

(2010) 10 SC CK 0128

In the Supreme Court Of India

Case No : Civil Appeal No. 9480 of 2010 (Arising out of S.L.P. (C) No. 26495 of 2008)

Steel Authority of India Ltd. and Others

APPELLANT

Vs

Dibyendu Bhattacharya

RESPONDENT

Date of Decision : 29-10-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 39

Citation : AIR 2011 SC 897 : (2011) AIRSCW 808 : (2011) 1 AWC 871 Supp : (2011) 2 GLH 18 : (2010) 12 JT 462 : (2011) 2 KCCR 103 SN : (2011) 11 SCC 122 : (2011) 2 SCC(L&S) 192

Hon'ble Judges : J. M. Panchal, J;Gyan Sudha Mishra, J;B. S. Chauhan, J

Bench : Full Bench

Advocate : Rajiv Dhavan, Anurag Sharma and Prashant Kumar, for the Appellant; S.K. Keshote Sarad Kr. Singhania and Abhijit Sengupta, for the Respondent

Final Decision : Disposed Of

Judgement

B.S. Chauhan, J.—Leave granted.

2. This appeal has been preferred against the judgment and order dated 1.8.2008 passed by the High Court of Calcutta in FMA No. 782 of 2007; MAT No. 4487 of 2005; and CAN No. 4852 of 2006 by which the Division Bench has allowed the appeal of the Respondent against the judgment and order of the learned Single Judge dated 16.9.2005 passed in Writ Petition No. 2539(W) of 2005 by which the learned Single Judge had rejected the claim of the Respondent for parity in pay and issuance of direction to upgrade the post held by him.

3. Facts and circumstances giving rise to this appeal are that the Appellant No. 2 issued an advertisement in "The Statesman" newspaper dated 22.9.1993 inviting applications for the post of Speech Therapist/Audiologist at the Durgapur Steel Plant in S-6 grade in Medical and Health Services. The Respondent applied in

response to the said advertisement. An interview was held on 17.6.1996 and the Respondent's name found place at serial No. 4 in the merit list. As none of the first three candidates joined, the appointment was offered to the Respondent vide letter dated 17.6.1996. The Respondent joined the said post without any protest. After serving for a few years, Respondent started claiming parity with one Shri B.V. Prabhakar, employed at Rourkela Steel Plant, a different unit of the same company who was holding the post of E-1 grade in executive cadre though designated as Speech Therapist/Audiologist. Respondent made representation dated 1.9.2004 not claiming parity in pay but to change the cadre and upgrade his post, accord relaxation in eligibility and give him the pay-scale of the post of E-1 grade from the date of his joining the service. The said representation stood rejected vide order dated 12/14.10.2004 by the Authorities, observing that upgradation of his post to executive cadre was not permissible under the policy of the company, and as the Respondent was working in non-executive cadre, he could not claim parity with an employee in another unit of the company on a post of executive cadre.

4. Being aggrieved, the Respondent preferred the writ petition before the High Court claiming the same relief, however, the learned Single Judge dismissed the same vide judgment and order dated 16.9.2005. The Respondent challenged the said judgment by filing an intra court appeal. The said appeal has been allowed, issuing direction to the present Appellants to grant the pay-scale to the Respondent as was being paid to Shri B.V. Prabhakar at the Rourkela Steel Plant in the executive cadre and that too from the date of his initial appointment. The arrears also were to be paid within six weeks. Hence, this appeal.

5. Shri Rajiv Dhawan, learned senior counsel appearing for the Appellants has submitted that the said B.V. Prabhakar had been appointed vide order dated 20.4.1987 in Rourkela Steel Plant in executive cadre in E-1 grade taking into account his experience in service in the Bokaro Steel Plant, another unit of the company. There are different set of rules governing the services of the employees of all different plants/units of the company and all the employees are not governed by the Central Rules. The Respondent has not been appointed in the centralised service nor is his post transferable. The mode of appointment and selection of employees in each unit is different and made independently. The Respondent had applied in pursuance of an advertisement dated 22.9.1993 for a non-executive post along with eight other candidates. Respondent's name was at serial No. 4 in the merit list/panel. The name of Shri Sourav Mukhopadhyay, serving in Bharat Heavy Electricals Ltd. (hereinafter referred to as BHEL) appeared at serial No. 1 in the panel, however as he was getting higher pay in BHEL than the post in question, he asked for pay protection. His demand was not acceptable to the Appellants, thus, he declined the offer. The post was offered to Shri Mithlesh Kumar, the next candidate in the panel, but he did not turn up to join. The third candidate in panel claimed for upgrading the post which was not acceptable to the company for the reason that the post had been advertised with certain grade and pay-scale and it was not possible for the unit to upgrade the

