Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1549 of 2011

The State of Punjab & Another ...Appellant(s)

Versus

Dharam Pal ...Respondent(s)

J U D G M E N T

Dipak Misra, CJI

The present appeal, by special leave, calls in question the legal acceptability of the order dated 20.08.2008 passed by the High Court of Punjab and Haryana at Chandigarh in Civil Writ Petition No. 18843 of 2007 whereby the Division Bench placing reliance on the decision in ***Pritam Singh Dhaliwal v. State of Punjab and another***[1] has acceded to the prayer made by the respondent for getting the benefit of the pay scale for the post he was holding on officiating basis.

2. To appreciate the gravamen of the controversy, exposition of facts in brief is necessitous. The respondent was appointed as a clerk on 22.05.1970

1 2004 (4) RSJ 599

and promoted to the post of Senior Assistant on 22.09.1980. He was given the officiating charge of the Superintendent Grade II vide order dated 09.12.2004 and thereafter, he was directed to function as Superintendent Grade I vide Government Order dated 26.05.2007. As the factual narration would reveal, he stood superannuated from service on 31.03.2008.

3. Before the respondent attained the age of superannuation, he approached the High Court in a Writ Petition as he was not granted the benefit of the pay scale for the posts of Superintendent Grade II and Superintendent Grade I despite having performed the duties of officiating current duty basis regularly. He sought the relief for grant of pay, the arrears of pay and other consequential allowances and benefits with 18% interest. As stated earlier, the High Court placed reliance on the authority in ***Pritam Singh Dhaliwal*** (supra) and opined that the controversy is covered by the said decision and disposed of the writ petition in terms of the said judgment. Hence, the present appeal.

4. We have heard Ms. Uttara Babbar, learned counsel for the appellants and Mr. Sudarshan Singh Rawat, learned counsel for the respondent.

5. Criticising the impugned order, it is submitted by Ms. Babbar that the High Court has committed gross illegality in granting the benefit to the respondent totally ignoring the restrictions incorporated in the orders dated 09.12.2004 and 26.05.2007 which clearly stipulated that

the respondent official will work in his own pay scale and his officiating promotion would be subject to the recommendations of the Departmental Promotion Committee and on the approval of the Committee, he shall be given the financial benefits. She would further urge that the authority relied upon by the High Court does not hold good in view of what has been laid down by this Court in ***State of Haryana and another v. Tilak Raj and others***[2], ***S.C. Chandra and others v. State of Jharkhand and other***[3] and ***A. Francis v. Management of Metropolitan Transport Corporation Limited, Tamil Nadu***[4]. She has also impressed upon the aspect that under the Punjab Civil Services Rules (for short, "Rules") the respondent is not entitled to the benefit inasmuch as the Rules unequivocally prescribe for denial of benefit.

6. Mr. Rawat, learned counsel for the respondent, while defending the order impugned, would contend that the assumption of the State that the said Rules impose conditions in the negative is fundamentally erroneous.

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2 (2003) 6 SCC 123
3 (2007) 8 SCC 279
4 (2014) 13 SCC 283

According to him, the pronouncements which have been relied upon are not applicable to the facts of the instant case and, therefore, the decision rendered by the High Court cannot be found fault with. He would further contend that the respondent was relieved from the substantive post and worked in the higher posts and carried out the responsibilities of the said posts and, therefore, denial of the benefits to him would be travesty of justice and further permit the State to pave the path of infidelity to the real legal position. That apart, submits the learned counsel, the language used in the order passed by the employer would crush the essential spirit of the Rule.

7. In the beginning, it is seemly to state that there is no factual dispute with regard to the appointments or the posts. That being the position, we think it appropriate to refer to the orders of appointment as Ms. Babbar, learned counsel for the appellant-State of Punjab, would harp on the same. The order dated 09.12.2004 reads as follows:

"ORDER

On the retirement of Smt. Chand Prabha, Superintendent Grade I on 31.07.2004 the

> post of Superintendent Grade I had become vacant. On that vacant post Sh. Kewal Singh Supdt. Gr. II is promoted as Superintendent Grade I in his own scale.
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> On account of promotion of Sh. Kewal Singh, Supdt. Gr. II as Superintendent Grade I and on account of proceeding on earned leave of Shri Bhinder Singh Supdt. Gr. II w.e.f. 07.9.2004 Shri Ashwani Kumar Sr. Assistant (Officiating Superintendent Gr. II) and Sh. Dharam Pal (Officiting Supdt. Gr. II) are promoted as Superintendent grade II.
>
> The official will work in their own pay scale and above promotions will be subject to the recommendations of the Departmental Promotion Committee. On the approval of the above committee they will be given financial benefits. On the basis of these orders the officials will not claim any seniority etc. "

On the basis of the aforesaid order, the respondent functioned as the official Superintendent Grade II.

