

(2014) 01 DEL CK 0388

In the Delhi High Court

Case No : Writ Petition (C) No. 7840 of 2012

Sh. Tejbir Singh Dagar and Others

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 03-01-2014

Acts Referred:

Constitution of India, 1950 — Article 39(d)

Citation : (2014) 01 DEL CK 0388

Hon'ble Judges : Gita Mittal, J;Deepa Sharma, J

Bench : Division Bench

Advocate : Jyoti Singh, Mr. Sanjeev Chaswal and Ms. Saahila Lamba, for the Appellant; J.P. Sharma, for the Respondent

Judgement

Deepa Sharma, J.—Vide this writ petition, the petitioners are seeking stepping up of their pay to that of their immediate juniors. The facts relevant for the purpose of the present writ petition are that the petitioners had joined the Railway Protection Force (RPF), Northern Railway as Constables and were subsequently promoted to the posts of Head Constable, Assistant Sub Inspector and Sub Inspector on different dates.

2. As per RPF Rules, 1987, there was a post of Naik RPF which was subsequently abolished after 4th December, 1997.

3. Besides the usual time bound promotions for the next post, constables/naiks who had completed 8 and 10 years of service or more were eligible for competing to the posts of Head Constable as well as Assistant Sub Inspector (ASI) respectively through a Limited Departmental Competitive Examination under Rule 72 of RPF Rules 1987.

4. The progression of petitioners upto the position of SI and ASI is tabulated as under:-

TABLE 1

5. The progression upto the post of SI and ASI of two juniors to petitioners reads as under:-

Table 2

6. Pursuant to 5th Central Pay Commission, Government introduced "Assured Career Progression" Scheme (hereinafter referred to as "ACP" Scheme) to grant financial benefits to those individuals who were stagnating and could not be promoted to next rank for lack of vacancies or failure to clear Limited Departmental Examinations. The Scheme was adopted for Railway Employees w.e.f. 1st October, 1999. Under the scheme, the salary of the petitioners was fixed lower than the salary of their juniors. While the pay of petitioner No. 1 was fixed at Rs. 5500/- in pay scale of Rs. 5500/- 9000/- in the rank of Assistant Sub Inspector, that of his junior Sh. Ram Chander was fixed at Rs. 6025/-

7. Aggrieved by the said action, the petitioners and others filed W.P. (C) No. 5867/2003 in this Court which was decided in their favour vide order dated 7th December, 2009, with following directions:-

14 We accordingly dispose of the writ petition issuing a mandamus to the respondents to upgrade the pay of the petitioners from the date persons junior to them were given a higher pay. This would mean that the petitioners would be placed in the same grade in which the person immediate junior to the petitioner was placed. Needful would be done within 12 weeks from today and arrears which have accrued be paid within further 4 weeks thereafter, failing which the arrears shall be paid with simple interest @ 8% per annum reckoned with effect from 16 weeks after the date of the present order.

(Emphasis supplied)

8. It is submitted that although four weeks were given to the respondents to do the needful, the respondents failed to execute the said directions. Representations dated 07.12.2009, 16.08.2011 and 02.10.2011, 22.3.2012, 16.06.2012 to concerned authorities fell on the deaf ears.

9. In the meantime, the Sixth Central Pay Commission had made its recommendations. Pursuant thereto, the pay rules of 2008 were notified by the Government. The pay scales were now replaced with pay bands with different grade pay in respective bands.

10. Based on earlier anomaly, the respondents fixed the petitioners' pay, once again lower than that of their juniors. The present pay of the petitioner No. 1 has been fixed in the pay band of Rs. 9300/- 34800 with grade pay of Rs. 4200/-. As against this Sh. Ram Chander, (who is junior to petitioner No. 1), has been given the same pay scale with a grade pay of Rs. 4600/-.

11. The pay scale of petitioner No. 2 has been fixed at Rs. 18980/- with a grade pay of Rs. 4200/- and that of petitioner No. 3 has been fixed at Rs. 18890/- with a grade pay of Rs. 4200/- while their junior ASI Ram Pal Vashisht was granted

higher pay.

12. It is submitted on behalf of the petitioners that the directions given in W.P. (C). No. 5867/2003 vide order dated 07.12.2009 passed by the Hon"ble High Court were upheld by the Hon"ble Supreme Court in SLP filed by respondent. As such, the matter has attained finality. It is submitted that the principle laid down by this Court in W.P. (C) No. 5867/2003 ought to have been followed by the respondents while fixing the pay scale of the petitioners pursuant to the recommendation of 6th Central Pay Commission. It is prayed by the petitioners that the respondents be directed to step up the pay of petitioners w.e.f. 1st September, 2008 to bring it at par with the pay of their juniors.