same. On refusal to join by the third candidate, the post was offered to the Respondent and he accepted and joined the post without protest in S-6 grade on 17.6.1996 on the terms and conditions incorporated in his appointment letter. The post to which the Respondent claimed parity is not equivalent to the post held by him and therefore, the question of pay parity could not arise. The relief sought by the Respondent had been of upgradation of post, granting relaxation of eligibility with retrospective effect. Such a relief could not be granted to him. Each plant/unit has to make the recruitment as per the local needs and as per the requirements of the plant. Thus, all the units do not have the same service conditions. A post may be in executive cadre in one unit and may be in non-executive cadre in another unit. Unequals cannot be treated equals. Thus, there was no justification for the Division Bench to allow the appeal filed by the Respondent. Pay parity claimed by the Respondent could not be given to him as he was holding a non-executive post, while Shri B.V. Prabhakar was holding the post in executive cadre in another unit of the same company. Hence, the appeal deserves to be allowed.

6. Per contra, Shri S.K. Keshote, learned senior counsel appearing for the Respondent has vehemently opposed the appeal contending that parity in pay is a fundamental right of an employee. Both the posts carry the same nature of work and responsibilities. There is no difference in both the posts qualitatively. It is immaterial whether Shri B.V. Prabhakar was holding the post in executive cadre. The relief has been granted by the Division Bench of the High Court after considering all relevant factors and judgments of this Court. The impugned judgment and order does not require any interference and thus, the appeal is liable to be dismissed.

7. We have considered the rival submissions made by both learned Counsel for the parties and perused the record.

8. Undoubtedly, several posts were advertised on 22.9.1993 by the Appellant No. 2 to fill up the vacancies in Durgapur Steel Plant including the post of Speech Therapist/Audiologist in S-6 grade and post of Doctor in grade E-1, Executive in Medical and Health Services. The Respondent applied for the post in grade S-6 as he was not eligible for the post of grade E-1 wanting the qualification of a Doctor. Respondent in his representation made to the Authorities, claimed the change of cadre and upgradation of his post. The last part of his representation dated 1.9.2004 reads as under:

I may kindly be placed/selected in Executive cadre waiving some criteria applicable to eligible candidate for Executive posts, if nothing can be done to place me initially from the date of my joining in DSP in Executive cadre.

(Emphasis added)

Thus, it is evident from the aforesaid representation that the Respondent requested the employer to waive the eligibility criteria and upgrade his post to the executive cadre with retrospective effect, i.e., from the date of his initial

joining.

The said representation stood rejected vide order dated 12/14.10.2004 with observation that non-executive post could not be upgraded to the executive cadre as per the policy of the company. More so, there was no enabling provision for grant of relaxation to the eligibility criteria.

9. The Respondent approached the High Court by filing the writ petition, inter alia, claiming the following reliefs:

(a) A writ of and/or in the nature of Mandamus commanding the Respondents, their men, agents and/or assigns to rescind and/or cancel the memos bearing No. PL- 1/1(101)/6/07/Theraphy/004/2217 dated 1.10.2004, and DMHS/Misc/reply/October dated 12/14.10.2004, issued by the Manager (Personnel/recruitment), SAIL, DSP and the Director (M & HS), Durgapur Steel Plant respectively, forthwith;

(b) A writ of and/or in the nature of Mandamus commanding the Respondents, each one of them, their servants, agents and/or assigns to fix up the scale of pay of the Petitioner commensurate to the post of E-1 as it is prevailing in other units of SAIL, forthwith;

(c) A writ of and/or in the nature of Mandamus commanding the Respondents, each one of their agents and/or assigns not to withhold scale of pay for the post of Speech Therapist/Audiologist commensurate to the post of E-1 grade;

