial Hand Book has got statutory force. Any condition contained in the officiating order contrary to the provisions contained in the Financial Hand Book which confers statutory right on the employees shall not be sustainable and suffers from vice of arbitrariness.

8. Apart from above, in para 8 of the writ petition, the petitioner has given the names of as many as 8 persons who were working on the post of Passenger Tax Officer and officiated on the post of A.R.T.O. They were given salary of the post of A.R.T.O. for the period when they have officiated in compliance of the provisions contained in Financial Hand Book.

9. In the counter-affidavit, a vague assertion has been made by the State Government and the contents of para 8 of the writ petition have not been denied with regard to payment of higher pay-scale to the officiating officers. For convenience, para 8 of the counter-affidavit is reproduced as under:

That the contents of paragraphs 6, 7 and 8 of the writ petition as stated are not admitted. The Government vide its order dated 25.1.2011 had directed and the office of the Transport Commissioner vide its order dated 31.1.2011 has issued consequential order that all similar kinds of arrangements as a Stop Gap Measure giving additional charge of the post of Assistant Regional Transport Officer should be terminated forthwith. Any officer still working on additional charge of Assistant Regional Transport Officer has been doing so only on the strength of orders granted by this Hon''ble Court in writ petition filed by him.

10. In case the pleading of the writ petition is not denied and a vague and illusive reply is given, then an adverse inference may be drawn with regard to correctness of the pleading contained in the writ petition. Hence, it may be assumed that similarly situate persons have been given higher pay-scale of the post of A.R.T.O. by the State.

11. Attention has been invited by the petitioner's counsel to the letter dated 8.7.2010 (Annexure-8) sent by the Transport Commissioner to the Principal Secretary, Transport which contains the names of 29 persons including the petitioner with recommendation that the officers officiating on the higher post for long time may be paid salary of the post of A.R.T.O. However, out of the recommendation sent by the Transport Commissioner, except the petitioner, all others have been paid higher pay-scale. At the face of record, while deciding the representation in pursuance to the order passed by this Court (supra), the Government has imparted discriminatory treatment while dealing with the subject-matter. Thus, the action of the State Government is not only violative of statutory right of the petitioner to avail the benefit of higher pay-scale in pursuance to the provisions contained in Financial Hand Book but it is also

discriminatory since others have been granted benefit of salary of the officiating post, hence hit by Article 14 of the Constitution of India.

12. It is well-settled proposition of law that equals cannot be treated unequally vide *Venkateshwara Theatre Vs. State of Andhra Pradesh and Others*, ; *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, ; *Onkar Lal Bajaj Vs. Union of India (UOI) and Another etc. etc.*, ; *Vellore Educational Trust Vs. State of Andhra Pradesh and Others*, ; *Dr. J.P. Kulshreshtha and Others Vs. Chancellor, Allahabad University and Others*, . Since 28 officiating A.R.T.Os have been given salary of the officiating post, it is unjustifiable on the part of the State Government to deny the same benefit to the petitioner.

13. The impugned order seems to be an incident of arbitrary exercise of power, that too under the teeth of judgment of this Court. In case the Court directs the State Government to decide a re-presentation in accordance with law by passing a speaking and reasoned order, then it shall be incumbent on the State Government and the authority concerned to adjudicate the controversy after taking into account the entire facts and circumstances and the provisions of law. The petitioner claims salary of the higher post not only in pursuance to the judgment of this Court (*supra*) but also claiming parity of the higher pay-scale on the ground that similarly situate persons were given the salary of officiating post. While passing the impugned order, why the Principal Secretary has not considered the plea raised by the petitioner in the writ petition is not borne out. Learned Standing Counsel also failed to satisfy why similarly situate persons have been granted salary of the higher pay-scale but the petitioner has been denied. Counter-affidavit also does not seem to give a specific reply with regard to applicability of Financial Hand Book (*supra*).

Since it is for the second time the petitioner has been compelled to approach this Court and having retired on 31.8.2012, coupled with the fact that the petitioner has suffered mental pain, agony and financial loss, it is a fit case where exemplary cost should be awarded in view of law settled by Hon'ble Supreme Court in the case in *Salem Advocate Bar Association, Tamil Nadu Vs. Union of India (UOI)*, .

14. In view of above, the writ petition deserves to be and is hereby allowed. A writ in the nature of certiorari is issued quashing the impugned order dated 24.2.2012 (Annexure 1) with all consequential benefits. A writ in the nature of mandamus is issued directing the respondents to pay difference of salary as well as arrears for the period when the petitioner discharged duty and officiated on the post of A.R.T.O. expeditiously, say within a period of two months from the date of receipt of a certified copy of the present judgment. Cost is quantified to Rs. 2 lacs which shall be deposited in this Court within two months. Out of the cost of Rs. 2 lacs, the petitioner shall be entitled to withdraw Rs. 1 lac and the remaining Rs. 1 lac shall be remitted to the Medication Centre, Lucknow. In case the cost is not deposited, it shall be recovered as arrears of land revenue.

However, it shall be open for the Chief Secretary, Government of U.P. to recover the cost from the concerned authorities who have passed the impugned order.

Registry to take follow up action.

The writ petition is allowed accordingly.