8. As stated earlier, while he was officiating on the said post, he was promoted on officiating basis to function in the post of Superintendent Grade I. The relevant portion of the said order reads as follow:

> "The official will work in their earlier own pay scale and above promotions will be subject to the recommendations of the Departmental Promotion Committee. On the approval of the above committee they will be given financial benefits. On the basis of these orders the officials will not claim any seniority etc."

9. The said orders have to be tested on the anvil of the Rules. It needs no special emphasis to state that if the orders are in consonance with the Rules indubitably the respondent cannot put forth a claim unless the Rules are declared unconstitutional. Our attention has been invited to Rule 4.13 which occurs under the heading "Pay of Officiating Government Employees". The relevant part of the said Rule reads as follows:

> "**Rule 4.13**. (1) Subject to the provisions of rules 4.22 to 4.24, a Government employee who is appointed to officiate in a post shall not draw pay higher than his substantive pay in respect of a permanent post, other than a tenure post, unless the post in which he is appointed to officiate is one enumerated in the schedule to this rule or unless the officiating appointment involves the assumption of duties and responsibilities of greater importance than those attaching to the post, other than a tenure post on which he holds a lien:
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> Provided that the competent authority may exempt from the operation of this rule, any service which is not organised on a time-scale basis and in which a system of acting promotions from grade to grade is in force at the time of the coming into force of these rules:
>
> Provided further that the competent authority may specify posts outside the ordinary line of a service the holders of which may, notwithstanding the provisions of this

> rule and subject to such conditions as the competent authority may prescribe, be given any officiating promotion in the cadre of the service which the authority competent to order promotion may decide and may thereupon be granted the same pay (whether with or without any special pay, if any, attached to such posts) as they would have received if still in the ordinary line.
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> (2) For the purpose of this rule, the officiating appointment shall not be deemed to involve the assumption of duties or responsibilities of greater importance if the post to which it is made is on the same scale of pay as the permanent post, other than a tenure post, on which he holds a lien, or on a scale of pay identical therewith."

10. Certain Notes have been appended to the said Rule but they are not relevant for adjudication of the present controversy. On a close scrutiny, it is noticeable that the said Rule postulates that the government employee appointed to an officiating post shall not draw pay higher than his substantive pay in respect of a permanent post unless the post in which he is appointed to officiate is one enumerated in the Schedule to the Rules and further the officiating appointment involves assumption of duties and responsibilities of greater importance than those attached to the post. It is not in dispute that the posts of Superintendent Grade II and Grade I are covered under

the Schedule. Be it mentioned, the extension of benefit is subject to the provisions of Rules 4.22 and 4.24.

11. In view of the aforesaid Rule position, it is necessary to reproduce Rule 4.22 and Rule 4.24. They read as follows:

> "**Rule 4.22.** The competent authority may appoint one Government employee to hold substantively, as a temporary measure or to officiate in, two or more independent posts at one time. In such cases, the Government employee shall draw the highest pay to which he would be entitled if his appointment to one of the posts stood alone:
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> Provided that the employee must fulfil the requisite qualifications and conditions for services for both the posts.
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> **Rule 4.24**. When a Government employee holds current duty charge of another post, in addition to that of his own substantive post, he does not officiate in the former post and as such is not entitled to any additional remuneration."

12. As we understand the said Rules, they categorically convey that the employee who holds the higher post must fulfil the requisite qualifications and conditions for service for both the posts. It is not controvered at the Bar that the respondent was eligible to hold the post of Superintendent Grade II and Grade I. In this context, the

learned counsel for the appellants has commended us to Rule 4.16. The said Rule reads as follows:

> "**Rule 4.16**. A competent authority may fix the pay of an officiating Government employee at an amount less than that admissible under these rules.
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> **Note 1**.–One class of cases falling under this rule is that in which a Government employee merely holds charge of the current duties and does not perform the full duties of the post.
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> **Note 2**.–When a Government employee is appointed to officiate in a post on a time-scale of pay but has his pay fixed below the minimum of the time-scale under this rule he must not be treated as having effectually officiated in that post within the meaning of rule 4.4 or having rendered duty in it within the meaning of rule 4.9.
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> Such a Government employee, on confirmation, should have his initial pay fixed under rule 4.4 (b) and draw the next increment after he has put in duty for the usual period required, calculated from the date of his confirmation.
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> **Note 3**.–The power conferred by this rule is not exercisable save by a special order passed in an individual case and on a consideration of the facts of that case. A general order purporting to oust universally the operation of rule 4.14 would be *ultra vires* of this rule. Although, the practice of passing ostensibly special order on every individual case would not be *ultra vires* of this rule it would constitute the grossest possible fraud thereon."