(d) A writ of and/or in the nature of Mandamus directing the Respondents, each one of them, their agents and/or assigns to fix up the scale of pay of the Petitioner commensurate to the post of E-1 grade and to release all arrear salary and consequential benefits since joining with the admissible rate of interest thereto, forthwith;

(e) A writ in the nature of Mandamus directing the Respondents, each one of them, their agents and/or assigns to treat the post of the Petitioner as Executive post (E-1 grade) forthwith;

(f) A writ of and/or in the nature of Certiorari directing the Respondents to transmit the entire records of the case forming the basis of non providing and/or non fixation of the pay scale for the post of Speech Therapist/Audiologist commensurate to the post of E-1 grade to this Hon'ble Court and to certify them and on being so certified, quash the same so that conscionable justice may be administered to the parties.

10. Appellants contested the case pointing out that it was not permissible under the statutory rules/policy of the company to meet the demand of the Respondent-employee. Had it been so, the appointment could have been offered to Shri Sourav Mukhopadhyay who claimed protection of pay which he was getting in BHEL, or to accede to the request made by other panellists to upgrade the post and in that manner the company could have got the service of a better candidate

than the Respondent. The writ petition was dismissed vide judgment and order dated 16.9.2005 observing that two unequals cannot be treated equals. Thus, the Respondent was not dealt with any discrimination as there was no post in Durgapur Steel Plant of Speech Therapist/Audiologist in executive cadre. The relief sought could not be granted to him and there was no reason to accept the writ petition. The Division Bench failed to appreciate what the relief claimed by the Respondent was and further that two unequals cannot be treated equals. The Division Bench was swayed by an impression that it was not permissible for the employer-Company to have different pay-scales in two different units existing at different locations, though such a course is always permissible for the management.

11. We have thoroughly examined the Personnel Manual prepared by the Steel Authority of India Ltd. in 1992. It prescribes different posts in different grades. E-1 grade posts include Management Trainees, Junior Managers and Medical Officers. Clause 5.3.1 clearly provides that centralised services are limited for few posts only which are Executive posts in grade E-6 and above; Management Trainees (Technical) in E-1 grade; and Junior Manager (F & A) in grade E-1 etc.

Clause 5.3.2 reads as under:

Direct recruitment to all other posts, executive as well as non-executive, will be done at the respective Plant/Unit level, unless decided otherwise by the competent authority.

Clause 16.2 provides that all appointments offered shall be made by respective Unit/Plant. Thus, it is evident that the services of the Respondent were governed by rules governing the Unit/Plant i.e. Durgapur Steel Plant. It was not centralised service and every unit was to be treated as a separate and independent in these regards though belonging to the same company. In peculiar circumstances, it may be open to the authority to place a particular post in executive cadre and such a post may be required to be filled up by an experienced/qualified person. Another unit may not require such a higher post, considering the local needs and requirements. In such a fact-situation, it is neither desirable nor permissible to allow the claim of parity by the Respondent holding a post in non-executive cadre to a post in executive cadre. Nor it is permissible for the court to have a judicial review of the reasons for which the said post has been kept in executive cadre in another unit. Such a requirement may be present in the Unit at Rourkela Steel Plant. However, it cannot be doubted that the said Shri B.V. Prabhakar had been appointed in 1987 about two decades prior to the Respondent. Parity in pay with a person of such seniority may not be justified.

12. In State of Haryana Vs. Jasmer Singh and others, , this Court considered the provisions of Articles 39 , 14 and 16 of the Constitution and held that the principle of 'equal pay for equal work' is not always easy to apply. There are inherent difficulties in comparing and evaluating the work done by different persons in different organisations, or even in the same organisation. There may be

differences in educational or technical qualifications, which may have a bearing on the skills which the holders bring to their job although the designation of the job may be the same. There may also be other considerations which have relevance to efficiency in service, which may justify differences in pay scales on the basis of criteria such as experience and seniority, or a need to prevent stagnation in the cadre, so that good performances can be elicited from persons who have reached the top of the pay scale. There may be various other similar considerations which may have a bearing on efficient performance in a job.

