

* **HIGH COURT OF DELHI : NEW DELHI**

+ **CCP No.535/2007**

% Judgment reserved on : 8th December, 2008

Judgment pronounced on : 2nd April, 2009

Sh. Ram Kumar Mehta & Ors. ...Petitioners
Through : Mr. Rama Shankar, Adv.

Versus

Sh. Ashok Kumar & Ors. Respondent
Through : Mr. H.S. Phoolka, Sr. Adv. with
Ms. Smita Shankar & Mr. Kanwar
Faisal, Adv. for respondent/MCD

Coram:

HON'BLE MR. JUSTICE MANMOHAN SINGH

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

MANMOHAN SINGH, J.

1. The petitioners filed this contempt petition against the respondents alleging that the respondents failed to comply with the orders granted by this court on 16th May, 2006 in W.P. (C) Nos. 22949/2005, 23646/2005, 23740/2005 and 1055/2006 whereby the respondents were directed to grant the ACP benefit scheme claimed by the petitioners and to complete all the formalities required for the purpose within a period of four months.

2. The petitioners were appointed as Field Advisors (Science) in the MCD originally in the pay scale of Rs. 440-750 with effect from

12.03.82, 27.11.76 and 17.07.76 respectively.

3. Vide the recommendation issued by the MCD in the year 1985 in Resolution No. 1130, following motion has been passed:-

“Resolved that as recommended by the Standing Committee vide its Resolution No. 1390 dated 25.1.85, regarding re-organisation and strengthening of Science Branch of Education Department vis-à-vis the conversion of 15 posts of Field Advisors (Science) into that of School Inspectors (Science) in the grade of Rs. 650-1200 plus C.A. on permanent basis and abolition of 5 posts of Field Advisors (Science), 4 posts of Science Assistants and one post of U.D.C. be approved.”

4. From the above, it is clear that the designation of the post Field Advisor (Science) was changed to School Inspector (Science) in the pay scale of Rs. 650-1200 with effect from 25.02.1985. The pay scale in the post of Field Advisor (Science) was Rs.440-750/-.

5. In the fifth pay commission, it was recommended under Clause 3.1 as under :

“3.1. While in respect of these categories also promotion shall continue to be duly earned, it is proposed to adopt the ACP Scheme in a modified form to mitigate hardship in cases of acute stagnation either in a cadre or in an isolated post. Keeping in view all relevant factors, it has, therefore, been decided to grant two financial upgradations [as recommended by the Fifth Central Pay Commission and also in accordance with the Agreed Settlement dated September 11, 1997 (in relation to Group ‘C’ and ‘D’ employees) entered into with the Staff Side of the National Council (JCM)] under the ACP Scheme to Group ‘B’ ‘C’ and ‘D’ employees on completion of 12 years and 24 years (subject to condition No.4 in Annexure-I) of regular service respectively. Isolated posts in Group ‘A’, ‘B’, ‘C’ and ‘D’ categories which have no promotional avenues shall also qualify for similar benefits on the pattern indicated above. Certain categories of employees such as casual employees (including those with temporary status), ad-hoc and contract employees shall not qualify for benefits under the aforesaid Scheme. Grant of financial upgradations

under the ACP Scheme shall, however, be subject to the conditions mentioned in Annexure-I.

3.2 'Regular Service' for the purpose of the ACP Scheme shall be interpreted to mean the eligibility service counted for regular promotion in terms of relevant Recruitment/Service Rules."

6. The ACP Scheme shall become operational from the date of issue of this Office Memorandum. Relevant conditions for Grant of Benefits under the ACP Scheme are as under :

“3. The financial benefits under the ACP Scheme shall be granted from the date of completion of the eligibility period prescribed under the ACP Scheme or from the date of issue of these instructions whichever is later.

4. The first financial upgradation under the ACP Scheme shall be allowed after 12 years of regular service and the second upgradation after 12 years of regular service from the date of the first financial upgradation subject to fulfillment of prescribed conditions. In other words, if the first upgradation gets postponed on account of the employee not found fit or due to departmental proceedings, etc. this would have consequential effect on the second upgradation which would also get deferred accordingly.

5.1 Two financial upgradations under the ACP Scheme in the entire Government service career of an employee shall be counted against regular promotions (including in-situ promotion and 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 upgradations under the ACP Scheme shall be available only if no regular promotions during the prescribed periods (12 and 24 years) have been availed by an employee. If an employee has already got one regular promotion, he shall qualify for the second financial upgradation 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.