13. On a careful scrutiny of the aforesaid prescription, it is perceptible that the said Rule envisages a different situation altogether. The present factual matrix is quite different. We are inclined to so hold as the respondent herein was holding higher posts and further he was performing the duties of higher responsibility attached to the posts. Thus analysed, we arrive at the conclusion that the Rules do not bolster the proposition advanced by the learned counsel for the State.

14. Having analysed the Rule position, we may allude to the authorities that have been commended to us. First, we shall dwell upon the decision in ***Pritam Singh Dhaliwal*** (supra) that has been relied upon by the High Court in the impugned order. In the said case, the Division Bench of the High Court had placed reliance upon ***Smt. P. Grover v. State of Haryana and another***[5] and ***Selvaraj v. Lt. Governor of Island, Port Blair and others***[6] and earlier decisions of the High Court and analyzing the Rule position opined that the officer therein had been asked to officiate as Deputy

5 AIR 1983 SC 1060
6 1999 (2) SCT 286

Director with effect from 14.03.1996 and he had been continuously posted to equivalent posts such as Additional Deputy Commissioner (D) and till his superannuation the officiating charge was never withdrawn and hence, his entitlement to claim higher pay scale for the post for which he was asked to officiate and perform his duties till his superannuation would not be negatived.

15. As the reasoning of the High Court is fundamentally based on enunciation of law propounded by the Court in ***Smt. P. Grover*** (supra), we think it apt to appreciate the ratio laid down in the said case. A two-Judge Bench of this Court was dealing with the fact situation wherein keeping in view the policy decision, the appellant therein was promoted as an acting District Education Officer. The order of promotion contained a superadded condition that she would draw her own pay scale which apparently meant she would continue to draw her salary on her pay scale prior to promotion. The claim was put forth by the appellant that she was entitled to the pay of District Education Officer and there was no justification for

denying the same to her. A Writ Petition was filed before the High Court and the State filed the counter affidavit contending, *inter alia*, that she was promoted to the post of acting District Education Officer as there was no Class I post and hence, she was not entitled to be paid the salary of District Education Officer. Appreciating the fact situation, the Court held:

> "... We are unable to understand the reason given in the counter-affidavit. She was promoted to the post of District Education Officer, a Class I post, on an acting basis. Our attention was not invited to any rule which provides that promotion on an acting basis would not entitle the officer promoted to the pay of the post. In the absence of any rule justifying such refusal to pay to an officer promoted to a higher post the salary of such higher post (the validity of such a rule would be doubtful if it existed), we must hold that Smt Grover is entitled to be paid the salary of a District Education Officer from the date she was promoted to the post, that is, July 19, 1976, until she retired from service on August 31, 1980."

16. In ***Tilak Raj*** (supra), the issue arose regarding justification of grant of minimum pay in the scale of pay applicable to the regular employees to the daily wagers. A two-Judge Bench referred to various decisions and came to hold thus:

> "11. A scale of pay is attached to a definite post and in case of a daily-wager, he holds no posts. The respondent workers cannot be held to hold any posts to claim even any comparison with the regular and permanent staff for any or all purposes including a claim for equal pay and allowances. 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 the other group vis-à-vis an alleged discrimination. No material was placed before the High Court as to the nature of the duties of either categories and it is not possible to hold that the principle of "equal pay for equal work" is an abstract one.
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> "12. Equal pay for equal work" is a concept which requires for its applicability complete and wholesale 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."

On a careful perusal of the said decision in its entirety, we are of the considered opinion that it is not an authority for the proposition canvassed by the learned counsel for the appellants. It remotely does not support the principle that is assiduously sought to be built by the State.

17. In ***S.C. Chandra*** (supra), the appellants therein had filed a Writ Petition in the High Court of Jharkhand

seeking a writ of mandamus against the respondent Nos. 3 to 6 to release the pay, DA with arrears along with interest and further a direction not to close the school or in the alternative, to issue a direction to respondent Nos. 1 to 2 to take over the management and control of the school in question. The writ petitioners before the High Court were teachers and non-teaching staff of the school and claimed themselves to be the employees of Hindustan Copper Limited (HCL). The Court, after going through the judgment of the High Court, came to hold that solely because the management of HCL was giving financial aid that by itself cannot be construed that the school was run by the management of HCL and accordingly, the Court dismissed the appeal. We have no hesitation in opining that the principle that has been laid down in the said judgment has no applicability to the facts at hand.