13. In *State of Haryana and Another Vs. Tilak Raj and Others*, , this Court held as under:

To claim a relief on the basis of equality, it is for the claimants to substantiate a clear-cut basis of equivalence and a resultant hostile discrimination before becoming eligible to claim rights on a par with other group vis-a-vis an alleged discrimination.... "Equal pay for equal work" is a concept which requires for its applicability complete and wholesome identity between a group of employees claiming identical pay scales and the other group of employees who have already earned such pay scales. The problem about equal pay cannot always be translated into a mathematical formula.

14. In *Harbans Lal and Others Vs. State of Himachal Pradesh and Others*, , this Court considered a similar issue and observed that while determining the issue of parity in pay, large number of considerations and various dimensions of the job are required to be taken up by the courts. The accuracy required by the job and the dexterity it entails may differ from job to job. It cannot be evaluated by the mere averments in the self-serving affidavits or counter affidavits of the parties. It must be left to be evaluated and determined by expert body. The Court further held as under:

The discrimination complained of must be within the same establishment owned by the same management. A comparison cannot be made with counterparts in other establishments with different management, or even in establishments in different geographical locations though owned by the same master. Unless it is shown that there is a discrimination amongst the same set of employees by the same master in the same establishment, the principle of "equal pay for equal work" cannot be enforced....

(Emphasis added)

15. In *Mew Ram Kanojia Vs. All India Institute of Medical Sciences and Others*, , this Court dealt with an issue of pay parity between Speech Therapists and Audiologists and held that merely because Speech Therapists perform similar duties and functions in other institutions, are paid higher pay-scales is no good ground to accept the Petitioner's claim for equal pay. There may be difference in educational qualifications, quality and volume of work required to be performed by the hearing therapists in other institutions. The person claiming parity must sufficiently produce material before the Court to adjudicate upon such a

complicated issue of factual determination. More so, if the employer is not the same, the principle of equal pay for equal work would not be applicable.

16. It is the duty of an employee seeking parity of pay under Article 39(d) of the Constitution of India to prove and establish that he had been discriminated against, as the question of parity has to be decided on consideration of various facts and statutory rules etc. The doctrine of 'equal pay for equal work' as enshrined under Article 39(d) of the Constitution read with Article 14 thereof, cannot be applied in a vacuum. The constitutional scheme postulates equal pay for equal work for those who are equally placed in all respects. The Court must consider the factors like the source and mode of recruitment/appointment, the qualifications, the nature of work, the value thereof, responsibilities, reliability, experience, confidentiality, functional need, etc. In other words, the equality clause can be invoked in the matter of pay scales only when there is wholesome/wholesale identity between the holders of two posts. The burden of establishing right and parity in employment is only on person claiming such right. (Vide U.P. State Sugar Corpn. Ltd. and Another Vs. Sant Raj Singh and Others, ; Union of India (UOI) and Another Vs. Mahajabeen Akhtar, ; Union of India (UOI) and Others Vs. Dineshan K.K., ; Union of India (UOI) and Others Vs. Hiranmoy Sen and Others, ; Official Liquidator Vs. Dayanand and Others, ; U.P. State Electricity Board and Another Vs. Aziz Ahmad, ; and State of Madhya Pradesh and Others Vs. Ramesh Chandra Bajpai,).

17. This Court while deciding a similar issue in State of West Bengal and Anr. v. West Bengal Minimum Wages Inspectors Association and Ors. (2010) 5 SCC 225, held as under:

The evaluation of duties and responsibilities of different posts and determination of the pay scales applicable to such posts and determination of parity in duties and responsibilities are complex executive functions, to be carried out by expert bodies. Granting parity in pay scale depends upon comparative job evaluation and equation of posts.

The principle 'equal pay for equal work' is not a fundamental right but a constitutional goal. It is dependent on various factors such as educational qualifications, nature of the jobs, duties to be performed, responsibilities to be discharged, experience, method of recruitment, etc. Comparison merely based on designation of posts is misconceived. Courts should approach such matters with restraint and interfere only if they are satisfied that the decision of the Government is patently irrational, unjust and prejudicial to any particular section of employees.

The burden to prove disparity is on the employees claiming parity.

