

(1992) 03 J&K CK 0011
In the Jammu And Kashmir High Court
Case No : S.W.P. No. 514 of 1983

Vijay Kumar

APPELLANT

Vs

State and Ors.

RESPONDENT

Date of Decision : 05-03-1992

Acts Referred:

Civil Services Regulations, 1956 — Article 85
Constitution of India, 1950 — Article 14, 16

Citation : (1992) JKLR 133 : (1992) KashLJ 82 : (1994) 1 SriLJ 165

Hon'ble Judges : K.K.Gupta, J

Bench : Single Bench

Advocate : S.K.Gupta, P.S.Dutta, J.S.Kotwal, J.A.Kazmi, H.Rehman,
H.L.Bhagotra, Advocates appearing for the Parties

Judgement

1. Above mentioned petitioners are identical in nature and also raise similar questions of fact and law and as such same are being disposed of by this common judgment.

2. Petitioners in all the above said petitions were working as Gazetted Officers in J&K Education Department when they were ordered under

various Government orders, issued in the year 1981, to hold posts of research Officers of higher grade. Petitioners case is that at the time of

making their appointments as Research Officers in the grade of Rs. 4501250, now revised as Rs. 10002000, each one of them was holding a pay

scale of Rs. 475850, revised as Rs. 9001460. In the orders it was, however, provided that they would work in their own pay and grade and order

with regard to charge allowance in their favour would be issued separately but according to them inspite of lapse of more than two years they were

neither given benefit of the grade of the post of research Officer nor any charge

allowance granted. They have referred to Art. 85 of Civil Services

Regulations under which any appointment lasting for a period of more than six years would be treated as permanent appointment.

3. Petitioners further case is that they were adjusted as Research Officers, which could only be interpreted as an order of temporary appointments

to a higher post and to deny benefit of higher grade to them when they were discharging their duties to the satisfaction of all concerned would

amount to violate the principle of equality as enshrined in the constitution. According to them inspite of numberable representations made to the

Government nothing was done. They have prayed for issuing writ of mandamus directing the respondents to perform their authority by allowing)

them grade of Research Officers on which they were working and discharging duties from April 1981 and further to treat them as permanent.

4. Respondents have filed reply affidavits in ail the petitions on identical lines stating therein that the petitioners were allowed to work against the

posts of Research Officers with specific condition that they would work against the said posts in their own pay and grade which condition was

accepted by them. According to them holding of the posts of Research Officers was not to confer any right on the petitioners as another condition

was also imposed that they were not to be entitled for preferential treatment at the time of final selection by the D.P.C. Public Service Commission.

5. I have heard the learned counsel for the parties and perused various orders placed on record. The facts of the abovesaid cases lay in a narrow

compass. Posts of Research Officers were created and petitioners who were already in Government Educational Gazetted service were ordered

to hold the some posts of the higher grade in their own pay and grade. There was also a stipulation in their appointment orders that order with

regard to grant of charge allowance in their favour would be issued separately. Petitioners waited for more than two years and despite their

repeated representation finding no response from the Government either to grant them pay and grade of Research Officer or that of charge

allowance they have knocked the door of the court by filling present writ petitions. The position as emerges from the facts placed on record is that

petitioners are working as research Officers on higher grade for the last more than ten years but they have neither been appointed permanently as

Research Officers nor allowed charge allowance. Now we have to see the legal position in this regard.

6. Art. 85 of Civil Service Regulations deals with such like appointments and it reads as under:

85 (1) A Government servant may be:

- (a) assigned the charge of another post in addition to his own duties; or
- (b) appointed to be in charge of a higher post independent of his own duties.

(2) The case falling under 1(a) above may be one of the following nature:

- (i) Where an employee is assigned the charge of an additional post either identical or higher, in the same office or a different office simply to discharge its current routine duties; or
- (ii) Where the additional charge is assigned to another identical or equivalent post not in the same office and additional charge so assigned involves full duties and responsibility of the post; or. (iii) where the additional charge of an identical or equivalent post involves full responsibilities of the post in the same office and there being no possibility of work of the other post being distributed amongst others; or
- (iv) Where the additional charge is allowed of a higher post in the same or different office and the Govt. Servant holds the plenary responsibility for the duties of additional post; or (v) Where the additional charge is allowed of a lower office/post in the same or different office.

(3) The cases falling under 1 (b) above may be of one of the following nature:

- (i) where for administrative reasons or noncompletion of formalities for appointment to the higher post, a person cannot be appointed to that post formally and is appointed in his own pay and grade to be in charge of the higher post and required to discharge full duties and responsibilities of the post either in the same office or in a different office, in the same cadre/line of promotion or in different cadre/line of promotion.
- (ii) where a Government servant is appointed to a higher post simply to be in charge of its current/routine duties and is not required to hold plenary responsibilities of the duties of the post e.g. a Superintending Engineer is appointed in charge of current duties of the post of a Chief Engineer independent of his own.

The most pertinent in this rule is the Government Instruction which is as follows:

(a) It is wrong in principles to appoint a Government servant to a higher post in his own cadre/line of promotion without observing the required

formalities of clearance from Departmental Promotion Committee etc. where, however, for reasons to be recorded, the Administrative authorities

cannot without detriment to public interests wait for formal appointments temporary stopgap arrangements may be made by them against such

posts provided that the same are not continued beyond a period of six months at a time. In making such arrangements the competent authorities

will ensure that only such officers are appointed who satisfy all the requirements for the higher appointments and can stand the scrutiny of the

Departmental Promotion Committee etc. Persons so appointed shall be appointed in their own pay and grade as incharge of the higher posts, and

will be required to discharge the full duties, and responsibilities of these posts. As soon as such officers are declared by the departmental

promotion committee etc. fit for appointment to higher posts without any break in the stopgap arrangements they will be allowed full pay of those

posts allowances etc. if any, drawn to be adjusted in full against the retrospective increase in pay.

