(1978) 08 MP CK 0010

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 263 of 1974

Ramesh Kumar Mishra APPELLANT

Vs

State of M.P. and others RESPONDENT

Date of Decision : 17-08-1978

Acts Referred:
Constitution of India, 1950 — Article 226, 309

Citation : (1978) JLJ 728

Hon'ble Judges : K.K. Dube, J;A.R. Naokar, J

Bench : Division Bench

Advocate : R.D. Jain, for the Appellant; S.K. Dube, Panel Lawyer, for the Respondent

Final Decision : Allowed

Judgement

K.K. Dube, J.—By this petition under Article 226 of the Constitution, he petitioner seeks a writ of mandamus to re-fix his pay in accordance with Fundamental Rule 22-C and Fundamental Rule 22-D.

2. The petitioner was appointed as a lecturer in the Education Department of the State of Madhya Pradesh in the scale of 250-10-390-15-350-20-450. He had not been confirmed when he appeared in the competitive examination for recruitment to State Civil Services. He was selected by the Public Service Commission as Deputy under their memo No. 4805/1010/1 (ii), dated 8th March 1968. By this order, he was to be on probation for two years from the date of appointment and the probation period could be extended by the State Government. The petitioner was relieved by the Education Department and he joined the new post of Deputy Collector as a probationer in the afternoon of 21st March 1968. The scale of pay of the new post of Deputy Collector is 300-300-25-550-30-850. The scale was revised with effect from 1-1-1972 to 425-1060.

3. There is no dispute that new post carried duties and responsibilities of greater

importance than attaching to the post of a lecturer. In course of time, the petitioner was confirmed as a Deputy Collector with effect from 21-3-1970 vide, memo No. 2858-4266 I (2) 71 dated 19th April 1972. The petitioner then requested the Government to re-fix his pay in accordance with F. R. 22-C. This request was turned down by the Accountant General. The Accountant General relied on the directions contained in letter No. 407/CR. 199/IV-B-1, dated 21st March 1966 issued by the Secretary, Finance Department, Bhopal. The petitioner contends that he is entitled to get his pay re-fixed in accordance with F. R. 22-C read with F. R. 22-D and the directions contained in the memo dated 21-3-1966, Annexure P-4 of the petition cannot take away his right and the decision of the Government refusing to re-fix his pay is not right.

4. The letter of the Secretary of Finance reads as under:

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Subject:--Fixation of pay of probationers under F. R. 22-C.

Attention is invited to F. R. 22-C (1)(b) introduced under this department Notification No. 269-35/IV-B I, dated the 2nd February 1961 as amended by Notification No. 9th July 1965 regarding fixation of pay of probationers, which provides that the pay of a Government Servant who is appointed as a probationer in another service or cadre shall, on confirmation in the service or post, after expiry of the period of probation be fixed in the time scale of the service or post in accordance with the provision of F. R. 22 or 22-D, as the case may be.

(2) Since a temporary Government servant does not have a lien on any post at the time of completion of probation, it is hereby clarified that, on completion of probation, when such a Government servant is confirmed in the service or post, his pay will not be refixed under F. R. 22 or F. R. 22-D with reference to the pay that he would have drawn in the previous post which he was holding in a temporary capacity but he will continue to draw pay in the scale of pay of the service or a post. Similarly, in the case of a permanent Government servant holding a higher officiating post at the time of appointment as probationer, the pay will not be refixed with reference to the pay he had drawn in the higher officiation post.

5. It would be seen that the above letter seeks to interprate F. R. 22-C and in the opinion of the Government, a temporary Government servant who does not have a lien on the post at the time of completion of probation was not entitled to have his pay refixed under F. R. 22 C or F. R. 22-D when such a Government servant is confirmed on the post. It is conceded, very fairly, and we think rightly that the above referred to memorandum of the Government does not amend the Fundamental Rules. It is merely by way of clarification. We, therefore, need not consider the effect of such a memorandum on the existing rules. The instructions contained in the memorandum could not take away the right which would be available to the petitioner under rules framed by the Government in exercise of

their powers under Article 309 of the Constitution. We would, therefore, proceed to examine the relevant rules.

6. Fundamental Rule 22 deals with the initial pay on appointment to posts on time scale pay. It indicated as to how the initial substantive pay of Government Servant who is appointed substantively to a post on a time scale of pay, is to be regulated. The relevant part of Fundamental Rule 22 (a) (i) reads as under:

F. R. 22-D Initial pay on appointment to posts on time-scale pay.--The initial substantive pay of a Government servant who is appointed substantively to a post on a time-scale of pay is regulated as follows:

(a) If he holds a lien on a permanent post, other than a tenure post, or would hold a lien on such a post had his lien not been suspended.--

(i) When appointment to the new post involves the assumption of duties or responsibilities of greater importance (as interpreted for purposes of rule 30) than those attaching to such permanent post, he will draw as initial pay the stage of the time-scale next above his substantive pay in respect of the old post.

We have only to consider the case where the appointment to the new post involves assumption of duties or responsibilities of greater importance than those attaching to the earlier post. According to this rule, if the Government servant had a lien on a permanent post his initial pay was to be fixed in accordance with this rule. This Fundamental Rule undoubtedly seeks to fix initial pay of a Government servant holding a lien on one post and, who was appointed to another substantive post under the Government.