(emphasis added)

(See also State of Kerala Vs. B. Renjith Kumar and Others,)

18. In Union of India (UOI) and Another Vs. P.K. Roy and Others, , this Court

accepted the factors laid down by the Committee of Chief Secretaries which was constituted for settling the disputes regarding equation of posts arising out of the States Reorganisation Act, 1956, wherein the following four factors had been held to be determinative of the issue of equivalence of posts:

1. The nature and duties of a post;
2. The responsibilities and powers exercised by the officer holding a post, the extent of territorial or other charge held or responsibilities discharged;
3. The minimum qualifications, if any, prescribed for recruitment to the post; and
4. The salary of the post.

19. In *State of Maharashtra and another Vs. Chandrakant Anant Kulkarni and others*, ; and *Vice-Chancellor, L.N. Mithila University Vs. Dayanand Jha*, , a similar view has been reiterated observing that equal status and nature and responsibilities of the duties attached to the two posts have to be taken into consideration for equivalence of the post.

20. Similar view has been reiterated in *E.P. Royappa Vs. State of Tamil Nadu and Another*, ; and *S.I. Rooplal and Another Vs. Lt. Governor Through Chief Secretary, Delhi and Others*, , wherein this Court following the earlier judgment in *P.K. Roy (Supra)* held that the salary of the post alone may not be a determining factor, the other three criterion should also be fulfilled.

21. In *Union of India and others Vs. S.L. Dutta and another*, ; *Union of India and Others Vs. N.Y. Apte and Others*, ; *State of U.P. and Ors. v. J.P. Chaurasia and Ors.* AIR 1989 SC 19; and *Kshetriya Kisan Gramin Bank v. D.B. Sharma and Ors.* AIR 2001 SC 168, this Court held that whether the determination of two posts are equal or not, is a job of the Expert Committee and the court should not interfere with it unless the decision of the Committee is found to be unreasonable or arbitrary or made on extraneous considerations. More so, it is an executive function to fix the service conditions etc. and lies within the exclusive domain of the rule making authority.

(See also *T. Venkateswarulu Vs. Executive Officer, Tirumala Tirupathi Devasthanams and Others*,).

22. In *S.C. Chandra and Others Vs. State of Jharkhand and Others*, , this Court held:

In our opinion fixing pay scales by courts by applying the principle of equal pay for equal work upsets the high constitutional principle of separation of powers between the three organs of the State. Realising this, this Court has in recent years avoided applying the principle of equal pay for equal work, unless there is complete and whole- sale identity between the two groups....

23. In *S.P. Shivprasad Pipal Vs. Union of India and Others*, , this Court held as under:

...it is not open to the court to consider whether the equation of posts made by the Central Government is right or wrong. This was a matter exclusively within the province of the Central Government. Perhaps the only question the court can enquire into is whether the four principles cited above had been properly taken into account. This is the narrow and limited field within which the supervisory jurisdiction of the court can operate.

24. It is a settled legal proposition that it is not always impermissible to provide two different pay-scales in the same cadre on the basis of selection based on merit with due regard to experience and seniority. (Vide J.P. Chaurasia (Supra) and Meva Ram Kanojia (Supra)).

25. "Non-uniformities would not in all events violate Article 14." Thus, a mere difference does not always amount to discrimination. (Vide Madhu Kishwar and others Vs. State of Bihar and others, ; Associate Banks Officers' Association v. State Bank of India and Ors. AIR 1998 SC 32; and Official Liquidator (Supra)).

26. In view of the above, the law on the issue can be summarised to the effect that parity of pay can be claimed by invoking the provisions of Articles 14 and 39(d) of the Constitution of India by establishing that the eligibility, mode of selection/recruitment, nature and quality of work and duties and effort, reliability, confidentiality, dexterity, functional need and responsibilities and status of both the posts are identical. The functions may be the same but the skills and responsibilities may be really and substantially different. The other post may not require any higher qualification, seniority or other like factors. Granting parity in pay scales depends upon the comparative evaluation of job and equation of posts. The person claiming parity, must plead necessary averments and prove that all things are equal between the concerned posts. Such a complex issue cannot be adjudicated by evaluating the affidavits filed by the parties. The onus to establish the discrimination by the employer lies on the person claiming the parity of pay. The expert committee has to decide such issues, as the fixation of pay scales etc. falls within the exclusive domain of the executive. So long as the value judgment of those who are responsible for administration i.e. service conditions etc., is found to be bonafide, reasonable, and on intelligible criteria which has a rational nexus of objective of differentiation, such differentiation will not amount to discrimination. It is not prohibited in law to have two grades of posts in the same cadre. Thus, the nomenclature of a post may not be the sole determinative factor. The courts in exercise of their limited power of judicial review can only examine whether the decision of the State authorities is rational and just or prejudicial to a particular set of employees. The court has to keep in mind that a mere difference in service conditions does not amount to discrimination. Unless there is complete and wholesale/wholesome identity between the two posts they should not be treated as equivalent and the Court should avoid applying the principle of equal pay for equal work.

