
(2004) 02 AHC CK 0187

Allahabad High Court

Case No: C.M.W.P. No. 7619 of 2004

Dr. Gopalji Mishra

APPELLANT

Vs

State of U.P. and
Others

RESPONDENT

Date of Decision: Feb. 23, 2004

Acts Referred:

- Constitution of India, 1950 - Article 14

Citation: (2004) 3 AWC 1922

Hon'ble Judges: Ghanshyam Das, J; B.S. Chauhan, J

Bench: Division Bench

Advocate: R. K. Pandey, for the Appellant; Noorul Huda, S.C. and S.C., for the Respondent

Final Decision: Partly Allowed

Judgement

B.S. Chauhan, J.

This writ petition has been filed for quashing the order dated 11.12.2003 by which recovery of Rs. 46,870 is being made from the petitioner as he has been paid the excess amount as selection grade for which he was not entitled as well as the order dated 23rd September, 2003 by which his claim for selection grade on completion of eight years service including the period which he had served on ad hoc basis, has been rejected.

2. Facts and circumstances giving rise to this case are that the petitioner had been appointed with respondent on ad hoc basis. After continuous service, his case for regularisation was considered and he was regularised with effect from 15.5.1998. He claimed the benefit of selection grade on completing eight years under the Government Order dated 13th May, 1993 (Annexure-9) and as it was not paid to him, he approached this Court by filing a Writ Petition No. 18251 of 2003. As it involved disputed questions of fact, the Court disposed of the said writ petition vide order dated 28.4.2003 directing the respondents to decide the claim of the petitioner by speaking and reasoned order. In pursuance of the same, the orders impugned has been passed. Hence this petition.

3. Shri Raj Kumar Pandey, learned counsel appearing for the petitioner has submitted that petitioner has illegally been deprived of the selection grade not taking into account the period of service rendered by him on ad hoc basis ; two similarly situated persons, namely Dr. Prem Nath Singh and Dr. Raj Kumar Mishra have been given the selection grade taking into account the services rendered on ad hoc basis by them. Thus, petitioner cannot be given a hostile discrimination and he is entitled for selection grade. More so, if the petitioner had been paid certain extra amount as of selection grade without being any misrepresentation or fraud on his part, it cannot be recovered from him. Thus, both the orders impugned are liable to be quashed.

4. On the other hand, Shri Noorul Huda, learned standing counsel has opposed the writ petition submitting that Article 14 of the Constitution does not envisage negative equality. If some person has wrongly been conferred the benefit of selection grade by mistake, it does not confer any right upon the petitioner to claim the same. Article 14 of the Constitution is not meant to perpetuate the illegality or fraud. If the petitioner has wrongly been paid the excess amount, he is liable to refund the same, as the State Government is entitled to make rectification of the mistake committed by it. The Government order under which petitioner claimed relief itself provided minimum eight years regular continuous satisfactory service for grant of selection grade. As the petitioner has been regularised with effect from 15.5.1998 and that order has not been challenged and as it had attained finality, petitioner is not entitled for selection grade for not completing prescribed period of eight years. Thus, the petition is liable to be dismissed.

5. We have considered the rival submissions made by the learned counsel for the parties and perused the record.

6. The issue of selection grade and, its entitlement is no more res integra. The Hon"ble Supreme Court has considered it time and again.

7. In [State of Orissa Vs. Durga Charan Das](#), considering the statutory provisions of the Rules, i.e., Government of India (Construction of Orissa) Rules, the Hon"ble Supreme Court held that selection grade is to be granted for the purpose of promotion on a selection post, therefore, it cannot be claimed as a matter of right merely on the basis of seniority.

8. Another Constitution Bench of the Hon"ble Supreme Court in Lalit Mohan Deb and Ors. v. Union of India and Ors.. AIR 1972 SC 996, explained the scope and concept of selection grade observing as under :

"This has been recognised by the Central Pay Commission in para 10 of Chapter X of the Report. The Commission observed "with the object of providing incentive to employees who have no outlets or very limited outlets for promotion to higher posts, we are recommending in a number of cases that a certain percentage of the posts in the grade usually 10 per cent should carry a somewhat higher scale of pay even though there will

be no change in the duties. Following the terminology in vogue, we have described these posts as selection grade posts." It is well recognized that a promotion post is a higher post with a higher pay. A selection grade has higher pay but in the same post. A selection grade is intended to ensure that capable employees who may not get a chance of promotion on account of limited outlets of promotions should at least be placed in the selection grade to prevent stagnation on the maximum of the scale. Selection grades are, therefore, created in the interest of greater efficiency."

9. In [Dayaram Asanand Gursahani Vs. State of Maharashtra and Others](#), the Hon"ble Apex Court interpreted the provisions of Bombay Judicial Service Recruitment Rules, 1956, which also included the provision for grant of selection grade. The Apex Court held that the Rules were meant to give a selection grade to an individual officer if his service for a particular prescribed period is found satisfactory. Therefore, in such an eventuality, selection grade was not given by selection but on the basis of seniority subject to found unfit.