7. Fundamental Rule 22-C deals with both types of Government servant, temporary and permanent; those that had lien on their post when they were appointed to another post and those who had no such lien. F. R. 22-C rends as under:

F. R. 22-C--(i) Notwithstanding anything contained in these Rules the following provisions shall govern the pay of a Government servant who is appointed as a probationer in another service or cadre, and subsequently confirmed in that service or cadre--

(a) During the period of probation he shall draw pay at the minimum of the time scale or at the probationary stages of the time scale or at the probationary stages of the time scale of the service or post, as the case may be:

Provided that if the presumptive pay the permanent post other than a tenure post, on which he holds a lien or would hold a lien had his lien not been suspended, should at any time be greater than the pay fixed under this clause, he shall draw the presumptive pay of the permanent post;

(b) On the confirmation in the Service or post after the expiry of the period of probation, the pay of the Government servant shall be fixed in the time scale of the service or post in accordance with the pro visions of Rule 22 or Rule 22-D, as the case may be.

The last words in sub-rule (b), "or Rule 22-D, as the case may be" were inserted by Notification No. 988-101-1 V-R-I dated 9-7-1965 published in M.P. Rajpatra Part IV (Ga) dated 16-7-1965, page 660, and it was stated that the amendment shall be deemed to have come into force with effect from 1 4-1961. The amendment thus brought about is important for the purpose of this case. Fundamental Rule 22-D may also be reproduced which concerns the case of a Government servant holding a post in a substantive temporary or officiating capacity, when such Government servant is promoted or appointed in a substantive, temporary or officiating capacity to another cost carrying duties and responsibilities greater than those attaching to the earlier post held by him.

8. A portion of F.R. 22-D relevant for our purpose is reproduced as under:

22-D.-(1) Notwithstanding anything contained in these rules where a Government servant holding a post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive temporary or officiating capacity to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him his initial pay in the time scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post by one increment at the stage at which such pay has accrued.

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Since the case is not governed by any of the provisos it is not necessary to reproduce them.

9. Having reproduced the relevant portions of the three rules, we would proceed to examine F. R. 23-C. The Non-Obstante portion of the rule would indicate that the rule is applicable to Government servants in general who are appointed as probationers in another service or cadre and subsequently confirmed in that service or cadre. The language of this portion of the sub-rule does not, in terms exclude those temporary Government servants who did not hold lien on their former post. Sub-rule (a) merely describes what the Government servant shall get during the period of probation. The proviso to sub-rule (a) carves out a special case for a person holding a lien pay on his former post and whose presumptive any was greater than the pay fixed under the rule. In such cases, by proviso if the presumptive pay of the permanent post on which the incumbent holds a lien or would hold a lien had his lien not been suspended, he would draw the presumptive pay of the former permanent post.

10. Then we come to sub-rule (b) which deals with how the pay is to be fixed on confirmation in the service or post alter the expiry of the period of probation. Sub-rule (b) covers cases of both the types of Government servants who held lien on the former post and who had no lien on the post when they were appointed as probationers. Before the insertion of the words "or Rule 22-D as the

case may be" at the end of this rule by the amendment dated 9-7-1965, the rule could be interpreted to have its application to only those servants to whom only the provision of F. R. 22 applied. As F. R. 22 applied only to persons who had a lien on a permanent post when they were appointed substantively to another substantive post, it could be said, then by implication that the scheme was that the persons who were holding temporary post, having no lien, were excluded from the benefit of F. R. 22-C. However, after the amendment, the position is entirely different and sub-rule (b) clearly directs that on confirmation after the expiry of the period of probation the pay of the Government servant shall be fixed in the time scale of service or post in accordance with the provision of F. R. 22 or F. R. 22-D as the case may be. F. R. 22-D applies to Government servants who were formerly holding post in a temporary capacity. Therefore, it would cover the case of the petitioner also. F. R. 22-D deals with the case of Government servant holding a post in a substantive, temporary or officiating capacity when he is promoted or appointed in a substantive temporary or officiating capacity to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him. In such cases, his initial pay in the scale of the higher post to which he is appointed shall be fixed at a stage next above the pay notionally arrived at by increasing his pay in respect of the lower post by one increment at the stage at which such pay has accrued.

11. In the petitioner''s case, he was holding the post in a temporary capacity. He has now been appointed in a substantive capacity as a Deputy Collector. His pay has, therefore, to be fixed on confirmation according to this rule. In our view, the interpretation placed by the Finance Department over-looked the amendment to sub-rule (b) brought about by the notification No. 961-101-IV-R-I dated 9-7-1965 published-in M. P. Rajpatra Part IV (GA) dated 16-7-1965 at page 660 We hold that the Finance Department memorandum, Annexure P-4 quoted above cannot override the express provision of the rule framed under Article 309 of the Constitution. As already stated before, the finance Department memo does not seek to amend the Fundamental Rules but was only trying to interpret them for the purposes of guidance. The Accountant General was, therefore, not right in relying on it.

12. The petition succeeds and is allowed with costs. We direct the respondents that the pay of the petitioner be fixed in accordance with F. R. 22-D as stated above. Counsel''s fee Rs. 100, if certified. The outstanding amount of security deposit shall be refunded to the petitioner.