27. The present case requires to be examined in view of the aforesaid settled legal propositions. Undoubtedly, the Respondent had applied in response to an

advertisement for the post of Grade S-6 and not for Grade E-1 as he did not possess the requisite qualifications for the post in the said Grade. The name of the Respondent had appeared at serial No. 4 in the merit list and he was offered appointment only for the reason that the candidates whose names appeared at serial Nos. 1 and 3 asked for pay protection/up-gradation of the post, and it was not acceptable to the employer. The candidate whose name appeared at serial No. 2 in the merit list, did not join though was offered the appointment. The Respondent accepted the appointment in Grade S-6 on the terms and conditions incorporated in his appointment letter without any protest. The relief sought by the Respondent is the same, which had, in fact been asked by two candidates in the merit list, above the Respondent. If such a demand was acceptable to the appellants they could have gotten a more meritorious candidate than respondent. Grant of the relief sought by the Respondent is violative of equality clause contained in Article 14 of the Constitution of India qua other candidates in the panel above the Respondent who did not join for not granting the same relief though it had been sought at least by two of them at the initial state of recruitment. By the impugned order, the Respondent has not been granted the post in Grade E-1 but salary equivalent to that of Shri B.V. Prabhakar has been granted to the Respondent. The order itself is mutually inconsistent and contradictory. The representation of the Respondent had been for waiving the criteria meaning thereby that the Respondent sought a relaxation in the eligibility criteria for the post in Grade E-1. It is evident from the representation itself that the Respondent never possessed the eligibility for the post of Grade E-1. The Law does not prohibit an employer to have different grade of posts in two different units owned by him. Every unit is an independent entity for the purpose of making recruitment of most of its employees. The Respondent had not been appointed in centralised services of the company. Shri B.V. Prabhakar, had been appointed in E-1 Grade, in the Rourkela unit, considering his past services in the Bokaro Steel Plant, another unit of the company, for about two decades prior to the recruitment of the Respondent. As every unit may make appointments taking into consideration the local needs and requirement, such parity claimed by the Respondent cannot be held to be tenable. The reliefs sought by the Respondent for upgradation of the post and waiving the eligibility criteria had rightly been refused by the Appellants and by the learned Single Judge. In such a fact situation, there was no justification for the Division Bench to allow the writ petition, granting the benefit from the date of initial appointment of the Respondent. The Respondent has not produced any tangible material to substantiate his claim, thus, he could not discharge the onus of proof to establish that he had made some justifiable claim. The Respondent miserably failed to make out a case for pay parity to the post of E-1 Grade in executive cadre. The appeal, thus, deserves to be allowed.

28. Before parting with the case, it may be pertinent to state that although a Plant/Unit of the Appellant-company is competent to make appointment in the executive and non-executive cadres in the said plant/unit, however, it has no

authority to determine the grade or the pay scale of a post or determine and sanction the number of posts since the same relates to the recruitment policy of the Appellant-company. This would be evident from the perusal of the Recruitment Plan of the Appellant-company laid down at Clause 7.1 of the Personnel Manual which reads:

The Recruitment Plan will form part of the annual Human Resource Plan of the Company. Among other things, the Human Resource Plan will clearly state the skill/grade wise requirement of man power in the Company i.e., the Plants/Units, and the subsidiaries separately. Any deviation from the approved plan/mix will be subject to the prior approval of Chairman/Board.

In view of the above, the competent authority in the corporate office of the Appellant-company is directed to consider the issue expeditiously relating to anomaly raised by the Respondent herein for future recruitments.

29. The appeal is allowed. The judgment and order of the Division Bench dated 1.8.2008 which is impugned herein, is hereby set aside and the judgment of the learned Single Judge dated 16.9.2005 is restored. In the facts of the case, there shall be no order as to costs.