13. It is contended by the respondents that order passed in W.P. (C) No. 5867/2003 is not applicable to the present circumstances of the case and the order is "per incuriam" as it is made without taking into consideration Clause 18 of the RBE No. 87/2000 and that provisions of ACP Scheme were not challenged and were not struck off. It is argued that the difference in pay is not a criteria to step up the pay of the senior to the same pay scale as that of junior as this is by virtue of a benefit given as per scheme which was to be observed in letter and spirit. It is submitted that para 9 of the Modified Assured Career Progression Scheme (hereinafter referred to as "MACP" Scheme) reads that "No stepping up of pay in the pay based or grade pay would be admissible on account of pay fixation in MACP Scheme"". It is contended that stepping up of pay is therefore prohibited.

14. Needless to say, the question in issue before this court is the same as was before the court in W.P. (C) No. 5867/2003. The result of implementation of the ACP Scheme was the same as is the result of the implementation of the MACP Scheme. There is not much difference in the two schemes except that under the ACP Scheme, there were two upgradations allowed on account of stagnation in the same grade after completion of the 12 years and 24 years of continuous service while under the MACP Scheme, the upgradation on account of stagnation in the same post has been allowed at three intervals of 10, 20 and 30 years of continuous regular service.

15. The reproduction of the relevant para of Counter Affidavit of respondent in W.P. (C) No. 5867/2003 reads as under:-

1. That the Fifth Central Pay Commission in its report had made certain recommendations relating to the Assured Career Progression Scheme (hereinafter called ACP Scheme) for the Central Government Civilian Employees in all Ministries/Departments. The scheme has been viewed as a safety net for those having the problem of genuine stagnation and hardship faced by the employees due to lack of adequate promotional avenues. Accordingly, the Railway Ministry decided to grant financial up-gradations (as recommended by the Vth Central Pay Commission and also in accordance with the agreed settlement dated 11th September, 1997 entered into with the staff side of the

National Council (JCM) under the ACP Scheme to Group-B, C & D employees on completion of 12 & 24 years of regular service respectively. The scheme was introduced by the Government of India vide Ministry of Railway Board letter No. PC-V/99/1/1/1 dated 1.10.99. Copy of the said letter is annexed as Annexure R-1.

2. That according to Condition No. 5.1, two financial upgradation under ACP Scheme in the entire Railway service career of an employee shall be counted against regular promotion (including in-situ promotion and or any other promotion including fast track promotion availed through limited departmental competitive examination) availed from the grade in which an employee was appointed as a direct recruit. This shall mean that two financial up-gradation under the ACP scheme shall be available only if no regular, promotions during the prescribed period (12 to 24 years) have been availed by an employee. If an employee has already got one regular promotion, he shall qualify for the second financial up-gradation only on completion of 24 years of regular service under the ACP scheme. In case two prior promotions on regular basis have already been received by an employee, no benefit under the ACP scheme shall accrue to him.

3. That according to Condition No. 8 the financial up-gradation under ACP Scheme shall be purely personal to the employee and shall have no relevance to his/her seniority position. As such there shall be no additional financial upgradation for the senior employee on the ground that the junior employee in the grade has got higher pay scale under the ACP scheme.

4. That vide Government of India, Ministry of Railways, Railway Board's letter No. 99/SEC (E)/PM-1/2 dated 23.7.2001, it was clarified that in case of those who have jumped intermediate grade due to passing of Limited Departmental Competitive Examination, the post they have actually worked, can only be taken into account for the purpose of ACP Scheme. Copy of the letter dated 23.7.2001 is annexed as Annexure R-2.

16. The above reproduction clearly shows that the respondent in the said writ tried to justify their actions based on Condition 8 of the ACP Scheme.

The Condition 8 of the ACP Scheme reads as under:-

8 The financial upgradation under the ACP Scheme shall be purely personal to the employee and shall have no relevance to his seniority position. As such, there shall be no additional financial upgradation for the senior employee on the ground that the junior employee in the grade has got higher pay-scale under the ACP Scheme;

17. Before us in order to justify its action, the respondents have relied on Condition 20 of the MACP Scheme which reads as under:-

20 Financial upgradation under the MACPS shall be purely personal to the employee and shall have no relevance to his seniority position. As such, there

shall be no additional financial upgradation for the senior employees on the ground that the junior employee in the grade has got higher pay/Grade Pay under the MACPS.

18. The language of both the conditions i.e. Condition 8 of ACP Scheme and Condition 20 of MACP Scheme is same. This court in W.P. (C) No. 5867/2003 between the same parties had dealt with the said issue, which has given rise to an anomaly. Seniors in service are getting lesser salary than their juniors in service in the same rank. The respondents were also well aware of the said issue in the Scheme. This fact is clear from the letter written by the then Chief Security Commissioner, Railway Protection Force to his Director General dated 03.06.2002. The said letter (reproduced by this court in the judgment in W.P. (C) No. 5867/2003) reads as under:-

The Director General/RPF,
Railway Board, Rail Bhawan,
New Delhi.