(b) In cases where appointments to higher posts are to be made on short term basis for a limited period of time and not on a regular basis and if

admissible to be made on adhoc basis or without reference to departmental Promotion Committee etc. the person so appointed should not be put

in charge of the post but appointed to that post formally and given the full pay of the post.

7. In accordance with the above referred provisions, cases of the petitioners were required to be regulated. While appointing them as Research

Officers on higher grade in their own pay and grade it was specifically provided in the Govt. orders that order with regard to the grant of charge

allowance in their favour would be issued separately. No such order has been issued upto date even after lapse of more than eleven years.

Petitioners are working against the posts which have permanently been created and their plea that they are discharging their duties to the entire

satisfaction of their superiors has not been denied by the respondents. Government orders also refer to the appointments being made in the public

interest. When we examine all these facts the Government instruction contained in Art.85, which has the force of law, comes into play. This

Government instruction clearly prohibits appointments of a Government servant to a higher post in his own cadre/line on promotion without

observing required formalities of clearance from Departmental Promotion Committee but it authorises for such appointments in the public interest

on temporary, stopgap arrangements, provided same does not continue beyond a period of six months at a time. It is also enjoined upon the

authorities under the said Government instruction that only such officers are to be appointed who satisfy all the requirements for higher

appointments and can stand the scrutiny of Departmental Promotion Committee. Admittedly in accordance with the rules Research Officers are

promoted from lower grade existing in the Education Department. It has also not been denied that all the petitioners are eligible to hold the posts of

Research Officers. It has, however, been pointed out by the respondents that clearance has not been obtained from the Departmental Promotion

Committee. The fact in this regard again remains that these posts have never been referred to D.P.C. or Public Service Commission. Petitioner are

continuing beyond six months, the period allowed under Art. 85, even by the Government, are required to be adjudicated upon.

8. We now find out the law propounded by the Supreme Court and other Courts in this behalf. In case, *Narinder Chadha and others. Vs. Union*

of India and others, AIR 1986 SC 638 in para 14 following principle was laid down by their lordships:

But we, however, make it clear that it is not our view that whenever a person is appointed in a post without following the rules prescribed for

appointment to that post, he should be treated as a person regularly appointed to that post. Such a person may be reverted from that post. But in a

case of the kind before us where persons have been allowed to function in higher posts for 15 to 20 years with due deliberation it would be

certainly unjust to hold that they have no sort of claim to such posts and could be reverted unceremoniously or treated as person not belonging to

the service at all, particularly where the Govt, is endowed with the power to relax the rule to avoid unjust results. In the instant case the Government

has also not expressed its unwillingness to continue them in the said posts.

In para 19 it has been held as under:

As observed in D.R. Nim Vs. Union of India (1967) 2 SCR 325: (AIR 1997 Sc 1301) when a person has worked for a long period as in this

case for nearly fifteen to twenty years in a post and had never been reverted it cannot be held that the officer's continuous officiation was a mere

temporary or local or stopgap arrangement even though order of appointment may state so. In such circumstances entire period of officiation has

to be accounted for seniority. Any other view would be arbitrary and violative of Art. 14 & 16(1) of the constitution because the temporary

service in the post in question is not for a short period intended to meet some emergent or unforeseen circumstance.

In AIR 1986 SC 1636 a postgraduate teacher was appointed temporarily and his service was terminated after three years of continuous service.

Subsequently a fresh appointment was given to him and he was specifically intimated that no benefit of the previous service rendered by him would

be admissible. The teacher after entering upon his fresh appointment requested the authorities that the break in service be condoned but his request

was turned out. Their lordship of the Supreme Court in such circumstances have held that the teacher was entitled to condonation of break in his

service despite the term to the contrary in his fresh appointment as the teacher was in no position to bargain for a better deal and he was compelled

to accept whatever was dictated to him. In another case, Sh. RaviNarian Mohapatra Vs. State of Orissa and others reported in AIR 1991

S.C.1286 it was held that where a teacher was appointed between the dates, appointment between which was made a condition for extending the

benefit of validation of appointment and has been working with the approval of the authority for almost four years with short breaks and the

Managing Committee had been utilizing his service afterwards, though there was no approval by the Educational authorities and his services were

never terminated on grounds of inefficiency or misconduct, the teacher was entitled to be regularized in his post.

9. After analysing the above referred rule 85 C.S.R. and the law on the point in issue petitioners, who are working as Research Officers in the

Education Department for the last more than ten years and are fully qualified for the posts and further working to the entire satisfaction of their

superiors, cannot be denied the right to have pay and grade of that post from the date they are working so. Denial to it would certainly be arbitrary and violative of Art. 14 and 16 of the constitution of India. There is no direct recruitment to the post of Research Officer and appointments to these posts are to be made by promotion. The formality of seeking approval of Departmental Promotion Committee/ Public Service Commission can easily be dispensed with in their case, especially when the petitioners are working as Research Officers for such a long time. Their Petitions are, therefore, allowed and a direction is issued to the respondents to grant them pay and grade, all other allowances, and consequential benefits as permissible under rules, as Research Officers, with effect from the date they were appointed against the said posts. Mr. Gupta learned Additional Advocate General, has pointed out that arrears be not allowed to the petitioners which would burden the State exchequer. I find force in this plea and as such it is directed that petitioners are not entitled to arrears. There shall be no order as to costs.