5.2 Residency periods (regular service) for grant of benefits under the ACP Scheme shall be counted from the grade in which an employee was appointed as a

direct recruit.”

7. The petitioners worked as Field Advisors (Science) in the Education Department of MCD till 25th February, 1985 and thereafter, their post was re-designated and merged with School Inspector (Science) in the pay scale of Rs. 650-1200. The petitioners alleged that the said re-designation of post is only a merger and is not the promotion and therefore, they would be entitled to the benefits granted under both ACP-I and ACP II schemes of the MCD.

8. The petitioners filed W.P. (C) Nos. 22949/2005, 23646/2005, 23740/2005 and 1055/2006 wherein this court passed common order directing the respondents to grant the benefit of Scheme to the petitioners within a period of four months. Thereafter, the respondents vide office order dated 10th October, 2006 granted benefit of second financial upgradation under the ACP scheme to the petitioners.

9. The respondents in their affidavit have stated that petitioners were initially appointed as ‘Field Advisor’ on ad-hoc/temporary basis in the pay scale of Rs.440-750/- during the year between 1976 to 1982. Subsequently the post of ‘Field Advisor’ was converted to the regular post of School Inspector (Science) in the pay scale of Rs.650-1200/- vide Corporation Resolution No.1130 dated 25th February, 1985 and petitioners were appointed to said regular post of School Inspector (Science) w.e.f. 25.2.1985 vide office order No.D/242/V.Sh./85 dated 28.3.1985.

10. The respondents in accordance with directions granted by this Court on 16.5.2006 has given second upgradation to the petitioners after

rendering of 24 years of service counted from their initial adhoc/temporary appointment on the post of Field Advisor 1976 to 1982 w.e.f. 17.7.2000 (Smt. Asha Bector) , 27.11.2000 (Smt. Shakuntla Arya), and 12.3.2006 (Sh. R.K. Mehta) vide office order dated 10.10.2006.

11. However, on representation by the petitioner against the grant of second ACP Scheme with reference to office order dated 10.10.2006 the respondents obtained the clarification from the Education Department which revealed that the petitioners were regularized to the post of School Inspector (Science) on permanent basis vide office order dated D/242/Science/Edu./85 dated 28.3.1985 w.e.f. 25.2.1985

12. It is submitted by the respondents/MCD by way of affidavit dated 3rd March, 2008 in para 8 that petitioners have been regularized on permanent basis to the post of School Inspector (Science) w.e.f. 25.2.1985 and they completed 12 years regular service on 24.2.1997 and 24 years regular service will be completed on 24.2.2009. therefore, the petitioners are entitled for their 1st upgradation under ACP Scheme w.e.f. 9.8.1999 (effective date of implementation of ACP) in the pay scale of Rs.10000-15200/- after completion of 12 years regular service w.e.f. 25.2.1985 and 2nd ACP will be given to petitioners in due course of time. Thus the order dated 10.10.2006 in which the 2nd ACP was given to the petitioners is being reviewed and its outcome will be communicated to the petitioners.

13. The petitioners alleged that they are entitled to the benefit of ACP-I scheme which was not provided to the petitioners by the respondents. It was also alleged that the benefit given to the petitioners

in ACP II scheme was Rs. 10,000-325-15200/- which ought to have been given on completion of 12 years of service under ACP Scheme.

14. It is submitted by the petitioner that they were appointed to the post of Field Advisor (Science) which was converted into the post of School Inspector (Science), the conversion of the said post to the School Inspector (Science) was promotion. A legal notice was issued on 16th July, 2007 by the petitioner to the respondents to comply with the orders of this court passed on 16th May, 2006.

15. The respondent relied upon the case of **J.S. Parihar vs. Ganpat Duggar & Ors., (1996) 6 SCC 291** wherein it was held that once there is an order passed by the Government on the basis of the directions issued by the Court, there arises a fresh cause of action to seek redressal in an appropriate forum. The preparation of the seniority list may be wrong or may be right or may or may not be in conformity with the directions but that would be a fresh cause of action for the aggrieved party to avail of the opportunity of judicial review. However, that cannot be considered to be the wilful violation of the order. After re-exercising the judicial review in contempt proceedings, a fresh direction by the Single Judge could not be given to redraw the seniority list as in doing so, the Single Judge was exercising the jurisdiction to consider the matter on merits in the contempt proceedings. It would not be permissible under Section 12 of the Act.