Sub: Financial up gradation under ACP scheme to those who jumped intermediary grade as a result of competitive examination.

Ref: Dy. Director/Security/Rly. Board's letter No. 99/Sec(E) PM-1/2 Dated 23.7.2001.

1. Vide Boards letter under reference, advice of the Pay Commission Directorate was conveyed which postulated that those staff who jumped intermediary grade due to passing of Limited Departmental Competitive Exam. The post they have actually worked, can duly be taken into account for the purpose of ACP scheme. This advice was given on a reference from security Directorate that whether such constables who have become ASI (U/R-72) without working as Head Constable can be allowed financial up gradation in the pay scale of Sub Inspectors without taking into consideration the post of Head Constable with they jumped due to Competitive Examination.

2. In the light of the said decision of Railway Board, such staff are being given financial up gradation under ACP Scheme in the pay scale of Sub Inspector over this Railway.

3. However some of the staff who were first promoted from constable to erstwhile rank of Naik and later on promoted directly as ASI(R/R 72) [without actually being promoted and working as Head Constable] have requested to consider them for the benefit under the ACP scheme, as they too have got only one promotion in the rank of Naik now re-designated as Head Constable w.e.f. 4.12.97.

4. Another anomaly has cropped up in view of the implementation of letter under reference. As per RPF rules, 1987, there was a post of Naik/RPF which has been abolished after 4.12.97. Those Constables/Naiks having 10 years service or more

service used to compete in the selection for the post of both Head Constables as well as ASI U/R 72 of the RPF Rules. Some of the Constables who failed in the earlier selection for the post of Head Constable competed in the subsequent selection for the post of ASI and succeeded. They have now become eligible for ACP for the grade of SI/RPF. Whereas those Constables, who succeeded in both the competitive examinations from Constable to Head Constable and then Head Constable to ASI are not eligible for the financial up gradation to the grade of SI/RPF under ACP Scheme as per the letter under reference. This has created an anomaly which requires clarification.

5. It is therefore, requested to clarify (i) whether such staff who were promoted as ASI (U/R 72) from the post of Naik are also entitled to benefit under ACP Scheme in the pay scale of Sub Inspectors (5500-9000) on completion to 24 years of service or otherwise, (ii) whether such staff who qualified in the completion from Constable to Head Constable and then selected as ASI in the subsequent competitive exam are also eligible for ACP as they are placed as disadvantageous position when compared with those who failed in the selection for promotion to Head Constable but qualified as ASI and now getting ACP for the grade of SI/RPF.

6. An early clarification on the above subject is solicited please.

(Emphasis Supplied)

19. No clarification was forthcoming even at that time and it was the court, which had intervened in order to remove the said anomaly and directed the respondents to upgrade the pay of the petitioners from the date persons junior to them were getting a higher pay.

20. Despite the facts that the respondents were fully aware of such an anomaly in ACP Scheme, no efforts were made to remove it while promulgating the Modified Assured Career Progression Scheme. This has again resulted into juniors getting more salary than the seniors in service in the same rank.

21. It does not appeal to the common sense of a reasonable man that Scheme which has been envisaged/formulated to benefit those employees who are stagnating in the same rank, either due to lack of promotion or failure to clear the departmental examination, by granting them financial up gradation to such stagnant employees, would prejudice meritorious and hardworking employees, who had qualified the Limited Departmental Competitive Examination and climbed the ladder of success. They cannot be penalised for their efficiency in securing a promotion to next rank instead of stagnating in same rank. The scheme is a welfare scheme for those employees who stagnate. It is certainly not intended to prejudice senior personnel by compelling them to draw lesser salary than those junior and less meritorious than them. The Scheme certainly did not envisaged the disadvantage it was causing to its bright employees. Such working of the Scheme would result in rewarding those who did not succeed in the competitive examination.

22. Despite the fact that this anomaly in ACP Scheme was recognised, no efforts were made to remove it while promulgating the MACP Scheme on coming into force of the Sixth Pay Commission.

23. It is cardinal principle of law, as held by the Hon'ble Supreme Court in number of cases, that no junior in the same post can be granted more salary than his seniors.