10. In [Union of India \(UOI\) and Another Vs. S.S. Ranade](#), , the Apex Court examined the same issue again and held that it will depend upon a particular Rules in case element of selection is involved in grant of selection, it would amount to promotion in a higher pay scale and it cannot be claimed as a matter of right or automatically. However, there may be a case like Dayaram Asanand Gursahani (supra), where it may be claimed only on the basis of seniority. Thus, as to whether grant of selection grade is a promotion or not, would depend upon a particular Rules/Government orders/Circulars, etc. It may be promotion or not, depending upon the facts of a case.

11. In [State of Rajasthan Vs. Fateh Chand Soni](#), the Hon"ble Supreme Court reconsidered the issue and observed as under :

".....in the literal sense the word "promote" means "to advance to a higher position, grade, or honour". So also. "promotion" means "advancement or preferment in honour, dignity, rank, or grade". (See : Webster"s Comprehensive Dictionary, International Edition, p. 1009). "Promotion" thus not only covers advancement to higher position or rank but also implies advancement to a higher grade. In service law also the expression "promotion" has been understood in the wider sense and it has been held that "promotion can be either to a higher pay scale or to a higher post"."

12. In [State of Haryana Vs. Haryana Veternaty and A.H.T.S. Asson. and Another](#), the Hon"ble Supreme Court considered the issue where a satisfactory regular service of 12 years would make an employee eligible for selection grade. The Apex Court held that there must be a satisfactory service of 12 years excluding the period of service rendered as ad hoc/appointment de hors the Rules.

13. Thus, in view of the above, it can be concluded that the selection grade in a given case may be a promotion where the number of selection post is fixed or it may not be a

promotion where it is granted automatically being the satisfactory service for a particular prescribed period.

14. In view of the above, it is settled that selection grade has to be granted in pursuance of the statutory provisions/Government orders/circulars. It may be for a particular number of posts in a cadre or for everyone completing a particular period in service as the purpose is to remove stagnation. In the instant case, as the Government order providing for selection grade itself provide for regular eight years continuous service to make the officer eligible for the selection grade and the petitioner has been regularised only with effect from 15.5.1998, we do not find any illegality in the order impugned rejecting the claim of the petitioner for time scale.

15. Article 14 is not meant to perpetuate an illegality. Therefore, we are not bound to repeat the wrong action done by us earlier. This view stands fortified by the judgments of the Hon"ble Apex Court e.g., *State of Orissa v. Durga Charan* (supra) ; [Smt. Sneh Prabha etc. Vs. State of U.P. and Another](#) , ; [Secretary, Jaipur Development Authority, Jaipur Vs. Daulat Mal Jain and Others](#) , ; [State of Haryana and Others Vs. Ram Kumar Mann](#), a [M/s. Faridabad Ct. Scan center Vs. D.G. Health Services and others](#),

16. In *Finance Commissioner (Revenue) v. Gulab Chandra and Anr.* 2001 AIR SCW 4774, the Hon"ble Apex Court rejected the contention that as other similarly situated persons had been retained in service, the petitioner could not have been discharged during the period of probation observing that if no action has been taken in a similar situation against similarly situated persons, it did not confer any legal right upon the petitioner therein.

17. In [Jalandhar Improvement Trust Vs. Sampuran Singh](#), and *Union of India and Ors. v. Rakesh Kumar* 2001 AIR SCW 1458, the Hon"ble Supreme Court held that Court cannot issue direction that some mistake be perpetuated on the ground of discrimination or hardship.

18. Any action/order contrary to law does not confer any right upon any person for similar treatment. Vide [State of Punjab and Others Vs. Dr. Rajeev Sarwal](#) , ; [Yogesh Kumar and Others Vs. Government of NTC, Delhi and Others](#), and [Union of India \(UOI\) and Another Vs. International Trading Co. and Another](#),

19. Thus, in view of the above. it becomes crystal clear that a wrong action taken or order passed cannot be perpetuated on the ground of equal treatment or hardship. Petitioner is not entitled for any relief on this count.

20. So far as the payment of excess amount, which the petitioner was not entitled is concerned, as there has been no misrepresentation or fraud on the part of the petitioner, he cannot be asked to refund the same. More so, petitioner might have spent the same considering his own money.

Recovery thereof would cause great financial hardship to the petitioner. In such circumstances, recovery should not be permitted. Vide [Shyam Babu Verma and Others Vs. Union of India \(UOI\) and Others](#), [Sahib Ram Vs. State of Haryana and Others](#), and [V. Gangaram Vs. Regional Joint Director and others](#),

21. Thus, in view of the above, petition succeeds partly and is allowed in part. The order dated 11.12.2003 is hereby quashed. However, the order dated 23.9.2003 shall remain intact.