18. In ***A. Francis*** (supra), the Court was dealing with the entitlement of the appellant to the salary in higher pay of Assistant Manager wherein he had worked from 28.02.2001 till 31.05.2005. The employer had denied

certain benefits and the employee preferred a Writ Petition before the High Court which was allowed by the learned Single Judge. The Corporation filed Letters Patent Appeal which reversed the judgment of the learned single Judge. The appellant before this Court placed reliance on ***Secretary-cum-Chief Engineer, Chandigarh v. Hari Om Sharma and others***[7]. On behalf of the Corporation terms of the order were pressed into service contending that there were specific conditions stipulated in the order with regard to salary and emoluments and, therefore, the claim with regard to higher post was not tenable in law.

19. The Court appreciating the factual score held thus:

> "The order dated 28-2-2001, by which the appellant was allowed to discharge duties in the post of Assistant Manager had made it clear that the appellant would not be entitled to claim any benefit therefrom including higher salary and further that he would continue to draw his salary in the post of Assistant Labour Welfare Officer. If the above was an express term of the order allowing him to discharge duties in the higher post, it is difficult to see as to how the said condition can be overlooked or ignored. The decision of this Court in Secy.-cum-Chief Engineer was rendered in a situation where the incumbent was promoted on ad hoc basis to the higher post. The aforesaid decision is also

7 (1998) 5 SCC 87

> distinguishable inasmuch as there was no specific condition in the promotion order which debarred the incumbent from the salary of the higher post. Such a condition was incorporated in an undertaking taken from the employee which was held by this Court to be contrary to public policy."

20. In ***Hari Om Sharma*** (supra), the respondent was promoted as a Junior Engineer I in 1990 and had been continuing on that post without being paid salary for the said post and without being promoted on regular basis. It was in this situation, he approached the Central Administrative Tribunal which allowed the claim petition with the direction that the respondent shall be paid salary for the post of Junior Engineer I. That apart certain other directions were also issued. The Court took note of the fact that the respondent was promoted on a stop-gap arrangement as Junior Engineer I and opined that this by itself would not deny his claim of salary for the said post. In that context, the Court held:

> "… If a person is put to officiate on a higher post with greater responsibilities, he is normally entitled to salary of that post. The Tribunal has noticed that the respondent has been working on the post of Junior Engineer I since 1990 and promotion for such a long period of time cannot be treated to be a stop-gap arrangement."

21. After so stating, the Court proceeded to opine thus:

> "Learned counsel for the appellant attempted to contend that when the respondent was promoted in stop-gap arrangement as Junior Engineer I, he had given an undertaking to the appellant that on the basis of stop-gap arrangement, he would not claim promotion as of right nor would he claim any benefit pertaining to that post. The argument, to say the least, is preposterous. Apart from the fact that the Government in its capacity as a model employer cannot be permitted to raise such an argument, the undertaking which is said to constitute an agreement between the parties cannot be enforced at law. The respondent being an employee of the appellant had to break his period of stagnation although, as we have found earlier, he was the only person amongst the non-diploma-holders available for promotion to the post of Junior Engineer I and was, therefore, likely to be considered for promotion in his own right. An agreement that if a person is promoted to the higher post or put to officiate on that post or, as in the instant case, a stop-gap arrangement is made to place him on the higher post, he would not claim higher salary or other attendant benefits would be contrary to law and also against public policy. It would, therefore, be unenforceable in view of Section 23 of the Contract Act, 1872."
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> [Emphasis added]

The principle postulated in the said case is of immense significance, for it refers to concept of public policy and the conception of unconscionability of contract.

22. In the instant case, the Rules do not prohibit grant of pay scale. The decision of the High Court granting the benefit gets support from the principles laid down in ***Smt. P. Grover*** (supra) and ***Hari Om Sharma*** (supra). As far as the authority in ***A. Francis*** (supra) is concerned, we would like to observe that the said case has to rest on its own facts. We may clearly state that by an incorporation in the order or merely by giving an undertaking in all circumstances would not debar an employee to claim the benefits of the officiating position. We are disposed to think that the controversy is covered by the ratio laid down in ***Hari Om Sharma*** (supra) and resultantly we hold that the view expressed by the High Court is absolute impeccable.

23. In view of the aforesaid premises, we do not perceive any merit in this appeal and accordingly the same stands dismissed without any order as to costs.

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.....CJI
[Dipak Misra]

.....J.

[A.M. Khanwilkar]

.....J.
[Dr. D.Y. Chandrachud]

New Delhi;
September 05, 2017.