24. In Civil Appeal Nos. 65-67 (Arising out of SLP (C) Nos. 12522-12514 of 2007 decided on 09.01.2009 titled as Er. Gurcharan Singh Grewal and Another Vs. Punjab State Electricity Board and Others, the Apex court in para 13 has observed:-

13. Something may be said with regard to Mr. Chhabra's submissions about the difference in increment in the scales which the appellant No. 1 and Shri Shori are placed, but the same is still contrary to the settled principle of law that a senior cannot be paid lesser salary than his junior. In such circumstances, even if, there was a difference in the incremental benefits in the scale given to the appellant No. 1 and the scale given to Shri Shori, such anomaly should not have been allowed to continue and ought to have been rectified so that the pay of the appellant No. 1 was also stepped to that of Shri Shori, as appears to have been done in the case of the appellant No. 2.

25. In another case titled as Commissioner and Secretary to Government of Haryana and Ors. v. Ram Sarup Ganda and Ors. 2006 (12) SCALE 440, the Apex Court has observed in its para No. 15:-

15. In the result, all the appeals are partly allowed. The appellants shall revise the pay scales of the respondents. In case of any anomaly, if the employees who, on fixation of ACP scales, are in receipt of lesser salary than their juniors in the same cadre/posts, then their salary shall be stepped up accordingly.....

26. In another decision dated 25th October, 2010 rendered in W.P. (C) No. 2884/2010 titled as UOI and Anr. v. Chandra Veer Jeriya, the Delhi High Court while dealing with the same issue has observed in para 8 as follows:-

8. We agree with the findings arrived at by the Tribunal in view of the law laid down by the Supreme court in the decision reported as Union of India (UOI) and Others Vs. P. Jagdish and Others, s. It may be highlighted that the respondents did not claim any pay parity with officers junior to them but in the combatized cadre till as long the officers remained in their respective streams. They claimed parity when the two streams merged in the same reservoir i.e. when they reached the post of Administrative Officer/Section Officer and that too from the date persons junior to them, but from the combatized cadre, became Administrative Officer/Section Officer. The anomaly which then arose was that persons junior in the combined seniority list of Administrative Officer/Section Officer started receiving a higher wage. With reference to FR-22, in P. Jagdish's case (supra) the Supreme Court held that Article 39(d) of the Constitution was

the guiding factor in interpreting FR-22, The principle of stepping up contained in the fundamental rules comes into play when a junior person in the same posts starts receiving salary more than his senior on the same post.....

27. The above case was concerned with the cadre of Ministerial staff in the CRPF wherein an anomaly cropped up regarding the juniors in the Administrative Officer, Section Officers posts were getting high salary than their senior ones. The court relied on the decision of the Apex Court reported in Union of India (UOI) and Others Vs. P. Jagdish and Others, wherein it was held that Article 39(d) of the Constitution was the guiding factor in interpreting FR-22 and the Principle of stepping up contained in the fundamental rules, comes into play when a junior person in the same post starts receiving salary more than his senior on the same post.

28. In P. Jagdish case (supra), the Apex Court has observed that the principle of Stepping up prevents violation of the principle of "equal pay for equal work". Applying the same principle of law here, a junior in the same posts cannot be allowed to draw salary higher than the seniors because that would be against the ethos of Article 39(d) of the Constitution which envisages the principle of "equal pay for equal work". Hence granting of stepping up is the only way out to remove the said anomaly, which permits juniors to draw higher salary in the same rank than their seniors. The only way to remove is the stepping up of salary of seniors.

The rules and provisions which allow the said anomaly to exist and prohibit the stepping up are violative of the principles of natural justice and equity; are contrary to Article 39(d) of the Constitution which envisages "equal pay for equal work" and contrary to the principles of law laid down by the Apex court in its pronouncements.

29. The next question is whether the findings of the court in W.P. (C) No. 5867/2003 acts as "per incuriam" as contended by the respondents. Reliance is placed by them on A.R. Antulay Vs. R.S. Nayak and Another, , Narmada Bachao Andolan Vs. State of Madhya Pradesh and Another, and State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another, . As per these judgments relied upon by the respondents, a judgment is "per incuriam" only when it was given in ignorance or forgetfulness of some inconsistent statutory provision or some authority binding on the court concerned, so that in such cases some part of the decision or some step in reasoning on which it is based found to be wrong.

30. While issuing directions of stepping up the salary of seniors in order to bring it at par with that of juniors, this Court had duly considered all the contentions of respondents; the relevant conditions of the ACP Scheme and relied on the principles enunciated by the Apex Court in P. Jagdish case (supra) for recording its findings. It therefore, cannot be said that the judgment in W.P. (C) No. 5867/2003 is "per incuriam". In view of above, the respondents are hereby directed to upgrade the pay of the petitioners from the date their juniors were given the higher pay in the same rank. The directions be complied with within 12

weeks from today and arrears shall also be paid within 4 weeks, failing which petitioners be entitled to simple interest @ 9% per annum after 16 weeks from today. The respondents are also directed to pay a sum of Rs. 20,000/- towards costs to each of the petitioners.