16. In the case of **Kartick Prodhan vs. Satyendra Nath Ghosh, (2000) 2 CHN 738** following observations have been made :

- (i) Without going into the merits of the aforesaid order it could be

said that the respondent authority concerned disposed of the representation of the writ petitioners for permanent absorption and/or for regularization of their services in any suitable post under Panchayat Samity finally, and accordingly there was substantial compliance with the order of this Court dated 23-11-1998.

- (ii) The said order at best gave rise to a fresh cause of action to the writ petitioners to challenge the same but it never amounted to violation of the order of the court and/or the willful disregard of the same.
- (iii) This Court by the said order dated 23-11-1998 directed that the petitioners would be paid minimum wages for the work performed by them as determined by the State Government under the provisions of the Minimum Wages Act. But upon reading of the scheduled employment in W.B. within the scope of minimum wages, it appears that the Panchayat Samity did not come within the meaning of the local authorities under the provisions of the Minimum Wages Act, 1948.
- (iv) Accordingly, there being no minimum wages for the work performed by the writ petitioners as per the provisions of the Minimum Wages Act, non-payment thereof did not amount to contempt for alleged violation of the said order of this Court.
- (v) I, therefore, do not find any merit in the contempt application, the same is, therefore, rejected. However, it is observed that the petitioners will be at liberty to challenge the order of disposal dated 3-3-1999 made by the Executive Officer, Panchayat Samity, South 24-Parganas in an appropriate forum in accordance with the provisions of law upon reference to the relevant circular and/or memorandum issued in this regard by the Government of W.B.
- (vi) It is also made clear that the petitioners will be entitled to the daily wages at the rate at which they were engaged for the period of which they performed their duties and the respondent Panchayat Samity accepted deposits from the writ petitioners. *Kartick Prodhan v. Satyendra Nath Ghosh*, (2000) 2 CHN 738.

17. In the case of **Union of India vs. Subedar Devassy PV**, (2006) 1 SCC 613, it was observed by the Apex Court that in contempt proceedings court is concerned only with question whether the earlier decision has been complied with or not. It cannot examine correctness of the earlier decision, or traverse beyond it and take a different view from what was taken therein, or give additional directions or delete any direction, that would be exercising review jurisdiction while dealing

with a contempt application which is impermissible. If any party concerned is aggrieved by the earlier decision, which in its opinion is wrong or its implementation is neither practicable nor feasible, it should always either approach court that passed the earlier order, or go in appeal there against. Rightness or wrongness of the earlier order cannot be urged in contempt proceedings. While dealing with an application for contempt, the court cannot traverse beyond the order, non-compliance with which is alleged. In other words, it cannot say what should not have been done or what should have been done. It cannot traverse beyond the order. It cannot test the correctness or otherwise of the order or give additional direction or delete any direction. That would be exercising review jurisdiction while dealing with an application for initiation of contempt proceedings. The same would be impermissible and indefensible.

18. This court in the case of **Abhendra Kumar Jain vs. B.K. Gupta, 2003 (108) DLT 734**, it was held that order of which disobedience is alleged should be explicit and unambiguous. If two opinions possible and one adhered and complied by respondent plausible, court should eschew exercise of its powers of committing for contempt. Powers of contempt can not be invoked as a substitute for execution proceedings.

19. In the case at hand, since the respondent had already granted benefit under ACP Scheme to the petitioners vide office order dated 10.10.2006 in compliance of the order of this Court passed on 16.5.2006 and a representation has been made by the petitioners to the

respondent to grant the benefit under ACP-II Scheme, it is under review of the respondent.

20. As held in J.S. Parihar's case (supra) where while implementing the orders, a particular stand has been taken by the employer giving rise to a substantial cause of action and another stand has been taken by the petitioner, the contempt is not maintainable. Where the orders of the Court is capable of two interpretations according to the parties, they should approach the same court for the specific directions in this regard.

21. In my view, in the present facts and circumstances, there was no disobedience, breach or neglect on the part of the respondents to execute the orders granted by this Court on 16.5.2006. As stated by the respondent/MCD in affidavit that the matter relating to the benefit of ACP Scheme to the petitioner is under review, the MCD should communicate the final order after review within four weeks. The contempt petition is hereby dismissed. No Cost.

MANMOHAN SINGH, J

April 02, 2009
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